U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 April 2021

Case No.: 2018-STA-00082

In the Matter of:

SAM BUCALO,
Complainant,

v.

TEAMSTERS LOCAL 100,
Respondent.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

This proceeding arises from a claim under the Surface Transportation Assistance Act ("Act" or "STAA"), as amended at 49 U.S.C. § 31105, filed by Sam Bucalo (the "Complainant") with the Department of Labor, Occupational Safety and Health Administration ("OSHA"), against Teamsters Local 100 (the "Respondent") for alleged retaliation. On March 28, 2018, an OSHA investigator determined that the Respondent did not violate the Act and dismissed the complaint. On September 12, 2018, the Complainant objected to OSHA's determination. Thereafter, the claim was transferred to the Office of Administrative Law Judges. The case was subsequently assigned to me and on August 14, 2019, I issued a Prehearing Order, directing the parties to begin discovery.

On July 10, 2020, the Respondent filed a Motion to Dismiss or for Summary Judgment ("Motion"). On July 24, 2020, the Complainant submitted a Statement of Opposition to Respondent's Motion with supporting documentation ("Complainant's Response"). Thereafter, on August 3, 2020, the Respondent filed a Reply Brief in Support of its Motion.

SUMMARY DECISION STANDARD[1]

The standard for granting summary decision under the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges is similar to that found

[1] A motion for dismissal of a whistleblower complaint for failure to state a claim upon which relief may be granted is governed by Federal Rule of Civil Procedure 12(b)(6). However, if a party submits evidence outside the pleadings in support of a Motion to Dismiss, the motion should be viewed as a Motion for Summary Decision under 29 C.F.R. § 18.40. As the Respondent noted, it submitted evidence is outside the pleadings, namely the affidavit of Sarah McFarland, a member of the Respondent's staff, with its Motion to Dismiss. For this reason, the Respondent's Motion shall be treated as a Motion for Summary Decision under C.F.R. § 18.40.

in Federal Rule of Civil Procedure 56, which governs summary judgment in the federal courts.[2] In particular, an "administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."[3]

The determination of whether a fact is material is based on the substantive law upon which the claim is based.[4] A material fact is one that might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine if the evidence is such that a reasonable fact-finder could return a verdict for either party.[5] The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact.[6] Once the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts showing there is a genuine issue for trial.[7] The party opposing the motion "may not rest on the mere allegations or denials of [the] pleadings. Such response must set forth specific facts showing there is a genuine issue of fact for the hearing."[8] "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."[9] In deciding on the motion, the evidence must be viewed in the light most favorable to the non-moving party.[10] Moreover, while a *pro se* complainant may be held to a lesser standard than legal counsel with regards to procedural matters, the burden of proving the necessary elements of a claim is no less.[11]

STATEMENT OF THE CASE

While the parties in this case do not agree on the various factual aspects of this claim, the identity and relationship of the parties is not in dispute. The Respondent is a labor organization that represents members in the greater Cincinnati area, including those employed by United Parcel Service ("UPS"). (*Respondent's Motion* at 2). For six years, the Complainant served as the Respondent Union's Secretary-Treasurer until December 31, 2016, when he was voted out of office. At the time of the alleged violation, the Complainant worked as a driver in television and film productions. (*Respondent's Motion* at 3). Referrals for such driving work were made by the Respondent's Transportation Captain, and involved working with a company planning to film in the Cincinnati area and contacting and offering jobs to drivers. (*Id.*).

In March 2018, the Complainant filed a charge with OSHA against the Respondent, alleging that the Respondent retaliated against him beginning in January 2018 for denying him future work through its referral system for movie industry driving jobs. (*Respondent's Motion* at 1). The complaint was initially dismissed by OSHA after concluding that the parties are not covered under the Act. (*OSHA Secretary of Labor's Findings* at 1). The Complainant appealed the dismissal to OALJ.

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[2] *Saporito v. Cent. Locating Servs., Ltd.*, ARB No. 05-004, slip op. at 6 (ARB Feb. 28, 2006).
[3] 29 C.F.R. § 18.40(d); *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322 (1986).
[4] *Saporito*, slip op. at 5 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).
[5] *Id.*
[6] *Celotex*, 477 U.S. at 323.
[7] *Anderson*, 477 U.S. at 250.
[8] 29 C.F.R. § 18.40(c).
[9] *Reddy v. Medquist, Inc.*, ARB no. 04-123, slip op. at 5 (Sep. 30, 2005) (citing *Celotex*, 477 U.S. at 322-23 (1986)).
[10] *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, slip op. at 2 (ARB Aug. 23, 2003).
[11] *Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec'y Oct. 10, 1991).

