



Issue Date: 31 December 2007

CASE NO. 2008-STA-4

In the Matter of:

CHARLES K. PFINGSTEN
Complainant

v.

COUNTRY MATERIAL CORPORATION
Respondent

ORDER ON EMPLOYER'S MOTION FOR SUMMARY JUDGMENT

The Background

Procedural Background

A hearing is scheduled to start on January 8, 2008 at 9:00 a.m. in St. Paul, Minnesota, in the above-styled matter arising under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2301 *et seq.* ("Act"). On December 17, 2007, employer's counsel submitted a Motion for Summary Decision pursuant to 20 C.F.R. § 18.40. Complainant submitted his Brief in Opposition to Motion for Summary Decision on December 27, 2007. Complainant submitted his Declaration In Opposition to Respondent's Motion for Summary Decision, and his October 16, 2006, written response to a disciplinary action along with his brief.

Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") on or about June 19, 2007. On September 17, 2007, the complaint was dismissed by OSHA. On October 8, 2007, Complainant objected to that determination, and requested a hearing before an Administrative Law Judge.

History

Generally, Complainant alleges that he was hired by Respondent, County Materials Corp. ("County Materials") in 2003 as a semi tractor-trailer driver. Around July or August of 2006, the brakes on his truck were not working properly, and he brought the truck in to have the brakes adjusted several times. He further alleges that he refused to drive the tractor-trailer because the brakes were not working properly, and that the brakes were eventually fixed. Complainant states that he was written up for not having the brakes adjusted enough, and that he filed a written response to that disciplinary action. Finally, Complainant alleges that he was laid off about one month early for the seasonal lay off in 2006, that he was not called back to work in March or

early April of 2007, and that he did not receive work when he returned to County Materials due to his complaints about the brakes on his tractor-trailer and his refusal to drive the tractor-trailer. Complainant quit working for County Materials on June 14, 2007.

Respondent's Contentions

County Materials argues that its Motion for Summary Decision should be granted for two reasons. First, County Materials argues that Complainant's alleged complaints of safety issues and alleged acts of retaliation fall outside of the statute of limitations. Second, County Materials argues that for Complainant to obtain relief by showing that he had a reasonable fear of causing serious injury to himself or others because of the vehicle's unsafe condition under 49 U.S.C. § 31105(a)(1)(B)(ii), Complainant must have asked County Materials to correct the unsafe condition, and he must have been unable to obtain the correction. 49 U.S.C. § 31105(a)(2). County Materials argues that Complainant himself has stated that it remedied the alleged unsafe condition.

County Materials also argues that Complainant's alleged late return from the seasonal lay off is too remote from Complainant's alleged safety complaints to sustain a claim under the Act, and that Complainant has not shown any intolerable working conditions that could sustain a claim of constructive discharge.

Complainant's Contentions

Complainant opposes the Motion for Summary Decision on the grounds that factual disputes exist regarding whether Complainant engaged in protected activity, and issues of material fact exist regarding whether Complainant was subject to adverse employment actions, and County Materials' motivation for the adverse employment actions.

More specifically, Complainant argues that all of the alleged adverse employment actions took place within the 180-day limitations period, and that he can recover under 49 U.S.C. § (a)(1)(B)(ii) because he sought correction of his tractor-trailer's defective brakes several times, without success, before any correction was made. In addition, Complainant argues that a reasonable trier of fact could conclude both that Complainant suffered a constructive discharge, and that Complainant's protected activities motivated County Materials to take adverse employment actions.

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).

The employee must file a complaint with the Secretary of Labor within 180 days after the alleged violation of the Act. 49 U.S.C. § 31105(b)(1).¹ 29 C.F.R. § 1978.102(d)(3) states that there are circumstances which justify tolling the 180-day period based on equitable principles or extenuating circumstances.²

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

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.

¹ "An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred." 49 U.S.C. § 31105(b)(1).

² For example, "where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation." 29 C.F.R. § 1978.102(d).

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.

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.

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, County Materials first argues that its Motion for Summary Decision should be granted because Complainant alleges complaints of safety issues and acts of retaliation that occurred outside of the statute of limitations.

The Act provides that an employee must file a complainant with the Secretary of Labor within 180 days of an alleged violation of the Act. A violation of the Act occurs when an employee is disciplined, discharged or discriminated against in the pay, terms, or conditions of employment because he engaged in protected activity. Therefore, the time at which Complainant made the alleged safety complaints is irrelevant; it is the time of the alleged acts of discipline and discrimination that are relevant for determining the 180-day limitation period.

Complainant filed his claim on or around June 19, 2007. Complainant has alleged that he suffered adverse employment actions in June of 2007,⁵ and that he suffered an adverse action in not being called back to work earlier in the Spring of 2007. These acts fall within the time provided for by the limitations period. Complainant has also alleged that he suffered an adverse employment action when he was laid off a month early in November of 2006. Because the lay off occurred more than 180 days before Complainant filed his claim, the limitations period bars his claim as it relates to the lay off.

