U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 May 2010

Case No.: 2010-STA-00035

In the Matter of:

BARRY STROHL,

Complainant,

v.

YRC, INC.,

Respondent.

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

This proceeding arises from a complaint filed under the provisions of Section 31105 of the Surface Transportation Assistance Act of 1982, U.S. Code, Title 49, § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 ("STAA") and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 1978 and Part 18. The claim was referred to this Office of Administrative Law Judges for formal hearing upon Complainant's April 14, 2010, appeal by Complainant of the Occupational Safety and Health Administration March 23, 2010, determination that the warning letter issued to Complainant did not rise to the level of an adverse action and the complaint was without merit.

On May 6, 2010, Respondent's counsel filed "Respondent's Motion for Summary Decision" on the grounds that the only issue is whether a warning letter issued to the Complainant on January 9, 2009 is an adverse personnel action within the meaning of the STAA. Counsel submits that decisional precedent by the Administrative Review Board and the U.S. Court of Appeals for the Sixth Circuit indicates that issuing such a warning letter does not rise to the level of a covered adverse personnel action under the STAA.

On May 24, 2010, Complainant's counsel filed "Complainant's Memorandum of Law in Opposition to Respondent's Motion for Summary Decision." Complainant's counsel submits that the Administrative Review Board in *Melton v. Yellow Transportation, Inc*., ARB 06-0052 (Sep. 30, 2008) is in error and urges return to pre-Melton determinations that a warning letter is an adverse disciplinary action. He requests that the Motion for Summary Decision be denied.

POSITION OF THE PARTIES

Complainant's position:

Complainant's counsel submits that the pre-2006 status of warning letters, being an adverse action under the STAA when issued as part of a stepped disciplinary procedure under collective bargaining agreements, is the more correct approach to warning letters because the pre-2006 status advances the purpose of the STAA. He submits that "a reasonable employee facing the choice of progression toward discharge, or committing an unsafe act, might be deterred from engaging in protected activity." He argues that "the STAA's purpose of preventing commercial drivers from being coerced to commit unsafe acts militates in favor of a finding that warning letters issued pursuant to a progressive disciplinary scheme are actionable."

Complainant's counsel submits that the warning letter issued to the Complainant "was an adverse action because it expressly warned him that he had advanced to a position of imminent discipline for a further like infraction." He seeks "the opportunity to demonstrate to the Board that a warning letter may deter future protected activity" and an opportunity for the Board to "overturn its decision in *Melton*."

Respondent's position:

Respondent's counsel submits that the Complainant was issued a warning letter on January 6, 2009, under the provisions of a collective bargaining agreement, for delay of freight. He reports the Complainant was assigned a load of freight to transport from Greenville, South Carolina to Winston-Salem, North Carolina, and then to Carlisle, Pennsylvania on January 5, 2009. He submits that the Complainant's stop overnight in Hagerstown, Maryland on January 5, 2009, was necessitated by the Complainant's personal actions in not covering the assigned trip mileage within the union approved time limits and resulted in the delay of delivering the assigned load of freight.

Respondent's counsel submits that the warning letter issued to the Complainant was not an adverse disciplinary action against the Complainant and did not deprive the Complainant of pay, pension opportunities, seniority, work assignments, eligibility for promotion, or employment. He argues that such warning letters are not actionable adverse acts under the STAA and cites *Melton v. U.S. Dept. of Labor (Yellow Transportation*, Intervenor), 2010WL1565494 (6th Cir. 2010) *unpublished*; *Pueschel v Peters*, 340 Fed. Appx. 858 (4th Cir. 2009); *Agee v. ABF Freight Systems, Inc.*, ARB 04-182 (Dec. 29, 2005); *West v. Kasbar, Inc.*, ARB 04-155 (Nov. 30, 2005); *Calhoun v. UPS*, ARB 00-026 (Nov. 27, 2002); and *Burlington Northern & Santa Fe Ry. Co. v White*, 548 U.S. 53 (2006)

Respondent seeks to have the case dismissed for Complainant's failure to set forth an adverse causable action under the Act.

