U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 January 2018

Case No.: 2017-STA-00054

In the Matter of

DAVID FLIPPO
Complainant

v.

M&S TRUCKING AND GARY MILLER
Respondents

RULING GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

1. Nature of Order. This claim arises under the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105 and the implementing regulations at 29 C.F.R. Part 1978. Pursuant to 29 C.F.R. § 18.72, Complainant filed a Motion for Summary Decision on the grounds Respondents failed to file a response to the undersigned's order to show cause or comply with other prehearing orders issued in this case. Respondents did not file a response to Complainant's motion.

2. Findings of Fact and Procedural History.

a. On June 6, 2017, the undersigned issued a Notice of Case Assignment and Prehearing Order. This notice set a scheduling teleconference for July 7, 2017 at 10:00 a.m.

b. On June 20, 2017, Complainant filed his Pleading Complaint in which he alleged: (1) he engaged in protected activity by refusing to operate his tractor-trailer until requested repairs were made; (2) Respondents retaliated against Complainant by terminating his employment; and (3) the protected activity was a contributing factor in his discharge.

c. Prior to the July 7, 2017 scheduling teleconference, administrative personnel in the Office of Administrative Law Judges (OALJ) contacted both parties to confirm their participation. Complainant, represented by counsel, confirmed receipt of the Notice of Case Assignment and Prehearing Order and his participation in the scheduling teleconference. On behalf of Respondents, Mr. Gary Miller, owner of M&S Trucking, confirmed receipt of the Notice of Case Assignment and Prehearing Order, but he expressed reluctance to participate in the scheduling teleconference because he was driving and did not have the assistance of counsel. The undersigned's administrative personnel instructed Mr. Miller that, as a pro se party in this matter, his participation in the scheduling teleconference was required by the Notice of Case Assignment and Prehearing Order. He was informed that he needed to make arrangements to

stop driving in order to participate in the scheduling teleconference that had been ordered more than a month earlier.

d. Subsequently, Mr. Miller, Mr. Paul Taylor, counsel for Complainant, and the undersigned participated in the scheduling teleconference on July 7, 2017. During this teleconference, the undersigned initially addressed the issue of representation with Mr. Miller. Mr. Miller indicated he had not retained an attorney or representative in this matter but was considering doing so. He further explained he had initiated bankruptcy proceedings for M&S Trucking. Mr. Miller asked for time to discuss this matter with the attorney who represents him in the bankruptcy action to determine if the attorney could also represent Mr. Miller in defense of this claim. The undersigned granted Mr. Miller's request and informed the parties the teleconference would be continued to a later date to allow Mr. Miller time to resolve the issue of representation. The undersigned also explained to Mr. Miller that, if he did not retain counsel prior to the next scheduling teleconference, he would be required to proceed in a pro se status.

e. In addressing the specific details of rescheduled teleconference, the undersigned established the following deadlines: 1) Respondents' attorney, if retained, must file a Notice of Appearance no later than July 14, 2017; 2) Respondents, either with the assistance of counsel or pro se, must file a Response to the Pleading Complaint no later than July 24, 2017; 3) a supplemental scheduling teleconference would occur on July 28, 2017 at 11:00 a.m., central standard time; 4) Respondents were responsible for meeting all filing deadlines if an attorney was not retained to represent them; and 5) the formal hearing was tentatively scheduled to occur on January 24-26, 2018, in Little Rock, Arkansas.

f. Prior to terminating the teleconference, the undersigned specifically asked Mr. Miller if he understood his obligations regarding filing a complaint response, complying with additional filing requirements, and participating in the rescheduled teleconference on July 28, 2017. Mr. Miller acknowledged that he understood fully; he explicitly confirmed his understanding that, at the July 28, 2017 follow-up scheduling teleconference, a hearing date would be established and that either he or an attorney he retained to represent him in this matter would be required to participate in the teleconference.

g. On July 7, 2017, immediately following the scheduling teleconference, the undersigned issued a written order confirming the supplemental scheduling teleconference for July 28, 2017 at 11:00 a.m., Central Standard Time.

h. No attorney or representative filed a Notice of Appearance on behalf of Respondents.

