



Issue Date: 03 May 2016

Case No.: 2008-STA-00061

In the Matter of:

TIMOTHY J. BAILEY,
Complainant,

v.

KOCH FOODS, LLC,
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY
JUDGMENT AND DISMISSING COMPLAINT WITH PREJUDICE**

This matter arises from a complaint filed under the provisions of Section 31105 of the Surface Transportation Assistance Act of 1982, U.S. Code, Title 49, § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 ("STAA") and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 1978.

Summary

On July 27, 2007, Complainant was a truck driver with Koch Foods, Inc. On July 27, 2007, he refused to drive a tractor-trailer loaded with live birds from a farm to Koch Foods' processing plant. Complainant believed the loaded tractor-trailer exceeded maximum weight restrictions for vehicles. Maximum weight allowed was 88,000 pounds. Alabama Code section 32-9-20 (a) (4) d. Another driver drove Complainant's loaded tractor-trailer. The July 27, 2007 vehicle weight ticket reflected that the tractor-trailer weighed 64,160 pounds gross while maximum weight allowed was 88,000 pounds. Complainant's refusal to drive the vehicle was considered a violation of company policy. The Koch Foods, Inc. established penalty was immediate termination. Following a three-day suspension, Complainant's employment was terminated. Complainant filed a complaint with OSHA under the Surface Transportation Assistance Act (STAA) alleging retaliatory termination.

Based on the weight ticket and the case law of Eleventh Circuit, Respondent is entitled to summary decision as a matter of law. At the time of Complainant's refusal to drive the tractor-trailer, there was no actual violation of any safety regulation since the tractor-trailer was not overweight. Respondent's Motion For Summary Judgment is granted.

Procedural History

This matter was heard by Administrative Law Judge Malamphy (ALJ) who issued a Recommended Decision And Order on September 29, 2009. The ALJ found that Complainant established that Respondent discriminated against him in violation of the Surface Transportation Assistance Act (STAA). The ALJ found that Respondent terminated his employment and did not show it would have terminated him in the absence of his protected activity. The ALJ recommended reinstatement, noting Complainant found alternative employment. The ALJ also awarded back pay and compensatory damages. Respondent appealed to the Administrative Review Board (ARB or Board). The Board affirmed the ALJ. *Bailey v. Koch Foods, LLC*, ARB no. 10-001, ALJ no. 2008-STA-061 (ARB September 30, 2011). Respondent appealed to the United States Court of Appeals for the Eleventh Circuit. The court vacated the Board's decision and remanded to the ARB. *Koch Foods, Inc. v. Secretary, U. S. Department of Labor*, 712 F.3d 476 (11th Cir. 2013). The court held that Section 31105 (a) (1) (B) (i) covers "only those situations where the record shows that operation of a motor vehicle would result in the violation of a regulation, standard, or order related to commercial motor vehicle safety, health, or security." *Id.*, at 486. (Emphasis added.)

Upon remand, the Administrative Review Board issued an Order Of Remand dated May 30, 2014. *Assistant Sec. of Labor for Occupational Safety and Health and Timothy Bailey v. Koch Foods, LLC*, ARB no. 14-041, ALJ no. 2008-STA-061 (ARB May 30, 2014). The Board vacated the ALJ's Decision And Order. The Board remanded "for a determination, including findings of fact, as to whether an actual violation of a regulation, standard, or order related to commercial motor vehicle safety, health, or security would have occurred had Bailey hauled the trailer in this case." As the ARB noted in its previous decision, "the ALJ did not make a definitive finding on whether the trailer Bailey refused to haul was overweight when he refused to drive. (See page 5) This finding is critical to a determination of whether an actual violation of a safety violation would have occurred if Bailey had hauled the trailer." *Id.*, at pages 2-3. The Board noted that in its previous decision, the Complainant's supervisor testified the trailer in question was not overweight when he refused to pull it. The Board noted that the weight ticket for the trailer was not in the evidentiary record. The Board held that "[g]iven the Eleventh Circuit's ruling, the weight ticket has increased significance that, in the presiding ALJ's discretion, may or may not require a reopening of the evidentiary record and discovery." *Id.*, at n. 8.

