U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 April 2008

CASE NO. 2008-STA-25

In the Matter of:

MICHAEL WOOD,
Complainant

v.

AGGREGATE INDUSTRIES,
Respondent

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

The Background

Procedural Background

A hearing is scheduled to begin on April 29, 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 April 7, 2008, Respondent submitted a Motion for Summary Decision pursuant to 20 C.F.R. § 18.40. 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.

Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") on or about September 14, 2007. On December 12, 2007, the complaint was dismissed by OSHA. By letter dated January 10, 2008, Complainant objected to that determination, and requested a hearing before an Administrative Law Judge. On January 29, 2008, I issued a Notice of Hearing ("NOH"). The NOH required Complainant to file a pre-hearing statement within thirty (30) days of receiving the Notice. To date, the Complainant has not submitted a pre-hearing statement.

By letter dated March 7, 2008, Complainant requested a continuance to secure legal representation, and, in the alternative, that his claim be dismissed without prejudice. By Order dated March 24, 2008 Complainant's request was denied. The March 24, 2008 Order directed the complainant to submit to the undersigned by April 23, 2008, documentation of his attempts to retain counsel. In conjunction with the March 24, 2008 Order, the Complainant was provided with a list of over a dozen attorneys practicing employment law in counties surrounding his

residence. To date, Complainant has failed to comply with the Order and has not submitted documentation of his attempts to retain counsel.

History

Complainant began working as a truck driver for Aggregate Industries ("Aggregate") at the company's Forest Lake Facility in 1992. Under the Collective Bargaining Agreement, truck drivers receive paid holidays, paid personal days, and paid vacation time, but do not receive sick days. Under the Time Off Policy, in certain circumstances, truck drivers must use personal holidays and vacation days for illness-related absences. If a truck driver fails to use either category of paid time off for an illness-related absence, the truck driver incurs a penalty under the Working Rules of Conduct Policy ("Policy"). The Policy sets forth specific point totals to be assessed against an employee for corresponding violations, and provides for progressive levels of discipline based upon an accumulated point total.

Generally, Complainant first states that Aggregate has applied the above-mentioned policies to him in violation of the Act's employee protection provisions. Complainant asserts that he became ill in 2007,[1] and was required to leave work early one day and miss work the following day due to the illness. Complainant did not want to use vacation time for the missed day, but was told that doing so was company policy. Complainant has not alleged that Aggregate assessed any points against him for violating the Policy. Nor has he alleged being subjected to any progressive discipline under the Policy, such as a written verbal or written warning. Complainant next alleges that Aggregate's Time Off Policy and Working Rules of Conduct Policy violate the Act in form. Complainant alleges that the policies and the policies' application to himself violate the employee protection provision which prohibits an employer from disciplining or otherwise discriminating against an employee with respect to the employee's pay, terms or conditions of employment because the employee has refused to operate a vehicle because the operation violates a regulation or standard related to commercial motor vehicle safety.[2]

Aggregate argues that an Order for Summary Decision should be entered in its favor for several reasons. First, Aggregate asserts that Complainant has not suffered an adverse employment action. Second, if the Complainant did suffer an adverse employment action, he did not suffer any compensable damages and any claims for injunctive relief are moot. Aggregate also states that its Time Off Policy does not violate the Act, but seeks to balance employees' needs for time off due to illness with legitimate business needs.

[1] In his Complaint, Complainant states that he became ill on July 2, 2002, and missed the following day of work. He then references a doctor's letter excusing him from work. This letter is dated May 15, 2007, and states that Complainant was seen in the office on May 15, 2007, and may return to work on May 17, 2007. For purposes of this Order, Complainant's absence due to illness occurred on or about May 15, 2007 through May 16, 2007.

[2] Complainant cites to 49 C.F.R. § 392.3 which states "[n]o driver shall operate a motor vehicle, and a commercial motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle."

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).

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).[3]

[3] 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.

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:[4]

> 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.

Discussion of Facts and Law

As previously stated, Aggregate first argues that its Motion for Summary Decision should be granted because Complainant has not suffered an adverse employment action, and therefore, cannot establish a prima facie case. Aggregate states that as a consequence of missing work due to illness, the complainant was required to use vacation time for the absence; the complainant was not given any disciplinary points under the Policy and no disciplinary warnings resulted from the absence. Aggregate asserts that requiring employees to use personal or vacation days when sick days are unavailable or exhausted does not constitute an adverse action.

Complainant must show a "tangible employment action" that created a significant change in his employment status. Examples include firing, failure to hire, failure to promote or "a decision causing a significant change in benefits." *See Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007); *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52 (ARB Feb. 29, 2000). The employer's actions must have affected the terms, conditions, or privileges of employment. *See West v. Kasbar*, ARB No. 04-155, 2004-STA-034 (ARB Nov. 30, 2005); *Simpson v. United Parcel Service*, ARB No. 06-065, 2005-AIR-031 (ARB March 14, 2008).

