U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 July 2008

CASE NO. 2008-STA-45

In the Matter of:

JEAN-PERRIE F. CARPENTIER,
Complainant

v.

GOLDEN VALLEY TRANSFER, INC. AND
HELEN BAKER,
Respondents

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION

The Background

Procedural Background

A hearing is scheduled to begin on August 12, 2008, in Minneapolis, Minnesota, in the above-captioned matter arising under the employee protection provisions of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2301 *et seq*. ("Act"). On June 16, 2008, Respondents submitted a Motion for Summary Decision pursuant to 20 C.F.R. § 18.40. Complainant's Brief in Opposition to Respondents' Motion for Summary Decision was filed on July 9, 2008.

Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") on or about January 7, 2008. On April 4, 2008, the complaint was dismissed by OSHA. By letter dated April 10, 2008, Complainant objected to that determination, and requested a hearing before an Administrative Law Judge.

On April 21, 2008, the undersigned issued a Notice of Hearing ("NOH"). The NOH required Complainant to file a Pre-Hearing Statement within thirty (30) days of receiving the Notice. Complainant failed to file a Pre-Hearing Statement within the given time period. On June 16, 2008, the undersigned issued an Order to Show Cause.[1] In response to the Show Cause Order, Complainant requested an extension of time to submit his Pre-hearing Statement and his

[1] Complainant was directed to show cause as to why he should not be precluded from presenting witnesses or documentary evidence, other than his own testimony, at the hearing due to his failure to file a timely Pre-Hearing Statement.

response to Respondents' Motion for Summary Decision. In support of the request, Complainant's counsel averred that "apparently due to health problems, Mr. Carpentier has been unable to cooperate in the prosecution of his case." Complainant's counsel produced an affidavit stating that his client told him that he suffered a heart attack in mid-March 2008. Complainant's request was granted by Order dated June 30, 2008. In that same Order, acceptance of a Pre-Hearing Statement from Complainant was conditioned on the Statement being "accompanied by a doctor's statement or other medical corroboration of a debilitating medical condition."

Complainant submitted both his Brief in Opposition to Summary Decision and his Pre-Hearing Statement on July 9, 2008; however, the Pre-Hearing Statement was not accompanied by the requisite doctor's statement or medical corroboration. Instead, the Statement was accompanied by a Declaration of Complainant's counsel, wherein counsel stated that that he has been unable to reach Complainant and that Complainant's "medical condition may be preventing him from responding." I find the declaration insufficient to satisfy the June 30, 2008 Order, and therefore, the Statement is treated as not submitted.[2]

The Parties' Contentions

Respondents first argue that their Motion for Summary Decision should be granted because Complainant cannot establish a prima facie case. Respondents assert that Complainant cannot show that he engaged in protected activity. Respondents further assert that even if Complainant can establish protected activity, he cannot establish a causal connection between said activity and his discharge. Secondly, Respondents argue, assuming that Complainant can establish a prima facie case, that their Motion for Summary Decision should be granted because Complainant was terminated for a legitimate, non-discriminatory reason.

Complainant first argues that the Motion for Summary Decision should be denied because he can establish a prima facie case. He further asserts that genuine issues of material fact exist as to the reason for his discharge. More specifically, Complainant argues that while it is admitted that Respondent Baker told him that he was discharged due to his failure to submit to an alcohol and drug test, such a statement does not establish that this was the true reason for the discharge.

History

Complainant was hired by Respondents on July 9, 2007, and was told upon hiring that the employment offer was conditioned upon him passing an alcohol and drug test prior to beginning employment. On July 10, 2007, Complainant told Respondent Baker that he had submitted to a drug test.[3] Complainant then began his driving duties on July 11, 2007. Also on July 11, 2007,

[2] Respondents' counsel, via fax received July 14, 2008, objected to the Pre-Hearing Statement on the ground that the Statement failed to comply with the June 30, 2008 Order.

