



**In the Matter of:**

**CRAIG HORNE,**

**ARB CASE NO. 08-007**

**COMPLAINANT,**

**ALJ CASE NO. 2007-STA-039**

**v.**

**DATE: May 29, 2009**

**UNITED PARCEL SERVICE, INC. (OHIO),**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**FINAL DECISION AND ORDER**

Craig Horne filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his former employer, United Parcel Service, Inc. (Ohio) (UPS) violated the employee protection provisions of the Surface Transportation Assistance Act (STAA)<sup>1</sup> when it terminated his employment. The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules.<sup>2</sup> In a Recommended Decision and Order on Motion for Summary Decision (R. D. & O.), a United States Department of Labor Administrative Law Judge (ALJ) granted UPS's motion for summary decision, recommending that Horne's complaint be dismissed. We affirm the ALJ's grant of summary decision and deny the complaint.

---

<sup>1</sup> 49 U.S.C.A. § 31105 (West 2008), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007).

<sup>2</sup> 49 U.S.C.A. § 31105(a).

## BACKGROUND

Horne testified on deposition that UPS hired him in 2000. He worked 20 hours per week, from 4 a.m. to 8 a.m. each day as a part-time sorter in pre-load at UPS's Waco, Texas facility. His duties included sorting packages that had been unloaded onto a conveyor belt from a feeder truck or trailer and "shifting," that is, driving a trailer up to or away from the pre-sorting facility to maintain the flow of packages on the belt. Horne shifted the trailers to other parts of the UPS parking lot or onto the street, where he parked them.<sup>3</sup>

Horne testified that in 2002 he asked his supervisor, Gregory Garrett, and Teamsters Union, Local 767 whether he was entitled to more pay for the time he spent shifting trailers. Garrett asked Horne to provide him with a copy of his pay stub, but Horne never did. Horne testified that a union representative told him that UPS should have paid him for the time he spent shifting trailers, but the union never pursued it.<sup>4</sup>

It is undisputed that on December 27, 2006, Garrett ordered Horne to shift a trailer, but Horne refused and told Garrett that he did not have to shift trailers because he was not getting paid to do that work.<sup>5</sup> Horne testified that he only refused Garrett's order to shift a trailer once and that Garrett told him only that he would get a warning letter for that refusal. Horne testified that later during that same day, Richard Lozano, manager of the Waco facility, came to see him and asked him why he had refused Garrett's order to move the trailer. Horne stated that he told Lozano that he had refused to move the trailer because, "I wasn't getting paid for it, so I figured that I did not have to move it."<sup>6</sup>

Garrett averred that Horne repeatedly refused his order to shift trailers. After the second refusal, Garrett told Horne he would issue him a warning letter; after the third refusal he told Horne that he would issue an intent to suspend him; and, after the fourth refusal, that he would issue an intent to terminate Horne's employment.<sup>7</sup>

Horne testified that after his shift ended on December 27, 2006, he was called into Lozano's office where he met with Lozano, Garrett, and Larius Pullen, a union steward,

---

<sup>3</sup> Horne Aug. 17, 2007 Deposition Transcript (T. (8/17/07)) at 10, 26, 30-35.

<sup>4</sup> T. (8/17/07) at 28-33, 36-38, 102; Declaration of Gregory Garrett, Exhibit C at 3, Appendix in Support of Respondent's Motion for Summary Decision.

<sup>5</sup> T. (8/17/07) at 93, 101-102; Declaration of Gregory Garrett, Exhibit C, Appendix in Support of Respondent's Motion for Summary Decision.

<sup>6</sup> T. (8/17/07) at 93, 103-104.

<sup>7</sup> Declaration of Gregory Garrett, Exhibit C at 2, Appendix in Support of Respondent's Motion for Summary Decision.

and where Lozano issued him “three attempts to terminate or suspend, whatever you call it” for being insubordinate.<sup>8</sup>

Lozano characterized the December 27 meeting as a “Center-level hearing” that was held to review Horne’s repeated failure to follow Garrett’s instructions that morning, for which Horne had received a warning, a verbal notice of intent to suspend, and a verbal notice of intent to terminate his employment.<sup>9</sup> Lozano explained that, according to the applicable collective bargaining agreement (CBA), when Horne received the notice of intent to terminate, he was placed on a “working termination” that “began immediately.”<sup>10</sup>

