U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 19 January 2007

Case No.: 2006-STA-00049

In the Matter of:

Daniel Davis,
Complainant

v.

Rock Hard Aggregate, LLC,
Respondent

Appearances: Daniel Davis, Pro Se
For the Complainant

Before: Kenneth A. Krantz
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act ("STAA" or "Act") of 1982, as amended and re-codified, 49 U.S.C. § 31105, and the corresponding agency regulations, 29 C.F.R. Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules.

Procedural History and Background

Daniel Davis ("Complainant") was employed by Rock Hard Aggregate, L.L.C., ("Respondent") from May 15, 2006 to May 18, 2006, he was thereafter terminated on May 19, 2006. On August 3, 2006, he filed a complaint with the Occupational Safety and Health Administration ("OSHA") in which he stated that during the three and one half days he worked for Respondent he noted several violations of the Federal Motor Carrier Safety Regulations ("FMCSR"). During the subsequent OSHA investigation it was determined that Complainant had not engaged in protected activity, and that even if he had, Respondent would have discharged him despite any protected activity. After conducting the investigation, OSHA issued

the findings of the Secretary on August 31, 2006, which concluded that the complaint had no merit, and that Respondent had not violated the Act.

On September 26, 2006, Complainant filed an appeal of the Secretary's determination with the Office of Administrative Law Judges ("OALJ"). The case was assigned to me for adjudication. The original complaint did not appear on its face to allege any protected activity, as the OSHA investigation had noted. A complainant who represents himself is not held to standards of pleading as strict as those that apply to an attorney. In light of this policy it appeared appropriate to conduct a hearing and take testimony from Complainant to determine if his testimony would reveal some protected activity under the Act that had not been included in his written complaint.

By notice issued on October 12, 2006, I scheduled a hearing in the matter on November 20, 2006 in Charlotte, North Carolina. The hearing occurred as scheduled, Complainant made appearance and the Respondent did not. Testimony was taken from Complainant to supplement the factual allegations in the original complaint.

The original complaint did not specify the remedy that Complainant was seeking. At the hearing on November 20, 2006 he indicated that after being terminated by Respondent he had found other employment and that he now calculated the pay he lost because of the period of unemployment as four thousand seven hundred dollars ($4,700) and that he was therefore requesting that amount in back pay, as well as reinstatement (Transcript p. 7).

On November 21, 2006, in response to an inquiry from my office, the owner of Respondent submitted a statement that he had not received notice of the hearing. On December 5, 2006, Complainant filed a post-hearing submission. This decision is based on all of the evidence, laws and regulations pertinent to the issues under adjudication.

Findings of Fact and Conclusions of Law

The Complainant's original August 3, 2006 complaint alleges a number of safety violations. When Complainant asked about when he was to do a urinalysis test for the job he was told not to worry about it and they would eventually do a three-dollar version from Wal-Mart. He further alleges that no one in the company had ever been given a urinalysis. Complainant additionally alleges that no logbooks were ever kept by the company, regardless of the distance traveled or whether they crossed state lines. He also alleges that Respondent routinely exceeded the legal weight limits, and would brag and laugh about going down mountain passes with over-weight loads. Furthermore, Complainant alleges that it was Respondent's routine practice to circumvent the weigh stations, both because the trucks were over the legal weight limits and because their equipment was defective. He further alleges that he was required to work in excess of fourteen-hour workdays and was not given the required ten-hour rest period between jobs. Finally, Complainant alleges that he was not allowed to stop and eat during the day, which was detrimental to his health because of the effect of low blood sugar.

Statutory Requirements

The section of the STAA at issue in this case is 49 U.S.C. § 31105 and the relevant part on employee protection provides the following:

> (a) Prohibitions.
>
> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—
>
> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (B) the employee refuses to operate a vehicle because—
>
> > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> >
> > (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a).

Discussion

At issue in this case is whether the Complainant was engaged in any protected activity prior to his termination. The initial OSHA investigation determined that Complainant was not engaged in any protected activity. The testimony of Complainant at the November 20, 2006 hearing produced no evidence that he was engaged in any protected activity. There is no allegation of any safety-related complaint or proceeding at the time Complainant was terminated, so subsection (A) of § 31105 is not involved in this case.

Additionally, there was no evidence in the written record that Complainant was terminated for refusing to operate a commercial vehicle for a reason listed under subsection (B) of § 31105. At the hearing on November 20, 2006 the Complainant was asked whether he had told his employer that he would not be reporting for work. He testified that he had not done so (Transcript p. 12).

While a complainant who represents himself is held to a lower standard than an attorney with regard to matters of procedure, the burden of proving the elements necessary to sustain a claim of discrimination is no less. *Flener v. H.K. Cupp, Inc.,* 90-STA-42 (Sec'y Oct. 10, 1991). Neither the original complaint nor the Complainant's testimony give any indication that he either refused to drive, or communicated to Respondent any intent to refuse to drive. This failure to allege any protected activity was the basis for the original findings by the OSHA investigation. Respondent's action in terminating Complainant when he did not show up for work cannot, in the complete absence of any communication to Respondent either of safety

concerns or of refusal to work because of safety concerns, be interpreted as unlawful conduct under STAA.

The Complainant has alleged serious safety violations, as well as tax and Social Security fraud, on the part of Respondent. The Office of Administrative Law Judges has no power to decide whether Respondent has or has not committed any of those alleged violations. This office's authority is limited to the issue of whether Respondent's firing of Complainant violated the statutory language quoted above.

The original complaint did not allege that Complainant had communicated either safety concerns or unwillingness to drive to Respondent before he was fired. At the hearing Complainant testified that he had not done so. It is clear both from the complaint and from Complainant's sworn testimony that there was no refusal to drive on his part. There must be a refusal to drive before there can be an improper retaliation for refusal to drive. Viewed in the light most favorable to Complainant, all assertions, both in the original complaint and his testimony, show that there was no protected activity governed by STAA before he was terminated.

Since Complainant was not engaged in any activity that is protected under the Act, his complaint must be dismissed.

RECOMMENDED ORDER

It is ORDERED that the complaint of Daniel Davis under the Surface Transportation Assistance Act be **DISMISSED**.

A

Kenneth A. Krantz
Administrative Law Judge

Newport News, Virginia
KAK/tls

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶ 4.c. (35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to,

the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.