

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 27 September 2012

Case No.: **2011-STA-00054**

In the Matter of:

TIMOTHY SIMS,

Complainant,

v.

EXEL, INC.,

Respondent.

DECISION AND ORDER

This proceeding involves a complaint under the “whistleblower” employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the Act), as amended, 49 U. S. C. Section 31105 (formerly 49 U. S. C. § 2305), and its implementing regulations found at 29 C. F. R. Part 1978. Section 405 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules.

A letter dated August 12, 2011, from the Area Director of OSHA, stated in part:

Timothy Sims, (Complainant) filed a complaint against Exel, Inc. (Respondent), on March 16, 2010, under the Surface Transportation Assistance Act (STAA), 49 U.S.C §31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53. In brief, you alleged that Respondent discharged you in retaliation for refusing to drive while fatigued.

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region IV, finds that there is no reasonable cause to believe that Respondent violated 49 U.S.C. §31105.

The letter also stated

Respondent contends Complainant violated Respondent Class 2 violations which were severe in nature and warranted termination. Therefore, Complainant was terminated.

There is no evidence that Complainant was terminated for raising concerns regarding driving while fatigued. A preponderance of the evidence indicates that Complaint's alleged protected activity was not a contributing factor in the termination. Consequently, this complaint is dismissed.

On August 31, 2011, the Complainant filed an appeal with OALJ. The case was assigned to the undersigned Administrative Law Judge and a hearing was held in Atlanta, Georgia on June 26, 2012. The Complainant had been advised of his right to counsel, but he agreed to proceed pro se.

Preliminary Matters¹

At the hearing, the Complainant had only one copy of his proposed exhibits. The Complainant identified numerous exhibits (CX 1-16) and was told to submit copies to the Respondent and the Judge after the hearing. CX 1-16 are not of record.

Post hearing the Complainant submitted:

- CX A - Driver chart for October 8-15, 2009.
- CX B - Sims' hours 10/10-10/17/09.
- CX C - Separation notice.
- CX D - Driver's log 10/14/09.
- CD E - Driver's log 10/9/09.
- CX F - Transcripts of tape recordings.

The Respondent submitted 24 exhibits, which are marked as RX 1-24.

CX A – F and RX 1-24 are entered into the record.

Contentions

The Complainant states that

DOT combines your driving time and your on-duty not driving time to determine if you broke the 14-Hour Rule, not by the clock on the wall. Your Honor also, DOT rule states if a driver picks up and returns back at the same location, he qualifies for the 16-Hour Rule. Based

¹ The following abbreviations will be used as citations to the record:

- TR - Transcript of the Hearing;
- CX - Complainant's Exhibits; and
- RX - Respondent's Exhibits.

on this information, I asked that you rule this an illegal and wrongful suspension on October 19th. This suspension took place via telephone conversation. I'm requesting \$60,000 for that wrongful suspension. I'm going to also ask that you rule the October 22~ termination a wrongful termination. Based on these reasons I'm requesting \$100,000.00.

The reasons are: If you look at Exhibit C, which is the separation notice they issued me, they said that I falsified DOT paper logs by stating on that paper log that I was off-duty while doing work for the company. Also, according to the log, they stated I was in Montgomery, AL while actually I was in Charlotte, NC. If you look at Exhibit D and Exhibit E, the only thing wrong with the paper logs is the wrong date on them because I am off-duty some days. I go to Montgomery, AL some days and also Charlotte, NC some days on my route. A wrong date on a paper log is not a falsification of a log, especially when these logs were turned in after the route was completed.

What you do on your paper logs does not make you violate a 14-Hour Rule on the electronic logs. This shows that Excel official logs were not paper logs, but Mr. Kresser said that paper logs were Excel's official logs. If they are saying that the paper logs were there official logs, then how were they able to suspend me on the electronic logs, stating that I violated the 14-Hour Rule. Your Honor, Mr. Robinson is stating that my paper logs were not matching my electronic logs, then every driver at Excel should have been terminated. The reason for stating they were falsification of a log instead of errors was because he wanted to keep me from receiving my unemployment benefits.

