U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 20 February 2007

Case No.: **2007-STA-00003**

In the Matter of:

JAMES T. HOLLENBECK, JR.,
Complainant,

v.

UNIVERSAL FUEL, 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 shut out from receiving new driving assignments with the Respondent in retaliation for engaging in protected activity, and it is before me on the Complainant's objection to the determination made by the Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor, and his request for a hearing before the Office of Administrative Law Judges ("OALJ"), U.S. Department of Labor.

PROCEDURAL HISTORY

On October 13, 2006, this case was assigned to me, and on November 2, 2006, I issued a Notice of Hearing. On October 31, 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 that they did not require time for discovery.
- Any dispositive motions were to be filed by December 1, 2006.
- Any responses to such motions were to be filed by January 3, 2007.
- Any replies to such responses were to be filed by January 17, 2007.

On November 29, 2006, the Respondent filed a Motion for Summary Decision. The January 3, 2007 deadline for response passed without the Complainant submitting any response. On January 8, 2007, the Respondent submitted a reply brief. No response of any kind to either filing was received from the Complainant.

EVIDENTIARY MATERIALS

The Respondent's Supporting Materials

In support of its Motion for Summary Decision, the Respondent has submitted as Exhibit 3 a detailed affidavit from Charles Evans, the Assistant General Manager for the Respondent. The Respondent has also submitted as Exhibit 1 a "Memorandum for Record" from Brian DeLong, who is a Contracting Officer for the Defense Energy Support Center. The Memorandum is signed but not sworn or notarized.

The Respondent has also submitted as Exhibit 2 a copy of the Secretary's Findings from the OSHA investigation. In accordance with 29 C.F.R. § 1978.106(a), however, reviews of claims under the STAA by the OALJ are conducted *de novo*, and therefore, the Secretary's Findings carry no evidentiary weight in my determination.

The Complainant's Supporting Materials

The Complainant has submitted no brief in opposition to the Respondent's motion for summary decision and no affidavits or other materials in support of his claim despite my explanation of the significance of motions for summary decision and of the importance of such materials in my November 2, 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 3-5 (November 2, 2006). I also explained that, if a judge determines that there is no genuine factual issue in the case, "the judge will decide the case as a matter of law without holding any hearing." Notice of Hearing and Pre-hearing Order at 4 (November 2, 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 Fourth Circuit, under whose jurisdiction this case falls, has held that prison inmates proceeding in court *pro se* are entitled to "be advised of [their] right to file counter-affidavits or other responsive material and alerted to the fact that [their] failure to so respond might result in the entry of summary judgment against [them]." ***Roseboro v Garrison***, 528 F.2d 309, 310 (4th Cir. Oct. 15, 1975). The Fourth Circuit has so far declined to extend that requirement to *pro se* litigants who are not prisoners. ***Amzura Enterprises, Inc. v. Ratcher***, 18 Fed.Appx. 95, 105 at n.11 (4th Cir. Sep. 07, 2001) (*unpublished*).

Although not clearly required by the Fourth Circuit, I elected to provide such notice to the *pro se* Complainant in this case 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. Consequently, I included, in my November 2, 2006 Notice of Hearing and Pre-hearing Order, an explanation of both the text of the rules applicable to motions for summary decision 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, ALJ Nos. 2000-CAA-20, 2001-CAA-9 and 11 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

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 made no submissions to the court and, as a result, has failed to ever identify for this court what his alleged protected activity was. The only indication of what the alleged protected activity might have been is in the Respondent's Motion for Summary Decision. In that document, the Respondent indicates that, in January 2006, the Complainant "filed some type of complaint with the U.S. Department of Transportation (USDOT) that included allegations that [the Respondent] was not in compliance with all aspects of a mandatory random drug and alcohol screening program for [the Respondent's] refuelers/drivers." Respondent's Motion for Summary Decision at 2-3.

As described *supra*, the standards for identifying protected activity under the STAA are extremely broad, and making the type of complaint described to the Department of Transportation would almost certainly qualify. Since the Respondent concedes that some such complaint was filed, I will assume for the purpose of deciding this motion that the Complainant did make some such complaint and that making that complaint constituted protected activity.

