

U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (FAX)



Issue Date: 10 August 2011

CASE NO.: 2009-STA-65

IN THE MATTER OF

SANTOS UVALLE, IV
Complainant

v.

AMERICAN SAFETY SERVICES CO., INC.
Respondent

APPEARANCES:

MARK ANTHONY ACUNA, ESQ.
On Behalf of the Complainant

HOLLY B. WILLIAMS, ESQ.
On Behalf of the Respondent

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

BACKGROUND

This claim arises under Section 405 of the Surface Transportation Act (the Act), 49 U.S.C. 31104. The Act protects employees from discharge, discipline, or discrimination for filing a complaint about commercial motor vehicle safety and/or for refusing to operate a vehicle when such operation constitutes a violation of federal motor safety regulations or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

PROCEDURAL HISTORY

On April 15, 2009, the Complainant filed a complaint with the Secretary of Labor alleging that he was discriminatorily terminated in violation of the Act. (ALJ-1). Following an investigation of this matter, on July 14, 2009 the Secretary of Labor, acting through her agent, the Regional Administrator, issued findings that the complaint had no merit. (ALJ-2). On August 14, 2009 the Complainant requested a formal hearing, and on January 14, 2010, a hearing was held in Midland, Texas, at which time all parties were given an opportunity to present evidence and arguments. This decision is based on the record made at the de novo hearing which included testimony of witnesses, Administrative Law Judge Exhibits 1-4, Complainant's Exhibits 1-40 excluding 33-35, 36-38 and 39, and Respondent's Exhibits 1-5. (Tr. 262). The parties were granted until June 15, 2011 to file post-hearing briefs, which both parties did.¹²

ISSUES (Tr. 9)

The parties agreed they are subject to the Act and issues for my determination are:

1. Did Complainant engage in activity which is protected within the meaning of the Act;
2. Did Respondent have knowledge of such activity; and
3. Whether any adverse action taken against Complainant was due to his engaging in protected activity.

UNCONTESTED FACTS (Tr. 9)

1. Respondent, American Safety Services, Incorporated, was an Employer within the meaning of the Act;
2. Complainant was an Employee within the meaning of the Act;.

¹ The following abbreviations will be used throughout this decision when citing evidence of record: Hearing Transcript: "Tr.____;" Administrative Law Judge Exhibit: "ALJX____, p. ____;" Complainant's Exhibit: "CX____, p.____;" and Respondent's Exhibit: "RX____, p. ____."

² On March 17, 2010, subsequent to the formal hearing, Respondent filed a voluntary Chapter 11 bankruptcy proceeding in the U.S. Bankruptcy Court for the Western District of Texas, and as a result of such filing this proceeding was automatically stayed until November 5, 2010 when the stay was lifted. Thereafter, by order dated March 16, 2011, Respondent's Counsel was given permission to continue her representation of the Respondent, and all parties were granted up to an until June 15, 2011 to file their closing briefs.

3. Complainant was an Employee for Respondent; and
4. Complainant was terminated by Respondent.

SUMMARY OF RELEVANT TESTIMONIES

Complainant now works for Southwest Disposal Services (SDS) and has since November 10, 2008. He has had a commercial driver's license since 1996 and has driven trucks for a variety of trucking companies. He is also an ordained minister and does mission work.

At the suggestion of a friend, Complainant started work for Respondent/Employer on October 31, 2007. Complainant testified he worked sixty to seventy hours per week including overtime. He drove what trucks were available, but his preference was truck #1073. However, Complainant testified all the trucks were in poor repair and had been bought used and all had over 30,000 miles on the odometer. He said he always did pre-trip inspections and reported problems to the mechanics, but often no attention was given to his complaints.

According to the Complainant, none of the trucks underwent scheduled maintenance, and in August 2008, while driving #1073, the tire rod came loose or broke on the truck and Claimant ended up in a roadside ditch. The truck was repaired at the site and driven again that day. However, despite the repairs, Complainant maintained the truck still had vibration in the front end, and Complainant said he reported that fact to Greg Robinson, the safety director.

