



**Issue Date: 19 February 2010**

Case No. 2008-STA-2

In the Matter of

REBECCA S. CLAYPOOLE,

Complainant,

v.

U.S. XPRESS ENTERPRISES, INC.,

Respondent.

### **RECOMMENDED ORDER OF DISMISSAL**

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA"), 49 U.S.C. § 31101, *et seq.*, and the regulations published at 29 C.F.R. Parts 18 and 1978.

On January 13, 2010, Respondent U.S. Xpress Enterprises, Inc. ("U.S. Xpress") filed a Second Renewal of Motion to Dismiss, requesting that Complainant's claim be dismissed for failure to respond to the company's discovery requests. By Order, issued January 14, 2010, Complainant was granted 20 days to show cause why her claim should not be dismissed. Complainant has filed no response to the Show Cause Order.

I find that Complainant has failed to respond to U.S. Xpress's discovery requests, comply with orders of the court, and prosecute her claim; accordingly, I recommend dismissal of her complaint.

### **Procedural History**

Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") on June 1, 2007, alleging retaliatory discharge. Complainant claimed that she was exposed to carbon monoxide and diesel fumes while driving a truck for U.S. Xpress, and that she was terminated in response to her complaints. After

an investigation, the Secretary of Labor, acting through the Regional Administrator for OSHA, found that Complainant engaged in protected activity in April 2007 when she reported to U.S. Xpress that exhaust was leaking into the cab of her truck and making her sick. The Secretary found, however, that U.S. Xpress addressed Complainant's concerns and accommodated her need to receive medical attention and recuperate. The Secretary further determined that Complainant was discharged for legitimate, nondiscriminatory reasons.

Complainant requested a formal hearing, and the case was assigned to Administrative Law Judge ("ALJ") Donald W. Mosser. After Complainant failed to respond to discovery requests, did not file prehearing submissions, and became unreachable by mail or phone, ALJ Mosser recommended that her complaint be dismissed as abandoned. Complainant subsequently sent a letter, providing an address at which she could be reached. The case proceeded to the Administrative Review Board, which issued an Order of Remand instructing the ALJ to consider Complainant's response and determine whether her case should continue. *Claypoole v. U.S. Xpress Enterprises, Inc.*, ARB No. 08-058, ALJ No. 2008-STA-2 (ARB Nov. 28, 2008). ALJ Mosser conducted a telephone conference with the parties and subsequently withdrew the order of dismissal and granted Complainant's request to reschedule the hearing. In the same Order, issued February 24, 2009, ALJ Mosser reassigned the case to me.

A formal hearing was scheduled for July 1, 2009, in West Palm Beach, Florida. By letter, dated April 30, 2009, Complainant stated that she would like to put her case on hold. She noted that her physical condition had not fully improved, that she had not yet responded to U.S. Xpress's discovery requests, and that she was attempting to retain an attorney to help her review her case. On May 18, 2009, U.S. Xpress filed a Motion to Compel and Motion for Sanctions regarding Complainant's failure to respond to its discovery requests. During a conference call with the parties on May 22, 2009, I granted a 30-day continuance from the date of the conference call to afford Complainant time to obtain an attorney. I also granted Complainant an additional 30 days to respond to U.S. Xpress's discovery requests and motions.

Complainant filed a letter, dated June 21, 2009, requesting that the case be placed in abeyance. Complainant expressed that she is ill, and wished to wait until her health improves before her case moved forward. Specifically, she stated that she has been sick since being exposed to diesel fumes as a driver for U.S. Xpress, but that she had not yet been given a complete diagnosis or prognosis. "At this time I am simply not up to the physical and mental stress of a legal case of any type, for I am very ill." She also requested more time to find an attorney who could help her respond to discovery.

On July 10, 2009, I held a conference call with the parties. Complainant confirmed her desire for a delay until she is physically and mentally able to proceed with her case. I gave Complainant the opportunity to provide objective information regarding her mental and physical status, and to submit any statements from medical professionals regarding her condition and her ability to fully participate in this litigation.

On August 10, 2009, a letter was submitted via facsimile by Roberta Thompson, an individual not in the medical field, but who is familiar with Complainant. Ms. Thompson attested to Complainant's illness, recent struggles, and her current inability to participate in litigation. Ms. Thompson further stated that Complainant is waiting to hear from various specialists and her primary care physician, in order to respond to the request for further information made during the July 10, 2009, conference call.

By Order, issued August 19, 2009, I gave Complainant 30 additional days to submit "any further information from medical professionals regarding her physical and mental condition and her present ability to participate in the litigation of her case." Complainant filed no additional information regarding her condition. On September 29, 2009, I issued an Order requesting that U.S. Xpress show cause why Complainant's claim should not be placed in abeyance.

On October 16, 2009, Respondent filed U.S. Xpress Enterprises, Inc.'s Motion to Dismiss and Response to Order to Show Cause. Regarding Complainant's request to place the case in abeyance, Respondent argued that Complainant has provided no documentation from a medical professional that she is unable to pursue her claim at this time. Accordingly, Respondent requested that the matter not be placed in abeyance.

