U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 June 2018

CASE NOS.: 2016-STA-00061
2016-STA-00062
2016-STA-00063

In the Matter of:

MICHAEL FORD
Pro Se Complainant

v.

PLUS WAY TRANSPORT, INC.
ZEBRA CARRIERS, INC.
TCM TRANSPORT, LLC
Respondents

RULING ON MOTION FOR SUMMARY DECISION

Procedural Background

This proceeding arises under the Surface Transportation Assistance Act of 1982, (the STAA)[1] and the regulations promulgated thereunder.[2] The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

Complainant filed his original complaint with the Occupational Safety and Health Administration (OSHA) in May 2016. OSHA dismissed the complaint the next month and Complainant requested a de novo hearing before the Office of Administrative Law Judges. I conducted an initial scheduling conference call with all parties on 15 Aug 16 and issued a scheduling order setting the hearing for 14 Nov 16. Consistent with my order, Complainant filed a document setting out the specific alleged protected activities and adverse actions on 19 Sep 16.

[1] 49 U.S.C. § 31105.
[2] 29 C.F.R. Part 1978.

Respondents filed their answers a few weeks later, but since that time the case has been plagued with repeated delays either requested or caused by Complainant:

- On 2 Nov 16, Complainant requested a continuance in order to continue his search for an attorney. Respondents acquiesced to the request and I canceled the 14 Nov 16 setting.
- On 20 Dec 16, I conducted another conference call during which Complainant indicated that he had thought he had engaged an attorney, but that attorney was ultimately unwilling to represent him. I rescheduled the hearing for 18 Apr 17 and cautioned Complainant to be prepared to try the case at that time.
- On 7 Apr 17, I conducted a conference call to ensure are all parties were prepared to try the case. Complainant indicated he would not be prepared and over the objection of the Respondents, I set a new hearing date of 6 Jun 17, with a prehearing conference call of 31 May 17 to ensure Complainant was prepared.
- On 25 May 17, I conducted a conference call during which Complainant requested a continuance in order to subpoena witnesses and collect additional records. Respondents opposed the request, but were unable to articulate specific prejudice. I granted a continuance to 8 Sep 17, but specifically cautioned Complainant that, particularly in view of the length of the continuance, absent a medical emergency or other unforeseen circumstance this would be the last continuance in the case. I also cautioned Complainant that if he should ultimately be able to engage counsel, that counsel must be ready to proceed on the scheduled date.
- On 31 Aug 17, Complainant requested an additional continuance, indicating that he had been communicating with Attorney Susan Kilgore and anticipated that she would represent him. I granted the continuance over Respondent's objections, setting the case for 20 Nov 17.
- On 31 Oct 17 and 3 Nov 17, Respondents Zebra Carriers, Inc. and TCM Transport, LLC filed Motions for Summary Decision.
- On 9 Nov 17, Complainant requested another continuance, indicating that Ms. Kilgore had agreed to take his case, pending his payment of an initial retainer.
- On 16 Nov 17, I issued an order canceling the 20 Nov 17 hearing, pending my consideration and adjudication of the Motions for Summary Decision.
- On 21 Nov 17, I conducted a conference call with the parties and Complainant requested 45 days to obtain funds and retain Ms. Kilgore before responding to the summary decision motions. He gave permission to contact Ms. Kilgore to verify her willingness to accept his case, once the retainer was paid. Respondents opposed any continuances.
- On 4 Dec 17, I issued an interim scheduling order in which Complainant was given until 10 Jan 18 to have an attorney file a notice of appearance or in the alternative, file his opposition to the Motions for Summary Decision no later than 1 Feb 18. I further noted that, absent exigent circumstances, this was the last time Complainant would be granted additional time as a pro se litigant.
- On 8 Jan 18, Attorney Kilgore filed a letter stating that she does not represent Complainant and providing no indication that she contemplated representing Complainant.

- On 29 Jan 18, I issued an order rescheduling the hearing for 1 May 18.
- On 7 Mar 18, Complainant having failed to comply with my order to respond to the Motions for Summary Decision by 1 Feb 18, I ordered Complainant to show cause no later than 30 Mar 18 why I should not grant the motions.[3]
- Complainant filed nothing in response, but by telephone stated that he was now represented by Attorney Tyesha Elam.
- Attorney Elam did not file a notice of appearance and did not respond to any of my staff's multiple phone calls and emails.
- My staff attempted to contact Complainant by telephone, but was informed that the number was no longer in service for him.
- On 26 Apr 18, I cancelled the 1 May 18 hearing date and renewed the order for Complainant to show cause, with a new deadline of 14 days after receipt.
- On 2 May 18, Complainant called in response to a voice message left by my staff. I was able to conduct a conference call with Complainant and Respondent's Counsel. Complainant indicated that he had not received the 26 Apr 18 order. After I read it to him, he stated that he had been told by Ms. Elam that she would take his case, he had paid her a retainer, and he had forwarded documents to her. I explained to Complainant that he has no attorney in this case until that attorney files a notice of appearance. I informed Complainant that 31 May 18 was the deadline for filing any answer to the Motions to Dismiss, whether he had an attorney or not.
- On 3 May 18, I issued an order that Complainant, either through counsel, or on his own, must file any responses to the Motions to Dismiss by 31 May 18.
- On 17 May 18, Complainant emailed documents purporting to demonstrate that he had retained Attorney Elam. He was again informed that the attorney must communicate directly with the judge and communicate her intent to appear on his behalf. Attorney Elam's assistant then emailed that Attorney Elam planned to file a notice of appearance by 21 May 18.
- On 24 May 18 an email was sent to Complainant and Attorney Elam informing them that (1) If an answer to the Motions to Dismiss is to be filed, it must be filed by 31 May 18, whether by Complainant or by an attorney representing him, (2) Since no notice of appearance had been received, Complainant remained unrepresented, and (3) An email from an attorney's assistant stating the attorney plans to file a notice of appearance does not suffice as a notice of appearance, particularly when the date by which the document was to be filed has passed.

