U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 January 2007

Case No.: **2006-STA-00037**

In the Matter of:

RICK JACKSON,
Complainant,

v.

SNE TRANSPORTATION COMPANY, INC.,
Respondent.

Before: WILLIAM S. COLWELL
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Granting the Respondent's Motion for Summary Decision

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the "Act" or "STAA"), 49 U.S.C § 31105, and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline, or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters.

This case concerns the Complainant's allegation that he was discharged from employment with the Respondent in retaliation for engaging in protected activity, and it is before me on the Complainant's request for a hearing and objection to the determination made by the Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor, after investigation of the Complainant's complaint.

PROCEDURAL HISTORY

On June 21, 2006, this case was assigned to me, and on July 5, 2006, I issued a Notice of Hearing. On June 30, 2006, a preliminary phone conference was held in which the schedule for discovery, for motion practice, and for the hearing was discussed. During this conference, both parties agreed to the following schedule:

- The parties agreed to complete all discovery by October 10, 2006.
- Any dispositive motions were to be filed by November 1, 2006.
- Any responses to such motions were to be filed by November 17, 2006.
- Any replies to such responses were to be filed by December 1, 2006.

On October 19, 2006 – after the agreed close of the discovery period – the Complainant filed a Motion to Compel, and on October 24, 2006, the Respondent filed a response. On October 31, 2006, the Respondent filed a Motion for Summary Decision. On November 3, 2006, the Complainant filed a Motion for Extension of Time in which to respond to the Respondent's Motion for Summary Decision because he also had to respond to a motion for summary decision in another case pending before me (2006-STA-00036) with the same response deadline. He also renewed his Motion to Compel.

On November 15, 2006, I issued an Order explaining that the Complainant was not entitled to his requested extension time on the stated ground because he had voluntarily acceded to identical briefing schedules for both cases during each case's pre-hearing conference. I did, however grant the Complainant a ten day extension in consideration of his *pro se* status. In that order, I set the Complainant's new response deadline as November 27, 2006 and set the Respondent's new reply deadline as December 11, 2006. Additionally, I denied his motion to compel on the joint grounds that it was made after the agreed-upon close of the discovery period and that he had failed to establish that the interrogatory responses he was challenging were in any way unreasonable or unresponsive.

On November 18, 2006, the Complainant submitted a letter in response to the Respondent's motion, and on November 27, 2006, the Complainant submitted an addendum to that response enclosing a letter from one of his past employers.

EVIDENTIARY MATERIALS

The Respondent's Supporting Materials

In support of its Motion for Summary Decision, the Respondent has submitted an affidavit from Patrick Wierzba, the Director of Logistics for SNE Transportation. The Respondent also submitted an affidavit from its attorney of record in this case, Laurie Peterson, which was accompanied by excerpts from the Complainant's deposition in this matter as well as excerpts from his discovery responses. Finally, the Respondent submitted a complete copy of its deposition of the Claimant.

The Complainant's Supporting Materials

The only item submitted by the Complainant is a letter from John Kutz, one of his past employers, attesting to the dates of the Complainant's employment with him and the reason for his termination. The letter is not sworn or notarized. Beyond this letter, the Complainant has submitted no affidavits or other materials in support of his

opposition to the Respondent's motion for summary decision despite my explanation of the importance of such materials in my July 5, 2006 Notice of Hearing and Pre-hearing Order. In that Order I explained, *inter alia*:

> In deciding a motion for summary decision, the judge will consider all evidence in the light most favorable to the non-moving party, but the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings to carry the burden of establishing there is a factual issue in the case…Rather, the non-moving party must set forth specific facts on each issue upon which he would bear the ultimate burden of proof…Consequently, it is very important that the nonmoving party submit affidavits that specifically set forth the facts of the case, along with any additional supporting materials, because the judge will rely heavily on such documents in determining whether there is a genuine issue of material fact to be resolved in the case.

Notice of Hearing and Pre-hearing Order at 4 (July 5, 2006).

