



Issue Date: 28 March 2008

CASE NO.: 2008-STA-17

IN THE MATTER OF

TIMOTHY L. BOWENS

Complainant

v.

INFRASTRUCTURE

Respondent

**RECOMMENDED DECISION AND ORDER
DISMISSING COMPLAINT**

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA) and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees with regard to their terms and conditions of employment who have engaged in certain protected activities.

On March 5, 2008, Respondent, Infrastructure, filed a Motion for Summary Judgment and for sanctions seeking dismissal of Complainant's complaint against it in this case arguing that: (1) Complainant has not shown that Infrastructure meets the statutory definition of an employer within the meaning of the STAA; and (2) that Complainant was served with 39 Requests for Admissions, ten Interrogatories and seven Requests for Production of Documents which were duly served on February 22, 2008, and Complainant failed to respond to such discovery within

the ten-day period provided in the Notice of Hearing and Pre-Hearing Order. Respondent averred that the Requests for Admission be deemed admitted or alternatively Complainant's claim be dismissed since he has no case against Respondent or that sanctions be imposed that Complainant not be permitted to introduce any documents sought by the discovery.

On March 7, 2008, an Order to Show Cause issued to Complainant to show cause by March 14, 2008, why Respondent's Motion should not be granted. Since Complainant is appearing in this matter without Counsel, he was advised that: (1) as a pro se party he was entitled to file a response opposing Respondent's Motion for Summary Judgment and that any such response had to be filed by March 14, 2008; (2) the Court could dismiss the action on the basis of the moving party's papers if the pro se party did not file a response; (3) the pro se party had to identify all facts stated by the moving party with which the pro se party disagreed and had to set forth the pro se party's version of the facts by offering affidavits (written statements signed before a notary public and under oath) or by filing sworn statements (bearing a certificate that it is signed under the penalty of perjury); and (4) the pro se party was also entitled to file a legal brief in opposition to the one filed by the moving party. The Order to Show Cause further provided the matter would be decided based upon the written submissions of the parties.

On March 17, 2008, Respondent filed a second Motion of Summary Judgment and/or for sanctions in view of Complainant's failure to timely respond to the show cause order.

A scheduled pre-hearing telephone conference was scheduled for 10:00 a.m. on March 17, 2008. Complainant did make himself available at any phone numbers provided nor did he make any efforts to advise the undersigned then or to this date why he would not participate in the scheduled conference call.

On March 17, 2008, an Order Cancelling Formal Hearing issued in view of Complainant's failure to respond to the show cause order and to be available for the pre-hearing conference. The motions filed by Respondent for Summary Judgment, sanctions, and dismissal of the matter were taken under advisement for consideration and decision.

Background

Complainant was employed as a driver for Respondent, a company that subcontracts to the city of Dallas, Texas, to provide street, road, and highway maintenance services. Accepting Complainant's version of pertinent facts, on September 6, 2007, Complainant was told to drive a truck with no working signal lights and bad breaks. When he informed his supervisor, Eric Lockwood, of the hazards of driving the truck, he was sent home. On September 10, 2007, while walking through the shop, Complainant slipped on an oil spill and was told to watch where he was going. Complainant received a write-up on September 11, 2007, for the incident that occurred on September 6, 2007. The write-up stated Complainant refused to drive the dump truck; Complainant refused to sign the write-up and Respondent refused to give Complainant a copy of the write-up for his records. An OSHA inspection occurred on September 14, 2007. On September 17, 2007, Complainant was sent home by Dennis Tucker, the office manager, for wearing tennis shoes. Complainant never received the uniform policy regarding the wearing of steel toe boots when he was hired and four other workers, who were also not wearing steel toe boots, were not sent home. On September 19, 2007, Complainant was terminated. Dennis Tucker accused Complainant of calling OSHA and was told he was not needed anymore because he was a "whistleblower."

