U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 December 2005

Case No.: **2004-STA-00012**

In the Matter of:

DANIEL SOMERSON,
Complainant,

v.

EAGLE EXPRESS LINES, INC.,
Respondent.

Before: WILLIAM S. COLWELL
Administrative Law Judge

For Complainant:
Daniel S. Somerson, *pro se*, Jacksonville, Florida

For the Respondent:
Thomas A. Appel, Esq., Appel & Appel, Lansing, Illinois

RECOMMENDED DECISION AND ORDER DISMISSING CASE

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter "the Act" or "STAA"), 49 U.S.C § 31105, and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline, or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters. This case arises out of Complainant's allegation that he was discharged from employment with Respondent for engaging in protected activity, and it is before me on Complainant's request for a hearing and objection to the determination made by the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, after investigation of Complainant's complaint.

BACKGROUND OF THIS CASE

By an order issued December 24, 2003, titled Notice of Judicial Inquiry and Order to Show Cause, assignment of the presiding judge in this case was stayed pending an inquiry into whether Complainant's attorney at that time, Mr. Edward A. Slavin, Jr. should be denied the privilege of representing clients before the U.S. Department of Labor Office of Administrative Law Judges (OALJ). On March 31, 2004, an Order Denying Authority to Appear was issued that denied Attorney Slavin the authority to appear in any capacity before the OALJ. On April 5, 2004, an Order was issued that stayed the proceedings in this case so that Complainant could retain another attorney.

On June 8, 2005, I was assigned as the presiding judge in this case. On August 23, 2005, I issued a Notice of Hearing and Pre-hearing Order, which specified that "[a]ll parties shall participate in a pre-hearing conference call at 10:00 a.m. (EST) on Tuesday, September 6, 2005, which this office will arrange." That pre-hearing conference was to cover pre-hearing matters to include any requests for a change in hearing date or location, discovery, status of counsel for the parties, and any other hearing-related matter the parties wish to discuss. The parties were also ordered to "exchange, by mail, with a copy to the judge, a pre-hearing submission" containing specified information. Finally, the order clearly stated that "[f]ailure to timely comply with this order may result in the exclusion of the testimony of witnesses not identified, the exclusion of documents not served on opposing party, or other appropriate sanctions."

According to the certified receipt form contained in the formal record, Complainant signed for the mailing on August 26, 2005. On the same day, my Legal Assistant Diane Johnson received a telephone call from Complainant. He stated that he could not step foot inside a federal court without being arrested because of a Consent Order. He also stated that he cannot mail or send anything through U.S. mail, Federal Express, or UPS, because he had been falsely accused of sending ricin through the mail. Finally, he stated that since he did not have an attorney to represent him, he would not participate in the conference call scheduled for Tuesday, September 6, 2005.

In response, I provided my legal assistant with a list of information to relate to Complainant. She called Complainant and told him:

He is authorized to file this claim with the Department of Labor;

We can hold the court in a federal courtroom in Jacksonville;

He is authorized to send documents by mail – as stated in the order;

Faxes are not allowed and won't be considered – as stated in the order;

He doesn't need an attorney for the conference call – he is required to participate;

On the conference call, we can discuss possible efforts for him to hire an attorney; and

If he needs a delay in the court date to give more time to hire an attorney, that request can be approved.

The pre-hearing conference call was initiated as scheduled at 10:00 AM on Tuesday, September 6, 2005. At the designated time, my Legal Assistant, counsel for the opposing party, the court reporter, and I were present and ready to begin the proceedings. After waiting for Complainant for a reasonable period past the scheduled start time, I opened the proceedings. During the proceedings, I asked the Conference Call Operator to make an additional attempt to reach Complainant and have him placed on the call, but neither Complainant nor any representative of Complainant made an appearance. Tr. at 5. Later that day, after the pre-hearing conference call ended, my Legal Assistant received a voice message from Complainant at about 11:27 AM. Complainant stated in his message that he had received two messages from the Conference Call Operator indicating he was wanted for the conference call that morning. He also stated that he did not have a lawyer or counsel to represent him, because the Department of Labor had stripped him of counsel due to a consent order in place.

On September 28, 2005, I issued an order canceling the hearing scheduled in this case and ordering Complainant to show cause why this case should not be dismissed "for failure to participate in the scheduled pre-hearing conference, for failure to follow the order from the judge, and for failure to prosecute this case." The order explained that showing cause meant fully explaining and providing justification, if a good justification was available. The order specifically requested that Complainant provide, with his response, documentation of any other authority, court directed or otherwise, that he believed was preventing him from participating in the pre-hearing conference, following my order, or prosecuting this case.

On October 6, 2005, a package was received from Complainant in response to the Order to Show Cause. The package contained three previously unsubmitted letters. The first letter was dated August 26, 2005 and was a response to the Notice of Hearing and Pre-Hearing Order issued on August 23, 2005.

In that letter, Complainant made the same arguments that he made to my Legal Assistant on the phone on August 26, 2005, i.e. that he could not participate, could not use the mails, and could not obtain a lawyer. Complainant claims that he is restricted by a Consent Order from Judge Schlesinger of the United States District Court for the Middle District of Florida that prevents him from participating "in legal proceedings or communications, *of any sort*, involving the Office of Administrative Law Judges." (Emphasis in original). The letter also requests that the court decide the case by summary judgment based on past motions submitted by his former counsel, Attorney Slavin.

The second letter in the package, which was dated October 3, 2005, was a response to the Order to Show Cause and to Cancel Hearing issued on September 28, 2005. In that letter, Complainant reiterates his statements from the first letter, including his assertions that he cannot obtain another counsel, cannot set foot in a federal courtroom, and cannot make use of the mails. He again blames his inability to participate on Judge Schlesinger's order, and requests the case be decided by summary judgment. He also claims that my Legal Assistant never communicated to him the list of information set out *supra*.