DISCUSSION

Standards for Summary Decision

Motions for summary decision in proceedings before an Administrative Law Judge in the Department of Labor are governed by the rules set out in 29 C.F.R. §§ 18.40 and 18.41. Under those sections, an administrative law judge may grant a party's motion for summary decision when "there is no genuine issue as to any material fact and that party is entitled to summary decision." 29 C.F.R. § 18.40(d). This standard is essentially the same as the standard applicable in granting summary judgment under Federal Rule of Civil Procedure 56. ***Hasan v. Burns and Roe Enterprises***, ARB No. 00-080, ALJ No. 2000-ERA-00006 at 6 (ARB Jan. 30, 2001).

If the moving party can establish that there is no genuine issue of material fact and that they are entitled to decision as a matter of law, the burden is shifted to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. ***Seetharaman v. General Electric. Co.***, ARB No. 03-029, ALJ No. 2002-CAA-21 at 4 (ARB May 28, 2004). The non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings to carry this burden, but rather, must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. *Id.*, *citing* ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 256 (1986). If the non-moving party fails to meet this burden as to any of the required elements of his case, all other factual issues become immaterial and there can be no genuine issue of material fact. *Id.*, *citing* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23 (1986). In deciding a motion for summary decision, all evidence must be considered in the light most favorable to the non-moving party. ***Darrah v. City of Oak Park***, 255 F.3d 301, 305 (6th Cir. 2001).

The Seventh Circuit, under whose jurisdiction this case falls, has held that "all pro se litigants…are entitled to notice of the consequences of failing to respond to a summary judgment motion." ***Timms v Frank***, 953 F2d 281, 285 (7th Cir. 1992). That notice must include both the text of Federal Rule of Civil Procedure 56(e) and "a short and plain statement in ordinary English" explaining the consequences of not offering supporting affidavits or documentary evidence in response to such a motion. *Id*.

Because the standard for summary decision is essentially the same as the standard applicable in granting summary judgment under Federal Rule of Civil Procedure 56, the Seventh Circuit's requirement is probably applicable in a case before the Office of Administrative Law Judges involving a *pro se* litigant, like this one. Consequently, I included, in my July 5, 2006 Notice of Hearing and Pre-hearing Order, a notice modeled on the Seventh Circuit's requirements, including both the text of the applicable rules and a plain explanation of the process and its consequences.

Applicable Legal Standards

The three key issues in a whistleblower case are whether (1) the Complainant has engaged in protected activity of which the Respondent was aware, (2) whether the Complainant has suffered adverse employment action, and (3) whether a nexus exists between the protected activity and the adverse employment action. ***Culligan v. American Heavy Lifting Shipping Co.***, ARB No. 03-046, slip op. at 6 (June 30, 2004). In order to prevail, the Respondent must demonstrate that no genuine issue of material fact exists as to any one of these three issues and that it is entitled to judgment as a matter of law on that issue. If the Respondent carries that burden and the Complainant cannot put forth any specific facts that would establish a genuine issue of material fact on that issue, then the other issues fall away, and the Respondent is entitled to summary decision as a matter of law.

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

> (a) Prohibitions:
>
> > (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because:
> >
> > > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; ...

49 U.S.C. § 31105(a).

Application to this Case

In this case, the second element of the whistleblower claim, whether or not the Complainant has suffered adverse employment action, is conceded. The Respondent concedes in its brief in support of its motion for summary decision that the Complainant was terminated and that his termination constitutes adverse employment action within the meaning of 49 U.S.C. § 31105(a)(1). The Respondent does not concede, however, that the Complainant engaged in any protected activity, that it was aware of any such activity if he did, or that there was any causal connection between his alleged protected activity and his termination.

Under 49 U.S.C. § 31105 (a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. ***Yellow Freight System, Inc. v. Martin***, 954. F.2d 353, 356-57 (6th Cir. 1992); *see also* ***Lajoie v. Environmental Management Systems, Inc.***, 1990-STA-00031 (Sec'y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. ***Nix v. Nehi-R.C. Bottling Co.***, 1984-STA-00001, slip op. at 8-9 (Sec'y July 4, 1984).