[3] I also cautioned Complainant that because of the random and disorganized way in which he had submitted documents, many of which have no bearing whatsoever on this case (E.g., copies of complaints of age and race based discrimination, demands for jury trial, and motions for an offer of settlement.), he must refile any documents with his response.

- Complainant responded by phone, explaining that he had not actually spoken with Attorney Elam since February, but had spoken with her mother (who is also her assistant) and was told Attorney Elam had been having heart problems and just had heart surgery. Complainant was told to either 1) file the response to the Motions to Dismiss himself by 31 May 18, or 2) have an attorney file both a notice of appearance and a response to the Motions to Dismiss by 31 May 18.
- On 25 May 18, Complainant left a voice mail requesting copies of the Motions to Dismiss.
- On 29 May 18, Complainant was informed by email that the motions could not be emailed, but could be faxed to any number he designated. However, he was cautioned that no notice of appearance had been filed and he remained unrepresented, even if he asked that the motions be faxed to Attorney Elam.
- Later that day, Attorney Elam's assistant emailed my clerk to confirm receipt of two motions and ask to be sent the third.
- On 30 May 18, Attorney Elam's assistant was informed by email that since no notice of appearance had been received, Complainant remained unrepresented and would have to specifically request the documents be sent to her. She was encouraged to file a proper notice of appearance and cautioned that any counsel in a case must avoid ex parte communications. She answered that she understood and would discuss the matter with Complainant.
- Since that date, neither Complainant nor any attorney on his behalf has filed an answer to the Motions to Dismiss or communicated in any other fashion.

Substantive Background

The Complaint

In response to my order to file a document specifying each protected activity and adverse action, Complainant submitted a loose collection of various documents and notes. However, his basic allegations appear to be that:

> His original protected activity took place in November 2015 while he was employed by Zebra and resulted in his termination.[4] He filed a whistleblower complaint under the Act with OSHA.[5] That complaint was ultimately resolved with a settlement agreement approved by OSHA in April 2016.

[4] The protected activities appear to involve an overweight truck, dirty trailer, blown tire and mud flap problem, failed Federal DOT inspection, and log book out of drive time. It also appears that Zebra cited Complainant being late as the reason for his dismissal, but he argued that he was late because of those issues.
[5] Case 6-1550-16-030.

The terms of the settlement provided that (1) Zebra would pay $4,116.70 in back wages, (2) Zebra would not rehire Complainant, since he had found other employment, (3) Zebra would give neutral references in responding to any inquiries about Complainant's performance as an employee.

In May 2016, he applied for employment with TCM, mentioning that he might get some bad references, because he won a case with the Department of Labor and some trucking companies are mad at him. TCM refused to hire him, explaining that Zebra told them he had been late three times.

Later that same month, he was hired by Plus Way. He refused to drive in violation of hours of service and was fired. He was told all he does is sue trucking companies. Sara Chapa from Plus Way had previously worked at Zebra.

The Motions to Dismiss

Zebra

Zebra asserts that it never broke the settlement agreement. It submits an affidavit from Sara Chapa stating that (1) it has never given a negative reference about Complainant to any motor carrier; (2) she was never asked by TCM for a reference and was unaware Complainant had sought a job with TCM until he filed his complaint; and (3) Zebra provided a neutral reference to Plus Way. Zebra also notes that even if it had violated the settlement agreement, Complainant's remedy would be in District Court.

TCM

TCM asserts that it was unaware of any protected activity by Complainant and elected to not hire him for other reasons. It submits an affidavit from Anahy Chapa stating that (1) Complainant told TCM (a) he had worked for Zebra for a short period, but not why he left, (b) he had been unfairly fired from a number of jobs, (c) some employers might give bad references because they were mad at him, but not why, and (d) he had won a lawsuit against Zebra, but not what it was about; (2) During the hiring process, TCM received unwanted repetitive calls, visits, and letters from Complainant; (3) Complainant became visibly upset that he had not been hired yet and raised his voice at TCM staff; (4) Complainant made a number of inconsistent statements that concerned TCM; and (5) TCM did not hire Complainant because he kept pestering their staff and it did not believe he would he would be a good fit, but not because of anything to do with concerns over what he may have done or said about motor carrier safety.

