

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 September 2012

Case Number: 2012-STA-00027

In the Matter of:

**DARYL E. O'BARR,
Complainant,**

v.

**BUILDERS TRANSPORTATION COMPANY, LLC.,
Respondent.**

Appearances: Daryl E. O'Barr, *Pro Se*
Hoover, Alabama
For the Complainant

David Rudolph, *Esq.*
Bourland, Heflin, Alvarez,
Minor & Matthews
Memphis, Tennessee
For the Respondent

Before: Stephen R. Henley
Administrative Law Judge

FINAL DECISION AND ORDER
DISMISSING THE COMPLAINT

This case arises under the whistleblower protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, 49 U.S.C. § 31105 (hereinafter the "STAA" or "Act"); as amended by the implementing recommendation of the 9/11 Commission Act of 2007, Pub. L. No 110-53, and the regulations promulgated thereunder at 29 CFR Part 1978. The STAA and its implementing regulations protect employees from discharge, discipline and other

forms of retaliation for engaging in protected activity, such as reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules or cause serious injury. In this case, Complainant Daryl E. O'Barr alleges he was constructively terminated from his position as a truck driver with Respondent Builders Transportation Company, LLC, on May 26, 2011 in retaliation for suffering and reporting a work-related injury on April 29, 2011, impacting his ability to safely operate a commercial motor vehicle.

Statement of the Case

On November 11, 2011, Complainant timely filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging his former employer, Builder's Transportation Company, violated the STAA's employee protection provisions when it constructively terminated his employment on May 26, 2011. After conducting an investigation, the OSHA's Regional Administrator issued a final determination letter on April 6, 2012. Concluding that the evidence showed Complainant voluntarily resigned his position, and finding no reasonable cause to believe Respondent violated the STAA, OSHA dismissed the complaint. On May 16, 2012, Complainant timely filed objections to the *Secretary's Findings and Order*.

The United States Department of Labor, Office of Administrative Law Judges (OALJ), has jurisdiction over the parties and subject matter of this proceeding. I conducted a formal hearing on this matter on July 24, 2012 in Nashville, Tennessee pursuant to my previous notices. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Hearings before the Office of Administrative Law Judges.¹ Because Mr. O'Barr was not represented by legal counsel, I explained the nature of the proceedings to him. He confirmed that he understood his rights, his burden of proof and the potential remedies available to him. The witnesses were separated during the hearing and therefore did not hear each other's testimony. At the hearing, I admitted Complainant's Exhibits ("CX") 1-4, Respondent's Exhibits ("RX") 1-8 and Administrative Law Judge Exhibits ("ALJX") 1-11 into evidence, except I informed the parties that I would not consider Mr. O'Barr's handwritten notes reflected on CX 1 and CX 2. Athos J. Sellers, Jackie Harper, Jennifer Scott and Complainant testified. I held the record open for 30 days after the hearing to allow the parties to submit closing briefs. Both parties submitted briefs, marked CX 5 and RX 9, respectively, and the record is now closed.

Issues

Did Complainant engage in protected activity on or about April 29, 2011 by reporting to his Employer a work-related injury impacting his ability to safely operate a motor vehicle? If so, did Respondent take an adverse employment action against Complainant on or about May 26, 2011? If so, was the protected activity a contributing factor in the adverse employment action? If so, would Builder's Transportation Company have taken the same adverse action despite the protected activity?

¹ 29 C.F.R. Part 18 (2011).

Applicable Standards

In relevant part, the employee protection provisions of the STAA, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, provide that a person may not discharge an employee or discipline or retaliate against an employee regarding pay, terms, or privileges of employment because (1) the employee refuses 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 (2) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.² Furthermore, it is unlawful for an employer to impose an adverse action on an employee who has refused to drive because operating a vehicle violates DOT regulations or because he has a reasonable apprehension of serious injury to himself or the public. 49 U.S.C. § 31105(a)(1)(B).

