



Issue Date: 19 December 2008

CASE NO.: 2009-STA-00001

In the Matter of:

DWAN STALWORTH,
Complainant,

v.

JUSTIN DAVIS ENTERPRISES, INC.,
Respondent.

RECOMMENDED DECISION AND ORDER

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the "ACT" or "STAA"), 49 U.S.C. § 31105 and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination because the employee has engaged in protected activity pertaining to commercial vehicle safety and health matters.

This matter is before me on the Complainant's request for hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration ("OSHA") after investigation of the complaint. A hearing was held pursuant to the Surface Transportation Act on November 6, 2008 in Macon, Georgia, pursuant to my previous notices. Complainant was present and testified at the hearing and submitted documents which were admitted into evidence.

Respondent failed to appear at the hearing despite timely Notice of the hearing date, time and place.

I issued an Order Requiring the Respondent to Show Cause why a default judgment should not be entered on November 20, 2008, requiring the Respondent to show good cause for their failure to attend the hearing. A one-page letter, dated November 25, 2008, was received in this Office on December 1, 2008 from Respondent in response to my Order. The letter was

received on letterhead from the Respondent with an address listing of “151 Lake Shore Drive, Madison, FL 32340.” The Respondent had been served with Notice at this identical address. I find the Respondent’s response to the Show Cause Order inadequate and disingenuous at best, particularly in light of the Respondent’s non-response and lack of cooperation subsequent to the Show Cause Order.¹

At the hearing, the Complainant appeared and testified. Claimant’s exhibits, CX- 1- 7, were entered into evidence.

APPLICABLE LAW

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

(a) Prohibitions:

- (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because:
 - (A) the employee, or another person at the employee’s request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;
 - (B) the employee refuses to operate a vehicle because:
 - (i) The operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
 - (ii) The employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.

49 U.S.C. § 31105(a).

29 C.F.R. § 18.1 sets forth that the Rules of Civil Procedure of the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation. There is no express authority in the STAA or the applicable regulations explicitly governing default judgments. Thus, the Federal Rules of Civil Procedure apply. Rule 55 of the Federal Rules of Civil Procedure provides further support and a procedural framework for a default judgment. A default decision may be entered against any

¹ Upon receipt of Respondent’s November 25, 2008 letter, this Court made several efforts (through my law clerk, Michelle Kim) to have Respondent provide written or oral testimony. Available dates for a formal hearing were provided to the Respondent. All efforts were completely ignored by the Respondent. Other than being contemptuous of this Court and the proceedings, such non-response supports a default or summary decision through abandonment, non-defense of the allegations, and failure to comply with the Rules.

party who fails to appear without good cause. *Husen v. Wide Open Trucking, Inc.*, ARB Nos. 05-115, 05-130.

A default decision may be entered for failure of the Respondent to comply with the Rules. *Ass't Sec'y & Marziano v. Kids Bus Service, Inc.*, ARB No. 06-068.

Prima Facie Case

Claims under the STAA are adjudicated pursuant to the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, the complainant must initially establish a prima facie case of retaliatory discharge, which raises an inference that the protected activity was likely the reason for the adverse action. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229(6th Cir. 1987); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To establish a prima facie case of retaliatory discharge under the Act, the complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of an adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of the employer. *Moon, supra*.

Background

Complainant worked as a fuel truck driver for the Respondent from March 2007 until he was terminated on May 7, 2008. The Respondent is a company headquartered in Florida with a local office and facility in Macon, GA. Complainant drove trucks which carry approximately 8,000 gallons of fuel being delivered to a variety of different gas stations in the Macon area. His immediate supervisor was Mr. Tyner, the original owner of the premises and business in Macon before it was bought out by Justin Davis Enterprises. Tr. at 9.

The Complainant normally drove Vehicle (truck) #101. On May 7, 2008 the Complainant was unable to drive his normal vehicle since it was being repaired for a fuel leak. CX- 4, 5. He was assigned to drive Vehicle #102. Upon completion of his safety inspection of the vehicle, he reported to Mr. Tyner that the truck (#102) was unsafe to drive since it had several tires that were unsafe, the seat belt was broken and a light on the tractor was out. Tr. at 11; CX- 6. He also stated in his testimony that the seat in the cab would not adjust. Tr. at 11.

When the Complainant informed Mr. Tyner of the problems, Mr. Tyner asked him to "drive just this one time." Complainant refused and Mr. Tyner then stated "If you don't drive that truck, don't come in tomorrow." When the Complainant returned to work on May 11, 2008 (his normal rotational workday), Mr. Tyner informed him "You no longer work for Justin Davis."

TR. at 11.

