U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 June 2005

In the Matter of:

KEVIN J. HUSEN,
Complainant,

CASE NO: 2005 STA 8

v.

WIDE OPEN TRUCKING, INC.,

and

JEREMY RUNYON,
Respondents.

RECOMMENDED DECISION AND ORDER
AWARDING DEFAULT JUDGMENT

Statement of the Case

This case involves a claim of retaliatory discrimination under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (STAA or Act). On September 27, 2004, Complainant, Kevin J. Husen, filed a Complaint with the United States Department of Labor alleging that Respondents, Wide Open Trucking, Inc. (Wide Open) and Jeremy Runyon, violated the employee protections provisions of the STAA by retaliating against him for notifying the Federal Motor Carrier Safety Administration (FMCSA) of Respondents' hiring and drug testing practices.

Following receipt of the Complaint, the Occupational Safety & Health Administration (OSHA) undertook an investigation pursuant to 29 C.F.R. Part 1978. On November 5, 2004, the area director of OSHA advised Complainant that, despite several attempts, OSHA was unable to serve notice of the claim upon Respondents, and thus, dismissed the Complaint. Complainant filed a timely objection to OSHA's findings and requested a formal hearing. A hearing was scheduled for January 25, 2005 in Washington, DC by Notice of Hearing dated December 8, 2004.[1]

On January 18, 2005, Complainant filed a *Motion to Vacate Hearing Setting*. Complainant requested that this tribunal vacate the hearing pending review of Complainant's

[1] The *Notice of Hearing and Prehearing Order* was mailed to Respondents by regular and certified mail at 408 Upplanda Street, Buffalo, MN 55313. Neither has been returned to sender. Complainant filed a waiver of time restrictions on December 8, 2004.

Motion for Summary Decision, filed January 14, 2005, and order Respondents to show cause why the motion should not be granted. On January 18, 2005, this tribunal issued an order canceling the hearing scheduled for January 25.[2] *Order Canceling Hearing* (Jan. 18, 2005). On January 26, 2005, this tribunal ordered Respondents to show cause as to why summary decision should not be granted in this case.[3] *Order to Show Cause* (Jan. 26, 2005). Respondents were given until February 4, 2005 to respond. *Id.* They failed to do so.

On April 1, 2005, this tribunal issued an *Order Denying Summary Decision and to Show Cause* finding that, to date, Complainant had not proved that there was "no genuine issue as to any material fact" and was therefore not entitled to summary decision. Specifically, this tribunal found that Complainant had not proved that Respondent's alleged adverse action was in retaliation for Complainant's protected activity. Complainant was ordered to show cause why the claim should not be dismissed for failure to state a claim upon which relief could be granted.

On April 19, 2005, Complainant responded with a *Declaration of Kevin J. Husen Submitted in Response to Order to Show Cause* and *Complainant's Brief in Response to Order to Show Cause.* Both the Declaration and the Brief alleged that Respondent's failure to pay Complainant his earned wages was direct retaliation for Complainant's threat to file a complaint with the FMCSA and for carrying out that threat.

On May 31, 2004, Complainant submitted a *Motion for Entry of Default Judgment*; *Complainant's Brief in Support of Motion for Entry of Default Judgment*; an *Affidavit of Paul O. Taylor*; and an *Affidavit of John P. Taylor*. Complainant requested that this tribunal enter a default judgment against Respondents or, alternatively, sanction Respondents by taking as established the facts alleged in the Complaint. *See* 29 C.F.R. § 18.6(d)(2).

