

**U.S. Department of Labor**

Office of Administrative Law Judges  
Heritage Plaza Bldg. - Suite 530  
111 Veterans Memorial Blvd  
Metairie, LA 70005

(504) 589-6201  
(504) 589-6268 (FAX)



**Issue Date: 29 June 2005**

CASE NO.: 2005-STA-9

IN THE MATTER OF:

GLEN FRAUSTO,  
Complainant, *Pro Se*

v.

BEALL CONCRETE ENTERPRISES, LTD.,  
Respondent

APPEARANCES:

Glen Frausto,  
*Pro Se*

Maricarmen Guzman Dollar, Esq.  
Levine Von Sternberg  
On behalf of Respondent

Before: Clement J. Kennington  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This case arises under the employee protections provisions of the Surface Transportation Assistance Act (herein "the Act") of 1982, as amended and re-codified, 49 U.S.C.A. § 31105 and the implementing regulations at 29 C.F.R. § 18.1 *et. seq.*, and 29 C.F.R. § 1978.100 *et. seq.*, (2004). Under Section 31105(a) of

the Act, a person is prohibited from discharging, disciplining or discriminating against an employee regarding pay, terms, or privileges of employment because that employee has filed a complaint or begun a proceeding related to a violation of commercial motor vehicle safety regulations, or refuses to operate a vehicle because to do so would violate a regulation, a standard, or order of the United States related to commercial motor vehicle safety, or health, or the employee has a reasonable apprehension of serious injury to the employee or public because of the vehicle's unsafe condition.

The Act protects employee complaints about vehicle safety-related issues ranging from the voicing of concerns to one's employer to the filing of formal complaints related to commercial motor vehicle safety. 49 U.S.C.A. § 31105 (a)(1); see *Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 3-8 (ARB Feb. 28, 2003). For an employee to be protected under the complaint clause, it is necessary that the employee be acting on a reasonable belief regarding the existence of a violation. See *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 221 (1<sup>st</sup> Cir. 1998).

## I. STATEMENT OF THE CASE

Following his discharge by Respondent, on August 24, 2004, Complainant filed a complaint against Respondent alleging that Respondent terminated him in retaliation for making internal safety complaints about: (a) the need to repair right and left front pedestal mounts on his truck, mixer unit 215; (b) refusing to issue protective safety equipment such as safety glasses to drivers at the time of hire; and (c) ordering mechanics to refuse to repair defective equipment by having them sign off on driver vehicle inspection reports (DVIRs) indicating no defects were found or need to be corrected thereby allowing the vehicle to remain in service. (ALJX-1).<sup>1</sup> The U.S. Department of Labor, Occupational Health and Safety Administration (OSHA) investigated the complaint and dismissed it on November 30, 2004, finding no merit to the allegations. Rather, OSHA found a legitimate, non-discriminatory reason for the discharge, i.e., Complainant's "bizarre behavior" of instigating conflicts among other employees. Complainant filed objections to OSHA's determination and requested a hearing which was held before the undersigned on May 3, 2005 in Dallas, Texas.

---

<sup>1</sup> Exhibits were designated as follows: CX-\_\_\_\_ (Complainant); RX-\_\_\_\_ (Respondent); and ALJX-\_\_\_\_ (Administrative Law Judge). Transcript pages Tr.\_\_\_\_.

Complainant represented himself at the hearing. Attorney Maricarmen Guzman Dollar represented Respondent. All parties were afforded the opportunity to adduce testimony, offer evidence, and submit post hearing briefs. Complainant testified and introduced 4 exhibits, including: a memo prepared by Complainant and signed by payroll clerk Sandy Lopez, indicating return of company uniforms; a letter from U.S. Department of Transportation regarding an investigation of Respondent in response to complaints filed by Complainant; various DVIR's filled out by Complainant on truck 215, and; an employee training manual. Complainant called Pete Ybarra, Bob Sweeney, James Puckett, Patrick Pease, Jackie Shultz and Blaine Gibbs. Respondent introduced 4 exhibits, including: Complainant's employee warning record; Complainant's performance rating; a letter dated December 8, 2004, from the U.S. DOT to Respondent giving Respondent a satisfactory safety rating; a letter from Respondent to the U.S. DOT responding to a DOT audit of December 2, 2004; and a Texas Department of Public Safety Compliance Review of Respondent dated July 10, 2003 giving Claimant a satisfactory safety rating.