The Respondent states that

Sims was suspended for three (3) days on October 19, 2009 after local Exel management was informed that Sims violated Department of Transportation ("DOT") hours of service safety regulations. Specifically, Sims violated the 14 hour rule on three (3) separate occasions between October 10-17, 2009. During the suspension, Exel discovered that Sims blatantly falsified his DOT driver logs between October 10 and October 14, 2009. Specifically, Sims' completed a DOT driver log on October 10 showing that he was driving in Alabama when in fact he was driving a route to North Carolina. Sims' completed a DOT driver log showing that he was "off duty" and not driving on October 11-14, 2009, when in fact he was driving his normal routes on October 12, October 13 and October 14, 2009. Falsification of driver logs is violative of DOT safety regulations and is grounds for immediate discharge under Exel policy. Sims admits that he completed the false logs and that they are inaccurate. Driver log falsification is the sole reason Exel discharged Sims.

Sims lodged a complaint with OSHA under the STAA in which he "alleges he was constructively discharged in reprisal for refusing to drive while fatigue[d]." Sims never informed Exel managers either before starting a route or during a route that he felt tired or fatigued. (TR 42, 72, 121-122, 139-143, 190; RX 23, pp. 11-14, RX 24, pp. 125-127.) Sims was never asked by Exel to start or continue a route after claiming fatigue. (*Id.*) Sims therefore never

refused to drive while fatigued because he was never asked to do so. During deposition, Sims rebutted his own claim. Sims testified that if he felt tired during a route he would simply park and rest and admitted he never asked Exel permission to do so. (RX 23, p. 11.). “No, I didn’t call and tell them because you ain’t got to do that. I don’t need to get permission from them to go to sleep.” (*Id.*). Sims also admitted the absence of any situation in which he told Exel he needed to rest and Exel asked or instructed him to drive. (*Id.* at 14). He confirmed this deposition testimony at the hearing. (TR 42, 72, 121-122, 139-143).

Applicable Exel work rules and DOT safety regulations

A Class Two rule violation under the Exel work rules is “grounds for termination of employment on the first occurrence.” (RX 3, Work Rules, p. 2 of 3.) Class Two rule violations include: “1. Dishonesty of any kind, including... falsifying employment data, reports, timecards, or time records.” (*Id.*) Falsification of DOT driver logs is a Class Two rule violation. (TR 182;RX 22, para 3).

Drivers are also required by law to comply with the Federal Motor Carrier Safety Regulations (“FMCSR”) issued by the DOT. Two (2) FMCSRS are relevant to this matter. First, the FMCSR hours-of-service rules mandate that drivers may drive a maximum of 11 hours after 10 consecutive hours off duty, and that drivers may not drive beyond the 14th consecutive hour after coming on duty following 10 consecutive hours off duty. (FMCSR, 49 C.F.R. § 395.3). In other words, following 10 consecutive hours off duty, a driver can be on duty a maximum of 14 hours (including 11 hours of driving) before another 10 hour break must occur. (TR 106, 178-180).

Second, the FMCSR require drivers to record their duty status (*e.g.*, off duty, driving, on duty, etc.) for each 24-hour period. (TR 106, 180; FMCSR, 49 C.F.R. § 395.8). Exel drivers used a FMCSR approved driver log and grid to record their duty status. (*See, e.g.*, RX 4, 8). When Sims was hired by Exel he acknowledged receipt of a copy of the FMCSR. (RX 2.). Sims testified that while he did not read all of these rules, he did read “the part about the 14 hour rule.” (RX 24, pp. 40-41). Sims also testified that he understood the FMCSR requirement to accurately record his duty status on a daily basis and that Exel policy also required him to accurately complete a daily driver log. (RX 24, pp. 59-64).