STIPULATION OF FACTS

For the purpose of determining the "Motion for Summary Decision" the Respondent submitted a joint document with the motion as supporting papers that was titled "Stipulated Facts" and signed by counsel for the respective Parties. The following stipulated facts area accepted as true:

1. Complainant became a dockworker employee of Roadway Express in January 1974 in its Stroudsburg, Pennsylvania location. He held a number of driving and non-driving jobs at that location.
2. In April 1997, the Complainant transferred to Roadway Express's Greenville, South Carolina area facility.
3. Roadway Express was a predecessor company to Respondent, YRC, Inc. (YRC). A common corporate parent owned Roadway Express and its competitor Yellow Transportation, Inc., for several years. Shortly after the events at issue, Yellow Transportation, Inc. and Roadway Express combined operations in 2009 and became the single company, YRC.
4. At all relevant times, Complainant was Roadway/YRC's employee for purposes of the Surface Transportation Assistance Act.
5. At all relevant times, Roadway/YRC was an employer under the Surface Transportation Assistance Act.
6. Complainant's job duties include operating commercial motor vehicles with a gross vehicle weight rating of 10,001 pounds or more, on highways in interstate commerce.
7. Complainant brings this action because of a warning letter dated January 6, 2009, for delay of freight.
8. The scope and effect of warning letters such as the one at issue in this case, are set out in the Collective Bargaining Agreement (CBA) between YRC and the local affiliate of the International Brotherhood of Teamsters.
9. Roadway Express was a party to earlier versions of the same CBA that currently exists between YRC and the Teamsters as was Yellow Transportation.
10. Except for so-called "cardinal offenses" (such as unprovoked violence, stealing, and drug use), the CBA requires Roadway/YRC to issue a warning letter for a first offense before it can issue substantive discipline for subsequent offenses.
11. The conduct of which Roadway/YRC accused the Complainant in this case was not a cardinal offense.
12. The warning letter at issue in this matter "aged off" after nine months, after which, except in certain circumstances that have not arisen in this matter, it has no more force or effect.
13. The warning letter at issue in this case did not cause Complainant to lose pay or pension opportunities; his assignment was unaffected; his seniority was unaffected; and, his eligibility for promotion was unaffected.

ISSUE

In light of the admitted facts, the dispositive issue to be addressed is:

> Was the Complainant subjected to an adverse employment action amounting to discharge or discipline or discrimination regarding pay, terms, or privileges of employment?

STATUTORY AND REGULATORY FRAMEWORK

In this case the Complainant claims that he was issued a warning letter because he refused to drive an assigned load when his authorized number of driving hours expired in Hagerstown, Maryland, on January 5, 2009.

To be entitled to a remedy under the Act, the Complainant must show (1) that he engaged in protected activity, (2) that the employer had knowledge of the protected activity, (3) that he was subjected to an adverse employment action amounting to discharge or discipline or discrimination regarding pay, terms, or privileges of employment, and (4) that there was a causal connection between the protected activity and the adverse action. *Calhoun v U.S. Dept of Labor*, 576 F.3d 201 (4th Cir. 2009); *BSP Trans., Inc. v. United States Dept of Labor,* 160 F.3d 38 (1st Cir. 1998); *Mickey v Zeidler Tool and Die Co*., 516 F.3d 516 (6th Cir. 2008); *Bettner v. Administrative Review Board*, 539 F.3d 613 (7th Cir. 2008); *Bechtel Construction Co. v. United States Sec'y of Labor,* 50 F.3d 926 (11th Cir. 1995); *Clean Harbors Environmental Services, Inc. v. Herman*, 1998 WL 293060 (1st Cir. June 10, 1998). If the Complainant establishes a prima facie case under the Act, the Respondent will not be held to have violated the Act if it establishes that the adverse employment action was the result of events and/or decisions independent of protected activity. If the Respondent presents evidence of a nondiscriminatory reason for the adverse action, the burden then shifts to the Complainant to prove, by a preponderance of the evidence, that the proffered reason is a mere pretext for discrimination. At all times the Complainant bears the burden of persuading the trier of fact that he was subjected to discrimination. *Calhoun v. U.S. Dept. of Labor*, 576 F.3d 201 (4th Cir. 2009); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

