

U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)



Issue Date: 19 January 2007

CASE NO.: 2006-STA-00013

In the Matter of:

CHAD BERG,
Complainant,

vs.

SWIFT TRANSPORTATION,
Respondent.

Appearances: Chad Berg, pro se

Frank A. Moscato, Esquire,
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

INTRODUCTION

This matter is before me on a request by Chad Berg, the Complainant, for a hearing before the Office of Administrative Law Judges ("OALJ") under the employee protection provision of the Surface Transportation Assistance Act of 1982 ("Act" or "STAA"), 49 U.S.C. § 31105. The Complainant objects to findings issued by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration ("OSHA") on January 6, 2006, which dismissed a complaint he filed on July 13, 2005, alleging that the Respondent, Swift Transportation, violated § 405¹ of the STAA by threatening and harassing him after he engaged in activity protected by the STAA. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules. The OALJ has jurisdiction over this matter pursuant to 49 U.S.C. § 31105 and 29 C.F.R. § 1978.105.

For the reasons set forth below, the Complainant's complaint is DISMISSED.

¹ Section 405 of the STAA was originally codified at 49 U.S.C. § 2305, but it was re-numbered to 49 U.S.C. § 31105 in 1994. References to Section 405 of the STAA will be to 49 U.S.C. § 31105.

DISCUSSION

This case was first set for hearing on April 11 and 12, 2006, in Sioux Falls, South Dakota in a March 9, 2006, Notice of Hearing. Respondent moved for a continuance of that hearing, stating that it had no prior knowledge that the Complainant had asked for a hearing before the OALJ, so it needed time to prepare for the hearing. Respondent also challenged the hearing venue, arguing that the hearing should be in Washington, where the Complainant had worked and where the complaint had been filed.

A review of the record showed that the Complainant had not served Respondent with a copy of his request for a hearing despite instructions in the Administrator's determination to do so. Thus, I granted the motion in an order issued March 16, 2006, and continued the hearing to June 14 and 15, 2006. I indicated that the hearing would be in either Seattle, Washington, or Sioux Falls, South Dakota, and ordered the parties to submit arguments as to the proper venue for the hearing. On April 11, 2006, after both parties responded to my order, I issued a new order notifying them that at the suggestion of the Complainant, the hearing would be held in Minneapolis, Minnesota, which was closer to the Claimant's home in Brookings, South Dakota. I noted that the location could be changed if Respondent paid the Complainant's travel expenses to travel to Seattle for a hearing because of the financial hardship on the Complainant of traveling to Seattle for a hearing.

The hearing was rescheduled to Seattle, Washington, on April 27, 2006, after Respondent agreed to pay the Complainant's travel expenses. In that April 27, 2006, order, I ordered the Complainant to contact Respondent's counsel to make travel arrangements. On May 22, 2006, the Respondent asked for a two week continuance of the hearing, stating that the Complainant had not contacted Respondent's counsel about travel arrangements and Respondent wanted an opportunity to depose the Complainant. This request for a continuance was discussed on May 31, 2006, in a conference call with the Complainant and Respondent's counsel. Respondent's explained that he was still waiting for discovery responses from the Complainant and needed time to evaluate them before the hearing. I ordered the Complainant to respond to Respondent's discovery requests by June 9, 2006. During the conference call, Complainant stated he did not need any information or documents from Respondent to prepare for the hearing. In an order issued June 2, 2006, I continued the hearing to July 18 and 19, 2006.

After the May 31, 2006, conference call, the Complainant submitted discovery requests to Respondent. On July 6, 2006, the Complainant asked that the hearing be continued because he needed additional time to review documents he had obtained from the Respondent in discovery. He also stated that he needed to subpoena documents for his case. Respondent opposed the motion for a continuance, but on July 7, 2006, I notified the parties that I was granting the request and ordered them to notify me as to their availability for alternative hearing dates. In this order, I advised the Complainant that I have no authority to issue subpoenas under the STAA but that I would issue subpoenas so that his witnesses will have them available if they need a subpoena to be excused from work to testify. I advised the Complainant that I could not issue subpoenas for the production of documents and that he would have to get any documents produced voluntarily.

The Complainant did not respond to the Order, but Respondent's counsel indicated he was available on December 12 and 13, 2006. On August 22, 2006, I issued an order notifying the parties that the hearing was now set for hearing in Seattle, Washington on December 12 and 13, 2006. I notified them that I would conduct a telephone pre-hearing conference on December 4, 2006, at 9:00 a.m. and ordered them to file their pre-hearing statements so that they were received by November 27, 2006. On August 28, 2006, the parties were notified of the specific hearing location for the December 12, 2006, hearing.

On September 5, 2006, the Complainant wrote a letter apologizing for failing to respond to my order about the alternative hearing dates and stated that he was available on December 12 and 13. He acknowledged the deadline for receipt of his pre-hearing statement and the date and time of the telephone pre-hearing conference.

On November 20, 2006, the Complainant filed another motion asking for a continuance of one month. He stated that he had had difficulty obtaining documents that he had subpoenaed from various parties and was attempting to contact a potential witness. Respondent opposed the request for a continuance.

The Complainant did not file a pre-hearing statement by November 27, 2006, as required by my order. On November 28, 2006, I issued an order denying the Complainant's motion for a continuance.

On December 4, 2006, I initiated the telephone pre-hearing conference with the Respondent's counsel and the Complainant. I was unable to contact the Complainant at the home phone number that was in the record, or on his cell phone. I left messages for him at both numbers to contact my office about the pre-hearing conference at that time. My law clerk was finally able to successfully contact the Complainant, and I conducted a telephone conference call with him and Respondent's counsel at noon on December 6, 2006.

At that time, I learned the Complainant had not received my order denying his request for a continuance. During the conference call, he informed me that he needed the continuance because he had not received documents that he had sought through a subpoena. I repeated to him the information I had provided in my July 7, 2006, order that the subpoenas he had were unenforceable, so he would be unable to obtain the documents unless they were voluntarily produced. After confirming that he only needed the delay because of the missing documents, I stated that the hearing would proceed as scheduled. I ordered him to submit his witness list immediately. I did not receive one.

The Complainant did not appear at the hearing on December 12, 2006. He did not contact my office to inform me that he would not be appearing, and he could not be reached on his cell phone or his home phone. Messages were left at both phone numbers on December 12, 2006, asking him to call, but he did not return the calls.

On December 14, 2006, I issued an Order to Show Cause requiring the Complainant to show cause why this case should not be dismissed for failure to prosecute. I ordered the Complainant to file his response by January 3, 2007. The Complainant did not respond to the Order to Show Cause.

The Complainant failed to appear at the hearing in this case and has offered no explanation for his absence from the hearing. He has failed to respond to my Order to Show Cause requiring him to explain his absence from the hearing. The regulations at 29 C.F.R. § 24.6(e)(4)(A) provide that a judge can dismiss a claim if the complainant or his or her representative fails to appear at a hearing without good cause.

In view of the Complainant's failure to appear at the December 12, 2006, hearing and his failure to explain his failure to appear, I find there is good cause to dismiss this case for failure to prosecute.

Accordingly, it is hereby ORDERED that the Complainant's complaint in this case be DISMISSED.

A

JENNIFER GEE
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).