Morrow manager Paul Robertson received a violations report dated 12:02 p.m. on October 19, 2009 showing that Sims violated the 14 hour rule on three (3) separate occasions -- October 10, 15 and 17, 2009. (*Id.*). The violations report (RX 21, p. 2) was generated by the electronic log system being phased in at that time. (*Id.*).

Sims participated in the October driver conference call and Robertson called Sims immediately thereafter and informed him of the three-day suspension. (*Id.*; RX 23, pp. 119-120). Sims admits that he was told during that call with Robertson that the reason for his suspension was violations of the 14 hour rule and that he was later sent the Corrective Action in the mail.

Sims did not complete a driver log reflecting that he worked beyond the DOT maximum 14 hours and manager Robertson was not otherwise aware of Sims committing prior 14 hour rule violations. (*Id.*; TR 183-184; RX 23, p. 12). Manager Robertson reviewed the DOT driver logs prepared and submitted by Sims covering his routes in October, 2009. (TR 192-202; RX 22, ¶ 8). What Robertson found was blatant falsification by Sims of these logs. (*Id.*)

It is undisputed that Sims completed a DOT driver log showing that he was “off duty,” when in fact he drove on October 12, 13 and 14. When confronted with these undisputed documents at deposition which show that his October 11-14 driver log was false, Sims again said that the log “Just had the wrong date on it, yeah.” and contained a “clerical error.” (RIX 24, pp. 93-94, 99). Incredibly, at the hearing, Sims continued to claim that the only problem with his driver logs was that they contained the “wrong date.” (TR 90-91, 94, 123-129). The “wrong” date is not the problem with the logs. Rather, the logs say he was not driving for three (3) days when in fact he was driving an Exel tractor/trailer on public highways! This is a blatant violation of DOT safety regulations and Exel work rules.

The termination notice states:

Class Two Violations Rule violations are extremely important for maintaining positive morale. Due to the serious nature of these rules, violation is considered gross misconduct and is grounds for termination of employment on the first occurrence. General Behavior Rules - 1. Dishonesty of any kind, including, but not limited to, falsifying employment data, reports, timecards, or time records. Knowingly punching another’s timecard.

The Respondent argues that

Sims did not engage in protected activity before his discharge and therefore cannot establish a *prima facie* case. Sims cannot make out a *prima fade* case under 49 U.S.C. § 31105a(1)(B) because Sims never refused to operate a truck while fatigued and he was never asked or ordered to do so by Exel. If Sims felt tired or fatigued during a route, he would simply park and rest without informing Exel or asking permission to do so. (TR 42, 72, 121-122, 139-143. 190; RX 23. pp. 11-14).

Sims did not lodge any internal safety related complaint either. Rather, Sims alleged at deposition that he raised a generalized question regarding “fatigue” during the October 19, 2009 drivers’ meeting. Specifically, Sims claimed during the meeting that he “asked [manager Carter]

what about a driver getting fatigued.” (RX 24, p. 119). A cursory review of this testimony on this point establishes that Sims did not engage in protected activity during that meeting.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I find the evidence shows that respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101 and falls under the Surface Transportation Assistance Act. I further find that Complainant is a commercial motor vehicle driver within the meaning of 49 U.S.C. § 31101.

The STAA employee protection provision prohibits disciplining or discriminating against an employee who has made protected safety complaints or refused to drive in certain circumstances:

- (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 motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
 - (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.

U. S. Department of Transportation Federal Motor Carrier Safety Administration, 49 U.S.C.A. §31105.

HOURS-OF-SERVICE RULES

Property Carrying CMV Drivers (Valid Until July 1, 2013)

11-Hour Driving Limit

May drive a maximum of 11 hours after 10 consecutive hours off duty.

14-Hour Limit

May not drive beyond the 14th consecutive hour after coming on duty following 10 consecutive hours off duty. Off-duty time does not extend the 14-hour period.

60/70-Hour On-Duty Limit

May not drive after 60/70 hours on duty in 7/8 consecutive days. A driver may restart a 7/8 consecutive day period after taking 34 or more consecutive hours off-duty.

