U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 September 2006

CASE NO: 2006-STA-00030

In the Matter of:

PAUL WALKEWICZ,
Claimant,

vs.

L&W STONE CORP.,
Employer.

Appearances: Paul Walkewicz
Pro se

Gary D. Babbitt
Hawley, Troxell, Ennis & Hawley LLP
Boise, Idaho
For Respondent

Before: Russell D. Pulver
Administrative Law Judge

Recommended Decision and Order

Paul Walkewicz (the Complainant) alleged that his former employer, L&W Stone Corp. (the Respondent) constructively terminated him in February of 2006 because he refused to drive his commercial vehicle more than the maximum number of hours permitted by a federal motor-carrier safety regulation.[1] On January 6, 2006, the Complainant filed a claim seeking relief under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), codified at 49 U.S.C. § 31104, and the implementing regulations contained at 29 C.F.R. § 1978. He requested damages in the amount that he claims he would have earned had he been dispatched fairly during the time between his alleged protected activity and constructive termination.

[1] Pursuant to 49 C.F.R. § 395.3(a)(2) (West, 2005), "[n]o motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle . . . [f]or any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of § 395.1(o) or § 395.1(e)(2)."

On June 8, 2006, a hearing was held on the merits in Sacramento, California. The Respondent was represented by counsel and the Complainant appeared *pro se*. Ms. Tina Wilhelm appeared as a witness for the Complainant, and he also testified on his own behalf. Mr. Scott Laine, Ms. Janet Stice, and Mr. Jon Danley testified on behalf of the Respondent. The following exhibits were admitted into the record: Administrative Law Judge's exhibit (ALJ) 1, Respondent's exhibits (RX) 1-16, and Complainant's exhibits (CX) A-P, excluding I.

At the close of the hearing I requested that the parties submit their post-trial briefs by June 28, 2006.[2] The Respondent timely submitted its brief but the Complainant filed his brief two weeks late. On July 20, 2006, the Respondent moved to dismiss the Complainant's closing brief on the ground of timeliness. Courts act with leniency toward *pro se* complainants who violate technical rules. *Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir.1986); *Pembrook v. Wilson*, 370 F.2d 37, 39-40 (9th Cir.1966). *But c.f. Flener v. H.K. Cupp, Inc*., 90-STA-42 (Sec'y Oct. 10, 1991) (explaining that while a *pro se* complainant is held to a lower standard with respect to procedural matters, the burden to prove the elements of the claim is no less than when one is represented by counsel). Here, both parties' briefs summarized testimony and provided rebuttal arguments. I find it is more useful to understand fully each respective position, than to exclude one for the sake of tardiness, especially in the case of a *pro se* complainant. Therefore L&W's request is denied, and the Complainant's brief was considered in determination of this claim.

Stipulations

1) There was an employer/employee relationship at the time of the alleged adverse action and constructive termination.

2) There is a decreased demand in the stone produced by the Respondent in the winter months.

Issue

1) Whether the Respondent was motivated by a discriminatory purpose when it reduced the Complainant's driving assignments.

Findings of Fact

The Respondent is a stone company with quarries in Idaho and Oklahoma, and distribution centers in New York, Oklahoma, Idaho, Southern and Northern California. TR at 122. The principal stone quarry is located near Challis, Idaho, where winter weather slows or stops production when it becomes severe. TR at 123. Mr. Scott Laine, the Respondent's CEO, testified that during the winter months the Respondent typically lays off over sixty people, and

[2] On June 13, 2006, copies of the Complainant's exhibits were sent to the Respondent, and a letter to that effect was sent to both parties. Post-trial briefs were due 15 days from receipt of that letter.

that the winter of 2005-2006 was the worst economic slowdown his company had ever experienced. TR at 122-126.