Furthermore, Complainant has not shown any circumstances which justify tolling the 180-day period based on equitable principles or extenuating circumstances. Complainant has not alleged that County Materials misled him regarding his cause of action or that he was prevented, in an extraordinary way, from filing his action.⁶ See *Thissen v. Tri-Boro Construction Supplies Inc.*, ARB No. 04-153, ALJ No. 2004-STA-35 (ARB December 16, 2005). Furthermore, Complainant has not alleged a continuing violation, but has instead alleged discrete adverse employment actions.⁷

⁵ For example, Complainant alleges that Respondent failed to provide him with work.

⁶ See also 29 C.F.R. § 1978.102(d)(3); *Hillis v. Knochel Brothers, Inc.*, ARB Nos. 03-136, 04-081, and 04-148, ALJ No. 2002-STA-50 (ARB Oct. 19, 2004); *Hoff v. Mid-States Express, Inc.*, ARB No. 03-051, ALJ No. 2002-STA-6 (ARB May 27, 2004); *Nixon v. Jupiter Chemical, Inc.*, 89-STA-3 (Sec'y Oct. 10, 1990).

⁷ See 29 C.F.R. § 1978.102(d)(3); *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

County Materials Motion for Summary Decision is granted with respect to the claim that it violated the Act by placing Complainant on early lay off in 2006; Complainant's claim is untimely.

Second, County Materials argues that its Motion for Summary Decision should be granted because Complainant himself admits that County Materials corrected the alleged unsafe conditions. County Materials' argument is incorrect to the extent that it ignores parts of 49 U.S.C. § 31105(a)(1). 49 U.S.C. § 31105(a)(1)(A)(i) makes it unlawful to discriminate against, discipline or discharge an employee because the employee has filed a complaint related to a violation of a commercial motor vehicle safety regulation or standard. 49 U.S.C. § 31105(a)(1)(B)(i) makes it unlawful to discriminate against, discipline or discharge an employee because the employee refuses to operate a vehicle because the operation would violate a regulation or standard related to commercial motor vehicle safety. 49 U.S.C. § 31105(a)(1)(B)(ii) makes it unlawful to discriminate against, discipline or discharge an employee because the employee refuses to operate a vehicle because the employee has a reasonable fear of serious injury to himself or others as a result of the hazardous safety condition. 49 U.S.C. § 31105(a)(2) then qualifies only 49 U.S.C. § 31105(a)(1)(B)(ii) by stating that an employee "must have sought from the employer, and been unable to obtain, correction of the hazardous safety" condition for the employee to receive protection.

An employee's inability to obtain a correction sought by him is only applicable to claims that an employee refused to operate a vehicle because of reasonable fear of injury to himself or others; a complainant does not have to seek a correction and be unable to obtain it to recover under 49 U.S.C. § 31105(a)(1)(A)(i) or (a)(1)(B)(i). *See* 49 U.S.C. § 31105(a); *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB September 14, 2007). In this case, Complainant has submitted documents to the undersigned, stating that he seeks relief under 49 U.S.C. § 31105(a)(1)(A)(i) and (a)(1)(B)(i).⁸ Complainant has not limited his relief to Section 31105(a)(1)(B)(ii).

To the extent that Complainant does seek to recover under Section 31105(a)(1)(B)(ii), I find that genuine issues of material fact exist regarding whether Complainant was able to obtain a correction. While the documents that have been submitted to the undersigned agree that the brakes were "ultimately remedied," the documents fail to provide a clear factual picture as to when attempts to remedy the brakes were made, when the alleged brake defect was actually fixed, and the temporal proximity between Complainant's refusal to drive, attempts to fix the alleged brake defect, and the actual fixing of the alleged brake defect. In short, fact issues remain that preclude the entry of summary decision.

Finally, County Materials argues that its Motion should be granted because there is no causal connection between Complainant's alleged protected activity and the alleged adverse employment actions, and because Complainant has failed to allege any working conditions

⁸ Respondent has not set forth specific grounds on which summary decision should be granted with respect to 49 U.S.C. § 31105(a)(1)(A)(i), (B)(i). Nevertheless, Complainant has addressed these provisions in his Brief in Opposition to Summary Decision. I find that in regard to these provisions, genuine issues of material fact exist.

which could amount to a constructive discharge.⁹ I find, however, that genuine issues of material fact remain.

ORDER

Therefore, it is hereby ORDERED that Employer's Motion for Summary Judgment is DENIED in Part and GRANTED in Part.

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RICHARD A. MORGAN
Administrative Law Judge

⁹ A constructive discharge occurs when "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Shoup v. Kloepfer Concrete Co.*, 95-STA-33 (Sec'y Jan. 11, 1996) citing *Hollis v. Double DD Truck Lines, Inc.*, 84-STA-13 (Sec'y March 18, 1995).