



In the Matter of:

**EDWIN I. PLUMLEY,**

**ARB CASE NO. 97-027**

**COMPLAINANT,**

**ALJ CASE NO. 94-STA-35**

**v.**

**DATE: March 12, 1997**

**TANKNOLOGY CORPORATION  
INTERNATIONAL,**

**RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

### **FINAL DECISION AND ORDER**

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105 (West 1995).<sup>1</sup> Complainant, Edwin I. Plumley, alleges that Respondent, Tanknology Corporation International, violated the STAA when it discharged him for complaining about working more hours than permitted under regulations promulgated by the Department of Transportation (DOT).

In a Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) found that Plumley did not establish a STAA violation by a preponderance of the evidence and recommended dismissal of the complaint. We agree. The ALJ's findings of facts are supported by substantial evidence on the record as a whole and therefore are conclusive. 29 C.F.R. § 1978.109(c). We repeat essential facts to focus the discussion.

### **BACKGROUND**

Tanknology, which tests underground storage tanks and their product lines for leaks, hired Plumley in September 1992 as a tank and line tester. In the course of his work, Plumley drove from

---

<sup>1</sup> At the time of Plumley's complaint, filed in January 1993, the employee protection provision was found at 49 U.S.C. app. § 2305 (1988). The provision was recodified in 1995 without substantive change.

site to site in a company test van. T. 117. Plumley stated on his application and his resume that he was a high school graduate, but in fact he had dropped out of high school. T. 99, 103-104; JX 9; RX 1.

In early November 1992, Tanknology assigned Plumley to perform an emergency test for leaks in three gasoline tanks and lines at a Shell Oil station in Cleveland. T. 144, 157. The test was an emergency because Shell Oil suspected there was a leak in one grade of gasoline and had an obligation to test the site within 48 hours or else risk substantial fines. T. 174, 242-244, 247-248. David Blake, the manager of Tanknology's Columbus office, faxed instructions to Plumley concerning the Shell Oil job. JX 7.

After starting the test of the first tank, Plumley realized that he did not have a needed nitrogen tank on his truck. T. 159-160. After receiving Blake's authority to purchase a nitrogen tank locally, Plumley was unable to obtain one because it was too late in the day.<sup>2</sup> T. 163. Blake drove from Columbus to Cleveland to deliver a tank to Plumley. *Id.*

At the time Blake arrived, Plumley had been on the job more than ten hours and had completed only two of the three tank tests, which Plumley acknowledged should take six hours in all. T. 157, 165. The tests of the tanks did not require use of a nitrogen, whereas the test of the lines did. T. 164 .

Shell Oil district engineer John Ferrara, who had ordered the testing, was concerned about Plumley's lack of progress, since he too believed the entire set of tests should take six hours. T. 251. Ferrara testified that Plumley told him that he was thinking about starting his own testing company and solicited Shell Oil's business, T. 253-254, but Plumley denied it. T. 176.

Plumley telephoned the results of the tests to Blake at the Columbus office and also left the results in a message on Ferrara's telephone answering machine. T. 166. In the message, Plumley advised Ferrara that the super unleaded line passed the test, that the middle grade line was untestable and that the regular unleaded line failed the test. T. 254-255. Ferrara was concerned because, based on an inventory discrepancy, he believed that the super unleaded line had a leak. T. 247.

When Ferrara telephoned Baker to confirm the test results, he learned that the super unleaded line had failed and the regular unleaded line had passed, which was the opposite of the results given in Plumley's telephone message. *Id.* Ferrara told Blake about Plumley's soliciting Shell Oil's business. T. 258. Since the correct results were in doubt, Tanknology decided to send a different tester to redo the tests at the Shell Oil station. T. 256. When Tanknology retested the lines, the super unleaded failed, the middle grade failed, and the regular unleaded was on the verge of failing. T. 259.

---

<sup>2</sup> At the hearing, Plumley admitted that he had made a false statement in an earlier sworn affidavit that he was not willing to use his own funds to purchase the nitrogen tank. T. 163.

Blake informed Todd Ferguson, Tanknology's Regional Manager, about Plumley's solicitation of Shell Oil's business. T. 395. Ferguson sent quality assurance representative Ken Slane to speak with Plumley and Ferrara. *Id.* Ferrara told Slane about Plumley's soliciting Shell Oil business. T. 262

Ferguson received a complaint from a representative of Clark Oil Company that Tanknology's lateness in performing tests was holding up the opening of a new service station. T. 327, 396. Ferguson learned that Plumley was assigned to do the tests at the new station but was still working at a different site, where he had not accomplished much. T. 397.

When Slane arrived at the site where Plumley was working, he noticed several safety violations and that Plumley had not determined if there was too much water in the tanks, as required prior to testing the tanks. T. 323-324. Slane asked Plumley for the worksheets concerning the emergency job at the Shell Oil station and Plumley reported that he had lost them. T. 328.

Over the next few days, Slane frequently checked Plumley's work and was disappointed in his performance, his inability to follow directions, and his wasting time on the job. T. 328, 332-340. Late in the day on November 7, 1992, Plumley screamed at Shane that he wanted to go home. T. 340-341.

Slane recommended to his superiors that Plumley be discharged for incompetence, poor attitude, failure to follow instructions, and unprofessional demeanor. JX 2. Blake, Ferguson, and Regional Vice President Kevin Keegan concurred. T. 399-400. On November 9, 1992, Blake advised Plumley that he was fired. JX 3.

## DISCUSSION

Plumley complains that the ALJ did not find his testimony credible (Brief at 8). Since the record shows that Plumley had misstated facts on several occasions, we agree with the ALJ's assessment of Plumley's credibility.

In answer to the ALJ's findings that he lied about graduating from high school, Plumley states: "This is true, but if they [Tanknology] were so worried about it why didn't they check the employment application like most businesses. . . ." Brief at 1; *see also* T. 101. Plumley's deflection of responsibility for lying does not help establish his credibility.

Plumley also faults the ALJ for stating that he lied about the amount he earned while working for a prior employer, NDE. Brief at 2. But Plumley admitted at the hearing that he earned less at NDE than he stated on his application. T. 105. We are not convinced by Plumley's argument on brief that an attached photocopy of the first page of his 1991 tax return shows that he earned the claimed amount. The photocopy was not presented in evidence before the ALJ and therefore is not part of the record. Also, without a valid W-2 form attached, the stated total amount of wages, salaries, and tips would not show how much Plumley earned from any one employer that year.

Plumley continues to deny soliciting Shell Oil's business, stating, "How can you solicit for business when you have no business to solicit for in the first place." Brief at 2. The ALJ, however, found that Plumley solicited for a business he was thinking about starting. R. D. and O. at 9. Moreover, Plumley conceded that a document in evidence contained his written estimations of the start up costs for his own tank testing business. T. 178; RX 2.

We have considered all of Plumley's arguments and find them unconvincing. We agree with the ALJ that Plumley lacked credibility. For the reasons stated in the ALJ's cogent decision, we find that Plumley has not established a STAA violation and DISMISS the complaint.

**SO ORDERED.**

**DAVID A. O'BRIEN**

Chair

**KARL J. SANDSTROM**

Member

**JOYCE D. MILLER**

Alternate Member