

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 August 2008

In the Matter of

YSAIAS VILLA
Complainant

v.

D.M. BOWMAN, INC.
Respondent

Case No. 2008-STA-00046

Ysaias Villa, *pro se*

Julie Reddig, Esq.
Bethesda, Maryland
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER¹

This case concerns a claim brought under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (“the Act”), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and the applicable regulations at 29 C.F.R. Part 1978, by Ysaias Villa (“Complainant”) against his former employer, D.M. Bowman, Inc. (“Respondent”). The Act prohibits an employer from discharging or otherwise discriminating against an employee for, among other things, operating a commercial motor vehicle in violation of a “regulation, standard, or order of the United States related to commercial motor vehicle safety or health” or because he reasonably believed that operating the vehicle would be unsafe. 49 U.S.C. § 31105(a)(1)(B)(i)-(ii). Following his January 29, 2008, termination by Respondent, Complainant filed a complaint with the Occupational Safety and Health Administration (“OSHA”) on February 4, 2008, alleging that Respondent had violated the Act. On March 31, 2008, OSHA’s Assistant Regional Administrator determined that no such violation occurred. On April 16, 2008, Complainant timely filed an objection to the OSHA findings and requested a hearing before this Office. On

¹ Citations to the record of this proceeding will be abbreviated as follows: CX – Complainant’s Exhibit; RX – Respondent’s Exhibit; and TR – Hearing Transcript.

June 19, 2008, a formal hearing was held in Frederick, Maryland. At the hearing, Complainant's Exhibit 1 and Respondent's Exhibits 3, 12-17, 22-23, and 29-34 were admitted into evidence. TR 61, 76, 70, 133, 137, 116, 94, 93. Respondent submitted a post-hearing brief. Complainant filed a short letter in lieu of a brief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

On November 13, 2007, Complainant, who is 46 years old, began working for Respondent as a truck driver. TR 21, 23. During his orientation program, Complainant received a copy of Respondent's employee manual, which contains the company's policies and procedures, and instruction in the safe operation of Respondent's equipment. TR 64-65; RX 3. Respondent also trained Complainant to prepare trip logbooks, comply with the federal regulations that limit driving hours, and communicate with the terminal using Respondent's voicemail system and onboard Qualcomm computer ("Qualcomm"). TR 65-68. While Respondent offered evidence that Complainant had violated company policies prior to January 28, 2008, *see* RX 22; RX 23, Respondent does not argue that it terminated Complainant because of those incidents.

On January 28, 2008, Complainant arrived at work at 8:00 a.m. TR 27. Complainant testified that the truck Respondent assigned to him for the day "wasn't ready at all until 11:30." *Id.* Prior to departing on his first trip of the day, Complainant performed an inspection of the truck. *Id.* Complainant testified that he found several problems that he reported to Respondent's shop. TR 27-28. Respondent's records indicate that the requested repairs began at noon and were completed by 12:15 p.m. RX 29. Bo Bowman, Respondent's shop manager, explained that he could not determine when Complainant requested the repairs that morning. TR 125. Complainant then drove a load from Respondent's Williamsport, Maryland, terminal ("the terminal") to a customer in Frederick, Maryland. TR 28. Complainant testified that, after delivering the load, he unsuccessfully attempted to contact the terminal using his cellular phone and Qualcomm to obtain his next assignment. TR 32-33. Complainant testified that, after an hour delay, he then drove to Martinsburg, West Virginia, pursuant to verbal instructions that he had received that morning and that the terminal eventually confirmed over Qualcomm. TR 33-37. Complainant testified that, upon arriving, the customer informed him that the load was not ready. TR 37. Complainant testified that he had to wait three and a half hours before he could pick up the load. TR 37-38. When asked what he did during the delay, Complainant testified that he "was trying a lot of [*sic*] time to contact the dispatch to explain the situation over the Qualcomm system . . . [and] to contact [the dispatcher] over the phone also." TR 38. Complainant testified that he never spoke with anyone at the terminal regarding the delay. *Id.*