Complainant testified that on November 3, 2008, his supervisor or "truck pusher", Barry Patton, told Complainant the 1073 truck was drivable and he was to use it for a trip from Odessa, Texas, to Hobbs, New Mexico, or he could take another truck. The other available truck, according to Complainant, had a flat tire and the tire was separated from the rim. Accordingly he took truck #1073.

After leaving the yard with the truck, Complainant testified he drove to Southwest Disposal Services, his present employer, to wash the truck out before his journey. While there, Complainant also applied for a job and put on his application that he was available "ASAP". Spending over an hour at the Southwest Disposal Services, Complainant said he then headed for New Mexico, but thought the truck was not steering correctly. He then called Barry Patton who told him to return to the yard. Once there, Complainant refused to drive a second truck alleging the tire was separated from the rim, and he went

home for the day. The next day, November 4, 2008, Complainant was terminated as unreliable. A week later, Complainant started his employment with Southwest Disposal Services on November 10, 2008. His current salary is \$48,000.00 per year and he is the plant operator and supervises 25 employees. When he started work he earned \$16.00 per hour for the first ninety days.

For damages, Complainant wants back pay, front pay, attorney's fees, expenses incurred for trial and punitive damages.

Craig Robertson was health and safety officer for Respondent from April 2008 until his termination in July 2009. He agreed with Complainant that Respondent's trucks "needed some help", for all were used and had problems. In fact he thought none were legal to be on the road, though he acknowledged that a DOT order of February 2009 was appealed and amended to "satisfactory."

As to truck #1073, Mr. Robertson testified that truck to be the best truck in the fleet, one he himself used to test new drivers; however, when he drove it on one occasion he said he had problems with the clutch. Otherwise, he said no one complained to him about any continuing problems with truck #1073.

Barry Patton worked for Respondent as a "truck pusher" or supervisor, but quit later to start his own business. After Jerry Fell quit, Mr. Patton became Complainant's supervisor, and he said he found Complainant to be unreliable.

On November 3, 2008, Mr. Patton testified that the alternative truck with a low tire, which Complainant refused to drive, was put in service after simply inflating the tire and the next driver used the truck for three days. As far as Complainant losing his job, Mr. Patton testified that it was because he refused the New Mexico trip.

Regarding #1073, Mr. Patton acknowledged the truck needed work which was performed on November 4, 2008, but maintained it was legal to drive prior to that time. Obviously, he testified Complainant did not decide it was unsafe until after he had applied for a job with Southwest Disposal Services. As to the other truck which Complainant was offered, Mr. Patton specifically testified that Complainant was offered the truck before he left the yard in #1073 en route to Southwest Disposal Services, but refused the offer.

Josh Wrangham is Respondent's Operation Manager and oversees day to day operations in the yard. He never told Complainant to drive an unsafe vehicle, and he always had the mechanics look at Complainant's safety concerns. Likewise, he testified the tire rod incident in August 2008 was a mechanical failure and was repaired on site. As to the hub, #1073 was safe to drive without the hub being replaced. Mr. Wrangham denied ever putting a truck in service that had been red tagged.

Ms. Stephanie Pate is the Director of Human Resources for Respondent; however, she was not so employed when Complainant worked for Respondent.

Kevin Hokett and his wife have owned the trucking business since 2000. He had a commercial license and is familiar with DOT regulations. Mr. Hokett maintained he had an “open door” policy with his employees, and Complainant never complained to him about unsafe vehicles. His, he said, is a safety company, and would stop any unsafe activities.

Since November 2008 Mr. Hokett testified he has experienced a downturn in business and has gone from 275 employees to 86 and has closed three yards. He is down to three drivers in Odessa and opined that under any circumstances Complainant would probably have been laid off. (As noted in footnote 2, Respondent filed for bankruptcy on March 17, 2010).

He denied that Complainant was fired for refusing to drive an unsafe vehicle, and he said Complainant was unreliable. According to Mr. Hokett, Complainant was to be on call twenty four-seven, but was never available for weekend work. As to overtime, he explained that it was billed per estimated time for the job, not time actually worked and that Complainant did not actually work the overtime reflected.

He agreed Complainant had every right to complain about unsafe vehicles, and he maintained that every complaint of which he was aware was addressed.

