

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 September 2005

Case No.: **2005-STA-00042**

In the matter of

DANIEL DAVIS,
Complainant,

v.

FONDA KAYE, INC.,
Respondent.

RECOMMENDED ORDER DISMISSING REQUEST FOR HEARING

This proceeding involves a complaint under the “whistleblower” employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the Act), as amended, 49 U. S. C. Section 31105 (formerly 49 U. S. C. § 2305), and its implementing regulations found at 29 C. F. R. Part 1978. Section 31105 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules.

The Respondent hired the Complainant as a long haul driver in January 2005. Reportedly, the Respondent fired the Complainant on February 28, 2005 because he had a “sarcastic” attitude. Thereafter, the Complainant filed a complaint under the Act alleging his dismissal was in retaliation for reporting unsafe vehicle conditions to management.

In late May 2005, the Deputy Regional Administrator of OSHA held that there was no merit to the complaint. The Complainant filed an appeal to the Office of Administrative Law Judges.

The undersigned Administrative Law Judge was assigned the case and held conference calls with the parties. A hearing was scheduled to be held in Charlotte, North Carolina on September 21, 2005.

On September 12, 2005, the Complainant submitted a letter which stated

I respectfully request that I be allowed to formally withdraw my complaint/charge against Fonda Kaye Trucking.

I can not submit the necessary documentation, required requests as per letter dated 26 July 2005 which is enclosed, etc. by the hearing date of 21 September 2005. I agreed to the 21/22 September 2005 hearing date so I do not and will not request an extension, continuation, etc. especially at this late date as I know that Judge Malamphy and his office and court are very busy and do not wish to inconvenience them unnecessarily.

Due to the time off from my present employer in regards to my complaint against another former employer, if I request any more additional time off, I may lose my present employment.

I have still enclosed all the documentation along with the cassette tape just in case it might still be needed by your office and I have also sent the identical documentation and cassette tape along with this letter to Fonda Kaye Trucking at the same time.

I may at a later date and with more time available to me consult legal consul and pursue this as according to North Carolina law by which I have a period of 2 years to take legal action.

I apologize for any inconvenience that I may have caused Judge Malamphy and his staff and again I respectfully request that I be allowed to formally withdraw my complaint/charge against Fonda Kaye Trucking.

29 C.F.R. §1918.111(c) permits a party to withdraw objections to the Secretary's Preliminary Findings or Preliminary Order at any time before the Findings or Order become final. Creech v Salem Carriers, Inc., 88-STA-29 (Secy's Sept. 27, 1988, slip op. at 2). The regulations provide that if a party files a written withdrawal of his objections, "[t]he judge shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn. §1978.111(c). I treat Complainant's letter as a request to withdraw his objections to the Area Director's findings. See Snow v. TNT Red Star Express, Inc., 1991-STA-44, slip op. at 2-3 (Secy's Mar. 13, 1992).

The Complainant is now working for another employer and he is aware that he continues to have rights under state law. The hearing scheduled for September 21 and 22, 2005 in Charlotte, North Carolina has been CANCELED.

ORDER

IT IS ORDERED that Complainant's request for withdrawal of his request for a hearing is hereby **GRANTED** pursuant to 29 C.F.R. § 1978.111(c). Accordingly, the May 31, 2005 Secretary's Findings issued by the Area Director of the Occupational Safety and Health Administration is hereby **affirmed** and **reinstated**. The Complaint, therefore, is hereby **DISMISSED**. This Order is the final administrative action and no Secretarial review is required.

Underwood v. Blue Springs Hatchery, 1987-STA-21 (Dep. Secy Nov. 2, 1987) (Order to Show Cause).

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RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia

NOTICE OF REVIEW: The administrative law judge's Recommended Order Approving Withdrawal of Objections and Dismissing Claim, 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 Order Approving Withdrawal of Objections and Dismissing Claim, the parties may file briefs with the Administrative Review Board ("Board") in support of, or in opposition to, the administrative law judge's order 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.