U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 January 2017

Case Number: 2016-STA-00066

In the Matter of:

ROBERT HINTON,
Complainant

v.

GENERAL MOTORS COMPANY,
Respondent.

SUMMARY DECISION AND ORDER DISMISSING THE COMPLAINT

This matter arises under the employee protection provisions of 49 U.S.C. § 31105 of the Surface Transportation Assistance Act of 1982 ("STAA") and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978, and was docketed by the U.S. Department of Labor, Office of Administrative Law Judges ("Office" or "OALJ") on July 20, 2016.

Background

On May 9, 2016, Robert Hinton ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA"), alleging General Motors ("Respondent") forced him to take disability retirement in March 2006. Complainant alleged violations of the STAA; § 399 of the Federal Motor Carrier Safety Administration (FMCSA) regulations; the Occupational Safety and Health Act ("OSH Act"); and the False Claims Act. Complainant alleged: (i) "racist graffiti in the men's locker rooms and washrooms"; (ii) that he reported an attack by a coworker to management; (iii) that he filed a civil rights complaint with the Michigan Department of Civil Rights; (iv) that he filed an action in federal court against Respondent "for failure to report job related injuries"; and (v) that he "requested that the U.S. Government do a survey (investigate) GM for violating safety protocol and protected rights."

On June 7, 2016, the Secretary of Labor, acting through the Regional Administrator for OSHA, issued findings dismissing the complaint. The Secretary of Labor found, in relevant part, that Complainant and Respondent are not covered under the STAA. The Secretary of Labor further found that, although not specifically referenced in the complaint, the Moving Ahead for

Progress in the 21st Century Act (MAP-21) is inapplicable because it was enacted after Complainant's alleged adverse action.[1]

Given that the alleged adverse employment action occurred in 2006, and MAP-21 was not enacted until 2012, it was unclear from Complainant's initial filings whether this Office had jurisdiction over Complainant's MAP-21 claim. Additionally, it appeared that Complainant and Respondent were not a covered "employee" and "employer" under the STAA.[2] Accordingly, on August 8, 2016, I issued a *Notice of Docketing and Order to Show Cause* ("Order to Show Cause") explaining that OALJ is an administrative tribunal of limited jurisdiction with authority to adjudicate matters only when a statute or regulation so provides; and the OALJ does not have authority to adjudicate claims under the FMCSA regulations, the OSH Act,[3] or the False Claims Act.[4] I also provided an overview of the employee protection provisions of the STAA. The Order to Show Cause instructed Complainant to provide a written statement showing good cause as to why this matter should not be dismissed. Complainant was instructed to address (i) the alleged protected activities related to commercial motor vehicle safety that he believed were covered by the STAA; (ii) whether Respondent is a covered employer and Complainant a covered employee under the STAA; (iii) the alleged adverse action under the STAA; and (iv) if alleging a claim under MAP-21, the alleged protected activities and adverse employment actions, including corresponding dates. Respondent was given leave to file a reply brief within 30 days of service of Complainant's response.

Complainant filed a response to the Order to Show Cause by letter dated September 7, 2016. Complainant attached to his letter: the complaint he filed with OSHA; a letter to the GM Board of Directors dated August 16, 2013; and numerous documents from his prior claims against Respondent in other tribunals. He articulated generalized concerns about

[1] Although Complainant does not refer specifically to MAP-21, his allegations of violations of the FMCSA regulations appear to be within the purview of MAP-21. *See* 49 U.S.C. § 30171; 29 C.F.R. Part 1988.

[2] As a self-represented complainant apparently lacking legal expertise, this Court analyzed Mr. Hinton's filings "with a degree of adjudicative latitude." *Hyman v. KD Resources, Inc, et al*., ARB No. 09-076, ALJ No. 2009-SOX-20, slip. op. at 8 (ARB March 28, 2010) (*citing Ubinger v. CAE Int'l*, ARB No. 07-083, ALJ No. 2007-SOX-36, slip op. at 6 (ARB Aug. 27, 2008)).

