



Issue Date: 03 December 2009

Case No.: 2009-STA-00063

In the matter of:

FERNANDO DEMECO WHITE,

Complainant,

v.

EXPERT MOVING AND DELIVERY, INC.,

Respondent.

**RECOMMENDED ORDER DISMISSING COMPLAINT WITH PREJUDICE FOR
FAILURE TO ESTABLISH A PRIMA FACIE CASE
AND
ORDER CANCELLING SCHEDULED HEARING**

The above matter is a complaint of employment discrimination under Section 31105 of the Surface Transportation Act of 1982, as amended (Act). On September 26, 2008, the Complainant filed a complaint with the Occupational Safety and Health Administration alleging that his employment was terminated by the Respondent in violation of the Act. The case has been referred to the Office of Administrative Law Judges for formal hearing on Appeal by Complainant of the July 1, 2009, Occupational Safety and Health Administration determination that the Complainant's case was without merit. A formal hearing in this matter scheduled for November 2, 2009, in Atlanta, Georgia, has been cancelled and continued to January 12, 2010 at 9:00 AM, in Atlanta, Georgia.

On October 30, 2009, Defendant filed a "Motion to Dismiss / Request for Summary Judgment". The Respondent indicates by affidavit and documents that the Complainant did not have his employment terminated as alleged so that the complaint fails to establish adverse personnel action based on protected activity as alleged. Accordingly, an "Order to Show Cause Why Complaint Should Not Be Dismissed" was issued on November 4, 2009.

On November 19, 2009, Complainant filed his response in the form of "Complainant's Motion for Partial Summary Judgment and Sanctions or Alternatively, to Continue Consideration Therefore Pending Discovery."

The Parties are each proceeding “pro se” in this matter. By the “Notice of Hearing Rights, Scheduling and Location Order” of September 14, 2009, both Parties were advised of the following:

“Advice to Participants (Party) without representation:

The complainant and employer may be represented in any proceeding under the Act by an attorney or other person previously authorized in writing by such complainant or employer to so act 29 CFR § 18.34(a). An Administrative Law Judge has no duty to assist a “pro se” Party in obtaining evidence or presenting their case. In order to conduct a full and fair hearing involving a “pro se” Party, the unrepresented Party must be informed of the right to be represented by a representative of their own choice, informed of the time and location for the hearing, be provided an opportunity submit evidence and to object to admission of evidence from the opposing party, to have the opportunity to provide testimony concerning the relevant issues of the case, and to have the opportunity to present objections, motions and argument. The Administrative Law Judge must evaluate if the unrepresented Party has the capacity to understand the rights afforded at the hearing and the capacity to comprehend the issues of the case and to participate actively in the resolution of the issues. The Administrative Law Judge must also determine if the choice to proceed without counsel is considered, deliberate and voluntary.

The right to a fair and impartial hearing extends to all participants. Accordingly, **the unrepresented Parties are advised that:**

- a. At hearing you may present evidence for consideration. It may be testimony under oath from yourself or others who have knowledge about the events related to your employment termination, such as an immediate supervisor. Basically you could ask witnesses questions about your case.
- b. The evidence may be documents, like vehicle inspections, repair reports, repair requests, written letters with the employer, copies of depositions, employment contracts showing wage rates and normal working hours.
- c. If the opposing Party calls witnesses, you may ask them questions after the calling Party is done. You may object to questions that are asked and the Judge will determine if the question is appropriate.
- d. You may enter an agreement with the opposing Party as to facts which you both agree upon and the Judge will consider them as agreed facts.
- e. After the evidence is in, you may explain to the Judge why you feel the evidence shows you are entitled to relief and what you want the Judge to do in your case.
- f. Services of an attorney may not be required nor recommended by the Administrative Law Judge; however, you may wish to consult with the following possible sources of representation referrals –

Atlanta Bar Association: (404) 521-0781/0777
Atlanta Legal Aide Society: (404) 524-5811
Atlanta Volunteer Lawyers Foundation: (404) 521-0790

- g. You may request that this claim be decided on the evidence of record without a formal hearing.
- h. You may request that this claim be withdrawn and dismissed if there is an appropriate reason for such a request.”

Neither Party has retained representation in this matter. It is specifically noted that the Complainant has represented himself in six other complaints under the Act¹. This Administrative Law Judge finds that the Parties have voluntarily and knowingly waived their respective right to representation.

