U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 February 2008

Case No.: 2008-FRS-00001

In the Matter of

DAVID HAMILTON,
Complainant,

v.

CSX TRANSPORTATION,
Respondent.

Appearances: David Hamilton
Pro Se Complainant

Robert G. Lian, Jr., Esquire
Akin Gump Strauss Hauer & Feld, LLP
For the Respondent

Before: John M. Vittone
Chief Administrative Law Judge

DECISION AND ORDER

This matter arises out of a claim filed by the Complainant under the employee protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53. The 9/11 Act was the result of a Conference Report, H.R. Rep. 110-259 (July 25, 2007) (Conf. Rep.). Section 1521 of the 9/11 Act amends the FRSA by modifying the railroad carrier employee whistleblower provision – both expanding what constitutes protected activity and enhancing administrative and civil remedies for employees to mirror those found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. §42121. Additionally, the amended FRSA Section 20109 will follow the AIR21 procedure for adjudication at the Department of Labor.

PROCEDURAL HISTORY

The Complainant has appealed to the Office of Administrative Law Judges ("OALJ") from the Secretary's Findings dated November 19, 2007. Therein, the Secretary, acting through her agent, Occupational Safety and Health Administration ("OSHA"), dismissed the complaint, determining that the Respondent is a railroad carrier for the purposes of 49 U.S.C. §§ 20102 and 20109, but that the Complainant's termination predated the August 3, 2007, amendments to the FRSA giving the Secretary jurisdiction over such matters. As a result, OSHA determined that the Complainant is not an employee covered under 49 U.S.C. § 20109. OSHA concluded that it has no jurisdiction to investigate because the decision to terminate the Complainant's employment was made and communicated to the Complainant prior to the date when OSHA became authorized to investigate FRSA complaints. After a review of the record, I ordered the parties to brief the jurisdictional issue. I received the Complainant's and Respondent's position statements on February 14, 2008.

ISSUES PRESENTED

Did the alleged adverse employment action continue until after the 9/11 Act, thus bringing this matter under the jurisdiction of the Department of Labor? If not, does the Department of Labor have retroactive jurisdiction over a complaint filed under the amended FRSA where the alleged protected activity and adverse employment action occurred prior to the effective date of the amendment?

FINDINGS OF FACT

The Complainant was terminated from his employment on May 25, 2007. After an appeal, his termination was reduced to a suspension and he was reinstated with unimpaired seniority rights on December 18, 2007. On October 31, 2007, the Complainant filed a complaint with the Department of Labor under the FRSA as amended by the 9/11 Act, alleging that his employment was terminated in retaliation for reporting to the Respondent violations of federal railroad safety regulations.

DISCUSSION

The initial issue to be addressed is whether the Complainant's appeal of his termination and subsequent reinstatement to his job on December 18, 2007, constitute a continuation of the original termination action, thus bringing the matter under the 9/11 Act amendments to the FRSA. The Complainant argues such, noting that his reinstatement terms provided that the period between May 25, 2007 (the termination date), and December 17, 2007 (his reinstatement date), did not constitute a break in the Complainant's employment because he was retroactively considered to be a railroad employee for the entire affected period. The Complainant argued that the alleged adverse employment action concluded on December 17, 2007, with his reinstatement

and, consequently, he has been subject to retaliatory action subsequent to the August 3, 2007, amendments and is covered under FRSA.

The Respondent argues that the appeal and reinstatement activity following the May 25, 2007, termination is not a continuation of the original termination action, as the Complainant suggests. The Respondent argues that the alleged adverse employment action occurred when the Complainant was fired, not when the discipline was reduced. Respondent also notes that a reduction of the Complainant's termination to a suspension is neither adverse nor retaliatory because it had the effect of reinstating the Complainant's employment with seniority rights unimpaired.

The Complainant's argument that the adverse employment action continued during the grievance process and concluded with his reinstatement is analogous to statute of limitations defenses raised in whistleblower actions where a complainant failed to timely file a complaint and argues that the statute of limitations should be tolled to include a grievance process following a termination. It is well established that the filing of a grievance does not operate to toll the limitations period for filing a complaint under the whistleblower statutes. *Greenwald v. City of North Miami Beach, Florida,* 587 F.2d 779 (5th Cir. 1979) (pursuit of local Civil Service Board review of discharge did not toll limitations period for filing complaint under whistleblower provision of Safe Drinking Water Act); *Prybys v. Seminole Tribe of Florida,* ARB No. 96-064, ALJ No. 95-CAA-15, slip op. at 5-6 (ARB Nov. 27, 1996) (appeal to Tribal Council did not toll limitations period for filing complaint under environmental whistleblower statutes). *Cf. International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc.,* 429 U.S. 229, 236-240 (1976) (initiation of grievance procedure under collective-bargaining agreement did not toll running of statutory limitations period for filing a claim under Title VII of the Civil Rights Act).

