U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 August 2013

Case No.: 2013-FRS-00047

In the Matter of:

RONNIE J. LENZY JR.,

Complainant.

v.

CSX TRANSPORTATION, INC.,

Respondent.

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

This matter arises out of a complaint filed 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, Pub. L. No. 110-53.

PROCEDURAL HISTORY

The Complainant, Mr. Ronny Lenzy, filed a complaint under the FRSA on December 21, 2012, alleging that the Respondent, CSX Transportation, Inc. ("CSX") was taking disciplinary action against him in violation of whistleblower protection provisions of the FRSA. The Occupational Safety and Health Administration ("OSHA"), as the agent of the Secretary of Labor, issued findings on March 6, 2013 dismissing the complaint. Mr. Lenzy appealed those findings on April 3, 2013. On June 19, 2013, CSX filed a Motion for Summary Decision. Mr. Lenzy filed his response to the motion on July 12, 2013.

BACKGROUND

Mr. Lenzy was working as an engineer on December 4, 2012 in the Jack Mack Plant in Atlanta, Georgia, when a trainmaster boarded the train and asked why it had not moved for a lengthy period. The conductor replied that he was having a job discussion with a trainee who was aboard the train. Mr. Lenzy and the conductor were eventually relieved of their duties and escorted from the train. They were taken out of service pending an investigation.

CSX began disciplinary proceedings against Mr. Lenzy and the conductor. In a letter dated December 7, 2012, CSX notified Mr. Lenzy that it would conduct a formal investigation of the incident. This letter alleged that "your train was parked in excess of 60 minutes and you failed to contact the Train Dispatcher, Yardmaster, or the Manager on duty notifying them that you were ready to depart, resulting in train being delayed."

On December 12, 2012, Mr. Lenzy submitted a letter to the regional office of the Federal Railroad Administration ("FRA") alleging that he was being harassed by the management of CSX. He argued that he should not be subject to disciplinary action. On December 21, 2012, he sent a copy of the December 12, 2012 letter to OSHA.

After a hearing that concluded on January 16, 2013, CSX terminated Mr. Lenzy on February 15, 2013. This decision was based on his earlier record of reported incidents, as well as the December 4, 2012 event. He was at "Step 3" in a progressive disciplinary system, based on earlier incidents. The decision to terminate him was made by Jermaine Swafford, the Division Manager of CSX's Atlanta Division.

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).

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.

In determining whether there is a triable dispute of material fact, a judge must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). However, a judge should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000).

STATUTORY PROVISION

The portions of the FRSA at issue in this case provide that:

> (a) In General. - A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful,

good faith act done, or perceived by the employer to have been done or about to be done -

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by –

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452);

(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

49 U.S.C. §20109(a) (1)-(4).

COMPLAINANT'S ALLEGATIONS OF PROTECTED ACTIVITY

In his original complaint, Mr. Lenzy stated that the conductor assigned to his train during the December 4, 2012 incident had reported an on-the-job injury in February, 2012 and alleged that he, Mr. Lenzy, was terminated in retaliation for the conductor's report. In his letter to the FRA he stated, "It also appears that CSX is going after an employee that had a personal injury and any other employee that is on the crew with that employee will be harassed." Mr. Lenzy was not present at the time of the conductor's injury in February. He noted in his June 12, 2013 motion response that he has never had an on-the-job injury.

In its March 6, 2013 findings, OSHA determined that the conductor's past report of an injury did not constitute protected activity under the FRSA on the part of Mr. Lenzy.

In his April 3, 2013 appeal of the OSHA determination Mr. Lenzy advanced a new theory. He noted that he had sent the same December 12, 2012 letter both to the FRA regional office and to Mr. Swafford, the CSX Atlanta Division Manager. In addition, he noted that the OSHA investigator assigned to the case had provided the complaint to CSX's attorney. The attorney was on notice of the complaint before Mr. Lenzy was terminated and therefore, he argues, so was CSX management. From this he contends that "the mere fact that I filed a claim with OSHA and my supervisor knew that I filed a complaint, makes me a protected employee".

DISCUSSION

Mr. Lenzy's first theory of protected activity, raised in his original complaint, was that the conductor assigned to the train in the December 4, 2012 incident had reported an injury the previous February and that Mr. Lenzy was discharged in retaliation for the conductor's act. Not only is this improbable on its face, but it is contradicted by the materials that Mr. Lenzy submitted. If the February report of injury prompted hostility by CSX management, the conductor who reported the injury would be the obvious target for any retaliation. However, the documents in the complaint note that Mr. Lenzy received more severe discipline than the conductor did after the December 4 incident.

