In the Matter of:

KENNETH J. MENEFEE,

COMPLAINANT,

v.

TANDEM TRANSPORT CORPORATION and LOWE'S COMPANIES, INC.,

RESPONDENTS.

ARB CASE NO. 09-046

ALJ CASE NO. 2008-STA-055

DATE: April 30, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Kenneth J. Menefee, *pro se,* Columbus, Ohio

For the Respondent, Tandem Transport Corporation:
Justin A. Morocco, Esq., *Mowery Youell & Galeano, Ltd.*, Dublin, Ohio

For the Respondent, Lowe's Companies, Inc.:
Jaime Landrum Powell, Esq., *Porter, Wright, Morris & Arthur, LLP*, Columbus, Ohio

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge,* E. Cooper Brown, *Deputy Chief Administrative Appeals Judge,* and Wayne C. Beyer, *Administrative Appeals Judge*; Judge Brown concurring.

FINAL DECISION AND ORDER

Kenneth J. Menefee filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on March 7, 2008.[1] He alleged that his employer, Tandem Transport Corporation (Tandem) and Lowe's Companies, Inc. (Lowe's), violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified, and its implementing regulations, when Tandem terminated his employment in retaliation for protected activities. 49 U.S.C.A. § 31105 (Thomson/West Supp. 2009); 29 C.F.R. Part 1978 (2009). A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Menefee's complaint on a motion for summary decision as he found that Menefee failed to carry his burden of setting forth specific facts from which an issue of material fact could be discerned regarding whether he had engaged in any protected activity or whether there was any causal connection between any alleged protected activity and his termination. We affirm.

BACKGROUND

We take the undisputed facts primarily from Menefee's complaint and the pleadings. Tandem, a commercial motor carrier engaged in transporting products on the highways, hired the Complainant, Menefee, to serve a dedicated account with Lowe's at their Regional Distribution Center in Washington Court House, Ohio. OSHA Findings at 1 (May 6, 2008); Resp. Joint Mot. To Dismiss (Dec. 3, 2008); Comp. Response to Resp. Joint Mot. To Dismiss (Dec. 15, 2008).

Tandem terminated Menefee's employment on November 9, 2007. Complaint at 1. Menefee stated in his complaint that on or about the day Tandem discharged him, he was told that he was barred from all Lowe's stores for which he picked up and dropped off trailer loads. Menefee stated that he was not given any written explanation and that he had no prior "write-ups" or warnings. Menefee believed he was fired because he made repeated requests to Lowe's to properly stack the loads on the trailers according to Tandem's guidelines and procedures. He claimed that he was persistent regarding ensuring that Lowe's appropriately signed all documents. When Menefee asked Tamdem for a letter of explanation as to why he was fired, Tandem did not provide one.

Menefee filed a STAA complaint with OSHA. Following an investigation, OSHA dismissed the complaint because the preponderance of the evidence showed that the redoing of Menefee's loads did not show a nexus between the barring and Menefee's termination by Tandem and Lowe's. The evidence further showed that the Lowe's managers who barred

[1] OSHA's findings state that Menefee's complaint was filed on March 13, 2008, while the complaint itself indicates that it was filed on March 7, 2008. As timeliness is not at issue, this discrepancy is harmless.

Menefee lacked knowledge of any STAA-protected activity. OSHA Findings at 3. OSHA also found that Tandem and Lowe's showed that they had a legitimate, non-discriminatory, and reasonable cause for their actions on November 8 and 9, 2007. Consequently, OSHA dismissed the complaint. Menefee requested a hearing before an ALJ. *See* 29 C.F.R. § 1978.105(a).

Tandem and Lowe's filed a Joint Motion to Dismiss or In the Alternative Joint Motion for Summary Decision stating that Menefee was barred from all Lowe's locations on November 8, 2007, and for this reason, as well as Menefee's uncooperative and disruptive behavior including refusing to give his name to Lowe's employees and his use of profanity while servicing a customer, Tandem terminated Menefee's employment. Tandem and Lowe's did not attach any affidavits to their Joint Motion.

Menefee responded to the Joint Motion with a letter in which he stated that he was not disruptive or uncooperative, but in fact had been given an award for having done a good job. Menefee explained that he did provide his name to Lowe's employees but would not sign his name because he was not required to sign for damaged materials under Tandem's policies and procedures. He had "multiple discussions with Tandem management regarding the irresponsible and negligent loading procedure by Lowe's staff" and "continually questioned Tandem's way of deciding how the loads were to be picked up and delivered because it required frequent long hour drives in order to meet delivery time constraints." He "believed that Lowe's did not want to address safety and regulatory issues and possibly perceived that [he] was going to contact federal regulators regarding their employee's [sic] constant negligence and inability to follow safety codes." He believed that "Tandem perceived an additional threat as to the frequent questioning, picture taking, and possible termination of a contract with Lowe's." Menefee did not attach any affidavits or other evidence to his response to the Joint Motion.

