

U.S. Department of Labor

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Issue Date: 20 August 2007

CASE NO.: 2007-STA-00012

IN THE MATTER OF

GARY JOHNSON,
Complainant

v.

ECONO STEEL,
Respondent

APPEARANCES:

Edward Johnson, Esq.
Joshua D. Wilson, Esq.
On behalf of Complainant

Philip E. Gable, Esq.
On behalf of Respondent

Before: Clement J. Kennington
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protections provisions of the Surface Transportation Assistance Act (Act) of 1982, as amended and re-codified, 49 U.S.C.A. § 31105 and the implementing regulations at 29 C.F.R. § 18.1 *et. seq.*,

and 29 C.F.R. 19978.1000 *et. seq.*, (2001). Under Section 33105(a) of the Act, a person is prohibited from discharging, disciplining or discriminating against an employee regarding pay, terms, or privileges of employment because the employee has filed a complaint or begun a proceeding related to a violation of commercial motor vehicle safety regulations or refuses to operate a vehicle because to do so would violate a regulation, a standard, or order of the United States related to commercial motor vehicle safety, or health, or the employee has a reasonable apprehension of serious injury to the employee or public because of the vehicle's unsafe condition.

Under Section 31105(a)(2) reasonable apprehension is defined as that which a reasonable employee, in the circumstances then confronting said individual, would conclude to be unsafe so as to establish a real danger of accident, injury, or serious impairment to health, provided that employee sought, but was unable to obtain, correction of the unsafe condition.

The Act protects employee complaints "related to a violation of a commercial motor vehicle safety regulation, standard or order." 49 U.S.C.A. § 31105(a)(1)(A). *Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, slip op. at 4 (ARB June 29, 2007). For an employee to be protected under the complaint clause, it is necessary that the employee be acting on a reasonable belief regarding the existence of a violation. *See Clean Harbors Env'tl. Servs., v. Herman*, 146 F. 3d 12(1st Cir 1998).

The Act also protects two categories of work refusals commonly referred to as "actual violation" and "reasonable apprehension" 49 U.S.C.A. Section 31105(a)(1)(B)(i), (ii); *See Ass't Secy' v. Consol. Freightways (Freeze)* ARB No. 98-STA-26, slip op. 5 (ARB Apr. 22, 1999). For an employee to be protected under the actual violation category, the record must show that the employee's driving of a commercial vehicle would have violated a pertinent motor vehicle standard. 49 U.S.C.A. Section 3305(a)(1)(B)(i); *See Freeze*, slip op. at 7. Under the reasonable apprehension category, an employee's refusal to drive is protected only if it is based on an objective, reasonable belief that the operation of a motor vehicle would pose a risk of serious injury to the employee and public and the employee has sought, but been unable, to obtain a correction of the unsafe condition. 49 U.S.C.A. Section 31105(a)(2). *See Young*, slip op. at 8.

I. STATEMENT OF CASE

On November 1, 2006, Complainant (Gary Johnson) filed a complaint against Respondent, (Econo Steel), alleging that Respondent terminated him on October 18, 2006 in reprisal for telling Respondent that he could not drive to Honey Brook, Pennsylvania on October 19 and 20, 2006, as Respondent requested without violating Federal Motor Carrier Safety Administration (FMCSA) hours of service regulations. (CX-1). On December 15, 2006, OSHA issued its findings and concluded that Respondent had not violated the Act when it discharged Complainant.

