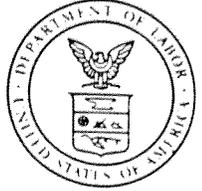


U.S. Department of Labor

Office of Administrative Law Judges  
Heritage Plaza, Suite 530  
111 Veterans Memorial Blvd.  
Metairie, LA 70005



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U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES

DATE: January 28, 1987  
CASE NO. 86-STA-21

IN THE MATTER OF  
SECTION 405 OF STAA COMPLAINT  
JOHNNY A. THOMAS,  
COMPLAINANT

v.

INDEPENDENT GROCERS OF  
ABILENE, TEXAS,  
EMPLOYER.

Appearances

Nathan O. Newman II, Esquire  
For the Complainant

Kelly Gill, Esquire  
For the Employer

BEFORE: KENNETH A. JENNINGS  
Administrative Law Judge

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RECOMMENDED DECISION AND ORDER

This is a proceeding by Complainant for back pay and actual damages against Independent Grocers of Abilene, Texas, pursuant to the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 2301 et seq.

A hearing was held on this matter in Abilene, Texas, on July 31, 1986, at which time the parties were afforded opportunity to present evidence and argument in support of their respective positions.

STIPULATIONS

The parties stipulated, and I so find, that on or about April 21, 1986, Complainant filed a complaint with the Secretary of Labor alleging that Employer discriminatorily fired Complainant for refusing to drive during very dangerous driving conditions, in violation of Section 405 of STAA (49 U.S.C. § 2305); that this complaint was timely filed; that Employer is

engaged in interstate trucking operations and maintains a place of business in Abilene, Texas, and that in the regular course of this business Employer's employees operate commercial motor vehicles in interstate commerce principally to transport grocery items; that Employer is a commercial motor carrier; that Employer is and at all material times herein has been a person as defined in Section 401(4) of STAA (49 U.S.C. 2301(4)); that on or about April 29, 1985, Employer hired Complainant as a driver of a commercial motor vehicle, to wit, a tractor-trailer with a gross vehicle weight rating in excess of 10,000 pounds; and, that at all material times herein Complainant was an employee in that he was a driver of a commercial motor vehicle having a gross vehicle rating of 10,000 or more pounds used on the highways in interstate commerce to transport groceries and in that he was employed by a commercial motor carrier and, in the course of his employment, directly affected commercial motor vehicle safety (49 U.S.C. 2301(a)(A)).

#### ISSUES

The unresolved issues are: (1) Whether Employer discriminatorily fired Complainant in violation of Section 405 of STAA; and (2) attorney fees.

#### STATEMENT OF THE CASE

Complainant Johnny Thomas was employed as an over-the-road truck driver with Independent Grocers during the period in question including February 9 and 10, 1986, and testified at trial herein. Complainant stated that one of his job responsibilities was taking products to Lubbock, Texas from Abilene, Texas every Sunday night, making approximately six to seven deliveries in Lubbock, and returning to Abilene Monday night. Complainant testified that he was scheduled to make this run on February 9 and 10, 1986, and that he had two conversations with his supervisor, Wayne Widdows, in regard to making that trip. During the first call made around 2:00 p.m. on February 9, 1986, Complainant asked whether Employer was going to shut down because of the weather. Complainant stated Mr. Widdows responded that Employer does not shut down for any type of weather reasons. During the second call made around 10:00 p.m. that same day, Complainant told Mr. Widdows he did not think it was safe to drive since he slid off the road in his pick-up truck on the way to work. Complainant stated Mr. Widdows responded that all of Employer's truckers were making their runs that night and that there was no reason why Complainant should not be able to do so. Complainant then told Mr. Widdows he was not going on the run because he did not feel it was safe, and related that Mr. Widdows requested Complainant to come to his office the next day. Mr. Thomas explained to Mr. Widdows that he had been listening to weather bulletins noting that weather conditions between Abilene and Lubbock were extremely dangerous and icy. Complainant stated

