



Issue Date: 19 October 2006

CASE NUMBER: 2005-STA-00050

In the Matter of

ROBERT HOLLAND,
Complainant,

v.

AMBASSADOR LIMOUSINE/RITZ TRANSPORTATION,
Respondent.

RECOMMENDED ORDER GRANTING MOTION FOR SUMMARY DECISION

The above-captioned matter arises from a complaint that Robert Holland (“the Complainant”) filed against Ambassador Limousine (“the Respondent” or “Ambassador”) on June 22, 2005 under the whistleblower provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105 (hereinafter “the STAA” or “the Act”), and implementing regulations set forth at 29 C.F.R. Part 1978. The Respondent is a firm that provides limousine transportation services in and around the city of Las Vegas, Nevada. The Complainant is a retired Air Force Master Sergeant who was employed as a limousine driver by Ambassador from January of 2005 until Ambassador terminated his employment on May 2, 2005. In a letter dated June 30, 2005, OSHA’s Regional Administrator in San Francisco, California, informed the Complainant that his complaint was being denied because he had failed to allege that he had engaged in any activity protected under the STAA’s whistleblower provisions. Thereafter, the Complainant filed a timely request for a hearing before the Department of Labor’s Office of Administrative Law Judges.

LEGAL STANDARDS GOVERNING COMPLAINTS UNDER THE STAA

The STAA protects employees who engage in certain safety-related activities from various types of employer retaliation, including the termination of employment. 49 U.S.C.A. §31105(a)(1)(A). There are three distinct types of protected activities under the STAA: (1) safety-related complaints (either internal or external), (2) refusals to operate a vehicle when the operation of the vehicle would in fact violate Federal safety standards, and (3) refusals to operate a vehicle if (a) an employee has a "reasonable apprehension of serious injury to himself or the public" because of the unsafe condition of the vehicle and (b) the employee has unsuccessfully attempted to have his employer correct the unsafe condition. 49 U.S.C. §31105(a)(1).

The evidentiary and procedural standards governing proceedings under the STAA’s whistleblower provisions are based on the burden-shifting rules set forth in the Supreme Court’s

decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In particular, an employee must initially present a *prima facie* case consisting of a showing that he or she engaged in protected conduct, that the employer was aware of that conduct, and that the employer took some adverse action against the employee. In addition, as part of the *prima facie* case, the employee must present evidence sufficient to raise the inference that his or her protected activity was the likely reason for the adverse action. If the employee establishes a *prima facie* case, the employer then has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, non-discriminatory reasons. At this point, however, the employer bears only a burden of producing evidence, and the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. If the employer successfully rebuts the employee's *prima facie* case, the employee still has the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This may be accomplished either directly, by persuading the factfinder that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence. In either case, the factfinder may then conclude that the employer's proffered reason is a pretext and rule that the employee has proved actionable retaliation for the protected activity. Conversely, the trier of fact may conclude that the employer was not motivated in whole or in part by the employee's protected activity and rule that the employee has failed to establish his or her case by a preponderance of the evidence. Finally, the factfinder may decide that the employer was motivated by both prohibited and legitimate reasons, *i.e.*, that the employer had "dual" or "mixed" motives. In such a case, the burden of proof shifts to the employer to show by a preponderance of the evidence that it would have taken the same action with respect to the employee, even in the absence of the employee's protected conduct. See *Densieski v. La Corte Farm Equipment*, ARB No. 03-145 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117 (ARB Sept. 30, 2004).

AMBASSADOR'S MOTION FOR SUMMARY DECISION

Pursuant to the provisions of 29 C.F.R. §18.40(d), on August 30, 2006, the Respondent filed a motion seeking a summary decision dismissing the Complainant's complaint. The Respondent's motion is primarily based on the contention that the Complainant has failed to provide any evidence that could support a finding that he engaged in any type of conduct protected under the provisions of the STAA. As support for this contention, the Respondent submitted, *inter alia*, a transcript of the Complainant's August 25, 2006 pre-trial deposition testimony (hereinafter cited as "Tr.") and an affidavit of the Complainant's former supervisor, Michael Rabonza (hereinafter cited as "Rabonza Aff.").