The Complainant made several efforts to have Mr. Tyner's superiors in Florida "work things" out but was told that the superiors were "taking Mr. Tyner's side." He had difficulty getting his last pay check and the company contested his unemployment claim.²

The vehicle involved was later driven by John Madry, who encountered several tire "blowouts" in the next two weeks. Tr. at 13. On May 29, 2008, Truck #102 and Mr. Madry were involved in a major accident in which the truck overturned on GA 247 North, while he was carrying 7,800 gallons of fuel. Tr. at 13; CX-2. Mr. Madry was injured slightly and fuel leaked from the vehicle.³

Protected Activity

Under 49 U.S.C. § 31105 (a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992); see also *Lajoie v. Environmental Management Systems, Inc.*, 1990-STA-00031 (Sec'y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. *Nix v. Nehi-R.C. Bottling Co.*, 1984-STA-00001, slip op. at 8-9 (Sec'y July 4, 1984). An employee's threats to notify officials of agencies such as the Department of Transportation or the Federal Motor Carrier Safety Administration may also be protected under the STAA. *William v. Carretta Trucking, Inc.*, 1994-S TA -00007 (Sec'y Feb. 15, 1995).

Such complaints may be oral rather than written. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed. See *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (holding that the complainant's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

² Claimant successfully proved his case for unemployment benefits on the basis of his termination on May 7, 2008. CX-3.

³ It is unknown what civil or criminal citations resulted from this incident. Apparently this really was an unsafe vehicle as the Complainant first alleged on May 7.

Under the STAA, an employee can also engage in protected activity by refusing to operate a vehicle because “the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health” or because “the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.” 49 U.S.C.A. §§ 31105(a)(1)(B)(i)-(ii). These two types of refusal to drive are commonly known as the “actual violation” and “reasonable apprehension” subsections. *Eash v. Roadway Express, Inc.*, ARB No. 04-036, slip op. at 6 (Sept. 30, 2005) (citing *Leach v. Basin Western, Inc.*, ARB No. 02-089, slip op. at 3 (July 31, 2003)). In this case, the Complainant refused to operate a vehicle which had several balding tires, no seat belt and no adjustable seat. He clearly falls under the refusals known as “actual violations” and “reasonable apprehension” subsections. Tr. at 11; CX-6.

Adverse Employment Action

The employee protection provisions of the Surface Transportation Assistance Act provide that “[a] person may not discharge an employee” for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). The Complainant was terminated and I hereby find that he suffered an adverse employment action within the meaning of the Act. Tr. at 9-13.

Causal Connection

A causal connection between the protected activity and the adverse employment action may be circumstantially established by showing that the employer was aware of the protected activity and that adverse action followed closely thereafter. See *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Thus, close proximity in time can be considered evidence of causation. *White v. The Osage Tribal Council*, ARB No. 99-120, slip op. at 4 (Aug. 8, 1997). While temporal proximity may be used to establish the causal inference, it is not necessarily dispositive. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6 (Apr. 28, 2006). When other, contradictory evidence is present, inferring a causal relationship solely from temporal proximity may be illogical. *Id.* Such contradictory evidence could include evidence of intervening events or of legitimate, nondiscriminatory reasons for the adverse action. *Id.* The causal connection here is clear and uncontroverted.

Rebutting the Complainant’s Prima Facie Case

If the Complainant can carry his burden of establishing a prima facie case, the burden shifts to the Respondent to rebut that prima facie case. The Respondent can do so by articulating,

through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. The employer “need not persuade the court that it was actually motivated by the proffered reasons,” but the evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). “The explanation provided must be legally sufficient to justify a judgment for the [employer].” *Id.* If the Respondent is successful, the prima facie case is rebutted, and the complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the respondent was a mere pretext for discrimination. *Id.* at 255-256.

The Respondent has offered no reason for the adverse actions, has refused to cooperate in the prosecution of this matter by first failing to appeal at the scheduled hearing and subsequently by failing to respond to this Court’s inquiries and directions. I find, therefore, that the Respondent has failed to rebut the Complainant’s prima facie case.

FINDINGS OF FACT

After a review of the evidence, I find that the Claimant has established a prima facie case: (1) he engaged in protected activity under the STAA as he declined to drive a load of fuel due to safety issues; (2) he was the subject of an adverse employment action in that he was terminated; and (3) there was a causal link between his protected activity and the adverse action of the employer.

I find that the Claimant is credible and not only do I accept his rendition, the facts show a temporal relationship between his actions and the adverse action of the employer. *See Moon, supra.*

The Claimant was a driver for Respondent on May 7, 2008 when he was asked to drive Vehicle 102. He declined the trip based on several safety concerns which were presented directly to his supervisor, both in writing and orally. CX-6.