The ALJ issued a Recommended Decision and Order (R. D. & O.) Granting the Respondents' Joint Motion for Summary Decision because he found that Menefee did not carry his burden of setting forth specific facts from which an issue of material fact could be discerned regarding whether he had engaged in any protected activity or whether a causal connection existed between any protected activity and Menefee's termination.

The Board issued a Notice of Review and Briefing Schedule permitting both parties to submit briefs in support of or in opposition to the ALJ's order.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority and assigned responsibility to the Administrative Review Board (ARB or the Board) to act for the Secretary of Labor, in review or on appeal, including, but not limited to, the issuance of final agency decisions. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board automatically reviews an ALJ's recommended STAA decision. 29 C.F.R. § 1978.109(c)(1). The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c).

We review a recommended decision granting summary decision de novo. *Hardy v. Mail Contractors of America,* ARB No. 03-07, 2002-STA-022, slip op. at 2 (ARB Jan. 30, 2004). The standard for granting summary decision in our cases is set out at 29 C.F.R. § 18.40 and is essentially the same standard governing summary judgment in the federal courts. Fed. R. Civ. P. 56. Summary decision is appropriate if "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and a party is entitled to summary decision. 29 C.F.R. § 18.40(c). The determination of whether facts are material is based on the substantive law upon which each claim is based. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). 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." *Bobreski v. U.S. 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. *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). "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.'" *Bobreski,* 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)). Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party." *Id.*

When a motion for summary decision is made, the party opposing the motion may not rest upon mere allegations or denials of such pleading. 29 C.F.R. § 18.40(c). Rather, the response must set forth specific facts showing that there is a genuine issue of fact for determination at a hearing. *Id.*

THE LEGAL STANDARDS

This case arises under "The Implementing Recommendations of the 9/11 Commission Act of 2007," signed into law on August 3, 2007. They provide that the STAA prohibits a person from discharging, disciplining, or discriminating against:

> "an employee . . . regarding pay, terms, or privileges of employment, because -
> (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a

> proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;
> (B) the employee refuses to operate a vehicle because - (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;
> (C) the employee accurately reports hours on duty pursuant to chapter 315;
> (D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or
> (E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

49 U.S.C.A. § 31105(a)(1).

Subsection (b) provides that "complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b),"[2] which is under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century [AIR 21]. Thus, our burdens of proof will follow the burdens of proof that we use in AIR 21 cases.

To prevail on his STAA claim, Menefee must prove by a preponderance of the evidence that he engaged in protected activity, that Tandem was aware of the protected activity and took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action. *Peters v. Renner Trucking & Excavating*, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008).

[2] 49 U.S.C. § 42121(b)(2)(B)(iii) and (iv) provide that the Secretary may determine that a violation has occurred only if the complainant demonstrates that any protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint and that relief may not be ordered if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Sievers,* ARB No. 05-109, slip op. at 4. A complainant can succeed either directly or indirectly. *Id.* Direct evidence is "smoking gun" evidence that conclusively links the protected activity and the adverse action and does not rely upon inference. *Id.* at 4-5. If the complainant does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that the reason offered for terminating him is not the true reason for the termination, but instead is a pretext for retaliation. *Id.* at 5. If the complainant proves pretext, we may infer that his protected activity contributed to the termination, although we are not compelled to do so. *Id.*

We explained the burdens of proof at the adjudicatory stage in detail in *Brune*. *See Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006). If the complainant "demonstrates," *i.e.*, proves by a preponderance of the evidence, that protected activity was a "contributing factor" that motivated a respondent to take adverse action against him, then the complainant has established a violation. *Brune*, ARB No. 04-037, slip op. at 13 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iii)(Thomson/West 2007); 29 C.F.R. § 1979.109(a)). *Cf. Dysert v. United States Sec'y of Labor,* 105 F.3d 607, 609-610 (11th Cir. 1997) ("demonstrate" means to prove by a preponderance of the evidence). A preponderance of the evidence is "[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Brune*, ARB No. 04-037, slip op. at 13 (citing BLACK'S LAW DICTIONARY at 1201.).