The facts averred under oath in this case, which have not been contested, establish that Complainant began working as a truck driver for Wide Open on August 10, 2004. *Affidavit of Kevin J. Husen* (Jan. 14, 2005). While Complainant was employed by Wide Open, Jeremy Runyon was the sole supervisor and Chief Executive Officer of Wide Open. *Id.* On August 20, 2004, Runyon told Complainant that he would be paid on August 27, 2004. Complainant did not receive this paycheck. At the end of the workday on August 27, 2004, Complainant told Runyon that he would not work until he was paid. Runyon then terminated Complainant. *Id.*

On August 30, 2004, Complainant sent a letter to Respondents demanding payment for his work. *Id.* Complainant also told Respondent, Jeremy Runyon, that he intended to report Respondents to the FMCSA concerning Respondents' hiring and drug testing practices. On

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[2] The *Order Canceling Hearing* was mailed to Respondents via regular and certified mail at 408 Upplanda Street, Buffalo, MN 55313; 609-B Summit Drive , Buffalo, MN 55313; and P.O. Box 563, Annandale, MN 55302. The certified copies sent to Upplanda Street and 609-B Summit Drive have been returned "unclaimed." The certified copies sent to P.O. Box 563 were not returned. None of the copies sent via regular mail were returned to sender.

[3] The *Order to Show Cause* was mailed to Respondents via regular and certified mail at 408 Upplanda Street, Buffalo, MN 55313; 609-B Summit Drive , Buffalo, MN 55313; P.O. Box 563, Annandale, MN 55302; and P.O. Box 394, Buffalo, MN 55313. The certified copies sent to Upplanda Street, 609-B Summit Drive, and P.O. Box 394 have been returned "unclaimed." The certified copies sent to P.O. Box 563 have not been returned. None of the copies sent via regular mail were returned to sender.

August 31, 2004, Complainant filed a complaint with the FMCSA concerning these practices. Complainant was never paid for the work he performed. *Id.*

The STAA states:

> (a) (1) A person may not discharge an employee, or discipline or discriminate against any 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 motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding.

49 U.S.C. § 31105(a). In a STAA proceeding, a complainant must show that he engaged in a protected activity, that his employer subjected him to an adverse action, and that the employer was aware of the protected activity when it took the adverse action. *Mace v. Ona Delivery Sys., Inc.*, 1991-STA-10, at 3 (Sec'y Jan. 27, 1992). Complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Id.*

Complainant alleges that he engaged in a protected activity when he threatened to notify, and when he in fact notified, the FMCSA of Respondents' violations of drug testing and hiring policies. Complainant further alleges that Respondents knew of Complainant's protected activity because Complainant warned Respondent of his intent to take such action. Finally, Complainant alleges that Respondent acted adversely against Complainant by refusing, and continuing to refuse, to pay Complainant's salary and that this refusal was done in retaliation for Complainant's report to the FMCSA. Thus, Complainant's allegations, if proved, would form a valid complaint under the STAA.

Notice to Respondents

Respondents have received sufficient notice of the pending action to satisfy both the applicable regulations and Constitutional standards of Due Process. The regulations at 29 C.F.R. § 18.3 state:

> Service of complaints . . . shall be made either: (1) By delivering a copy to the individual, partner, officer of a corporation, or attorney of record; (2) by leaving a copy at the principal office, place of business, or residence; (3) by mailing to the last known address of such individual, partner, officer or attorney. If done by certified mail, service is complete upon mailing. If done by regular mail, service is complete upon receipt by addressee.

Complainant submitted evidence documenting that the United States Department of Transportation listed the following addresses as Respondent, Wide Open's, address:

> Wide Open Trucking, Inc.
> P.O. Box 563
> Annandale, MN 55302

and

Wide Open Trucking, Inc.
609 B Summit Drive Buffalo, MN 55313.

See www.safersys.org. Evidence of record also established that Wide Open is a small company run solely by Jeremy Runyon. *Affidavit of Kevin J. Husen in Support of Motion for Summary Decision* (Jan. 14, 2005). These addresses are thus fairly attributed to Respondent, Jeremy Runyon. Furthermore, Complainant submitted evidence that whitepages.com, a website containing national address listings, listed the following address as Respondent, Jeremy Runyon's, address:

408 Upplanda St
Buffalo, MN 55313-1911

See whitepages.com. Thus, correspondence has also been addressed to Respondent, Jeremy Runyon, at this address.

