U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 28 March 2016

OALJ Case No.: 2015-STA-00050
OSHA Case No.: 7-7080-14-103

In the Matter of:

TONY C. WILLIAMS,
Complainant,

v.

FIRST STUDENT, INC.,
Respondent.

* * * * * * *

OALJ Case Nos.: 2015-STA-00049 and 2015-STA-00053
OSHA Case Nos.: 7-7080-14-105 and 7-7080-14-106

In the Matter of:

LATONYA L. GRIFFIN,
Complainant,

v.

FIRST STUDENT, INC.,

and

NORTH AMERICAN CENTRAL SCHOOL BUS, LLC,
Respondents.

DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("the Act" or "STAA") and implementing regulations set forth at 29 C.F.R. Part 1978. The pertinent provisions of the Act prohibit the discharge, discipline of or discrimination against an employee in retaliation for the employee engaging in certain protected activities.

I. Procedural Background

In a Decision and Order dated February 2, 2016, I granted a Motion for Summary Decision by Respondent First Student, Inc., ("Respondent") and dismissed the portion of the Complaint by Complainant Tony C. Williams ("Complainant") that alleged First Student blacklisted him for engaging in protected activity, which he asserted caused him not to get hired by North American Central School Bus.[1] I withheld ruling on the Motion for Summary decision *in toto* because in a handwritten statement submitted by fax on January 8, 2016, Complainant alleged that Respondent had punished him for engaging in protected activity by assigning him to a work location that was 20 to 30 miles from his home when he could have been assigned to a location that was closer.[2] As this allegation had not been raised before, I gave Respondent until March 4, 2016, to respond if it chose to do so. Respondent submitted a Motion to Dismiss and Motion for Summary Decision on March 3, 2016. The Motion to Dismiss argues that Complainant did not raise the alleged violation within 180 days of its occurrence as required by the STAA. The Motion for Summary Decision argues, in the alternative, that even if the allegation was raised in a timely manner the facts alleged, viewed in the light most favorable to Complainant, do not establish that he suffered an adverse employment action because he is still employed by Respondent in the same role and at a higher hourly wage. Complainant did not submit anything in reply.

II. Discussion

A. Motion to Dismiss

1. Legal Standards

The regulation implementing the STAA, in 29 C.F.R. § 1978.103(d), states:

> Within 180 days after an alleged violation of STAA occurs, any employee who believes that he or she has been retaliated against in violation of STAA may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

Pro se litigants are given more latitude than parties represented by attorneys, but they are still required to comply with the rules absent legal justification. With respect to the 180 day

[1] The February 2, 2016, Decision and Order also dismissed a complaint by Myron K. Herron against North American Central School Bus (2015-STA-00055) and allowed complaints by LaTonya L. Griffin against First Student (2015-STA-00053) and North American Central School Bus (2015-STA-00049) to proceed. Complainant Griffin filed a request for review of my decision with the Administrative Review Board on February 17, 2016. As the Board has not acted upon her request, I have not taken any further action on her complaints.

[2] Complainant submitted his statement in response to an order to show cause that I issued on November 5, 2015, which was a *Roseboro* notice informing the *pro se* Complainants of the standards that apply in assessing whether summary decision is appropriate. *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975).

limitation period in the STAA, a complainant is expected to comply unless equitable tolling principles apply. The Administrative Review Board has recognized three circumstances[3] where equitable tolling may excuse a late submission:

> (1) [when] the respondent has actively or otherwise misled the complainant respecting the cause of action,
> (2) the complainant has in some extraordinary way been prevented from asserting his rights, or
> (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Eubanks v. A.M. Express, Inc., ARB Case No. 08-138 (Sept. 24, 2009). *See also, Wyatt v. J.B. Hunt Transportation, Inc.*, ARB No. 11-039 (Sept. 21, 2012); *Maverick Transportation, LLC v. U.S. Dept. of Labor,* 739 F.3d 1149 (8th Cir. 2014). The complainant bears the burden of proving that equitable tolling applies and ignorance of what the law requires is generally not sufficient to invoke equitable tolling. *Eubanks, supra*. The 180 day time clock begins to run "from the date an employee receives final, definitive, and unequivocal notice that an adverse employment decision has been made." *Beatty v. Inman Trucking Management, Inc.*, ARB Case No. 09-032 (June 30, 2010).