This employee protection provision was enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles." Congress recognized that employees in the transportation industry are often best able to detect safety violations and, yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting the violations.³

The current version of the STAA provides that whistleblower complaints shall be governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21).⁴ Under the AIR-21 standard, complainants must initially make a prima facie showing by a preponderance of the evidence that a protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint.⁵ If a complainant makes this prima facie showing, an employer can overcome this showing if it demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior.⁶

Thus, in order to prevail in this case, Mr. O'Barr must prove the following by a preponderance of the evidence: (1) that he engaged in protected activity; (2) that his employer, Builders Transportation Company, took an adverse employment action against him; and (3) that the protected activity was a contributing factor in Builder's decision to take the adverse employment action.⁷ Only if Complainant satisfies this initial burden does Respondent have to demonstrate by clear and convincing evidence that it would have taken the adverse action against Mr. O'Barr even if he had not engaged in protected activity, thus avoiding liability.

² 49 U.S.C. § 31105(a)(1)(A).

³ *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987)

⁴ 49 U.S.C. § 42121.

⁵ 49 U.S.C. § 42121(b)(2)(B)(i). *See also* 75 Fed. Reg. 53,544; 53, 550 (Aug. 31, 2010) ("It is the Secretary's position that the complainant [in an STAA case] must prove by a 'preponderance of the evidence' that his or her protected activity...contributed to the adverse action at issue."); *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, slip op. at 8 (ARB Sept. 15, 2011.); *Clarke v. Navajo Express, Inc.* ARB No 09-114, Case No. 2009-STA-00018 (ARB June 29, 2011) (citing *Williams v. Domino's Pizza*, ARB No. 09-092, Case No 2008-STA-52 (ARB Jan 31, 2011).

⁶ 49 U.S.C. § 42121(b)(2)(B)(ii).

⁷ While a pro se Complainant may be held to a lesser standard than that of legal counsel in procedural matters, the burden of proving the elements necessary to sustain a claim of discrimination is no less. *See Fleener v. H.K. Cupp Inc.*, 90-STA-42 (Oct. 10, 1991).

Based on a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations and case law, I hereby make the following:

Findings of Fact and Conclusions of Law

I find that Respondent Builders Transportation Company is engaged in interstate trucking operations and is an employer subject to the Surface Transportation and Assistance Act, 49 U.S.C. § 31105. Complainant was an employee of Respondent within the meaning of 49 U.S.C. § 31101 and § 31105 from April 25, 2011 until May 26, 2011.

A. Summary of the Evidence

Complainant was born on March 19, 1951 and resides in Hoover, Alabama (RX 1). Prior to receiving his commercial driver's license in 2011, Complainant was employed in a number of high level managerial positions, including director of operations for a four-star hotel, oil and gas developer, financial consultant and owner and operator of several multi-million dollar businesses (Tr. at 98-100). Complainant turned to the commercial trucking business due to the slowdown in the economy (Tr. at 91).

Respondent Builders Transportation Company hired Complainant as a company truck driver on April 25, 2011 (Tr. at 108). Builders Transportation is a family owned medium-sized trucking firm based in Memphis, Tennessee (Tr. at 117). On April 29, 2011, Complainant suffered a work related injury to his right arm and shoulder. While reporting the injury to Builder's, Complainant told them that "I do not want to be a bother. I will seek medical attention through the Veteran's Administration (VA)," or words to that effect (Tr. at 120). Complainant then signed a declination letter refusing further medical treatment offered though Builders' workers compensation insurance plan (RX 2; Tr. at 119). The declination letter is a short one paragraph document which required Complainant to fill in his name, the date of injury and the date he was offered medical treatment in three separate places as well as check a block declining treatment and then signing and dating at the bottom of the page. Complainant was not under duress when he read and signed the document and I find that he understood its contents. Notwithstanding Complainant's declination of treatment, Builders submitted a report of injury to the appropriate authorities, in compliance with Tennessee state law (RX 1; Tr. at 119).⁸

After receiving medical attention at the Birmingham, Alabama VA Hospital, and being misdiagnosed with a simple bruise,⁹ Complainant returned to Memphis and informed Builders he was ready to continue driving (Tr. at 110, 121). With no significant work related limitations imposed by the VA, Complainant continued driving for Builders until on or about May 26, 2011 when he informed AJ Sellers, Builders' Safety Director, that the previous injury suffered on April 29th was now impacting his ability to safely operate his truck. Sellers did not order Complainant to continue driving but, instead, offered him treatment through Concentra Medical

