U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 January 2017

Case No.: 2016-STA-26

In the matter of:

MARTY LYNCH,
Claimant,

v.

BEAULIEU GROUP, LLC,
Employer.

ORDER GRANTING SUMMARY DECISION AND CANCELLING HEARING

This case arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2012) ("STAA"), and its implementing regulations at 29 C.F.R. Part 1978, 77 FR 44121-01, 2012 WL 3041790 (F.R.) (Jul. 27, 2012).

Complainant, Marty Lynch, a trucker, initiated this action when he filed a complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA") on October 28, 2014. In his OSHA complaint, Complainant alleged that Respondent, Beaulieu Group, LLC, violated the STAA when it terminated his employment in retaliation for Complainant reporting that he was required to drive trucks that were overweight, and that he was required to drive trucks with overinflated steer tires. After completing an investigation, OSHA dismissed Complainant's complaint in a letter dated February 25, 2016. Complainant timely requested a hearing before the Office of Administrative Law Judges ("OALJ"). An Order was issued on October 20, 2016, scheduling this matter for hearing in Chattanooga, Tennessee on February 22, 2017.

Complainant was originally represented by counsel. On September 13, 2016, I received from Complainant's counsel a Motion for Leave to Withdraw as Counsel. On September 19, 2016, I issued an Order Denying the Motion to Withdraw, in part because there was no indication that Complainant had given consent for counsel to withdraw.

I conducted a telephone conference with counsel on September 22, 2016. At my request, Complainant also participated in that telephone conference. During the conference, Complainant stated unequivocally that he no longer wanted to be represented by his attorney. Counsel indicated that he still wished to withdraw. I thus issued an order on September 22, 2016 allowing Complainant's counsel to withdraw. I cancelled the hearing that had been set for October 18, 2016, and I scheduled a conference call for November 1, 2016, to determine whether

Complainant had retained a new attorney. As of the date of this Decision and Order, Complainant has not retained successor counsel.

On December 20, 2016, I issued a Notice Regarding Motions for Summary Decision. In this Notice, I provided Complainant with information describing how he might appropriately oppose any Motion for Summary Decision filed in the case.

Respondent filed a Motion for Summary Decision on December 30, 2016. Respondent's Motion is supported by affidavits and other materials. In its Motion for Summary Decision, Respondent denies Complainant's factual allegations, and argues that Complainant was terminated from employment because he failed to timely complete his driving logs.

On January 16, 2017, Complainant filed a timely "Summary Decision/Judgment Rebuttle and Positon Statement." No affidavits or other evidence are attached to Complainant's brief.

Standards for Summary Decision

Summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.72; *see also Williams v. Dallas Indep. Sch. Dist.*, No. 12-024, 2012 WL 6849447 (ARB Dec. 28, 2012). "At the summary decision stage of a STAA case, the ALJ assesses the evidence for the limited purpose of deciding whether it shows a genuine issue as to a material fact . . . If Complainant fails to establish an element essential to his case, there can be "no genuine issue as to a material fact" since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Coates v. Southeast Milk, Inc*., No. 05-050, 2007 WL 4107740, *3-4 (ARB Jul. 31, 2007).

In evaluating if Respondent is entitled to a summary decision in this matter, all facts and reasonable inferences therefrom are considered in the light most favorable to the non-moving Complainant. *Battle v. Seibles Bruce Ins. Co*., 288 F.3d 596 (4th Cir. 2002) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986)). "However, even when all evidence is viewed in the light most favorable to the nonmoving party, the non-moving party cannot defeat a properly supported summary judgment motion without presenting 'significant probative evidence.'" *Pueschel v. Peters*, 340 Fed. Appx 858, 860 (4th Cir. 2009)(unpub.) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986)). A party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading; [the response] must set forth specific facts showing that there is a genuine issue of fact for the hearing." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

When the information submitted for consideration with a motion for summary decision and the reply to that motion demonstrates that there is no genuine issue as to any material fact, the request for summary decision should be granted. Where a genuine question of a material fact remains, a motion for summary decision must be denied.

Whistleblower Protection under the STAA

The STAA prohibits an employer from discharging or discriminating against an employee because the employee has engaged in certain protected activity. The employee protection provisions of the STAA which appear to me to be at issue in this case are these:

> (a) Prohibitions: A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because: (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order; (B) 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 (C) the employee accurately reports hours on duty pursuant to chapter 315;

49 U.S.C. §31105.

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.A. §42121(b).[1] *Smith v CRTS International, Inc*., No. 11-086, 2013 WL 2902809, *2 fn 1 (ARB Jun. 6, 2013); 49 U.S.C. §31105(b). Because the complaint was filed on October 28, 2014, the post-2007 standards of proof apply. I also note the recent decision of the Administrative Review Board in *Palmer v. Canadian National Railway*, No. 16-035, 2016 WL 5868560 (September 30, 2016). The ARB's decision in *Palmer* will affect all cases (such as this one) where the whistleblower protection burdens of proof have been drawn from the Wendell H. Ford Act.