2. Application to the Facts

As was discussed in more detail in the February 2, 2016, order, Complainant and other members of Teamsters Local 610 ("Teamsters") that worked at Respondent's Pagedale facility had to be reassigned to other facilities or lose their jobs with Respondent after Respondent lost the contracts to provide school bus services to the Ladue and University City school districts. Complainant was reassigned to the Rockwood facility effective July 21, 2014. (Motion, EX I). Complainant was one of four employees reassigned from Pagedale to Rockwood. (EX G).

Complainant filed his complaint online with OSHA on July 28, 2014. He alleged in the complaint that he had been blacklisted for reporting safety issues, which led to him not being hired by the contractor who took over the bus routes. The reassignment to Rockwood was not raised. (EX J). U.S. Department of Labor Investigator Laura Aunan interviewed Complainant on August 15, 2014, and took a statement from him that he reviewed and signed on October 27, 2014. The only adverse action Complainant discussed was the allegation that he had been blacklisted and denied a job by the new contractor. (EX K). The Secretary issued findings on March 2, 2015, dismissing the blacklisting complaint against Respondent.

In a letter dated March 10, 2015, addressed to the Directorate of Whistleblower Protections Programs, Complainant disputed the Secretary's findings. The letter was

[3] The Administrative Review Board expanded the first principle to include both intentional and innocent acts and omissions by an employer that mislead an employee into foregoing prompt action to vindicate his or her rights. *Hyman v. KD Resources*, ARB No. 09-076 (Mar. 31, 2010).

received at the Office of Administrative Law Judges ("OALJ") on April 20, 2015. I issued a Notice of Hearing on May 14, 2015. Between the Notice of Hearing and the issuance of the order on February 2, 2016, Complainant filed documents or other evidence with OALJ on five occasions. The only time Complainant raised his reassignment to Rockwood as an adverse employment action was in the letter he submitted on January 8, 2016.

The period from the effective date of Complaint's assignment to the Rockwood facility (July 21, 2014) to the date he alleged that the reassignment was an adverse employment action (January 8, 2016) is 537 days.

Unlike the complainants in *Beatty* who were unaware that their former employer had filed a negative commercial truck driver report until 20 months later when a prospective employer cited it as the reason they were pulled out of new-hire training and dismissed, in this case the employment action was patently obvious from at least July 21, 2014 when Complainant began reporting to Rockwood to work. Complainant was working at Rockwood when he filed his online complaint with OSHA, when he was interviewed by the DOL investigator, and when he submitted documents and evidence to OALJ prior to his January 8, 2016, letter. If he considered his reassignment to Rockwood to be a punitive action in retaliation for raising safety issues, he had ample opportunity to complain within the 180 day period the STAA permits.

Based upon the record, I find that Complainant failed to complain that his reassignment to Rockwood was an adverse employment action in violation of the whistleblower protections of the STAA within 180 days of notice of the action as required by 41 U.S.C. § 31105(b) and 29 C.F.R. § 1978.103(d). I also find that the equitable tolling principles are not applicable under the facts of this case. Accordingly, I find that the allegation that Complainant was reassigned to Rockwood in retaliation for engaging in STAA protected activity was not filed in timely manner and is **DISMISSED**.

B. Motions for Summary Decision

The dismissal of the Complaint on timeliness grounds renders consideration of summary decision unnecessary, but it does serve as an alternative basis for resolving the Complaint.

1. Legal Standards

The standard for summary decision in cases before this tribunal is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure. *Frederickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 5 (May 27, 2010). An ALJ may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact and that the party is therefore entitled to summary decision as a matter of law. 29 C.F.R. § 18.72(a); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (June 28, 2011). "A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation." *Frederickson*, ARB No.

