U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 12 January 2005

Case No. 2004-STA-0060

In the Matter of:

GEOFFREY R. COATES,
Complainant,

v.

SOUTHEAST MILK, INC.,
Respondent.

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

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

The above-referenced matter is a complaint of discrimination under Section 31105 of the Surface Transportation Assistance Act ("STAA") of 1982.

On December 23, 2004, Respondent, Southeast Milk, Inc. ("SMI"), submitted to the court a Motion for Summary Decision. On January 6, 2004, Complainant was notified by the court that he was entitled to file a response and supporting material in opposition to Respondent's Motion. Complainant submitted his Answer Opposing Respondent's Motion for Summary Decision on January 6, 2004.

BACKGROUND

On December 16, 2003, OSHA received from Complainant a complaint of discrimination. Following an investigation, OSHA notified Complainant that it did not believe that Respondent had fired Complainant in violation of 49 U.S.C. § 31105. Complainant then requested a full hearing before the Office of Administrative Law Judges. On August 9, 2004, the matter was referred from OSHA to this office. In a telephone conference call on September 27, 2004, the parties agreed to hold a hearing in Ocala, Florida on January 19 and 20, 2005.

CONTENTIONS OF THE PARTIES

Respondent

Respondent asserts that Complainant has not demonstrated that a causal connection exists between his protected activity and the adverse employment action. Respondent cites a statement from Complainant in which he connects his November 10, 2003 termination with an email he sent to SMI General Trucking Manager Pamela Roland on November 9, 2003. Respondent states that not only does Complainant's November 9, 2003 email not address concerns covered by the STAA, but the decision to terminate Complainant was made on November 7, 2003, prior to Complainant sending his email. Respondent states that the decision to terminate Complainant's employment was immediately proximate to Respondent's discovery of a defamatory, unprotected statement which appeared on Complainant's website. Specifically, Respondent cites the statement "Federal Criminal Complainants of Embezlement [sic] of Earned Wages filed with Wage and Hour" on Complainant's website which led to Complainant's termination.

Respondent also states that assuming Complainant met his burden for establishing a *prima facie* case, he cannot prove by a preponderance of the evidence that the legitimate, non-retaliatory reason articulated by Respondent is a pretext. Respondent notes that Complainant had made complaints to SMI management and had made insulting and threatening statements to SMI management throughout the course of his employment, yet Respondent did not terminate his employment until the defamatory statement was published. In support of its Motion, Respondent submitted affidavits from Albert Antoine, Chief Financial Officer for SMI, and Pamela Roland, Trucking Division General Manger for SMI, outlining the timing and series of events which led to Complainant's termination. Additionally, Respondent submitted several documents, consisting mostly of emails written to and by Complainant, which support Respondent's position.

Complainant

Complainant first requested that the court order Respondent to provide full discovery before requiring any response by Complainant. Complainant alleged that he had not had full and fair discovery and accused the court of failing to protect his rights.[1] Complainant asserts that Respondent's Motion fails because the statement in question did not appear on his website until November 10, 2003. In light of Respondent's claim that the statement appeared on Complainant's website on November 6, 2002, Complainant contends there are disputed material facts. Additionally, Complainant requests the court to reincorporate by reference and grant his

[1] Complainant's concerns regarding discovery were previously addressed in Pre-Hearing Order # 6. The court therefore denies Complainant's request to provide full discovery before ruling on Respondent's Motion.

Motion for Partial Summary Decision[2], which Complainant asserts would "require only a trial on damages and remedies." In support of his Opposition to Respondent's Motion, Complainant has submitted an affidavit, in which he states that no embezzlement statements appeared on his website until November 10, 2003.[3] Complainant also attached an index of images which were uploaded to his website and the dates on which such action was allegedly taken. CX-45.