The Complainant was ready and willing to work for respondent on May 11, 2008, the day he returned for work after refusing to drive Vehicle 102. He then made several communications with the main office of his company in an effort to maintain his employment and/or get a written explanation from the owner about his termination. Tr. 91-13; CX-6.

Once a Complainant has established a prima facie case, the Respondent can rebut by articulating, through the introduction of admissible evidence, a legitimate, nondiscriminatory

reason for its employment decision. However, Respondent has failed to do so and has, indeed, defaulted.⁴

I also find that the Respondent's failure to comply with the Rules as discussed herein is sufficient basis to find in favor of the Complainant in Summary Judgment/Decision.

RELIEF

Under the STAA, a prevailing complainant is entitled to relief including abatement, reinstatement and compensatory damages, including back pay. 49 U.S.C. § 31105(b)(3)(A)(i)(iii).

Complainant does not seek reinstatement to his position as a truck driver. He does seek an award of back wages and compensatory damages.

REINSTATEMENT

Under STAA section 405(c), the Secretary must order reinstatement upon finding reasonable cause to believe that a violation occurred. A finding of violation by an ALJ necessarily subsumes a finding of reasonable cause to believe that a violation has occurred. Such preliminary order may issue at any time after the Secretary has investigated a discrimination complaint and before she issues a final order.

I would recommend reinstatement if the Complainant desired reinstatement. However, he feels that the Respondent has unsafe vehicles and would continue to conduct reprisals against him. He has chosen to seek employment elsewhere and is now employed.

BACK PAY

The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 418-421 (1975) (under Title VII). Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e seq. (West 1988). Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. Back pay calculations must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude."

⁴ Upon receipt of Respondent's November 25, 2008 letter, this Court made several efforts (through my law clerk, Michelle Kim) to have Respondent provide written or oral testimony. Available dates for a formal hearing were provided to the Respondent. All efforts were completely ignored by the Respondent. Other than being contemptuous of this Court and the proceedings, such non-response supports a default or summary decision through abandonment, non-defense of the allegations, and failure to comply with the Rules.

Cook v. Guardian Lubricants, Inc., ARB No. 97-05, slip op. at 11, citing *Beltway v. American Cast Iron Pipe Co., Inc.*, 494 F.2d 211; 260-61 (5th Cir 1974).

Complainant alleges that he made \$1,100.00 every two weeks in 2007 and 2008. He did not work after May 7, 2008, the date that he refused the load. A review of CX- 7, a pay sheet for an 8-day work period, actually shows that he made \$851.50 in gross wages for the period.⁵ Prorating that amount on a daily basis yields \$106.44 per day for the period that the Complainant worked for the Respondent.

Post termination, the Complainant received unemployment compensation in the amount of \$320.00 per week, or \$64.00 per day.

I find that Complainant is entitled to an award of \$42.44 per day for each work day between May 11, 2008 until he commenced work with another company on November 10, 2008.

Interest is due on back pay awards from the date of termination to the date of re-employment. Prejudgment interest is to be paid for the period following Complainant's termination on May 7, 2008 until the instant order of reinstatement. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made. *Moyer v. Yellow Freight System, Inc.*, [*Moyer I*], Case No. 89-STA-7 at 9-10 (Sec'y Sept. 27, 1990), rev'd on other grounds. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992).

The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a)(2001) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621 (2001). The interest is to be compounded quarterly. *Ass't Sec'y of Labor for Occupational Safety and Health and Harry D. Cote v. DoubleR Trucking, Inc.*, Case No. 98-STA-34 at 3 (ARB Jan. 12, 2000).

COMPENSATORY DAMAGES

The Complainant alleges that while unemployed, he was unable to maintain his household; unable to pay his monthly bills or his credit card payments; became "un-engaged" from his fiancée due to the financial and emotional stress; and suffered from general anxiety and depression due to the loss of his job and inability to quickly find other work. Tr. at 21.

The Complainant alleges that the Respondent refused to respond to his reasonable inquiries and terminated him unjustly.

After a review of the evidence and after listening to and observing the Complainant, I credit his testimony on the whole.

⁵ This comports with the testimony of the Complainant. Tr. at 19.