07-100, at 5-6 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The primary purpose of summary decision is to isolate and promptly dispose of unsupported claims or defenses. *Celotex*, 477 U.S. at 323-24.

If the party moving for summary decision demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact that might affect the outcome of the case and that is supported by sufficient evidence. *Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). The non-moving party may not rest upon the mere allegations of his or her pleadings, but must instead set forth "specific facts" showing that there is a genuine issue of fact for hearing. 29 C.F.R. § 18.40(c); *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. Where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there is no genuine issue of material fact, and the moving party is entitled to summary decision. *Celotex*, 477 U.S. at 322-23. In assessing the merits of a motion for summary decision, an ALJ must consider the record in the light most favorable to the non-moving party and draw all inferences in favor of the non-moving party. *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. An ALJ is not to weigh conflicting evidence or make credibility determinations. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, Dec. & Ord. of Remand, slip. op. at 6 (Nov. 30, 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)).

2. ***Whistleblower Protection Under the STAA***

Congress amended the STAA on August 3, 2007, to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b). *Smith v CRTS International, Inc*., No. 11-086, 2013 WL 2902809, *2 fn 1 (June 6, 2013); 49 U.S.C. § 31105(b). Because this complaint was filed after 2007, the post-2007 standard of proof applies.

The employee protection provisions of the STAA provide (in pertinent part):

(a) Prohibitions:

> (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because:
>
> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;
>
> 49 U.S.C. § 31105(a).

The "Complaint" clause of the STAA protects an employee who has "filed a complaint or begun a proceeding related to a violation of a regulation, standard, or order, or has testified or

will testify in such a proceeding." 49 U.S.C. § 31105(a)(A)(i). The statute covers internal complaints to supervisors as well as external complaints to government officials. *See Nix v. Nehi-RC Bottling Co., Inc.*, 84 STA-1 (July 13, 1984); *Davis v. H.R. Hill, Inc.*, 86-STA-18 (Mar. 19, 1987); *Harrison v. Roadway Express, Inc*., 1999 STA 37 (Dec. 31, 2002). An employee's complaints cannot be too generalized or informal. *Calhoun v. U.S. Dept. of Labor*, 576 F.3d 201, 213-14 (4th Cir. 2009). If the "internal communications are oral, they must be sufficient to give notice that a complaint is being filed." *Jackson v. CPC Logistics*, ARB No.07-006 (Oct. 31, 2008); *see Clean Harbor Environmental Services, Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (finding that a driver "filed a complaint" when he sent letters to his superiors explaining various safety precautions he had been taking in an attempt to explain his slow pick-up times). All complaints, whether internal or external, must "relate to" safety violations. Courts have construed "relate to" broadly to encompass violations of both federal and state laws. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992). However, in order to qualify for protection, the complaint must be based on a "reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation." *Calhoun*, 576 F.3d at 213.

The STAA prohibits an employer from discharging or discriminating against an employee because the employee engaged in certain protected activities. 49 U.S.C. § 31105(a)(1). To prove a STAA violation, a complainant must show by a preponderance of evidence that: (1) he or she engaged in protected activity, (2) that employer took an adverse employment action against him or her, and (3) that his or her protected activity was a contributing factor in the adverse action. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (Jan. 31, 2011). If a complainant proves by a preponderance of evidence that his or her protected activity was a contributing factor in an adverse personnel action, the respondent can avoid liability by demonstrating by clear and convincing evidence that the same adverse action would have been taken in any event. *Id.* at 5 (citing 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). Protected activity is a contributing factor if "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." 77 Fed. Reg. 44127 (July 27, 2012); *Benjamin v. Citationshares Management, LLC*, No. 12-029, 2013 WL 6385831 (Nov. 5, 2013). "If the employee does not prove one of these elements, the entire complaint fails." *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004, *3 (Apr. 25, 2013).