The Title VII burden-shifting pretext framework is warranted in cases in which a complainant initially makes an inferential case of discrimination by means of circumstantial evidence. The ALJ (and ARB) may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. *Brune*, ARB No. 04-037, slip op. at 14 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Thereafter, and only if, the complainant has proven discrimination by a preponderance of evidence, does the employer face a burden of proof. That is, the employer may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. *Id.* (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *Brune,* ARB No. 04-037, slip op. at 14, (citing BLACK'S LAW DICTIONARY at 577).

DISCUSSION

We agree with the ALJ's conclusion that Tandem and Lowe's are entitled to summary decision as a matter of law.

Because the Respondents assert that there is no evidence to support Menefee's claims in their Joint Motion, it is properly considered as a motion for summary decision. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Although the Respondents did not support their motion with

affidavits or other similar materials, Menefee, as the nonmoving party is required to go beyond the pleadings and "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324.

Menefee did not submit any evidence with his response to the motion for summary decision. He did however submit pre-hearing materials prior to the motion for summary decision. The ALJ considered this material and so shall we, viewing the evidence in the light most favorable to Menefee, and considering that he is a pro se litigant. The Board "construe[s] complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude." *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2 (ARB Apr. 26, 2005) (citing *Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075, ALJ No. 2000-STA-028, slip op. at 8-10 (ARB Feb. 28, 2003) (citing *Hughes v. Rowe*, 449 U.S. 5, 10 (1980))).

In Menefee's complaint, he stated that Tandem terminated his employment without given giving him a reason and that he had not had any warnings as to his job performance. He indicated that he had been told that he did a great job. He indicated that he believed Tandem fired him because of repeated requests to Tandem's client, Lowe's, to stack loads "properly" and because he was persistent with ensuring that documents were appropriately signed.

On summary judgment, Menefee's response was required to go beyond his pleadings to designate specific facts showing that there is a genuine issue of fact for the hearing.

In his response to the joint motion for summary decision, Menefee stated that he was not disruptive or uncooperative, but had been rewarded for having done a good job. Menefee explained that he provided his name to Lowe's employees but would not sign his name because he was not required to. He indicated that he had "multiple discussions with Tandem management regarding the irresponsible and negligent loading procedure by Lowe's staff" and "continually questioned Tandem's way of deciding how the loads were to be picked up and delivered because it required frequent long hour drives in order to meet delivery time constraints." He "believed that Lowe's did not want to address safety and regulatory issues and possibly perceived that [he] was going to contact federal regulators regarding their employee's [sic] constant negligence and inability to follow safety codes." He believed that "Tandem perceived an additional threat as to the frequent questioning, picture taking, and possible termination of a contract with Lowe's."

STAA-protected activity occurs when the employee files a complaint or begins a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or when an employee testifies or will testify in such a proceeding or is perceived to have filed or be about to file a complaint regarding same. 49 U.S.C.A. § 31105(a)(1)(A). The STAA also protects employees who refuse to drive because "the employee refuses to operate a vehicle because the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C.A. § 31105(a)(1)(B). Finally, the STAA protects employees who accurately report their hours on duty, cooperate or are perceived to be cooperating with a safety or security investigation by certain regulatory authorities, or furnish or are perceived to furnish or to be about to furnish information to certain regulatory authorities

relating to any accident or injury resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation. 49 U.S.C.A. § 31105(a)(1)(C), (D), (E).

Menefee's submission is vague and fails to point to any specific conduct that Menefee engaged in that was protected. He does not allege that the loading procedures he discussed were unsafe or that the "long hour drives" violated the hours of service rules. He states that he believes that Lowe's did not want to address safety and regulatory issues and "possibly perceived" that he was going to contact officials but he gives no basis for his beliefs or for why Lowe's would perceive that he was going to contact anyone. He also fails to provide any basis for why he believed that Tandem perceived "an additional threat" or the nature of that threat.

Thus, we agree with the ALJ that Menefee's response to the motion for summary decision was vague to the point that it did not raise any genuine issue of material fact regarding whether he engaged in protected activity.

After reviewing Menefee's pre-hearing submissions, we agree with the ALJ that they do not show that there is a genuine issue of material fact regarding whether Menefee engaged in any protected activity. As found by the ALJ, the submissions consist of "delivery receipts, bills of lading, vehicle weight certificates, violation documents, work orders, trip activity logs, photographs, and other documents . . . ." It is unclear to us, as it was to the ALJ, how these documents support any allegation that he engaged in protected activity. Because Menefee has not made a sufficient showing regarding a necessary element of his STAA claim, the Respondents are entitled to judgment as a matter of law and it is unnecessary to discuss the remaining elements of a STAA claim.

