



In the Matter of:

BRIAN HEYWARD,

ARB CASE NO. 2021-0023

COMPLAINANT,

ALJ CASE NO. 2020-STA-00117

v.

DATE: July 29, 2021

BENORE LOGISTIC SYSTEM, INC.,

RESPONDENT.

Appearances:

For the Complainant:

Brian Heyward; *pro se*; Piedmont, South Carolina

For the Respondent:

**A. Jack Finklea, Esq.; *Scopelitis, Garvin, Light, Hanson & Feary, P.C.*;
Indianapolis, Indiana**

**Before: James D. McGinley, *Chief Administrative Law Judge*, Randel K.
Johnson and Stephen M. Godek, *Administrative Appeals Judges***

DECISION AND ORDER

PER CURIAM. This case arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105(a) (2007) (STAA), as amended, and its implementing regulations at 29 C.F.R. Part 1978 (2020).

Brian Heyward (Complainant) started working as a truck driver for Benore Logistic System, Inc. (Respondent) on January 5, 2018. On November 14, 2018, Complainant was selected to participate in a random drug test. He refused to submit to a urinalysis at Respondent's testing area, and was subsequently fired based on that refusal on the same day.

On February 11, 2019, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging retaliation in violation of the STAA. On July 17, 2020, OSHA dismissed the complaint based on its determination that refusing to submit to a drug test is not protected activity.

Complainant requested a hearing before an Administrative Law Judge (ALJ). On February 12, 2021, the ALJ issued an Order to Show Cause as to why the case should not be dismissed for failure to allege a protected activity under the STAA. On March 10, 2021, Complainant filed a response. On March 16, 2021, the ALJ issued a Decision and Order dismissing the complaint (D. & O.). Complainant appealed the ALJ's ruling to the Administrative Review Board (Board).

The Secretary of Labor has delegated his authority to the Board to issue agency decisions in STAA cases.¹ The Board reviews an ALJ's factual determinations under the substantial evidence standard.² The Board reviews the ALJ's legal conclusions de novo.³

Upon review of the record and briefs on appeal, we conclude that the ALJ's D. & O. is a well-reasoned decision based on the facts and applicable law. As a result, we **ADOPT** and **ATTACH** the ALJ's D. & O. and, accordingly, we **DISMISS** Heyward's complaint.

SO ORDERED.

¹ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

² 29 C.F.R. § 1978.110(b).

³ *Olson v. Hi-Valley Constr. Co.*, ARB No. 2003-0049, ALJ No. 2002-STA-00012, slip op. at 2 (ARB May 28, 2004) (citations omitted).



Issue Date: 16 March 2021

CASE NO.: 2020-STA-00117

In the Matter of:

BRIAN HEYWARD,
Complainant,

v.

BENORE LOGISTIC SYSTEM, INC.,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act (“STAA” or “the Act”), 49 U.S.C. § 31105 et seq., and the implementing regulations found at 29 C.F.R. Part 1978. Complainant, Brian Heyward, alleges that he was terminated after refusing to submit to a random urinalysis.

PROCEDURAL HISTORY

On February 11, 2019, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging retaliation in violation of the STAA. On July 17, 2020, after an OSHA investigation, the Secretary of Labor determined that Respondent had not violated the Act. On September 21, 2020, Complainant appealed the Secretary’s determination and requested a hearing before the Office of Administrative Law Judges. On February 12, 2021, I issued an Order to Show Cause requiring Complainant to respond showing cause why this case should not be dismissed for failure to allege a protected activity under the Act. On February 27, 2021, Complainant filed a prehearing statement. On March 5, 2021, in response to Respondent’s request for a continuance, I issued an Order Cancelling the Hearing. In the order, I stated that if Complainant filed a response to the Order to Show Cause that rendered a hearing necessary, the hearing would be rescheduled. On March 10, 2021, Complainant timely filed a response to the Order to Show Cause.

STATEMENT OF FACTS

Complainant worked as a truck driver for Respondent. On November 14, 2018, Complainant was instructed to participate in a Department of Transportation random drug test. He refused to provide a urine sample at the Respondent’s testing area. He returned later, telling Respondent that he would provide a sample at a medical facility instead. Respondent was terminated for refusal to submit to a urinalysis as instructed.

Complainant then filed a complaint alleging that he was terminated for engaging in a protected activity. Complainant alleges that he refused to submit to a urinalysis because the manner in which it was conducted would have been a violation of his privacy under the Department of Transportation's rule at 49 C.F.R. § 40.43. Thus, he argues, refusing to submit to the drug test that he thought was a violation of his privacy is protected activity, and termination for that conduct, he claims, is wrongful.