Complainant filed a timely appeal of OSHA's decision resulting in a hearing before the undersigned on June 12, 2007, in Birmingham, Alabama. Both parties were represented at the hearing. Complainant, Respondent's Owner, Steven B. Gable, and Plant Manager, Woody Thompson testified. Complainant introduced 17 exhibits which were admitted including FMCSA regulations; copy of the Act; Complainant's trip record for October 9, 2006 to October 18, 2006; Complainant's driver's daily log for October 17, 2007 to October 19, 2006; Complainant's sample log for October 19 and 20, 2007; Complainant's calculation of his average weekly wage; Complainant's drivers logs for October 17, 18, 19, 2004; letter of termination; letter from Steven Gable to OSHA concerning Claimant's termination; Notice of Claim form from Alabama Unemployment Compensation Division; and Statement of Stephen Gable. Employer introduced 7 exhibits which were admitted including statements from Steven Gable and Woody Thompson to OSHA; OSHA's finding; Complainant's letter of termination dated October 18, 2006; Complainant's logs from October 7-18, 2006 and trip record from October 9-18, 2006.

Following the hearing both parties submitted post-hearing briefs. In its brief, Complainant asserts that he complained to both Johnson and Gable that he could not make local runs on the morning of Thursday, October 19, 2006, and then leave Birmingham, Alabama to drive to Honey Brook, Pennsylvania, and get there by 3 p.m. central time on Friday, October 20, 2006, as Respondent requested without either driving in excess of the permissible 11 hour limit or cutting short the 10 hour required break following 11 hours of driving, as required by FMCSA regulations. When Complainant refused to make such a run and thereby violate FMCSA regulations, Respondent terminated him.

Complainant further asserts that the record shows both circumstantial and direct evidence of retaliation with Respondent, giving inconsistent, untrustworthy, and pre-textual reasons for his termination. According to Complainant, the record contains clear and convincing evidence as admitted to by Gable and Thompson that Complainant's failure to violate safety rules was the motivating factor in Complainant's termination, citing *Wentworth v. We Care Transportation*, 2005-STA-13 (April 4, 2006), and *Pollock v. Continental Express*, 2006-STA-1. (May 3, 2007).

On the other hand, Respondent asserts Gable made the decision to terminate Complainant on Tuesday October 17, 2006 after speaking with customer Mark Hancock, who called Gable on October 17, 2006 and complained about Complainant's attitude in dealing with his employees. This complaint combined with two other complaints in June, 2005, and November, 2005, against Complainant, convinced Gable he needed to terminate Complainant. Respondent denies Complainant ever raised the issue of FMCSA regulations. Rather, Complainant stated he wanted to leave on Wednesday evening, October 18, 2006 so as to avoid driving over the weekend on the return trip to Birmingham. Further, Plant Manager Thompson testified, that Complainant could have departed early enough on October 19, 2006 to make a timely delivery on the following day in Honey Brook, and return to Birmingham, on Saturday, October 21, 2006, so as to allow Complainant to take another load on the following Monday to Florida. Neither Thompson, nor Gable, had any knowledge of Complainant's concerns of potential FMCSA rules violations with the Honey Brook run.

II. STIPULATIONS

1. Respondent is a person within the meaning of 49 U.S.C. Section 3111.05.
2. Respondent is a commercial motor carrier within the meaning of 49 U.S.C. 31101.
3. Respondent has been engaged in transporting products on the highways and maintains a place of business in Birmingham, Alabama.
4. Respondent hired Complainant as a truck driver on April 1, 2005 to drive commercial vehicles (trucks), with a gross vehicle weight of 10,100 pounds.

5. Respondent terminated Complainant on October 18, 2006.
6. Complainant's work directly affected commercial motor vehicle safety.

III. ISSUES

1. Whether Respondent violated Section 31105(a)(1)(A) and Section 31105 (a)(1)(B)(i)(ii) of the Act by discharging Complainant on October 18, 2006, because he complained about, and refused, to drive to Honey Brook, Pennsylvania, October 19 or 20, 2006, arriving as requested by 3 p.m. central time (CT), or 4 p.m. eastern time (ET), on October 20, 2006.
2. If so, what is the appropriate remedy?