The Complainant began working for the Respondent at the Orland, California distribution center as a relief driver in April of 2002. TR at 52. In May of 2003, he stopped driving to work as the full-time caregiver of his children. TR at 65. Over the next two years he filled-in about a dozen times as a relief driver. TR at 67. In August of 2005, he returned to driving for the Respondent full-time. TR at 52. He was one of six available drivers when this dispute arose.[3] TR at 46.

On September 20, 2005, the Complainant delivered a load of rocks to Mr. Laine's home just outside of Chico. TR at 99. He testified that his supervisor, Jon Danley, instructed him to pick up a loader (used to take the rock off of the truck bed) and take it to a repair center in Chico. *Id.* When he arrived, however, the Complainant received different instructions to take the loader to Willows. *Id.* On his way to Willows, a California Highway Patrol officer pulled him over and cited him because his license was covered by a ramp extension, and for two other non-moving violations. TR at 97. After the officer released him, the Complainant called Mr. Danley who confirmed that the loader should go to Chico, not to Willows. TR at 101.

Mr. Laine testified that he was driving his own truck through Chico when he witnessed the Complainant driving too quickly. TR at 129. Mr. Laine called and reported his observation to Mr. Danley, who called the Complainant and told him to slow down. TR at 101. The Complainant protests that he was driving very carefully because he had never hauled a piece of heavy equipment before, and that he was driving 48 miles-per-hour in a 55-miles-per-hour zone. TR at 102. He claims that he was never cited or reprimanded for this incident, save Mr. Danley's relayed message from the CEO that he slow down. TR at 103.

On October 5, 2005, the Complainant had to make deliveries to two places – the first in Modesto, and the second in Merced. TR at 68. He testified that he got lost, but figured he could still complete the work if he went to Merced first. TR at 69. He arrived there, but unloading the product was more difficult because he had not yet gone to Modesto. TR at 70. The load destined for Modesto was taken off the truck, and then reloaded by the customer, but poorly done such that when he arrived in Modesto the stone had to be carried off by hand, which took an hour longer than usual and caused him some stress. *Id.*

On October 6, 2005, the Complainant nearly lost his cargo when the baskets that keep the stone from falling off of the truck had separated from their wooden pallets. TR at 71. While mid-route, he noticed the problem before the stone fell through the baskets, and he stopped his truck. TR at 72. The Complainant called Mr. Danley and told him that he "did not get paid to deal with stress like this" and that he planned to leave the truck for the company to retrieve. EX 9. The Complainant testified that the management knew the baskets were faulty. TR at 74. Mr. Danley convinced the Complainant not to abandon the truck. TR at 73.

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[3] The Respondent provided evidence that it had seven drivers from December 1, 2005 through January 6, 2006, but one was on family leave or vacation all but 2 days during that time.

The following day, Mr. Danley and Mr. Ben Pressley, the company's chief operating officer, called the Complainant into a meeting. TR at 73. The Complainant was accompanied by his wife, and he apologized for threatening to leave the truck. *Id.* He explained that he was under stress because he was not sleeping well, and he requested that he be staffed for shorter routes on days after he works a longer haul. TR at 74-76. Mr. Pressley agreed to try to accommodate him. TR at 54, 76; EX 9. The Complainant contests that this meeting had anything to do with his dependability because he was not formally reprimanded. TR at 55. Mr. Pressley later described this meeting as one where the Complainant "went on-and-on describing different challenges that he had his wife were having at home with their children." EX 9.