he also spoke with the sheriff's department in Sweetwater which reiterated those concerns. Complainant noted that truck stops in the area were full, and that truckers he spoke with on the CB said that the roads were slick, that there were several truck wrecks, and that they were going to park their trucks until the ice cleared. Complainant thought it unimportant to ask Employer's other drivers going to Lubbock on February 9 and 10, 1986, their opinion about the drive because Complainant believes he knows his capabilities and uses his own judgment when driving on ice. Complainant reported to work the next day, on February 10, 1986, around 3:30 p.m., when he thought the roads clear enough to get to town. At that time, Complainant stated Wayne Widdows said it was decided by himself, Mr. Seaton, Mr. Mullins, and Mr. Yarbrough that Complainant was fired for refusing to drive in bad weather. Complainant asserted it was not reasonable for him to drive in that weather, and he feared for his and others' safety. He told of seeing a truck overturned on the interstate on February 10, 1986. Johnny Thomas testified that he has lost pay since discharge on February 10, 1986, that his average weekly wage for Employer was \$400.00 at the time of discharge, that in order to pay the rent, he had to sell his wife's car for \$375.00 when it was worth \$1,750.00, that his washer and dryer worth \$850.00 were repossessed with \$42.00 in payments owed, that he has pawned personal property which will cost approximately \$300.00 to redeem, and that he has had a full-time job since about the middle of May, 1986, averaging \$350.00 to \$500.00 per week. Complainant stated that the trucks Employer provided for him to operate were not equipped with tire chains.

Jerry O'Bryant has been a meteorological technician with the National Weather Service since 1963 and testified at trial herein. His duties involve weather observations, weather warnings, and weather forecasts to the general public, and he identified Exhibit C-2 as records of the National Weather Service. Mr. O'Bryant testified that in Abilene, Texas, on February 9, 1986, a cold front blew in; that the temperature just after midnight on February 9 was 29° and falling; that shortly after 8:00 a.m. freezing drizzle started to fall; and, that the temperature was 25° at midnight February 10. He further stated that the weather pattern at Abilene on February 9 between 10:00 a.m. and 3:00 p.m. consisted of light freezing drizzle, fog, temperatures of 27° to 29° with a northeast wind of 10 to 15 miles per hour, and low visibilities. He believed a travelers' advisory was issued for that period which is transmitted to all media locally and around the state; however, he does not know this of his own personal knowledge. Mr. O'Bryant testified that the weather pattern at Abilene on February 10 consisted of freezing drizzle, fog from midnight to 9:00 a.m. with visibility as low as 1 1/2 miles, temperature in the 20's, and snow from 9 a.m. to 10:00 a.m. He stated that the weather pattern at Lubbock

on February 9 was similar to that at Abilene, being cloudy with low visibilities, temperature of 18° to 19° with snow grains and fog, and pure snow grains around 3:00 p.m. He believed weather advisories would also have been posted in Lubbock. Mr. O'Bryant stated that the U. S. Department of Commerce's storm data manual focuses on significant weather events. The manual noted in regard to the Western, Panhandle, and South Plains regions of Texas in February, 1986:

The worst winter storm of the season hit the area from Friday (7th) through early Monday (10th), dropping heavy snow on the South Plains and the Panhandle. Snow accumulations ranged from 3 to 15 inches. The heaviest was 15 inches in Moore County and up to 11 inches in Deaf Smith, Gray, and Roberts Counties. Other amounts ranged from 6 to 10 inches in many locations by Sunday night.

Besides the snow; sleet, freezing rain, and freezing drizzle multiplied the problems in the area. Also, dense fog (with visibility to near zero) added to the woes of travelers.

The thick blanket of snow stranded travelers, closed schools, caused traffic accidents, and disrupted air travel.

U. S. Department of Commerce Storm Data, publication of the National Oceanic and Atmospheric Administration (February 1986).

Mr. O'Bryant stated that the South Plains of Texas covers the area between Abilene and Lubbock, or part of it, but not including Abilene. He believes that Deaf Smith, Gray, Roberts, and Moore Counties are north of Abilene and Lubbock.