## II ISSUES

The parties presented the following issues:

1. Whether Complainant engaged in protect activity by reporting alleged safety problems to supervisors and employees of Respondent.
- 2 Whether Respondent terminated Complainant in violation of the Act by making internal safety complaints relative to use of defective equipment (driving a truck with defective pedestal mounts, refusal to issue protective safety equipment (safety glasses) to drivers and refusal to allow mechanics to make safety repairs so as to avoid taking a truck out of service.
3. Whether Respondent terminated Complainant for legitimate, non-discriminatory reasons, namely, engaging in bizarre and disruptive behavior that caused unnecessary confrontation and disharmony among employees.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **A. Background**

Respondent is engaged in the manufacture and delivery of concrete product with facilities located in Fort Worth, Willow Park, Waxahachie, Alliance, Lewisville, North Dallas and Euless Texas. Respondent owns over 100 trucks, including cement mixers, and employs about 115 drivers. (RX-5). The Euless facility is the primary facility involved in these proceedings; it utilizes 12 mixers in its delivery operations. Area manager Bob Sweeney supervises operations at the Euless facility and 8 other plants. (Tr. 38, 107, 108).

Reporting to Sweeney is plant operator Blaine Gibbs who is responsible for making up batches of concrete, plus mixer drivers, and truck mechanics. (Tr. 81). Sweeney reports to Rick Gibson, the operations manager, who in turn reports to Scott Evans, vice president and general manager. (Tr. 150). As safety manager, Jackie Shultz oversees safety, environmental and health operations at all Respondent's facilities. (Tr. 140).

Sweeney hired Complainant as a readmix driver on June 2, 2004. (Tr. 52). Less than 90 days later, while Complainant was still a probationary employee, Sweeney terminated him. When hired, Complainant had a B.A. degree from Dallas Baptist University and 15 years of truck driving experience including the previous year in which he had driven a cement mixer for Lattimore Materials. (Tr. 34). As a driver for Respondent, Complainant hauled up to 10 yards of cement at a time, weighing up to 69,000 pounds each. (Tr. 29). Complainant worked basically a 5-day week, Monday through Friday, and occasionally on Saturday, reporting at different starting times depending upon weather conditions and contractor needs. Complainant drove truck 215 to destinations provided by plant operator Gibbs. (Tr. 36-38).

Company policy and DOT regulations, 49 C.F.R. § 396.11, require each driver at the end of each work day to complete a vehicle inspection report (DVIR) identifying defects that would result in mechanical breakdown or otherwise affect safe vehicle operation. Before allowing the vehicle to resume operation, Respondent is required to repair safety defects and its mechanics must indicate that repairs have been made or were not needed. Before driving a vehicle, a driver is

required to do a pre-trip inspection making sure the vehicle in question is safe to operate and that the necessary repairs have been made. (49 C.F.R. § 396.13).<sup>2</sup>

During his short term employment, Complainant made numerous complaints to Sweeney and other personnel about not being accepted and having difficulties working with employees. After talking with driver Paul Teaken and Gibbs, Sweeney advised Complainant to just come to work and do his job and not try to immediately jump into the drivers' close-knit inner circle. (Tr. 114). Drivers such as Patrick Pease considered Complainant to be out of place when he attempted to break into the inner circle with inappropriate jokes. (Tr. 73).

Complainant's difficulty in being accepted by other drivers was compounded by the fact that he would tell certain drivers that other drivers were talking about them behind their backs, when in fact that was not the case. As a result, Complainant caused needless conflict among the drivers and disrupted production. (Tr. 63, 77, 78, 86, 105, 110, 111, 115). Complainant also had apparent difficulty in working with mechanics, frequently complaining they worked too slow. (Tr. 128).