[3] The aforementioned facts are set forth in Respondents' Memorandum in Support of Motion for Summary Decision, Exhibit B. The same facts are set forth in the Respondents' First Requests for Admissions, which are treated as conclusively established. *See* The Law, *Requests for Admissions*. Complainant puts forth different facts in his Pre-Hearing Statement, wherein he states that he told Respondent Baker that he needed to undergo a pre-employment alcohol and drug test and that Respondent Baker told him to wait. Complainant has not mentioned these facts in his

Complainant was told by Respondent Baker to take his work vehicle to Jerry's Repair, Inc. ("Jerry's") at the end of the work day on July 13, 2007. Complainant operated the work vehicle on July 11, July 12, and through the end of his work day on Friday, July 13; he then delivered his work vehicle to Jerry's. A work order from Jerry's, dated July 13, 2007, shows that work was scheduled to be performed on the vehicle's windshield. Invoices from Jerry's, dated July 15, 2007, show that the vehicle's windshield and tires were replaced.

On Monday, July 16, 2007, Respondent Baker notified Complainant, via telephone, that he was terminated due to his failure to submit to an alcohol and drug test. Complainant was further instructed by Respondent Baker not to pick the work vehicle up from Jerry's.

The Law

Surface Transportation Assistance Act

The employee protection provision of the Act prohibits an employer from discharging, disciplining or otherwise discriminating against an employee with respect to the employee's pay, terms or conditions of employment based upon the following reasons: the employee has filed a complaint related to a violation of a commercial motor vehicle safety regulation or order; the employee has refused to operate a vehicle because the operation of the vehicle violates a regulation or standard related to commercial motor vehicle safety; or, the employee refuses to operate a vehicle because he has a reasonable fear of serious injury to himself or the public because of the vehicle's unsafe condition. 49 U.S.C. § 31105(a)(1). 49 U.S.C. § 31105(a)(2) states that "the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition" to recover under 49 U.S.C. § 31105(a)(1)(B)(ii).

To prevail a claimant must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer was aware of the protected activity; (3) the employer discharged, disciplined, or discriminated against him; and, (4) the protected activity was the reason for the adverse action. *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB September 14, 2007). A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *See Byrd v. Consolidated Motor Freight*, 97-STA-9 (ARB May 5, 1998); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

Upon finding that the Act has been violated, a Respondent may be ordered to take affirmative action to abate the violation, and to pay compensatory damages. 49 U.S.C.A. § 31105(b)(3)(A). A complainant may be awarded compensatory damages for mental pain and suffering, embarrassment, and other consequences related to the violation. *Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998-STA-8 (ARB July 28, 1999). *See also* 49 U.S.C.A. § 31105(b)(3)(A).

Brief Opposing Respondents' Motion for Summary Decision nor has Complainant brought forth documents or other evidence supporting such facts. As previously discussed, Complainant's Pre-Hearing Statement is treated as not submitted. Furthermore, my finding of no protected activity renders these facts immaterial.

Summary Judgment

Any party may move, with or without supporting affidavits, for summary decision on all or any part of a proceeding. 29 C.F.R. § 18.40(a). The Administrative Law Judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 29 C.F.R. § 18.40(d).[4]

The Administrative Review Board has offered specific guidance on the issue of summary decision. In *Reddy*, the Board announced the following procedure for adjudicating such motions:[5]

> Once the moving party has demonstrated an absence of evidence supporting the nonmoving party's position, the burden shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation. The nonmoving party may not rest upon mere allegations, speculations, or denials in his pleadings, but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. If the nonmoving party fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Reddy* at 4-5.

The Board further emphasized that, in a summary decision ruling, the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* at 5. Additionally, the summary decision ruling shall not include a weighing of the evidence or determination of the truth of the matters asserted. *Id.*

Therefore, the Board has put forth a two-step burden-shifting process, whereby summary decision may only be granted if, given the parameters stated above, the moving party meets its burden AND the nonmoving party fails to meet its own. Conversely, if EITHER the moving party fails to meet its burden OR the nonmoving party succeeds in meeting its burden, summary decision must be denied.