Exhibits C-3 and C-4 are special weather statements by the National Weather Service in Abilene, Texas. C-3 dated Sunday, February 9, 1986, at 9:50 p.m. states:

...A TRAVELERS ADVISORY IS IN EFFECT FOR THE BIG COUNTRY TONIGHT...

...A WINTER STORM WATCH IS IN EFFECT FOR THE WESTERN HALF OF THE BIG COUNTRY TONIGHT AND FOR THE EASTERN HALF OF THE BIG COUNTRY MONDAY...

FREEZING DRIZZLE OVER THE AREA THIS EVENING HAS DEPOSITED A THIN LAYER OF CLEAR ICE ON ROADS AND HIGHWAYS. EARLIER IN THE EVENING THE SHERIFFS OFFICE IN SWEETWATER REPORTED

ROAD CONDITIONS IN WESTERN SECTIONS OF THE BIG COUNTRY WERE VERY DANGEROUS AND THE ABILENE POLICE DEPARTMENT IS REPORTING NUMEROUS ACCIDENTS IN AND AROUND ABILENE.

THE FREEZING DRIZZLE WILL CHANGE TO SNOW LATER TONIGHT WITH POSSIBLE ACCUMULATIONS OF 1 to 3 INCHES BY MORNING.

ROAD CONDITIONS ARE VERY DANGEROUS ACROSS THE BIG COUNTRY AND TRAVEL IS DISCOURAGED UNLESS ABSOLUTELY NECESSARY. IF YOU MUST TRAVEL, REDUCE SPEEDS, ALLOW EXTRA TIME TO REACH YOUR DESTINATION AND REMEMBER BRAKING ACTION WILL BE POOR. PUMP BRAKES GENTLY AND ALLOW PLENTY OF DISTANCE TO COME TO A STOP.

STAY TUNED TO LOCAL RADIO OR TV OR NOAA WEATHER RADIO FOR THE LATEST WEATHER INFORMATION.

Likewise, C-4 dated Monday, February 10, 1986, at 5:05 a.m., states:

...A TRAVELERS ADVISORY IS IN EFFECT FOR THE BIG COUNTRY TODAY...

FREEZING DRIZZLE CONTINUES OVER THE AREA THIS MORNING CAUSING HAZARDOUS DRIVING CONDITIONS. ROADS AND HIGHWAYS ACROSS THE BIG COUNTRY ARE COATED WITH A THIN SHEET OF CLEAR ICE AND ARE VERY DANGEROUS. THE FREEZING DRIZZLE IS EXPECTED TO CHANGE TO SNOW TODAY WITH 1 to 3 INCH ACCUMULATIONS ACROSS THE AREA.

MOTORISTS ARE URGED TO STAY OFF THE ROADS AND HIGHWAYS THIS MORNING AS CONDITIONS ARE EXPECTED TO WORSEN. IF YOU NEED TO TRAVEL PLEASE SLOW DOWN AND ALLOW EXTRA TIME TO REACH YOUR DESTINATION.

STAY TUNED TO LOCAL RADIO OR TV OR NOAA WEATHER RADIO FOR THE LATEST WEATHER INFORMATION.

Claimant testified that "Big Country" is a colloquialism for an area covering about a 100 mile radius of Abilene.

Kenneth Havins has been a state trooper with the Texas Department of Public Safety, Highway Patrol Service, in the Abilene, Taylor County District for 6 years, and testified at trial herein. Mr. Havins stated he was on duty on February 9 and 10, 1986, and recalls investigating an accident involving a truck

and 2 other vehicles on February 10, 1986. He stated it was snowing and sleeting at the time of the collision, and that the road surface was slick with snowy ice. He considered the weather as one of the reasons for the collision and felt that the weather was hazardous.