The Complainant alleges he engaged in protected activity on December 19, 2005. TR at 78. He began his shift at midnight. TR at 64 He delivered his cargo and on his return he was only miles away from the Employer's yard when he ran out of gas. TR at 65. By that time it was 3:00 P.M. and he had been working for the maximum time allowed for one shift – 15 hours. TR at 64. The Complainant called Mr. Danley to report that he had broken down, and that he could not drive even the few miles back to the yard because he was "out of hours." *Id.* Mr. Danley told the Complainant that he thought there was an exception where a driver could exceed his maximum hours in the event of an emergency. TR at 185

The parties agree that the Complainant called his wife, Ms. Tina Wilhelm, who works for the California Department of Motor Vehicles, to verify this exception. TR at 48. She got in touch with a CHP officer, who explained that there was no such exception and that the Complainant could be fined as much as $1,200 if he were caught driving over the maximum hours. TR at 49. Ms. Wilhelm called Mr. Danley to tell him the Complainant could not drive back. *Id.* Mr. Danley also called the CHP weigh-station in Cottonwood and received confirmation that Ms. Wilhelm's information was correct. TR at 185. The Complainant admits that no one threatened him with termination for refusing to drive the truck back to the yard. TR at 114. He claims, however, that he refused to drive two times, and that after the first Mr. Danley told him there was an exception, but after the second the matter escalated.[4] TR at 78. Mr. Danley testified that when he arrived to service the truck and take it back to the yard, the Complainant "got in [his] face." EX 11.

The Complainant called Mr. Danley on December 21, 2005, and told him that he would bring all of his company property to the meeting on the following day because he thought he would be terminated. EX 11. Mr. Danley told him he knew of no such plans. *Id.* The actual purpose of the meeting was to give the employees bonus checks, and the Complainant received one, too. *Id.* Also on the day of this meeting, the Complainant made two vacation requests: the first for an additional day off for a vacation from January 16th through the 23rd, 2006; and the second for July 24 through August 4, 2006. EX 4, 5. Mr. Danley granted both requests. *Id.*

The Complainant admits that it is typical for business to slow down during the week between Christmas and the New Year. TR at 80. He alleges that when business started to pick-

[4] In his post-trial brief, the Complainant alleges that Mr. Danley became aggressive and told him to "just drive the f***ing truck to the yard, OK?" Mr. Danley asserts that he never used the "f" word while he was talking to the Complainant. EX 11.

up again in the second week of January, he was assigned only once or twice while other drivers received more assignments. However, he filed his complaint with OSHA on January 6, 2006 – in the first week of January. Soon afterwards, the Complainant found a new job with a different trucking company. On February 8, 2006, the Complainant resigned, citing his reduced earning opportunity. EX 15.

Conclusions of Law

The STAA prohibits discrimination against an employee who refuses to operate a vehicle when "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C. § 31105(a)(1)(B)(i). Congress extends whistleblower protection to employees in the transportation industry because these employees are often best situated to discern safety violations. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

Retaliation against an employee in violation of the STAA may be proven with either direct or circumstantial evidence. Here, there is no direct evidence of retaliation because the Complainant admitted that no one threatened him with termination if he did not drive the truck back to the yard. Therefore, the Complainant relies on circumstantial evidence.

Ordinarily, it is a complainant's burden to establish by a preponderance of evidence that: 1) he engaged in protected activity; 2) the employer was aware of the conduct; 3) the employer took an adverse action against him; and 4) the existence of a causal link or nexus between the adverse action and the protected activity so as to justify an inference of retaliatory or discriminatory motive. *BSP Trasp. Inc., v. U.S. Dept. of Labor,* 160 F.3d 38, 46 (1st Cir. 1998); *Byrd v. Consolidated Motor Freight,* 97-STA-9 (ARB May 5, 1998). Once a complainant satisfies his *prima facie* case, he is entitled to a presumption that the protected activity was the reason for the adverse action, and the burden-shifting framework of *McDonell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies.[5]

Where a case has been tried fully on the merits, however, there is no particular need to determine whether the employee has established a *prima facie* case. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-16 (1983) (Title VII). Instead, "the relevant inquiry" is whether an employer was motivated by a discriminatory purpose when it took adverse action against a complainant. *Pike v. Public Storage Companies, Inc.*, ARB 99-072, ALJ 1998-STA-35 (ARB Aug. 10, 1999) (placing emphasis on the causal link between the complainant's discharge and the protected activity); *Ass't Sec'y & Ciotti v. Sysco Foods Co. of Philadelphia*, 97-STA-30 (ARB July 8, 1998). This ultimate burden of persuasion remains on the complainant. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Although a full analysis of the Complainant's *prima facie* case is unnecessary because this case was tried fully on the merits, the following