Complainant contacted OSHA on October 27, 2007, to file a complaint against Respondent. An investigation was conducted and findings were issued on November 14, 2007. The Secretary's findings noted Complainant's concerns involved items such as how water to clean the streets was paid for, how the work day would proceed, and how the operators would get paid. Complainant alleged he was accused by his supervisor of calling OSHA. Complainant also alleged he was disciplined because he refused to operate equipment with faulty brakes. Respondent alleged Complainant did not refuse to operate any equipment or tell Respondent about any brake problems on any of the equipment. Respondent further averred Complainant was disciplined because he refused to attend a meeting with his supervisor. It was also alleged by Respondent that there was an issue with Complainant wearing tennis shoes on the job and he was discharged when he again presented to work wearing tennis shoes after he was instructed not to wear such footwear.

The Regional Supervisor noted none of Respondent's several street repair and cleaning vehicles had a Gross Vehicle Weight Rating (GVWR) in excess of 10,001 pounds and Respondent is not a commercial motor carrier in that their services do not include the transportation of cargo or passengers. The Regional Supervisor concluded the equipment involved was not covered by the Department of Transportation's (DOT) safety regulations, the OSHA complaint was barred as untimely, and a preponderance of the evidence supported Respondent's position that Complainant's alleged protected activity was not a contributing factor in Complainant's discharge. Accordingly, Complainant's complaint was dismissed.

On December 2, 2007, Complainant objected to the Secretary's Findings and requested a hearing before an Administrative Law Judge. A Notice of Hearing and Pre-Hearing Order issued on December 21, 2007, setting formal hearing on the merits for March 19, 2008, in Dallas, Texas, and ordering Complainant to file and serve upon Respondent on or before January 11, 2008, a complaint alleging in detail the nature of his protected activities, each and every violation alleged against Respondent, as well as the relief sought.

On January 25, 2008, Respondent filed a Motion to Dismiss Complainant's case for failure of Complainant to timely file his complaint. On January 29, 2008, an Order Denying Motion to Dismiss issued in which it was noted Complainant was proceeding without counsel and untimely filed his complaint on January 28, 2008, but did not serve Respondent. As per the order, Respondent was served with a copy of Complainant's "complaint" and given until February 11, 2008, to file an answer.

Complainant's complaint states:

I was told to violate State and City Laws by Dennis (Terry) Tucker. Told to take water from City Fire Fountain without using water meters. I was told to watch were I was walking when oil was on the floor and the shop area after slipping.

So I called OSHA to report the problem OSHA came out. ISI had to fix all the problems OSHA founded after that happen (Terry) Dennis Tucker told me that he knew that I was the one who called OSHA.

After OSHA came out on 9/14/07 I was a target (Terry) Dennis Tucker said that he was going to do everything in his power to get rid of me on 9/19/07 he fired me calling me a "Whistle Blower" and the one who called OSHA.

Further, Complainant alleges: (1) "I was told by Dennis Tucker (management), to fill up the sweeper truck with water, without using the water meter. I was told that, as long as I have a safety vest and a hard hat on, no one would suspect me of stealing water (violation);" (2) I was told by Eric (upper management), if I wanted to maintain my position as a driver, driving a sweeper truck, I need to keep up with the other trucks even if they ran red lights on City streets, I needed to run those red lights too. (safety violation);" (3) "I was told by Eric (upper management), to flush out the trucks by the storm drain so the trash wouldn't show up on City streets. (EPA violation);" (4) "After I refuse to bend/break the rules of my integrity, I was told by Dennis Tucker & Eric (Dennis step-son) I was a trouble maker and that's why we don't hire a lot of yall! (racist remark);" (5) "Management then removed me from driving the sweeper truck and placed me in a shadow truck. (retaliation);" and (6) "While being placed in a shadow truck, I was placed with a crew of non-English speaking individuals which formed a communication breakdown. (communication barrier)."