Wayne Widdows is transportation manager for Employer, and held that position on February 9 and 10, 1986. He has worked for Employer for 5 1/2 years, and testified at trial herein. Mr. Widdows' duties and responsibilities for Employer include: being in charge of transportation as a whole; the maintenance, dispatch, and setting up of the truck runs; and, monitoring the drivers, loads and distribution. He recalls February 9 and 10, 1986, and stated that the weather was cold, hazed over, and cloudy. He stated that he received a telephone call from Complainant on the afternoon of February 9 wherein Complainant asked if the trucks were going out and Mr. Widdows responded that they were. Mr. Widdows testified that he had been out driving on February 9 and that there was no ice on the driving lanes in Abilene. Mr. Widdows stated he decided whether the trucks would go out. He testified he based his decision on media reports, police scanners, truckers' reports on the CB, and on his own personal knowledge from driving. Although he decided the trucks would go out on February 9 and 10, he admitted knowing that the weather bureau stated there were hazardous conditions on the road, and that police scanners indicated local wrecks in Abilene. Yet, Widdows also stated that only one driver besides Complainant called to state that the weather was bad, and that none of his truckers had an accident or problem on either February 9 or 10. Mr. Widdows noted that Messers. Clayton Tettleton and Cecil Cooper drove the Abilene to Lubbock route during the period in question, and that neither of them complained about the weather. Mr. Widdows testified that he has never refused to permit truck operation because of weather conditions. He acknowledged that on February 9 and 10, 1986, truckers were told to leave earlier, and that their trips took approximately 2 to 3 hours longer. Mr. Widdows stated that when he spoke with Complainant on the night of February 9 he told Complainant that he wanted to see him first thing in the morning; however, Complainant did not arrive at work until 4:00 p.m. on February 10, at which time he was terminated for failure to make the run.

Cecil Cooper is a truck driver for Employer, and was employed by Employer during the period in question from February 9 to 10, 1986. Mr. Cooper stated that he received a call from Wayne Widdows on the night of February 9 just before midnight, at which time Widdows asked whether he would take the Abilene to Lubbock run. Mr. Cooper accepted the run. He stated he had no problems with the run other than driving slower than usual, taking 5 hours to get to Lubbock instead of the normal 3 hours.

He did state, however, that there was thin ice on the road between Abilene and Roscoe, and he characterized the roads as slick. He also ran into snow near Lubbock. He noted seeing two trucks on their side on the way to Lubbock, and did not see many cars out. Mr. Cooper stated that the truck he drove on that run was not equipped with chains.

Clayton Tettleton has worked as a trucker for Employer for 7 years, and testified at trial herein. He testified that he drove the Abilene to Lubbock route on February 9 and 10, 1986, and that it took about 6 hours to get there whereas it normally took 3 to 3 1/2 hours. He stated that the roads were slick between Abilene and Roscoe, and that it snowed near Lubbock. Even so, Mr. Tettleton stated that he had no problems. He acknowledged that if he put the brakes on hard in the snow, the truck would slide, that the air brakes on Employer's truck do not work very well in cold weather, and that visibility is shorter when driving in snow. Mr. Tettleton stated, however, that he had no problems with the air brakes or visibility during that run. He further expressed that Employer does have mud/snow tires on its trucks and that he has never had a traction problem with those tires. Mr. Tettleton recounted seeing one vehicle in a ditch on his trip to Lubbock.

Gregg White has been a trucker for Employer for 2 1/2 years, and testified at trial herein. He stated that the roads were slick on February 10, 1986, and that he had problems getting to work that day. Nevertheless, Mr. White felt the weather had not caused the road conditions to be unsafe for driving a truck.

James Yarbrough has worked for Employer for 13 years and is presently vice president in charge of distribution. He recalled the weather on the night of February 9 and the morning of February 10, 1986. In considering whether to let truckers go out in bad weather, he stated that television weather reports are considered but are not given much weight. He related that most reliance is placed on drivers' reporting of bad conditions, and noted that Complainant was the only driver to call in on February 9, 1986, concerning the weather. He reported that none of Employer's 13 drivers who drove during the period in question had problems. Mr. Yarbrough stated that Employer's trucks are not insured for collision, and that this is also considered when deciding whether to send trucks out. He felt it was safe to drive on February 9 and 10, 1986, if the drivers left early and were cautious. Mr. Yarbrough considered Complainant to be a good and experienced driver.