Furthermore, the conduct defined as protected activity in 49 U.S.C. § 20109(a)(4) is "to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee." Mr. Lenzy does not allege that he has ever reported an illness or injury of himself or anyone else, only that he served on the same crew with someone who had done so approximately ten months earlier.

His second argument, raised for the first time in his appeal of the OSHA determination, is that he automatically gained whistleblower status when management of CSX became aware of his complaints to federal authorities. Between the railyard incident on December 4 and his disciplinary hearing in January he filed his complaint with two federal agencies.

Mr. Lenzy sent his complaint to the FRA on December 12, 2012. Several "copy to" addressees are listed on the letter, including a certified mail copy to Mr. Swafford. Mr. Swafford's copy was delivered and the return receipt signed on December 13, 2012.

In his December 12 letter to the FRA, Mr. Lenzy described in detail the earlier incidents that had resulted in his being at Step 3 of the disciplinary process. He gave his versions of each of these events, and argued that they were not serious enough to justify his facing the risk of termination for the December 4, 2012 incident.

In his appeal of the OSHA determination Mr. Lenzy writes that "[t]he reason I am a protected employee is the fact that I sent a letter to my Division Manager J. Swafford on December 12, 2012 proclaiming my innocence." This accurately summarizes the contents of that letter. The December 12, 2012 letter argued the case against disciplining Mr. Lenzy for the

December 4 railyard incident. It did not allege any conduct violating a federal law or regulation related to safety or security.

On December 21, 2012 Mr. Lenzy sent a copy of the December 12, 2012 letter to OSHA, beginning the process that has led to this appeal. In his April 3, 2013 appeal Mr. Lenzy notes that the OSHA investigator informed attorneys for CSX of the complaint. Based on this he concludes that "Mr. Swafford my division manager apparently already knew that I had contacted OSHA through the CSXT legal team, and my original letter before the adverse decision of dismissal was made."

There is no direct evidence that Mr. Swafford knew of the December 21, 2012 filing with OSHA. However, the postal records establish that before making the termination decision he was on notice that Mr. Lenzy had filed his complaint with at least one federal agency, the FRA.

Mr. Swafford was on notice of one of Mr. Lenzy's complaints filed with federal agencies, and may have known of the other. On a motion for summary decision all evidence is to be construed in the light most favorable to the non-moving party. Therefore, I will assume for purposes of this motion that Mr. Swafford was aware of the complaint to OSHA as well as the one to the FRA.

However, not every complaint about an employer's behavior, even if communicated to a federal regulatory agency, falls within the FRSA's definition of protected activity. In order to be covered the communication must relate to railroad safety or security. None of the allegations in the December 12 letter come within the categories of communication described in Section 20109(a). Mr. Lenzy alleged that CSX treated him unfairly in the earlier incidents and was doing so in the pending disciplinary action. He has never, in his submissions to OSHA or to this office, alleged that CSX had created a hazard or violated any safety or security regulation.

Neither party has argued that the December 4, 2012 incident had anything to do with the safety or security of the train, the railyard, or any other part of the rail system. The rule that the company cited Mr. Lenzy for violating dealt with efficient utilization of its trains, not with their safety. No one, including Mr. Lenzy, has argued that the train created any hazard by sitting motionless for what company management considered an excessive period of time.

The question of whether discipline was appropriate for any of the three incidents that Mr. Lenzy described can be argued. CSX contends that it was appropriate, while Mr. Lenzy contends that it was motivated by a desire to harass him. Whatever the merits of either of those arguments, the FRSA does not give the Department of Labor jurisdiction over that issue.

Mr. Lenzy has never, in his original letter, his appeal of the OSHA determination, or his brief on the motion for summary decision, alleged having performed any action that comes within Section 20109's definition of protected activity. Accordingly, the complaint must be dismissed.

ORDER

The Respondent's motion for summary decision is **GRANTED** and the complaint is **DISMISSED** due to failure to allege any protected activity within the meaning of the Act.

Digitally signed by Kenneth Krantz
DN: CN=Kenneth Krantz,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Newport News, S=VA, C=US
Location: Newport News VA

KENNETH A. KRANTZ
Administrative Law Judge

KAK/mrc

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 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. § 1982.110(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. § 1982.110(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.

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, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (b).

NOTICE OF RIGHT TO FILE CIVIL ACTION: Section 20109(d)(3) of Title 49 of the U.S. Code states that "if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

The appropriate court for such an action is the U.S. District Court for the Northern District of Georgia. Information about the procedures for filing an action is available at the court's website, http://www.gand.uscourts.gov/home/