The parties do not dispute that during his shift the next day, December 28, Horne again refused Garrett’s order that he move a trailer. Horne testified that he told Garrett that he did not feel well, and Garrett responded by continuing to ask him to move the trailer. Horne testified that he replied that he needed an ambulance “because my blood pressure is up and I can’t see.”<sup>11</sup> Horne stated that Garrett then fired him, and that he, Horne, then had an anxiety attack and lay down on the package sorter belt.<sup>12</sup>

Garrett’s version of events differs from Horne’s. Garrett stated that on December 28 he asked Horne several times to shift a trailer and that Horne refused each time, resulting in Garrett issuing Horne “another intent to terminate notice” after each refusal. Garrett avers that it was only after he explained to Horne that he was disciplining him again that Horne told him that he was sick and needed an ambulance. “I do not recall Mr. Horne complaining that he did not feel well until after he learned that because he had refused to follow instructions, disciplinary action would occur.” Garrett stated that Horne then lay down on the sorter belt and “claimed that he could not move due to high blood pressure,” which “shut down operations at the Waco Center and delayed loading of package cars for the day.”<sup>13</sup>

After Horne lay down on the package sorter belt, the police were called. They then called an ambulance at Garrett’s request. Horne testified that the ambulance took

---

<sup>8</sup> T. (8/17/07) at 103-110; T. (9/4/07) at 70-78.

<sup>9</sup> Declaration of Richard Lozano, Exhibit B at 3, Appendix in Support of Respondent’s Motion for Summary Decision.

<sup>10</sup> *Id.*

<sup>11</sup> T. (8/17/07) at 81-82; T. (9/4/07) at 123-125.

<sup>12</sup> T. (8/17/07) at 79-83; T. (9/4/07) at 47.

<sup>13</sup> Declaration of Gregory Garrett, Exhibit C at 2, Appendix in Support of Respondent’s Motion for Summary Decision.

him to Hillcrest hospital in Waco where the physician diagnosed elevated blood pressure, anxiety attack, and jaundice.<sup>14</sup>

## **The CBA**

The CBA's Article 52, which applies to Horne's employment at UPS, addresses "Discharge or Suspension." Section A of Article 52 provides that once UPS warns an employee of a complaint against him or her, UPS shall provide the employee, with a copy to the union, a written warning notice of the complaint "within ten (10) working days of said complaint or within ten (10) working days of knowledge of said complaint." Section B of Article 52 provides that the employee may request an investigation of the discharge or suspension, and that "[a]ppeals from discharge, suspension, or warning notice must be taken within ten (10) working days by written notice."<sup>15</sup>

Lozano explained that under the terms of the CBA, employees have ten working days to file a grievance over disciplinary actions such as a notice of intent to terminate. Lozano added that under the CBA, Horne's "working termination began immediately" on December 27, 2006, as did "the ten-day period for Mr. Horne to file a grievance over that intent to terminate."<sup>16</sup> It is undisputed that Horne did not timely file a grievance over any intent to terminate.

On January 5, 2007, to comply with the CBA, UPS sent Horne a Warning Letter, an Intent to Suspend Letter, and an Intent to Terminate Letter for his insubordinate actions on December 27. The company also sent him a letter terminating him for his insubordination on December 28. UPS stated that Horne was discharged for "gross insubordination, for just cause pursuant to Article 52 of the labor agreement."<sup>17</sup>

## **Procedural History**

Horne's complaint to OSHA alleged that UPS discharged him on December 28, 2006, "for complaining about being ill and fatigued due to elevated blood pressure;" that Horne "did not feel safe driving, and complained to management," and that Horne had "refused to operate the rig because of elevated blood pressure."<sup>18</sup>

---

<sup>14</sup> T. (8/17/07) at 83-84; Declaration of Gregory Garrett, Exhibit C at 2, Appendix in Support of Respondent's Motion for Summary Decision.

<sup>15</sup> Exhibit B, Appendix in Support of Respondent's Motion for Summary Decision.

<sup>16</sup> Declaration of Richard Lozano, Exhibit B at 2, Appendix in Support of Respondent's Motion for Summary Decision.

<sup>17</sup> *Id.*

<sup>18</sup> Administrative file.

OSHA investigated the complaint. On June 15, 2007, Gerald Foster, Regional Supervisor, for OSHA's Dallas, Texas, office found that Horne did not provide "any medical evidence ... to support his basis" for refusing to operate a motor vehicle and did not provide "any kind of evidence which would establish a legal rationale for his refusals to do his assigned job." Therefore, Foster determined that Horne's "refusals to do his job can not be considered as activities protected by the Act," and dismissed Horne's complaint.<sup>19</sup> Horne objected to OSHA's findings and requested a hearing before an ALJ.

