



Issue Date: 16 February 2012

Case No.: **2011-STA-00032**

In the matter of:

FERNANDO D. WHITE,
Complainant,

v.

AMERICAN MOBILE PETROLEUM, INC.,
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT
AND DISMISSING COMPLAINT¹**

This proceeding arises from a complaint filed under the provisions of Section 31105 of the Surface Transportation Assistance Act of 1982, U. S. Code, Title 49, § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 ("STAA") and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 1978 and Part 18. The claim was referred to this Office of Administrative Law Judges for formal hearing upon Complainant's appeal of the Occupational Safety and Health Administration's denial of his complaint filed on January 18, 2011.

By motion dated December 21, 2011, Respondent filed a motion for summary decision seeking dismissal of the above-captioned claim. Respondent submits that viewing the facts of this case in the light most favorable to Complainant, Complainant has failed to establish he engaged in protected activity, that was known to the Respondent, and that his employment was terminated at least in part due to his protected activity. Complainant filed a response in opposition dated February 6, 2012.

FINDINGS OF FACT

1. Complainant filed an STAA complaint against Respondent on January 18, 2011. He stated his protected activity as "wouldn't drive over posted speed limit." (DXA)²
2. Respondent hired Complainant on August 8, 2010, to work as a commercial fuel truck driver. (C.D. p 25)³

¹ Respondent requests in the alternative that the complaint be dismissed for Complainant's failure to cooperate in the discovery process. The alternative request for dismissal is DISMISSED as being moot.

² The complaint was timely filed. Complainant has now amended his complaint in a timely manner to include any additional protected activity. Such complaints are not time-barred and will not be considered in this proceeding.

³ Complainant's Deposition appended to Respondent's Exhibit M.

3. Claimant was employed by Respondent from August 8, 2010, to August 13, 2010. (C.D. p. 4; C.A. #2).⁴
4. On August 10, 2010, Complainant was assigned to work with an experienced truck driver/trainer who would accompany and train Complainant. This trainer was Mr. Carroll. (C.A. #6, 7; C.D. pp 30, 54).
5. At no time on August 10, 2010, did Mr. Carroll order Complainant to exceed the posted speed limit. (C.D., pp. 55-58).
6. Mr. Parchman, Respondent's President, has authority to hire and/or fire employees. (DX H #2).
7. On August 11, 2010, Mr. Carroll again rode with Complainant for purposes of training. During the shift, Mr. Carroll did not tell Complainant to exceed the posted speed limit. (C.D., pp. 58-60).
8. After August 11, 2010, Mr. Carroll refused to conduct any further training with Complainant. (C.D., p. 61). Mr. Parchman then met with Complainant and decided that the two individuals probably had a personality conflict. Mr. Parchman told Complainant to go home and that he would be paid. He further told Complainant that he would assign another trainer to him. (C.D., p. 62).
9. On August 12, 2010, Mr. Glover was assigned to be Complainant's trainer. As a trainer, Mr. Glover did not have authority to hire or fire an employee. During that shift, Complainant alleged that Mr. Glover directed him to exceed the posted speed limit. (C.D., pp. 62-68).
10. On August 13, 2010, Mr. Parchman telephoned Complainant and told him that Mr. Glover had also declined to continue training Complainant. At that point, Mr. Parchman terminated Complainant's employment. After being fired, Complainant told Mr. Parchman that Mr. Glover had directed him to exceed the posted speed limit. (C.D., p. 80; C.A. #29).

DISCUSSION

Looking at all the facts in a light most favorable to Complainant, I conclude that Complainant has failed to establish he engaged in protected activity of which his employer was aware and which contributed to an adverse action by that employer.

First of all, Mr. Carroll and Mr. Glover were trainers who had no decision making authority with regard to Complainant's employment status. The fact that Complainant complained to them about any safety issues cannot be imputed to his supervisor, Mr. Parchman, the man who fired Complainant. Complainant's complaint was filed on January 18, 2011. (RX-

⁴ Complainant's Affidavit appended to his brief in opposition.

A). His only complaint was that he was terminated because he “wouldn’t drive over the posted speed limit.”

Complainant’s first trainer, Mr. Carroll, rode with Complainant on August 10 and 11, 2011. At no time on either training date did Complainant allege that Mr. Carroll ordered him to exceed the posted speed limit.

Moreover, there is nothing in the record that Complainant complained to his superior, Mr. Parchman, that Mr. Carroll ordered him to exceed the posted speed limit as alleged in the complaint. Complainant maintains that he did have a meeting with Mr. Parchman on August 11, 2010, after Mr. Carroll refused to drive with him again. He may well have made other complaints to Mr. Parchman, but they are not included in the allegations made in the complaint filed on January 18, 2011, and are time-barred. Moreover, Complainant suffered no adverse action as a result of his complaints on August 11, 2010. Both parties agree that Mr. Parchman concluded that there may have been a personality conflict; agreed to pay him and sent him home. Complainant was told that another trainer would be assigned to him.

The next day, August 12, 2010, Mr. Glover was assigned to train Complainant. The training session did not go well on that day either. The record reflects that Complainant alleged that Mr. Glover ordered him to exceed the posted speed limit as alleged in his complaint. There is no dispute that at the end of the training session, Mr. Glover refused to conduct any further training with Complainant.

The parties agree that Complainant received a telephone call from Mr. Parchman the following day on August 13, 2010. Mr. Parchman told him that after a conversation with MR. Glover, Mr. Parchman was terminating Complainant. After being told he was fired, Complainant maintains that he told Mr. Parchman that Mr. Glover had ordered him to exceed the speed limit. Even if that is true, Complainant has failed to show that Mr. Parchman was aware of that fact prior to terminating Complainant’s employment. Consequently, I conclude that Claimant has failed to establish that he engaged in protected activity of which Mr. Parchman was aware prior to Mr. Parchman firing Complainant.

Accordingly, IT IS ORDERED that Respondent’s Motion for Summary Decision is GRANTED. IT IS FURTHER ORDERED that complaint is DISMISSED with prejudice.

SO ORDERED.

A

DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR/dlh
Newport News, Virginia

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).