Requests for Admissions

Title 29, C.F.R. Part 18 sets forth the Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges. 29 C.F.R. § 18.20(a) allows a party, during discovery, to serve written requests "for the admission of the truth of any specified relevant matter of fact." Section 18.20 further provides

[4] In *Reddy v. Medquist, Inc.*, No. 04-123 (September 30, 2005), the Administrative Review Board ("Board") elaborated on the meaning of "genuine issue of material fact." It stated, "[a] 'material fact' is one whose existence affects the outcome of the case. A 'genuine issue' exists when the nonmoving party produces sufficient evidence of a material fact so that a fact-finder is required to resolve the parties' differing versions at trial. Sufficient evidence is any probative evidence." *Reddy* at 4.

[5] The Board noted that, because it reviews issues of law *de novo*, its procedure for reviewing a grant of summary decision is the same as the Administrative Law Judge would follow in ruling on the motion.

> Each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request … the party to whom the request is directed serves on the requesting party:

a written statement denying the matters; a written statement setting forth why the matters cannot truthfully be admitted or denied; or, written objections. 29 C.F.R. § 18.20(b). Any matter admitted under 29 C.F.R. § 18.20 is *conclusively established* "unless the administrative law judge on motion permits withdrawal or amendment of the admission." 29 C.F.R. § 18.20(e). [emphasis added].

In this case, Respondents' First Requests for Admissions were served upon Complainant's attorney on May 5, 2008. Respondents' counsel has submitted an affidavit stating that as of June 13, 2008, neither Respondents nor their counsel had received a response from Complainant. *See Respondents' Motion for Summary Decision, Exhibits A - A-3.* By Ruling, dated June 30, 3008, the undersigned ordered that Respondents' First Requests for Admissions are deemed conclusively established.

Discussion of Facts and Law

As set forth above, Complainant's Pre-Hearing Statement has not been admitted. In addition, Respondents' First Requests for Admissions has been deemed conclusively established. It should be noted that Complainant's Pre-Hearing Statement contains five exhibits. Complainant's Brief in Opposition to Respondents' Motion for Summary Decision contains no exhibits; no affidavits or other documentation supporting Complainant's position has been attached.

Without consideration of Complainant's Pre-Hearing Statement, Respondents' are clearly entitled to summary decision. With respect to Complainant's alleged protected activity, Respondents' have carried their burden by showing that no issue of material fact exists as to Complainant's engagement in protected activity and that they are entitled to decision on this issue as a matter of law. Complainant has failed to carry his burden by failing to set forth specific facts from which a genuine issue of material fact can be discerned.[6]

Notwithstanding the above, the following Discussion of Facts and Law considers Complainant's Pre-Hearing Statement as part of the record and does not treat Respondents' First Requests for Admissions as being conclusively established.

[6] If the nonmoving party fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Reddy* at 4-5.

Protected Activity[7]

As previously stated, Respondents first argue that Complainant cannot show that he engaged in protected activity. More specifically, Respondents assert that Complainant did not make any complaint regarding his work vehicle or refuse to drive the work vehicle. Complainant asserts that "[w]hen [he] put his assigned work vehicle into a shop for repairs, he engaged in a [sic] protected activities by making complaints related to violations" of commercial motor vehicle safety regulations.[8] Complainant additionally argues that the same act constituted and manifested a refusal to operate the work vehicle because such operation would have violated commercial vehicle safety regulations.

Complainant states that he engaged in protected activity by making internal complaints regarding the condition of his work vehicle's windshield and tires. Internal complaints to management are protected activity under the whistleblower provision of the STAA. *See Williams v. CMS Transportation Services, Inc.*, 94-STA-5 (Sec'y Oct. 25, 1995); *Doyle v. Rich Transport, Inc.*, 93-STA-17 (Sec'y Apr. 1, 1994); *Juarez v. Ready Trucking Co.*, 86-STA-27 (Sec'y July 7, 1998). [9]

First, Complainant's Pre-Hearing Statement shows that Complainant completed a Vehicle Inspection Report ("VIR") on July 13, 2007.[10] The VIR shows Complainant to have worked from 6:00 a.m. to 3:00 p.m. and to have conducted a pre-trip and post-trip inspection. "Windshield" and "Out of Service" are written in the VIR's remarks section. Complainant correctly points out that the Administrative Review Board has held that VIRs prepared by an employee who is expressing safety-related concerns can qualify as complaints for purposes of the STAA. *See Schulman v. Clean Harbors Environmental Services, Inc.*, 1998-STA-24 (ARB Oct. 18, 1999). However, unlike *Schulman*, Complainant has not produced documents or other evidence indicating that the purpose of the VIR he completed was to apprise management of safety defects and Complainant's safety-related concerns; that the VIR was filed; that Complainant informed a supervisor or other employee of the completed VIR; or, that