DISCUSSION

I. Standards under the Act.

The “whistle-blower” provisions under the Surface Transportation Assistance Act of 1982, as amended, are designed to protect “employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance.” *Brock v. Roadway Express, Inc.*, 481 US 252 (1987)

To be entitled to a remedy under the Act, the Complainant must show that he engaged in protected activity, that the respondent was aware of the protected activity, that he was subjected to an adverse employment action, and that there was a causal connection between the protected activity and the adverse action (i.e.: the employer was aware of the protected activity when it took the adverse action). *Bettner v. Administrative Review Board*, 539 F.3d 613 (7th Cir. 2008); *Bechtel Construction Co. v. United States Sec’y of Labor*, 50 F.3d 926 (11th Cir. 1995); *Self v. Carolina Freight Carriers Corp.*, ARB No. 89-STA-9 (Jan. 12, 1990); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987) If the Complainant establishes a prima facie case under the Act, the Respondent will not be held to have violated the Act if it establishes that that adverse employment action was the result of events and/or decisions independent of protected activity. *Culver v. Gorman & Co.*, 416 F.3d 540 (7th Cir. 2005). If the Respondent articulates a reason for the adverse employment action, the Complainant then receives the opportunity to show that the reason give was pretextual and that intended discrimination remained. *Roadway*

¹ *F. White v. J.B. Hunt Transport, Inc.*, 2003-STA-00044 (ALJ, June 10, 2004) - settled; *F. White v. J.B. Hunt Transport, Inc.*, 2005-STA-00065 (ALJ, February 22, 2006) - dismissed; *F. White v. Naturally Fresh, Inc.*, 2006-STA-00016 (ALJ, September 4, 2007) - settled; *F. White v. Gresh Transport, Inc.*, 2006-STA-00048 (ALJ, December 14, 2006) - dismissed; *F. White v. Gemini Traffic Sales, Inc.*, 2007-STA-00013 (ALJ, February 27, 2008) - settled; *F. White v. Salson Logistics, Inc.*, 2009-STA-00065 (ALJ, November 23, 2009) – settled.

Express, Inc. v. U.S. Department of Labor [Cefalu], 495 F.3d 477 (7th Cir. 2007); *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12 (1st Cir. 1998).

Federal regulations implementing the Act provide that “Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges” at 29 CFR, Part 18, shall apply to complaints under the Act while the case is pending before an Administrative Law Judge, 29 CFR §§ 1978.100(b) and 1978.106(a). Pursuant to 29 CFR § 18.40, the presiding Administrative Law Judge “may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” In this case, both Parties have requested a summary decision.

II. Positions of the Parties.

a. *Position of Complainant:*

Complainant submits that he “was discharged on or about September 19, 2008, immediately after refusing to operate his assigned vehicle in violation of 49 CFR §§ 517.108 [Standard No. 108; Lamps, Reflective Devices, and Associated Equipment], §§393.78 [Windshield Wiping and Washing Systems], §§ 392.22 [Scope of the Rules in this Part. (A) Hazard Warning Signal Flashers], and §§ 396.7 [Unsafe Operations Forbidden].” He specifically avers that “Since the Respondent would not communicate with me to let me know I still had my job and I did not have to file for my unemployment wage, he violated my rights protected by the STAA as he lead me to believe I was terminated.” He seeks reinstatement, compensatory damages including back pay, expungement of adverse information in his personnel file, deletion of all unfavorable information in his DAC file, requirement for Respondent to post a copy of the decision in its terminals, attorney fees and costs.

b. *Position of Respondent:*

Respondent submits that the Complainant’s employment was not terminated by Respondent as alleged by Complainant. Respondent reports that the Complainant abandoned the assigned truck in Louisiana on September 21, 2008, and failed to return to work or communicate with Respondent company about the truck or work assignments. Respondent indicates that the Complainant was carried on the company payroll until after OSHA completed its investigation in December 2008 and that the Complainant was carried on the company’s insurance policy until January 16, 2009.

III. Evidence submitted by the Parties for consideration on their respective Motions for Summary Decision.

a. *Complainant's Affidavit of November 18, 2009.*

On November 18, 2009, the Complainant stated in writing, under oath, that he was hired to work as a commercial truck driver for the Respondent on or about May 13, 2008. He testified that he had access to a cell phone after 9:00 PM, local time, and that he communicated by internet e-mail on a personal computer. He reported "on September 17, 2008, after completing Belton, Texas delivery, and executing my DOT required post inspection, I found that my assigned vehicle's windshield washer system appear[ed] to be getting weak; however, but still slightly operational." He reported that "my assigned vehicle's windshield washer system completely stop[ped] operating near Waco, Texas" around September 18, 2008, and bugs "were still splattering all over the windshield and now smeared thereby obstructing my view ... causing me to [feel] apprehension of serious injury or death would happen to the travelling public and/or myself as a result thereof." He pulled the vehicle off interstate 35 and into a truck stop at approximately 11:33 AM, September 18, 2008, and informed the Respondent by e-mail of the status.

