U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 August 2004

Case No.: 2004-STA-00043

In the Matter of:

CHRISTOPHER WAECHTER,
Complainant
v.

J.W. ROACH & SONS LOGGING AND HAULING

JAMES D. ROACH

and

AMY PAYTON
Respondents

Appearances:
Paul O. Taylor, Esquire, for Complainant

Before:
RICHARD E. HUDDLESTON,
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This matter arises upon a complaint filed by Mr. Christopher Waechter pursuant to § 31105 of the Surface Transportation Assistance Act of 1982, (hereinafter, "STAA" or the "Act") 49 U.S.C. 31101, *et seq*., and the regulations promulgated thereunder at 29 C.F.R. Part 1978, and the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18. This matter was investigated by the Occupational Safety Health Administration, which issued its findings on April 8, 2004. On May 4, 2004, the Complainant filed objections and requested a formal hearing before the Office of Administrative Law Judges.

It is noted that during the investigative stage of this proceeding, the Respondents were represented by Counsel, Attorney Gary Coates, Lynchburg, Virginia. The Complainant has been represented throughout the proceeding by Counsel, Attorney Paul O. Taylor, Burnsville, Minnesota. This matter was assigned to the undersigned on May 18, 2004. A telephone conference was scheduled with Counsel for Complainant and Respondents to discuss scheduling the case for trial. During the conference the parties waived the time limitations in order to have

an adequate amount of time to conduct discovery, and agreed to schedule the matter for hearing on October 6, 2004, in Bedford, Virginia. Counsel for the Respondents advised that, while he represented the Respondents at that time, he would need to advise if his representation would extend beyond the telephone conference.

On May 21, 2004, a Notice of Hearing and Pre-Hearing Order was issued scheduling this matter for hearing commencing October 6, 2004. In the order, the Respondents were ordered to provide additional information within 10 days which would indicate the legal nature of the business entity, Roach & Sons Logging and Hauling, and indicate the relationship of the individual Respondents to Roach & Sons Logging and Hauling, and provide a current mailing address for the individuals named. Additionally, the Respondents were ordered to file an answer to the complaint within 20 days, and if they were to be represented by Counsel, to have Counsel file a notice of appearance.

On June 9, 2004, Mr. Coates advised by letter that he would not be representing the Respondents any further. No other responses have been filed by or on behalf of the Respondents.

On July 13, 2004, an Order to Show Cause was issued directing the Respondents to show cause in writing within 10 days, why sanctions should not be imposed for failure to comply with the pre-hearing order. No response was filed by the Respondents. In accordance with the July 13, 2004 Order, the Complainant filed, on August 3, 2004, a Motion for Partial Summary Judgment and Sanctions along with a brief and affidavit in support thereof.

On August 6, 2004, an Order was issued finding that the Respondents have failed to comply with the pre-hearing order, and have failed to respond to the Order to Show Cause. Therefore, it was found that sanctions are appropriate and will be imposed. The August 6, 2004, order further directed he Respondents, Roach & Sons Logging and Hauling, and James D. Roach, individually, and Amy Payton, individually, to file a response to the Complainant's motions in writing, to be received in this office on or before the close of business on August 17, 2004. No response has been filed by any of the Respondents.

The Complainant's motion for partial summary decision was filed on August 3, 2004, and included an affidavit by Complainant's Counsel regarding service of his discovery upon the Respondents, along with a copy of the Complainant's Request for Admissions, Interrogatories and Request for Production of Documents. The affidavit of Counsel establishes that the discovery was properly served upon the Respondents and that no responses were ever filed by any of the Respondents.

FINDINGS OF FACTS

Upon consideration of the motion and supporting documents, I find that the matters requested to be admitted are now deemed admitted. Therefore, I make the following findings of fact:

1. Complainant was formerly an employee of Respondent as defined in 49 U.S.C. §31101(2).

2. Respondent J. W. Roach & Sons Logging & Hauling is an employer subject to 49 U.S.C. §31105.

3. Complainant's job duties for Respondent include driving commercial motor vehicles with a gross vehicle rating of 10,001 pounds or more on the highways in interstate commerce.

4. On or about January 20, 2004, Complainant discovered an exhaust leak beneath the cab of his assigned truck and reported this exhaust leak to James D. Roach who told Complainant he did not have funds for repair of the truck.

5. On or about February 2, 2004, Complainant's assigned truck was inspected by Overnite Express, Inc. and that the revealed an under-cab exhaust leak, illegal tire tread depth, a defective vacuum line, oil leaks, and a poorly adjusted fifth wheel.

6. On or about February 2, 2004, Complainant told James D. Roach that he would not continue to drive his assigned truck-tractor unless it was repaired.

7. Actual violations of Federal Motor Carrier Safety Regulations, specifically 49 C.F.R. §§392.7, 393.46, 393.75, 393.83, 396.5, and 396.13 would have occurred if the defects described in finding of facts number 5 (above) had not been made.

8. Respondents discharged Complainant on or about February 13, 2004, because he engaged in activities protected under the Surface Transportation Assistance Act.

DISCUSSION

Complainant's position, briefly stated, is that he engaged in protected activity under Section 405 of the Act, and as a result of that activity, he was discharged from employment with Respondent. Section 405 provides that:

> (a) Prohibitions—(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—
>
> > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceedings related to a violation of a

commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because—

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 31105(a) (2002).