[3] Section 11(c) of the OSH Act prohibits any employer from discharging, retaliating or discriminating against any employee because the worker has exercised rights under the Act. These rights include complaining to OSHA and seeking an OSHA inspection, participating in an OSHA inspection, and participating or testifying in any proceeding related to an OSHA inspection. However, the OSH Act does not create any private right of action and there is no provision in the OSH Act or its implementing regulations for a hearing on a Section 11(c) complaint before an administrative law judge. *See Taylor v. Brighton Corp.*, 616 F.2d 256, 260-64 (6th Cir. 1980) (noting that the Senate abandoned an earlier version of the OSH Act, which would have provided a Section 11(c) complainant with a right to an administrative hearing similar to that provided under Sarbanes-Oxley, in favor of the final version which vests the Secretary of Labor with exclusive authority to determine whether to prosecute a complaint of discrimination prohibited by the OSH Act). Instead, Employee complaints of discrimination under Section 11(c) are filed with the Secretary of Labor who may then bring an action in a United States district court. *See* 29 U.S.C.A. § 660(c)(2); *Reich v. Cambridgeport Air Sys.*, 26 F.3d 1187 (1st Cir. 1994). Since alleged violations of the OSH Act's anti-discrimination provisions are not subject to an administrative hearing, Complainant's Section 11(c) claim is not further addressed in this decision.

[4] 31 U.S.C. § 3732.

institutionalized racism and continued violations of the Fourteenth Amendment to the U.S. Constitution. He also stated that "[t]his cause of action was not directed here at my request" and continued:

> It is here before this Chief Administrative Law Judge because [of] the chain of authority. I made my claim to be a witness to the U.S. Attorney General who was in control over the General Motors investigation passed it over to the Department of Justice, who passed it over to the Department of Labor, who passed it over to OSHA, who sent it before this tribunal.

Complainant's September 7, 2016 letter did not otherwise address the four items in the Order to Show Cause. After review of the filing, it remained unclear to the undersigned whether this Office had jurisdiction over this matter. Accordingly, I issued a *Second Order to Show Cause* on September 23, 2016 instructing Complainant to provide a written statement showing good cause as to why this matter should not be dismissed. Complainant was instructed to address (i) the alleged protected activities related to commercial motor vehicle safety that are covered by the STAA; (ii) whether Respondent is a covered employer and Complainant a covered employee under the STAA; (iii) the alleged adverse action under the STAA; and (iv) if alleging a claim under MAP-21, the alleged protected activities and adverse employment actions, including corresponding dates. Complainant was warned that failure to provide a responsive filing as described above could result in the dismissal of his complaint. Respondent was given leave to file a reply brief within 30 days of service of Complainant's response.

On October 25, 2016, Complainant filed approximately 60 unnumbered pages titled *Complainant Address Order to Show Cause* ("Response"). Respondent filed its *Reply to Complainant's Address of Order to Show Cause* ("Reply") on November 23, 2016.

Positions of the Parties

Respondent

Respondent requests that Complainant's complaint be dismissed. Respondent contends that Complainant "fails to address . . . how he was engaged in alleged protected activities under the STAA," and that his allegations are general complaints related to "the challenges of working as a welder." (Reply at 3.) Respondent further contends that Complainant has "failed to substantiate" a claim of retaliation under MAP-21 "and again generally complains of fraud and concealment by GM." (Reply at 4.)

Complainant

Complainant seeks redress for workplace violence, injury, and racial discrimination; as well as for alleged wrongful conduct by Respondent during litigation of Complainant's claims of workplace violence, injury, and racial discrimination in federal district court.

Complainant contends that adverse action under the STAA occurred and states:

> It was their intentional action of revenge and retaliation, to hurt complainant and his family financially for acting as an attorney general as a whistleblower requesting the U.S. Government to investigate General Motors and the UAW for allowing a hostile work environment to exist (racism) and enabling management to practice discriminatory acts (deny all opportunities and benefits) and for taking the issue of fraudulent concealment up to the Supreme Court.