In this case, the Complainant has failed to identify his alleged protected activity in any of his submissions to this court. Even the handwritten, original complaint submitted to OSHA speaks almost exclusively about a related claim against another company and provides no details about the Complainant's claim against the Respondent in this matter. The only indication of the Complainant's theory of this case contained anywhere in the record is in a Case Activity Worksheet prepared on April 24, 2006 by OSHA Investigator Calvin Fernstrum.

The Case Activity Worksheet, like the Complainant's handwritten, original complaint, was provided to the Office of Administrative Law Judges ("OALJ") by OSHA as an attachment to the Secretary's Findings issued after OSHA investigated this matter. This Worksheet was prepared as part of that OSHA investigation. In the box labeled "Allegation Summary," Fernstrum indicated that the Complainant alleged he had been terminated by the Respondent in retaliation for complaining to management about "being assigned dispatches which were illegal (i.e. beyond the hours of service)" and about "being required to drive beyond 11 hours/day; work beyond 14 hours/day; and not getting a full 10 hours rest as required by FMCSR."

This allegation summary, however, does not identify with adequate specificity what the Complainant's protected complaints actually were, when they were made, to who they were made, or what form they took, and none of the Complainant's submissions since this case was assigned to me have provided any additional information from which I could determine what specific protected activity the Complainant alleges he took.

In stark contrast, the Respondent has provided affidavits and other materials that support its contention that no protected activity of which it was aware took place. First, the Respondent has provided the affidavit of Patrick Wierzba, Director of Logistics for the Respondent. In this affidavit, Wierzba explains, *inter alia*, that the Complainant made only three runs for the Respondent during his twenty-one day tenure there and that all three runs were completed in accordance with the rules and regulations of the Department of Transportation ("DOT"). Wierzba Affidavit at 2-3. Wierzba also states that:

> 29. During the course of his employment, [the Complainant] never alleged any violations of the motor carrier safety regulations by SNE Transportation nor did he threaten to complain to any agencies or file any complaints of such violations.
>
> 30. During the course of his employment, [the Complainant] never refused to operate any vehicle of SNE Transportation because it was unsafe or he perceived it to be unsafe.

Wierzba Affidavit at 4. Finally, Wierzba describes a conversation between the Complainant and a dispatcher for the Respondent in which the Complainant informed the dispatcher "that he would run his truck legally" and the dispatcher "responded that is good, because [the Respondent] requires that [the Complainant] run his truck legally." Wierzba Affidavit at 5.

Wierzba's affidavit is supported on this issue by the Complainant's discovery responses, which have been provided by the Respondent. In the Complainant's answers to the Respondent's Requests to Admit, the Respondent admits that he completed his solo driving for the Respondent "within the hours of service restrictions," and he admits that all of his log entries for his solo driving for the Respondent "were truthful and logged as legally required."

The Complainant has submitted no affidavits or supporting materials to challenge the affidavit and evidence supplied by the Respondent. Moreover, he has failed to identify a single specific fact in support of his case that he could prove in order to create a genuine issue of material fact. Instead, he has used his response brief to rail against what he perceives to be the injustices inherent in the legal system generally, including the "special interest money…as we have here buys influence in our entire legal system and not just O.S.H.A., Dept. of Labor, etc." and the "biased" judges. He also discusses some depositions that he allegedly took but has failed to ever submit to this tribunal.

I find that the Respondent has carried its burden of establishing that no issue of material fact exists as to this element of the Complainant's case and that it is entitled to decision on this issue as a matter of law. I also find that the Complainant has failed to carry his burden of setting out specific facts related to this element adequate to create a genuine issue of material fact. Because the Complainant has failed to meet his burden

as to this required element of his case, all other factual issues are immaterial and there can be no genuine issue of material fact. ***Seetharaman v. General Electric. Co.***, ARB No. 03-029, ALJ No. 2002-CAA-21 at 4 (ARB May 28, 2004), *citing* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23 (1986). Therefore, the Respondent is entitled to summary decision in this case.

Even if the Complainant could establish a genuine issue of material fact as to whether or not he engaged in protected activity, however, the Respondent would still be entitled to summary decision because the Respondent has also carried its burden with regard to the third issue, causal connection. According to the allegation summary discussed *supra*, the Complainant is alleging that he was terminated because of unspecified complaints he made regarding some unspecified hours of service violation. The Respondent, however, has provided extensive evidence supporting its contention that the Complainant was discharged for falsifying his employment application.