In order to prevail on an STAA complaint, a complainant must make a *prima facie* case of discrimination by showing that: (1) he engaged in protected activity, (2) the employer was aware of his activity; (3) he was subject to adverse employment action, and (4) there was a causal link between his protected activity and the adverse action of his employer. *See Clean Harbors Env'tl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Moon v. Transp. Drivers*, 836 F.2d 226, 229 (6th Cir. 1987); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987). Under the STAA, the ultimate burden of proof usually remains on the complainant throughout the proceeding. *Byrd v. Consol. Motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, slip op. at 5 n.2 (May 5, 1998).

Evaluation of the Evidence

The complainant began working for Exel in 2000.

During the last two (2) years of his employment with Exel, Sims drove the J route from the Morrow facility to Charlotte, North Carolina and back on Mondays, Wednesdays and Fridays. (TR 108-109, 181-182; RX 24, pp. 51-54). On Tuesdays and Thursdays, Sims drove a shorter route from the Morrow facility to Montgomery, Alabama and back. (*Id.*) Sims did not drive on the weekends. (*Id.*)

The Charlotte route is designed to take less than 12 hours.

In October, 2009, Exel began phasing in an electronic driver log system at the Morrow facility. (TR 184-186; RX 22, ¶5; RX 24, pp. 67-68). The electronic logs were computerized and used a GPS tracking system. (*Id.*) They would eventually eliminate the need for paper logs completed by drivers. (*Id.*) All drivers, including Sims, were however required to continue to accurately record their daily duty status on the DOT paper logs. (*Id.*; RX 24, pp. 67, 70). In other words, the paper logs completed by the drivers remained the "official" DOT required status reports during Sims' tenure with Exel. (*Id.*)

At the hearing, the complainant testified that he taped recorded a conversation on October 19, 2009 regarding the suspension, and also recorded the termination conversation on October 22, 2009. (TR 14) (*See CX F*).

The complainant testified that McKinney, his longtime supervisor, was aware that he often took naps while running his routes. Carter, the supervisor for eight months, told him that he had to run his routes on time. Robertson was a supervisor for about 3 weeks prior to dismissal. At the driver's meeting on October 19 the complainant asked a question about driver fatigue, but he was ignored.

Paul Robertson, the general manager, testified that in October 2009, the company phased in electronic logs and it became apparent that the complainant was over the 14 hour rule. (TR 44).

On his paper logs, after we discovered the errors and the 14-rule, he stated on one log that he was on vacation for four days. One of the days, he was on vacation. The other three, he was working and being paid to work by the company.

And one day his paper log stated that he was in Charlotte, North Carolina, when, in fact - or, excuse me, his paper log stated he was in Montgomery, Alabama when his electronic log and his sign-out and route for that day both went to Charlotte, so total opposite compass directions. The federal law requires you to update your logs as you stop, to keep them current, not to fill them out posthumously way after the fact. (TR 45).

Roberston acknowledged that Sims asked a question about fatigue at the meeting on October 19. (TR 48). After the meeting, Robertson called Sims and reported the suspension for hours of service violations. When asked about the transcript of that conversation Robertson pointed out

I said, no, you're not being suspended for going to sleep, you're being suspended for violating the 14-hour rule? Is that not an answer to your question that you raised during the safety call? (TR 52).

Respondent's counsel noted that a computer printout of the complainant's driving time showed 18 minutes over on October 17, 9 minutes over on October 15, and 53 minutes over on October 10. (TR 59, *see* RX 21).

Robertson testified that he discovered the 14 hour rule violations one day prior to the safety call meeting in October. The decision to suspend the complainant was made prior to the meeting but it was decided to make the call to Sims after the meeting rather than in the meeting. (TR 82).

The complainant testified that

you are allowed to make corrections on a log. If a log got the wrong date, day of the week, you are supposed to scratch it out, initial it, and put the correct date in. (TR 93).

Sims testified that he never turned in a paper log that showed that he violated the 14 hour rule. (TR 110).