Complainant used the DVIRs to report truck defects. Copies of those DVIR's were provided for July 10, 12, 16, 19, 20, 22, 23, 24, 26, 27, 30; and August 2, 3, 6, 16 of 2004. On those reports, Complainant listed front pedestal mount cracks as frame cracks, fuel gauge problems as well as bent front and rear bumpers. Although Claimant asserted that the defects listed constituted safety issues preventing him from driving the truck before repair, all of Respondent's mechanics indicated otherwise on the DVIR's, as did Trooper Pete Ybarra who found cracks in pedestal mounts not to constitute cracks in truck frames. Further, after reviewing Complainant's DVIR's, Trooper Ybarra found nothing, assuming they were accurate, to allow him to put a vehicle out of service. (Tr. 17-31).

## **B. Alleged Protected Activity**

Complainant testified that when he reported cracked pedestal mounts, which were used to support the mixer drum, the mechanics told him they did not have the parts to replace them, even though the pedestal mounts were cracked on two sides. Complainant allegedly talked to Sweeney about the problem on four to five occasions, but his pleas went unheeded. (Tr. 43-45). In fact, on August 20, 2004,

---

<sup>2</sup> Complainant never followed the correct procedures, for even by his own admission he filled out pre- and post-trip inspections after completing his afternoon run. (Tr. 153).

just a few days before his termination, Complainant testified that Sweeney threatened to fire him because he persisted in having the pedestal mounts replaced. Allegedly, lead driver Paul Teaken, who overheard the conversation, intervened saying that if the mechanics signed off acknowledging the validity of the complaint, it would not be proper to terminate Complainant. At that point, Sweeney allegedly tore up the termination paper. (Tr. 46-49).

Sweeney denied threatening to fire Complainant for writing up truck defects but did admit issuing a written warning to Complainant on or about August 20, 2004, because he did not properly fill out the necessary DVIR's. According to Sweeney, Complainant would wait until the morning after a trip to fill out both post and pre-trip inspection reports, rather than filling out the post-trip report in the evening at the end of the workday, and the pre-trip report the following morning before commencing his run, as is required by company and DOT regulations. When Complainant asserted he had not been counseled about the proper manner in filling out DVIR's, Sweeney tore up the warning. (Tr. 111-13, 121).

Sweeney testified that Complainant's complaints about the pedestal mounts were unfounded and that when so informed by the mechanics, the shop foreman instructed Complainant to cease the write ups. (Tr. 129-30).

Complainant testified he also complained to Sweeney and Gibbs about Respondent's alleged failure to provide protective safety glasses to himself and other drivers; when his complaints went ignored, he went out and purchased his own safety glasses. Complainant raised the issue of safety glasses at employee safety meetings and was told by safety director Shultz to ask Gibbs for a pair, which he did but to no avail. (Tr. 39-41, 53). Complainant also testified he voiced concerns at safety meetings about an overflow of rain water into the mechanics' area creating a potential safety problem due to exposed electrical outlets in the mechanic shop, but he was ignored by Shultz. (Tr. 42-43).

Driver Puckett confirmed that Complainant raised some safety issues in safety meetings, but they were mostly minor complaints, including the fact that mechanics would not always repair items listed on the DVIR's. (Tr. 104, 107). Pease also confirmed Complainant's conduct. (Tr. 74, 80). Shultz, who ran the safety meetings, testified that Complainant brought up a number of issues at the safety meetings on occasion crying, complaining and complimenting Shultz. Concerning safety complaints, Shultz told Complainant to follow the chain of command. (Tr. 147-48). Shultz testified that, as safety manager, he purchases and

issues safety equipment to the plants which are in-turn distributed to employees by the area manager or his designee (plant operator). (Tr. 157).