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Respondent is engaged in the business of purchasing carbon steel tubing and pipe, and reselling it for structural applications, fencing, and storage building. (CX-18, p. 16).¹ Respondent delivers products to customers who are located in Alabama, Georgia, Tennessee, Kentucky, Pennsylvania, and Florida, by truck driven either by its drivers or commercial haulers. Respondent employs 14 employees including two supervisors (President Stephen B. Gable (Gable), Plant Manager, Woody Thompson (Thompson); two truck drivers, eight laborers, two clericals. (CX-18, pp. 20, 21).²

¹ References to this record are as follows: Complainant's exhibits- CX-; Respondent's exhibits- RX; trial transcript- Tr.).

² Complainant attached two additional exhibits to its brief, Gamble's pre-trial deposition of April 26, 2007 as CX-18 and CX-17 a back-pay computation produced by Respondent. In as much as, Respondent filed no objection to their admission, I admitted them to provide greater insight into Respondent's operations.

Respondent's facilities are located at 2500 First Avenue South, in Birmingham, Alabama. These facilities consisting of offices and a yard occupy an acre of land. Respondent's drivers do not work at these facilities, other than to pick up and deliver loads to its customers. Drivers also pick up loads from suppliers such as Hanna Steel and deliver them directly to customers. (CX-18, pp. 24, 29, 30). Ninety eight percent of Respondent's routes are driven by its drivers. (CX-18, p. 78).

Respondent is owned by Gable and his brother Philip Gable, Counsel for Respondent. Gable purchased Respondent in March, 2005. (CX-18, p. 11). Before the purchase Gable served for 20 years as Econo Steel's manager. (Tr. 75, 76). Thompson was initially hired as a supervisor for Econo Steel in June, 2004. He continued in that capacity following the Gable purchase until September, 2006, when he was appointed plant manager, a position he presently holds. (Tr. 117, 118). As plant manager, Thompson supervised and assigned Complainant's truck loads.

Gable and Thompson are responsible for hiring employees. Firing is done only by Gable who terminated Complainant. (CX-18, p. 22-24). Prior to his deposition of April 26, 2007, Gable was unfamiliar with federal regulations limiting driver hours or prohibiting employer retaliation against employees who refuse to violate such safety rules and took no steps to ensure driver compliance relying instead upon Thompson to handle such matters and resolve driver concerns. (CX-18, p. 33-41, 93, 94).

As a commercial motor vehicle driver Complainant was required to follow Federal Motor Carrier Safety Administration, (FMCSA), the Revised Hours of Service Regulations-2005, 49 C.F.R. Part 395. In pertinent part these regulations allow a commercial driver to drive a maximum of 11 hours after 10 consecutive hours off duty, prohibit driving beyond the 14 hour after coming on duty following 10 consecutive hours off duty and driving after 60/70 hours on duty in the 7/8 consecutive days. Simply stated the rule means:

Respondent initially raised no objections to Complainant's 16 exhibits which were admitted at the beginning of the hearing. (Tr. 5). During Gable's testimony Respondent objected to the admission of the affidavit of Mark Hancock. (CX-15). I admitted this document under Rule 804 and 807.

- Drivers may drive up to 11 hours in the 14 hour on duty window after they come on duty following 10 hours off duty.
- The 14 hour window may not be extended with off duty time for meal and fuel stops, etc.
- The prohibition on driving after being on duty 60 hours in 7 consecutive days or 70 hours in 8 consecutive days, remains the same but drivers can restart the 7/8 period anytime a driver has 34 consecutive hours off duty. (CX-1).

B. Complainant's Driving Record

Complainant has driven trucks for 17 years during which he has never received any tickets or citations about his driving. (Tr. 25). In either, August, or September, 2004, Joel Knight, a supervisor with Respondent's predecessor hired Complainant. (Tr. 26). When Gamble purchased Respondent in March, 2005, he retained Complainant along other Econo Steel employees. (CX-18, pp. 10). As a commercial driver Complainant is and has been aware of the driving limitations set forth in CX-1. (Tr. 27).