On February 11, 2008, Respondent filed an answer to Complainant's complaint. Respondent denied Claimant's allegations aside from admitting Complainant had been assigned to trucks with employees, some of whom did not speak fluent English, there was an OSHA inspection on September 14, 2007, Complainant was written-up, but not for the reasons alleged by Complainant, and Complainant was once reprimanded for not wearing proper footwear. Further, Respondent averred the STAA is not applicable to Respondent's type and size of vehicles and the services it provides—street cleaning and street repair in the Dallas, Texas area. In the alternative, and without admission, Respondent asserted Complainant failed to state a claim upon which relief can be granted. Specifically, Respondent noted the only allegation that dealt with motor vehicle safety was his allegation that: "I was told to drive a dump truck with no working signal lights and bad breaks. When I informed Eric of the hazards of driving the dump truck, I was sent home," but that Complainant did not allege that he filed a complaint or began a proceeding regarding commercial motor safety, that he refused to operate an unsafe vehicle, or that he was discharged, disciplined, or discriminated against regarding

pay, terms, or privileges because of the alleged dump truck incident. Subsequently, Respondent's two motions for summary judgment, as discussed above, were filed.

DISCUSSION

A. Summary Decision

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d) (2001). See, e.g. Stauffer v. Wal Mart Stores, Inc., Case No. 1999-STA-21 (ARB Nov. 30, 1999) (under the Act and pursuant to 29 C.F.R. § 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); Webb v. Carolina Power & Light Co., Case No. 1993-ERA-42 @ 4-6 (Sec'y July 17, 1995). This section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party (i.e., Complainant), and Respondent must be entitled to prevail as a matter of law. Gillilan v. Tennessee Valley Authority, Case Nos. 1991-ERA-31 and 1991-ERA-34 @ 3 (Sec'y August 28, 1995); Stauffer, supra.

The non-moving party must present **affirmative evidence** in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. However, such evidence must consist of more than the mere pleadings themselves. Id. at 324. Affidavits must be made on personal knowledge, set forth such facts as would be **admissible** in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. F.R.C.P. 56 (e).

A non-moving party who relies on conclusory allegations which are unsupported by factual data or sworn affidavit . . . cannot thereby create an issue of material fact. See Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993); Rockefeller v. U.S. Department of Energy, Case No. 1998-CAA-10 (ALJ Sept. 28,

1998); Lawrence v. City of Andalusia Waste Water Treatment Facility, Case No. 1995-WPC-6 (ALJ Dec. 13, 1995). Consequently, Complainant may not oppose Respondent's Motion for Summary Decision on mere allegations. Such responses must set forth specific facts showing that there is a genuine issue of fact for a hearing. 29 C.F.R. 18.40(c).

The determination of whether a genuine issue of material fact exists must be made by viewing all evidence and factual inferences in the light most favorable to Complainant. Trieber v. Tennessee Valley Authority, Case No. 1987-ERA-25 (Sec'y Sept. 9, 1993).

The purpose of a summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Where the record taken as a whole could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Id. at 587.

Accordingly, in order to withstand Respondents' Motion, it is not necessary for Complainant to prove his allegations. Instead, he must only allege the material elements of his **prima facie** case. Bassett v. Niagara Mohawk Power Co., Case No. 1986-ERA-2, 4 (Sec'y July 9, 1986). Timely filing or meeting requirements to toll the statutory time limit is an essential requirement.

B. Complainant's Failure to Answer Discovery

The rules of discovery applicable to proceedings before the Office of Administrative Law Judges, U.S. Department of Labor, are provided at 29 C.F.R. 18.13, et seq. As set out in the Notice of Hearing and Pre-Hearing Order, issued December 21, 2007, the parties were to respond to interrogatories or requests for production within ten days from the date of service. Respondent served Complainant with 39 Requests for Admissions, ten Interrogatories, and seven Requests for Production of Documents on February 22, 2008. Complainant failed to respond to such discovery within the ten-day period provided in the Notice of Hearing and Pre-Hearing Order. Further, Complainant failed to comply with the Revised Pre-Hearing Order, issued on February 19, 2008, ordering the parties to exchange and serve upon this office the name and address of each witness the party proposed to call as well as a list of all documents the party expected to introduce as evidence.