In order to prove a STAA violation, Complainant must show, by a preponderance of evidence: (1) that he engaged in protected activity; and (2) that Respondent took an adverse employment action against him, and (3) that his protected activity was a contributing factor in the adverse action. *Williams v. Dominos Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). In this case, there is no dispute as to element (2) – Complainant was fired by Respondent on July 21, 2014.[2] 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 FR 44127 (July 27, 2012); *Benjamin v. Citationshares Management, LLC*, No. 12-029, 2013 WL 6385831 (ARB Nov. 5, 2013) "If the employee does

[1] Pub. L. 110-53, 9/11 Commission Act of 2007, 212 Stat. 266 §1536.
[2] Respondent's Motion for Summary Decision at paragraph 20.

not prove one of these elements, the entire complaint fails." *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013).

If Complainant successfully proves that he engaged in protected activity, and also proves that his protected activity was a contributing factor in the decision to discharge him, then Respondent may nonetheless avoid liability if it demonstrates by clear and convincing evidence that the adverse employment action was the result of events or decisions independent of protected activity.[3] Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013) quoting *Warren v. Custom Organics*, No. 10-092, 2012 WL 759335, *5 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, No. 12-035, 2013 WL 143761 (ARB Jan. 9, 2013). As the ARB explained in *Palmer*:

> The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.
>
> The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

Slip opinion at 32.

Complainant's Safety Complaints

The whistleblower protection provisions of the STAA were enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles." *Brock v. Roadway Express, Inc*., 481 U.S. 252, 258 (1987). The "complaint" clause of the STAA protects an employee who has "filed a complaint or begun a proceeding related to a

[3] 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(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 (Sec'y Jul. 13, 1984); *Davis v. H.R. Hill, Inc.*, 86-STA-18 (Sec'y Mar. 19, 1987); *Harrison v. Roadway Express, Inc*., 1999 STA 37 (ARB Dec. 31, 2002). A complaining employee's complaints should not be too generalized or informal. *Calhoun v. U.S. DOL*, 576 F.3d 201, 213-14 (4th Cir. 2009).

As noted above, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading; [the response] must set forth specific facts showing that there is a genuine issue of fact for the hearing." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Complainant's OSHA Complaint contains some details about his safety complaints. Many of those factual details are omitted from Complainant's Brief Opposing Summary Decision. As discussed below, Complainant presents no admissible facts to me by way of affidavit, declaration, deposition testimony or in any other way that would allow me to find such facts at this summary decision stage.

A complainant may prove that he engaged in protected activity by demonstrating that he made complaints about safety issues.[4] "Internal complaints about violations of commercial motor vehicle regulations may be oral, informal or unofficial." *Jackson v. CPC Logistics*, ARB No.07-006, ALJ No. No 2006-STA-4 (ARB Oct. 31, 2008); *see Clean Harbor Env't Servs., 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 Sys., 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.

In his Complaint filed with OSHA, Complainant alleges that he made oral complaints about overinflated steer tires to a person named "Joe," who is identified only as a "dispatcher."[5] In his papers opposing Respondent's Motion for Summary Decision, Complainant comes forward with no evidence showing that he had ever made a complaint regarding safety conditions to any person employed by Respondent. In my December 20, 2016 "Notice Regarding Motions for Summary Decision," I explicitly informed Complainant that he was required to support any assertions of fact by "[c]iting to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." In that same Notice, I advised Complainant that if he failed **"to present evidence establishing that there is a genuine issue of material fact, summary decision may be entered, which could mean that [your claims] would be dismissed."** (emphasis in original). Complainant has not produced the evidence required to establish a genuine issue of material fact

[4] 49 U.S.C. §31105(a)(1)(A).
[5] Complainant's OSHA Complaint at paragraph 11.

as to whether he ever made a complaint regarding safety conditions to "Joe" or to anyone else employed by Respondent.

In the Complaint filed with OSHA, Complainant alleges that "Paul Doe (last name unknown) is a Manager at Beaulieu Group LLC, and the individual who terminated the Complainant and retaliated against him."[6] Complainant's OSHA Complaint does not allege that Complainant made complaints about unsafe operating conditions to Paul Doe or to any other supervisor. The record contains no written complaints concerning overweight trucks or overinflated steer tires (or any other safety complaint) made by Complainant before he was discharged. In his papers Opposing Summary Decision, Complainant comes forward with no evidence indicating that prior to his discharge he ever complained orally to a supervisor or to OSHA about any safety violations.[7] I have no admissible evidence showing that "Paul Doe" or any other person involved in the decision to terminate Complainant's employment were aware of any safety complaints made by Complainant before Complainant was discharged from employment.