Notice in this case has been served at all three of the above addresses. On or about September 27, 2004, Complainant filed a Complaint regarding this matter. On or about November 9, 2004, Complainant filed an objection to OSHA's findings and requested a formal hearing before this tribunal. Complainant mailed copies of both the Complaint and his *Objection to Secretary's Findings & Order* to Respondents at the Upplanda Street address. On December 8, 2004, this tribunal sent a *Notice of Hearing and Prehearing Order* to Respondents at the Upplanda Street address via certified and regular mail. On December 15, 2004, Complainant filed his *Prehearing Statement* and mailed copies to Respondents at both the Upplanda Street address and to P.O. Box 394 in Buffalo, MN.[4] On January 11, 2005, Complainant served copies of his *Motion for Summary Decision*, *Brief in Support of Motion for Summary Decision*, *Affidavit of Kevin Husen*, additional copies of the *Notice of Hearing and Prehearing Order*, a *Declaration of Service of Notice of Hearing and Prehearing Order*, and Complainant's *Final Statement of Position*. Claimant's counsel signed an affidavit, attesting under penalty of perjury, that he mailed those documents to both Respondents at 609-B Summit Drive, Buffalo, MN 55313 and P.O. Box 563, Annandale, MN 55302—the two addresses listed by the Department of Transportation. On January 18, 2005, this tribunal mailed an Order Canceling Hearing to both Respondents at the Upplanda Street address and the 609 B Summit Drive via certified and regular mail.

On January 26, 2005, this tribunal mailed an *Order to Show Cause* to Respondents at the Upplanda Street address, the 609 B Summit Drive address, P.O. Box 593 in Annandale, and P.O. Box 394 in Buffalo.[5] In addition to requiring that Respondent show cause why Complainant's *Motion for Summary Decision* should not be granted, the *Order to Show Cause* documented that

[4] P.O. Box 394 is not one of the addresses previously listed for Respondents. The connection between Respondents and this address is not explained in the record.

[5] In addition, an agent for this tribunal left detailed phone messages on Respondents' answering machine on or about November 19 and December 2, 2004—neither of which were returned. Furthermore, Complainant averred that his counsel left three voice messages for Jeremy Runyon that were also unreturned.

Complainant filed a complaint under the STAA, stated the nature of that complaint, and stated that the Complaint was brought against Wide Open Trucking and Jeremy Runyon. The *Order to Show Cause* was sent via both certified and regular mail. The Domestic Return Receipt from the certified mail was received by this tribunal. The section titled "Complete this Section on Delivery" was completed, with a signature,[6] and the date of delivery was documented as February 1, 2005. The signed receipts are additional evidence that Respondents had actual notice of Claimant's pending claim. Most, if not all of the above documents, would be independently sufficient to advise Respondents that an action was pending against them and the nature of that action. These documents reflect efforts easily satisfying the regulations, which permit service of a Complaint by mailing to the last known address. *See* 29 C.F.R. § 18.3(d).

The efforts listed above also satisfy any Constitutional requirements regarding the sufficiency of notice. The United States Supreme Court has made clear that Due Process does not require actual notice of a pending action. *Dusenbery v. United States*, 534 U.S. 161, 169-70 (2002). In *Dusenbery*, the Court held that questions regarding the adequacy of notice should be decided under the test enunciated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). *Dusenbery*, 534 U.S. at 169-70; *see also City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953); *Tulsa Professional Collection Serv., Inc.*, 485 U.S. 478, 484 (1988). Under *Mullane*, notice is constitutionally sufficient if, in the particular case, it was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to be heard." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Court in *Mullane* also found that the U.S. mails "are recognized as an efficient and inexpensive means of communication." *Id.* at 319; *see also Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956); *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 490 (1988).