i. Respondents did not file the required Response to the Pleading Complaint by July 24, 2017.

j. Prior to the July 28, 2017 supplemental scheduling teleconference, the undersigned's administrative personnel contacted both parties to confirm their participation in the supplemental scheduling teleconference.

k. On July 28, 2017 at 11:00 a.m., Mr. Taylor called the designated teleconference

phone line, but Mr. Miller did not initiate his participation in the supplemental scheduling teleconference. As a result, the undersigned directed that OALJ administrative personnel make an effort to contact Mr. Miller with his available contact information to clarify whether Mr. Miller had experienced difficulties in using the teleconference phone line. The undersigned's legal assistant spoke with Mr. Miller's wife; she stated her husband was at work and did not have cellular service at the time of the supplemental scheduling teleconference. In addition, Mr. Miller's wife stated that Mr. Miller has a bankruptcy attorney, Mr. Kevin Keech, who had advised Mr. Miller not to speak with anyone about this case. The undersigned's legal assistant informed Mrs. Miller that her husband was required to call back to the undersigned's office to address his failure to participate in the supplemental scheduling teleconference.

l. At approximately 11:30 a.m. on July 28, 2017, the undersigned informed Mr. Taylor that Mr. Miller had not called as instructed at the prior teleconference on July 7, 2017 and in the written order scheduling the supplemental teleconference. The undersigned concluded Mr. Miller did not intend to participate in the teleconference and inquired as to Mr. Taylor's availability to participate in a hearing in January or February of 2018 if necessary and terminated the conference call.

m. Mr. Miller has not contacted the undersigned or administrative personnel since failing to participate in the July 28, 2017, supplemental teleconference.

n. On August 23, 2017, the undersigned issued an Order to Show Cause Why Summary Decision Should Not Be Granted in Favor of Complainant. This Order specifically noted Respondent had, among other things, failed to: (1) file a response to the Pleading Complaint as instructed by the undersigned during the initial scheduling teleconference and in the Notice of Case Assignment; and (2) participate in a supplemental scheduling teleconference on July 28, 2017. The Order explicitly required Respondents to file a written reply with the undersigned within 20 days showing good cause why summary decision should not be granted in favor of Complainant. In addition, the Order specifically warned that Respondents' failure to timely comply with the Order may result in the granting of summary decision in favor of Complainant.

o. As of today, more than four months after the order to show cause, Respondents have not filed a response with the undersigned.

p. On November 17, 2017, Complainant filed a "Motion for Entry of Respondents' Default, A Summary Decision on the Merits in Favor of Complainant and for an Order Vacating Hearing Setting and Deadlines." Complainant's motion explained that a search of the Public Access to Court Electronic Records (PACER) did not indicate that Respondents had filed for bankruptcy protection within the past two years.

q. On December 18, 2017, Complainant supplemented the motion with a "Petition for Award of Fees and Costs" and "Declaration of David Flippo." Complainant seeks an award of the following from Respondents: (1) $1,200 in unpaid wages; (2) $6,428.57 in back pay or wage losses; (3) unspecified compensatory damages for "emotional distress and mental pain which [Complainant] suffered as a result of the withholding of pay, and [his] firing"; and (4) unspecific punitive damages "to deter [Respondents] from firing drivers in the future because they have

complained about violations of DOT safety regulations or refused to violate DOT safety regulations." Complainant also seeks reinstatement to his former employment with Respondents. Additionally, Complainant's counsel seeks an award of $6,347.70 in fees for representation of Complainant in this case. The fee petition is accompanied by a statement setting forth the qualifications of Complainant's counsel and a statement detailing the legal services performed on Complainant's behalf.