Complainant testified that, on the morning of January 28, he received a verbal instruction to deliver the load he was picking up in Martinsburg to South Charleston, West Virginia, by 6:00 a.m. on January 29, 2008. TR 38-39. Complainant testified that he received no additional instructions or confirmation of this assignment after picking up the load in Martinsburg at 7:00 p.m. TR 38-41. Complainant also testified that, since the drive from Martinsburg to South Charleston is 300 miles, he could not deliver the load by 6:00 a.m. on the 29th without exceeding

the number of consecutive hours he could remain on duty under U.S. Department of Transportation (“DOT”) regulations. TR 39-41; *see* 49 C.F.R. § 395.3(a) (2007) (prohibiting both driving more than 11 cumulative hours and being on duty more than 14 consecutive hours after an off-duty period of 10 consecutive hours).² According to Complainant, he would have “run out of hours” at 10:00 p.m. TR 41. Once his truck was loaded at 7:00 p.m., Complainant drove back toward the terminal. TR 42. Complainant testified that, during the drive back to Williamsport, he had a “problem” with the truck that would have prevented him from reaching South Charleston. TR 42-43. Specifically, Complainant testified that the truck was shaking. TR 57. In addition, Complainant testified that he felt sick upon arriving at the terminal. TR 43. Accordingly, he left the truck in the terminal yard around 8:00 p.m. and went home for the night. TR 44. Complainant testified that, while the terminal was open when he arrived, he “didn’t see anybody around.” *Id.* Despite feeling that he should have informed someone at the terminal about his situation, Complainant testified that he did not because he was sick. TR 44-45.

Complainant returned to the terminal at 6:00 a.m. the following morning. TR 45. Upon his arrival, morning dispatcher Rob Holman directed Complainant to give him the truck’s key and wait to meet with him and terminal manager Dean Price. TR 45-47; *see* TR 140, 150. Complainant testified that Holman and Price questioned him about his failure to deliver the load. TR 46-47. Complainant testified that he told them that he would have had to violate DOT regulations to make the scheduled delivery. TR 47. Complainant testified that he also told them that he did not want to drive for Respondent if he would be forced to work 22 consecutive hours. *Id.* Complainant testified that Holman and Price then left the room and returned with a termination letter that they asked him to sign. TR 46. The letter reads:

On 1/28/2008, Ysaias was dispatched on Bowman BL 2288323 that was to deliver in S. Charleston, WV on 1/29/2008 @ 0800. Ysaias brought the load to Williamsport yard and dropped it berfore [*sic*] going home. He communicated to no one that he was not delivering the load or that the load would be late. When his log book was checked he showed that he still had approx 2 hrs left to drive with the 14 hour rule. It was also noted that he showed 1 ½ hrs to drive 8 miles from Fasloc to Williamsport yard. When he was questioned about this action, He [*sic*] stated that the truck was not running properly and had to stop several times to restart the truck. He was questioned as to if he contacted the shop to report, he responeded [*sic*] that he did not, chosing [*sic*] to continue to the yard possibly causing damage to the tractor. The above actions caused a service failure with the customer. As a result of these actions, Yaisas’ [*sic*] employment with DM Bowman will be terminated effective 01/29/2008.³

CX 1. Importantly, when asked if he disputed the letter’s contents, Complainant alleged that the authors should have listed the scheduled delivery time as 6:00 a.m. and not 8:00 a.m. TR 52-53. He also testified that he drove from Martinsburg to Williamsport in an hour rather than 90 minutes. TR 55.

² The regulation contains exceptions to the 14-hour rule that are inapplicable to the instant case. *See* 49 C.F.R. § 395.3(a)(2) (2007).

³ The letter includes a handwritten correction of the misspelling of Complainant’s name in the last sentence.

Respondent has offered evidence contradicting some of Complainant's testimony. Respondent's load manager, Jason Hood, testified that, accounting for time with the customers and stopping, Complainant could have made his deliveries in 12 hours. TR 87-88. Accordingly, Hood testified that the assignments he gave Complainant early on January 28, 2008, would not violate DOT regulations. TR 88. Hood also testified about the apparent discrepancies between Respondent's records—the tractor position records, the Qualcomm log, and Complainant's logbook—and Complainant's testimony. Specifically, the dispatcher sent Complainant all of his tentative load assignments for the day over Qualcomm at 10:18 a.m. TR 95; RX 34, at 8. Hood also explained that the Qualcomm log shows that Complainant also received instructions for his South Charleston trip at 2:41 p.m. TR 100; RX 34, at 10. After requesting and receiving directions to the customer in South Charleston, Complainant informed the terminal that he had the load and was leaving Martinsburg at 6:21 p.m. TR 102; RX 34, at 11. The dispatcher heard nothing further from Complainant that night. TR 104. However, rather than driving directly to the terminal, Complainant drove past Williamsport to Respondent's tractor shop in Hagerstown, Maryland. TR 103-04; RX 34, at 6. Complainant remained there for almost 30 minutes before returning the truck to the Williamsport yard for the night. *Id.* Hood testified that, if Complainant was having issues with his truck, he had no reason to drive to Hagerstown because Respondent's maintenance shop is located at the Williamsport terminal. TR 103-04. Complainant's log reflects that he drove from Martinsburg to Williamsport in 90 minutes; Complainant did not note the Hagerstown detour in his log. RX 33; TR 105. Hood confirmed that the Williamsport terminal is always open and that the dispatch office at the terminal would have been staffed when Complainant abandoned his truck. TR 107.