In the present case, Complainant and this tribunal have made every reasonable effort to notify Respondents of this action. Correspondence has been repeatedly made via regular and certified mail to four different addresses associated with Respondents. Complainant has researched and provided evidence that tends to confirm that the addresses are or were Respondents' addresses. These efforts conform to the standards of serving notice delineated in the applicable regulations. Furthermore, these efforts conform to the Supreme Court's recognition that the U.S. mails are an acceptable form of notice. The efforts made to notify Respondents were "reasonably calculated to apprise" Respondents of the pending action and to afford them an opportunity to respond. Furthermore, the returned receipts, bearing a signature and date of delivery, are evidence that Respondents in fact had actual notice of the receipt. Regardless, Complainant has proved that every reasonable effort has been made to provide such notice. The efforts amply meet the Constitutional requirements. *See Mullane*, 339 U.S. at 314.

Default Judgment

In *Somerson v. Mail Contractors of America*, ARB No. 02-057, ALJ Nos. 2002-STA-18 & 19 (ARB Nov. 25, 2003) the Administrative Review Board (Board) explicitly found that

[6] The signature appears to be that of Jeremy Runyon but is not entirely legible. Because Jeremy Runyon's signature is not otherwise of record there is no basis for comparison. The box that requests the deliveree's printed name was unfortunately left blank.

neither the STAA nor the applicable regulations gave administrative law judges the authority to enter a default judgment. However, despite the lack of such express authority, the Board in *Somerson* upheld the administrative law judge's dismissal of the case as an inherent power of the office. In *Somerson*, the complainant, Somerson, was importunate through each phase of the administrative process, engaging in inappropriate and abusive behavior and defiance of judicial orders. At the hearing, he persisted in obstructive and abusive behavior. *Id.*

In dismissing the case, Judge Huddleston relied on 29 C.F.R. §§ 18.6(d) & 18.36. However, on appeal, the Board found that § 18.36 grants the judge the authority to exclude parties but not to dismiss cases. *Somerson v. Mail Contractors of America*, ARB No. 02-057, ALJ Nos. 2002-STA-18 & 19, 5 (ARB Nov. 25, 2003). Regarding § 18.6(d), the Board wrote:

> This regulation pertains to requirements for motions and requests, answers to motions, oral arguments, briefs, motions to compel answers, and sanctions for non-compliance with discovery requests. And while subsection (d)(2)(v), quoted above, permits an ALJ to render "a decision of the proceeding" against "a party who fails to comply . . . with an order . . . for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge . . .," we hold that the "or any other order of the administrative law judge" language implicitly refers to orders concerning discovery, not orders or warnings the ALJ gives to a party disobeying pre-trial orders or misbehaving at a hearing. Therefore, Somerson's complaints may not be dismissed on the basis of section 18.6(d)(2)(v).

Id. at 4-5.

Despite finding that neither the STAA nor the regulations in part 18 authorized Judge Huddleston's actions, however, the Board upheld the dismissal. The Board reasoned that the authority to dismiss an action was an inherent authority of an administrative law judge. Quoting a recent decision, the Board wrote, "federal judges have an 'inherent power, governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Id.* (quoting *Reid v. Niagara Mohawk Power Corp.,* ARB No. 00-082, at 7 (August 30, 2002) (citations omitted)). According to the Board, administrative law judges possess this same inherent power. *See Butz v. Economou,* 438 U.S. 478, 514 (1978) (finding that administrative law judges are "functionally comparable" to federal judges). The Board concluded:

> [C]ourts are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. Indeed, a court's inherent power includes the ability to do whatever is reasonably necessary to deter abuse of the judicial process, including the power to dismiss actions or enter default judgments for abusive litigation practices or willful misconduct. We hold, therefore, that Department of Labor ALJs have inherent power to dismiss whistleblower complaints when they find that the complainant's conduct is egregious.

Somerson, ARB No. 02-057, 5 (internal quotations omitted).

