



Issue Date: 27 April 2010

CASE NO: 2006-STA-00048

IN THE MATTER OF

FERNANDO WHITE
Complainant

v.

GRESH TRANSPORT, INC
Respondent

**RECOMMENDED DECISION AND ORDER GRANTING COMPLAINANT'S
MOTION FOR SUMMARY DECISION**

This case is before the undersigned on remand from the Board to consider Complainant's claim for reinstatement having granted Respondent's Motion for Summary Decision denying Complainant any monetary damages that may have resulted from his termination under the doctrine of judicial estoppel which precludes Complainant from recovering any monetary damages due to his failure to disclose the instant STAA claim to the bankruptcy court. *White v. Gresh Transport, Inc.*, ARB Case No. 07-035, ALJ Case No. 2006-STA-048 (Nov. 20, 2008).

On February 11, 2010, Complainant filed a Motion for Summary Decision against Gresh Transport, Inc., (Respondent) alleging that he was entitled to Summary Decision against Respondent since there was no genuine issue of material fact and Complainant was entitled to summary decision against Respondent as a matter of law. In support of that motion Complainant attached an affidavit of Fernando White and a brief in support of said motion. On April 1, 2001, the undersigned issued to Respondent an Order to Show Cause why Complainant's Motion for Summary Decision should not be granted. Respondent was given 10 days from receipt of Complainant's motion to show cause why the undersigned should not issue a summary decision against Respondent. Respondent failed to respond to the motion.

In his affidavit Complainant established the following facts:

1. Respondent hired Complainant as a commercial truck driver on December 28, 2005.
2. Respondent assigned to Complainant the truck and tractors he operated under lease for Federal Freight Systems Inc.

3. As an employee of Respondent, Complainant operated commercial vehicles on highways in commerce with a commercial vehicle weight rating of 80,000 pounds.
4. Complainant's immediate supervisor while working for Respondent was Curtis Gresham.
5. While employed by Respondent Complainant received dispatch and hauling assignment from dispatchers employed by Federal Freight Systems. Inc.
6. After being assigned by Respondent to operate truck No. 602. Complainant performed an initial inspection of that vehicle and completed a vehicle inspection report, copies of which he gave to Curtis Gresham and Federal Freight.
7. The inspection and report for vehicle 602 showed the following defects: defective panel/dash lamps; inoperable horn; air leak in break system; lack of warning devices (flares or reflective triangle) for stopped vehicles; defective coupling device; defective door lache and locks; defective tires; missing battery cover; poor wheel alignment; exhaust leak beneath sleeper berth; faulty air compressor.
8. Complainant told Gresham of the defects. In turn Gresham arranged for the exhaust leak, and panel lights to be fixed and replaced one of two defective tires. The defective tire that remained on the drive axle had bald spots on major grove patterns. Gresham told Complainant that he would have to drive with the defective equipment until the truck earned the necessary funds to make such repairs if he wanted to keep his job.
9. During his employment with Respondent, Complainant completed daily inspection reports on truck 602 noting the uncorrected defects while orally complaining on almost a daily basis to Gresham that said defects needed to be corrected. In turn Gresham responded that he was working on it but could not afford the repairs at that time.
10. On or about January 16, 2006, while waiting at a truck stop near San Francisco Complainant called Gresham and informed him that after driving across the U.S. the air leak had become more severe such that he did not have enough air pressure to operate his breaks properly. Further he told Gresham the tire condition had worsened with significant bald spots on the right drive axle tire and another tire with less than 2/32 tread depth.
11. On January 19, 2009, Complainant was dispatched by Federal Freight to deadhead from San Francisco to Commerce City where he was to pick up a load. On January 2, 2009, Complainant learned he was to deliver the load to Providence, RI, without going for repairs in Federal Freight Inc.'s terminal. Complainant complained to Gresham that the air leak had gotten worse such that Complainant could not maintain 90 p.s.i. in the break system. Gresham replied that he did not have the money to fix the truck and that if he wanted to keep his job he would drive the truck to earn him

the money for the repairs. Gresham also told Complainant he would try to arrange for the repairs after Complainant made the Providence delivery.