3. <u>Applicable Law and Analysis.</u>

a. *Applicable Law.* In all proceedings, the judge has "all powers necessary to conduct fair and impartial proceedings . . . ." 29 C.F.R. § 18.12(b). This includes the power to "terminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order." 29 C.F.R. § 18.12(b)(7). "When a party has not waived the right to participate in a hearing, conference or proceeding but fails to appear at a scheduled hearing *or conference*, the judge may, after notice and an opportunity to be heard, dismiss the proceeding or enter a decision and order without further proceedings if the party fails to establish good cause for its failure to appear." 29 C.F.R. § 18.21(c)(emphasis added). "Furthermore, the authority to dismiss a case also comes from an ALJ's inherent power to manage and control his or her docket and to prevent undue delays in the orderly and expeditious disposition of pending cases. *See Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). Where the respondent is the non-appearing party, the ALJ may take the allegations in the complainant's complaint as admitted and render a decision and order with findings and appropriate conclusions. *Ass't Sec'y & Marziano v. Kids Bus Service, Inc.*, ARB No. 06-068, ALJ No. 2005-STA-64 (ARB Dec. 29, 2006).[1]

b. *Motions for Summary Decision.* A party may move for summary decision, identifying each claim or defense—or the part of each claim or defense—on which summary decision is sought. The 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 decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion. 29 C.F.R. § 18.72; *see also Celotex v. Catrett*, 477 U.S. 317, 322 (1986). The burden is on the moving party to demonstrate the absence of any material issue of fact. *Celotex*, 477 U.S. at 323. Once the moving party satisfies his initial burden, the non-moving party "may not rest upon his allegations," but must present evidence demonstrating the existence of a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court is obliged to view the facts and inferences drawn from the facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Comp. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

c. *Elements of STAA Claim.* The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. 49 U.S.C.A. § 31105(a)(1). To prove a STAA violation, the

[1] This case cites to OALJ Rules of Practice and Procedure that were amended in 2015. *See* 29 C.F.R. §§ 18.5, 18.39 (2006). The updated OALJ Rules of Practice and Procedure became effective June 18, 2015. The specific section pertaining to default judgments no longer exists in the current rules. However, neither the new rules nor recent case law explicitly revoke this holding; thus, the undersigned concludes this case-law created authority remains effective.

complainant must show by a preponderance of evidence that his safety complaints to his employer were protected activity, that the company took an adverse employment action against him, and that his 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 (ARB Jan. 31, 2011). If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the adverse personnel action, his employer can avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event. *Id.* at 5-6 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv)).

In this case, Respondents failed to substantively comply with any of the undersigned's orders. With the exception of participation in the initial scheduling teleconference, Respondents have failed, among other things, to: 1) file a Complaint Response; 2) participate in a supplemental scheduling teleconference; 3) respond to the undersigned's order to show cause why summary decision should not be granted in favor of Complainant; and 4) file a response to Complainant's "Motion for Entry of Respondents' Default, A Summary Decision on the Merits in Favor of Complainant and for an Order Vacating Hearing Setting and Deadlines." The undersigned's order to show good cause unambiguously informed Respondents of the potential consequences of failing to file a response with the undersigned, which included granting summary decision in favor of Complainant. More than four months have elapsed since the order to show cause, and Respondents have not filed the required response nor made any attempt to informally contact OALJ and explain a reason for the failure to timely file a written response.

Consequently, the undersigned finds the allegations set forth in the Pleading Complaint are deemed admitted by Respondents. As a result, the undersigned concludes Complainant engaged in protected activity, Respondents engaged in adverse action against Complainant, and the protected activity was a contributing factor in the adverse personnel action. Because Respondents wholly failed to respond to Complainant's evidence in this case, the undersigned further concludes that Respondents did not prove by clear and convincing evidence they would have taken the same adverse action in the absence of Complainant's protected activity.

a. *Damages Recoverable.* A wrongfully terminated employee is entitled to back pay with interest. 49 U.S.C.A. § 31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc.*, 90-STA-44, slip op. at 10 (Sec'y Jan. 6, 1992). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (Dec. 30, 2002), *citing Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418-421 (1975).

"Compensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. A key step in determining the amount is a comparison with awards made in similar cases. To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm." *Fink v. R&L Transfer, Inc.*, ARB No. 13-018, ALJ No. 2012-STA-6 (ARB Mar. 19, 2014) (citations omitted). An award of punitive damages

may be warranted where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Id. citing Youngerman v. United Parcel Serv. Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 4-5 (ARB Feb. 27, 2013). An award of punitive damages cannot exceed $250,000. 49 U.S.C.A. § 31105(b)(3)(C).