While Complainant testified that his truck was shaking during the drive back to Williamsport, Price testified that, on January 29, 2008, Complainant claimed that the truck was repeatedly shutting off. TR 141. The termination letter reflects the same. CX 1. Furthermore, while technicians in Respondent's shop performed some repairs on the truck on January 29, 2008, Bowman testified that the problems were "all pretty common complaints." TR 122; RX 30; RX 31. Indeed, he explained that none of the problems would have caused the truck to shake. TR 122. Price testified that, if a truck's engine malfunctions and shuts off, the truck's computer will "throw a code." TR 142. Accordingly, Price testified that he asked the maintenance department "to pull any codes" from Complainant's truck's computer following the termination meeting. *Id.* He testified that the department found no such codes. TR 142-43. In addition, he testified that Complainant explained that "he didn't see any point in going two hours down the road" before having to stop for the night. TR 141. Apparently, Complainant did not mention his alleged illness.

Price also testified about Complainant's termination. Consistent with his termination letter, Price cited two reasons for his decision.⁴ First, Price testified that he terminated Complainant for his failure to communicate to the terminal his decision to return the truck to Williamsport. TR 143-44. Price and Hood testified that Complainant had options other than violating the hours-of-service regulations to ensure that either the load was delivered on time or that the customer received timely notice of any delay. TR 143; TR 106. Second, Price testified that he terminated Complainant because he did not report the truck's alleged malfunction to the

⁴ Price testified that he also would have terminated Complainant for omitting his stop in Hagerstown in his logbook had he been aware of the infraction at the time. TR 144.

maintenance department and continued to drive the truck back to Williamsport, thereby risking serious harm to the engine. TR 144-45; *see* TR 142. According to Hood, Complainant violated company policies by, among other things, failing to communicate his decision to return the truck to Williamsport and abandon his load in the yard. TR 107.

Discussion

To establish a claim under the Act, Complainant must first demonstrate that he engaged in a protected activity, that he was subjected to an adverse employment action, and that a causal connection existed between the protected activity and the adverse employment action. *See BSP Trains, Inc. v. U.S. Dept. of Labor*, 160 F.3d 38, 46 (1st Cir. 1998). Assuming, for the sake of argument, that Complainant engaged in protected activity by refusing to deliver his load in violation of DOT hours-of-service regulations, Complainant has not established a causal connection between his termination and any protected activity.⁵ It is undisputed that Price terminated Complainant because he abandoned his load without informing Respondent's dispatcher. It is equally undisputed that Price terminated Complainant because, at the time, he believed that Complainant risked seriously damaging one of Respondent's vehicles by continuing to drive the malfunctioning truck without notifying the maintenance department. Significantly, Complainant did not dispute Price's stated reasons when he testified about the accuracy of the termination letter's contents.

The record lacks any evidence connecting Complainant's termination to a refusal to violate DOT hours-of-service regulations. Since Complainant has not established his *prima facie* case, his claim must fail.

RECOMMENDED ORDER

IT IS RECOMMENDED that Complainant's claim be DENIED.

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JEFFREY TURECK
Administrative Law Judge

⁵ The Act proscribes retaliation against an employee who refuses to operate a motor vehicle due to "a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." 49 U.S.C. § 31105(a)(1)(B)(ii). An employee must have sought from the employer and failed to obtain a correction of the condition to qualify for the Act's protection. § 31105(a)(2). Since Complainant never communicated any problem with the truck until after he abandoned it, he cannot succeed on his claim under § 31105(a)(1)(B)(ii).

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, Suite S-5220, 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. 64,272 (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.