By Order dated January 11, 2016, the parties were ordered to submit individual status reports by February 12, 2016. The court ordered that the status report should alternatively state whether either party had a copy of the weight ticket for the trailer, and whether this matter was ready to be set for hearing. By letter dated February 12, 2016, Respondent submitted its Response to Order for Status Report. Respondent stated that, "On the eve of trial, Respondent located the weight ticket dated July 27, 2007, showing the weight of the trailer that Timothy Bailey, the Complainant, had refused to haul because he stated he believed it to be overweight. A copy was forwarded to counsel for the Secretary immediately after the remand of this case and is attached hereto as Exhibit A. The weight ticket shows indisputably that the weight of the loaded trailer that Mr. Bailey had refused to pull did not exceed the maximum allowed of 88,000 pounds. Therefore, according to the Eleventh Circuit's ruling, Complainant's refusal was not protected

activity, and Respondent is entitled to judgment in its favor and dismissal of the Complaint with prejudice.”

Respondent further moved for summary judgment stating that based on the weight ticket, “there are no disputed issues of material fact.”

Respondent was ordered to file its Motion for Summary Judgment and supporting brief by March 25, 2016. Complainant was ordered to file his response by April 8, 2016.

On March 25, 2016, the court received Respondent’s Motion For Summary Judgment And Memorandum In Support of Summary Judgment and Dismissal of the Complaint with Prejudice. Complainant did not respond to the court’s Order or to Respondent’s Motion For Summary Judgment.

Proceedings before the Office of Administrative Law Judges are guided by the Administrative Procedure Act, 5 USC 554, et. seq., and federal regulations at 20 CFR Part 702 and 29 CFR Part 18A. Under these procedural rules, “A party may move for summary decision, identifying each claim or defense – or the part of each claim or defense – on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” 29 CFR §18.72 (new Rules of Practice and Procedure, effective June 18, 2015.)

Findings of Facts

On July 27, 2007, Complainant was a truck driver with Koch Foods, Inc. On July 27, 2007, he believed the tractor-trailer assigned to him was over the maximum weight allowed by the State of Alabama. He refused to drive the tractor-trailer loaded with live birds from a farm to Koch Foods’ processing plant. Complainant believed the loaded tractor-trailer exceeded maximum weight restrictions for vehicles. Maximum weight allowed was 88,000 pounds. Alabama Code Section 32-9-20 (a) (4) d.

In its Motion for Summary Judgment, Respondent submitted the March 24, 2016 Declaration Of Harold Hunt. Mr. Hunt was a complex manager with Koch Foods, in its Gadsden, Alabama facility. (Respondent Exhibit 1) Mr. Hunt declared that:

2. In July 2007, I was Complex Manager for Koch Foods at its Gadsden, Alabama location. In that capacity I am responsible for the entire range of plant operations, including but not limited to the making and retention of records. I am also familiar with the weight limitations for tractor/trailer operating in Alabama.

3. The tractors and trailers used at Koch Foods are rated safe to operate (Gross Vehicle Weight Rating, or GVWR) at up to 130,000 pounds.

4. Alabama sets the maximum weight for a tractor/trailer operating on state roads at 88,000 pounds.

5. In early to mid-July 2007, it came to my attention that a few trailers loaded with live birds for processing at the Gadsden plant were coming in overweight. I ordered an investigation and determined that one of the catching crews had been overloading cages. The contractor responsible for that crew was notified, and the crew leader fired. To the best of my knowledge and belief, there were no more overweight trailers after that action was taken.

6. Prior to July 27, 2007, Timothy Bailey never expressed any concerns to me about overweight trailers, nor did I discuss such matters with him. I am not aware that he ever raised any such concerns with his supervisor or the safety manager.

7. On July 27, 2007, Bailey refused to pull a trailer loaded with live birds from a farm. Bailey later told his supervisor, Tim Graul, that he believed the trailer was overweight because it was of the same type as those that he had seen recorded as overweight a week or two earlier.

8. Another driver, Brian Valentine, pulled the trailer Bailey refused back to the plant.

9. On July 27, 2007, when the tractor/trailer that Bailey had refused to pull was weighed upon arrival at Koch's processing facility, it was determined to have a gross weight of 84,160 pounds [sic]. A true and correct copy of the weight ticket is attached hereto as Exhibit A.

10. Despite diligent efforts, we were unable to locate the weight ticket attached hereto until August 2008. The ticket had been misfiled and was discovered by a Live Haul accounting clerk named Judy Horton in the course of her duties.