#### DISCUSSION, FINDINGS OF FACT, CONCLUSIONS OF LAW

In 1983 Congress enacted § 405 of the Surface Transportation Assistance Act, 49 U.S.C. § 2305. This legislation is designed

to promote safety on the highways by protecting employees from discriminatory action due to an employee's engagement in protected activity. Section 405(b) states:

No person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 2305(b). In the context of this case, the protected activity would be Complainant's refusal to operate a commercial motor vehicle when he had a reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment when used in very dangerous driving conditions (Cf. In the Matter of Roadway Express, Inc. and Lucius Abrams, Case File No. 4-1220-83-OIE (November 4, 1983)).

Complainant bears the initial burden of establishing a prima facie case of retaliatory conduct. Curtis McDaniel v. Boyd Brothers Transportation, Case No. 86-STA-6 (December 2, 1986). To do this, Complainant must prove by a preponderance of the evidence that he engaged in a protected activity, that an adverse employment action occurred, and that there was a causal connection between the protected activity and the adverse action. Id.

If a prima facie case is established by a preponderance of the evidence, then the employer has the burden of articulating some legitimate non-discriminatory reason for terminating the employee. The complainant would then, in turn, have the burden of proving that the alleged non-discriminatory basis for firing was merely a pretext for discrimination. Id., Dickerson v.

Metropolitan Dade County, 659 F.2d 574 (5th Cir. 1981); Smalley v. City of Eatonville, 640 F.2d 765 (5th Cir. 1981); McDonald Douglas Corp. v. Green, 93 S.Ct. 1817 (1973).

To establish his prima facie case, Complainant asserts that he was fired for refusing to drive his truck in very dangerous driving conditions. According to Mr. Thomas, he spoke with his supervisor for Employer, Wayne Widdows, to state that he did not feel it was safe to drive on February 9, 1986, and that he was not going to drive. On February 10, 1986, Mr. Widdows told Complainant he was terminated for failure to make his scheduled run.

I find that Complainant met his prima facie case. I find Complainant established he engaged in the protected activity of refusing to operate a commercial motor vehicle when having reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment when used in the very dangerous driving conditions present on February 9 and 10, 1986, crediting Complainant. I also credit Complainant's and Mr. Widdows' testimony that Complainant was fired by Employer because of his refusal to operate Employer's truck in those conditions, thus proving an adverse action and a causal connection between the adverse action and the protected activity.

Under Section 405(b), Complainant must also prove that he acted reasonably. Complainant argued that he acted as a "reasonable person" in concluding there was a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe conditions existing on February 9 and 10, 1986. In determining the reasonableness of Complainant's refusal to drive, he asserted he based his refusal on weather bulletins, sheriff's department reports, his own personal observations and experience in having his pick-up truck slide off the road, and truckers' statements heard on the CB regarding the slick condition of the roads.

The National Weather Service in 15 U.S.C. § 313 delegated certain duties to the Secretary of Commerce including ". . . forecasting of weather, the issue of storm warnings, the display of weather . . . signals for the benefit of . . . commerce, . . . the display of frost and cold-wave signals, the distribution of meteorological information in the interests of . . . commerce, and the taking of such meteorological observations as may be necessary to establish and record the climatic conditions of the United States, or as are essential for the proper execution of foregoing duties."

Exhibits 2, 3, and 4 include National Weather Service bulletins and U. S. Department of Commerce meteorological and storm data records. This information indicates that road

conditions in the Abilene, Texas, area and surrounding areas were very dangerous on February 9 and 10, 1986. A travelers advisory was in effect during this period, and travel was discouraged. Furthermore, freezing drizzle occurred on both days causing hazardous driving conditions; a thin layer of clear ice was noted on the roads and highways; and, numerous accidents were reported. The U. S. Department of Commerce's storm data publication showed that the "worst winter storm of the season" hit parts of the Abilene to Lubbock area during the period in question.