In evaluating whether the Respondent is entitled to a Summary Decision, all facts and reasonable inferences there from are considered in the light most favorable to the non-moving Complainant. *Battle v. Seibles Bruce Ins. Co*., 288 F.3d 596 (4th Cir. 2002) citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986) "However, even when all evidence is viewed in the light most favorable to the nonmoving party, the non-moving party cannot defeat a properly supported summary judgment motion without presenting 'significant probative evidence.'" *Pueschel v. Peters*, 340 Fed. Appx 858, 860 (4th Cir. 2009), *unpub*, citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986) When the information submitted for consideration with a Motion for Summary Decision and the reply to the motion demonstrates that there is no genuine issue as to any material fact, the request for summary decision should be granted. Where a genuine question of a material fact remains, the request for summary decision must be denied. 29 CFR §§18.40 and 18.41

Complainant's counsel was counsel of record for R.J. Melton while before the Administrative Review Board in *Melton v. Yellow Transportation, Inc*., ARB 06-052 (Sep. 30, 2008). In *Melton*, the Administrative Review Board held that a warning letter without tangible job consequences does not constitute actionable discipline or discrimination under the STAA. This is the holding that Complainant's counsel submits was made in error by the Administrative Review Board. Complainant's counsel failed to acknowledge that upon appeal to the U.S. Court of Appeals for the Sixth Circuit, the Court specifically acknowledged the purpose of the STAA and affirmed the Administrative Review Board "because substantial evidence supports the determination that the warning letter Melton received had no effect on his conditions of employment and, therefore, was not 'discipline' and not actionable as retaliation under the Transportation Act." *Melton v. Yellow Transportation, Inc*., 2010WL1565494, 1565499 (6th Cir. 2010) It is specifically noted that Complainant's counsel raises the same five case determinations in this case that the Administrative Review Board distinguished in its decision in *Melton*, id.[1]

At all times relevant to this complaint, the actions involved occurred within the jurisdictional area of the U.S. Court of Appeals for the Fourth Circuit. In *Yellow Freight Systems, Inc. v. Reich, Secretary of Labor [Hornbuckle]*, 8 F.3d 980 (4th Cir. 1993)[2], the Court dealt with an appeal involving complaints under the STAA where a warning letter and a letter of information were involved in the chain of events. In upholding the Administrative Review Board determination that Yellow Freight Systems "had issued the letters of warning and suspension in retaliation for the fatigue break and Hornbuckle's complaints about the letter of information" under the existing circumstances, id at 983, the Court reiterated that "deference [is] due the Secretary's interpretation of a statute Congress charged him with administering", id at 984. The Court went on to "emphasize that out holding is a narrow one. The STAA charges the Secretary with protecting the interests of driver and public safety. Nothing in this legislation authorizes the Secretary to engage in general supervision of employer disciplinary practices or to undercut the legitimate interests of a trucking company in assuring the timely delivery of freight for its customers. An employer obviously remains free to sanction an employee for chronically tardy conduct or indeed for any action not protected by the STAA" id at 987. In *Hornbuckle* the warning letter and letter of information were included as a basis for a period of job suspension and employment termination.

The Circuit Court's holding in *Hornbuckle* is not inconsistent with *Melton* or the U.S. Supreme Court's guidance set forth in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). In *White* the Court looked at employee protection related to the statutory substantive prohibited discrimination provision and the antiretalitory provision of Title VII of the Civil Rights Act. The Court specifically noted that the language of the substantive prohibitive provision used the terms "hire," "discharge," "compensation, terms, conditions or privileges of employment," "employment opportunities," and "status as an employee" which "explicitly limit