Complainant argues that both parties are covered under the STAA because Respondent concealed evidence pertinent to the district court case, averring that

> because the concealment was never discover[ed] nor acknowledge[d] by General Motors and their legal staff for over a decade, not until the U.S. Government investigation exposed circumstantial evidence that establish directly with my case as being true, in that General Motors and their legal did scheme to conceal reporting the presence of racism in the workplace a safety violation (that lead to bodily injuries); fraudulent concealment and obstructed justice by using the court as its shield (false statements before the court of law) to avoid the truth.

Complainant submits that he had a reasonable apprehension of serious injury and sought a correction from GM, asserting:

> My job as a skill tradesman . . . is responsible for the weld process of the structure and building the frame and body parts of all motor vehicle under GM (both for the public and business sector). If these welds are not holding, then the whole frame; door(s); hood; etc., would/could become defective and if not stop during the production process, then the public and business driver's life would be in jeopardy and possibly loss of life.

Complainant explains that it was his job to perform weld checks and that it resulted in "injuries to not just myself but, to anyone performing this task." Complainant lists carpal tunnel, pinched nerve condition, rotator cuff tear, and back pain as injuries. Complainant alleges that Respondent has concealed these injuries, and that "GM management and the UAW union singled out complainant . . . from receiving long term care" for these injuries.

Complainant attached the following documents to his October 25, 2016 filing:

Outside Litigation

- an unsigned, undated draft of an amended complaint before the United States District Court for the Eastern District of Michigan listing himself as the plaintiff and Cadillac Boc

(General Motors Corporation) as the defendant. The complaint alleges racial discrimination and assault, resulting in damage to his mental and physical health. The complaint requests $60 million in damages.

- an article, author and date unknown, entitled "U.S. Attorney of the Southern District of New York Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement with $900 Million Forfeiture." The article states that "GM is charged with concealing a potentially deadly safety defect from its U.S. regulator . . . from the spring of 2012 through February 2014."

- a statement, author and date unknown, that the Department of Justice "has begun a criminal investigation into General Motors' decade-long failure to address deadly safety problems before announcing a huge vehicle recall last month."[5]

Grievances Related to Reporting Workplace Injuries and Receiving Health Coverage

- an excerpt from what Complainant describes as "General Motors-UAW Contract Guide for Reporting Job Related Injury." Complainant complains that "OSHA is not included in [the] guide," but should be.

- medical records from 1992 indicating that Complainant injured his back when pulled off a shuttle at work; medical records from 1992 indicating that Complainant was having neck and shoulder problems because "he apparently had to break steel with a chisel"; medical records from 2004 indicating a neck and back sprain.

- documents dated 2000-2002 pertaining to a dispute over payment of physical therapy for neck pain, including a complaint filed by Complainant against GM Grand Blanc with the Michigan Bureau of Safety and Regulation, General Industry Safety Division, as well as correspondence from MetLife

Racial Discrimination in the General Motors Plant

- articles related to discrimination in the General Motors plant;
- documents related to Complainant's request to transfer to another GM facility;
- documents related to Complainant not being promoted in 1997.

STAA Claim

The employee protection provisions of the STAA generally provide that a covered employer may not take adverse employment action against an employee because the employee has filed a complaint or testifies about "a violation of *a commercial motor vehicle safety or security regulation*, standard, or order." 49 U.S.C. § 31105(a)(1)(A) (emphasis added).

[5] Complainant does not allege protected activity involving these vehicle safety problems or any vehicle safety concerns. Complainant appears to mention these safety issues to argue that Respondent has a pattern of failing to address safety issues, in general, in a timely manner.

Additionally, adverse employment action may not be taken against an employee for "*refus[ing] to operate a vehicle* because (i) the *operation [of the vehicle] violates a regulation*, standard, or order of the United States related to *commercial motor vehicle safety* or health; 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*." 49 U.S.C. § 31105(a)(1)(B) (emphasis added).

