



Issue Date: 20 March 2013

OALJ Case No.: 2013-STA-00020

In the Matter of:

THEODIS DANIELS,
Complainant,

v.

SCHAETZEL TRUCKING CO., INC.,
Respondent.

ORDER DISMISSING COMPLAINT
FOR FAILURE TO ESTABLISH A PRIMA FACIE CASE

On February 7, 2013, the court issued an Order to Show Cause requiring Complainant to show why the complaint in this matter should not be dismissed and requiring Respondent to show why it should be dismissed. As outlined in that order, Complainant had twice indicated that he did not file a complaint under the Surface Transportation Assistance Act (“STAA”), 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, and the applicable regulations issued thereunder at 29 C.F.R. Part 1978. Instead, he had indicated that he was seeking redress for unlawful termination.

The Order to Show Cause explained the Office of Administrative Law Judges (“OALJ”) “has jurisdiction only over cases involving wrongful termination based on activity protected by one of the whistleblower statutes it administers, such as the STAA” and noted that “[i]f Complainant is alleging that he was wrongfully terminated for some reason other than activity protected by the STAA or another whistleblower statute OALJ administers, he has filed his complaint in the wrong forum.

Moreover, the Order to Show Cause explained that a complaint must include:

(1) some facts about the protected activity and alleging that the facts relate to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) an assertion of causation and (4) a description of the relief that is sought

in order to survive a motion to dismiss, and also noted that an ALJ “should not dismiss a complaint for failure to state a claim until he or she has allowed the complainant a sufficient opportunity to amend or supplement the claim(s) contained in the complaint,” citing *Evans v. U.S. Environmental Protection Agency*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 11-12 (ARB July 31, 2012). Finally, the Order to Show Cause also required a response within 30 days, thereby allowing Complainant “a sufficient opportunity to amend or supplement the claim(s) contained in ... [his] complaint.”

On February 26, 2013, the Office of Administrative Law Judges (“OALJ”) received Respondent’s submission dated February 20, 2013, showing cause why the complaint in this matter should be dismissed. The seventh reason Respondent gave for why the complaint should be dismissed was:

“Complainant’s own submissions to the Department of Labor confirmed that he is not proceeding under the Surface Transportation Assistance Act. Accordingly, coverage under said Act should be deemed waived and disclaimed by Complainant.”

Respondent’s Submission, at 2.

On March 15, 2013, OALJ received Complainant’s response dated February 25, 2013, to the Order to Show Cause. As the envelope containing Complainant’s response was postmarked in Milwaukee, Wisconsin on March 11, 2013, Complainant’s response was timely.

In his response, Complainant admitted paragraph 7 of Respondent’s submission, quoted above. Moreover, Complainant concluded:

Based on the foregoing self-evident [sic] some of the Complaint in this matter should be dismissed under the STAA, however, the remaining Complaint not reference [sic] to the STAA should and will be addressed in a different arena.

Claimant’s Response, at 2.

In his response, Complainant repeatedly referred to and attached a copy of a Wisconsin Department of Workforce Development Appeal Tribunal Decision (the “Wisconsin Decision”) concerning the incident at issue. The findings of fact and conclusions of law in the Wisconsin Decision concern claimant’s eligibility for unemployment insurance benefits. Additionally, Claimant included a copy of a letter he had previously provided, dated December 31, 2012, containing his objections to the Secretary’s Findings in this case.

As Complainant is proceeding pro se, he is given some leeway in procedural matters, as was noted in the Order to Show Cause, citing *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA 047 (ARB June 30, 2005). Accordingly, I have reviewed the documents Claimant submitted with his Response to the Order to Show Cause in considering whether Complainant has amended or supplemented his claims sufficiently to avoid dismissal for failure to make out a prima facie case of a violation of the STAA.

Upon review, the Wisconsin Decision does not provide additional information that would satisfy *Evans*' requirements to avoid dismissal. Specifically, the Wisconsin Decision provides no facts concerning alleged protected activity or to the STAA (or, indeed, to any other statute within OALJ's jurisdiction). While it contains information concerning the adverse action, Respondent's alleged termination of the Complainant, it neither provides an assertion of causation nor a description of the relief sought.

Similarly, Claimant's December 31, 2012, letter does not provide information that would satisfy *Evans*' requirements to avoid dismissal. It does not contain information concerning alleged protected activity and in fact denies that this complaint is brought under the STAA by stating, "I am very much aware of the STAA complaint Rules and Regulations. This complaint did not come under those rules and regulations." While the letter does contain information about the adverse action, Respondent's alleged termination of the Complainant, it provides no assertion of causation and no description of the relief sought. Moreover, in the letter Complainant underscores that this is not a whistleblowing complaint by stating, "**[u]nlawful termination is the key to this complaint, not the fact of whistleblowing.**" Claimant's December 31, 2012, letter, at 2 (emphasis in original).

As noted in the Order to Show Cause, according to Complainant, he "filed a DOT complaint as well as an OSHA safety complaint after ... [he] was fired" and "called OSHA to make ... [his] whistleblower complaint the same day" as the altercation with Respondent's owner, Lyle Schaezel, in other words, on March 27, 2012. May 25, 2012, Interview Statement of Theodis (Dan) Daniels, at 1. Because Complainant has stated he filed his DOT and OSHA statements *after* he was fired, he has not alleged facts showing that Respondent was aware of his activity or that the protected activity was a contributing factor in his termination. As a result, Complainant has not made out a prima facie case of an STAA violation under 29 C.F.R. § 1978.104(e)(2).

Complainant's response to the Order to Show Cause does not cure his complaint's failure to state a cause of action upon which a relief can be granted because that response, as outlined above, does not allege facts that would establish an STAA violation. Accordingly, the complaint in this matter is **DISMISSED**.

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.

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).

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).