Crediting the National Weather Service records, the U. S. Department of Commerce records, Complainant's testimony, Jerry O'Bryant's testimony, Kenneth Havins' testimony, and testimony concerning vehicular accidents noted during this period, I find that Complainant acted as a reasonable person in refusing to drive under the circumstances which existed during the period of February 9 and 10, 1986. Moreover, Mr. Thomas complied with the requirement of 49 U.S.C. § 2305(b) that he attempt to obtain correction of the unsafe condition. I find he did this by telling Employer of the condition and requesting that he not drive Employer's truck during those weather conditions.

I find that Employer did not meet its burden of articulating a legitimate non-discriminatory reason for terminating Complainant. Employer acknowledged it fired Complainant for the sole reason that Complainant refused to drive, and argued it was "unreasonable" for Complainant to refuse to drive under the circumstances. Employer noted that none of its other drivers refused to drive. As I have already determined that Complainant acted reasonably, I reject Employer's argument. The fact that other drivers of Employer decided to make their routes under the same circumstances, and the fact that several of these drivers testified that it was safe to drive and that they had no trouble, was considered when weighing the evidence on reasonableness (See also, Stack v. Preston Trucking Company, Case No. 84-STA-15 (November 2, 1984); however, I find that the evidence noted in the paragraph supra in my finding of reasonableness outweighs the Employer's evidence as to the unreasonableness of Complainant's action.

Based on the findings of fact and conclusions of law cited above, the undersigned finds that the Complainant has established a violation of the STAA.

Under 49 U.S.C. § 2305(c)(2)(B), Complainant is entitled to reinstatement; compensation (including back pay); and, compensatory damages. Additionally, all costs and expenses (including attorney's fees) may be assessed against Employer.

In the case at bar, Complainant requested back pay, compensatory damages, and attorney fees. He did not seek reinstatement or future damages. I find Complainant entitled to

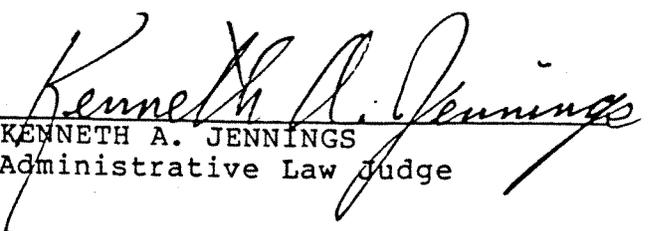
back pay from February 10, 1986 through May 10, 1986, in the amount of \$400.00 per week, crediting Complainant's statements that his average weekly wage for Employer was \$400.00, that he was fired by Employer on February 10, 1986, and that he obtained another full time job in about the middle of May, 1986. Employer presented no evidence to the contrary. Furthermore, crediting Complainant's testimony, I find Complainant entitled to compensatory damages including: \$1,375.00 (\$1,750.00 car value minus \$375.00 received) for vehicle required to be sold to pay for rent; and, \$808.00 (\$850.00 washer/dryer value minus \$42.00 in unpaid payments) for repossession of washer/dryer. Claimant is not entitled to the \$300.00 requested to redeem pawned property. The personal property deposited with the pawnbroker was merely security for a loan, and no damage has been shown thereby.

Complainant's attorney, Nathan O. Newman II, is entitled to attorney's fees reasonably incurred in bringing and litigating this case as Complainant's position has prevailed. He requested fees for 21 hours 30 minutes at the rate of \$150.00 per hour. Considering the quality of the representation, the work performed, the complexity of the case, the benefits awarded and the risk of loss, I find that a fee of \$3,225.00 for 21 hours 30 minutes at \$150.00 per hour is reasonable in this case and will be awarded.

ORDER

As Complainant has established a violation against him by Employer under the STAA, it is therefore ORDERED:

1. Employer shall pay Complainant compensation for back pay commencing February 10, 1986 through May 10, 1986, at the rate of \$400.00 per week.
2. Employer shall pay compensatory damages totalling \$2,183.00 for losses for a washer/dryer and vehicle.
3. Employer shall pay Complainant's reasonable attorney fees in the amount of \$3,225.00 for services rendered in bringing and litigating this case.

  
KENNETH A. JENNINGS  
Administrative Law Judge