According to the Complainant's deposition testimony, he served 30 years in the Air Force and then worked for approximately five years as a driving examiner for the Nevada Department of Motor Vehicles. Tr. at 15, 20. In 2000, he testified, he began working as a limousine driver in Las Vegas, and eventually worked for four different limousine companies before being hired as a driver for Ambassador in January of 2005. Tr. at 22-25. The Complainant's testimony also indicates that while he was employed by Ambassador he normally worked from 7:00 a.m. to 5:00 p.m., except on Wednesdays and Saturdays, which were his days off. Tr. at 26.

The Complainant further explained that while he worked for Ambassador he obtained driving “runs” in three different ways. First, he testified, he would be assigned some runs by one of Ambassador’s dispatchers. Tr. at 31-32. Second, he was sometimes directly retained by one of his own “regular clients” and would be allowed to transport these so-called “personals” after getting permission from Ambassador. Tr. at 32-33, 40. The third category of runs, according to the Complainant, consisted of so-called “kellys,” which were unscheduled runs that he obtained by waiting outside hotels until summoned to pick up passengers by hotel doormen. Tr. at 36-40, 98.

Sometime after he began working for Ambassador, the Complainant testified, his original supervisor was replaced by Mr. Rabonza, who the Complainant perceived as being “more demanding” than the previous supervisor. Tr. at 42-45. For example, the Complainant explained, around March of 2005 he was “fired” by Mr. Rabonza for refusing a request to work on a Saturday. Tr. at 45-46, 50. When asked if he told Mr. Rabonza why he was refusing the request, the Complainant testified that he told Mr. Rabonza that Saturday was his day off, that he had a medical appointment, and that he had been planning some “personal things.” Tr. at 48-50. According to the Complainant, after being fired by Mr. Rabonza he appealed to the company’s owner and was reinstated. Tr. at 51-52. Subsequently, the Complainant testified, Mr. Rabonza suspended him from working for three or four days because of a dispute over the form of a payment he had accepted from a group of passengers he had picked up at a Weston hotel. Tr. at 53-57.

According to the Complainant’s testimony, on or about April 29, 2005, Mr. Rabonza told him that he was needed to make a “bus run” that was scheduled for the late evening on April 30, 2005, which was a Saturday and therefore one of the Complainant’s scheduled days off. Nonetheless, the Complainant testified, he agreed to take the run because, “if I didn’t say yes, I knew I wouldn’t be there any longer.” Tr. at 60, 63-64. However, the Complainant added, “[y]ou can sort of tell when a person doesn’t want to do something. It took me a little while to respond.” Tr. at 65. The Complainant also testified that the late evening bus run was the only thing that Mr. Rabonza told him that he had to do on April 30.¹ Tr. at 66.

On the morning of April 30, the Complainant testified, he arrived at Ambassador’s facility about 6:30 a.m. in order to pick up a limousine that he needed for a “personal” that was scheduled to begin around 9:00 a.m. Tr. at 66. After completing the “personal,” he explained, he had hoped to work the rest of a “normal shift.” Tr. at 67-69, 100, 101. However, he acknowledged, an Ambassador dispatcher called him around 2:30 p.m. and told him to return the limousine because another driver needed it for a previously scheduled run. Tr. at 68, 100. For this reason, the Complainant testified, as soon as he completed a “kelly” that had already begun, he headed back to Ambassador’s yard and arrived there about 5:00 p.m. Tr. at 69. At that time, he recalled, someone was waiting to take him home and he therefore declined a request from the dispatcher or Mr. Rabonza to take another run. Tr. at 70-71.

¹ According to the Complainant’s July 20, 2005 request for a hearing, the April 30 bus run was expected to last for two hours.

At approximately 7:00 p.m. that evening, the Complainant testified, one of the Ambassador dispatchers called him at home to remind him about the “bus run” and he told the dispatcher that he was unavailable because he “was tired and had had a beer.” Tr. at 72-73. According to the Complainant, when he reported for work on the following morning, he was told that he had been suspended and, on the next, day Mr. Rabonza informed him that he was being fired for refusing to accept the April 30 bus run. Tr. at 74.

The Complainant further testified he would work more hours than the law permits about once a week during the period when he was employed by Ambassador, but he acknowledged that he had not complained about the excess hours to Ambassador’s dispatchers. Tr. at 92, 95. In addition, the Complainant asserted that working straight through a long day is a “whole lot different” from working a portion of a day, going home, and then coming back. Tr. at 105.

