U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 May 2017

CASE NO.: 2017-STA-00009

In the Matter of:

SHAWN JENNINGS,
Complainant

v.

MCLANE COMPANY, INC.,
Respondent

DECISION AND ORDER GRANTING
RESPONDENT'S MOTION FOR SUMMARY DECISION

This case arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (STAA), and its implementing regulations at 29 C.F.R. Part 1978 (Jul. 27, 2012), filed by Complainant Shawn Jennings (Complainant) against Respondent McLane Company, Inc. (Respondent).

Complainant initiated this action when he filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on September 13, 2016. In his OSHA complaint, Complainant alleged that Respondent violated the STAA when it terminated his employment in retaliation for Complainant reporting safety issues, which included complaints at every quarterly drivers' meeting since 2009 that trailers were not loaded correctly, that there was lack of workspace to unload product safely, that driving solo heightened the potential for violent attacks, and that he was not paid solo pay when working solo. After completing an investigation, OSHA dismissed Complainant's complaint on October 7, 2016. Complainant requested a hearing before the Office of Administrative Law Judges (OALJ).

On March 24, 2017, Respondent filed its Motion for Summary Decision. Respondent argued (1) that Complainant's written disciplinary actions in December 2015 are not timely as they predate the OSHA complaint by more than 280 days, (2) that Complainant's resignation does not constitute an adverse employment action, (3) that no causal connection exists between Complainant's protected activity and his resignation, and (4) that Respondent would have taken the same disciplinary action, assuming Complainant was constructively discharged, absent any protected activity. For purposes of summary decision, Respondent conceded that Complainant engaged in protected activity and that Respondent had knowledge of that activity. *See* Respondent's Memorandum in Support of the Motion for Summary Decision, p. 20.

Complainant filed his Response on April 10, 2017. Complainant argued that his December 2015 discipline is properly before the Court as the discipline formed the basis of the March 2016 adverse employment action. He further argued that he was constructively discharged, that the constructive discharge was causally connected to his protected activity, and that Respondent would not have disciplined him absent the protected activity. With leave of court, Respondent filed its reply brief to Complainant's Response on April 1, 2017. Complainant filed his Surreply on April 24, 2017.

For the reasons that appear below, Respondent filed its Motion for Summary Decision is **GRANTED,** and this matter is **DISMISSED WITH PREJUDICE.**

I. SUMMARY DECISION STANDARD

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.

II. 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 at issue in this case are these:

> (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)(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….

49 U.S.C. § 31105(a)(1)(A)(i).

Congress amended the STAA on August 3, 2007, to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (AIR-21), 49 U.S.C. § 42121(b). Pub. L. 110-53, 9/11 Commission Act of 2007, 212 Stat. 266 § 1536; *Smith v CRTS International, Inc.*, No. 11-086, 2013 WL 2902809, *2 fn.1 (ARB Jun. 6, 2013); 49 U.S.C. § 31105(b). In order to prove a STAA violation, Complainant must show, by a preponderance of evidence: (1) that he engaged in protected activity; (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 (1) – for purposes of its Motion for Summary Decision, Respondent has conceded that Complainant engaged in protected activity and that Respondent was aware of such activity. Element (2), whether Complainant suffered an adverse employment action, and Element (3), whether the protected activity was a contributing factor to the adverse employment action, are contested. If Complainant establishes that "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision," then he has met element (3). 77 FR 44127 (Jul. 27, 2012); *Benjamin v. Citationshares Management, LLC*, No. 12-029, 2013 WL 6385831 (ARB Nov. 5, 2013). "If the employee does not prove one of these elements, the entire complaint fails." *Coryell v. Arkansas Energy Services, LLC*, No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013).

Here, if Complainant successfully proves that his constructive discharge amounted to an adverse employment action and 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. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). 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).

At this summary decision juncture, it is Respondent's burden to establish that no genuine issue of material fact exists regarding one or more essential elements of Complainant's claim. *Coates v. Southeast Milk, Inc., supra*.

III. UNDISPUTED MATERIAL FACTS

As to Element (2), the undisputed material facts are these:

1. As a commercial motor carrier, Respondent must comply with the Department of Transportation Federal Motor Carrier Safety Administration's hours-of-service regulations. These regulations require a carrier's drivers to record their duty status on their driving logs, drive no more than eleven hours during a 14-hour period, and take 30-minute rest breaks for every eight. Resp.'s Memo., pp. 4-5, citing Resp.'s Ex. B, Braden Decl. at ¶2 and Resp.'s Ex. C, Rimberg Decl. at ¶2.

2. Complainant was aware of these regulations and Respondent's policies implementing those regulations. Resp.'s Memo., p. 5, citing Resp.'s Ex. A, Comp.'s dep. at 59-60, 64-65, 70-71.