12. Complainant drove to Providence with the following defects which Complainant reported to Gresham; an inoperable horn; a bald drive axle tire; exposed electrical wiring; defective windshield wipers; defective door latch that allowed door to open at highway speeds; no battery cover; poor wheel alignment; no reflective triangles or flares; serious lack of proper air pressure in break line.
13. Complainant drove from Providence to Billerica, MA where he picked up a shipment for Dothan, Alabama and again experienced a lack of air pressure in the break system which prevented him from maintaining a minimum safe air pressure of 90 p.s.i., which in turn prevented the parking breaks from proper release and presented a danger of jackknifing or blowout at highway speeds. In addition Complainant was exposed to other dangers caused by bald tires, defective windshield wipers and missing flares.
14. Complainant stopped driving in Littleton, MA, when Gresham told him the repairs would not be made in Littleton and he would be fired and his pay docked if he did not continue to drive. Complainant called the Massachusetts State Police, Commercial Enforcement Office, told the officer who responded to his call about the truck defects and requested an inspection which the officer declined because the truck was on private property. The officer however called Federal Freight informed them that the repairs Complainant requested needed to be made and would be placed out of service if anyone attempted to drive the truck in its present condition on the highway.
15. A few minutes after the officer's call, a maintenance official (Richard) from Federal Freight called Complainant and asked what was wrong with the vehicle and why Complainant would not drive. When Complainant explained the truck's defects and Gresham's refusal to repair them the maintenance official asked Complainant to drive to Billerica, MA, which Complainant refused to do until the truck was brought into DOT compliance.
16. Thereafter two officials from Federal Freight, Gerald Ragle (President) and Terry Burnett (Safety Director) called Complainant and tried to persuade him to drive the truck and trailer which Complainant refused until the proper repairs were made.
17. On January 27, 2006, a repair vendor arrived at Merrimac Valley Truck Service and repaired the air leak by bypassing the air dryer system which allowed moisture to remain in the air lines and ice to form in cold weather resulting in potential break failure. The vendor declined to make other repairs to the horn, tires, windshield washer to bring the truck and trailer into DOT compliance.
18. On the morning of January 29, 2006, Complainant met with 3 police officers, one of whom told Complainant Gresham wanted Complainant out of the truck. In the presence of the police officers Gresham told Complainant he had been given a load

and told where to take it but had refused and was hereby terminated from employment.

19. On May 19, 2006, Complainant filed a complaint with the U.S. Department of Labor, OSHA pursuant to provisions of the Surface Transportation Assistance Act, 49 U.S.C. Section 31105. Thereafter, on August 2, 2006, the U.S. Department of Labor, OSHA issued a preliminary determination to which Complainant objected and requested hearing before the Office of Administrative Law Judges.

The standard for granting summary judgment or decision is set forth at 20 *C.F.R.* §18.40(d) which is derived from Federal Rules of Civil Procedure (FRCP) 56. Section 18.40(d) permits an Administrative Law Judge to enter summary decision “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issues as to any material fact and that a party is entitled to summary decision” as a matter of law. A “material fact” is one whose existence affects the outcome of the case and is determined by the substantive law upon which the claim is based. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A “genuine issue” exists when the non-movant produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties’ differing versions at trial. *Id.* at 249.

In deciding a motion for summary decision, the Court must consider all the material submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). In other words, the Court must look at the record as a whole and determine whether a fact-finder could rule in non-movant’s favor. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587. The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. If the non-movant fails to sufficiently show an essential element of his 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-movant’s case necessarily renders all other facts immaterial.” *Id.* at 322-323.

This case arises under the employee protections provisions of the Surface Transportation Assistance Act (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. 19978.1000 *et. seq.*, (2001). Under Section 33105 (a) of the Act, a person is prohibited from discharging, disciplining or discriminating against an employee regarding pay, terms, or privileges of employment because (1) the employee has filed a complaint or begun a proceeding related to a violation of commercial motor vehicle safety regulations or (2) refuses to operate a vehicle because (a) to do so would violated a regulation, a standard, or order of the United States related to commercial motor vehicle safety, or health, or (b) the employee has a reasonable apprehension of serious injury to himself or public because of the vehicle’s unsafe condition.

The Act thus protects employee complaints “related to a violation of a commercial motor vehicle safety regulation, standard or order.” 49 U.S.C.A. § 31105 (a)(1)(A). *Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, slip op. at 4 (ARB June 29, 2007) 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 Envtl. Servs., v. Herman*, 146 F. 3d 12 (1st Cir 1998). In addition to prevail on a section 31105 (a)(1)(A) complaint , the employee must prove by a preponderance of the evidence that (1) he engaged in activity protected by the Act , (2) the employer was aware of the protected acts, (3) the employer took an adverse action against the employee, and (4) the existence of a “causal link” or “nexus between then protected activity and the adverse action. In cases under the Act the Board has adopted a burden of proof framework developed for pretext analysis under Title VII of the Civil Rights Act of 1964 as amended which requires the complainant to show that respondent employer was aware of this activity and took adverse action against the employee because of the protected activity If the employee makes this showing, the burden shifts to the employer to articulate a nondiscriminatory reason for the adverse action. If the employer identifies such a non-discriminatory reason, the employee must then prove by a preponderance of evidence that the reasons offered by the employer were not its true reasons but were a pretext for discrimination. *St. Mary’s Honor Ctr., v. Hicks*, 509 U.S. 502, 507 (1993); *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp v .Green*, 411 U.S. 792, 802 (1973; *Coates. V. Southeast Milk, Inc.*, ARB No. 05-050, (ARB July 31, 2007)

The Act also protects two categories of work refusals commonly referred to as “actual violation” and “reasonable apprehension” 49 U.S.C.A. Section 31105 (a)(1)(B)(i), (ii); see *Ass’t Secy’ v. Consol. Freightways (Freeze)* ARB No. 98-STA-26, slip op. 5 (ARB Apr. 22, 1999). For an employee to be protected under the actual violation category, the record must show that the employee’s driving of a commercial vehicle would have violated a pertinent motor vehicle standard. 49 U.S.C.A. Section 3305(a)(1)(B)(i); See *Freeze*, slip. op. at 7. Under the reasonable apprehension category, an employee’s refusal to drive is protected only if it is based on an objective, reasonable belief that the operation of a motor vehicle would pose a risk of serious injury to the employee and public and the employee has sought, but been unable, to obtain a correction of the unsafe condition. 49 U.S.C.A. Section 31105(a)(2). See *Young*, slip. op. at 8.