The Complainant testified that he remained overnight at the truck stop and undertook a trip to Gramercy, Louisiana for a load to New York after the windshield washing system had been repaired. He reported that the "turn signal and hazard lamps stop[ped] working" near Frierson, Louisiana, while enroute to Gramercy. Complainant states he was directed to "lock Expert Moving & Delivery, Inc., belongings inside the vehicle where it was."

Complainant testified that "Respondent would not communicate with me to let me know [if] I still had my job and I did not have to file for my unemployment wage."

b. *Complainant submitted e-mail printouts.*

Exhibits "J" and "L" of Complainant's response to the Show Cause Order and his Request for Summary Decision contains printouts of various e-mails. The relevant e-mails provide the following information:

Thursday, September 18, 2008, entries indicate the Complainant was approximately 107 miles south of Dallas, Texas, at 11:09 AM, local time. At 11:33 AM, local time, Complainant reported that the windshield washer system was malfunctioning and inquired as to which repair shop should he take the vehicle. He was directed to stop the truck if it was raining and that a shop would be located on the way to Louisiana. The Complainant responded at 12:37 PM, local time, that it was not raining but the windshield washer system needed repaired because in was a DOT requirement and there had been a "love bug and moth problem." The indicated response was "I believe we can fix it after the pick up. What do you think?" The Complainant replied at 1:02 PM, local time, that it was not up to him since it was a DOT requirement and requested road service be sent to him. The response from Respondent stated "If the truck is drivable, why don't we move to the mechanic instead of calling road assistance?" Prior to 1:39 PM, September 19,

2008, Complainant's local time,² the Complainant had been advised to call "A-Wright Way 24-Hr. Road Service" for service and that his Gramercy, Louisiana, pickup would be rescheduled and he should move towards Dallas, Texas. The Complainant acknowledged receipt and direction to move toward Dallas, Texas.

At 9:16 PM, local time, Complainant sent an e-mail that his vehicle was in "brokedown status, no signal lamps as required, please send road service to I-49, Exit 186, west direction off exit, I have drove to first safe place." The Respondent requested "some more details about the malfunctioning." The Complainant responded at 11:09 PM, local time that "your vehicle's signal lamps [are] inoperative." Another entry at 12:19AM, EST, September 20, 2008, indicates Respondent authorized "come home with the daylight, that was your desire." Complainant's subsequent entries indicate he sent an e-mail at 12:38 AM and 12:53 AM, local time, on Saturday, September 20, 2008, declining to drive during the daylight with no operational signal lights. The Complainant send e-mail messages at 1:35 AM, 2:32 AM, local time, September 20, 2008, asking for a response about road service. At 7:57 AM, local time, Complainant alleged Respondent was "now discriminating in violation of STAA aimed [at] me by refusing to communicate with me." Respondent replied at 12:09 EST, September 20, 2008, that road service was on the way and he needed the address and telephone number of the truck stop at which the Complainant was located. At 11:41 AM, local time, Complainant sent an e-mail message stating that the vehicle "is in jeopardy of being impound[ed] and additional fees lev[ied] against it" unless the faulty signal system is repaired by road service or the vehicle is towed from the location. Complainant further wrote that his court date is in jeopardy and he would hold Respondent liable for any negative consequences as a result of missing his court date or anything else. By e-mail at 1:06 PM, local time, September 20, 2008, Complainant provided the Respondent with the authority name, address, telephone number of the truck stop at which the vehicle was located. By return e-mail at 1:11 PM, EST, Respondent messaged "Please lock the truck where it is and come home. I will pick it up from there. Thanks!" By e-mail message at 3:00 PM, local time, Complainant inquired if Respondent was "refusing to adhere to safety Regulations, by correcting Tk. 1020, so I can bring the truck to you an meet my PA court obligation with reliable transportation?" By return e-mail at 2:27 PM, EST, Respondent indicated that the road service had moved to another location while waiting for the Complainant's location information and would not be available before noon Sunday, September 21, 2008, and that "with you[r] urgency to get reliable transportation ... to get home today, I believe your best option with you will be renting a vehicle." A 4:45 PM, EST entry from Respondent indicates he messaged to an e-mail captioned "so you've stopped responding again" the following: "I told you what to do. Come home. What['s] your case. I will fix my truck next week. Lock everything that belong[s] to expert moving inside the truck and the car. Head home." At 6:23 PM, local time, Complainant messaged that there was no rental car available, that the police would impound the vehicle the next morning and he would not leave the vehicle until the police make a report and "you will have to get me home."