A default judgment is similarly justified in the present case. This tribunal is cognizant of the severity of this result. Because a default judgment is "'the death knell of the lawsuit,' [the ALJ] must reserve such strong medicine for instances where . . . misconduct is correspondingly egregious." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir. 1989). In the present case, Respondent's absolute refusal to participate in the pending proceedings necessitates this severe remedy. While the complainant's conduct in *Somerson* was more shocking than Respondent's conduct in the present case, Respondents' conduct was no less disruptive. Respondent's absolute refusal to participate in these proceedings resulted in a denial of this tribunal's ability to adjudicate the issues before it, and likewise, a denial of Complainant's right to a hearing and fair adjudication of his claim.

As discussed above, both Complainant and this tribunal have made repeated attempts to serve Respondents. The signed receipts attached to the *Order to Show Cause* attest that Respondents received notice of and blatantly ignored the present proceedings. Furthermore, the *Order to Show Cause* gave Respondents fair warning that the failure to participate in the present process would end in precisely this result. Given Respondent's willful disobedience and disrespect of this tribunal, a default judgment is not only the most equitable result for Complainant, but also necessary to maintain this tribunal's integrity and ability to adjudicate this dispute.

Unlike *Somerson*, the respondent, rather than the complainant, is responsible for obstructing the administrative proceedings. However, the Board in *Somerson* does not ascribe importance to this distinction. In fact, *Somerson*'s broad language supports a general authority to act as necessary to preserve the authority of this tribunal. *See Somerson v. Mail Contractors of America*, ARB No. 02-057, ALJ Nos. 2002-STA-18 & 19, 5 (ARB Nov. 25, 2003) ("[A] court's inherent power includes the ability to do whatever is reasonably necessary to deter abuse of the judicial process, including the power to dismiss actions or enter default judgments for abusive litigation practices or willful misconduct."). To limit *Somerson*'s holding to misconduct by a complainant would limit the impact of the holding, which enables an administrative law judge to "do whatever is reasonably necessary to deter abuse of the judicial process." *Somerson*, ARB No. 02-057, 5 (internal quotations omitted).

Rule 55

29 C.F.R. § 18.1 states that "[t]he Rules of Civil Procedure of the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation." As the Board recognized in *Somerson*, there is no authority in the STAA or the applicable regulations explicitly governing default judgments. Thus, the Federal Rules of Civil Procedure apply. Rule 55 of the Federal Rules provides further support, and a procedural framework, for a default judgment.

Rule 55 (a) states:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

Fed. R. Civ. Pro. 55(a). As discussed above, Respondents have failed to respond at every stage of this proceeding. Respondents failed to (1) answer the Complaint, (2) submit a Prehearing Statement in response to this tribunal's order to do so in the *Notice of Hearing and Prehearing Order*, (3) answer Complainant's discovery requests, and (4) respond to this tribunal's *Order to Show Cause* as to why Complainant's motion for summary decision should not be granted. These failures easily amount to a failure to defend under Rule 55(a).

Rule 55 provides two procedures for relief: one for circumstances where the defending party has made no appearance and one in which some appearance was made prior to default. Fed R. Civ. Pro. 55. In the present case, Respondents have not made any appearance whatsoever. Thus, procedurally, the default judgment is governed by Rule 55(a)(1), which provides:

> When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

Fed. R. Civ. Pro. 55(a)(1). Complainant is seeking a sum certain. Complainant's specific and certain damages include wage loss, interest, and attorney's fees and costs. The wage losses, established by affidavit, total $1,938.75. The interest, attorney's fees, and costs are readily calculable, and the amount of the attorney's fees will become certain after review and approval by this tribunal.

ORDER

Complainant's *Motion for Entry of Default Judgment* is granted. Respondents, Jeremy Runyon and Wide Open Trucking, are declared to be in default and are ordered to pay Complainant's lost wages totaling $1,938.75 plus interest. Complainant's counsel is directed to submit an appropriate petition for reasonable attorney's fees and costs within thirty days.

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Edward Terhune Miller
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).