In this case Complainant voiced internal complaints to Gresh about air leaks/defective compressor, defective windshield washer, wipers, horn; missing flares or reflective triangles, defective systems, unsecured wiring, bald tires, defective coupling devices and door latch. Complainant believed and in fact all of these complaints related to violations of commercial vehicle safety regulations at 49.C.F.R. 392, 393, 396, 397 and constituted protected activity even if made to supervisors of Respondent. *Zurenda v.J & K Plumbing & Heating Co.*, ,1997-STA-16 (ARB June 12, 1998); See also *Yellow Freight System, Inc., Martin*, 954 F. 2d 353 at 356-57 (6th Cir. 1992)

Complainant’s refusal to drive the truck with an air leak and low air pressure was also protected under 49 U.S.C. Section 31105 (a)(1)(B) because had he continued to operate his unit 602 on highways actual violations of 49 C. F.R. 392.7, 393.1, 396.3(a), and 396.7 would have occurred. Likewise his refusal to drive because of bald tires or lack of flares or safety triangles

or an inoperable horn without correction of these conditions would have resulted in violation of 49 C.F. R. Sections 392.7; 392.8; 393.75; 393.81; and 393.93 (f).

To be protected under Section 31105 (a)(1)(B)(ii), Complainant's refusal must be based upon an objectively reasonable belief that the operation of his motor vehicle would have posed a risk of serious injury to himself or the public. *Asst. Secretary and Freeze v. Consolidated Freightways*, ARB Case No. 99-030 (1999); *Brink's Inc. v Secretary of Labor*, 148 F.3d 175 , 180 (2nd Cir. 1998). Reasonable belief is defined as that which a reasonable employee, in the circumstances then confronting said individual, would conclude to be unsafe so as to establish a real danger of accident, injury, or serious impairment to health provided that employee sought, but was unable to obtain, correction of the unsafe condition. In addition complainant must show he sought to have employer correct the condition but employer failed to do. Further, the objective reasonableness of the refusal must be evaluated in light of the situation that confronted the employee at the time of the refusal. *Yellow Freight Sys. V. Reich*, 38 F. 3d 7 6, 82 (2d Cir. 1994).

Complainant argues and the record supports the fact that his belief of serious harm to himself or the public was reasonable in that his operation of truck 602 without the necessary repairs showed an inability to safely operate the vehicle due to a lack of a brake line air pressure bald tire and non functioning horn and windshield wipers. Complainant repeatedly requested Gresh to perform the necessary repairs. The only problem Gresh partially corrected was the air leak but in so doing created another problem when the mechanic bypassed the air dryer and allowed moisture to accumulate thus allowing freezing and break failure to occur.

Complainant presented direct evidence that he was discharged because of his refusal to drive an unsafe vehicle and one which if driven would have violated commercial motor safety regulations when Gresh told him in Littletown, MA that he was being fired because of his failure to take a load to Dothan. Further, he presented indirect evidence that both his action in making internal and external complaints about truck safety to government officials led to his dismissal when his discharged is viewed in the context of his protected activity, Respondent's knowledge of such, and the proximity of his discharge in relation to his complaints and Respondent's failure to articulate any non discriminatory reason for the discharge show Respondent's discriminatory motivation.

Since Respondent has not responded to Complainant motion for summary judgment, I hereby find Complainant has presented by a preponderance of evidence proof that Respondent violated both 49 U.S.C. 31105 (a)(1)(A) and 49 U.S.C.(a)(1)(B) of the Act when it discharged Complainant on January 29,2006.

ORDER

ACCORDINGLY IT IS HEREBY ORDERED that

1. Respondent (Gresh Transport, Inc.), shall immediately reinstate Complainant, (Fernando Demeco White) to his former position as a commercial truck driver with Respondent.

2. Respondent shall delete all information§ pertaining to Complainant’s wrongful and discriminatory discharge and any unfavorable information related thereto concerning Complainant from its personnel records.
3. Counsel for Complainant shall, within 30 days of receipt of this order submit a fully documented fee petition as to attorney fees and costs.
4. This Recommended Decision and Order and the administrative file in this matter will be forwarded for review to 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)(2002).

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**CLEMENT J. KENNINGTON
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.

The order directing reinstatement of the complainant is effective immediately upon receipt of the decision by the respondent. All other relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).