UPS filed a Motion for Summary Decision on September 12, 2007. It argued that it had terminated Horne's employment on December 27 and that he had not engaged in any STAA-protected activity. Horne responded with an affidavit dated September 21, 2007. As noted, the ALJ issued his R. D. & O. on October 4, 2007, granting UPS's motion for summary decision.

### JURISDICTION AND STANDARD OF REVIEW

This matter is now before the Administrative Review Board (ARB or the Board) pursuant to the STAA's automatic review provisions.<sup>20</sup> The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under, inter alia, the STAA.<sup>21</sup>

We review an ALJ's recommended grant of summary decision de novo.<sup>22</sup> That is, the standard the ALJ applies also governs our review.<sup>23</sup> The standard for granting summary decision is essentially the same as that found at Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. Accordingly, summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.<sup>24</sup> A genuine issue of material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."<sup>25</sup>

---

<sup>19</sup> *Id.*

<sup>20</sup> "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee." 29 C.F.R. § 1978.109(a) (2006).

<sup>21</sup> Secretary's Order 1-2002, 67 Fed Reg. 64,272 (Oct. 17, 2002).

<sup>22</sup> *King v. BP Prod. N. Am., Inc.*, ARB No. 05-149, ALJ No. 2005-CAA-005, slip op. at 4 (ARB July 22, 2008).

<sup>23</sup> 29 C.F.R. § 18.40 (2008).

<sup>24</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

<sup>25</sup> *Bobreski v. United States EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.<sup>26</sup> “To prevail on a motion for summary judgment, the moving party must show that the nonmoving party ‘fail[ed] to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.’”<sup>27</sup> Accordingly, a moving party may prevail by pointing to the “absence of evidence proffered by the nonmoving party.”<sup>28</sup> Furthermore, a party opposing a motion for summary decision “may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing.”<sup>29</sup>

## DISCUSSION

### 1. The Legal Standard

To prevail on a claim of unlawful discrimination under the STAA’s whistleblower protection provisions, the complainant must allege and later prove by a preponderance of the evidence that he is an employee and the respondent is an employer; that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him regarding pay, terms, or privileges of employment; and that there is a causal connection between the protected activity and the adverse action.<sup>30</sup> If the complainant fails to allege and prove any one of these requisite elements, his entire claim must fail.<sup>31</sup>

The STAA protects two categories of work refusal, commonly referred to as the “actual violation” and “reasonable apprehension” subsections. Horne’s complaint involves only the “actual violation” subsection, which protects a refusal “to operate a

---

<sup>26</sup> *Lee v. Schneider Nat’l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

<sup>27</sup> *Bobreski*, 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

<sup>28</sup> *Bobreski*, 284 F. Supp. 2d at 73.

<sup>29</sup> 29 C.F.R. § 18.40(c). See *Webb v. Carolina Power & Light Co.*, No. 1993-ERA-042, slip op. at 4-6 (Sec’y July 17, 1995).

<sup>30</sup> *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 12-13 (ARB May 24, 2007).

<sup>31</sup> *West v. Kasbar, Inc. /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health.”<sup>32</sup> Horne must establish that to have accepted Garrett’s order to drive the trailer would have violated the United States Department of Transportation regulation prohibiting an ill or fatigued driver from operating a commercial motor vehicle.<sup>33</sup>

## 2. UPS is entitled to summary decision.

Horne claims that he engaged in protected activity on December 28, 2006, when he told Garrett that he was sick and did not feel that he could drive safely and therefore refused Garrett’s order to shift a trailer.<sup>34</sup> He alleges that because of this refusal, UPS fired him on that day. UPS argued to the ALJ that it fired Horne because of his actions on December 27, 2006.<sup>35</sup> The ALJ determined that UPS fired Horne on December 27 and that, therefore, the events of December 28 were moot. Furthermore, he found that Horne had not adduced evidence that he engaged in protected activity on either the 27th or the 28th.<sup>36</sup>

The record supports the ALJ’s findings. In his deposition, Horne acknowledged that UPS notified him on December 27 that it intended to terminate him.<sup>37</sup> Under the terms of the CBA, Horne had 10 days to file a grievance over the intent to terminate and that, in the interim, his “working termination” began on December 27.<sup>38</sup> The record shows that Horne did not timely file a grievance pertaining to the December 27 intent to terminate.<sup>39</sup> Therefore, the termination became effective on January 6, 2007. While the record shows that Horne received another notice of intent to terminate on December 28 because he again refused Garrett’s instructions, he has not demonstrated that the December 28 notice somehow negated or superseded the December 27 notice of intent to terminate.