[5] When the employer responds to the employee's *prima facie* case by offering evidence of a legitimate reason for the adverse action, then the fact finder must decide whether the employer's motivation was discriminatory. At this stage, the presumption "drops from the case." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10 (1981).

perfunctory treatment is useful to determine the Respondent's motivation. Here, the Complainant engaged in protected activity when he refused to drive over 15 hours. *See* 49 U.S.C. § 31105 (a)(1)(B)(i); *Jackson v. Protein Express*, 95-STA-38 (ARB Jan. 9, 1997) (finding that a refusal to drive is protected activity under the STAA if the driver's perception of the unsafe condition was reasonable at the time). His refusal was reasonable because he knew that violating this safety statute could subject him to a hefty fine. The Complainant spoke his refusal to Mr. Danley, who made the driving-assignment decisions. Thus, the Respondent was aware of this conduct.[6] The Complainant's assignments were reduced after December 19, 2005. Consequently, he made less money. This constitutes adverse action because the Complainant need only establish that the reduction of assignments is reasonably likely to deter him or others from engaging in protected activity.[7] *Ray v. Henderson*, 217 F.3d 1234, 1242-1243 (9th Cir. 2000).

Only the inference of causation is needed to satisfy a *prima facie* case. The temporal proximity between the Complainant's protected activity (on December 19th), and reduced assignments (the Complainant received no assignments on the 20th) raises the inference that the protected activity was the likely reason for the adverse action. *Kovas v. Morin Transport, Inc.,* 92-STA-41 (Sec'y Oct. 1, 1993) (*citing Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir. 1987)).

Having established a *prima facie* case, the burden shifts to the Respondent to provide a legitimate reason for the adverse action. Here, the Respondent argues that business slowed such that fewer assignments were available, and that some drivers received more assignments than the Complainant because he was a less dependable driver. These are legitimate reasons. Therefore, the presumption that the adverse action was caused by the protected activity falls from the case and the Complainant bears the ultimate burden of proving by a preponderance of evidence that the Respondent was motivated by a discriminatory purpose when it reduced his driving assignments.

Discriminatory Purpose

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[6] Ms. Stice, the Respondent's human resources manager, was also aware that the Complainant had filed a grievance with OSHA. TR at 144.

[7] Here, the Complainant alleges that the reduced assignments resulted in his constructive discharge, which, if proven, constitutes an adverse action under the Act. In order to prove constructive discharge, he must show more than mere consequences resulting from an adverse employment decision, such as demotion, failure to promote, or failure to provide equal pay for equal work. *Earwood v. D.T.X. Corporation*, 88-STA-21 (Sec'y Mar. 8, 1991). The working condition must be rendered so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign. *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361-62 (9th Cir. 1987). The Complainant presents no evidence, except his reduced hours yielding less pay, that his work place was so unpleasant that a reasonable person would have felt compelled to resign. To the contrary, the Respondent presents evidence that the company had fewer assignments for all of the drivers, but the Complainant was the only one who quit. This tends to show that a reasonable person would not have felt compelled to resign. Therefore, the Complainant cannot prove that he was constructively discharged. His *prima facie* case survives on the grounds that reduced hours alone constitute adverse action.