The second issue is whether the Respondent took adverse employment action against the Complainant, specifically whether it "discharge[d]…discipline[d] or discriminate[d]…regarding pay, terms, or privileges of employment." 49 U.S.C. §31105(a)(1). With regard to this issue, it appears that the Complainant alleged that he was not given any more driving assignments by the Respondent after January 2, 2006. This is the adverse employment action addressed both by the Secretary's Findings and by the Respondent's Motion for Summary Decision. Respondent's Motion for Summary Decision at 4 & Ex. 2. Again, though, this is essentially guesswork since the Complainant has made no submissions to the court and has failed to ever identify for this court what adverse employment action he is alleging.

The Respondent has offered the affidavit of Charles Evans, which contains an explanation of the distribution of driving assignments during the relevant period. He explains that the Complainant was a part-time refueler/driver and that such drivers sign up to work the shifts for which they are available. Evans Affidavit at 3. He explains further that, from the drivers who have signed up as available for each shift, the Respondent generally assigns work in order of seniority, though it may make exceptions to train new drivers or in cases where a driver is needed at the "last minute." Evans Affidavit at 3.

Evans states that, from January 9, 2006 until March 5, 2006, the Complainant signed up for shifts on 32 different work days. Evans Affidavit at 4. He then explains that each of the part-time refuelers/drivers used during this time period had more seniority than the Complainant except for Ernesto Cendana. Evans Affidavit at 4. Evans explains that Cendana was used on February 13-19, 2006 and on March 1-5, 2006 because he was being trained. Evans Affidavit at 4. He also states that Cendana

was originally hired in March 2005 but was not assigned to train as a refueler/driver until after he had obtained the necessary licenses to transport hazardous materials. Evans Affidavit at 4-5. Additionally, Evans points out that the amount of work available for part-time refuelers/drivers was reduced beginning in early February 2006, because the Navy eliminated a special project which in turn reduced the flight schedule. Evans Affidavit at 4.

The Respondent's affidavit makes clear that no particular action, adverse or otherwise, was taken with regard to the Complainant. During the few weeks in question, the amount of available work decreased, more senior drivers were available for all shifts, and a new driver was trained over a number of days. What work there was was given out as it always had been. The fact that this confluence of factors resulted in a lack of shifts available for the Complainant to drive during these weeks does not reveal any active adverse employment action. As explained *supra*, the Complainant has offered no response to this motion and has set forth no specific facts related to this issue that could establish a genuine issue of material fact.

I find that the Respondent has carried its burden of showing that no issue of material fact exists as to this issue and that it is entitled to decision on this issue as a matter of law. The Complainant, however, has failed to carry his burden of setting forth specific facts from which some issue of material fact could be discerned. Therefore, I find that the Respondent is entitled to summary decision on this issue. Consequently, 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 adverse employment action was taken, 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 denied driving assignments because he made a complaint to the Department of Transportation. The Respondent, however, has provided evidence supporting its contention that the Complainant was not given driving assignments during the relevant period for legitimate, non-discriminatory business reasons, and the Complainant has failed to set forth any specific facts to create a genuine issue of material fact as to this issue.

In addition to making it clear that no adverse employment action even occurred, the explanations in the Evans affidavit also make it clear that, even if the lack of driving assignments were characterized as an adverse employment action, there was no causal connection between the lack of assignments and the alleged protected activity. As explained *supra*, Evans states in his affidavit that, during the few weeks in question, the amount of available work decreased, more senior drivers were available for all shifts, and a new driver was trained over a number of days. Lack of available shifts,

rewarding seniority, and developing new employees are all legitimate, non-discriminatory business reasons for making employment decisions.

In light of this evidence of legitimate, non-discriminatory business purposes for the lack of driving assignments and the complete absence of any evidence supporting a causal connection between the alleged protected activity and the Complainant's failure to receive driving assignments during the relevant period, I find that even if the lack of assignments was interpreted to be an adverse employment action, 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 suffered adverse employment action, 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. Consequently, 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.

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 directed to the Board.