---

<sup>32</sup> 49 U.S.C.A. § 31105(a)(1)(B)(i).

<sup>33</sup> See 49 C.F.R. § 392.3; *Eash v. Roadway Express, Inc.*, ARB No. 04-036, ALJ No. 1998-STA-028, slip op. at 6 (ARB Sept. 30, 2005).

<sup>34</sup> T. (8/17/07) at 82; T. (9/4/07) at 123-125; Affidavit dated Sept. 21, 2007; Statement From Craig Horne at 5.

<sup>35</sup> Motion for Summary Decision at 2.

<sup>36</sup> R. D. & O. at 5-6.

<sup>37</sup> T. (8/17/07) at 57, 103-110; T. (9/4/07) at 70-78.

<sup>38</sup> Declaration of Richard Lozano, Exhibit B at 2, Appendix in Support of Respondent’s Motion for Summary Decision.

<sup>39</sup> T. (9/4/07) at 89-96.

Moreover, even if Horne was alleging that he was fired on the 27th, not the 28th, he did not engage in protected activity on the 27th. To defeat summary decision, Horne must adduce at least some evidence that he engaged in STAA-protected activity. As noted earlier, the STAA protects employees who refuse to drive when to do so would violate a regulation, standard, or order of the United States related to commercial motor vehicle safety or health. But Horne admits that he refused Garrett's order on the 27th, not because he felt sick and could not drive safely, but because he was not getting paid to do that kind of work.<sup>40</sup> Therefore, the record supports the ALJ's finding that Horne has not created an issue of fact that he engaged in STAA-protected activity on December 27, 2006.

Finally, the ALJ wrote that even if the events of December 28 were relevant, Horne did not adduce evidence that he was fired on the 28th because of protected activity. Horne claims that he engaged in protected activity on the 28th when, after telling Garrett that he felt ill and could not drive safely, he refused Garrett's instruction to move a trailer.<sup>41</sup> We have noted that refusing to drive because of illness can constitute protected activity. But according to Garrett, Horne told him on the 28th about being sick only after he had already disciplined Horne for again refusing to move a trailer.<sup>42</sup> And, as the ALJ noted, Horne's deposition testimony and other portions of his affidavit responding to UPS's summary decision motion contradict his statement in that same affidavit that he was fired on the 28th when he refused to drive because he was sick.<sup>43</sup> Thus, Horne's affidavit opposing summary decision is suspect and cannot suffice to defeat UPS's motion.<sup>44</sup>

---

<sup>40</sup> T. (8/17/07) at 93, 101-102; Declaration of Gregory Garrett, Exhibit C, Appendix in Support of Respondent's Motion for Summary Decision.

<sup>41</sup> T. (8/17/07) at 82; T. (9/4/07) at 123-125; Affidavit dated Sept. 21, 2007; Statement From Craig Horne at 5.

<sup>42</sup> Declaration of Gregory Garrett, Exhibit C at 2, Appendix in Support of Respondent's Motion for Summary Decision.

<sup>43</sup> See T. (8/17/07) at 97 (testifying that the "only reason" for UPS's retaliation was because he had "started asking about back pay," i.e., pay he thought UPS owed him for moving trailers); 9/21/07 Affidavit (stating he had no problems "until I asked about my pay" and alleging that racism and a "cover up of wrong doing [sic] between UPS and the Teamsters" played a role in the termination).

<sup>44</sup> Cf. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806-807 (1999) ("[A] party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement ... without explaining the contradiction or attempting to resolve the disparity."); see, e.g., *Iko v. Shreve*, 535 F.3d 225, 230 (4th Cir. 2008) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").



## **CONCLUSION**

We have reviewed the entire record herein. After viewing the evidence and drawing inferences in the light most favorable to Horne, the ALJ awarded summary decision to UPS because he found that no issue of fact existed as to whether UPS terminated Horne's employment on December 27, 2006, and whether Horne engaged in protected activity on December 27 and December 28, 2006. The record supports these findings. Accordingly, Horne's complaint is **DENIED**.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Chief Administrative Appeals Judge**