An employer's discharge decision must be motivated by retaliation to be actionable. *Clement v. Milwaukee Transport Services, Inc.*, ARB 02-025, ALJ 2001-STA-6 (ARB Aug. 29, 2003). The Complainant provide his travel logs from August 1, 2005 to February 9, 2006, and his pay stubs from December 6, 2005 until January 10, 2006, to show the change in his work schedule after he engaged in protected conduct. These travel logs record the following frequency of his assignments:[8]

	Number of days assigned	Number of hours	Average hours per assignment
August 1 – 31	15	144.5	9.63
September 1 – 30	18	194.5	10.8
October 1 – 31	16	162	10.13
November 1 – 30	17	161.5	9.5
December 1 – 19	12	121	10
***alleged protected activity**			
December 20 – 31	1	12.50	12.50
January 1 – 31	7	60.75	8.7
February 1 – 14	5	55.75	11.15

After December 19th, there was a dramatic reduction in the number of days that the Employer assigned the Complainant, and therefore the number of hours worked was proportionally less.[9] Compared to his assignments before December 19th, it is difficult to ascertain whether he received more short assignments after he engaged in protected activity because there is information for only one full month (January). Although the average hours per assignment in January is slightly lower than the averages of August through December 19th, February is slightly higher.

Despite the temporal proximity between the protected activity and the reduced assignments, this information alone does not prove that the Respondent acted with discriminatory intent. The Complainant admitted that it was typical for the company to slow

[8] All of the information in this chart is supplied in CX A-E and CX F-H, J.

[9] The Complainant's pay stubs reflect lower pay during periods when he worked fewer hours. He received a paycheck for $425 on December 6; for $625 on December 13; for $425 on December 20; for $228 on January 3; for $479.93 on January 10. CX F-H, J.

down for the week between Christmas and New Year, and that it remained slow during the first week of January. TR at 80. He insists, however, that when work began to pick up during the second week of January, other drivers received 3, 4, or 5 assignments, but he only got 1-2.

The Employer counters that the reduction in the Complainant's assignments had nothing to do with his refusal to drive over hours. Instead, it was mainly because there were far fewer assignments to give. TR at 85. Mr. Laine testified that the company's productivity goes through "big ebbs and flows" partly because 80-90% of the business is done between the months of April through November. TR at 123. He explained that the slow period generally lasts through February, but during the winter of 2005-2006, inclement winter weather slowed work down until April. TR at 125. Ms. Stice, the Respondent's human resources manager, investigated the OSHA complaint and concluded that there was no retaliation against the Complainant because "[t]here weren't as many loads available as there were at our peak season just because of the fluctuations of our business." TR at 145. Mr. Danley, who assigned the loads to the drivers, testified that sales were down because of rainy weather. TR at 166. He insists that he did not know of the OSHA complaint, and therefore he could not have considered it when he assigned the loads from December through February. TR at 133, 167.

The Respondent did not lay off any of its drivers during this slow period, but with the reduced number of loads, some drivers received more assignments than others. TR at 128. Mr. Danley gave assignments based on factors like the type of truck needed to haul the material and customer requests for specific drivers, but the most important consideration was driver dependability.[10] TR at 133. Mr. Danley explained that the most dependable drivers "are those that get the loads delivered on time, get the trucks back to the yard so that they can be serviced, take loads to all necessary destinations, do not get citations from CHP that could have been prevented, do not threaten to abandon loads when a problem arises like Paul did back in October, clean their trucks inside and out and have few if any customer complaints." EX 11.

The Respondent offers its schedule of load assignments from December 1, 2005 to January 6, 2006, which shows driver availability and the number of loads per day, as evidence of its staffing considerations.[11] Based on the 27 work days covered in this schedule (excluding Saturdays and Sundays), and 6 available drivers, the Complainant was the only available driver who was not given an assignment just twice (December 20th, and January 6th). On December 21st, the Complainant was 1 of 2 who did not receive assignments. On December 22nd, only 2 drivers received load assignments. All of the drivers, including the Complainant, were on holiday from December 23-26th. On the 27th the Complainant was 1 of only 3 drivers who received assignments. He did not receive an assignment from the 28-30th, but there were only 2

[10] The parties dispute whether the type of truck driven by the Complainant, a double-axel truck with two 27-foot trailers, was one that could have been dispatched more often. This type of truck is better for larger loads and double deliveries, but worse for single-drop customers or those with limited turn space. TR at 165. Although the Complainant insists that there were only two or three sites where it was tough to turn around, and that his truck had more load options than two other trucks in the fleet that could carry only pallets, neither party presents evidence that there was any change in need for this type of truck. Moreover, there was no evidence that there were any customer requests for drivers made at that time. Therefore, I find that these two factors played less significant roles in the reduction of the Complainant's assignments.