Besides filling out driver logs, (CX-4, 5), Complainant kept a trip report when using a Ryder Truck for deliveries. (CX-3). This report shows the date, odometer readings, routes traveled and delivery locations. In the week prior to his termination, Complainant drove a Ryder truck a distance of 1,451 miles from October 9-13, 2006. Complainant did no driving on October 14, 15, 2006. On October 16, 2006, Complainant drove 178 miles making local deliveries. On the following day, October 17, 2006, Complainant drove 190 miles on local deliveries. On October 18, 2006 Complainant drove 74 miles to Tuscaloosa, Alabama and return. Complainant's driver logs for October 16, 17, and 18, 2006 show

Complainant on duty 7 a.m. to 2:30p.m.; 6:30 a.m. to 2:30 p.m., and 4:30 a.m. to 9 a.m., respectively.³ (CX-4).

C. Complainant's Termination

Claimant testified that on Tuesday, October 17, 2006, Thompson told him he would be making local deliveries on Wednesday, and Thursday, October 18, and 19, 2006. On Wednesday morning he assigned Complainant a load for Stoltzfus Manufacturing in Honey Brook, Pennsylvania to be delivered by 3 p.m. (CT) Friday; October 20, 2006, with pickup at Respondent's facility at lunchtime (noon) on Thursday, October 19, 2006. (Tr. 30, 31, 72). Complainant replied that employees in Honey Brook left at 3 p.m. (CT) on Friday, and there was no way he could legally drive leaving at Thursday, noon, and arrive in Honey Brook before 3 p.m. (CT) on Friday. Thompson replied he would talk to Gable and get back to him. On the following morning Complainant made a local run to Tuscaloosa leaving at 4:30 a.m. and getting in at 9:00 a.m. Upon arriving back at Respondent's facility Complainant asked if Thompson had talked to Gable. Thompson replied he would talk to Gable that afternoon. Complainant responded that he needed to leave before that afternoon and would talk directly with Gable if Thompson refused to do sooner. Thompson told Complainant to go ahead, but he knew the consequences of so doing. (Tr. 32).

Complainant sought out Gable and told him he understood Respondent had assigned him to leave for Pennsylvania at about noon on Thursday arriving in Pennsylvania by 3 p.m. on Friday. Gable responded Complainant was correct. Complainant said he could not do it. Further, it was illegal and highly impossible to which Gable said "I'm terminating you." (Tr. 33, 66). Complainant admittedly wanted to leave on the Pennsylvania run on Wednesday, October 18, 2006.⁴

Prior to this assignment Complainant had made the Pennsylvania run on a dozen occasions, and knew he could not arrive in Pennsylvania by 3 p.m. on Friday, without either driving more than 11 hours on Thursday or foregoing 10 hours of rest before resuming driving on Friday. In fact, the Pennsylvania trip in 2004 took 32¼ hours round trip. (Tr. 64). Thompson expected Complainant to

³ . The driver log for October 16, 2006 shows an incorrect date of October 19, 2006. (Tr. 29; RX-6, p. 5). When making local runs within a 150 mile radius of Respondent, Complainant recorded such deliveries as "on duty." (Tr. 58, CX-1, pp. 1, 2).

⁴ See Complainant's brief at pp. 4, 5.

make local runs for approximately 6 hours on Thursday morning leaving only 5 more hours of driving that day which would have allowed him to drive no further than Locust Springs, Tennessee arriving there by 8 or 9 p.m. after taking time off to eat and shower. At this point, Complainant had to shut down for 10 hours leaving the next morning by 7 a.m. and arriving in Honey Brook between 5:30 or 6:30 p.m. CT. (Tr. 66, 71-73).

Complainant also testified that several weeks before his termination as he was leaving Columbia, Kentucky he called Thompson to let him know he was leaving. Thompson told Complainant he needed him to go to Tuscaloosa. Complainant replied he was going to be out of hours upon his return. Thompson said he did not care, but had to have Complainant pick up a trailer in Tuscaloosa, and if he refused he could be terminated. (Tr. 40).