Complainant submits an e-mail from 6:39 AM, local time, September 21, 2008, in which he inquires "So my fail[ure] to follow you drive in daylight directive caused me to loss this job, Yes or No? If yes, I will know have know more responsibility regarding this vehicle which you assigned me too and when the police come, I will try to get a ride with them, as there is no need

² 12:39 PM, EST, September 19, 2008, Respondent's Georgia time.

to wait for your to fix the truck so I can get home to reliable transportation to get to PA court.” He submitted another message from 7:46 AM, local time, inquiring “If I am no longer employed by you just let me know and I can go on with my life.” By message marked 9:27 AM, local time, September 21, 2008, Complainant wrote “I have no choice but to take your no response as Yes at this point, I’m sure the Court would agree.”

c. Complainant submitted Claims Examiner’s Determination, Georgia Department of Labor

This exhibit indicates that the Complainant was interviewed on October 22, 2008, by an Examiner for the Georgia Department of Labor related to a claim for unemployment compensation. There is no indication that the Examiner’s decision was based on anything except the Complainant’s interview. The reason indicated for employment termination was “Your employer fired you for insubordination to supervisor. ... available facts show that you did follow employer rules and that you conducted yourself in an acceptable way. Therefore you can be paid unemployment benefits.”

d. Respondent submitted Insurance Policy Change Request

This exhibit indicates that the Raymond Nelson Insurance Agency, Inc., was requested on January 16, 2009, to delete the Complainant from the insurance policy for Expert Moving & Delivery, Inc., with an effective date of January 16, 2009.

e. Respondent submitted December 15, 2008, E-mail from Bank of America

This exhibit indicates that the Bank of America handled the Respondent’s payroll and reminded the Respondent that sufficient funds to pay two employees, including the Complainant, for the pay period December 8-14, 2008, needed to be deposited and approved by December 17, 2008.

f. Respondent’s affidavit of F. Mbe

By affidavit, F. Mbe testified that the Complainant had been his driver since May 13, 2008 and was one of the best drivers he had. He reported that the Complainant delivered a load to Belton, Texas, on September 17, 2008, and had a court date in Pennsylvania on September 23, 2008. He confirmed that when notified about the breakdown in Louisiana he contacted road services but they could not get to the truck to repair it because they had moved to another location due to not having an address to report to. He testified that he personally left Georgia Saturday evening and drove to the truck stop and arrived around 10:30 AM, local time, September 23, 2008, and the Complainant was not present.

Mr. Mbe testified that he brought his truck to Georgia and “since that date he never contacted me to get back to work [and] never contacted me about the truck.” He reported that he had never been contacted by the Georgia Department of Labor concerning the unemployment claim and that the report the Complainant was fired for insubordination is false.

Mr. Mbe testified “I will tell you that [the Complainant] never been dismissed by Expert Moving & Delivery. If you are expecting any document or statement showing his dismissal, he will be

the only one to give it to you. He was in my payroll until December after OSHA informed that he claimed being dismissed. Same for my trucking insurance, he was deleted precisely on January 16, 2009.”

IV. Analysis of Evidence Submitted.

The Complainant has the burden to establish a prima facie case in order for the case to proceed beyond a Summary Decision adverse to the Complainant. To do this he must establish that he engaged in protected activity, that the Respondent was aware of the protected activity, that he was subjected to an adverse employment action, and that there was a causal connection between the protected activity and the adverse action (i.e.: the employer was aware of the protected activity when it took the adverse action). Where there is a close period in time between the protected activity and the adverse employment action, a rebuttable presumption arises that the adverse employment action was related to the protected activity.

In evaluating the Respondent’s Motion for Summary Decision dismissing the complaint, the evidence is construed in the light most favorable to the Complainant. Likewise, in evaluating the Complainant’s request for summary decision, the evidence would be construed in the light most favorable to the Respondent. In that the Complainant, for reasons set forth below, has failed to establish a prima facie case; the Respondent’s evidentiary submissions are considered only to the extent that the Respondent contests that the Complainant suffered an adverse employment action until after December 18, 2008.