According to Mr. Rabonza’s affidavit, the Complainant “took it upon himself” to perform the “personal” on April 30 and then “stayed out all day doing ‘kellys’” without first receiving Mr. Rabonza’s permission. Rabonza Aff. at 1. In the affidavit, Mr. Rabonza further represents that he spoke to the Complainant at about 5:15 p.m. on April 30 and asked him why he had argued with the dispatcher when told to bring in the limousine, and that the Complainant had replied that he didn’t understand why he had to bring the car in if he had to do a bus run at 9:45. Rabonza Aff. at 2. The affidavit also represents that the Complainant then said that, because he had been required to bring the car in, he was not going to do the bus run. Rabonza Aff. at 2. According to the affidavit, Mr. Rabonza then told the Complainant that if he didn’t do the bus run, he would be fired. Rabonza Aff. at 3. Mr. Rabonza’s affidavit also asserts that the Complainant “never mentioned excessive hours before April 30, 2005, or on that day.” Rabonza Aff. at 3.

THE COMPLAINANT’S RESPONSE TO AMBASSADOR’S MOTION

The Complainant’s response to the Respondent’s motion was submitted on September 7, 2006. In the response, the Complainant asserted that, as a manager, Mr. Rabonza should have been aware that the Complainant was scheduled to work on his day off and represented that the “personal” he performed on the morning of April 30 had been booked “well before the date of pickup.” The Complainant further asserted that the dispatcher would not have given him the keys to a limousine if he did not have permission to work and contended that a “duty day” for drivers runs from “the time you clock in until the time you clock out.” However, the Complainant’s response did not dispute Mr. Rabonza’s representation that the Complainant had said that he was not going to do the bus run because he had been required to bring the limousine in on the afternoon of April 30. Nor did the Complainant dispute Mr. Rabonza’s assertion that the Complainant “took it upon himself” to take the “personal” and the “kellys” that he performed on April 30.

ANALYSIS

In administrative proceedings in which it is alleged that a defendant has engaged in unlawful retaliation, including cases arising under the STAA, the standard governing motions for summary decision is essentially the same as the standard set forth in Federal Rule of Civil

Procedure 56, which governs motions for summary judgment in the federal courts. *See Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, slip op at 2 (ARB 1999). Thus, pursuant to 29 C.F.R. §18.40(d), an Administrative Law Judge may issue a summary decision "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 that a party is entitled to summary decision." A "material fact" is one whose existence affects the outcome of the case and a "genuine issue" exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Once a moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *See Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998). The non-moving party may not rest upon mere allegations, speculation, or denials in pleadings, but must set forth specific facts on each issue upon which he or she would bear the ultimate burden of proof. *See Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P 56(e). If the non-moving party fails to sufficiently show an element essential to his or her case, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Accordingly, a motion for a summary decision can be granted if, upon review of the evidence in the light most favorable to the non-moving party, it is concluded, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact. *See Dominguez-Curry v. Nevada Transportation Department*, 424 F.3d 1027 (9th Cir. 2005). Moreover, the Ninth Circuit has held that in cases where a plaintiff is alleging that the proffered reason for a defendant employer's action is a pretext, summary judgment can be granted to the employer if the plaintiff fails to present "specific" and "substantial" evidence indicating that the employer had motives other than the purported pretext. *See Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1066 (9th Cir. 2004); *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654 (9th Cir. 2002).

In this case, the Complainant's deposition testimony indicates that he told Ambassador's dispatcher that he was refusing to perform the April 30 bus run because he was "tired" and because he had consumed a beer.² It is clear that refusals to drive based on fatigue or recent alcohol consumption are protected activities under the STAA.³ However, it is equally clear that

² It is noted that after the Complainant was terminated, he also asserted that his performance of the bus run would have violated regulations limiting the number of hours that a limousine driver is permitted to work. However, the Complainant's deposition testimony and Mr. Rabonza's affidavit both affirm that no such concerns were expressed to the Respondent prior to the Complainant's termination. Hence, the Complainant's post-termination assertion that his acceptance of the bus run would have violated maximum-hours regulations does not provide a basis for finding a violation of the STAA's whistleblower provision, even if that allegation were in fact accurate. *See Harris v. Allstates Freight Systems*, ARB Case No. 05-146 (ARB Dec. 29, 2005).