Employer's counsel called attention to the complainant's deposition in December 2011.

Q And I said, "How much time between the meeting when you got the phone call from Derrick and Paul?" And you said, "Five minutes." And I asked you, "Do you think they had already decided to suspend you before the meeting?" An you said, "Sounded like it." Correct?

A Right.

Q Now, during that suspension telephone call, you were specifically told that you were being suspended for violating the 14-hour rule, correct?

A Yeah. Told that, yeah.

Q And you were told you were suspended for violating it on the 10th, the 15th and the 17th, correct?

A Yes. (TR 112).

Respondent's counsel focused on the termination conversation transcript and asked

Q Was there any discussion in here about you napping or being fatigued or any safety discussion during the termination meeting?

A Huh-uh. No. (TR 169).

After Sims was suspended on October 17, Robertson looked at the driver logs. Sims' logs indicated that he was off duty from October 11 to October 14 while the GPS logs showed that he worked three of those four days. (TR 197). Sims was terminated for falsification of logs. (TR 199) (*See* RX 10).

49 U.S.C. § 31105(a)(1)(B)(i)

The regulation at 49 C.F.R. § 392.3 qualifies as a regulation under § 31105(a)(1)(B)(i). Section 392.3 states that "a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle."

49 U.S.C. § 31105(a)(1)(B)(ii)

The regulation at § 31105(a)(1)(B)(ii) protects refusal to drive when "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." The regulation has been construed to apply to conditions such as driver fatigue in addition to unsafe conditions involving the vehicle itself.

There is no allegation in this case of a defective or unsafe motor vehicle.

The complainant questions whether or not he actually violated the 14 hour rule. The electric logs clearly show such violations. The complainant states that Carter was aware that he often took naps and could not complete the route on time. There is no documentation from Carter to support this allegation.

The complainant acknowledges that he never called in for sickness or fatigue while driving, presumably because of discussions with Carter.

In this case, Robertson did not have knowledge of complaints of fatigue prior to the decision to suspend Sims for the 14 hour rule violations. Sims was informed of the decision within minutes after the driver's meeting. Sims never drove for the company again and was terminated for falsifying driver logs.

Sims has mentioned a 16 hour rule and there is no indication of such an item in the DOT regulations. Despite Sims' statement that logs can be corrected a discrepancy would be a violation of DOT and company rules.

An essential element of proof under the environmental whistleblower laws, 29 C.F.R. Part 24(1995), is that, before taking adverse action, the employer had knowledge of the employee's protected activity. "[P]laintiff must establish that the employer was actually aware of the protected expression at the time it took adverse employment action").

In *Miller v. Thermalkem, Inc.* (94 SWD 1, Secy. 11/9/95).

Miller asserts that he engaged in protected activity on January 3, 1994: when he told Scull that making up missed feeds was a common practice at ThermalKem. The record is clear, however, that ThermalKem reached the decision to fire Miller before he made that allegation and only postponed carrying out that decision because Miller alleged widespread wrongdoing at ThermalKem. I find that ThermalKem reached a decision to fire Miller before it was aware of any protected activity on his part and only delayed carrying out that decision because Miller raised allegations of widespread wrongdoing by other employees.

The undersigned Administrative Law Judge finds this case to be analogous to the Miller case. Exel decided to suspend Sims before there was any complaint of fatigue or sickness.

The undersigned concludes that the complainant has not made a prima facie case of discrimination. The employer was ready to suspend, and later terminate the complainant, before Exel became aware of safety or health complaints.

Although it is undisputed that the complainant suffered adverse employment action when he was terminated on October 22, 2009, the complainant has failed to establish that he engaged in any protected activity, that such activity had any causal connection to his termination, or that the nondiscriminatory reasons offered by the Respondent were mere pretexts. Because he has failed to carry his burdens of proof under the STAA, the Complainant's claim for relief must be denied.

ORDER

The claim by Timothy Sims under the STAA is denied.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia

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. 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 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).

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(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).