⁸ On April 18, 2012, an adjudicator with the Tennessee Department of Labor and Workforce Development required Respondent to pay for Complainant's medical treatment and care directly related to his April 29, 2011 work place injury but did not award temporary disability benefits because she determined Complainant voluntarily resigned from his employment. A subsequent state administrative review board affirmed the workers' compensation specialist's order on May 9, 2012. (RX 6-7).

⁹ Complainant was subsequently diagnosed with and treated for a ruptured bicep.

Clinic pursuant to Builders' workers compensation plan. When Complainant asked about the declination letter he previously signed, Sellers told Complainant "Don't worry. We can get around that. The insurance company works for us," or words to that effect (Tr. at 122). Sellers then offered Complainant light duty under the company's return to work transition policy, which included 100% of the average monthly salary, hotel expenses and travel to and from home on the weekends. However, Sellers also informed Complainant that all employees in the light duty program capable of performing work would be required to do so in the company's Memphis terminal as that is where the jobs are (Tr. at 127-28). While Complainant was physically capable of light duty work, he declined the offer, telling Sellers that "I've been out long enough. I just want to go home," or words to that effect (Tr. at 43). Complainant then turned in his individual driver fuel card and returned to his home in Hoover, Alabama.¹⁰ Complainant did not ask for an unpaid leave of absence or be placed in a similar employment status before departing. Builders Transportation subsequently characterized Complainant's reason for departure as "Quit-Medical" and removed Complainant from the Company rolls on May 26, 2012 (RX-3). Given the circumstances under which Complainant left Builders, I find it was reasonable for Respondent to conclude Complainant would not return and Complainant did not contact Respondent or inquire about a possible return to duty after departing on May 26, 2011 (Tr. at 130).

Prior to May 26, 2011, the Complainant had no work performance problems or disciplinary infractions. He was a "pretty decent driver" and well-regarded by Builders, which had invested time and money in his training (Tr. at 144).

B. Discussion

To satisfy his prima facie burden under the STAA, Complainant must prove three elements by a preponderance of the evidence. First, he must show that his refusal to drive Respondent's trucks constituted protected activity. Second, he must establish that Builders Transportation Company took an adverse employment action against him. Finally, he must show that his refusal to drive was a contributing factor in Respondent's adverse employment action.

As an initial matter, I find that Mr. O'Barr has proven that he engaged in protected activity when he told Builders on May 26, 2011 he could not continue driving because of the work-related injury suffered on April 29, 2011. 49 U.S.C. § 31105(a)(1)B(ii) protects an employee who refuses to operate a commercial motor vehicle when he reasonably believes to do so could cause serious injury to the employee or the public. In this regard, I note the statute does not require that the employer actually order an employee to continue driving notwithstanding an injury, or even urge him to do so. To qualify as protected activity under the Act, the Complainant must simply have reasonably believed the injury to his arm prevented him from safely operating the truck on the public roads, a concern which he then related to his employer. Given the nature of the injury he sustained, I find Complainant's belief that he could cause an accident if he continued driving was objectively reasonable.

I also find Complainant was the subject of an adverse employment action by Respondent when he was terminated on May 26, 2011. Under the STAA, any discharge by an employer constitutes an adverse action and a discharge is any termination of employment by an

¹⁰ Hoover, Alabama is approximately 250 miles from Memphis, Tennessee.

employer.¹¹ In other words, except where an employee has actually resigned, an employer who decides to interpret an employee's actions as resigning has in fact decided to discharge that employee.¹² In this case, I find Complainant did not actually resign but instead refused Respondent's offer of limited duty employment in the Memphis terminal and went home to Alabama. Under *Minne*, I find Respondent's subsequent termination of Respondent to constitute an adverse employment action.

