



Issue Date: 02 July 2013

CASE NO. 2012-STA-00045

In the Matter of:

DUDLEY C. CAMPBELL,
Complainant,

v.

PROGRESSIVE TRANSPORTATION, INC.,
Respondent.

**DECISION AND ORDER GRANTING SUMMARY DECISION AND DENYING
COMPLAINT**

On May 31, 2013, Respondent Progressive Transportation, Inc. filed a motion for summary decision, and Complainant Dudley Campbell was allowed until June 14, 2013 (postmark date) to respond to it. On June 16, 2013, Complainant submitted a response by facsimile to Respondent's motion for summary decision; however, I did not receive it until June 18, 2013.

On June 17, 2013, this Office received Respondent's Motion to Strike Complaint. Because there was only a short time left before the hearing, scheduled for June 25, 2013, it was clear that Complainant would not have the opportunity to file a written opposition. Accordingly, the hearing on June 25, 2013 remained scheduled, but as a limited hearing for the purpose of addressing Employer's two motions. By order dated June 17, 2013, I notified the parties of that change, and informed them of the location of the hearing. Mr. Campbell was served a copy of that notice by email, in accordance with his wishes, as well as by mail.

At the time set for hearing, Mr. Campbell was not present. The matter was subsequently called to order, and Mr. Campbell remained absent. He did not inform me or my staff of his whereabouts. Respondent was given the opportunity to present argument on the motions, but declined to do so, other than to request that its motions be granted due to Mr. Campbell's continuing failure to comply with my orders.

For the reasons set forth below, Respondent's motion for summary decision will be granted and this matter will be dismissed. Respondent's motion to dismiss will therefore be rendered moot, and will be denied on that basis.

Summary Decision

Summary decision may be entered pursuant to 29 C.F.R. § 18.40(d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See Gillilan v. Tennessee Valley Authority*, 91-ERA-31 at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1 at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson*, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). When a respondent moves for summary decision on the ground that the complainant lacks evidence of an essential element of his claim, the complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Celotex Corp. v. Catrett, supra*.

Findings of Fact and Conclusions of Law

1. Findings of Fact¹

Respondent Progressive Transportation, Inc. is a commercial motor carrier engaged in the transportation of freight through use of commercial motor vehicles, with corporate headquarters in Wausau, Wisconsin. [Respondent's Motion for Summary Decision, Exhibit A.] Complainant Dudley Campbell became an independent contractor with Respondent on September 17, 2007, when he was engaged to operate a tractor and trailer. [MSD, Exhibits A and B.] Mr. Campbell thereafter entered into a series of annual lease agreements with Respondent for tractor Unit No. 718; the most recent such lease agreement was entered into on September 8, 2011. [MSD, Exhibit C.] Complainant was required to return the leased vehicle to Respondent at the expiration or termination of the lease. [*Id.*]

Between 2007 and 2011, Complainant was cited for a number of service failures, including:

- Late delivery on November 6, 2007, which Respondent discussed with Complainant;

¹ All facts are taken from the evidentiary materials submitted with Respondent's Motion for Summary Decision. Although Mr. Campbell was specifically instructed to submit documents and/or affidavits or other statements contradicting Respondent's factual assertions, if he disagreed with them, he failed to do so in his facsimile submission of June 16, 2013. As he was advised might happen, his failure to do so results in my acceptance of Respondent's factual assertions as true.

- Late delivery on September 16, 2008, which Respondent discussed with Complainant, who provided no reason for the late delivery;
- Untimely pick-up on August 31, 2010, which Respondent discussed with Complainant;
- Late delivery on or about February 16, 2011;
- Being placed out of service by the Department of Transportation for operating a vehicle with two flat tires and for multiple log book violations;
- Late delivery on March 2, 2011, for which Complainant provided no reason;
- Late pick-up on April 20, 2011;
- Suspension of Complainant's commercial driving privileges by the State of Alabama sometime prior to September 6, 2011;
- Decision by a top customer on September 7, 2011, that Complainant would not be allowed to handle the customer's shipments due to his lack of cooperation in loading or unloading;
- Being placed out of service by the Department of Transportation for having a suspended license;
- Service failure on September 9, 2011;
- Ten log report violations on September 26, 2011;
- Failure to enter a required pre-trip inspection report before driving on November 8, 2011;
- Late delivery on December 1, 2011, resulting from Complainant's having placed his truck in repair when the repair facility could find nothing wrong with it;
- Decision by two customers on December 8, 2011 that they would no longer allow Complainant to handle any of their shipments due to his lack of cooperation in assisting with loading and unloading;
- Service failure on December 9, 2011 by failing to make timely notice that he would not deliver a load on time without providing a reason and without following company protocol requiring a driver to call the 24-hour call service line;
- Failure to enter pre-trip inspection report on December 22, 2011.

