



Issue Date: 29 July 2014

Case No.: 2014-STA-00021

In the Matter of

KENNETH HERBST
Complainant

v.

UNITED STATES POSTAL SERVICE
Respondent

ORDER GRANTING MOTION FOR DISMISSAL

This matter arises under the whistleblower provision of the Surface Transportation Assistance Act (“STAA”) as enacted in 1982 and codified at 49 U.S.C. § 31105, as amended 2007, and its implementing regulations at 29 C.F.R. Part 1978. Complainant alleges that he was disciplined by his employer, the United States Postal Service (“USPS”), in retaliation for reporting to management a safety issue related to the Federal Motor Carrier Safety Regulations concerning a vehicle over 10,001 pounds.

The Occupational Safety and Health Administration investigated Complainant’s complaint and in a Notice of Determination issued November 27, 2013, advised that it found no reasonable cause to believe that Respondent violated 49 U.S.C. § 31105. Complainant made a timely request for hearing. The matter was assigned to me and I scheduled a hearing in New York, New York for April 7, 2014.

On March 10, 2014, Respondent filed a Motion to Dismiss for Lack of Jurisdiction. Shortly thereafter, Complainant’s counsel requested an extension of time within which to respond to the Motion to Dismiss and requested that the prehearing teleconference be adjourned as the parties were actively discussing settlement. I granted this request and continued the hearing by Order dated March 28, 2014. On May 30, 2014, I received notification from the Respondent that the parties had resolved the matter. When I did not receive the finalized settlement agreement, I issued an Order to Show Cause on June 24, 2014 directing the parties to show cause why the matter should not be rescheduled for hearing. By letter dated June 26, 2014 counsel for Respondent advised that Complainant had refused to sign the settlement agreement and that Complainant’s attorney had advised Respondent the Complainant wanted to proceed with the matter *pro se*. On July 1, 2014, Complainant sent in a letter detailing his disagreements with the proposed settlement.

By Order issued July 1, 2014, I directed Complainant's counsel to file a formal withdrawal from the matter and gave Complainant ten days from the date of the Order to respond to the pending Motion to Dismiss for Lack of Jurisdiction. By letter dated July 7, 2014, Complainant's counsel submitted his formal withdrawal from the case. On July 10, 2014, Complainant filed his response to the Agency's Motion to Dismiss for Lack of Jurisdiction. On July 22, 2014, Respondent filed its Reply in Support of its Motion to Dismiss for Lack of Jurisdiction. As in the Secretary's Findings, OSHA had found jurisdiction over the Respondent, by Order dated July 15, 2014, I directed the Secretary to respond to the Agency's Motion to Dismiss. Counsel for the Secretary responded on July 25, 2014.

Respondent argues that I should dismiss this matter because the USPS is not subject to the provisions of the STAA. Respondent points out that in order to become subject to suit, two steps must be met. First, there must be a waiver of immunity and then, the substantive provisions of the statute must be found to apply to an independent establishment of the executive branch. United States Postal Service v. Flamingo Indus., 540 U.S. 736, 744-745 (2004).

The Administrative Review Board has already addressed the issue of the applicability of the STAA to the Postal Service. In Cawthorne v. United States Postal Service, ARB No. 08-083 (ARB May 7, 2009) the Board found that the STAA provides that an "employer" is a "person" for purposes of coverage under the STAA's antidiscrimination provisions, but specifically "does not include the government." Id. As the USPS is a federal government entity, it is not subject to the STAA and Complainant has no avenue for relief. Counsel for the Secretary, in his July 25, 2014 response, stated that OSHA's finding of jurisdiction in this matter was in error as the definition of employee in 49 U.S.C. §31101(3)(B) expressly excludes one who is "an employee of the United States Government" and the USPS is an independent establishment of the executive branch of the government of the United States. 49 U.S.C. § 201.

Accordingly, I hereby GRANT Respondent's Motion and ORDER that this matter is DISMISSED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

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).