U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 July 2014

Case No.: 2014-STA-00028

In the Matter of

ANDREW MORRISON
Complainant

v.

LP FLEMING JR TRUCKING COMPANY, INC.
Respondent

ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

The whistleblower provision of the Surface Transportation Assistance Act ("STAA") was enacted in 1982 and codified at 49 U.S.C. app. § 2305. In 1994, the STAA was recodified at 49 U.S.C. § 31105. The STAA was amended by the Implementing Recommendations of the 9/11 Commission Act 2007, P.L. No. 110-053 (Aug. 3, 2007).

Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his prior employer, LP Fleming Trucking Company (Respondent) violated the employee protection provisions of the STAA. Complainant alleged that Respondent terminated his employment in retaliation for raising concerns related to inoperative lights and other equipment on a truck that he was assigned to operate. OSHA conducted an investigation and on December 13, 2013 issued its finding dismissing the complaint due to Complainant's failure to cooperate in the investigation.

Complainant, acting *pro se*, made a timely request for hearing before the Office of Administrative Law Judges (OALJ). On February 18, 2014, I issued a Notice of Hearing and Prehearing Order setting a hearing date of April 21, 2014 and directing the parties to comply with certain prehearing requirements, including appearance at telephonic prehearing conferences. No one entered an appearance to represent Respondent in this matter. Neither party complied with the requirements of the Prehearing Order nor appeared for the telephonic prehearing conference. Thus, on March 21, 2014, I issued a Notice to Show Cause why the Matter should not be dismissed. Neither party responded to the Notice to Show Cause. On April 11, 2014, I issued an Order of Dismissal.

By letter dated April 15, 2014, Complainant sent a letter that I determined to be a request to reconsider the Order of Dismissal. Complainant had not served a copy of this letter upon Respondent. On April 18, 2014, I forwarded a copy of Complainant's letter to Respondent and issued a new Order to Show Cause why I should not grant Complainant's request for reconsideration and reschedule the matter for hearing. Respondent did not reply to this Order.

On May 7, 2014, I granted Complainant's request for reconsideration and rescheduled the matter for hearing on Monday, June 23, 2014 at 11:00 a.m. Complainant appeared for the prehearing teleconference on June 9, 2014, but Respondent did not. Complainant also appeared on June 23, 2014 at the time and place for the hearing. Again, Respondent did not appear, and no one representing Respondent appeared. I had scheduled the hearing for 11:00 a.m. I went on the record at 11:36 a.m. with only the Complainant present. Complainant requested that I issue a default judgment in his favor for $1.2 million dollars for lost wages and possible future wages. Complainant was sworn as a witness and I took limited testimony in order to establish the basis for his allegation that Respondent violated the STAA and to determine what his damages were.

Complainant testified that he began working for Respondent as a driver in "the beginning of August or late July" 2013. (Transcript "Tr." 7.) He drove fifty-three foot trailers under contract to the U.S. Postal Service. He worked full-time, between forty and fifty hours a week. He earned $27.27 an hour, with no overtime. (*Id.*) On August 22, 2013, he was concerned about some hazardous equipment failures on his truck, so instead of driving, he took the truck to be repaired. He testified that the defoggers, hazard lights, and windshield wipers were not working. (Tr. 8.) At the Volvo dealership where he took the truck, they would not make the repairs without authorization from his boss, Luther Fleming. Complainant called his boss on the phone to get authorization and instead, his boss told him that it was more important to get the load to its destination than it was to get the truck repaired. Complainant refused to drive the truck and Fleming told him that he was terminated. (Tr. 9.) On August 26, 2013, when Complainant attempted to return to work, Respondent told him he had been terminated. (Tr. 10.)

Complainant was out of work until January 2014, when he returned to work for his former employer, Swift Transportation. (Tr. 10.) He earns less money for Swift, anywhere from $300 to $700 a week. (Id.) Working conditions are also more difficult because he works longer hours and can be assigned to drive anywhere in the country; when working for Respondent he had a regular daily route and was home at the end of every day. (Tr. 11.) Complainant did collect unemployment benefits between August 2013 and January 2014. (Tr. 10.)

STAA Violation

49 U.S.C. § 31105(a)(1)(B) provides:

> A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because …
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> 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, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.

In a STAA proceeding, a complainant must show that he engaged in a protected activity, that his employer subjected him to an adverse action, and that the employer was aware of the protected activity when it took the adverse action, and that the protected activity was the likely reason for the adverse action. *Kevin J. Husen v. Wide Open Trucking, Inc. and Jeremy Runyon*, Case No. 2005-STA-8 (ALJ June 23, 2005), citing *Mace v. Ona Delivery Sys., Inc.*, 1991-STA-10, at 3 (Sec'y, Jan. 27, 1992).

The facts Complainant testified to have not been contested. Thus, Complainant has established that Respondent subjected him to an adverse action (terminated him from his job) immediately after Complainant refused to drive a truck that he believed was in a hazardous safety condition (nonfunctioning defoggers, hazard lights, and windshield wipers).

Notice to Respondent

Respondent has received sufficient notice of the pending action to satisfy both the applicable regulations and Constitutional standards of due process.

> Service of complaints . . . shall be made either: (1) By delivering a copy to the individual, partner, officer of a corporation, or attorney of record; (2) by leaving a copy at the principal office, place of business, or residence; (3) by mailing to the last known address of such individual, partner, officer or attorney. If done by certified mail, service is complete upon mailing. If done by regular mail, service is complete upon receipt by addressee.