[MSD, Exhibits A, D, and E.]

On December 22, 2011, based on the numerous performance issues and customer complaints, Respondent's president, Craig Olsen, and Vice President of Operations, Troy Zahrt, made the decision to terminate Complainant's lease and independent contractor agreement. [MSD, Exhibits A and E.]

On December 22, 2011, Complainant picked up a load in St. Louis, Missouri, to be delivered on December 27, 2011 in Houston, Texas. [MSD, Exhibit F.] The load was a "show-load," meaning that on-time delivery was required. [MSD, Exhibit G.] On December 25, 2011, Complainant called Respondent and reported that his truck was experiencing problems in Oak Grove, Missouri. [MSD, Exhibits G and H.] He was instructed to take the truck to a Petro Truck Stop repair facility in Oak Grove. [*Id.*] Upon inspection, the truck was found to have coolant, power steering, and air leaks. [MSD, Exhibit I.] The repair facility was unable to perform the repairs until December 27, 2011 due to the holidays. [MSD, Exhibit G.] Thus, on December 26, 2011, Complainant was instructed by Respondent to swap loads with another contract driver,

who would take the “show-load” to Houston by December 27. [MSD, Exhibits G and H.] Complainant was told to complete a local delivery instead of taking the load to Houston. [*Id.*] The mechanic at the Petro Truck Stop stated that Complainant’s truck was fine to drive to Blue Springs, Missouri to make the local delivery. [*Id.*] Complainant made the local delivery on or about December 26, 2011, and then returned to the Petro Truck Stop. [*Id.*]

On December 27, 2011, Complainant, pursuant to Respondent’s instructions, took the truck to Diamond International Truck Stop in Kansas City, Missouri, a drive of approximately 25 miles, for repairs, and the truck was repaired on the same day. [MSD, Exhibits K and L.] Complainant was then routed to Respondent’s facility in Wausau, Wisconsin. [MSD, Exhibit K.] On December 28, 2011, Complainant was informed by Sherri Struck, Respondent’s Contractor Resources and Safety Officer, that his lease was being terminated for multiple service failures, including customer complaints and repeated log compliance and safety violations. [MSD, Exhibit M.]

2. Conclusions of Law

To prevail on a whistleblower claim under the Act, a complainant must prove by a preponderance of the evidence that (1) the employee engaged in activity or conduct the statute protects; (2) the respondent took unfavorable action against the employee; and (3) the protected activity was a contributing factor in the adverse personnel action. *Canter v. Maverick Transportation, LLC*, ARB No. 11-012, ALJ No. 2009-STA-054, slip op. at 5 (ARB June 27, 2012); see 29 C.F.R. §§ 1978.104(e)(2) and 1978.109(a). If the complainant meets his burden of proof, the employer may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event. 29 C.F.R. § 1978.104(e)(4); see also *Canter*, slip op. at 5.

For purposes of this Decision and Order, I will assume that Complainant engaged in protected activity when he reported that his truck was experiencing problems on December 25, 2011 in Oak Grove, Missouri. Further, it is clear that Respondent terminated Complainant’s lease, thereby satisfying the requirement to show an unfavorable action. As discussed below, however, I find that Complainant’s report of December 25, 2011 was not a contributing factor to Respondent’s decision to terminate the lease and independent contractor agreement.

Engaging in a protected activity is a “contributing factor” to the adverse action if it “alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 11 (ARB Feb. 29, 2012). A complainant can show contribution by either direct or indirect proof. *Id.* If Mr. Campbell “does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment.” *Id.*

In this case, the undisputed facts demonstrate that Respondent made the decision to terminate Complainant’s lease and independent contractor agreement on December 22, 2011, three days before Complainant reported problems with his truck on December 25. The decision was based on multiple service failures, including customer complaints and repeated log

compliance and safety violations. At the time the decision was made, Complainant had not reported any issues with his truck. Accordingly, I find that Complainant's protected activity played no role in Respondent's decision to terminate him, and therefore was not a contributing factor to that decision. Complainant has therefore failed to satisfy an essential element of his claim, and his complaint must be denied.

ORDER

For the foregoing reasons, IT IS ORDERED:

1. Respondent's Motion for Summary Decision is GRANTED;
2. Complainant's Complaint is DENIED; and
3. Respondent's Motion to Dismiss is DENIED as moot.

SO ORDERED.

PAUL C. JOHNSON, JR.

Associate Chief Administrative Law Judge

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).