[1] *Self v. Carolina Freight Carriers Corp*., 198-STA-009, slip op. at 6-7 (Sec'y Jan. 12, 1990); *Stack v. Preston Trucking Co*., 1989-STA-015 (Sec'y Apr. 18, 1990); *Hornbuckle v. Yellow Freight Sys., Inc*., 1992-STA-009 (Sec'y Dec. 23, 1992); *Scott v. Roadway Express*, ARB No. 99-013, ALJ No. 1998-STA-008 (ARB Jul. 28, 1999); *Eash v. Roadway Express, Inc*., ARB No. 02-008, ALJ No. 2000-STA-047 (ARB June 27, 2003)

[2] This is the same case referenced by Complainant's counsel as *Hornbuckle v. Yellow Freight Sys., Inc*., 1992-STA-009 (Sec'y Dec. 23, 1992)

the substantive provision's scope to actions that affect employment or alter workplace conditions …" *White* at 53, 54. The Court stated it "presumes that, where words differ as they do here, Congress has acted intentionally and purposely. There is strong reason to believe that Congress intended the differences here, for the two provisions differ not only in language but also in purpose." The Court acknowledged that "Congress has provided similar protection from retaliation in comparable statutes" without further explanation. Id at 54.

The motor carrier employee protections specifically set for in the STAA at 49 USC §31105(a)(1) states "A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment" because of employee actions specifically described in subsections 49 USC §31105(a)(1)(A) through (E). Here the parties dispute whether the January 9, 2009 warning letter amounted to one of the prohibited acts of discharge, discipline, or discrimination regarding pay, terms, or privileges of employment.

After deliberation on the complaint, motion for summary decision including the supporting documents, and Complainant's reply to the motion for summary decision, this Administrative Law Judge finds that there is no evidence that the Complainant was discharge from employment with Respondent due to his actions on January 5, 2009. Likewise, there is no evidence that the Complainant was discriminated against in the form of pay, terms of employment or privileges of employment. Thus, in order to sustain a cause of action under the STAA, the evidence submitted for consideration, in a light most favorable to the Complainant, must demonstrate that he was disciplined due to covered actions on January 5, 2009.

Here the scope and effect of the Complainant's January 5, 2009, warning letter is controlled by the Collective Bargaining Agreement (CBA) between Respondent and the local affiliate of the International Brotherhood of Teamsters. Article 45 of the CBA is titled "Discharge, Suspension or Other Disciplinary Action." Article 45 states that an employer may not discharge or suspend an employee without giving the employee at least one a written warning notice prior to discharge or suspension within 90 days of the suspension or discharge. Article 45 also provides that in certain specifically described employee actions, discharge may be made without first issuing at least one written warning notice. Article 45 specifically provides that "Warning notices shall have no force or effect after nine (9) months from the date thereof." The evidence in this case demonstrates that the January 5, 2009, warning letter has "aged off", has no more force or effect and did not cause Complainant to lose pay or pension opportunities and did not affect the Complainant's assignments, seniority or eligibility for promotion. Under the facts of this case, the Complainant has failed to establish that the January 5, 2009, warning letter was in fact discipline imposed upon the Complainant.

CONCLUSION AND FINDINGS OF FACT

After deliberation on the complaint filed by Complainant, all the evidence submitted for consideration on the Motion for Summary Decision including the briefs of counsel, this Administrative Law judge finds:

1. At all times relevant to this matter, the Parties were subject to the provisions of the STAA.

2. On January 6, 2009, the Complainant was issued a "warning letter" related to his actions on January 5, 2009.
3. The evidence fails to demonstrate that the Complainant was discharged from employment with Respondent.
4. The evidence fails to demonstrate that the January 5, 2009, "warning letter" was discipline imposed on the Complainant.
5. The evidence fails to demonstrate that the Complainant was subject to discrimination regarding pay, terms of employment, or privileges of employment.
6. The evidence fails to demonstrate at least one required element required by the STAA to sustain the Complainant's cause of action under the STAA.
7. The Respondent is entitled to summary decision in this matter.
8. The Complainant is not entitled to compensatory damages, reinstatement, attorney fees, or legal costs related to the January 5, 2009, "warning letter".

ORDER

It is hereby ORDERED that Respondent's **Motion for Summary Decision is GRANTED** and **the Complaint is DISMISSED**.

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ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

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, Suite S-5220, 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.