In response to Respondent's first Motion for Summary Judgment and for sanctions seeking dismissal of Complainant's complaint, the March 7, 2008 Order to Show Cause was issued to Complainant to show cause by March 14, 2008, why Respondent's Motion should not be granted. As set out above, Complainant was advised, as a pro se party, the specificity to which he must respond. No such response was made, and on March 17, 2008, Respondent filed a second Motion for Summary Judgment and/or for sanctions in view of Complainant's failure to timely respond to the show cause order. Complainant also failed to make himself available for a scheduled pre-hearing conference on March 17, 2008.

In response to Complainant's failure to answer discovery, Respondent sought sanctions in both its first and second Motion for Summary Judgment. The procedural rules at 29 C.F.R. § 18.6 applicable to this case provide in part as follows:

(d) Motion for order compelling answer: sanctions.

(1) A party who has requested admissions or who has served interrogatories may move to determine the sufficiency of the answers or objections thereto. Unless the objecting party sustains his or her burden of showing that the objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of these rules, he or she may order either that the matter is admitted or that an amended answer be served.

(2) If a party or an officer or an agent of a party fails to comply with a subpoena or with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(i) Infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party;

(ii) Rule that for the purposes of the proceeding matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party;

(iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

(iv) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown.

(v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

29 C.F.R. § 18.6(d).

Here, Complainant failed to respond to any of Respondent's requests for discovery as well as the undersigned's Pre-Hearing Order and Order to Show Cause. Accordingly, I find and conclude sanctions are appropriate in this instance and Respondent's requests for admissions are hereby deemed as admitted. As such, these admissions establish no viable complaint against Respondent. As fully explained to Complainant in the March 7, 2008 Order to Show Cause, the matter was to be decided based upon the written submissions of the parties and the Court could dismiss the action on the basis of Respondent's papers if Complainant did not file a response. Moreover, Complainant did not allege any evidence in his complaint upon which he intended to rely to rebut OSHA's finding the Respondent is not a commercial motor carrier since they operate trucks doing street, road, and highway maintenance, repair, and services. Nor did

Complainant allege any evidence that any of the vehicles which Respondent operates have a Gross Vehicle Weight Rating (GVWR) in excess of 10,001 pounds or that Respondent transports cargo or passengers, which are requirements to show coverage under the STAA.

Further, dismissal is appropriate upon a party's abandonment of a request for a hearing and a default decision, under Section 18.5(b), may be entered against any party failing, without good cause, to appear at a hearing. 29 C.F.R. § 18.39(b). Complainant's actions in this matter demonstrate his desire to abandon the pursuit of his claim and are tantamount to abandonment under Section 18.39(b). Accordingly, it is hereby recommended that Complainant's complaint be **DISMISSED**.

Respondent further seeks a total of \$875.00 in attorney's fees (\$350.00/hour X 2.5 hours = \$875.00) and \$148.73 in costs incurred in seeking discovery and in filing its first and second Motions for Summary Judgment. However, there is nothing in the STAA which suggests a complainant's abandonment of his claim holds him responsible for a respondent's costs incurred subsequent to abandonment, but prior to final dismissal of the complaint. Krisik v. Latex Construction Co., Case No. 1995-STA-23 (Sec'y Oct. 20, 1995). Further, the Department has not elected to assert any inherent authority to impose costs in a whistleblower proceeding. Billings v. Tennessee Valley Authority, Case Nos. 1989-ERA-16, 25, 1990-ERA-2, 8, 18 (Sec'y July 28, 1992). Accordingly, Respondent's request for attorney's fees and costs is hereby **DENIED**.

Accordingly,

IT IS HEREBY RECOMMENDED that Complainant's complaint be **DISMISSED**.

ORDERED this 28th day of March, 2008, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.