[7] Respondents' additionally argue that their Motion for Summary Decision should be granted for two other reasons. First, Complainant cannot establish a prima facie case because Complainant cannot establish a causal connection between any protected activity and his discharge. Second, assuming that Complainant can establish a prima facie case, Complainant was terminated for a legitimate, non-discriminatory reason. Because I find that Complainant can not establish that he engaged in protected activity, I do not need to address these arguments.

[8] It is difficult to discern if Complainant is alleging that he made complainants when taking his work vehicle into Jerry's, or that the act of taking the work vehicle to Jerry's constituted making a complaint related to a violation of commercial vehicle safety regulations, or both. For purposes of this Order, both will be addressed.

[9] It should be noted that Respondents' First Requests for Admission establish that "Prior to July, 17, 2007, [Complainant] did not inform any employee or agent of GVT about his belief that his GVT work vehicle had deficiencies that created a safety hazard." Request No. 5. This admission, deemed conclusively established, has not been relied upon in finding that Complainant did not engage in protected activity.

[10] *See* Exhibit 2.

Respondents were aware of the completed VIR.[11] *See Harrison v. Roadway* Express, 1999-STA-37 (ARB Dec. 31, 2002). Complainant has not brought forth facts from which it can be discerned that he wrote "Windshield" on the VIR out of safety-related concerns or to apprise management of a safety defect. Complainant completed the VIR in close temporal proximity, the end of his shift on July 13, 2007, to delivering his work truck to Jerry's for scheduled repairs, including a repair of the windshield. Additionally, Complainant has failed to bring forth evidence establishing that the VIR was filed or otherwise communicated, in any manner, to a supervisor. Complainant has failed to carry his burden of showing a genuine issue of material fact.[12]

Second, Complainant's Brief Opposing Motion for Summary Decision, states that Complainant requested that the tires on his work truck be replaced, that this request was beyond the scope of repairs authorized by Respondents, and that such request factored into Complainant's discharge. However, Complainant has provided no documentary or other evidence in support of these statements. The record contains no evidence which shows that Complainant requested the replacement of his work truck's tires or that he made any complaints regarding the condition of the truck's tires. Without such evidence, Complainant has failed to bring forth specific facts and to show that there remains a genuine issue of material fact with respect to whether he engaged in protected activity as related to the work truck's tires.

Third, Complainant also states that he engaged in protected activity by taking his work vehicle to Jerry's on July 13, 2007. With respect to this claim, Respondents have carried their burden by showing an absence of evidence supporting Complainant's assertion that the delivery of his work truck to Jerry's for repairs on July 13, 2007, constituted a complaint related to a violation of commercial vehicle regulations. In support of their Motion, Respondents have attached an affidavit of Respondent Baker, *See Respondents' Motion for Summary Decision, Exhibit B*, wherein Respondent Baker states that she called Jerry's on July 11, 2007, and made an appointment to have repair work performed on Complainant's work truck. The affidavit further states that on July 11, 2007, Respondent Baker instructed Complainant to deliver his work truck to Jerry's at the end of the work day on July 13, 2007.[13] Respondents' Motion includes a time sheet showing Complainant to have worked from 6:30 a.m. to 3:00 p.m. on July 13, 2007, presumably a complete workday. *Exhibit B-2.*[14] This evidence establishes that Complainant's act of delivering his work vehicle to Jerry's on July 13, 2007, was an act of complying with the *instructions* of Respondents.

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[11] The facts suggest that Complainant's supervisors or other employees of Respondents were not aware of the VIR. Complainant completed the VIR at the end of his workday on Friday and then took the work vehicle to the repair shop, where it remained throughout the weekend.

[12] Additionally, to establish a prima facie case a Complainant must show that the employer was aware of the protected activity. *See Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB Sept. 14, 2007).

[13] These facts are also established through Respondents' First Requests for Admission, Request Nos. 13, 16.

