U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 February 2012

Case No.: 2011-FRS-00035

In the Matter of:

ERIC NELSON,

Complainant

v.

NORFOLK SOUTHERN RAILWAY CO.,

Respondent.

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

This matter arises out of a claim filed by the Complainant under the employee protection provisions of the Federal Rail Safety Act ("FRSA" or "the Act"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53. The employee protection provisions of FRSA are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

PROCEDURAL HISTORY

The Complainant, Mr. Eric Nelson, is a former employee of Norfolk Southern Railway Company ("NSR"). He filed a complaint under FRSA on October 14, 2009, and an amended complaint on November 16, 2009. The Occupational Safety and Health Administration ("OSHA") issued its findings on August 08, 2011. OSHA found reasonable cause to believe that NSR had violated the FRSA and ordered various remedies, including the payment of compensatory and punitive damages. The Respondent appealed those findings on September 6, 2011.

On November 2, 2011, the Respondent moved for summary decision. The Complainant responded on November 28, 2011. The Respondent and Complainant filed supplemental briefs on the motion on November 30, 2011 and December 19, 2011 respectively.

STANDARD FOR SUMMARY DECISION

Summary decision may be granted where it is shown that the non-moving party cannot prove an essential element of his claim, so that there is no genuine issue of fact to be determined at trial. 29 C.F.R. §18.41. A genuine issue of material fact is presented when the record, taken as a whole, could lead a rational trier-of-fact to find for the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In determining whether there is a genuine issue of fact for the hearing, the judge shall view "all the evidence and factual inferences in the light most favorable" to the non-moving party. *See Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30, 1999) (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1969)).

The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of his case. Once the moving party has met its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Celotex* at 324.

BACKGROUND

The Complainant filed a petition under Chapter 13 of the Bankruptcy Code in the Bankruptcy Court for the Southern District of Florida on October 14, 2005. On February 9, 2011, the court issued an Order of Discharge of Debtor. On June 8, 2011 the court issued a Final Decree, noting that the estate had been fully administered and the case was closed.

The Complainant did not, at any time while the bankruptcy case was pending, disclose the existence of the FRSA claim to the court. Block 4 of the Statement of Financial Affairs requires a listing of "all suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case." The filing included schedules of property. Schedule B, Personal Property, included at Line 20 "Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims."

When the petition was filed the FRSA claim did not exist. The duty to disclose assets is a continuing one, and the Complainant filed a First Amended Schedule B on January 19, 2006.

On November 9, 2009, less than a month after filing his initial FRSA complaint, the Complainant filed a Seventh Modified Chapter 13 Plan. Under the heading of "Other Provisions Not Included Above" this plan stated "The debtor will modify the Plan to provide for the distribution of funds recovered from (1) a potential lawsuit against his former bankruptcy attorney. The debtor has increased payments to unsecured creditors in the amount of $6,000.00 due to the settlement of his personal injury suit." This statement included a merely potential future lawsuit, but does not mention his recently filed FRSA complaint. The statement makes clear that he was aware of the requirement that claims arising after the bankruptcy petition was filed had to be reported.

On November 19, 2009, the court granted Mr. Nelson's motion to modify the Chapter 13 plan. The modified plan was the basis on which the court granted the Order of Discharge on February 9, 2011.

DISCUSSION

Judicial estoppel is an equitable doctrine that prohibits a party from asserting a position in a legal proceeding that is inconsistent with a position the party took in a previous proceeding. The purpose of the doctrine is to "protect the integrity of the judicial process … by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

The Respondent's brief discusses at length the case of *White v. Gresh Transport, Inc*. ARB No. 07-035, ALJ No. 2006-STA-048 (ARB Nov. 20, 2008), in which the Administrative Review Board applied judicial estoppel to a whistleblower claim that was undisclosed in bankruptcy proceedings. The facts in *White* are strikingly similar to those in this case. The complainant in *White* had filed a bankruptcy petition on February 22, 2005. The bankruptcy case was reopened on July 21, 2006. He had filed a whistleblower complaint under the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 on May 19, 2006. He never informed the bankruptcy court of that claim. However, he did inform the court of another STAA claim that he had pending against a different former employer. This established that he was aware of the obligation to report pending claims and lawsuits as potential assets of his bankruptcy estate.

