U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 March 2014

Case No. 2013-STA-39

In the Matter of:

SAMUEL BUCALO,
Complainant,

v.

ESTIL "BUTCH" LEWIS AND
TEAMSTERS LOCAL 100,
Respondents.

DECISION AND ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

Procedural History

On September 10, 2012, Complainant, Samuel Bucalo ("Complainant"), filed a complaint with the Department of Labor, Occupational Safety and Health Administration ("OSHA"), alleging that Respondents, Estil "Butch" Lewis ("Respondent Lewis") and Teamsters Local 100 ("Respondent Local 100") retaliated against him in violation of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31101 *et seq*. On March 29, 2013, an OSHA investigator determined that Respondents did not violate the STAA and dismissed the complaint. On April 16, 2013, Complainant objected to the OSHA investigator's determination. Thereafter, the claim was transferred to the Office of Administrative Law Judges ("OALJ").

On May 20, 2013, I issued an Order notifying the parties that the case had been assigned to me and of my intent to schedule a telephone conference. On May 22, 2013, I received an *ex parte* letter from Complainant seeking to delay the telephone conference. On June 19, 2013, I issued a Notice of Ex Parte Contact to all parties. On November 8, 2013, I conducted a telephone conference with the Pro Se Complainant and Respondents' Counsel. Counsel was given thirty days to file a dispositive motion. Complainant was given thirty days to respond. On December 5, 2013, Complainant filed a "Motion to Dismiss Charges against Respondent, "'Teamsters Local 100'". ("Complainant's Motion"). On December 9, 2013, Respondents filed a Motion to Dismiss and Supporting Memorandum. ("Respondents' Motion"). On January 8, 2014, Respondents filed a Memorandum in Reply to Complainant's Motion.

Summary Decision Standard[1]

The standard for granting summary decision under the Rules of Practice and Procedure for Administrative Hearings before the OALJ is similar to that found in Federal Rule of Civil Procedure 56, which governs summary judgment in the federal courts. *Saporito v. Cent. Locating Servs., Ltd.*, ARB No. 05-004, slip op. at 6 (ARB Feb. 28, 2006). "The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d); *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322 (1986).

The determination of whether a fact is material is based on the substantive law upon which the claim is based. *Saporito*, slip op. at 5 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A material fact is one that might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine if the evidence is such that a reasonable fact-finder could return a verdict for either party. *Id*. The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts showing there is a genuine issue for trial. *Anderson*, 477 U.S. at 250. The party opposing the motion "may not rest on the mere allegations or denials of [the] pleadings. Such response must set forth specific facts showing there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Reddy v. Medquist, Inc.*, ARB no. 04-123, slip op. at 5 (Sep. 30, 2005) (citing *Celotex*, 477 U.S. at 322-23 (1986)). In deciding on the motion, the evidence must be viewed in the light most favorable to the non-moving party. *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, slip op. at 2 (ARB Aug. 23, 2003).[2]

Summary of Facts

While the parties in this case do not agree on many of the factual aspects of the claim, the identity and relationship of the parties is not in dispute. Respondent Local 100 is a labor organization that represents Union members in the greater Cincinnati area, including those employed by United Parcel Service ("UPS") (Official Report of Conference Call ("Trs.") at 5, 9; Correspondence of April 12, 2012 regarding OSHA litigation (Exhibit 2 of Respondents' Motion to Dismiss ("Ex. 2")). At the time of the alleged violations, Respondent Lewis was the President of Respondent Local 100. (Trs. at 5). Complainant was a retiree of UPS and the Secretary-Treasurer of Respondent Local 100. (Trs. at 10; Ex. 2). Both Respondent Lewis and

[1] A motion for dismissal of a whistleblower complaint for failure to state a claim upon which relief may be granted is governed by Federal Rule of Civil Procedure 12(b)(6). However, if a party submits evidence outside the pleadings in support of a Motion to Dismiss, the motion should be viewed as a Motion for Summary Decision under 29 C.F.R. § 18.40. In this matter, Respondents have submitted evidence outside the pleadings in support of their motion and as a result, the motion will be viewed as a Motion for Summary Decision.

[2] "[While] a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the burden of proving the [necessary] elements…is no less." *Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec'y Oct. 10, 1991).