Gable testified he terminated Complainant solely because of a complaint he received on October 17, 2006, from customer Mark Hancock of Commercial Metals who allegedly accused Complainant of driving recklessly that day on Commercial Metals' property. (CX-18, pp. 44, 45; Tr. 77, 78, 85, 88, 89). Gable met with Complainant after receiving the complaint and allegedly told him a driving complaint had been made against him and he should go home and meet with him on the following morning. (CX-18, p. 99). Complainant admitted talking with Gable about Hancock's complaint, but denied it had anything to do with reckless driving. Rather the complaint had to do with Complainant becoming upset with Hancock's employees for making him wait to get unloaded. (Tr. 54, 55). When questioned about his conversation with Hancock, Gable admitted he was unable to recall what was said. (Tr. 79). In a sworn statement dated April 22, 2007, Hancock stated that he called Gable to complain about Complainant's attitude and not his driving, and in fact, never mentioned anything about reckless driving. (CX-15; Tr. 83).

Gable later changed his testimony and asserted he terminated Complainant because of three complaints he had received against him, with the second complaint coming in November, 2005, when motorist sent him a voice mail accusing Complainant of reckless driving on Highway 65 South. Gable subsequently told Complainant about the call, but had no recollection about Complainant's response. (CX-18, pp. 53-55.) Complainant recalled the incident, but testified that the driver in question had been playing with him by speeding up when he attempted to pass and slowing down when the driver was in front of him. The first complaint against Complainant allegedly came in July, 2005, from Terry McCall of Hanna Steel claiming Complainant had driven recklessly. (CX-18, p.

57). Gable kept no notes of this complaint and never discussed it with Complainant. (CX-18, p. 58, 59).⁵ Gable never issued any written warnings to Complainant, terminated any other employees for bad attitudes or not taking a load or had any progressive discipline or any personnel policies. (Tr. 114).

Gable met with Complainant on October 18, 2006 at about 8 a.m. and terminated him. Later, Gable faxed Complainant a letter stating he terminated Complainant because he did not fit into Respondent's organization. (CX-18, pp. 45-52). In responding to OSHA, Gable cited the same reason about Complainant not fitting into Respondent's organization, and more specifically, Hancock's alleged complaint of reckless driving. (CX-18, p. 62, 63; CX-14; Tr. 87, 88).

Thompson testified that part of his job was to assign loads to drivers, and that on October 18, 2006, Complainant asked Thompson to speak to Gable about his run to Honey Brook Pennsylvania on the following day. (Tr. 121). On the following Monday, Complainant was scheduled to go to Florida. (Tr. 124). Thompson testified that if Complainant left Thursday afternoon at about 3 p.m., having already having driven 6 hours, he would have to stop at 8:30 p.m., CT, and lay up 10 hours or until 7:30 am the following morning. Further, if required to be in Pennsylvania by 4 p.m. Eastern Time or 3:30 pm CTS, he would had to drive several extra hours he did not have the night before. (Tr. 133). However, according to Thompson, Complainant was assigned to complete local scrap runs and be loaded before lunch allowing him to arrive back in Birmingham, Saturday morning, October 21, 2006. Complainant never complained this trip would have violated DOT rules and could easily have completed Thursday morning's local runs. (Tr. 138). Rather than wait until finishing a local run on Thursday, Complainant wanted to leave Wednesday. (Tr. 120).