29 C.F.R. § 18.3. OSHA sent the Secretary's Findings and Order to Respondent at LP Fleming Jr. Trucking, Inc., 3830-3832 West Street, Landover, MD 20785 by certified mail #7012 1640 0001 1742 8462. Complainant sent a copy of his request for hearing to LP Fleming Jr. Trucking, Inc. at the same address. My office mailed the Notice of Hearing and Prehearing Order dated February 18, 2014 to LP Fleming Jr. Trucking Inc. at the above address by certified mail #7012 2920 0001 7032 3797 and the domestic return receipt shows that it was signed for by Megan Stokes.

The April 11, 2014 Order of Dismissal sent to LP Fleming Jr. Trucking Inc. by certified mail #7012 2920 0001 7033 2744 was returned as undeliverable. My office sent the same Order of Dismissal by United Parcel Service (UPS) and UPS returned that letter as undelivered with the notation that the receiver had moved. My office sent the April 18, 2014 Order to Show Cause to Respondent at the above address by both certified mail and UPS. Again, UPS returned the letter as undeliverable with the notation that the receiver had moved.

Research done by my office revealed a new address for Respondent at 1268 Cronson Boulevard, Crofton, MD 21114-2043. My office sent the Notice of Hearing dated May 7, 2014 to that address by certified mail #7012 2920 0001 7033 3307. L Fleming[1] signed the return receipt acknowledging delivery on May 27, 2014. My office sent the same Notice of Hearing by UPS to the new address at 1268 Cronson Boulevard, Crofton, MD 21114-2043 and UPS tracking reports that they delivered the letter to "Flemming" at the office's front desk at 10:11 a.m. May 14, 2014. On June 10, 2014, after Respondent failed to appear at the scheduled prehearing teleconference, I issued an Order advising that the hearing remained scheduled for Monday, June 23, 2014 at 11:00 a.m. at 201 Varick St., New York, New York. My office sent the Order by certified mail #7012 2920 0001 7033 3598. The return receipt establishes that Luther Fleming signed for the letter.

Following the hearing, at which Respondent failed to appear, I issued an Order to Show Cause on July 1, 2014 and sent it to Respondent at 1268 Cronson Boulevard, Crofton, MD 21114-2043 by certified mail #7012 2920 0001 7033 3789. L Fleming signed the return receipt on July 9, 2014.

The efforts made by this office to inform Respondent about the case more than meet the requirements of the regulations and the constitutional requirements for sufficiency of notice. *See Husen*, Case No. 2005-STA-8, at 5.

Default Judgment in STAA cases

There is no express authority in the STAA or the applicable regulations explicitly governing default judgments. However, 29 C.F.R. § 18.1 sets forth that the Rules of Civil Procedure of the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation. Thus, the Federal Rules of Civil Procedure apply. Rule 55 of the Federal Rules provides further support, and a procedural framework, for a default judgment. The Board has held, in *Somerson v. Mail Contractors of America*, ARB No. 02-057, ALJ Nos. 2002-STA-18 & 19, 5 (ARB Nov. 25, 2003) that administrative law judges have an inherent authority to enter default judgments in whistleblower complaints. A default decision may be entered against any party who fails to appear without good cause. *Larry Barnum* ***v.*** *J.D.C. Logistics, Inc.*, Case Number 2008-STA-00006 (ALJ December 17, 2007).

Respondent's failure to participate in any manner in this case (Respondent has made no written response to any Orders issued, has failed to show up for scheduled telephonic conferences and failed to appear at the hearing) has "resulted in a denial of this tribunal's ability to adjudicate the issues before it, and likewise, a denial of Complainant's right to a hearing and fair adjudication of his claim." *Husen*, Case No. 2005-STA-8, at 7. Default judgment is appropriate.

[1] Complainant testified that Luther Fleming was his boss and the owner of LP Fleming Trucking Co, Inc. (Tr. 8.)

Remedies

> Statutory remedies under the STAA include directing the employer to
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> (i) take affirmative action to abate the violation; (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and (iii) pay compensatory damages, including back pay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

49 U.S.C. § 31105(b)(3)(A). Relief may also include punitive damages in an amount not to exceed $250,000.00. 49 U.S.C. § 31105(b)(3)(C).

Under the STAA, the Secretary of Labor must order reinstatement upon finding reasonable cause to believe that a violation occurred. *Spinner v. Yellow Freight System, Inc.*, 90-STA-17 (Sec'y May 6, 1992). The Administrative Review Board (ARB) has held that reinstatement is an automatic remedy under the STAA and must be ordered unless it is impossible or impractical. *Dickey v. West Side Transport, Inc.*, ARB Nos. 06-150, 06-151, ALJ Nos. 2006-STA-26 and 27 (ARB May 29, 2008)

Thus, as Complainant has established, through Respondent's default, that his rights under the STAA have been violated, Complainant is entitled to reinstatement to his former position and to back pay at the fulltime rate of $27.27 per hour ($1,090.80 per week) from August 22, 2013 until he is reinstated.

Accordingly, I hereby ORDER:

1) Complainant is entitled to default judgment against Respondent;

2) Respondent shall reinstate Complainant to his prior position as a full-time driver; and

3) Respondent shall pay to Complainant front and back wages in the amount of $1,090.80 per week until Respondent makes a bona fide offer of reinstatement, less any mitigation by Complainant (unemployment compensation received, other wages earned since his discharge by Respondent);

4) Respondent shall pay to Complainant interest on the entire back pay award, calculated in accordance with 26 U.S.C. §6621; and

5) The Secretary shall designate an official to calculate the amounts set forth by ¶¶ 3 and 4 above.

SO ORDERED

Digitally signed by THERESA TIMLIN
DN: CN=THERESA TIMLIN, OU=JUDGE, O=Office of Administrative Law Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

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, the Associate Solicitor, 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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).