However, I find that any protected activity engaged in by Complainant was not a factor in Respondent's decision to terminate Complainant's employment. The only reason Respondent discharged Complainant was because he declined to take a light duty position in the company's Memphis terminal and told Employer he was "going home for treatment and didn't want to be there," or words to that effect (Tr. at 122-23). Builders reasonably interpreted Complainant's actions as quitting in order to seek medical treatment closer to his home, a fact supported by the reason cited for Complainant's departure on the company termination form, emailed to several company personnel by the Human Resources office shortly after Complainant's return to Alabama, as "Quit-Medical" (Tr. at 124-5). On this point, I find credible AJ Seller's testimony that he did not require Complainant to continue driving after Complainant informed him of the nature of the injuries on May 26, 2011 (Tr. at 43). Instead, Sellers offered Complainant the option of limited duty in the Memphis terminal under the company's existing return to work policy as well as medical treatment for the work related injury to his right arm, notwithstanding Complainant's prior declination. Sellers' actions were consistent with existing company practice and it would have been in the company's interest to retain the services of an otherwise competent driver, given the resources already invested in training him. However, the evidence shows that Complainant refused Builders' offer of medical care and limited duty in the Memphis terminal pursuant to the company return to policy. While Complainant's reason for declining Employer's offer was understandable, a desire to receive medical treatment closer to home, it was the sole basis for the company's subsequent discharge; not because he had suffered and reported a work related injury. Further, if Complainant believed that his departure from the Memphis terminal on May 26, 2011 was simply a temporary medical leave of absence while he recuperated from his work place injury in a more hospitable environment, then it would be reasonable to assume that he would contact Builders at some point to discuss the conditions of his return to duty. That he did not do is evidence that Complainant himself believed that his actions constituted a resignation and that he did not intend to return to Builders once departing the worksite for home.

C. Conclusion. For the reasons discussed above, I find that Complainant has failed to establish his prima facie case. The evidence does establish that Complainant engaged in protected activity when he decided not to drive Respondent's trucks due to a reasonable safety concern given his injuries. The evidence also establishes that Complainant was subject to an adverse employment action when Respondent discharged him on May 26, 2011. However the evidence establishes that Complainant's refusal to drive was not a contributing factor in the employer's adverse employment action. Here, Complainant knowingly and voluntarily refused Employer's offer of limited duty pursuant to its reasonable return to work policy at Employer's

¹¹ *Minne v. Star Air, Inc.* ARB No. 05-005, ALJ No. 2004-STA-26, slip op. at 13-15 (Oct. 31, 2007); *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19, slip op at 10 (ARB Sept. 30, 2010).

¹² *Minne*, slip op at 14.

Memphis, Tennessee terminal in order to be closer to his home for medical treatment. While he may not have actually uttered the words “I resign,” Complainant’s actions in this case demonstrate nothing less. Complainant voluntarily left Builders; he was not terminated as a result of his decision not to drive because of any safety concerns related to his work place injury. In other words, Complainant has not proven by a preponderance of the evidence that his protected activity was a contributing factor in Builder’s decision to terminate his employment.

Order

The complaint for whistleblower protection under the Surface Transportation Assistance Act filed by Daryl E. O’Barr with the Occupational Safety and Health Administration on November 11, 2011 is hereby DISMISSED.

SO ORDERED:

STEPHEN R. HENLEY
Administrative Law Judge

Date Signed: September 14, 2012
Washington, DC

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 the administrative law judge’s decision. *See* 29 C.F.R. § 1980.110(a). 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. Generally, 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 (4) copies of the petition for review with the Board, together with one copy of this decision. In addition, within thirty (30) calendar days of filing the petition for review, you must file with the Board: (1) an original and four (4) copies of a supporting legal brief of points and authorities, not to exceed thirty (3) double-spaced typed pages, and (2) an appendix (one (1) 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 thirty (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 (4) copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty (30) double-spaced typed pages, and (2) an appendix (one (1) 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 (4) copies) not to exceed ten (10) double-spaced typed pages, within such time period as may be ordered by the Board.

In no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor. 29 C.F.R. § 1978.109(e), 1978.110(a). Even if you do file a Petition, 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 after 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).