³ In this regard, it has been assumed for purposes of considering Ambassador's motion that the Complainant's statement that he was "tired" was equivalent to claiming that he was too fatigued to drive safely. It is recognized, however, that a driver's mere statement that he is "tired" may

the Complainant's alcohol consumption on the evening of April 30, 2005 was entirely voluntary. Likewise, it is apparent that if the Complainant had not voluntarily elected to spend nearly six hours pursuing "kellys" on April 30, he would not be able to make an even superficially plausible assertion that he had become too tired to perform the previously scheduled bus run.⁴ Hence, even when all the relevant evidence is viewed most favorably to the Complainant, it is clear that any inability by the Complainant to have safely performed the bus run was entirely the result of his own volitional acts of drinking beer and spending much of his day off seeking "kellys."

Review of recent decisions under the STAA indicates that there are several different ways of analyzing of the foregoing evidence.

First, it may be possible to analyze these facts in the way described in the Administrative Review Board's (ARB) decision in *Porter v. Greyhound Bus Lines*, ARB No. 98-116 (ARB June 12, 1998). In that decision, the ARB agreed with an Administrative Law Judge's determination that "the STAA does not protect an employee who, through no fault of the employer, has made himself unavailable for work." Slip opinion at 3. This approach was also followed by the ARB in *Blackann v. Roadway Express, Inc.*, ARB Case No. 02-115 (June 30,

not by itself be sufficient to convey a safety concern protected by the STAA. See *Mace v. Ona Delivery Systems, Inc.*, 91-STA-10 (Sec'y Jan. 27, 1992); *Smith v. Specialized Transportation Services*, 91 STA-22 (Sec'y April 20, 1992).

⁴ According to a log sheet for April 30, 2005 that the Complainant faxed to the Office of Administrative Law Judges on June 15, 2006, he picked up his "personal" at the Mirage Hotel at 9:15 a.m. and dropped him off at "LAS" at 9:45 a.m. The log sheet further shows that the Complainant picked up the first of four "kellys" at 10:35 a.m. and that he dropped off the last "kelly" at 4:30 p.m. Hence, although the Complainant worked as many as 10 and one-half hours before returning his limousine to Ambassador at 5:00 p.m., at least five hours and 55 minutes of that time was devoted to performing "kellys." It is also noted that if the Complainant had promptly returned his limousine after dropping off his "personal" at 9:45 a.m., he would have had at least 10 hours to rest before doing the bus run. Because of this prolonged potential rest period and the absence of evidence of any other reason for the Complainant to have felt "tired" on the evening of April 30, it has been determined that if the Complainant had not elected to spend nearly six hours performing "kellys" on the morning and afternoon of April 30, no jury or Administrative Law Judge would have been able to reasonably conclude that the Complainant was actually so "tired" on the evening of April 30 that he could have reasonably believed that it would have been unsafe for him to perform the bus run. It is recognized in this regard that the Complainant has alleged that Mr. Rabonza should have been aware of his intention to work on his day off. However, even though this assertion could support an inference that Mr. Rabonza was aware that the Complainant was scheduled to perform a 30-minute "personal" on the morning of April 30, no one has offered evidence that would rationally support an inference that Mr. Rabonza knew or should have known that the Complainant would voluntarily spend so much of the rest of that day seeking "kellys" that he would be too tired to perform an evening bus run. It is also important to recognize that even though Mr. Rabonza apparently did learn of the "kellys" around 5:00 p.m. on April 30, the bus run had been assigned the day before.

2004), which holds that a truck driver's frequent "fatigue breaks" did not constitute a form of activity protected under the STAA. In reaching that conclusion, the ARB implicitly acknowledged that the complainant's inability to sleep during the day had made it necessary for him to take frequent fatigue breaks during night-time runs, but determined that the STAA provided no protection for such breaks because they were the result of the complainant's own inability to adapt to the physical requirements of his job on a sustained basis. Slip opinion at 3-4.