The administrative law judge ("ALJ") in *White* granted the employer's motion for summary decision. On appeal, the Board noted that the duty to disclose potential assets was a continuing one and that the complainant "had the same obligation to disclose all of his STAA claims to the bankruptcy court." It affirmed the grant of summary decision as to Mr. White's monetary claims.

The Board remanded the *White* case to the ALJ for resolution of the claim for reinstatement. The Board noted that reinstatement would not add any assets to the bankruptcy estate and held that the claim for reinstatement was therefore not subject to judicial estoppels. *See also Barger v. City of Cartersville*, 248 F.3d 1289 (11th Cir. 2003); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002). In the present case there is no claim for reinstatement.

The Complainant's original brief does not discuss *White*, but makes several arguments against applying judicial estoppel to this case. One such argument is that the OSHA investigation into Mr. Nelson's complaint was not a judicial proceeding. The Complainant cites *New Hampshire v. Maine*, in which the Supreme Court noted the potential

> that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edward* v. *Aetna Life Ins. Co.,* 690 F. 2d 595, 599 (CA6 1982). Absent success in a prior proceeding, a party's later inconsistent position

> introduces no "risk of inconsistent court determinations," *United States* v. *C. I. T. Constr. Inc.,* 944 F. 2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity.

New Hampshire v. Maine, 532 U.S. 742, 750-751 (2001).

The only action on Mr. Nelson's FRSA complaint that the Department of Labor has completed to date is the initial administrative investigation by OSHA. The argument is that, because that investigation is not a judicial proceeding the doctrine of judicial estoppel does not apply.

The first difficulty with this position is that this procedural history was identical in *White*, as it is in DOL whistleblower litigation generally. The OSHA administrative investigation precedes the adjudicatory phase before an ALJ. If the non-judicial nature of the OSHA investigation were a bar to applying judicial estoppel, the doctrine would be a dead letter in this class of cases, but *White* establishes its viability.

More fundamentally, it is not the Department of Labor, at either the OSHA or the ALJ levels, that is potentially misled by a failure to disclose the claim. It is irrelevant to the issues in a whistleblower protection case whether the complainant is solvent, or is going through bankruptcy, or has received a bankruptcy discharge. The quoted language from *New Hampshire v. Maine* speaks of the potential for "either the first or the second court" to be misled.

The Department of Labor could not be misled by lack of knowledge of a pending bankruptcy petition. However a bankruptcy court (the "first court" in the Supreme Court's phrasing) can be misled by lack of knowledge of a pending monetary claim. The Supreme Court went on to note that "absent success in a prior proceeding" there would be no risk of inconsistent decisions, but success in a prior proceeding is precisely what happened in this case, as in *White*. In both cases the bankruptcy court issued a discharge without knowledge of the pending claim.

The Complainant also argues that judicial estoppel should not apply because he asked his bankruptcy attorney whether he should disclose his FRSA claim to the bankruptcy trustee and was told that he should not. This assertion must be accepted as true for purposes of a motion for summary decision, in which factual inferences must be construed in the light most favorable to the non-moving party.

The Complainant in *White* represented himself before the ALJ and the ARB. It does not appear from the decision whether he had counsel in the bankruptcy case. In *Barger*, one of the cases that the Board relied on in *White*, the plaintiff had failed to disclose an employment discrimination suit in her bankruptcy filing. The district court granted the employer summary judgment in the discrimination suit on the grounds of judicial estoppel. The bankruptcy court issued a written order finding that the failure to list the discrimination claim resulted from her attorney's inadvertance and that the plaintiff had not concealed the discrimination claim to obtain a financial advantage. In spite of this finding by the bankruptcy court, the court of appeals affirmed the district court's grant of summary judgment.

The court of appeals in both *Barger* and *Burnes* held that intent may be inferred where the debtor has knowledge of the undisclosed claims and a motive for concealment. In this case it is undisputed that the Complainant had knowledge of the FRSA claim and the filing of the Seventh Modified Plan on November 9, 2009 makes it clear that he was aware of the requirement to inform the bankruptcy court of claims arising after the initial bankruptcy petition. A motive to avoid disclosure exists whenever, as in this case, the asset is a potential one that the debtor may receive in the future, after the bankruptcy discharge.