FINDINGS OF FACT³

1. Complainant was hired by Respondent as a truck driver on or about October 31, 2007.
2. Complainant’s employment was terminated on or about November 4, 2008.
3. At the time of Complainant’s termination, Barry Patton was his immediate supervisor.
4. Patton was the truck supervisor, also known as the “truck pusher”, while he worked for Respondent.

³ The findings that follow are in part those proposed by one or both parties in their post-hearing proposals, for where I agreed with the summations as being accurate and correct, I adopted the language rather than re-phrase the sentence.

5. On November 3, 2008, Complainant was assigned to drive from Odessa, Texas to Hobbs, New Mexico.

6. Complainant drove truck # 1073, his favorite truck, on November 3, 2008.

7. According to Craig Robertson, who was employed by Respondent as a safety coordinator (trainer), for a little over a year, truck # 1073 was his favorite truck to use to road test new drivers because it was always clean inside and everything was nice. Robertson had a problem once with the clutch, but never experienced the problems that Complainant described.

8. On November 3, 2008, Complainant alleges that he had to first take truck #1073 to Southwest Disposal Services to wash it out from a previous job before proceeding to New Mexico.

9. Complainant alleges that as he started to pick up speed on his way to the disposal service, he noticed that the wheel just started banging and hitting the inside of the tractor and jerking.

10. Complainant called his supervisor, Barry Patton, who told him to take a different truck.

11. Patton testified otherwise saying that Complainant called him before leaving the yard to go to SDS.

12. In either event, Patton called the lead mechanic, Chris Wells, who was working in Fort Stockton, Texas, that day and asked Wells about truck #1073.

13. Wells told Patton that the truck was safe to drive.

14. Patton called Complainant back and told him what Wells said, and Complainant said he would take Truck No. 1073.

15. Patton told Complainant, "if you don't feel safe, man, don't take it."

16. Regardless of whether Complainant called Patton before or after leaving the yard, both agree that Patton told Complainant to take another truck.

17. Truck No. 1073 was scheduled to have a hub replaced, but was safe and DOT compliant on November 3, 2008.

18. Complainant filled out an employment application while he was at Southwest Disposal Services on November 3, 2008 because he “want[ed] to be the boss.” Respondent’s Exhibit 3 is the application Complainant completed stating he wanted employment “ASAP” and salary desired was “open.”

19. After leaving SDS, Complainant returned to Respondent’s yard.

20. Once at the yard, Complainant claimed that the second truck that he was instructed to take had a flat tire and the tire was broken off of the rim.

21. Patton told Complainant to take the alternate vehicle to a service station and put air in the tire.

22. Complainant stated that he could not put air in the tire because the walls of the tire were not connected to the rim. However, when Patton inspected the alternative vehicle only one tire was low, and another driver put air in the tire and drove the truck.

23. Complainant went home for the day.

24. According to Patton, Respondent lost the job in Hobbs, New Mexico, because Complainant did not make the trip.

25. On November 4, Patton called Complainant. Complainant met with Patton and Charles Coon, who was the General Manager of the company at the time.

26. Patton made the decision to terminate Complainant’s employment in consultation with General Manager Charles Coon, Operations Manager Josh Wrangham, and Owner/President Kevin Hokett.

27. While, “Not Dependable” was written as the reason on the Permanent Record Termination Form, Patton elaborated by explaining: “Told him to take his truck. Told me he didn’t feel safe so I told him to take the other truck he said the tire was flat so he was going to try his. It was in the yard. Albert was called in his truck was broke. I came to the yard & the truck that I told Santos to take the tire was a little low so I put Albert in it and he put air and is still running it today.” (RX-1).

28. Complainant’s employment application at Southwest Disposal Services is dated November 3, 2008, and reflects that he was hired on November 6, 2008, and was scheduled to report to work on November 10, 2008, as Assistant Manager Trainee at a wage of \$16.00 per hour. (RX-3).

29. Complainant started working at \$16.00 per hour, his same rate of pay as with Respondent, and was initially entitled to overtime, as with Respondent.

