



April 4, 2017

Mr. Joshua Bailey
c/o Mr. Paul O. Taylor
Tuckers Justice Center
900 West 128th Street, Suite 100
Springfield, MO 65806

Re: FL Transportation, Inc., Traci Wiegert and Rick Pederson/Bailey/7-5880-16-034

Dear Mr. Taylor:

The U.S. Department of Labor has completed its investigation of the above-referenced complaint filed under the whistleblower provision of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105.

A copy of the Secretary's Findings letter is enclosed for your records. Please note that Respondent has 30 days from receipt of the letter and preliminary order to request a hearing on the merits before an Administrative Law Judge.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Crain". The signature is stylized and written in cursive.

Kevin Crain
Assistant Regional Administrator



April 4, 2017

FL Transportation, Inc., Traci Wiegert, Rick
Pederson
c/o Mr. Bill J. Howard
Law Department Manager
7701 Legacy Drive, MD 3A-442
Mail Stop 1580
Plano, Texas 75024

Re: FL Transportation, Inc., Traci Wiegert and Rick Pederson/Bailey/7-5880-16-034

Dear Mr. Howard:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Joshua Bailey ("Complainant") against Frito Lay ("FL") Transportation, Inc. ("the Company"), Traci Wiegert and Rick Pederson (collectively "Respondents") under the Surface Transportation Assistance Act ("STAA") 49 U.S.C. § 31105. In brief, Complainant alleges that Respondents issued him progressive disciplines after engaging in valid work refusals.

Following an investigation by a duly-authorized investigator, the Acting Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration ("OSHA"), Region VII, finds that there is reasonable cause to believe that Respondents violated STAA and issues the following findings:

Secretary's Findings

Complainant was issued progressive disciplines on December 1, 2015, and February 12, 2016. On January 22, 2016, Complainant filed his initial complaint with the Secretary of Labor, which he later amended on February 18, 2016. He alleged in both that Respondents retaliated against him in violation of STAA. As the complaints were filed within 180 days of the adverse actions, they are timely.

Respondents are persons within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31105. They are also a commercial motor carrier within the meaning of 49 U.S.C. § 31101.

The Company is engaged in transporting products on the highways via commercial motor vehicles with a gross vehicle weight rating of 10,001 pounds or more.

Ms. Wiegert is the Logistics/Transportation Manager.

Mr. Pederson is the Senior Transportation Manager.

Complainant, who is employed by the Company as a truck driver, is an employee within the meaning of 49 U.S.C. § 31101.

Complainant and Respondents are, therefore, covered by STAA.

Under STAA, Complainant must show that (1) he engaged in protected activity, (2) Respondents knew or suspected that he engaged in protected activity, (3) he experienced an adverse action, and (4) his protected activity was a contributing factor in the adverse action. If Complainant makes this showing, Respondents, to avoid liability, must show, by clear and convincing evidence, that they would have taken the same adverse action even in the absence of the protected activity.

Under the STAA work refusal provisions, an employee can refuse the operation of a commercial motor vehicle if:

(1) 31105(a)(1)(B)(i): the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

(2) 31105(a)(1)(B)(ii): the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.

Complainant engaged in protected activities when he refused to drive a commercial motor vehicle while ill and fatigued on November 25, 2015, and February 10, 2016.

The evidence indicates Complainant met both work refusal provisions. The evidence shows that if Complainant had operated the vehicle on those two dates, he would have violated 49 CFR 392.3, which states, "No driver shall operate a commercial motor vehicle ... while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle."

The evidence also shows that Complainant engaged in protected activity when he refused to operate his assigned truck based upon a reasonable apprehension of serious injury or death. Complainant submitted evidence to include doctor's notes and associated medications. These medications can cause drowsiness and fatigue.

Respondents do not dispute having direct knowledge of the protected activity. Ms. Wiegert, for example, acknowledged Complainant presented a doctor's note to her on November 25, 2015.

STAA states that "a person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment" because the employee engages in a protected activity.

Respondent employs a no-fault, five-step attendance policy, which establishes progressive discipline for unauthorized absences within a twelve-month period. The final step is termination of employment. Complainant experienced an adverse action on December 1, 2015, when he received a "book-off," or attendance occurrence, and was placed on Decision-Making Leave Status. Additionally, Complainant experienced an adverse action on February 12, 2016, when he received another "book-off" and was placed on Written Status. Under this policy, Complainant was on the path toward termination of employment.

The protected activity was a contributing factor in the adverse action. The two are inextricably intertwined. Because he followed his doctor's advice and refused to operate the vehicle on November 25, 2016, and February 10, 2016, Complainant received progressive discipline. The only way to avoid progressive discipline, therefore, was to ignore his doctor's advice and operate the vehicle while ill. This untenable choice harms drivers who choose to follow the safe course as outlined in 29 CFR 392.3.

Respondents have failed to show, by clear and convincing evidence, that they would have taken the same adverse actions even in the absence of the protected activity.

ORDER

- (1) Respondents shall pay Complainant punitive damages in the amount of \$10,000.00. Respondents' conduct in this particular situation flies in the face of STAA's whistleblower protection provision. Respondents' policy discourages other drivers from refusing to drive while ill or fatigued. This chilling effect strikes at the heart of STAA's whistleblower protection provision.
- (2) Respondents shall pay Complainant compensatory damages in the amount of \$1,500.00. Complainant reported experiencing anxiety due to the progressive nature of the discipline.
- (3) Respondents shall pay Complainant attorney's fees in the total amount of \$5,915.10.
- (4) Respondents shall refrain from retaliating or discriminating against Complainant in any manner for exercising his rights under STAA.
- (5) Respondents shall post for 60 consecutive days the Notice to Employees included with this Order in all areas where employee notices are customarily posted at the facility in Topeka, K.S.
- (6) Respondents shall remove from Complainant's employment records any references to the exercise of his rights under STAA and the attendance-related discipline issued on December 1, 2015, and February 12, 2016.

Respondents and Complainant have thirty 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street NW, Suite 400 North
Washington, D.C. 20001-8002
Telephone: (202) 693-7300; Facsimile: (202) 693-7365

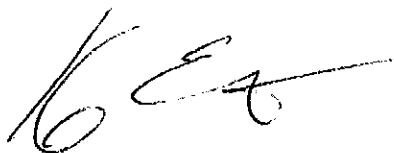
With copies to:

Kimberly Stille
Regional Administrator
U.S. Department of Labor
Two Pershing Square Building
2300 Main Street, Suite 1010
Kansas City, MO 64108

Joshua Bailey
c/o Truckers Justice Center
Attn: Paul Taylor
4601 Weston 900 West 128th Street, Suite 100
Burnsville, MN 55337

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge ("ALJ") in which the parties are allowed an opportunity to present their evidence for the record. The ALJ who conducts the hearing will issue a decision based on the evidence and arguments presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board ("ARB"), to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under STAA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of the complaint. The rules and procedures for the handling of STAA cases can be found in Title 29, Code of Federal Regulations Part 1978 and may be obtained at www.whistleblowers.gov.

Sincerely,



For: Kimberly Stille
Regional Administrator

cc: Complainant's Attorney

USDOL/OALJ-Chief Administrative Law Judge
Federal Motor Carrier Safety Administration
Enclosure