DISCUSSION

Under the Rules for Practice and Procedure for Administrative Hearings, any party may "move with or without supporting affidavits for a summary decision on all or any part of the proceeding." 29 C.F.R. §18.40(a). A party opposing the motion may not rest on the mere allegations or denials of the motion but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §18.40(c). An administrative law judge "may enter summary decision for either party if . . .there is no genuine issue as to any material fact and [the] party is entitled to summary decision." 29 C.F.R. §18.40(d). In evaluating a motion for summary decision, "the judge does not weigh the evidence or determine the truth of the matters asserted, but only determines whether there is a genuine issue for trial . . . If the slightest doubt remains as to the facts, the ALJ must deny the motion for summary decision." *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, (ARB November 30, 1999), *citing Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1985). Moreover, in determining whether a genuine issue of material fact exists, the evidence and factual inferences must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). In ruling upon a motion for summary decision, the administrative law judge may consider the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed. 29 C.F.R. § 18.40(d).

The STAA prohibits the discharge of, or discipline or discrimination against, an employee in the commercial motor transportation industry because the employee either files a complaint or initiates or testifies in a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or because the employee refuses to operate a vehicle in certain circumstances:

> (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because
>
> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (B) the employee refuses to operate a vehicle because

[2] Complainant submitted a Motion for Summary Decision on October 27, 2004. The court already denied Complainant's Motion for Summary Decision in Pre-hearing Order # 3, and declines to resurrect Complainant's Motion in this Recommended Order.

> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105.

To establish a *prima facie* case of discriminatory treatment under the STAA, the complainant must prove: (1) that she was engaged in an activity protected under the STAA; (2) that she was the subject of adverse employment action; and (3) that a causal link exists between her protected activity and the adverse action of her employer. *Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir. 1987). Once the *prima facie* case is established, the burden of production shifts to the Respondent to present evidence sufficient to rebut the inference of discrimination. To rebut this inference, the employer must articulate a legitimate, nondiscriminatory reason for its employment decision. *Id.*. A credibility assessment of the non-discriminatory reason espoused by the employer is not appropriate; rather, the Respondent must simply present evidence of any legitimate reason for the adverse employment action taken against the Complainant. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993).

If the Employer successfully presents evidence of a non-discriminatory reason for the adverse employment action, the Complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a mere pretext for discrimination. *Moon*, *supra*; *See also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In proving that the asserted reason is pretextual, the employee must do more than simply show that the proffered reason was not the true reason for the adverse employment action. The employee must prove both that the asserted reason is false and that discrimination was the true reason for the adverse action. *Hicks*, *supra*, at 515.

Complainant's *Prima Facie* Case

To determine whether Complainant engaged in protected activity, the court initially looked to a letter written by Complainant to Secretary of Homeland Security Tom Ridge, and copied to numerous agencies, including OSHA. This letter apparently served as the basis for Complainant's complaint regarding his STAA protected activity. Upon review of this letter, the court found no indication that Complainant had engaged in activity which would fall under the STAA. The court then looked to documents submitted by both Complainant and Respondent to determine if Complainant had engaged in any activity which would fall under STAA jurisdiction. The court finds that Complainant did engage in protected activity. Specifically, Complainant communicated to SMI management officials his concerns and opinions regarding driver logs, truck ladders and landing gear. SMIGC.DP 111; CX-8; CX-10; CX-14.[4] Although Respondent

[4] The following will be used to reference documents submitted by the parties:

SMIGC: Documents submitted by Respondent in support of its Motion for Summary Decision

doubts whether these complaints constitute protected activity, the court finds that these complaints relate to commercial motor vehicle safety, and thus constitute protected activity under the STAA. Additionally, Complainant has shown that he suffered an adverse employment action, namely, his termination on November 10, 2003.

Having established these two elements of the *prima facie* case, Complainant must also establish a causal link between his STAA protected activity and his termination from SMI. *Minn. Corn Processors, Inc. (Helgren),* ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003); *Moon,* 836 F.2d at 229. Initially, the court notes that the evidence submitted by both parties indicates that during the course of his employment, Complainant raised concerns regarding a plethora of subjects, including, but not limited to, wage and hour violations; protected activity under the NLRB; broken seals on milk tankers; and accusations that SMI managers committed perjury. Regardless of whether Complainant's actions may constitute protected activity under statutes outside of this court's jurisdiction, the only action at issue in this case is whether Complainant's STAA protected activity can be causally linked with his termination. Although the burden to establish an inference of causal connection is not onerous, it is the complainant's burden to come forth with some evidence to link the adverse action with the protected activity. *See e.g. Ertel v. Giroux Brothers Transportation, Inc.,* 88-STA-24 (Sec'y Feb. 16, 1989); *Simpkins v. Rondy Co., Inc.*, ARB No. 02 097, ALJ No. 2001 STA 59 (ARB Sept. 24, 2003); *Moon v. Transport Drivers, Inc.,* 836 F.2d 226 (6th Cir. 1987). The court reiterates that Complainant, as the party opposing the Motion for Summary Decision, must set forth specific facts showing that there is a genuine issue of fact for the hearing. 29 C.F.R. §18.40(c).