Complainant were elected to their Union positions and took office on January 1, 2011. (OSHA Investigative Report (Exhibit 1 of Respondents' Motion to Dismiss ("Ex. 1") at 2). Of note, all of the alleged violations occurred after Complainant no longer worked at UPS. (Trs. at 9, 10). As an elected officer of Respondent Local 100, Complainant served as a Union Business Agent for several UPS facilities. (Ex. 1 at 2). Business Agents' job responsibilities include negotiating contracts, processing grievances, and otherwise providing representation to Union members. (Respondents' Motion at 2-3).

In 2008, Complainant filed a charge with OSHA against UPS and Respondent Local 100. (Trs. at 7). The complaint was initially dismissed by OSHA's Cincinnati office. (Ex. 1 at 2). Complainant appealed the dismissal to the OALJ. (Ex. 1 at 2). The OALJ dismissed the appeal by Summary Judgment. (Trs. at 7). The OALJ's ruling was affirmed by the Administrative Review Board ("ARB"). (Ex. 1 at 2).

After Respondent Lewis and Complainant took office in 2011, office personnel alleged that Business Agents were removing Union files and not returning them. (Ex. 1 at 2). As a result, Respondent Lewis had the office personnel lock up the files at 5:00 p.m., with two office personnel maintaining the keys. (Ex. 1 at 2). Complainant alleges retaliation by Respondent Lewis in his directing office staff to lock up the files without providing Complainant with a key. (Respondents' Motion at 4).

Complainant was removed as the Business Agent from UPS Small Package facility in July 2011. (Ex. 1 at 2). During that time, several Business Agents were removed and reassigned due to performance and balancing issues. (Ex. 1 at 2).

On March 21, 2012, the ARB published their decision upholding the OALJ's ruling on Complainant's appeal of Judge Kane's dismissal of his STAA and SOX claims. (Ex. 1 at 2). On April 12, 2012, Respondent Lewis and another Union representative presented Complainant with a letter. (Ex. 1 at 2). The letter sought Complainant's intentions with regard to appealing the ARB's decision in Complainant's 2008 case against UPS and Respondent Local 100. (Ex. 1 at 2). The letter stated that Complainant had the right to pursue the appeal and to maintain his elected position. (Ex. 2). The letter also stated that it was essential for Respondent Lewis to know Complainant's intentions so that the Union could "take the necessary steps to protect itself in light of the possible court case." (Ex. 2). The letter, if signed, would waive Complainant's right to appeal the ARB's decision as to Respondent Local 100. (Ex. 2). The letter was written and presented at the instruction of Respondent Local 100's legal counsel. (Ex. 1 at 2).

Complainant alleges that Respondent Lewis approached Complainant with the letter and threatened that if Complainant did not waive his right to file an appeal of the ARB's decision, that Respondent Lewis would remove Complainant as a Business Agent for UPS workers. (Trs. at 9). According to Complainant, the waiver is written proof of Respondent Lewis' intention to retaliate against Complainant. (Complainant's Motion at 2).

On August 6, 2012, Respondent Lewis removed Complainant as the Business Agent for UPS Kentucky View. (Complainant's Motion at 2). Complainant alleges that the reassignment was intended to "increase [his] job difficulties" and reduce his prospects of being re-elected as

Secretary-Treasurer in 2013 because he would be unable to adequately perform his new, unfamiliar assignments. (Complainant's Motion at 2). Complainant also alleges that in August 2012, Respondent Lewis began attending UPS Freight meetings to encourage a Union steward to circulate a petition for workers to sign. (Complainant's Motion at 2). If signed, the petition would remove Complainant as the Business Agent for UPS Freight. (Complainant's Motion at 2). According to Complainant, this action by Respondent Lewis demonstrates the animus of Respondent Lewis toward Complainant and his efforts to continue to retaliate against Complainant. (Complainant's Motion at 2). Without any specific instances, Complaint has additionally alleged that Respondent Lewis retaliated against him by scolding him several times without just cause. (Respondents' Motion at 5).

Complainant was removed as the Business Agent for UPS Freight in November 2012. (Ex. 1 at 2). This removal was in response to a petition that nearly 90 percent of UPS Freight members signed with intent to remove Complainant as their Business Agent. (Ex. 1 at 2).

Applicable Law

STAA section 405(a) provides that: (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because - (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order * * *." 49 U.S.C. app. § 2305(a) (emphasis added).