Congress enacted the Surface Transportation Assistance Act to "combat[] the 'increasing number of deaths, injuries, and property damages due to commercial motor vehicle accidents.'" *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) (quoting 128 CONG. REC. 32509, 32510 (1982) (statement of Sen. Danforth)). The purpose of Section 405 is to "protect[] employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance." *Id.* at 255.

"The basic Title VII proof scheme governs actions under the STAA." *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 983 (4th Cir. 1993) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981)); *see also Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). The Supreme Court established the "basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment" in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981). The employee carries the initial burden of proof and must establish, by a preponderance of the evidence, a prima facie case that the Act was violated. *Id.* at 252-53. Establishing a prima facie case creates the inference that the protected activity was likely the reason for the adverse action. *Id*. at 253.

To establish a prima facie case of retaliatory discharge under Section 405, the employee must establish the following: "(1) that he engaged in protected activity under the STAA; (2) that he was the subject of adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of his employer." *Moon*, 836 F.2d at 229; *see also Burdine*, 450 U.S. at 252-53. To aid in the proof of the third element, the employee needs to

show that the employer was aware that the employee had engaged in protected activity when the adverse employment action was taken against the employee. *Moon*, 836 F.2d at 229 n.1.

If the employee establishes a prima facie case, the employer must then "'articulate some legitimate nondiscriminatory reason for the employee's rejection'" to rebut the inference of discrimination. *Burdine*, 450 U.S. at 253 (quoting *McDonnell Douglas*, 411 U.S. at 802). If a legitimate nondiscriminatory reason is articulated by the employer, the burden of proof shifts back to the employee to show, "by a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination." *Id*. (citing *McDonnell Douglas*, 411 U.S. at 802). While the burden of proof shifts under the scheme announced in *McDonnell Douglas* (and adapted for use in STAA cases), the ultimate burden of persuasion remains, as always, with the employee to show that the employer intentionally discriminated against the employee. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Burdine*, 450 U.S. at 256.

Protected activity under the STAA encompasses the filing of a complaint or beginning of a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order" or an employee's testimony in such a proceeding. 49 U.S.C. § 31105(a)(1)(A) (2002). A complaint includes one made internally to the employer. *See Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 20 (1st Cir. 1998) (citing *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) (oral complaints to supervisor "are protected activity under the STAA"); *Moon v. Transport Drivers, Inc*, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors)).

The admitted facts in this case clearly establish, as a matter of law, that the Complainant was unlawfully discharged from employment as a direct result of protected activity under the STAA. The Complainant reported safety problems with his truck directly to his employer on or about January 20, 2004. Subsequently the truck was inspected on or about February 2, 2004, by Overnite Express, Inc., which found an under-cab exhaust leak, illegal tire tread depth, a defective vacuum line, oil leaks, and a poorly adjusted fifth wheel. At that time the Complainant advised James D. Roach that he would not continue to drive his assigned truck-tractor unless it was repaired. On or about February 13, 2004, Respondents discharged Complainant because he engaged in activities protected under the Surface Transportation Assistance Act. The Complainant's internal reporting of safety issues relating to the assigned tractor constitute protected activity under the STAA. Additionally, the Complainant's refusal to operate his assigned tractor unless it was repaired constitutes protected activity. The undisputed facts establish that the Respondents refused to correct the problems after they were reported.

Although the Respondents have been repeatedly given opportunities to respond to the Complainant's complaint, discovery, and the orders issued in this case, no response has ever been made. Therefore, I find that the Respondents have waived their right to present evidence or argument in response to the Complainant's case. As such the Respondents have waived their right to articulate a legitimate nondiscriminatory reason for the termination of the Complainant's employment.

Based upon the foregoing, I find that there are no disputed issues of fact concerning the liability of all of the Respondents to the Complainant under the STAA. As such the issuance of a summary decision, as requested by the Complainant is appropriate.

ORDER

It is, accordingly, Ordered that:

1. The Complainant's motion for partial summary decision is granted and the hearing in this matter is canceled;

2. Respondent J.W. Roach & Sons Logging and Hauling, shall reinstate Complainant, Christopher Waechter, to employment, effective immediately;

3. Respondents J.W. Roach & Sons Logging and Hauling and James D. Roach and Amy Payton shall pay to Complainant damages in the form of back wages for the period from February 13, 2004 to the present and continuing until the Complainant is reinstated, plus interest at the rate specified in 28 U.S.C.§ 1961, commencing on February 13, 2004, the date of Complainant's discharge;

4. Complainant shall, within 20 days of receipt of this order, submit evidence and argument as to the amount of back wages and any additional damages claimed;

5. Counsel for Complainant shall, within 30 days of receipt of this order, submit a fully documented fee petition as to attorney fees and costs;

6. Respondents, having waived their right to present evidence opposing the complaint in this case, shall not be permitted to present evidence in opposition to the Complainant's evidence of damages or to Counsel's petition for attorney fees and costs;

7. A supplemental order will be issued finding the exact amount of damages, attorney fees and costs as soon as Complainant's evidence and argument is filed;

8. This Recommended 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, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. *See* 29 C.F.R. §§ 1978.109(a) (2002).

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RICHARD E. HUDDLESTON
Administrative Law Judge