30. Respondent went from a high of approximately 275 active employees on January 1, 2008 to 86 active employees on December 1, 2009 and had Complainant continued to work at Respondents, according to Kevin Hokett, he likely would have been laid off and/or received a paycut.

31. Complainant's claim that the second vehicle was unsafe because it had a tire with a separated rim is not credible given Barry Patton's inspection of the vehicle and findings that only one tire needed some air.

32. Respondent discharged Complainant for a legitimate nondiscriminatory reason.

CONCLUSIONS OF LAW

In 1982, Congress enacted § 405 of the Surface Transportation Assistance Act, 49 U.S.C. § 31104. This legislation was designed to promote safety on the highways by protecting employees from discriminatory action due to an employee's engagement in protected activity. Section 405 of the Act provides:

No person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards or orders applicable to commercial motor vehicle safety or health, or because the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

The first clause of this Section is known as the "when clause" and the second as the "because clause," and in this instance I do not find Complainant has established a violation under either.

Under the "when clause" Complainant must prove that the operation of the vehicle would have constituted a violation of a Federal commercial motor vehicle safety regulation, standard, or order. No such violation was demonstrated in this case.

In order to satisfy the requirements of the “because clause” Complainant must establish “a reasonable apprehension of serious injury to the employee or the public because of the vehicles’ unsafe conditions.” While perhaps “condition” is a broad term and not confined to merely safety equipment aboard the vehicle, still Complainant must show his apprehension or concern was “of such a nature that a reasonable person, under these circumstances, then confronting the employee, would have concluded that there is a bona fide danger of an accident, injury or serious impairment of health, resulting from the unsafe condition.”

When a case has been fully tried on the merits, it is unnecessary to determine whether the Complainant presented a *prima facie* case of discrimination and whether the Respondent rebutted that case. Rather, once the Respondent produces evidence attempting to demonstrate that Complainant was subjected to an adverse employment action for legitimate, nondiscriminatory reasons; it no longer serves any analytical purpose to determine whether Complainant has presented a *prima facie* case. *Ciotti v. Sysco Foods of Philadelphia*, 1997-STA-30, at p. 4 (ARB July 9, 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991). The relevant inquiry is whether Complainant has prevailed by a preponderance of the evidence on the ultimate question of liability. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5 (Mar. 29, 2000).

According to Complainant’s original complaint (ALJ-1) Complainant alleged he was terminated because he refused to drive an unsafe truck. An allegation he again made in his appeal (ALJ-3). I, however, find otherwise. Complainant was given an opportunity to drive another truck if he felt uncomfortable with his favorite truck #1073, but refused maintaining the second truck was undriveable because a tire was separated from the rim. An assertion which was not correct, for the tire was inflated by another and driven without incident. No, on that day it appears from the evidence Complainant had applied for a job with Southwest Disposal Services and his refusal to drive the second truck offered by Patton was unacceptable to Complainant for reasons other than safety concerns.

Whether Complainant was offered the second truck before he left the yard in route to New Mexico, or after he returned to the yard following his one hour stop at Southwest Disposal Services where he applied for a job, is not clear. What is clear and undisputed is that Complainant initially chose #1073 because that was his favorite truck and that once he complained to his supervisor about how the truck was handling he was told to return to the yard and take the other truck. This, Complainant refused to do saying the alternative truck had a tire separated from the rim. A fact discovered to be untrue when Mr. Patton inspected the second truck and found the tire only low and in need of air, which another driver remedied and drove the vehicle.

In sum, regardless of the condition of #1073 no adverse action befell Complainant because he complained about #1073. What he was terminated for was his refusal to drive the second truck which was not shown to be unsafe. At most the truck needed air in the tire. In other words, Complainant was terminated for legitimate, nondiscriminatory reasons and Complainant has failed to show otherwise by a preponderance of the evidence.

CONCLUSION

Because Complainant has not demonstrated a link between any protected activity and any adverse action the Respondent might have taken, I find Complainant is not entitled to the relief he seeks under the Act.

ORDER

It is **ORDERED** that the Complaint of Santos Uvalle, III be **DISMISSED**.

A

C. RICHARD AVERY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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 waive 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).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 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(a). 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(a) and (b).