[4] 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.

In *Burlington Northern & Santa Fe Railway Company v. White*, 126 S. Ct. 2405 (2006), the Supreme Court held that to establish a materially adverse employment action "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination."'"[5] The reasonable worker has "the perspective of a reasonable person in the plaintiff's position." *Burglington N. & Sante Fe Ry Co.*, 126 S. Ct. 2405, 2415-2416 (2006) citing *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006).

Complainant has failed to allege an adverse employment action. The use of a paid vacation day for an illness-related absence is not a tangible employment action causing a significant change in Complainant's employment status or benefits. Complainant has not alleged that he was otherwise disciplined for his absence; no points were assessed against Complainant and he did not receive a verbal written or written warning. Additionally, Complainant has not alleged an employment action that is materially adverse such that a reasonable employee in his situation would have been dissuaded from engaging in protected activity.

I find that Aggregate as carried its burden of showing that no issue of material fact exists as to an adverse employment action and that it is entitled to decision on this issue as a matter of law. The Complainant has failed to carry his burden of setting forth specific facts from which some issue of material fact could be discerned. As Aggregate is entitled to summary decision on this issue, 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, Aggregate's Motion for Summary Decision should be granted.

Next, Aggregate argues that assuming Complainant has alleged a prima facie case, its Motion for Summary Decision should be granted because Complainant has not suffered any damages and his claim is moot. Aggregate states that Complainant has alleged no compensatory damages. Furthermore, Aggregate asserts that any claim for injunctive relief is moot because its Forest Lake facility was closed on September 24, 2007, and all of the drivers were laid-off. Aggregate has no plans to re-open the facility in 2008.

First, Aggregate is correct is asserting that Complainant has alleged no compensatory damages. Complainant has not alleged that he lost wages at the time of his absence or thereafter as a result of using a vacation day. Nor has he alleged any pain, suffering, embarrassment, or other damages that flowed from the use of a vacation day for his illness-related absence.

Second, to the extent that Complainant seeks injunctive relief, his claim is moot. *See Ciofani v. Roadway Express, Inc.*, ARB Case No. 05-020, ALJ Case No. 2004-STA-46 (ARB Sept. 29, 2006); *Agee v. ABF Freight Systems, Inc.*, ARB Case No. 04-182, ALJ Case No. 2004-STA-40 (ARB Dec. 29, 2005). In *Lane v. Roadway Express, Inc.*, ARB Case No. 03-006, ALJ Case No. 02-STA-38 (ARB February 27, 2004), the ARB stated, "[a]lthough administrative proceedings are not bound by the constitutional requirement of a 'case or controversy,' the Board has considered the relevant legal principles and case law developed under that doctrine in

[5] The Court stated that the action must be materially adverse because "it is important to separate significant from trivial harms." *Burlington N.*, 126 S. Ct. at 2415.

exercising its discretion to terminate a proceeding as moot." The Board went on to state that "[m]ootness results 'when events occur during the pendency of a litigation which render the court unable to grant the requested relief.'" *Id.* at 3.

Complainant has not disputed the fact that Aggregate's Forest Lake facility has closed and that the facility's drivers were laid-off. Furthermore, Complainant has not alleged facts establishing that Aggregate is engaged in any ongoing activity that can be abated. As such, this court is unable to grant the relief requested, and the claim is moot. Finally, Complainant has not asserted that this claim satisfies the "capable of repetition, yet avoiding review" exception to the doctrine, and he has not alleged any facts which would satisfy the exception.[6] *See Ciofani v. Roadway Express, Inc.*, ALJ No. 2004-STA-46 (AJL November 18, 2004).

Aggregate has carried its burden of showing that no issue of material fact exists as to damages and that it is entitled to decision on this issue as a matter of law. The Complainant has failed to carry his burden of setting forth specific facts from which some issue of material fact could be discerned. Therefore, even assuming that Complainant suffered an adverse employment action, Aggregate's Motion for Summary Decision should be granted.

Finally, Aggregate argues that its Motion for Summary Decision should be granted because its Time Off Policy and Working Rules of Conduct Policy do not violate the Act in form. Aggregate's motion is granted in this respect. For purposes of this litigation, I will only determine whether Aggregate has applied the policies to the complainant in a discriminatory manner that violates the Act; a declaratory order is not appropriate.

RECOMMENDED ORDER

It is hereby ORDERED that the Respondent's Motion for Summary Decision be GRANTED and the Complainant's complaint be DISMISSED. It is FURTHER ORDERED that the hearing scheduled to begin on April 29, 2008, in Minneapolis, Minnesota is cancelled.

A

RICHARD A. MORGAN
Administrative Law Judge

[6] The exception applies where "(1) the challenged action is too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

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.