The Complainant's brief also argues that granting summary decision will deprive his creditors of the opportunity to recover any proceeds from the claim. The Complainant's brief asserts that he has requested his bankruptcy attorney to re-open his case in order to disclose the FRSA claim. This approach was rejected by the court of appeals in *Burnes*:

> The success of our bankruptcy laws requires a debtor's full and honest disclosure. Allowing [the appellant] to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets.

Burnes, 291 F.3d at 1288.

The Complainant argues further that barring his claim on the grounds of judicial estoppel thwarts the purpose of whistleblower laws. If summary decision is granted, there will be no hearing on the merits of the claim and no decision on whether the Respondent violated the Act. If there was such a violation, it will not be punished, and future violations will not be deterred.

This is a legitimate concern based on the public policy embodied in whistleblower protection statutes. However, this consideration applied with equal force in *White*, as it will in any whistleblower case. Application of the doctrine will prevent a claim that may be meritorious from being heard on the merits. More broadly, in any case in which it applies it will prevent a plaintiff or complainant from having the merits of the case decided. This consideration is a serious one, but has not prevented the courts and the ARB from applying the doctrine in situations substantially similar to this case.

In his supplemental brief the Complainant does address the *White* case. He argues first that in *White* the STAA claim arose before the bankruptcy proceeding "whereas Complainant was involved in bankruptcy four years prior to his FRSA claim. At the time of his injury, Complainant was accustomed to his life being an open book and the courts having ready access to his financial life."

The Board's decision in *White* does not support the asserted distinction based on timing. Mr. White filed his whistleblower claim between the initial filing of his bankruptcy petition in 2005 and its reopening in 2006. In affirming the grant of summary decision the Board noted that the duty to disclose assets is a continuing one. In the present case, the fact that the Complainant

was long accustomed to the bankruptcy process seems to argue for expecting him to disclose his FRSA claim rather than to fail to disclose it.

The Complainant also argues that *White* should be distinguished because of the different result in the OSHA investigations. In this case OSHA found that a violation had occurred, while in *White,* the OSHA finding on the merits was in favor of the employer. This is correct, but it overlooks the *de novo* nature of proceedings before an ALJ in DOL whistleblower adjudication. The OSHA determination is not binding on the ALJ. The complainant in the *White* case lost his case at the OSHA level, but might have been able to win it at the ALJ level. He did not get the chance, at least with regard to the claim for monetary damages, because the ARB held that judicial estoppel barred him from proceeding on that claim.[1]

The Complainant argues for an additional distinction from *White.* The complainant in that case argued both to the ALJ and the ARB that he was not required to disclose his STAA claim to the bankruptcy court because it arose after he filed his initial petition. The Board refuted this claim with citations to the relevant provisions of the Bankruptcy Code, but did not base its finding on the complainant's incorrect view of the law. Similarly, the court of appeals cases that the Board cited did not base the outcome on statements of intent by the plaintiffs.

In *White*, as in the present case, the complainant was aware of the existence of the pending whistleblower claim. In this case the supplemental filings in the bankruptcy case indicate awareness of the continuing duty to disclose assets to the court. The *White* case is controlling precedent on the issue raised by the motion.

ORDER

The Respondent's Motion for Summary Decision is **GRANTED** and the claim is **DISMISSED**.

A

KENNETH A. KRANTZ
Administrative Law Judge

KAK/mrc
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative

[1] After the Board remanded the *White* case, the ALJ granted the complainant a summary decision on his claim for reinstatement. The Board affirmed this decision. *White v. Gresh Transport, Inc*. ARB No. 10-096, ALJ No. 2006-STA-048 (ARB Aug. 30, 2011). Although he lost at the OSHA level, the complainant ultimately prevailed on his claim for reinstatement, and presumably would have prevailed on his monetary claim if the ARB had permitted that claim to proceed. This outcome emphasizes the non-binding nature of the OSHA determination on the merits.

Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).