U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 27 September 2012

Case No.: 2012-FRS-00075

In the matter of

KEVIN E. GONDER,
Complainant,

v.

NORFORK SOUTHERN CORPORATION,
Respondent.

Appearances: Kevin E. Gonder
Pro Se Complainant

Thomas A. Shumaker
General Solicitor
Norfolk Southern Corp. Law Department

Before: Stephen M. Reilly
Administrative Law Judge

DECISION AND ORDER DISMISSING CLAIM

This matter arises out of a claim filed by the Kevin E. Gonder 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

Mr. Gonder first called OSHA then followed with an e-mail dated July 2, 2012. This e-mail is being treated as the complaint. On July 30, 2012, 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. § 20109, but finding that Mr. Gonder's complaint was not timely because it was not filed within 180 days of the adverse action. On August 28, 2012, Mr. Gonder, in a handwritten letter appealed the Secretary's Findings to the Office of Administrative Law Judges ("OALJ"). The case was assigned to the undersigned to render a decision.

ISSUES PRESENTED

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? If the Department of Labor has jurisdiction over the complaint, does the 180 day time limit for filing the complaint, under 49 U.S.C. § 20109(d)(2)(A)(ii), bar consideration of the complaint?

FINDINGS OF FACT[1]

Mr. Gonder alleges he was terminated from his employment in 2002 after reporting an injury on the job. Mr. Gonder admits to reporting his injury the day after he was injured, not on the day the injury took place as required by company rules. Mr. Gonder said he delayed because the "rumors" stated that you got fired for reporting an injury. Mr. Gonder received internal "hearings" that culminated with proceedings before an arbitrator. Mr. Gonder was represented by the union during these proceedings. The arbitrator found in favor of the Employer upholding Mr. Gonder's termination.

Mr. Gonder is clearly angry and frustrated over the process. He feels that he did not get a fair opportunity and that the "union and the lawyers seemed to be more for the railroad than me." At one unspecified point in time he heard on the news about OSHA ordering Norfolk Southern to pay $800,000.00 for terminating employees after reporting injuries. In the July 2, 2012 e-mail to OSHA, he stated that he was "wondering if [he] could get in on this suit? . . . if these employees win anything I should be entitled to something also."

DISCUSSION

Amendments to the FRSA, effective August 3, 2007, gave the Secretary jurisdiction over matters relating to "whistleblower" complaints under the FRSA. 49 U.S.C. § 20109. Although the Secretary does not raise the question of jurisdiction in her Findings, I raise it on my own motion and find that because the termination in question took place at least five years before the

[1] The facts come from the first page of the Report of Investigation included with the Secretary's findings, Mr. Gonder's July 2, 2012 e-mail to OSHA, his handwritten letter, filed August 28, 2012, that is being treated as an appeal, and a telephone conversation on September 24, 2012, between Mr. Gonder, Mr. Shumaker, and myself.

Secretary had the authority to act on these questions, there is no jurisdiction for me to review Norfolk Southern's termination of Mr. Gonder.

It is undisputed that the termination action occurred well before the FRSA amendments were enacted. Therefore, the only way that I could hear this case is if the amendments to the FRSA had retroactive jurisdiction. 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 is *Landgraf v. USA Film Prods.*, 511 U.S. 244 (1994). 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, I must determine if Congress impliedly intended 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.

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 enhance 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.

However, even if the statute applied in 2002, when Norfolk Southern terminated Mr. Gonder, he failed to file his complaint in a timely manner.

> An action under paragraph (1) shall be commenced not later than 180 days after the date on which the alleged violation of subsection (a), (b), or (c) of this section occurs.

49 U.S.C. § 20109(d)(2)(A)(ii). The alleged violation, the termination of Mr. Gonder took place no later than 2002. He filed his complaint on July 7, 2012. I see no way to justify a 10 year delay in filing the complaint. Therefore, even if the statute applied to this action, I would still be compelled to dismiss the complaint as late filed.

ORDER

IT IS ORDERED that this complaint is hereby DISMISSED.

Digitally signed by Stephen M. Reilly
DN: CN=Stephen M. Reilly, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

STEPHEN M. REILLY
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 he 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.