In viewing the evidence in light most favorable to Complainant, the court finds that Complainant has failed to establish the causal connection required for a *prima facie* case. The court has thoroughly reviewed the evidence, and is unable to find a nexus between Complainant's protected STAA activity and his termination. The court first looked to Complainant's letter to Tom Ridge,[5] in which Complainant wrote

> "I was discharged from my employ with Southeast Milk, Inc. [SMI] for engaging in Federally Protected Concerted Efforts by being the Spokesman for SMI's 200+ drivers plus other employees; and, for cooperating with various State and Federal Enforcement Agencies during their investigations of driver, farmer, and third party allegations of misconduct by SMI management…"

The majority of Complainant's letter focuses on contaminated milk and broken seals, although he does make a few vague statements regarding OSHA and the Department of Transportation. However, nowhere in this letter does Complainant specifically state that *he* made complaints regarding truck safety, nor does he specifically contend that he was terminated in retaliation for his protected STAA activity. The court also notes that this

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CX: Documents submitted by Complainant in support of its Motion for Summary Decision (see footnote 2) and in support of its Opposition to Respondent's Motion for Summary Decision.

[5] This letter, as mentioned previously, was written by Complainant on December 15, 2003, and apparently served as Complainant's complaint with OSHA and has been accepted by this court as the complaint for this action under the STAA.

letter was sent to numerous government agencies and officials, including the Florida Department of Agriculture; OSHA; U.S. Secretary of Labor Elaine Chao; Senator Judd Gregg; U.S. Department of Transportation; NLRB Region 12; and U.S. Representative John Boehner.[6]

Furthermore, it appears that the last communication made by Complainant to Respondent in reference to his STAA concerns occurred months prior to his termination, on July 1, 2003. SMIGC.DP 89; CX-14. In this email, Complainant noticed Respondent of his safety complaints and his intent to share the alleged violations with OSHA, and wrote that he was notifying the NLRB of SMI's alleged threat to terminate his employment for filing safety complaints, which Complainant viewed as extortion. *Id.* Thereafter, in September, an OSHA investigation ensued, but the investigation revealed that Respondent was not in violation of any law. Despite his allegation of retaliation in the July 1, 2003 email, Complainant did not allege that he suffered any retaliation following the OSHA investigation. Furthermore, Complainant continued to file complaints with SMI in the months following the OSHA investigation and preceding his termination - from September 2003 through November 2003. However, these complaints dealt not with safety issues, but rather with concerns regarding milk tickets and overtime pay. SMIGC.DP 94-95; SM.GC 264-266; SM.GC 267-268.[7]

In an email written to SMI officials on the night of November 10, 2003, Complainant recounted the details of his termination that day. In this email, Complainant states that he was told that he was fired for making a defamatory statement on his website. SMIGC.DP 17-18. Complainant does not state that Respondent made any remarks regarding his protected activity, which could create an inference of causal connection.

Additionally, the court notes that despite continuing complaints by Complainant throughout the course of his employment, as well as numerous statements he made to SMI Management which alone may have sanctioned his termination,[8] Respondent had not previously terminated his employment. *See Monteer v. Milky Way Transport Co., Inc.,* 90-STA-9 (Sec'y

[6] The court makes note of these recipients because such a diverse list makes it even more difficult to determine which of Complainant's actions he was alleging as the reason for his termination.