The Department Of Agriculture weight ticket was attached to Respondent's Motion For Summary Judgment. (EX 1A). The weight ticket shows that on July 27, 2007, the tractor-trailer weighed 64,160 pounds gross. Specifically, the document lists Koch Foods, location Gadsden, and date July 27, 2007 at the top of the document. The document lists "commodity poultry" and "Carrier Koch Farms, Inc." The time lists as "1:57 AM" July 27, 2007. The weight is "64,160 pounds gross." Signature of authorized plant official is Judy Horton and the inspector in charge signed as well.

Complainant presented no evidence in response to Respondent's Motion For Summary Judgment to support his claim that the tractor-trailer exceeded maximum weight allowed. Complainant presented no evidence to support that there was an actual violation of safety regulations. (Emphasis added.)

The facts found by the initial Administrative Law Judge regarding the sequence of events, company policy, and date of subsequent termination, are adopted and incorporated herein. In summary, believing the tractor-trailer was overweight and exceeded the State of Alabama weight limitations, Complainant's supervisor testified the vehicle was not overweight when Complainant refused to drive the trailer. Complainant refused to drive. After his shift ended, Complainant contacted his supervisor. Another driver drove Complainant's loaded tractor-trailer. Pursuant to Koch Foods' company policy, Complainant's refusal to drive the vehicle was considered a violation of company policy. The company penalty for refusal to drive was immediate termination. After a three-day suspension, Complainant's employment was terminated.

Argument

Respondent argued that there is no genuine issue of material fact; the trailer weighed less than 88,000 pounds. Respondent argued that the July 27, 2007 weight ticket was evidence that the tractor-trailer the Complainant refused to pull was not overweight. Respondent stated that since driving the tractor-trailer would not have resulted in an actual violation of any safety regulation, Complainant's refusal was not protected activity. Therefore, the subsequent termination of his employment was not retaliatory.

Respondent moved that the court grant Its Motion for Summary Judgment and Dismissal of Complainant's Complaint with Prejudice. Respondent argued that the Eleventh Circuit Court of Appeals held that protection afforded by any whistleblower provision only applies when the operation of a vehicle would result in an actual violation of law. (Emphasis in Respondent's original argument) Respondent relied upon *Koch Foods, Inc.*, 712 F.3d at 476. Respondent quoted the Court of Appeals:

[T]he statute that prohibits an employer from disciplining or discriminating against an employee 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, health, or security [...] 49 U. S. C. Section 31105 (a) (1) (B) (Emphasis added by Respondent).

In drafting this subparagraph, Congress employed the phrase 'because... the operation violates' unadorned by any reference to the employee's belief. A plain reading of the text, therefore, suggests that an actual violation of a regulation, standard, or order must occur as a result of the operation of the vehicle. *Koch Foods*, 712 F.3d at 486.

The Respondent argued that the Court of Appeals concluded:

Upon review of the statute's plain language, structure, and statutory history, we conclude that Section 31105 (a) (1) (B) (i) unambiguously covers only those situations where the record shows that operation of a motor vehicle would result in the violation of a regulation, standard, or order related to commercial motor vehicle safety, health, or security. We therefore grant Koch Foods' petition and remand this case to the ARB for proceedings consistent with this opinion. *Koch Foods*, 712 F.3d at 486.

Respondent argued that Exhibit 1, the weight ticket, showed that the tractor-trailer Complainant refused to operate would not have resulted in any violation of a safety regulation. Respondent argued that the gross weight shown on the ticket was 84,160 pounds. The court has reviewed Exhibit 1. The computer printed numbers are 64,160 pounds. This is below the 88,000 pound maximum allowed.

Respondent argued that inasmuch as "pulling the trailer would not have resulted in an actual violation, [Complainant's] refusal did not qualify as protected activity; and because his refusal was not protected activity, Koch Foods' decision to terminate his employment for that refusal was not retaliation."

Complainant did not respond to Respondent's Motion For Summary Judgment and Motion For Dismissal Of The Complaint With Prejudice.

Standard Of Review For Summary Judgment

Pursuant to 29 C.F.R. Section 18.72, Rules Of Practice And Procedure effective June 18, 2015, controlling proceedings before the Office of Administrative Law Judges, United States Department Of Labor, the rules for summary decision state:

"A party may move for summary decision, identifying each claim or defense-or the part of each claim or defense-on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."

