

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 April 2008

CASE NO.: 2008-STA-00028

In the Matter of:

EARL S. CAWTHORNE,
Complainant,

vs.

UNITED STATES POSTAL SERVICE,
Respondent.

Appearances: Earl S. Cawthorne, *pro se*

Leigh Bonds, Esq.,
For the Respondent

Before: Steven B. Berlin
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is an action under the employee protection or “whistleblower” provision of the Surface Transportation Assistance Act, 49 U.S.C. § 31105, as amended 2007. Complainant alleges that he was employed as a truck driver and suspended without pay because he resisted Respondent’s demand that he work hours in excess of Department of Transportation regulatory safety limits and because he reported a workplace injury. On January 23, 2008, the Acting Regional Administrator of the Occupational Health & Safety Administration dismissed the complaint. He wrote that OSHA lacked jurisdiction because Respondent is a United States Government agency and thus outside the ambit of the Act. He gave other reasons. Complainant timely requested a hearing on February 12, 2008.

At my request, Respondent filed a motion that I dismiss the claim on the same basis as did the Administrator. I will take the motion as one for summary decision. The parties fully briefed the motion. Having considered the affidavits, exhibits, and arguments and other submissions of the parties and being fully informed, I will find that this matter should be dismissed.

UNDISPUTED FACTS

Complainant is the President of Cawthorne Dump Trucking Services, Inc. R.Exh. 1, A 2.¹ In April 2007, the corporation renewed a four-year contract with Respondent to haul mail twice daily, once in the early morning hours and again in the late afternoon. The contract is nearly 100 pages long and sets out detailed requirements for the time, place, and manner in which the corporation was to perform. These include a requirement that the contractor perform extra trips on four hours' notice and complete such trips within the same time frames as the regular trips. There are many more specific requirements.² The contract establishes an annual pay rate of \$50,271. *Id.* A 6.

Late in the day on October 17, 2007, there was an altercation at the Spokane District postal facility. Claimant states that a postal dock worker shoved a six-foot tall, 200-pound cart into his chest and midsection. Complainant reports that about this time, one of Respondent's officials required him to drive 60 miles during his time allotted for sleep and he disputed this.

On October 18, 2007, Respondent denied Complainant personal access to the mail pending an investigation of the altercation. Respondent stated that Cawthorne Dump Trucking was expected to continue to perform, although not through Mr. Cawthorne. On October 25, 2007, Complainant confirmed his intent to have the corporation perform.

A month later, on November 21, 2007, Respondent notified Complainant that the decision to bar him personally was permanent but that the corporation was to continue to perform. The corporation in fact has continued to perform. Complainant filed this action.

¹ "R. Exh." refers to Respondent's exhibits, attached to the Declaration of Raymond K. Luke.

² Examples of the requirements' specificity include: a truck was to load in Spokane at 4:00 a.m., leave at 4:45 a.m., arrive at Sprague at 5:25 a.m., leave at 5:40 a.m., and arrive in Ritzville at 6:10 a.m. for unloading by 6:20 a.m. There is a similar very specific schedule for the afternoon run. R.Exh. 1, A9. The vehicles had many requirements. If a van, it had to have a capacity of at least 1,200 "cubes," cargo compartment (interior) measurements of length 24 feet, width 7.5 feet, and height 7 feet. There were also minimal exterior measurements. The van had to have a power lift tailgate of certain dimensions, at least three louvers that can be opened and closed in the cargo compartment, ¼ inch plywood on the cargo compartment walls, floor to ceiling with a durable flat sheet scuff liner bonded over the plywood without any protruding fasteners, the compartment had to be water-proof with secure locking devices kept locked at all times except loading and unloading, and many more very specific requirements. *Id.* A 11-13. Similarly, the contractor had to await completion of delayed mail. *Id.* A 13. The truck could have a sign that reads "United States Mail," but only when carrying mail, and if the truck was red, white, and blue, it had to have inscribed on all doors in black letters at least one inch high: "United States Mail Contractor." Such trucks also had to have the same inscribed on the front of the trailer in black letters at least two inches high and set such that the lettering could be seen behind the tractor. The contractor was not permitted to carry any letters other than the U.S. mail. If a truck became disabled, the driver was required to activate the signal flashers, place three bi-directional reflective triangles or three lighted fuses or three liquid burning flares in the center of the traffic lane 100 feet to the rear and 100 feet in front of the vehicle. *Id.* A 18-19.

DISCUSSION

The Surface Transportation Assistance Act prohibits a person from discharging, disciplining, or discriminating against employees because, *inter alia*, the employee refuses to operate a vehicle in violation of a federal regulation or standard related to safety, health, or security. 49 U.S.C. § 31105 (a)(1)(B)(i). An “employee” for this purpose includes “a driver of a commercial motor vehicle (including an independent contractor while in the course of personally operating a commercial motor vehicle).” 29 C.F.R. § 1978.101(d). A “motor vehicle” is a “vehicle . . . propelled . . . by mechanical power and used on a highway in transportation [excluding essentially city buses and trolleys].” 49 U.S.C. § 13102 (16).

Government employees, however, are excluded from the Act’s protections:

The STAA’s definition of “employee” explicitly excludes “an employee of the United States Government,” and the definition of “employer” explicitly excludes “the Government.” 49 U.S.C. §31101(2)(B), §31101(3)(B). There is no ambiguity in these scope provisions, and therefore we can rely upon their plain meaning. Moreover, the United States is immune from suit absent an **explicit statutory waiver** of sovereign immunity. *United States Dep’t of Energy v. State of Ohio*, 503 U.S. 607, 615 (1992) (any waiver of the government’s sovereign immunity must be “unequivocal”). Here we have an **explicit statutory invocation** of such immunity.

Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6 (ARB Oct. 31, 2000), slip op. at 6-7; *Moore v. U.S. Dept. of Energy*, ARB No. 99-094, ALJ No. 1999-CAA-14 (ARB July 31, 2001) (definitions of “employee” and “employer” are an express invocation of sovereign immunity).

Given the exclusion of government employees, this claim must be dismissed. Respondent is an independent establishment of the United States Government. *See* 39 U.S.C. § 201. Members of its governing board are appointed by the President with the advice and consent of the Senate and in consultation with both parties in both houses of Congress. *Id.* § 202. The Board must be bipartisan. *Id.* The Governors appoint and may remove the Postmaster General. *Id.* This defines Respondent as a United States Government entity.

Respondent argues that Complainant was not an employee, was at all relevant times an independent contractor, and thus falls outside the Act’s protections because the Act protects only employees. Respondent is correct that the Act protects only employees, but I do not reach this issue.³ I find that, assuming Complainant was (or is) an employee, his claim fails because Respondent is a Government entity.

³ I could not grant summary decision on the argument that Complainant is not an employee for this purpose. Respondent exercises considerable control over the minutiae of Complainant’s contract performance. The extent of control might bring Complainant within the scope of being an employee. Also, the definition of “employee” in the Act appears to include an independent contractor who personally is performing the contract.

CONCLUSION

For the foregoing reasons, I recommend that this action be dismissed.

A

STEVEN B. BERLIN
Administrative Law Judge

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, 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, 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.