[7] The court acknowledges that in some cases, temporal proximity is enough to establish a causal connection between the protected activity and the adverse action. However, in light of Complainant's long history of protected and non-protected complaints and his continued employment despite those complaints, Complainant's July 1, 2003 email cannot, by itself, support an inference of causation. *See e.g. Simpkins v. Rondy Co., Inc.*, ARB No. 02 097, ALJ No. 2001 STA 59 (ARB Sept. 24, 2003), where the Administrative Review Board affirmed the ALJ's finding that complainant had not established a causal link between the protected activity and the adverse employment action where Complainant's protected activity was remote to warning letters and the ultimate termination, whereas the warning letters and termination closely followed incidents that Respondent believed were a deviation from company policy. *Simpson* also noted that there was a lack of evidence indicating that Respondent's management held hostility against Complainant for STAA protected activity.

[8] For example, in a May 5, 2003 email to Pamela Yoder, SMI Safety and Regulatory Compliance Manager, which was also copied to other SMI managers and SMI employees, Complainant recommends that Ms. Yoder be discharged for cause. CX-7.

July 31, 1990)[9] In a May 20, 2003 email from SMI manager Albert Antoine to Complainant, Mr. Antoine stated that Complainant was free to raise his concerns to the Human Resources Department and was free to communicate his concerns to other employees, provided it was done on non-work time. CX-12. When Complainant violated this rule and approached another employee with unwanted communications, Respondent still did not terminate his employment, instead providing Complainant with a written employee warning notice. CX 23 (October 24, 2003). Respondent also sent Complainant a two-page, detailed written letter on November 6, 2003, addressing Complainant's concerns regarding the Fair Labor Standards Act. Viewing the evidence in Complainant's favor, the court is unable to find any suggestion from Complainant that his STAA protected activity is causally connected to his termination.

Notwithstanding the substantial evidence recounted above, the strongest evidence against a finding of a causal connection exists in statements made by Complainant. Specifically, Complainant made numerous statements in which he characterizes his termination as retaliation for an email he sent to SMI Manager Pamela Yoder on November 9, 2003, in which he complained of alleged wage and hour violations by Respondent. Specifically, in Complainant's Response to Respondent's November 3, 2004 Second Motion to Enlarge Time, Complainant writes:

> "On November 9, 2003, Complainant electronically sent Respondent Notice of Complainant's Federal Filings. Such Notice was delivered on November 10, 2003. Immediately thereafter, Respondent discharged Complainant within hours of receiving Complainant's Notice."

In an email written by Complainant on December 29, 2003, Complainant wrote:

> "We were fired when we pointed out that it is unlawful to: falsify milk tickets; or violate the 'chain of custody' on the tanker's seals; or charging farmer's an extra 0.11 cents 100# in an apparent market/price fixing scheme, or not paying lawfully required overtime; etc."

SMIGC.DP 7.

Complainant also wrote in an email on July 2, 2004 that "they [Respondent] unlawfully fired me for filing a legitimate complaint with Wage and Hour." SMIGC.DP 1 (Exhibit F). The court cannot ignore Complainant's own characterization of his termination. In any of these communications, Complainant could have alleged that he was terminated in retaliation for his STAA protected activity, yet his statements clearly show that he believed he was terminated in retaliation for non-STAA activity. Even viewing this evidence in light most favorable to Complainant, the court is unable to infer a causal connection in the face of such overwhelming evidence to the contrary.

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[9] In *Monteer*, the Secretary held that complainant failed to establish a *prima facie* case where the evidence showed that although complainant had routinely complained about safety concerns, respondent had never taken any adverse action against him, and where wholly unprotected activity immediately preceded complainant's discharge.

The court need not address Complainant's argument that his website did not contain the "Embezzlement statement" until *after* his termination because it is unnecessary to reach that point in the legal analysis. *See Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229, fn. 5 (6th Cir. 1987).[10] Complainant's failure to establish any nexus between his STAA protected activity and his termination, instead making statements in which he attributes his termination to non-STAA protected activity, results in his failure to establish a *prima facie* case under the STAA. For these reasons, I find that summary decision is proper because there exists no genuine issue of material fact regarding a causal link between Complainant's protected activity and his subsequent termination. Therefore, Respondent is entitled to summary decision as a matter of law.

ORDER

It is hereby RECOMMENDED that the Respondent's motion for summary decision be GRANTED.

SO ORDERED

A

Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/jrr

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.

[10] In *Moon*, the Sixth Circuit, having concluded that the complainant failed to establish a prima facie case, found it unnecessary to address whether the employer had a legitimate, non-discriminatory reason for terminating complainant.