APPLICABLE LAW

Section 405(a) of the Act protects employees from employer discrimination where an employee has engaged in a protective activity, which includes reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when operation would violate those rules.[12] Specifically, the Act provides that "[a]ll complaints initiated under this section shall be governed by the legal burdens of proof set forth in [49 U.S.C. §] 42121(b)[,]" the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").[13] Under the AIR 21 framework, an employee must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.[14] If the employee establishes these four elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of that [protected] behavior."[15]

Under the Act, "employee" refers to a driver of a commercial vehicle, a mechanic, a freight handler, or an individual that is not an employer who "(A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and (B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment." [16] An "employer" is "any persons engaged in a business affecting commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it in commerce" but "does not include the Government, a State or a political subdivision of a State."[17]

DISCUSSION AND ANALYSIS

The Respondent first contends that it is entitled to dismissal because neither the Complainant nor the Respondent are covered under the Act. However, even if the parties fit the Act's definitions of "employee" and "employer," the Respondent argues that the evidence does not support the Complainant's claim of retaliation for protected activity. Conversely, the Complainant avers that the parties are covered under the Act and that he engaged in protected activity when he called in sick for work.

As noted above, the Complainant previously served as Secretary-Treasurer for the Respondent until December 31, 2016. However, at the time of the alleged violation, he worked as a driver in television and film productions for which job referrals were made by the Respondent's Transportation Captain, who is not a paid employee of the Respondent Union. (*Respondent's Motion* at 3; *Affidavit of Ms. McFarland* at 1-2). In this case, while the Complainant might have been able to "directly affect commercial motor vehicle safety" in the course of his employment as

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[12] 49 U.S.C. § 31105(a)(1).
[13] 49 U.S.C. § 31105(b).
[14] 49 U.S.C. § 42121(b)(2)(B)(iii); *see Reiss v. Nucor Corp*., ARB No. 08-137, slip op. at 4 (Nov. 30, 2010).
[15] 49 U.S.C. § 42121(b)(2)(B)(iv); *see Reiss*, slip op. at 4.
[16] 49 U.S.C. § 31101(2).
[17] 49 U.S.C. § 31101(3).

a driver in the film production industry, as required by the Act, the Respondent is neither his employer nor a "commercial motor carrier." Specifically, the Act limits the scope of protected employees to those who "affect commercial vehicle safety in the course of employment *by a commercial motor carrier*."[18] The term "commercial motor carrier" refers to "any person engaged in a business affecting commerce between States or between a State and a place outside thereof who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate such a vehicle."[19] Here, the Respondent is a labor organization and does not meet the definition of "commercial motor carrier" under 29 C.F.R. § 1978.101(d) or "employer" under 49 U.S.C. § 31101(3). Because the Complainant was not employed by a commercial motor carrier, he is unable to establish that he is an "employee" under the Act.

Moreover, the Respondent does not fit the definition of "employer" pursuant to 49 U.S.C. § 31101(3). As discussed above, the Respondent is not a commercial motor carrier, but rather, a labor organization that provides representation to members with regards to employment terms and benefits. The Respondent did not own or lease a commercial motor vehicle, nor did it assign employees to operate commercial motor vehicles in commerce as part of its business. Notably, the Respondent does not provide any transportation in connection with its business. Thus, for the reasons described, the Respondent does not fit the definition of an "employer" under the Act.

CONCLUSION

Therefore, in construing the facts in a light most favorable to the Complainant, I find that there is no genuine issue of material fact as to whether he is an "employee" or whether the Respondent is an "employer" pursuant to the Act. Because the Complainant is unable to establish the requisite employer-employee relationship, I find that the Respondent is entitled to summary decision.

Accordingly, the Respondent's Motion to Dismiss is **GRANTED.** It is hereby **ORDERED** that the above-captioned claim filed by Sam Bucalo is **DISMISSED**.

PETER B. SILVAIN, JR.
Administrative Law Judge

IMPORTANT NOTICE ABOUT FILING APPEALS:

[18] 49 U.S.C. § 31101(2) (emphasis added).
[19] 29 C.F.R. § 1978.101(d).

The Notice of Appeal Rights has changed because the system for online filing will become mandatory for parties represented by counsel on April 12, 2021. Parties represented by counsel after this date must file an appeal by accessing the eFile/eServe system (EFS) at <u>https://efile.dol.gov/ EFILE.DOL.GOV. Before April 12, 2021, all parties may elect to file by mail rather than by efiling.</u>

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 the administrative law judge's decision. 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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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).

Filing Your Appeal Online
Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact. If you file your appeal online, no paper copies need be filed. During this transition period, **<u>you are still responsible for serving the notice of appeal on the other parties to the case.</u>**

Filing Your Appeal by Mail

Self-represented litigants (and all litigants prior to April 12, 2021) may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties
If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at: https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed
After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board
Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.