I do not have any admissible evidence before me by which I might evaluate whether Complainant actually measured the weight of any truck driven by him. In the Complaint filed with OSHA, Complainant says that "On or about July 3, 2014, Complainant weighed his assigned tractor-trailer set and found the weight across the tandem axle of the trailer was approximately 4000 pounds over the maximum weight allowed by law."[8] This allegation suggests to me that Complainant has/had evidence showing that he was asked to drive an overweight truck. However, in his papers opposing Respondent's Motion for Summary Decision, Complainant comes forward with no evidence concerning the truck he was asked to drive on July 3, 2014, nor does he present any other evidence showing that he had been asked to drive an overweight truck at any other time. Complainant has not produced the evidence required to establish a genuine issue of material fact as to whether he was asked to drive truck(s) that exceeded weight limits.

I do not have any admissible evidence before me by which I might evaluate whether Complainant actually measured the pressure of the tires of any truck driven by him. In the Complaint filed with OSHA, Complainant alleged that he measured the air pressure of his tires on July 10, 2014 at a truck stop in Jasper, Tennessee, and that the air pressure exceeded 120 pounds per square inch.[9] This allegation suggests to me that Complainant has/had evidence showing that he was asked to drive a truck with overinflated tires. However, in his papers opposing Respondent's Motion for Summary Decision, Complainant comes forward with no evidence concerning the truck he was asked to drive on July 10, 2014, nor does he present any other evidence showing that he had been asked to drive a truck with overinflated tires at any

[6] *Id*. at paragraph 4.
[7] Page 5 of Complainant's Brief Opposing Summary Decision contains a list of alleged safety violations said to have occurred while Complainant was employed by Respondent. At the very bottom of the page, Complainant, apparently referring to the alleged safety violations, states: "Beaulieu knows all this." This is as close as Complainant ever gets in his Brief Opposing Summary Decision to claiming that Respondent was aware of his complaints.
[8] OSHA Complaint at paragraph 8.
[9] OSHA Complaint at paragraphs 9-10.

other time.[10] Complainant has not produced the evidence required to establish a genuine issue of material fact as to whether he was asked to drive truck(s) with overinflated steer tires.

On the evidence now properly before, Complainant has failed to demonstrate that he was ever asked to drive a truck with safety issues. On the evidence now properly before, Complainant has failed to demonstrate that he ever complained to anyone about safety issues. On the evidence now properly before me, I find that Complainant has failed to create a question of fact as to whether he engaged in protected activity by making safety complaints to Respondent.

Complainant's Refusal to Drive

Complainant may also demonstrate that he engaged in protected activity by providing evidence that he refused to drive for Respondent because of safety concerns.[11] In this case, Respondent has provided evidence that Complainant was behind in completing his driving logs.[12] Respondent provides admissible testimony that Complainant was told that Complainant would not be permitted to drive for Respondent unless and until his log books were brought up to date.[13] Complainant provides no admissible evidence disputing Respondent's evidence. On the record before me, I find that Complainant was prohibited from driving for Respondent because Complainant refused to complete his log books. On the record before me, I do not find that Complainant refused to drive for Respondent because of safety issues. On the record before me, I find Complainant has failed to prove that he engaged in any type of protected activity. Respondent is this entitled to judgment as a matter of law.

Respondent's Clear and Convincing Evidence

Alternatively, I conclude that Respondent has established by clear and convincing evidence that Complainant would have been terminated even if Complainant could prove that he had engaged in protected activity. Specifically, there is clear and convincing evidence in the record that Complainant failed to complete his log books in the time allowed, and that as a consequence he was not permitted to drive for Respondent, and that Complainant then stopped coming to work. There is clear and convincing evidence that Complainant was terminated from his employment only after failing to show up for work.[14] There is clear and convincing evidence that Respondent was following its employee manual in discharging Complainant. Complainant has come forward with no admissible evidence to contest any of this evidence.

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[10] At page 5 of his papers opposing summary decision, Complainant states: "I will prove overinflation of my steer tires." Complainant presumably meant that he would present such evidence at the formal hearing. However, as my December 20, 2016 "Notice Regarding Motions for Summary Decision" made clear, evidence supporting the existence of a claimed material fact must be presented at the summary decision stage.

[11] 49 U.S.C. §31105(a)(1)(B).

[12] *See Declaration of Billy Welborn* (Exhibit 1 to Respondent's Motion for Summary Decision) at paragraphs 5 through 10; *Declaration of Sean Reynolds* (Exhibit 3 to Respondent's Motion for Summary Decision) at paragraphs 5 through 7, and Exhibits attached as Exhibit 4 to Respondent's Motion for Summary Decision.

[13] *Reynolds Declaration* at paragraph 9.

[14] *Id*. at paragraphs 12-13; *Welborn Declaration* at paragraphs 11-13.

ORDER

For the reasons explained above, I **GRANT** Respondent's Motion for Summary Decision. This matter is hereby **DISMISSED WITH PREJUDICE**.

The hearing set for February 22, 2017, in Chattanooga, Tennessee is hereby **CANCELLED.**

Digitally signed by Steven D. Bell
DN: CN=Steven D. Bell, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

Steven D. Bell
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).