A second possible approach to the facts of this case can be found in the ARB's decision in *Eash v. Roadway Express, Inc.*, ARB Case No. 04-036 (Sept. 30, 2005). In that decision, the ARB held that its decision in *Porter* "did not create a *per se* exception to the fatigue rule" and concluded that an employee "does not automatically lose whistleblower protection by failing in an alleged 'duty' to be ready for work." Slip op. at 10. Instead, the ARB explained, an Administrative Law Judge "must consider all of the circumstances of the incident" when determining whether a complainant's refusal to drive constitutes a protected activity. *Id.* See also *Eash v. Roadway Express, Inc.*, ARB Case Nos. 02-008, 02-064 (March 13, 2006).

The third possible analytical approach is set forth in the majority opinion supporting the Sixth Circuit's unpublished decision affirming the ARB's decision in *Blackann*. See *Blackann v. Roadway Express, Inc.*, 6th Cir. Case No. 04-4026, Dec. 15, 2005. The two members of the appellate panel who joined in that opinion did not expressly disagree with the ARB's holding that the complainant in that case had not engaged in a protected activity, but nonetheless believed it necessary to state that even if the complainant's fatigue breaks did constitute a type of protected activity, the ARB's decision could still be upheld on the grounds that the complainant had "failed to establish a causal link between his protected activity and his discharge." In explaining this determination, the panel members asserted that the ARB had found that the complainant had not been discharged for taking frequent fatigue breaks, but because he had repeatedly reported for duty when he was too sleepy to drive. Slip opinion at 5-6.

The fourth possible way of analyzing the facts of this case is found in the concurring opinion of the third member of the panel in the *Blackann* decision, Judge Cole. In that opinion, Judge Cole implied that the evidence concerning the complainant's fatigue breaks and subsequent termination was sufficient to make the minimal showing necessary to establish the protected activity and causal relationship elements of a *prima facie* case. However, Judge Cole further concluded that the ARB's decision should nonetheless be upheld because the complainant had failed to provide evidence to rebut the employer's "legitimate, non-discriminatory reason" for discharging him---his persistent inability to obtain the amounts of sleep necessary to perform the duties of his job. Slip opinion at 8-10.

After considering all of the foregoing precedents, it has been concluded that the approach set forth in Judge Cole's concurring opinion is the analytical framework that is the most consistent with the burden-shifting rules adopted by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and that Judge Cole's analytical approach should therefore be followed in this case. Accordingly, it has been determined that even though the Complainant's refusal to drive on the evening of April 30, 2005 was necessitated by his own volitional acts (drinking beer shortly before a scheduled run and voluntarily fatiguing himself by performing nearly six hours of "kellys" on his day off), the refusal was nonetheless a protected

activity. Likewise, it is concluded that the evidence concerning the Complainant's subsequent termination is sufficient to establish the adverse action and causal relationship elements of a *prima facie* case. However, it has also been determined, just as Judge Cole determined in his concurring opinion in *Blackann*, that the Respondent has rebutted the Complainant's *prima facie* case by articulating and presenting evidence of a legitimate, non-discriminatory reason for the adverse action, *i.e.*, the evidence indicating that the termination was based on the Respondent's good faith belief that the Complainant's inability to perform the previously-scheduled bus run was entirely due to his own volitional acts. Moreover, just as Judge Cole concluded in the *Blackann* case, it has been further concluded that the Complainant in this case has failed to meet his burden of presenting evidence to discredit the Respondent's explanation.⁵ Accordingly, it has been concluded that the Respondent's motion for a summary decision must be granted.

RECOMMENDED ORDER

1. All requests for relief under section 31105 of the Surface Transportation Assistance Act are hereby dismissed with prejudice.

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Paul A. Mapes
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS

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 D.C. 20210. *See* 29 C.F.R. §1978.109(a); 61 Fed. Reg. 19978 (1996). The parties may file with the Administrative Review Board briefs in support of or in opposition to the Administrative Law Judge's decision and order within thirty days of the issuance of that decision unless the Administrative Review Board notifies the parties

⁵ It is further noted that even if it could be argued that the Complainant has in some way offered evidence to rebut the Respondent's explanation, any such evidence would not be sufficient to constitute the "specific" and "substantial" evidence that the Ninth Circuit requires in order to defeat a motion for summary judgment in circumstances such as these. *See Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1066 (9th Cir. 2004); *Aragon v. Republic Silver State Disposal, Inc*, 292 F.3d 654 (9th Cir. 2002).