[11] All of the evidence cited in this paragraph is found in EX 12.

loads on the 28th, 3 on the 29th, and there were none on the 30th. The next three days were holidays for all of the drivers. There were only 2 assignments on January 3rd. On the 4th, the Complainant received 1 of 4 assignments. He received 1 of 5 on the 5th.

Notably, one of the drivers received fewer assignments because he was out on vacation for most of the time. A second driver who received the same number of assignments was not staffed as often because, according to the Complainant, he had trouble getting to work early enough because of transportation difficulties.[12] TR at 83. Out of six drivers, Mr. Danley ranked the Complainant "in the middle" in terms of dependability, yet he conceded that he does not formally rank the drivers before assigning them.[13] TR at 189. Although this assignment schedule does not show that the Complainant was ranked "in the middle," but rather suggests that he was closer to the bottom, the Complainant presents no evidence that he was just as reliable, or more so, than the drivers who were given more assignments during the slow period.

The Respondent considered the Complainant less reliable than some of the other drivers because: 1) he had to be told to slow down when he was delivering the loader in Chico (EX 6-7); 2) he received a citation from the CHP (TR at 97); 3) he had threatened to abandon his truck (EX 8); 4) he had run out of gas 3 times (TR at 158); and 5) too frequently he returned his truck to the yard too late for the mechanic to service it (EX 10).[14] Mr. Danley further testified that he spoke to the Complainant "a number of times" about the requirement that loads be delivered to a customer by 8 A.M. EX 11. The Complainant insists he knew nothing about that until January 23, 2006. CX K. Even assuming that the Complainant did not know until later that he had to deliver the loads by 8 A.M., he cannot prove that the Respondent was motivated by a discriminatory purpose without more information on the dependability of other drivers.

Additional evidence mitigates against a finding that the Respondent intended to retaliate against the Complainant for the December 19th incident. Three days afterward, the Respondent gave him a bonus check and approved his requests for vacation. The Complainant filed his OSHA complaint during a time that he admitted was still slow – the first week of January. Although he argued that he was not given assignments upon the second week of January, he took vacation from January 16 - 23, 2006. He resigned just two weeks later.

Based on all of the evidence, I find that the business slowed down almost immediately after the protected incident, such that there were fewer assignments to give. The Respondent had legitimate reasons for reducing the assignments given to the Complainant based on these economic factors, as well as issues with his dependability. The Respondent extended good will

[12] Mr. Danley testified that despite this other driver's compromised availability, he found him "very dependable for me." TR at 190.

[13] After December 19, 2005, 1 driver had fewer assignments than the Complainant, 1 driver had the same amount, and 3 drivers had 6, 5, and 4 assignments more. The driver with the most assignments had been with the company for a long time, but the Complainant had been driving full-time for only four months by mid-December. TR at 189.

[14] The Respondent's senior mechanic believed the Complainant was late getting back to the yard 80% of the time. EX 10. The Complainant presented evidence that he was late getting back to the yard only 13% of the time. CX O.

toward the Complainant after the protected incident by giving him a bonus and granting his vacation requests. Therefore, the Complainant failed to meet his burden to prove by a preponderance of evidence that the Respondent acted with a discriminatory purpose.

ORDER

Based on the above findings of fact and conclusions of law, the complaint is hereby DISMISSED.

A

Russell D. Pulver
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, 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.