The Complainant has established that he was employed by Respondent as a commercial truck driver for long hauls in interstate commerce as of May 13, 2008. He has also established that he was engaged in protected activity when he parked the Respondent’s truck at the relay station at I-49 & Highway 186 in Frierson, Louisiana on Friday, September 19, 2008, because the signal lamps did not function properly. He also established that he had engaged in protected activity the same week when he complained about the windshield washer system needing repaired and that they were repaired prior to the complaint about the signal lamps.

However, the Complainant has failed to establish that the Respondent imposed an adverse employment action upon him. The Complainant alleges he was fired because of his history of safety complaints, yet there is no supporting documentation or corroborating evidence. Even his submitted documentation from the Georgia Department of Labor indicates that he advised state authorities he was terminated for insubordination and not for engaging in any protected activity afforded him. The Complainant wishes to have the pro se Respondent’s failure to answer a request for admissions within thirty days to be sufficient to demonstrate that his employment was terminated due to protected activity. However, the pro se Respondent has filed an affidavit refuting that the Complainant was ever fired.

Here the Complainant has established that he inquired about whether he was fired or not by three e-mail messages sent in the early morning hours of Sunday, September 21, 2008, and that he abandoned the truck in Frierson, Louisiana, prior to 10:30 AM, local time, September 21, 2008. The Respondent acknowledged he received the Complainant’s early morning September 21, 2008 e-mail messages after driving the truck from Louisiana back to Georgia late September 21,

2008. However, his subsequent actions were consistent with treating the Complainant as still an employee who had departed the area in order to attend his September 23, 2008, court appearance in Pennsylvania, as discussed in the September 19 and 20, 2008 e-mails.

The Complainant has failed to establish any termination of his employment was directed by the Respondent prior to the Complainant filing his complaint on September 26, 2008. Since he has failed to establish an adverse employment action within 180 days preceding his filing of the complaint, the Complainant has necessarily failed to show an adverse employment action was taken in violation of the Act.

In view of all the foregoing, this Administrative Law Judge finds that the Complainant has failed to establish that the Respondent took any adverse employment action against the Complainant within the 180 days prior to his filing the subject complaint on September 26, 2008. Accordingly, the Complainant has failed to establish a prima facie case and the Respondent's Motion for Summary Decision must be granted and the complaint dismissed. Since the complaint must be dismissed, the Complainant is not entitled to reinstatement, compensatory damages, attorney fees and/or legal costs associated with this complaint, or other requested remedies.

CONCLUSION AND FINDINGS OF FACT

After deliberation on all the evidence of record, including post-hearing briefs of counsel, this Administrative Law judge finds:

1. Through out 2008 the Respondent was engaged in interstate trucking operations and operated commercial vehicles on the highways in commerce with a gross vehicle weight rating of 10,001 pounds or more.
2. The Complainant was an employee of Respondent commencing May 13, 2008, and operated commercial motor vehicles with a gross vehicle weight rating of 10,001 pounds or more on the highways in interstate commerce.
3. The Complainant engaged in protected activity under the Act as related to his Respondent provided truck in September 2008.
4. Respondent was aware of the Complainant's protected activity of safety complaints concerning the assigned truck's windshield washer system and signal lamps in September 2008.
5. The Complainant has failed to establish that he was subject to an adverse employment action by Respondent within 180 days prior to his September 26, 2008, complaint.
6. The Complainant has failed to establish that he was subject to an adverse employment action by Respondent as a result of protected activity under the Act.

7. The Respondent is entitled to a summary decision in the form of Dismissal of the Complaint.
8. The Complainant is not entitled to compensatory damages, reinstatement, attorney fees, legal costs, or other requested relief based upon his September 26, 2008, complaint.

ORDER

It is hereby ORDERED that:

1. the Respondent's **Motion for Summary Decision in the form of a "Request for Dismissal" is GRANTED;**
2. Complainant's **"Motion for Partial Summary Judgment and Sanctions or Alternatively, to Continue Consideration Thereof Pending Discovery" is DENIED;** and,
3. the formal hearing scheduled to commence at 9:00 AM, Tuesday, January 12, 2010, in Atlanta, Georgia, is hereby **CANCELLED.**

A

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb

NOTICE OF REVIEW: The administrative law judge's Recommended Order Approving Settlement, 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 Order Approving Settlement, the parties may file briefs with the Administrative Review Board ("Board") in support of, or in opposition to, the administrative law judge's order 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.