The statute in its current form provides that complaints shall be "governed by the legal burdens of proof set forth in [49 U.S.C. §] 42121(b)," the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ('AIR 21"). Under the AIR 21 framework, Complainant must demonstrate five elements, the first being that Respondents are an employer that is subject to the Act and that Complainant is a covered employee. *Jackson v. C.R. England Corp.*, 2012-STA-00007, at slip op. 11 (ALJ July 3, 2012). *See also Forrest v. Dallas and Mavis Specialized Carrier Co.*, ARB Case No. 04-052, ALJ Case No. 2003-STA-53, at slip op. 3 (July 29, 2005). If Complainant is unable to establish an employer-employee relationship, the entire claim must fail. *Forrest*, at slip op. 3.

Under the statute, an "employee" is (A) a driver of a commercial motor vehicle, a mechanic, a freight handler, or (B) any individual other than an employer "who is employed by a commercial motor carrier and who in the course of his employment directly affects commercial motor vehicle safety." 49 U.S.C. app. § 2301(2). An "employer" is "any person engaged in a business affecting commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it in commerce, but such term does not include the United States, a State, or a political subdivision of a State . . . ." 49 U.S.C. app. § 2301(3).

Discussion

A. The Parties' Arguments

Respondents contend that they are entitled to dismissal on three grounds. As a general matter, Respondents assert that Complainant has failed to allege, and cannot establish, sufficient facts to establish a claim under the employee protection provisions of the STAA. Respondents argue that Complainant has failed to state a claim against Respondent Lewis individually and that Complainant has failed to allege that he experienced discharge, discipline, or discrimination as a result of the Respondents' actions. Respondents contend that even if Complainant had managed to state a claim upon which relief may be granted, Complainant is not an employee as defined by the STAA; therefore, Complainant's entire case must fail on jurisdictional grounds.

Complainant contends that he now wishes to proceed only as against Respondent Lewis. Complainant argues that Respondent Lewis was acting outside the scope of his employment with regard to Complainant because he acted alone and without Executive Board approval. Complainant further argues that it was in error that Respondent Local 100 was added as a Co-Defendant as it was never his intent to file a complaint against Respondent Local 100. Complainant contends that his complaint can be properly filed against Respondent Lewis individually because Respondent Lewis is "a person" as defined by the STAA. Accordingly, Complainant requests that the OALJ dismiss the claims against Respondent Local 100 and proceed as against Respondent Lewis alone.[3]

B. Analysis

As stated previously, Complainant served as an elected Union Business Agent and Secretary-Treasurer for Respondent Local 100. Complainant's job responsibilities included negotiating contracts, processing grievances, and otherwise providing representation to Union members. Complainant did not drive a commercial motor vehicle, nor was he a mechanic or a freight handler. Additionally, Complainant did not directly affect commercial motor vehicle safety as he was not responsible for the operational safety of any commercial motor vehicles or for reporting, auditing, or reviewing any safety defects in any commercial motor vehicles. *See Luckie v. Administrative Review Board, USDOL*, No. 07-13997 (11th Cir. Mar. 24, 2009) (per curiam) (unpublished) (case below ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39). As a result, Complainant did not deal with a commercial motor vehicle as part of his job responsibilities. Consequently, he does not fit the definition of an "employee" under the STAA.

Moreover, Respondents do not fit the definition of an "employer" pursuant to the Act. Respondent Local 100 is not a commercial motor carrier, but a labor organization for which Respondent Lewis served as the elected President. Furthermore, as a labor organization and an elected officer, Respondents provided representation to Union members with regard to employment terms and benefits. Neither party owned or leased a commercial motor vehicle, nor did they assign employees to operate commercial motor vehicles in commerce as part of their business. Respondents did not provide for transportation in any fashion in connection with their

[3]As neither party meets the statutory definition of "employer", Complainant's Motion to Dismiss his charges against Respondent Local 100 is moot and immaterial to the granting of summary decision.

business. For those reasons, Respondents do not fit the definition of an "employer" pursuant to the Act.

Conclusion

In conclusion, even when construing the facts in a light most favorable to Complainant, I find that there is no genuine issue of material fact as to whether Complainant is an "employee" or whether Respondents are "employers" for purposes of the STAA. Because Complainant is unable to establish the requisite "employer-employee relationship", Respondents are entitled to summary decision.[4]

THEREFORE, **IT IS HEREBY ORDERED** that Respondents' Motion to Dismiss is **GRANTED**.

Digitally signed by PETER SILVAIN JR.
DN: CN=PETER SILVAIN JR.,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

PETER B. SILVAIN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

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. § 1978.110(a).

[4] As neither party is covered under the Act, it is not necessary to reach a conclusion to the remaining issues in dispute.

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.

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. §§ 1978.109(e) and 1978.110(b). 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. § 1978.110(b).