Additionally, the conclusion of the grievance process on December 17, 2007, marked by the reinstatement of the Complainant's employment does not act as a continuation of the adverse employment action – the termination of the Complainant's employment on May 25, 2007. It is established that the adverse employment action that serves as the basis for the present claim is the discreet act of terminating the Complainant's employment on May 25, 2007, which was over two months before the Department of Labor was granted jurisdiction over such claims. Thus, the remaining issue is whether the Department of Labor has retroactive jurisdiction over a complaint filed under the amended FRSA where the asserted protected activity and alleged adverse employment action occurred prior to the effective date of the amendment.

The Respondent argues that OSHA properly concluded that it lacks jurisdiction because alleged protected activity and adverse employment action occurred before the effective date of the 9/11 Act giving the Secretary the authority to hear FRSA complaints. The Respondent recalled *Landgraf v. USA Film Prods.,* 511 U.S. 244 (1994), in making this argument. I agree that *Landgraf* is the principal case addressing the issue of whether a new federal statute may be retroactively applied to conduct occurring before the statute went into effect.

The Court in *Landgraf* reasoned that there is a strong presumption against retroactive application of laws and, unless it is determined that Congress intended that the law be

retroactively applied, courts should only engage in prospective application of the law. *Landgraf*, 511 U.S. at 265. *Landgraf* provides a two-step analysis for determining whether there should be retroactive application. First, the court must review the statute to determine whether Congress provided an express directive or implied intent for retroactive application of the law to a cause of action that arose before the date of enactment. *Id.* at 280. In the present case, there is no express statement in the amended FRSA Section 20109 indicating Congressional intent for retroactive application.

Because the 9/11 Act amendment to the FRSA is void of any express directive authorizing retroactive application of Section 20109, we must determine if Congress impliedly intended for retroactive application. It is noted that another amendment made by the 9/11 Act to the FRSA includes express language providing for retroactive application of that provision. 49 U.S.C. § 20106(b)(2), as amended by Section 1528 of the 9/11 Act, Pub. L. No. 110-53. Because Congress did not provide a similar explicit provision for retroactive application in §20109 of the amended FRSA, the statutory construction concept of negative implication becomes relevant. The fact that Congress included an express directive allowing retroactive application of Section 20106 and did not do the same for Section 20109 indicates that Congress did not intend to allow retroactive application of Section 20109. As a result, I find that Congress did not explicitly or implicitly indicate that Section 20109 was to be retroactively applied.

Where the statute does not explicitly direct or impliedly indicate that retroactive application is intended, the second step under the *Landgraf* analysis prescribes that the court must determine whether the new statute would have retroactive *effect* on the parties regulated by the amendment. *Landgraf*, 511 U.S. at 280. "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . ." *Id.* at 269. When determining whether a statute should be retroactively applied, a court should evaluate the "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, at 270. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* at 265. Considerations for determining retroactive effect include "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id* at 280.

In this vein, the Respondent argues the amendment to Section 20109 has retroactive effect on the parties because it includes significant substantive changes to the provision, including increasing employer liability for past conduct, expanding the scope of protected activity, and enhancing administrative and civil remedies. According to the Conference Report on the 9/11 Act, the amendments to Section 20109 are intended to expand the protected acts of employees and enhances administrative and civil remedies for employees. *H.R. Rep. No. 110-259*, at 348 (2007). The amendment provides for de novo review of a complaint in Federal District Court if the Department of Labor does not timely issue an order related to the complaint and raises the cap on punitive damages that could be awarded under Section 20109 from $20,000 to $250,000. *Id.*

The amendment to Section 20109 of the FRSA is more than procedural because it changes the rights and obligations of the parties by expanding the scope of protected activity and significantly increases penalties for employers. Retroactive application of the amended FRSA would have a retroactive effect on the parties regulated by the amendment due to increased liability for the employers. Consequently, the application of the amended FRSA to conduct occurring prior to enactment would be improper. The Complainant's claim arising from his May 25, 2007, termination is hereby dismissed.

ORDER

IT IS ORDERED that this complaint is hereby DISMISSED.

A

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE: Review of this Decision and Order is by the Administrative Review Board pursuant to ¶¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the Federal Railroad Safety Act. Accordingly, this Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.