DISCUSSION

To prevail on his STAA complaint, Complainant must show by a preponderance of the evidence that: (1) he engaged in protected activity, (2) he suffered an adverse employment action, and (3) the protected activity was a contributing factor to the adverse employment action. *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-309, ALJ No. 2008-STA-00020, slip. Op. at 4–5 (May 13, 2014). If Complainant meets his burden of proof, the burden shifts to Respondent to prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 49 U.S.C. § 42121(b); 49 U.S.C. § 31105(b)(1) (incorporating the AIR21 legal burdens of proof). Respondent will escape liability if it meets this burden.

First, Complainant must prove that he engaged in protected activity. The STAA outlines a variety of protected activities for which a person may not discharge, discipline, or discriminate against an employee regarding pay, terms, or privileges of employment because an employee engaged therein. 49 U.S.C. § 31105(a). Those activities include when the employee (A) has filed, is about to file, or is perceived as about to file a complaint related to a violation of commercial motor vehicle safety, (B) refuses to operate a vehicle out of concern for personal or public safety, (C) accurately reports hours on duty, (D) cooperates or is perceived to be cooperating with a safety or security investigation, or (E) furnishes or is perceived to furnish information relating to any accident resulting in injury or death to the Secretary of Transportation, Secretary of Homeland Security, National Transportation Safety Board, or any regulatory or law enforcement agency. 49 U.S.C. §§ 31105(a)(1)(A)–(E).

The alleged protected activity in this case is refusal to submit to a random drug screening. In *Bergman v. Schneider National*, it was undisputed that the complainant was terminated after refusing to take a random drug test as directed. 2004-STA-00019 (March 9, 2004). Administrative Law Judge Jennifer Gee held that refusal to take a random drug test is not an activity protected under the STAA. *Id.* at 2. Judge Gee issued an Order to Show Cause and found that the complainant's response failed to offer a new argument or evidence that would establish that his refusal to take a random drug test was a protected activity. *Id.* at 3. On appeal, the Administrative Review Board ("ARB" or "the Board") affirmed Judge Gee's decision and concluded that "the ALJ was correct to conclude that refusing to take a random drug test is not protected because it is not activity that falls within the STAA's enumerated protected activities." *Bergman v. Schneider National*, A.R.B. No. 03-155 (April 29, 2005).

Here, Complainant was fired for refusing to submit to a random urinalysis. Complainant argues that his refusal was justified due to Respondent's failure to conduct the urinalysis in a

manner that, he claimed, failed to protect his privacy.¹ Refusal to submit to a random drug test is not an enumerated protected activity under the STAA. *See* 49 U.S.C. § 31105. Moreover, the Board has concluded that refusal to take a random drug test is not a protected activity. *See Bergman*, A.R.B. No. 03-155. Thus, I find that Complainant's refusal to submit to a drug test is not a protected activity under the STAA. Therefore, Complainant has failed to allege or prove an essential element of an STAA complaint—that he was engaged in a protected activity.

Because Complainant is unable to establish one of the three required elements to prevail in an STAA complaint, his complaint must be dismissed.²

ORDER

IT IS ORDERED that Complainant's February 11, 2019 complaint alleging that Respondent violated the Act is DISMISSED.

LARRY W. PRICE
Administrative Law Judge

LWP/KRS/jcb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of the administrative law judge's decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

¹ Complainant articulated in his complaint documentation, prehearing statement, and response to the Order to Show Cause that he refused to submit to a random drug screening due to what he perceived as Respondent's failure to protect his privacy. However, these allegations do not change the fact that refusing to submit to a urinalysis is not a protected activity under the STAA.

² Because Complainant has failed to establish one essential element—that he engaged in a protected activity—I do not reach the questions of whether he suffered an adverse employment action or whether the protected activity was a contributing factor to said employment action.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. See 29 C.F.R. § 1978.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1978.110(b).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing will become mandatory for parties represented by counsel on April 12, 2021. Parties represented by counsel after this date must file an appeal by accessing the eFile/eServe system (EFS) at <https://efile.dol.gov/EFILE.DOL.GOV>. Before April 12, 2021, all parties may elect to file by mail rather than by efileing.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at <https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf> an/or the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at <https://efile.dol.gov/contact>.

If you file your appeal online, no paper copies need be filed. During this transition period, **you are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

Self-represented litigants (and all litigants prior to April 12, 2021) may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor

200 Constitution Ave, N.W., Room S-5220
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

<https://efile.dol.gov/support/boards/request-access-an-appeal>

After an Appeal is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.

SERVICE SHEET

Case Name: **HEYWARD_BRIAN_v_BENORE_LOGISTIC_SYST_**

Case Number: **2020STA00117**

Document Title: **Decision and Order Dismissing Complaint**

I hereby certify that a copy of the above-referenced document was sent to the following this 16th day of March, 2021:

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