U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

ARTIS ANDERSON,

COMPLAINANT,

v.

EAGLE CARRIERS, LTD.,

RESPONDENT.

ARB CASE NO. 98-165

ALJ CASE NO. 97-STA-33

DATE: April 16, 1999

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Artis Anderson, *West Somerset, Kentucky, Pro Se.*

For the Respondent:
Richard A. Whitaker, Esq., *Nicholasville, Kentucky*

FINAL DECISION AND ORDER

The Administrative Law Judge (ALJ) submitted a decision (R. D. & O.) in this case arising under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. §31105 (West 1994), recommending that the complaint be dismissed because Complainant, Artis Anderson, did not carry his burden of proving that the Respondent, Eagle Carriers, Ltd., discriminated against him for protected activities. The record in this case has been reviewed. We agree with the ALJ's conclusion, and dismiss the complaint.

BACKGROUND

The facts are stated in detail in the R. D. & O. at pages 2-4. Complainant worked for Respondent as an over-the-road truck driver from June 1994 to June 1995.[1/] Respondent operated

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[1/] The ALJ found that Complainant worked for Respondent until January 1996, R. D. & O. at (continued...)

out of Somerset, Kentucky. In May 1995, Complainant drove a load to Milwaukee, Wisconsin, arriving around 9:00 AM. However, the consignee of the load did not unload it. At 3:00 PM, after waiting most of the day, Complainant decided to drive back to Somerset with the load. When he returned to Kentucky, Complainant quit his job, but soon went back to work after agreeing to pay Respondent damages for the undelivered load. Respondent promised that Complainant would not be delayed by similar incidents in the future.

Two weeks later (*i.e.*, sometime in early June 1995) Complainant drove a load to Winchester, Kentucky, and again was kept waiting most of the day for the cargo to be unloaded. Complainant decided to drive back to Somerset with the load and quit his job "for the second and final time." R. D. & O. at 3. Upon returning to Respondent's headquarters with the undelivered load, Complainant did not tell anyone in Respondent's management that he quit; instead, he parked his truck and left. *Id*.

Complainant claims he resigned his employment because he refused to drive in violation of Department of Transportation rules on hours of driving, because he was scheduled too tightly, and because he had been subjected to extensive unpaid delays. Complainant testified he voiced these concerns to fellow employees, and that he made a complaint about excessive hours to DOT in February 1995 and again in May or June of that year. R. D. & O. at 4

In the beginning of 1997, Respondent sued Complainant in Small Claims Court in Kentucky for unauthorized use of a vehicle in the Milwaukee and Winchester incidents and won a judgment and garnishment order against Complainant. R. D. & O. at 4. Thereafter, Complainant filed a complaint with the Department of Labor under the STAA, alleging Respondent filed the small claims court action in retaliation for his complaints to DOT. Administrative Exhibit 1 at paragraph 4(d). Complainant claimed he suffered disparate treatment because another employee of Respondent was not sued for unauthorized use of a vehicle. *Id.*

The ALJ found that Complainant engaged in protected activity when he complained to DOT about hours of service. R. D. & O. at 5.[2/] The ALJ ruled that Complainant alleged two acts of retaliation: that he had been constructively discharged by being required to drive excessive hours, and that he had been retaliated against by the filing of the small claims action. R. D. & O. at 6. The ALJ inferred that Complainant had been required by Respondent to drive in excess of the DOT hours of service regulations. R. D. & O. at 6. But the ALJ held that fact alone was insufficient to establish constructive discharge, because Complainant did not offer any other evidence to show that Respondent made his working conditions so "difficult, unpleasant, unattractive or unsafe" that Complainant was constructively discharged. *Id.*

[1/](...continued)
2, but Complainant testified that he quit after the second incident of delay in unloading freight in June 1995. T. (Transcript of hearing) 15.

[2/] The ALJ found that Complainant did not prove that he made internal safety complaints. *See* R. D. & O. at 5 n.2.

With regard to the small claims court action, Respondent's owner, Mike Whitaker, testified that Respondent's policy is to impose a mileage charge for unauthorized use of company vehicles. The ALJ found that Respondent did not enforce this policy discriminatorily against Complainant. The ALJ noted that Whitaker produced a list of other employees who had been charged for unauthorized use of a company vehicle, and that OSHA found that another employee had been sued to collect such a charge. R. D. & O. at 7.

Finally, the ALJ found that Complainant failed to establish that Respondent was aware of Complainant's protected activity when it allegedly constructively discharged him or when it instituted the small claims action. He held therefore that Complainant failed to establish one of the elements of a *prima facie* case of retaliation under the STAA. R. D. & O. at 8.

DISCUSSION

We agree with the ALJ's ultimate conclusion that this complaint should be dismissed, but on somewhat different grounds than those found by the ALJ.

First, we conclude that Complainant's constructive discharge claim, if in fact he made one,[3/] was untimely and must be dismissed. A complaint under STAA must be filed within 180 days of the date of the alleged discrimination. 49 U.S.C.A. §31105(b)(1). Complainant resigned, and claims he was constructively discharged, in early June 1995,[4/] but did not file his complaint with OSHA until May 7, 1997, almost two years later. Thus, a constructive discharge complaint was untimely.

Second, Complainant failed to prove that Respondent retaliated against him for engaging in protected activity by filing an action against him in small claims court. We agree with the ALJ that Complainant has not established that he made internal safety complaints. Therefore, Complainant was required to prove that Respondent knew of his complaints to DOT about hours of work and retaliated against him for those complaints by suing him in small claims court. Complainant did not carry his burden of proving by a preponderance of the evidence[5/] that the Respondent was aware of Complainant's protected activity. Complainant's vague testimony that he raised his concerns about

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[3/] The original complaint to OSHA is not in the record.

[4/] There is contradictory evidence in the record regarding the date Complainant resigned. The OSHA determination letter states he resigned "approximately the third week of January 1996," but Complainant testified that he resigned after the Winchester incident "around the 1st of June [1995]." T. 15.

[5/] The ALJ analyzed this case in terms of whether Complainant had established a *prima facie* case. But as the Secretary and the Board have repeatedly held, once a case has been fully tried on the merits, the trier of fact can decide the ultimate question of whether the Complainant has proven by a preponderance of the evidence that retaliation was a motivating factor in the adverse action taken against him. Once a case has been tried on the merits, determining whether Complainant has established a *prima facie* case no longer serves any useful purpose. *See Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec'y. Dec. Feb. 15, 1995, slip op. at 8-12.

hours of service to "Pete, Bill and Claudette," whose last names he could not remember, T. 11-12, was far from sufficient to prove that supervisors or managers of Respondent were aware of his complaints. Absent persuasive evidence that Respondent knew of Complainant's protected activity, we cannot conclude that Respondent retaliated against him for it.[6/]

Accordingly, the complaint in this case is **DISMISSED.**

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

[6/] Thus, we need not reach the question whether Respondent's filing of an action in small claims court constituted adverse action against Complainant.