Not every action taken by an employer that renders an employee unhappy constitutes an adverse personnel action. *Bechtel v. City of Belton*, 250 F.3d 1157, 1162 (8th Cir. 2001), citing *Montandon v. Farmland Industries, Inc.*, 116 F.3d 355, 359 (8th Cir. 1997). For example, in *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994), the court held that a secretary who was reassigned to another secretarial position with no diminution in her title, salary, or benefits that would cause her to suffer a "materially significant disadvantage," failed to establish a prima facie case that she was subjected to an adverse employment action. Similarly, in *Montandon v. Farmland Industries, Inc.*, 116 F.3d 355, 359 (8th Cir. 1997), the court said "[h]owever unpalatable the prospect may have been to [Plaintiff], the requirement that [Plaintiff] move to [another city] did not rise to the level of an adverse employment action" where the move did not result in a change in his position, title, salary, or any other aspect of employment.

3. Application to the Facts

Respondent focuses solely on the adverse employment action element and argues that, even viewing the evidence in the light most favorable to Complainant and drawing all inferences in his favor, Complainant did not establish a prima facie case that he suffered an adverse employment action. Having reviewed the entire record, I come to the same conclusion and will only discuss that one element.

While Respondent operated a number of facilities in the area where Claimant could have worked, the sensible choice was for Claimant to relocate to one represented by the Teamsters in order to preserve his seniority and higher wage rate under the collective bargaining agreements ("CBA") between the Teamsters and Respondent. Pay records show that at the time Complaint's employment at Pagedale ended in July 2014, he was earning $18.04 per hour, which was the hourly rate specified in the CBA. (EX 7 and 12). When he began working at Rockwood, his hourly wage increased to $19.00 and then to $19.40 a month later when the new school year started. (EX 8 and 12). Respondent submitted copies of the CBAs for each of its work locations in the area that were represented by the Teamsters (EXs 7-11) and its one operating location represented by the Laborers' International Union (EX 13). Respondent also submitted maps prepared using Google Maps that calculated the distances and normal driving times between various home addresses Complainant had used and its various operating locations. (EX 14). These documents show that while there were other operating locations that may have resulted in a commute that was several minutes less, they also would have resulted in a 7.5 percent or more reduction in Complainant's wage rate compared with what he earned working under the CBA at Rockwood.[4]

Undoubtedly, the longer commute that came with the relocation from Pagedale to Rockwood was an inconvenience, but the loss of the Teamsters routes at Pagedale meant it was inevitable that the commuting time would increase if Complainant was going to continue working for Respondent. It likely was an inconvenience for the three other employees that relocated from Pagedale to Rockwood along with the Complainant. (EX G). On the other hand, the relocation resulted in Complainant receiving a 7.5 percent pay raise. Under the circumstances, I find that Complainant did not suffer a "materially significant disadvantage" and has not established a prima facie case that he was subjected to an adverse employment action.[5] *Harlston* and *Montandon, supra.* The failure to make a prima facie showing on the adverse employment action element, regardless of whether the other elements can be established, makes entry of summary decision in favor of Respondent appropriate in this case.

[4] As an example, from Complainant's last reported address on Raymond Avenue to the Rockwood site the driving distance is 25.7 miles and takes 39 minutes. Working there, Complainant earned $19.40 an hour per the CBA. The Teamster represented site closest to Complainant's residence is Riverview Gardens. It is 8.7 miles from Complainant's residence and it is a 21 minute drive. Under the CBA at the Riverview Gardens site, Complainant would have earned $17.92 an hour. The hourly wage rates at the other sites were significantly less.

[5] Proximity to his former work site and home was the only complaint raised in Complainant's January 8, 2016, letter. Otherwise, the record shows that his salary went up and it appears his position, title, benefits and other aspects of employment remained unchanged.

III. Conclusion and Order

The only allegation remaining after the entry of summary decision in Respondent's favor and partial dismissal in the February 2, 2016 Order is Complainant's allegation that he was reassigned to a work location further from his home and former work site when there were closer locations available in retaliation for having engaged in protected activity. For the reasons set forth above, that allegation is **DISMISSED** as is the Complaint against Respondent.

SO ORDERED.

Digitally signed by MORRIS D. DAVIS
DN: CN=MORRIS D. DAVIS, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

MORRIS D. DAVIS
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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).