



Issue Date: 15 June 2012

CASE NO.: 2012-STA-00019

IN THE MATTER OF

**ALBERTO CARVAJAL,
Complainant**

v.

**STEVENS TRANSPORT, INC.,
Respondent**

**ORDER DISMISSING COMPLAINANT'S COMPLAINT AS NOT TIMELY
PURSUANT TO 49 U.S.C. § 31105(b)(1) AND CANCELLING HEARING**

This case arises under Section 405, the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105, and the implementing regulations at 29 C.F.R. Part 1978 (2008). A hearing is presently scheduled for August 7, 2012 in Austin, Texas.

On April 20, 2012, Complainant filed a 31-page Amended Pre-Hearing Legal Position Statement. On April 26, 2012, Respondent filed a Pre-Hearing Statement of Position. On May 11, 2012, Complainant filed an Answer to Stevens Pre-Hearing Statement and Motion to Strike.

Complainant alleges that between April 15, 2011 and April 22, 2011, he reported various violations of DOL and FMCSA regulations to executives at Stevens Transport, Inc. (Respondent). Complainant further alleges that from April 15, 2011 until October 3, 2011, he was the target of retaliation by Respondent including: termination, hostile work environment, harassment, differential treatment, discrimination because of race or religion, breach of contract, breach of implied contract, and breach of the covenant of good faith and fair dealing. Complainant's employment with Respondent was terminated on April 22, 2011. On August 9, 2011, Respondent filed a "Drive-a-Check" History Report (DAC Report) on Complainant with HireRight. On August 17, 2011, Complainant claims he learned of the DAC Report filing and alleges that it was made with actual malice, to defame and damage his personal and work history reputation. Complainant asserts that the filing of the DAC Report amounts to a separate incident of retaliation and claims that pursuant to 49 U.S.C. § 31105(b)(1) he has 180 days from the date he discovered the report to file his complaint with the Secretary of Labor. Further, Complainant claims that Respondent's alleged misrepresentations continuously mislead him as to the time limitations set forth in § 31105(b)(1) and are the basis for the equitable tolling of the statute of

limitation and equitable estoppel of Respondent's assertion of untimeliness as a defense. Complainant filed his STAA Complaint with OSHA on February 10, 2012. OSHA denied the complaint as untimely on February 13, 2012¹ and Complainant appealed on February 28, 2012.

Respondent moves for dismissal of Complainant's complaint as untimely pursuant to 49 U.S.C. § 31105(b)(1) which states in pertinent part:

An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred.

49 U.S.C. § 31105(b)(1). Respondent contends that Complainant was terminated on April 22, 2011, for falsifying his employment application by withholding material information about his driving history and providing misleading information about his prior employment. Respondent asserts that Complainant was never asked to violate hours of service regulations and that he never reported any violations to Respondent in order to seek protections under § 31105. Nevertheless, Respondent argues that based on his termination date of April 22, 2011, Complainant had until October 19, 2011 to file his complaint under the STAA; his failure to meet the deadline bars his claim.

Respondent objects to Complainant's allegation that the filing of the DAC Report is a separate incident of retaliation for which the 180 day filing period did not start to run until the date he learned of the report. Respondent asserts that in separate communications with both Complainant and Complainant's previous counsel, Complainant demonstrated that he was well aware of the STAA complaint filing deadline. Respondent argues that no misrepresentations of fact with regard to Complainant's claim under the STAA were Respondent did nothing to mislead him into believing the deadline for filing his claim would be extended beyond the 180 day limitation. Likewise, Complainant does not allege in his Pre-Hearing Statement that Respondent ever made representations that the time limitations for filing a STAA complaint would ever be suspended. Respondent alleges that Complainant's former counsel first raised the possibility of filing a STAA claim in a letter to Respondent dated May 9, 2011 that accused Respondent of falsely reporting in Complainant's DAC Report that he had lied and falsified his application for employment. Although Respondent stresses that the DAC Report does not state that Complainant lied or falsified his application, Respondent contends that any potential retaliation claim arising from the DAC Report would have to be filed by November 5, 2011 pursuant to § 31105(b)(1).

In any case, whether it be the date of termination on April 22, 2011; date of Complainant's counsel's letter to Respondent on May 9, 2011; or the date the DAC Report was filed by Respondent on August 9, 2011, Complainant's complaint which was filed on February 10, 2012, is untimely pursuant to 49 U.S.C. § 31105 and must be dismissed.

¹ The Secretary's Findings cite August 9, 2011, the filing of the DAC Report as the date of the alleged adverse action taken against Complainant. The Secretary acknowledges receipt of Complainant's complaint as being on February 10, 2012 and deemed it not timely since the complaint was filed on the 185th day following the unfavorable personnel action; therefore, the complaint was untimely filed in accordance with STAA and 29 CFR 1978.

In addition, the hearing in this case which had been set for **AUGUST 7, 2012**, at **9:00 a.m.**, in **AUSTIN, TX**, is **cancelled**.

SO ORDERED this 15th day of June, 2012, at Covington, Louisiana.

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**CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**