The third and final letter in the package, which was dated October 4, 2005, was an additional response to the Order to Show Cause and to Cancel hearing issued on September 28, 2005. In that letter, Complainant explains that he has submitted this package of three letters in a attempt to comply with my Order. He also asserts that "*there is no attorney (in the nation) who will dare go near this matter on my behalf*." (Emphasis in original). He also requests that he no longer be required "to participate in this proceeding and for [me] to kindly issue Summary Judgment based on the last two motions Mr. Slavin directed to the USDOL-OALJ and ARB that went unheard and unanswered."

DISCUSSION

Applicable Legal Standards

There are three provisions in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges located at 29 C.F.R. Part 18 that supply authority for the dismissal of this case.

First, and most importantly, Administrative Law Judges have the explicit authority to enter a default decision against a party for failure to appear at a properly noticed hearing without demonstrating that good cause existed for the failure ("abandonment by party"). 29 C.F.R. § 18.39(b); 29 C.F.R. 18.5(b). Second, Administrative Law Judges have authority to render decision against any party that fails to comply with an order of an ALJ. The relevant regulation states:

> If a party…fails to comply…with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:
>
> …
>
> (v) Rule …that a decision of the proceeding be rendered against the non-complying party….

29 C.F.R. § 18.6(d)(2)(v). Finally, Administrative Law Judges have generally "all powers necessary to the conduct of fair and impartial hearings," including conducting hearings, compelling appearances, taking any action authorized by the APA, acting with the authority of the Secretary, taking actions authorized by the Federal Rules of Civil Procedure, or taking any other necessary action. 29 C.F.R. § 18.29(a)(1-9).

Complainant's Conduct

As discussed *supra*, Complainant failed to participate in the scheduled pre-hearing conference despite being notified in writing and by phone of his obligation to do so. Moreover, Complainant's message on the day of that phone hearing indicates that he was fully aware of the ongoing phone hearing and chose not to participate despite the attempts to reach him. In light of the written Notice of Hearing explaining his obligation to participate, in light of the information relayed to Complainant by my Legal Assistant, and in light of the delay provided in this proceeding to accommodate Complainant's need to retain new counsel, this failure to participate demonstrates an egregious disregard for this judicial process and unacceptable disrespect for the other participants in this process. Complainant's conduct is also a failure to comply with my order and a failure to prosecute his case, and it is more than adequate justification for the invocation of my authority under the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges to dismiss his case.

Complainant's response to my Order to Show Cause further exemplifies Complainant's disregard for this process. The content of the letters provides no new explanation of his conduct beyond a reiteration of the arguments to which I already responded through my Legal Assistant. Complainant's references to the orders issued by Judge Schlesinger and to the motions filed by his former counsel do nothing to establish good cause for his failure to participate in the scheduled pre-hearing conference, failure to follow my order, and failure to prosecute this case.

Judge Schlesinger's Orders

The consent order from Judge Schlesinger to which Complainant makes repeated reference was originally issued when Complainant was referred to Judge Schlesinger because of inappropriate conduct during the course of a previous lawsuit before the OALJ. The original consent order from Judge Schlesinger, who sits on the United States District Court for the Middle District of Florida, required Complainant to "conduct himself *within the bounds of appropriate respect and decorum*, albeit with allowance for appropriate zeal and vigor, *during any proceedings, and any matters related thereto*, held under the authority of the Office of Administrative Law Judges, U.S. Department of Labor." *In re: Daniel S. Somerson*, Case No. 3:02-cv-1158-J-20TEM (M.D. Fla. September 8, 2003) (emphasis in original).

Subsequently, Complainant violated that Consent Order and was returned to Judge Schlesinger. At that point, Judge Schlesinger imposed the additional

requirement that Complainant obtain leave of the District Court before "filing or attempting to initiate any new claim or lawsuit in any federal district in the Middle District of Florida." *Id*. The original requirement of appropriate respect and decorum, and this additional requirement of seeking leave for any new case filings are the only restrictions placed on Complainant by Judge Schlesinger's orders. Thus, Judge Schlesinger's orders do not establish good cause for Complainant's failure to participate in the scheduled pre-hearing conference, failure to follow my order, and failure to prosecute this case.

Complainant's Reference to Attorney Slavin's Past Motions

Mr. Somerson also makes reference in his letters dated August 26, 2005, October 3, 2005, and October 6, 2005 to two motions for summary judgment filed by his former attorney, Edward A. Slavin, Jr., in this case. He requests that his case be decided on those motions rather than through a hearing. Unfortunately, none of the numerous motions filed by Mr. Slavin during his participation in this case during 2003 and 2004 were motions for summary judgment (or summary decision). Thus, this request by Mr. Somerson has no basis in the record and cannot help him establish good cause why his case should not be dismissed for failure to participate in the scheduled pre-hearing conference, failure to follow my order, and failure to prosecute this case.

CONCLUSION

Complainant has requested that he no longer be required "to participate in this proceeding," and he no longer will be. His conduct thus far, including his failures to participate in the scheduled pre-hearing conference, to follow my order, and to prosecute this case, is more than adequate justification for the invocation of my authority under the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges to dismiss his case. Complainant has not shown good cause why his case should not be dismissed for these reasons, and accordingly, it will be dismissed.

RECOMMENDED ORDER

It is hereby RECOMMENDED that Complainant's case be DISMISSED.

A

WILLIAM S. COLWELL
Administrative Law Judge

WSC/MAWV

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.