The Secretary and the Administrative Review Board have held that compensatory damage awards for emotional distress or mental anguish should be similar to awards made in other cases involving comparable degrees of injury. *See Leveile v. New York Air National Guard*, 1994-TSC-3 & 4 (ARB Oct. 25, 1999). A vast array of award amounts have been upheld. *See, e.g., McCuiston v. Tennessee Valley Authority*, 1989-ERA-6 (Sec’y Nov. 13, 1991). For example, the claimant received \$10,000 in damages for chest pains, difficulty with swallowing, indigestion, sleeplessness, and general anxiety and depression in *DeFord v. Tennessee Valley Authority*, 1981-ERA-1 (Sec’y Apr. 30, 1984). However, in *Muidrew v. Anheuser Busch, Inc.*, the Court of Appeals held an award of \$50,000 was reasonable for emotional distress and mental suffering for the complainant’s loss of his house and his car, and marital difficulties that resulted. *See Muidrew v. Anheuser-Busch, Inc.*, 728 F.2d 989, 992 (8th Cir. 1984). Likewise, in *Wulf v. City of Wichita*, the court granted an award of not greater than \$50,000 to a plaintiff who was angry, scared, frustrated, depressed, under emotional strain, and experienced financial difficulties as a result of losing his job. *Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989).

In *Calhoun v. United Parcel Services*, 2002-STA-31 (ALJ June 2, 2004), the ALJ awarded compensatory damages for emotional distress. Based on the ALJ’s observations of the Complainant at two hearings, the Complainant’s treatment by a psychologist for emotional distress, and the Employer’s lack of challenging the Complainant’s emotional distress claims, the ALJ awarded a modest amount of damages for emotional distress. Similarly, in *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000), the ALJ awarded emotional distress damages where the Complainant had put forth evidence demonstrating that he had gained weight from depression and stress, testified that he had trouble sleeping, and that his self-esteem had been damaged.

The Complainant has provided adequate testimonial evidence of emotional distress. In comparable cases, a complainant would often offer evidence of the adverse effects that psychological trauma has had on his or her life, such as damage to a relationship, an inability to function at work, or other disruption of the normal routines of life.⁶

⁶ • *Hall v. U.& Army, Dugway Proving Ground*, 1997-SDW-5 (ALJ Aug. 8, 2002) (awarding \$400,000 in compensatory damages for mental anguish, adverse health consequence, and damage to professional reputation caused by “repeated and continuous discrimination and retaliation” that caused great mental suffering, compromised mental health, and destroyed professional reputation).
• *Moder v. Village of Jackson, Wisconsin*, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB

After a review of the evidence, I find that \$3,000.00 provides adequate compensation for the Complainant's pain and suffering.

RECOMMENDED ORDER

For the foregoing reasons, I hereby **RECOMMEND** that the Complainant be awarded the following remedies:

1. Respondent shall remit to Complainant:
 - A. Back pay of \$42.44 per day for the period of May 11, 2008 to November 10, 2008;
 - B. Interest on the entire back pay award, calculated in accordance with 26 U.S.C. §6621;⁷
2. The Respondent pay to the Complainant \$3,000.00 in compensation for the stress and anxiety the Complainant suffered as a result of his wrongful discharge.

IT IS SO ORDERED.

A

ROBERT B. RAE
Administrative Law Judge

Washington, D.C.

June 30, 2003) (awarding no emotional trauma damages because the plaintiff failed to demonstrate both (1) objective manifestations of distress, e.g., sleeplessness, anxiety, embarrassment, depression, feelings of isolation, and (2) a causal connection between the violation and the distress).

- *Creekmore v. ABB Power Systems Services, Inc.*, Case No. 93-ERA-24, slip op. at 25 (Dep'y Sec'y Dec. Feb. 14, 1996) (awarding \$40,000 for emotional pain and suffering caused by a discriminatory layoff after the Complainant showed that his layoff caused emotional turmoil and disruption of his family because he had to accept temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company).
- *Michaud v. BSP Transpor4 Inc.*, ARB Case No. 97-113, ALJ Case No. 95-STA-29, slip op. at 9 (ARB Dec. Oct. 9, 1997) (awarding \$75,000 in compensatory damages where evidence of major depression caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiatrist; evidence also showed foreclosure on Michaud's home and loss of savings).
- *Blackburn v. Metric Constructors, Inc.*, Case No.1986-ERA-4, slip op. at 5 (Sec'y Dec. after Remand, Aug. 16, 1993) (awarding \$5,000 for mental pain and suffering caused by discriminatory discharge where complainant became moody and depressed and became short tempered with his wife and children).
- *Lederhaus v. Paschen*, Case No. 91-ERA-13, slip op. at 10 (Sec'y Dec., Oct. 26, 1992)(awarding \$10,000 for mental distress caused by discriminatory discharge where the Complainant showed he was unemployed for five and one half months, foreclosure proceedings were initiated on his house, bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted).

⁷ The Secretary is requested to designate an official to calculate the amounts set forth by A and B above.

NOTICE OF REVIEW: The 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, 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 relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).