(D) Discussion, Conclusion, and Recommendation

Prior to August 3, 2007, in order to prevail on a claim which was fully litigated a complainant must prove by a preponderance of evidence that he: (1) was a covered employee and engaged in protected activity; (2) employer was aware of the protected activity; and, (3) employer discharged, disciplined, or discriminated

⁵ Complainant admitted signing a statement while Gable was Vice President and General Manager for Econo Steel and Joel Knight was plant manager that he could be subject to loss of pay for traffic violations and "violations" of his log book. (RX-7; Tr. 56). Complainant signed RX-7 as part of his initial employment package. (Tr. 74).

against him, and that the protected activity was the reason for the adverse action. *B.P.S. Trans. Inc., v. U.S. Dept of Labor*, 160 F. 3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys. Inc., Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). A claimant may show that protected activity likely motivated the adverse action by showing not only protected activity, employer's knowledge of it and adverse employment action, but also the existence of a "causal link" or "nexus" that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Kahn v. United States Sec'y of Labor*, 64 F.3d 261, 277(7th Cir. 1995). Discriminatory motive can also be inferred by a showing of pretext when the above elements are established. *St. Mary's Honor Center., v. Hicks*, 509 U.S. 502, 511. (1993).

Amendments implemented on August 3, 2007, slightly alter a complainant's burden such that in order to prevail on a claim which was fully litigated a claimant must now prove by a preponderance of evidence that he: (1) engaged in protected activity; (2) employer knew he engaged in the protected activity; (3) he suffered an adverse employment action; and (4) the protected activity was a contributing factor to the adverse employment action. See, 49 U.S.C. §31105, *as amended by* Implementing Regulations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053 (amendment adopting legal burdens of proof found in AIR21); See also, *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11. Should a complainant prove these four elements by a preponderance of evidence, employer must then articulate a legitimate, non-discriminatory reason for terminating complainant. *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11 (citing *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3). Once employer articulates a legitimate, non-discriminatory reason for terminating complainant, complainant must prove by a preponderance of evidence that the employer's articulated reason is pretext for discrimination. See *e.g.*, *Moon v. Transport Drivers, Inc.*, 836 F. 2d 226 (6th Cir. 1987); See also, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253(1981). A complainant can show pretext by proving that the articulated reason is false and discrimination is the more likely reason for the adverse action. *St. Mary's Honor Center v. Hicks*, at 515. Should complainant satisfy this burden of proof, employer must prove by clear and convincing evidence that it would have taken the adverse employment action regardless of any protected activity in order to avoid liability under the Act. *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11. Even where an employer is motivated by prohibited and legitimate reasons, it can escape liability by establishing by clear and convincing evidence it would have taken the same adverse action in the absence of protected conduct. *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir.

1999); *Byrd v. Consolidated Motor Freight* 97-STA-9. (ARB May 5, 1998); *Hobson v. Combined Transport Inc.*, 2005-STA-35 (ALJ Nov. 10, 2005).

Concerning the first element of whether Complainant engaged in protected activity, I am not persuaded that Complainant raised FMSCA regulations or the legality of the Pennsylvania run with either Thompson or Gable. Rather, I find it much more probable that he told them as they testified that he needed to leave by Wednesday in order not to drive over the weekend on his return trip to Birmingham as was his agreement with the former plant manager, Joel Knight. Further, Complainant could easily made the run to Pennsylvania by leaving at noon on Thursday after completing his local runs at which point he would have between 5 to 6 hours of driving time remaining having to stop between 5 and 6 p.m. and resume driving between 3 a.m. and 4 a.m. the following day. At this juncture, Complainant had 10 to 11 hours left to drive which would put him into Honey Brook, Pennsylvania between 1 p.m. and 2 p.m. on Friday having finished the 15 to 16 hour run.

While Complainant argues that it was reasonable for him to assume an inability to drive to Pennsylvania as requested, I find no credible reason for Complainant to believe he would not finish his local runs until 2:30 p.m. on Thursday, especially, when Thompson assured him he would complete the local runs and be loaded for Pennsylvania by noon time on Thursday. In essence, I find no basis to conclude Complainant engaged in protected activity or that Employer was aware of such activity. Accordingly, I recommend dismissal of the instant complaint.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

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, at 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, 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 inquires and correspondence in this matter should be directed to the Board.