A "material fact" is a fact that affects the outcome of the case. A "genuine issue" exists "if the evidence is such that a reasonable [fact finder] could return a verdict for the non-moving party," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), after "drawing all reasonable inferences in favor of that [non-moving] party." *Williams v. Utica College of Syracuse University*, 453 F.3d 112, 116 (2nd Cir. 2006); *Jeffrey v. Sarasota White Sox, Inc.*, 64 F.3d 590 (11th Cir. 1995) (citing *Anderson v. Liberty Lobby Inc., supra*). While the burden is on the moving party for the summary judgment "to demonstrate the absence of any material factual issue genuinely in dispute," *American Intern Group Inc. v. London American Intern Corp. Limited*, 664 F.2d 348, 351 (2nd Cir. 1981), when the party seeking the summary judgment does not bear the ultimate burden of proof at the formal hearing, the moving party need not prove a

negative on an issue the non-moving party must prove at the hearing. In such a case the moving party need only point to the absence of proof by the non-moving party to a material fact. The non-moving party may not rest upon mere allegations or denials but must present proof for the material fact so noted. Summary judgment must be entered “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 at trial.” *Dadeland Depot Inc. v. St. Paul Fire and Marine Insurance Company*, 479 F.3d 799, 802 (11th Cir. 2007), quoting *Johnson v. Board of Regents*, 263 F.3d 1234, 1243 (11th Cir. 2001), quoting *Celotex Corporation v. Catrett, supra* at 322. “If the non-moving party fails to make a sufficient showing on an essential element of [the non-moving party’s] case with respect to which [the non-moving party] has the burden of proof, then the court must enter summary judgment for the moving party.” *Dadeland Depot Inc. v. St. Paul Fire and Marine Insurance Company*, 479 F.3d at 802 quoting *Gonzales v. Lee County Housing Authority*, 161 F.3d 1290, 1294 (11th Cir. 1998), quoting *Celotex Corporation v. Catrett, supra* at 323.

Here, the issue is whether there was an actual violation of safety regulations when Complainant refused to haul a loaded tractor trailer claiming it was overweight. If so, whether he has established a *prima facie* case of retaliation when he was terminated for refusing to haul the tractor trailer under the Surface Transportation Assistance Act.

Discussion and Conclusions of Law

Based on the facts of this case, analysis of the statute, the case law, the holding by the Eleventh Circuit Court of Appeals, and the Administrative Review Board in this matter, the undersigned agrees with Respondent’s argument. After deliberation on the material submitted for consideration in a light most favorable to the Complainant, this Administrative Law Judge finds that there is no genuine issue as to material fact before this court.

Pursuant to the Eleventh Circuit, there must be an actual violation, not a belief on the part of the driver, for the refusal to drive to be a protected act under the Surface Transportation Act. In this case, there was no actual violation. There is no material dispute as to the weight of the tractor-trailer. Per the weight ticket, the tractor-trailer weighed 64,160 pounds gross. (EX 1) Per Alabama statute, the maximum weight allowed is 88,000 pounds. The trailer weighed 24,000 pounds less than the maximum weight allowed such that there was no actual violation.

The facts are clear and undisputed regarding the weight of the tractor-trailer Complainant refused to drive. The Complainant has failed to establish a *prima facie* case under STAA that he engaged in actual protected activity while an employee of Respondent.

There was no actual violation of a safety regulation based on the undisputed weight of the tractor-trailer when Complainant refused to drive. Complainant’s refusal to drive the tractor-trailer was not a protected act. Respondent’s termination of the Complainant for refusal to drive the tractor-trailer was not retaliation against the Complainant. There was no violation under the Surface Transportation Assistance Act when Complainant was terminated from employment

with the Respondent. The Complainant is not entitled to any requested relief from Respondent under STAA. Accordingly, the Respondent is entitled to summary decision and dismissal of this complaint.

ORDER

It is hereby Ordered that:

1. Respondent's Motion for Summary Judgement and Dismissal with Prejudice is GRANTED.
2. Complainant's complaint under the Surface Transportation Assistance Act alleging retaliatory termination is DISMISSED WITH PREJUDICE.

DANA ROSEN
Administrative Law Judge

DR/mja
Newport News, VA

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).