We note that in his December 5, 2008 order, the ALJ gave Menefee explicit notice that his response to the Respondents' motion for summary decision must set forth specific facts showing that there is a genuine issue of fact for the hearing. The order also informed Menefee that he had the right to file affidavits and other responsive materials opposing the motion. Menefee failed to file any responsive materials and to set forth specific facts showing that there was a genuine issue of fact for the hearing. The Respondents are therefore entitled to summary decision as a matter of law.

CONCLUSION

We have reviewed the entire record herein. The ALJ thoroughly and fairly examined the evidence each party submitted. After viewing the evidence and drawing inferences in the light most favorable to Menefee, the ALJ dismissed the complaint because Menefee failed to show whether a genuine issue of material fact exists regarding whether he engaged in protected activity.

Since Menefee proffered no evidence to show that he engaged in protected activity and failed to designate specific facts to show that he did, the ALJ correctly applied the law and

properly dismissed Menefee's complaint on this element. Thus, we **AFFIRM** the ALJ's Recommended Decision and Order granting the Respondents' Joint Motion for Summary Decision and **DENY** the complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

E. COOPER BROWN, Deputy Chief Administrative Appeals Judge, concurring:

I concur with the decision reached by my colleagues affirming the Decision and Order herein appealed. I write separately because of the significance to this case of the Supreme Court's clarification in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) of the respective burdens of proof and appropriate standard for disposition with respect to a motion for summary decision where the moving party asserts, without supporting affidavit, that the pleadings and evidence of record do not support the claim as presented.

In granting Respondents' motion to dismiss and for summary judgment, the ALJ first determined that Complainant Menefee's complaint arguably stated a STAA protected claim for relief under 49 USC §§ 31105(a)(1)(A). This provision, the ALJ noted, "has been construed to extend to 'an employee's internal complaint to superiors conveying his reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation.'" R.D.& O. at pg. 6 (citing *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998)). Respondents' motion further asserted that should the ALJ find that a valid STAA claim was stated, that nevertheless there existed no evidence to support Menefee's claim. Accordingly, the ALJ evaluated the evidentiary record pursuant to 29 CFR § 18.40 and Rule 56 of the Federal Rules of Civil Procedure, after having afforded Menefee an opportunity to respond (including the opportunity to present additional evidence). Finding Menefee's response to Respondents' motion inadequate for failing to set forth any specific facts or identify evidence supporting his claim, the ALJ granted summary decision in Respondents' favor.

What is, in my estimation, of critical importance for fully understanding the significance of the ALJ's decision, as well as the majority's decision herein reached, is that Respondents' motion for summary decision was made without supporting affidavits, relying instead on the pleadings and evidence of record. 29 CFR § 18.40 permits the filing of an unsupported motion for

summary decision, as does FRCP Rule 56.[3] However, as the Supreme Court explained in *Celotex Corp. v. Catrett, supra,* the analysis that necessarily follows in such instances is not based upon whether the nonmoving party is able to establish genuine issues of material fact thereby overcoming the motion for summary judgment. Rather, the analysis focuses upon whether the nonmoving party is able to establish the existence of an essential element of his or her case with respect to which he/she has the burden of proof. "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 322-323.

Thus, in a case such as that currently before the Board, where the complainant will bear the burden of proof at trial on a dispositive issue, "a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" 477 U.S. at 324. To be clear, this does not mean that the moving party may discharge its burden of proof by moving for summary decision "without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." 477 U.S. at 328 (Justice White, concurring). However, where, as in the instant case, the moving party relies upon the pleadings and evidentiary record before the tribunal, the motion for summary decision "requires the nonmoving party to go beyond the pleadings and by [his/her] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" 477 U.S. at 324. Failure of the nonmoving party to accordingly respond will result in summary judgment in favor of the moving party, as the moving party will have discharged its burden by "showing . . . that there is an absence of evidence to support the nonmoving party's case." 477 U.S. at 325.

With this explanation, I concur with the majority in affirming the ALJ's Decision and Order granting Respondents' motion for summary decision and dismissing Menefee's complaint.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

[3] 29 CFR § 18.40(a) provides for the filing of a motion for summary decision "with or without supporting affidavits. Similarly, FRCP Rules 56(a) and (b) provide that claimants and defendants, respectively, may move for summary judgment "with or without supporting affidavits."