After reviewing the arguments of the parties, I issued an Order on October 26, 2009, stating that: "[w]ithout additional objective evidence that Complainant is physically or mentally unable to proceed with her case, I find it inappropriate to hold the case in abeyance." In that Order, I denied U.S. Xpress's motion to dismiss and granted Complainant an additional 30 days to respond to U.S. Xpress's discovery requests. I cautioned Complainant that "discovery is an integral part of the hearing process, and failure to respond to Respondent's discovery requests in the time allotted may result in dismissal of her complaint prior to a hearing."

On November 19, 2009, Complainant sent a letter, which I interpreted as a request for reconsideration. By Order, issued December 15, 2009, I denied Complainant's motion, stating that "I continue to find insufficient evidence that Complainant is unable to proceed with this stage of the litigation. Complainant has been able to provide well-written and coherent letters to the Court on several occasions, and I find that she is able to provide responses to Respondent's discovery requests."

Complainant was granted 20 additional days to respond to Respondent's discovery requests.

On January 13, 2010, U.S. Xpress filed its Second Renewal of Motion to Dismiss. U.S. Xpress argues that Complainant's claim should be dismissed, based on her continued failure to respond to the company's discovery requests. U.S. Xpress described its many attempts to obtain discovery responses from Complainant, beginning in December of 2007:

U.S. Xpress has now spent over two years trying to obtain discovery responses from Ms. Claypoole. U.S. Xpress first attempted to serve discovery on Ms. Claypoole on December 21, 2007 via U.S. mail to an address that Ms. Claypoole had provided to OSHA. The mailing was returned and marked as undeliverable. U.S. Xpress again attempted to serve discovery on Ms. Claypoole on January 17, 2008 via U.S. mail to an alternative address that she had provided to OSHA. U.S. Xpress understands that the U.S. Postal Service was not able to deliver to that address either.

....

The parties unsuccessfully mediated this case on March 31, 2009. The next day, April 1, 2009, U.S. Xpress again served discovery requests on Ms. Claypoole. . . . Ms. Claypoole did not timely respond to the discovery requests. On May 4, 2009, undersigned counsel sent Ms. Claypoole a letter via e-mail and Federal Express notifying her that her responses were past due and requesting that she let him know by no later than Wednesday, May 5 when he could expect to receive her responses. Ms. Claypoole never responded.

....

Ms. Claypoole has at least three times been explicitly directed by the ALJ—in the May 22 [2009] conference call, the October 26 [2009] Order, and the December 15 [2009] Order—to respond to U.S. Xpress' discovery requests. She also has been clearly informed—more than once—that not responding to discovery could lead to dismissal of her case. Ms. Claypoole nevertheless has failed to provide any discovery responses to U.S. Xpress.

Ms. Claypoole has unnecessarily and repeatedly delayed the course of this proceeding. She should not be allowed to hold the administrative process hostage by her inaction and her refusal to comply with the ALJ's orders.

For all these reasons, U.S. Xpress requests that the ALJ dismiss Ms. Claypoole's claim.

By Order, issued January 14, 2010, Complainant was granted 20 days to show cause why her claim should not be dismissed on the grounds of abandonment. The Order was sent via certified mail. Complainant filed no response.

### **Discussion**

The regulations provide that failure to comply with an order, including a discovery order, may result in a decision against the non-complying party. 29 C.F.R. § 18.6(d)(2)(v). An administrative law judge may also recommend dismissal on the grounds of abandonment if a party has failed to prosecute his or her case. *Belajonas v. Load One Inc.*, ARB No. 09-135, ALJ No. 2009-STA-027, slip op. at 2 (ARB Nov. 18, 2009) (citing *Kruml v. Patriot Express*, ARB No. 03-015, ALJ No. 2002-STA-007, slip op. at 4-5 (ARB Feb. 25, 2004); *Assistant Sec'y for OSH & Reichelderfer v. Bridge Transp., Inc.*, ARB No. 02-068, ALJ No. 2001-STA-040, slip op. at 3 (ARB Aug. 29, 2003)); *see also Rose v. ATC Vancom, Inc.*, ARB No. 05-091 (Aug. 31, 2006)(triers-of-fact have an "inherent power" to dismiss a case upon their own initiative).

The court has given Complainant multiple extensions to respond to U.S. Xpress's discovery requests. She has also been cautioned that a failure to respond to discovery may result in dismissal of her claim. Nevertheless, Complainant has produced no responses to U.S. Xpress's discovery requests. Nor has Complainant shown cause why her claim should not be dismissed for failure to prosecute. For these reasons,

### **ORDER**

**IT IS HEREBY RECOMMENDED** that the complaint **BE DISMISSED** for Ms. Claypoole's failure to comply with orders of the court, failure to respond to U.S. Xpress's discovery requests, and failure to prosecute her claim.

**A**

LARRY S. MERCK  
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.