3. In December 2015, Respondent conducted an audit and observed that Complainant was working while logged into the sleeper berth on his driving logs. Resp.'s Memo., p. 10, citing Resp.'s Ex. D, Katzer Decl. at ¶8.

4. Complainant admitted he was working while logged into the sleeper berth. Resp.'s Memo., p. 11, citing Comp.'s dep. at 128.

5. On December 7, 2015, Complainant was written up for this violation. Comp.'s Response, p. 2, citing Comp.'s dep. at 126.

6. The Teammate Counseling/Corrective Action Record indicated that "[a]ny further instances on or before 12/02/2016 could lead to further disciplinary action up to and including termination." Resp.'s Ex. C, Rimberg Decl. at Ex. 1 thereto.

7. Complainant understood he would be fired if he was written up again within six months of the first write up in accordance with Respondent's policies. Comp.'s Response, p. 3, citing Resp.'s Ex. A, Comp.'s dep. at 131-32; Comp.'s Ex. 4, Phelps Decl. at ¶7.

8. Complainant did not expect to be written up again until a six-month period passed. Comp.'s Response, p. 3, citing Resp.'s Ex. A, Comp.'s dep. at 120.

9. In late March 2016, Complainant was discovered working while logged into the sleeper berth on his driving log. *See* Comp.'s Response, p. 3, citing Resp.'s Ex. A, Comp.'s dep. at 154; *see also,* Resp.'s Memo., p. 12, citing Resp.'s Ex. C, Rimberg Decl. at ¶8, and Resp.'s Ex. D, Katzer Decl. at ¶9.

10. Complainant admitted he was working while logged into the sleeper berth. Resp.'s Memo., p. 13, citing Resp.'s Ex. A, Comp.'s dep. at 132-33.

11. On March 28, 2016, Complainant resigned his employment. Comp.'s Response, p. 3, citing Resp.'s Ex. A, Comp.'s dep. at 105.

12. Prior to Complainant's resignation, Respondent had not determined that it would terminate Complainant. Resp.'s Memo., p. 14, citing Ex. B, Braden Decl. at ¶19, and Ex. C, Rimberg Decl. at ¶12.

13. In his OSHA complaint, Complainant alleged, "Numerous other drivers have been written up multiple times for working out of the bunk, but none have been terminated for it." Resp.'s Ex. B at Ex. 6 thereto.

14. All terminations for teammates with 15 years or more of employment, like Complainant, must be approved by the Grocery Division President. Resp.'s Memo., p. 14, citing Ex. B, Braden Decl. at ¶19.

15. At the time of Complainant's resignation, Respondent intended to suspend Complainant pending investigation. Resp.'s Memo., p. 14, citing Ex. B, Braden Decl. at ¶19; *see also*, Resp.'s Ex. B, Braden Decl. at Ex. 3 thereto.

16. Complainant completed an Exit Interview sheet on the date of his resignation. On that sheet, he stated as his reason for leaving, "I am not willing to continue working for [Respondent] after multiple [safety] issues that I've brought up will not change." He also stated that he was treated "fine" by his lead and/or supervisor. Resp.'s Memo., pp. 14-15, citing Ex. A, Comp.'s dep. at 143 and Ex. 9 thereto.

17. Respondent's payroll documentation also designated the resignation as a termination. Comp.'s Response, p. 3, citing Comp. Ex. 3, payroll form.

18. Respondent stated in discovery that it likely would have terminated Complainant. Comp.'s Ex. C, response to Interrog. No. 12.

IV. NO ISSUE OF MATERIAL FACT EXISTS REGARDING WHETHER COMPLAINANT SUFFERED AN ADVERSE EMPLOYMENT ACTION, A NECESSARY ELEMENT OF HIS WHISTLEBLOWER CLAIM

Complainant argues that the above material facts, when viewed in the light most favorable to him, present "at least a fact issue over whether the 'handwriting [was] on the wall" or the "axe [was] about to fall" when Complainant resigned, such that Complainant's resignation constitutes an adverse employment action. Complainant does not allege hostile work environment. Comp.'s Response, p. 6.

A. The Disciplinary Action in December 2015

Complainant does not allege that the disciplinary action taken in December 2016, in and of itself, is an adverse employment action. Rather, he complains that the discipline formed the basis of an adverse employment action (his alleged constructive discharge) in March 2016. However, as I found, below, Complainant's resignation does not constitute an adverse employment action. Out of an abundance of caution, I address the timeliness issue and find that a

whistleblower claim on the basis of any alleged adverse employment action occurring prior to the 180th day preceding Complainant's OSHA filing is untimely.

Complainant filed his complaint with OSHA on September 13, 2016. An employee has 180 days to file a whistleblower complaint from the date of an adverse employment action. *Maverick Transp. v. U.S. Dept. of Labor*, 739 F.3d 1149 (8th Cir. 2014). The 180th day prior to September 13, 2016, is March 17, 2016. Claimant does not allege any facts that would warrant tolling of the 180 day filing requirement. Therefore, any discipline occurring prior to March 17, 2016, including the discipline in December 2015, is not separately actionable.