[14] While this Order relies on the time sheet included in Respondents' Memorandum as showing Complainant to have driven his work vehicle for his entire shift on July 13, 2007, Respondents' First Requests for Admissions also establish that Complainant operated his work vehicle until the end of his work day on July 13, 2007.

In response, Complainant has stated that he took his work truck to Jerry's on July 13, 2007, but has brought forth no evidence or documentation to support his assertion that he took the vehicle to Jerry's *as a complaint*. Complainant fails to bring forth evidence to show that the delivery of his work truck was anything more than following his employer's orders. Other than a conclusory allegation, Complainant has not presented evidence which suggests that he delivered his truck to Jerry's or was motivated to deliver his truck to Jerry's because he had a grievance or complaint about motor vehicle safety regulation violations. Therefore, Complainant has failed to carry his burden of setting forth specific facts from which some issue of material fact can be discerned.

Similarly, Respondents have carried their burden by showing an absence of evidence supporting Complainant's assertion that the delivery of his work vehicle to Jerry's for repairs on July 13, 2007, was a refusal to operate the vehicle because such operation would have violated commercial vehicle safety regulations. As discussed above, Respondent Baker's affidavit and Complainant's time sheet establish that Complainant took his work vehicle to Jerry's in accordance with Respondents' instructions. The evidence further shows that the work vehicle was taken off of the road by Respondents, and that the work vehicle was not being driven due to repairs scheduled by Respondents.[15]

Complainant, on the other hand, has not presented any evidence from which it can be discerned that his delivery of the work truck to Jerry's constituted a refusal to drive. Complainant has not provided any documentation to support his assertion that he refused to drive his work truck. He has presented no evidence indicating that he made the decision to deliver his work truck to Jerry's because he was no longer willing to drive the vehicle due to violations of commercial vehicle regulations. Further, Complainant has not presented any evidence showing that when the truck was available to be driven and he was instructed to drive the truck, he declined to do so.[16]

[15] It should be noted that Respondents' First Requests for Admission establish that "Prior to July, 17, 2007, [Complainant] did not inform any employee or agent of GVT of his intention not to operate his GVT work vehicle as a consequence of his belief that his GVT work vehicle had deficiencies that created a safety hazard." Request No. 6. This admission, deemed conclusively established, has not been relied upon in finding that Complainant did not refuse to drive his work vehicle.

[16] In addition, Complainant has not produced any documentation or other evidence showing that an actual violation of commercial vehicle safety regulations would have occurred if the work vehicle was driven. *See Yellow Freight System, Inc. v. Reich,* 38 F.3d 76 (2d Cir. 1994); *Robinson v. Duff Truck Line, Inc.,* 86-STA-3 (Sec'y Mar. 6, 1987), slip op. at 12-13, *aff'd, Duff Truck Line, Inc. v. Brock,* 848 F.2d 189 (6th Cir. 1988)(per curiam) (unpublished decision available at 1988 U.S. App. LEXIS 9164); *Brame v. Consolidated Freightways,* 90-STA-20 (Sec'y June 17, 1992), slip op. at 3. Complainant alleges refusal to drive under 49 U.S.C. § 31105(a)(1)(B)(i).

Conclusion

In summary, I find that Respondents have carried their burden of showing that no issue of material fact exists as to protected activity and that they are entitled to decision on this issue as a matter of law. Complainant has failed to carry his burden of setting forth specific facts from which some issue of material fact could be discerned.[17] Therefore, Respondents' Motion for Summary Decision should be granted.

RECOMMENDED ORDER

It is hereby ORDERED that the Respondents' Motion for Summary Decision be GRANTED and the Complainant's complaint be DISMISSED. It is FURTHER ORDERED that the hearing scheduled to begin on August 12, 2008, in Minneapolis, Minnesota is **cancelled**.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order Granting Respondent's Motion for Summary Decision, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 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 Granting Respondent's Motion for Summary Decision, the parties may file briefs with the Administrative Review Board ("Board") in support of, or in opposition to, the administrative law judge's order 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.

[17] I reach the same conclusions irrespective of whether the Complainant's Pre-Hearing Statement is considered and Respondents' First Requests for Admissions are deemed established.