Complainant alleges protected activities under 49 U.S.C. § 31105(a)(1)(B)(ii) and asserts that he had a reasonable apprehension of serious injury because his job involved performing quality control checks that he contends were detrimental to the health of the employees. However, 49 U.S.C. § 31105(a)(1)(B) applies only to employees who "refuse to operate a vehicle." Complainant does not allege that he operated a qualifying vehicle as part of his employment duties, or that he refused such operation. Additionally, injuries to employees performing safety checks are not the type of hazardous safety or security condition described in subpart (ii). The provisions make clear that hazardous safety conditions must arise out of the operation of the vehicle. Nor are Complainant's allegations covered by § 31105(a)(1)(A) because Complainant's previous litigation and complaints were not about the violation of a commercial motor vehicle safety or security regulation. Complainant's record of complaints against Respondent alleged systemic racism and workplace injuries, without any nexus to the safety of the vehicles that Complainant worked on.

MAP-21 Claim

Complainant contends that complaints about workplace violence, injury, and racial discrimination constitute protected activity under MAP-21 and alleges the following acts of retaliation:

> training on the job; Succeeded in preventing complainant from transfer to GM Lansing plant as an Electrician; opportunities to work overtime; opportunities to transfer out of the department, so as to get away from under their control and racist behavior.

Complainant states that "[t]ime on this case was tolled, because the discovery didn't occur until the U.S. Government exposed General Motors concealment, just as Complainant claim in his request to have this investigation."

The Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171, has an effective date of October 1, 2012. It is undisputed that both the alleged protected activity and the alleged retaliatory conduct occurred no later than 2006. I decline to apply MAP-21 retroactively.[6]

[6] In general, "[c]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Landgraf v. Usi Film Products*, 511 U.S. 244 (1994) (quoting *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)). *See, e.g., Gilmore v. Parametric Technology Corp.*, 2003-SOX-01 (declining to retroactively apply the Sarbanes-Oxley Act's employee protection provisions). I find that the language of the statute and regulations at issue here do not allow retroactive application.

Standard for Summary Decision

The standard of review for a motion for summary decision is essentially the same as the one used in Rule 56 of the Federal Rules of Civil Procedure, the rule governing summary judgment in the federal courts. *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-000006, slip op. at 6 (ARB Jan. 30, 2011). According to the Rules of Practice and Procedure for Administrative Hearings before the OALJ, an Administrative Law Judge "shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law." 29 CFR § 18.72(a). A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists when the nonmoving party produces sufficient evidence of a material fact that a factfinder is required to resolve the parties' differing versions at trial. Sufficient evidence is any significant probative evidence. *Id.* at 249, citing *First Nat'l Bank of Ariz. V. Cities Serv. Co.*, 391 U.S. 253, 288-290 (1968). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The party moving for summary decision[7] has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Zenith Radio Corp.*, 477 U.S. 317, 325. The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson*, 477 U.S. at 257 (1986). In reviewing the request for summary decision, all of the evidence must be viewed in a light most favorable to the non-moving party. *See, e.g., Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001). A genuine issue of material fact exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. *Anderson*, 477 U.S. at 242.

In this case, Complainant's detailed filings establish that there is no genuine issue of material fact and Respondent is entitled to a decision as a matter of law. Complainant has fully developed both the pertinent factual background and his legal theory of the case. Viewing the submissions in the light most favorable to Complainant, the submissions do not describe any protected activity under the STAA. The STAA does not protect the filing of claims and participation in investigations related to racial discrimination and workplace violence.[8] Complainant also lacks a claim under MAP-21 because its effective date of October 1, 2012 is after the dates Complainant alleges that protected activities and retaliation occurred.

[7] A judge may order summary decision sua sponte if the record establishes that there is no genuine dispute as to any material fact and one of the parties is entitled to a decision as a matter of law. 29 C.F.R. § 18.72(f)(3).

[8] Similarly, Complainant's racial discrimination and workplace violence complaints would not come under the purview of MAP-21, even assuming, *de arguendo*, that it applied retroactively. *See* 49 U.S.C. § 30171; 29 C.F.R. Part 1988.

Order

Based on the foregoing, I hereby GRANT summary decision for Respondent. The above-captioned complaint is hereby DISMISSED.

SO ORDERED:

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

STEPHEN R. HENLEY
Chief Administrative Law Judge

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).