B. Complainant's Alleged Constructive Discharge in March 2016

To establish constructive discharge, a plaintiff must demonstrate that "'working conditions were so intolerable that a reasonable employee would feel compelled to resign.'" *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001) (*quoting Faruki v. Parsons*, 123 F.3d 315, 319 (5th Cir. 1997)). "Constructive discharge requires a greater degree of harassment than that required by a hostile environment claim." *Id*. (citation omitted). It is not enough that an employee suffered "the ordinary slings and arrows that workers routinely encounter in a hard, cold world." *Suarez v. Pueblo Int'l, Inc.*, 229 F.3d 49, 54 (1st Cir. 2000). In order for a resignation to constitute a constructive discharge, it must be "void of choice or free will—[the] only option was to quit." *EEOC v. Kohl's Dep't Stores, Inc.*, 774 F.3d 127, 134 (1st Cir. 2014) (quotation marks omitted). "[A]n employee is obliged not to assume the worst, and not to jump to conclusions too fast." *Torrech-Hernandez v. Gen. Elec. Co.*, 519 F.3d 41, 52 (1st Cir. 2008) (quotation marks omitted).

However, "that is not the only method of demonstrating constructive discharge. When an employer acts in a manner so as to have communicated to a reasonable employee that [he] will be terminated, and the . . . employee resigns, the employer's conduct may amount to constructive discharge." *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002 (ARB Mar. 30, 2016) (arising under the Tenth Circuit). Under this standard, an employee who can show that the "handwriting is on the wall" and the "axe is about to fall" can make out a constructive-discharge claim. *E.E.O.C. v. Univ. of Chi. Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002); *see also Burks v. Okla. Pub. Co.*, 81 F.3d 975, 978 (10th Cir. 1996) ("This court has recognized that an employee can prove a constructive discharge by showing that she was faced with a choice between resigning [and] being fired."). But, see *Ames v. Nationwide Mut. Ins. Co.*, 760 F.3d 763, 769 (8th Cir. 2014) (noting that the Eighth Circuit has "not recognized the second form of constructive discharge in…non-hostile work environment cases"), citing *Trierweiler v. Wells Fargo Bank*, 639 F.3d 456, 461 (8th Cir. 2011) ("Part of an employee's obligation to be reasonable is an obligation not to assume the worst, and not to jump to conclusions too fast."). The Eighth Circuit further noted that, in the second form of constructive discharge cases, an employee must show that she would have been immediately fired if she had not resigned. *Id.*, citing *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 680 (7th Cir. 2010).

Here, I find that the undisputed material facts establish that Complainant was neither subject to hostile work conditions nor was the "handwriting…on the wall" or the "axe…about to fall." Though Respondent's policy allowed for termination upon a second write up, termination

had been not communicated to Complainant. In fact, in his OSHA complaint, Complainant acknowledged that other employees had been written up numerous times for working out of the berth and never fired. Moreover, the undisputed facts establish that Respondent had not even made the decision to terminate Complainant. Complainant was not faced with any ultimatum at all. Instead, he jumped the gun and preemptively resigned. He did exactly what a reasonable employee is obligated *not* to do—he assumed the worst and jumped to conclusions too fast. On his Exit Interview sheet, Complainant did not even complain that he had been treated unfairly or that he was resigning in lieu of termination. Based upon the undisputed facts, I find it was objectively unreasonable for Complainant to assume he faced imminent discharge. At the time of Complainant's resignation, Respondent had *not* "act[ed] in a manner so as to have communicated to [Complainant] that [he was going to] be terminated…." *Dietz, supra*.

Finally, I acknowledge that the Texas Workforce Commission designated Complainant's resignation as a discharge based on Respondent's policy that a second write-up within six months would lead to termination. Comp.'s Response, pp. 3, 6, citing Resp.'s Ex. C, Rimberg Decl. at Ex. 5 thereto. However, the TWC was applying standards set forth under Section 207.044 of the Texas Unemployment Compensation Act, not the whistleblower law applicable to the present case. *See* Resp.'s Ex. C, Rimberg Decl. at Ex. 5 thereto. The TWC's determination, therefore, has no impact on my decision here.

When the evidence is viewed in the light most favorable to Complainant, I find he has failed to demonstrate the existence of any disputed material fact on an essential element of his claim, i.e., that Respondent subjected him to adverse employment actions when he resigned in March 2016.

V. ORDER

Based upon the foregoing and upon the entire record, Respondent's Motion for Summary Decision is hereby **GRANTED.** Case No. 2017-STA-00009 is hereby **DISMISSED WITH PREJUDICE.**

So ORDERED.

Digitally signed by LARRY PRICE
DN: CN=LARRY PRICE, OU=JUDGE, O=US DOL Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

LARRY W. PRICE
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).