Complainant requests $6,428.57 in back pay as a result of Respondents terminating his employment. In addition, Complainant seeks $1,200 in unpaid wages for his work performed for Respondent from February 26 – March 5, 2017. Although the STAA does not specifically provide for the payment of unpaid wages, employers have been ordered to pay unpaid wages to complainants in other cases. *See Palmer v. W. Truck Manpower*, 85-STA-016 (Sec'y. June 26, 1990). Consequently, Complainant is entitled to $6,428.57 back pay with interest and $1,200 unpaid wages.

Complainant also seeks compensatory damages for emotional distress and mental pain he suffered as a result of Respondents withholding his pay and terminating his employment. Although Complainant does not request a specific amount of compensatory damages, his declaration that he suffered mental anguish has not been refuted by Respondents. Consequently, the undersigned concludes an award of $5,000 in compensatory damages is warranted in this case. *See Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004) (ARB affirmed the ALJ's award of $4,000 for emotional distress based on the testimony of the complainant and his wife, even though that testimony was not supported by evidence of professional counseling or other medical evidence, where the testimony was unrefuted by the respondent); *Barnum v. J.D.C. Logistics, Inc.*, ARB No. 08-030, ALJ No. 2008-STA-6 (ARB Feb. 27, 2009) (ARB affirmed the ALJ's award of $5,000 based on the complainant's testimony that he suffered stress from the loss of insurance and other fringe benefits as result of the respondent's wrongful adverse action); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-47 (ARB Aug. 31, 2011) (ARB affirmed as supported by substantial evidence the ALJ's award of compensatory damages for emotional distress based on the complainant's unrefuted and credible testimony, although the testimony was not supported by any medical evidence).

Further, Complainant seeks an unspecified amount of punitive damages to "deter [Respondents] from firing drivers in the future because they have complained about violations of DOT safety regulations or refused to violate DOT safety regulations." Because Complainant's assertions are unrefuted by Respondents, the undersigned concludes Respondents recklessly disregarded Complainant's rights and intentionally violated federal law by terminating Complainant's employment for engaging in protected activity. Therefore, an award of $5,000 in punitive damages is reasonable and warranted in this case.

b. *Reinstatement.* If a person violates the STAA, that person shall "reinstate the complainant to the former position with the same pay and terms and privileges of employment." 49 U.S.C.A § 31105(b)(3)(A)(ii). Reinstatement is an automatic remedy under the STAA. Reinstatement must be ordered unless it is impossible or impractical. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4-5 (ARB Mar. 31, 2005).

Because the undersigned concluded that Respondents violated the STAA, Respondents shall reinstate Complainant to his former position with the same pay and terms and privileges of employment pursuant to 49 U.S.C.A § 31105(b)(3)(A)(ii).

c. *Attorney Fees.* If a person violates the STAA, that person shall "pay compensatory damages . . . including litigation costs, expert witness fees, and reasonable attorney fees." 49 U.S.C.A § 31105(b)(3)(A)(iii); 29 C.F.R. § 1978.109(d)(1).

Complainant's counsel requests $6,347.70 for legal services performed on Complainant's behalf in connection with this claim. The undersigned concludes this amount is reasonable as it supported by an itemized statement of the legal services performed and a list of qualifications of Complainant's counsel. Because the undersigned concluded that Respondents violated the STAA, Respondents shall pay Complainant's counsel $6,347.70 representing reasonable attorney's fees pursuant to 49 U.S.C.A § 31105(b)(3)(A)(iii).

4. Ruling and Specific Orders. Complainant's Motion for Summary Decision is GRANTED.

a. Respondents shall pay Complainant a total of $6,428.57 in back pay with interest.

b. Respondents shall pay Complainant a total of $1,200 in unpaid wages.

c. Respondents shall pay Complainant $5,000 in compensatory damages for mental anguish.

d. Respondents shall pay Complainant $5,000 in punitive damages.

e. Respondents shall pay Complainant's counsel a total of $6,347.70 in reasonable attorney's fees and costs.

f. Respondents shall reinstate Complainant to his former position with the same pay and terms and privileges of employment.

SO ORDERED this day at Covington, Louisiana.

TRACY A. DALY
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).