Wierzba recounts in his affidavit the chain of events leading to the Complainant's termination. He states:

> 16. On November 23, 2005, as part of the safety manager's injury investigation, the Company discovered an inconsistency with [the Complainant's] employment application.
>
> 17. [The Complainant's] application stated that he worked for Kutz Trucking until October 2005.
>
> 18. A medical report from Mercy Health noted that [the Complainant] told the doctor he had not worked since July 2005.
>
> 19. My safety manager called John Kutz of Kutz Trucking to verify [the Complainant's] dates of employment.
>
> 20. My safety manager reported to me that Mr. Kutz states that [the Complainant] had not worked for him since October 2004, except for a run for cash in February 2005.
>
> 21. As part of her accident and injury investigation, my safety manager looked at previous Labor and Industry claims for prior injury claims and found another discrepancy on the employment application.
>
> 22. The safety manager showed me a document stating that [the Complainant] was discharged from Stoughton Trucking, a previous employer, for insubordination and log violations.
>
> 23. [The Complainant's] application states that he left Stoughton Trucking because of a slow season.

24. The Company employment application states that any misrepresentations will lead to discharge.

25. After reviewing the misrepresentation on [the Complainant's] employment application and verifying the misrepresentations, [the Complainant] was discharged for those misrepresentations.

26. [The Complainant] admits those misrepresentations.

27. [The Complainant] also admits further misrepresentations in that he left other employers off of his employment history.

Wierzba Affidavit at 3-4. He also states that he has discharged another employee for similar misrepresentations on his employment application. Wierzba Affidavit at 4.

The Respondent has also provided evidence – in the form of the Complainant's deposition testimony – that corroborates Wierzba's explanation of events. In his deposition testimony, the Complainant admits each of the alleged misrepresentations on his employment application, admits that he's familiar with the DOT requirement that drivers accurately report their past driving history, admits that he read the instructions on the employment application, admits that he was aware that misrepresentations could result in his discharge, and admits that he falsified the application anyway. Deposition of Rick Jackson (October 6, 2006) at 10-16. The Complainant's answers to the Respondent's Requests to Admit are also corroborating. In them, the Complainant admits to specific misrepresentations as well as to generally having falsified his employment application.

In contrast, the Complainant has provided no affidavits or other supporting materials to demonstrate that some genuine issue of material fact exists as to this issue. As discussed *supra*, the Complainant has used his response brief to criticize the legal system and discuss depositions he allegedly took but has failed to submit rather than to set forth some specific facts he could prove that would establish a genuine issue of material fact as to this issue. Moreover, the only supporting document he has provided is a letter from John Kutz regarding his dates of employment and discharge, which the Complainant claims "contradicts the Respondent's position on what Mr. Kutz told them." This letter is not sworn or notarized, but even if it were, it confirms the Respondent's position rather than contradicting it as the Complainant claims. Kutz writes that the Complainant was let go in October 2004, which is the same end of employment date Wierzba reports in his affidavit that his safety manager discovered during her investigation. Wierzba Affidavit at 3.

In light of this overwhelming evidence of a legitimate, non-discriminatory business purpose for the Complainant's discharge and the complete absence of any evidence supporting a causal connection between some alleged protected activity and the Complainant's discharge, I find that the Respondent has carried its burden as to this issue and that the Complainant has failed to carry his burden as to this issue. Thus,

even if the Complainant could have established that there was some genuine issue of material fact as to his having engaged in protected activity, the Respondent would still be entitled to summary decision because there is no genuine issue of material of fact as to the issue of causal connection. Thus, I find that the Respondent is entitled to summary decision in this case.

RECOMMENDED ORDER

It is hereby ORDERED that the Respondent's Motion for Summary Decision be GRANTED and the Complainant's complaint be DISMISSED.

A

WILLIAM S. COLWELL
Administrative Law Judge

Washington, D.C.
WSC:MAWV

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