Plant operator Gibbs testified that Complainant did not know what pedestal mounts were and that the only crack on Complainant's truck was a ¼- to ½-inch crack on a welded plate that provided extra bracing for the pedestal mounts. (Tr. 88-92). Further, Complainant was issued protective safety glasses on several occasions. (Tr. 95-97). On one occasion, Complainant drove a truck with bad breaks out of the plant ignoring the DVIR and requiring mechanics to drive to the Alliance plant to retrieve the vehicle. (Tr. 98).

On the issue of safety, Respondent introduced two safety audits. The most recent was completed by U.S. DOT on December 2, 2004, and rated Respondent satisfactory with 8 deficiencies noted, of which one was determined to be critical, i.e., failing to require driver to prepare driver vehicle inspection report. (RX-4). An earlier audit of July 10, 2003, by the Texas Department of Public Safety also resulted in a satisfactory rating.

### **C. Complainant's Discharge**

On August 23, 2004, Complainant, before waiting to have plant mechanics repair his truck, drove his vehicle 25 miles to the Alliance plant where he demanded mechanical repairs. While in the process of waiting on the repairs, he so irritated the Alliance mechanics that the area manager for the Alliance plant, Alex Moody, had to drive Complainant back to the Euless plant before the repairs were completed. Moody subsequently informed Sweeney what had occurred, at which point Sweeney determined that he no longer could tolerate Complainant's disruptive and bizarre behavior and decided to terminate Complainant. (Tr. 114-20).

On the morning of August 24, 2004, Sweeney called Complainant into his office and in the presence of driver Mike Hampshire told Complainant that he (Sweeney) had received complaints from others employees about Complainant's behavior and bad attitude and after reviewing his performance decided to terminate him. (Tr. 132). Sweeney gave Complainant a termination notice and performance evaluation which Complainant refused to sign. (Tr. 133-34). Hampshire signed the termination notice which indicated Complainant had received a prior warning. (RX-1).

The performance rating (RX-2, 2a) evaluated Complainant in seven categories on a scale of 5 to 1 and read as follows:<sup>3</sup>

**EQUIPMENT MAINTENANCE:** Employee maintains their truck clean, fluids maintained, rollers greased – 2

**PRODUCTIVITY:** Employee does their best to get loaded, to the job, and pour out in safe and timely manner – 2

**ATTITUDE:** Employee has a positive attitude about the company and their job. Is a good team member – 1

**CUSTOMER SERVICE:** Employee does everything he or she can to make the customer satisfied. Employee works well with other team members – 2

**SAFETY:** Employee does their job with safety coming first. Wears hardhat, safety glasses, drives safely – 2

**POLICY & PROCEDURES:** Employee follows all company policies. Fills out paperwork correctly and turns it in promptly – 1

**APPEARANCE:** Employee maintains a professional appearance. Shirt tails in, boots clean and hardhat clean – 3

Sweeney explained the numerical ratings as follows. On equipment maintenance, he gave Complainant a 2 because he failed to keep his truck clean. Had he done so, Complainant would have noticed a concrete build-up on the pedestal which had cracked, as opposed to the pedestal mount. Complainant also failed to check a fan belt that tore up. On productivity, Complainant received a 2 because he was disruptive and slowed down production. On attitude, Complainant received a 1 because he was not a good team member but, rather, had a hard time fitting in, acted like a child and created conflicts. On customer service, he received a 2 because he did not work well as a team member. On safety, Complainant received a 2 because he did not maintain the safety equipment given him and had to be reissued both hard hats and safety glasses. On policy and procedures, Complainant received a 1 because of a failure to fill out paperwork correctly. On

---

<sup>3</sup> The rating scale was as follows: 5 (far exceeds requirements); 4 (exceeds requirements); 3 (meets requirements); 2 (falls below requirements); 1 (falls below requirements).

appearance he received a 3, which indicated no problem in this area. (Tr. 134-136).