Discussion

The Act provides that:

> (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 … has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety … regulation, standard, or order … [6]

To prevail on his claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that the respondent took an adverse employment action against him, and that his protected activity was a contributing factor in the unfavorable personnel action. For a finding of protected activity under the complaint clause of the STAA, a complainant need only show that he reasonably believed he was complaining about the existence of a safety violation.[7] If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the unfavorable personnel action, a respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.[8]

"Contributing factor" causation may be proven indirectly by circumstantial evidence such as "temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity."[9]

Summary decision is a tool used to dispose of actions in which there is no genuine issue of material fact between the parties and which may be decided as a matter of law.[10] An administrative law judge (ALJ) may grant a motion for summary decision if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact.[11] In a motion for summary disposition, the moving party has the burden of establishing the absence of evidence to support the nonmoving party's case.[12] The evidence is then viewed in the light most favorable to the nonmoving party.[13]

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[6] 49 U.S.C. § 31105.

[7] *Bethea v. Wallace Trucking Co.*, ARB No. 07-057, ALJ No. 2006-STA-023, slip op. at 8 (ARB Dec. 31, 2007); *Calhoun v. United Parcel Serv*., ARB No. 04-108, ALJ No. 2002-STA-031, slip op. at 11 (ARB Sept. 14, 2007); *Ulrich v. Swift Transportation Corp.*, 2010-STA-41 (ARB Mar. 27, 2012).

[8] 75 Fed. Reg. 53545, 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii); *Salata v. City Concrete, LLC*, 2008-STA-12 and -41 (ARB Sept. 15, 2011).

[9] *DeFrancesco v. Union R.R. Co.*, 2009-FRS-009, (ARB Feb. 29, 2012); *See, e.g., Id.; Bobreski v. J. Givoo Consultants, Inc*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011).

[10] *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

[11] 29 C.F.R. § 18.40 (d).

[12] *Wise v. E.I. DuPont de Nemours and Co.*, 58 F.3d 193, 195 (5th Cir. 1995), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

To meet its burden, though, "the nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts."[14] The nonmoving party may not rest solely upon his allegations or speculations, but must present specific facts that could support a finding in his favor at trial.[15]

The nonmoving party must "make a showing on every element that is essential to his or her case and on which the party will bear the burden of persuasion at trial."[16] The ALJ will take all evidence presented by the nonmoving party as true, but "a properly crafted defense motion for summary judgment requires a complainant to exhibit admissible proof of facts crucial to his or her claim for relief….[which] must be grounded in affidavits, declarations and answers to discovery[.]"[17] If the moving party presented admissible evidence in support of the motion for summary decision, the nonmoving party must also provide admissible evidence to raise a genuine issue of fact.[18]

If a party fails to comply with the terms of a settlement agreement approved by OSHA, the remedy for enforcement is by civil action in Federal District Court.[19] However, a failure to comply with the settlement could be considered new adverse action, if it independently constituted an adverse action.[20]

The allegation that Zebra failed to comply with the settlement is not properly raised as an administrative action and should be before a district court. That part of the complaint is dismissed, leaving the allegation that Zebra gave a negative reference to TCM as a new adverse action. Zebra cites the affidavit from Sara Chapa stating that it has never given a negative reference about Complainant to any motor carrier and she was never asked by TCM for a reference and was unaware Complainant had sought a job with TCM until he filed his complaint. It argues that Complainant has been unable to create a genuine of material fact that Zebra ever provided a negative reference to TCM.

Zebra and TCM filed their motions over seven months ago. In spite of multiple "last chance" show cause orders, "final" deadlines, and specific cautions and warnings of the consequences, Complainant has failed to submit any evidence in compliance with my order. As a result, he has failed to create a genuine issue of material fact that Zebra gave a negative recommendation. The complaint as to Zebra is dismissed.

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[13] *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).
[14] *Taita Chemical Co., Ltd. v. Westlake Styrene Corp.* 246 F.3d 377, 385 (5th Cir. 2001), *quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).
[15] *Hasan v. Enercon Services, Inc.*, ARB No. 10-061, 2011 WL 3307579 at *3 (July 28, 2011); 29 C.F.R. § 1840(c).
[16] *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, 2007 WL 1578494 at 7 (May 24, 2007).
[17] *Gallagher v. Granada Entertainment USA*, ALJ No. 2004-SOX-74 (April 1, 2005).
[18] *Hasan* at 3.
[19] 49 U.S.C.A. § 31105(e).
[20] *White v. J.B. Hunt Transport, Inc.*, ARB No. 06-063, ALJ No. 2005-STA-65 (ARB May 30, 2008).

Similarly TCM offered evidence that it was unaware of any protected activity and refused to hire Complainant because it was tired of his pestering them. Again, in seven months, Complainant has failed to offer anything in compliance with my order and raising a genuine issue of material fact that TCM was aware of any protected activity. The complaint as to TCM is dismissed.

Within ten days of receipt of this letter, Counsel for Plus Way and Complainant will confer and arrange for a telephone conference call to discuss future scheduling.

ORDERED this 7th day of June, 2018, at Covington, Louisiana.

PATRICK M. ROSENOW
ADMINISTRATIVE LAW JUDGE