Sweeney testified that he terminated Complainant essentially for two reasons: bizarre behavior and an inability to work with others resulting in needless employee confrontations. (Tr. 114-15). The bizarre behavior included telling other employees he was being followed by a person in a white Cadillac; an unidentified person wanted to have sex with his wife; and someone was changing the tires on his car. (Tr. 80, 85-86, 94, 137). Sweeney testified that he counseled Complainant about his conduct on several occasions but without success. Complainant denied prior counseling and insisted he pointed out significant safety issues which Respondent refused to address. Complainant also denied being told and shown that what he thought were cracks in the pedestal mount were in fact cracks on built up concrete which had settled and not been removed from the pedestal. (Tr. 162).

#### **D. Discussion, Conclusion and Recommended Order**

In order to prevail on a retaliatory discipline or discharge claim under the Act, a complainant must prove: (1) he engaged in protected activity under the Act; (2) the employer was aware of the activity; (3) he suffered adverse employment action; and (4) the existence of a causal link or nexus between the adverse action and the protected activity so as to justify an inference of retaliatory or discriminatory motive. *BSP Transp Inc., v. U.S. Department of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc., v. Reich*, 55 F.3d 41, 46 (2d Cir. 1995); *Moon v. Transport Drivers, Inc.*, (6<sup>th</sup> Cir. 1987); see *Yellow Freight System, Inc., v Reich*, 27 F.3d 1133, 1138 (6<sup>th</sup> Cir. 1994). Such claims are often analyzed under the familiar burden-shifting framework of *McDonnell Douglas Corp., v. Green*, 411 U.S. 792 (1973). However, where, as here, the employer has satisfied its burden of producing evidence of a non-discriminatory reason for adverse action, the *McDonnell Douglas* framework falls by the wayside and the trier of fact is faced with the ultimate question of whether the employer intentionally discriminated against the complainant or whether the complainant established the elements of his case by preponderance of credible evidence.

Concerning the issue of protected activity, a complainant does not have to establish the merit of his safety complaint for such to be protected conduct. Rather all he has to show is a reasonable belief that what he complained about constituted a safety hazard. *Schuler v. M7P Contracting Inc.*, 94 STA 14 (Sec'y Dec 15. 1994); *Doyle v. Rich Transp., Inc.*, 93 STA 17 (Sec'y Dec. April 1, 1994).

Complainant's initial complaints about cracked pedestals were protected. However, subsequent complaints about the same problem after he was shown that the pedestals were not cracked, but rather, it was the cement coating the pedestal, were not reasonable and thus not protected.

Similarly, Complainant's complaints about non-issuance of safety equipment such as safety glasses were not protected because, contrary to his testimony, I find such equipment was issued to him and other drivers. Complainant failed to produce any evidence to support his claim of non-issuance, although Respondent produced every witness he requested. Complainant also failed to offer any evidence to support his assertion that he complained about excess rain water running into the mechanic work area or that mechanics were told not to repair vehicles so as to avoid taking them out of service; thus, I do not credit such assertions. Further, there is no reason to believe that he had any good faith or reasonable basis for making such assertions. Likewise, I find his complainants about front and rear bent bumpers and faulty fuel gauges do not constitute safety hazards, and thus are not protected. On occasion, it appears that Complainant complained about faulty breaks and drove a truck with faulty breaks, after reporting the condition, without giving mechanics time to correct the problem, and requiring the mechanics to go to the Alliance plant to retrieve his truck. Such complaints constitute protected activity.

Complainant showed knowledge of protected activity by his complaints to Sweeney and also adverse employment action as noted above. However, Complainant failed to establish any causal connection between his protected action and his discharge. Rather, the overwhelming and credible evidence shows that Respondent terminated him for cause, namely engaging in bizarre and disruptive behavior causing undue inter-personnel conflicts. Contrary to Complainant's assertions, Sweeney counseled him about his conduct and, only when confronted by continued disruptive conduct, decided to terminate Complainant.

In essence, I find that Respondent discharged Complainant for legitimate, non-discriminatory reasons, and thus, recommend dismissal of the instant complaint.

**A**

CLEMENT J. KENNINGTON  
ADMINISTRATIVE LAW JUDGE

**NOTICE:** This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a