U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 May 2020

CASE NO.: 2019-STA-00069

In the Matter of:

JACKIE A. TOWE,
Complainant,

v.

AUTOBAHN FREIGHT LINES, LTD.,
Respondent.

ORDER GRANTING MOTION FOR SUMMARY DECISION

Pursuant to the scheduling order of October 24, 2019, Respondent Autobahn Freight Lines ("Autobahn") filed a motion for summary decision on February 13, 2020. Complainant Jackie Towe ("Complainant" or "Mr. Towe") filed a timely opposition.[1] Because the undisputed evidence shows that Complainant did not suffer an adverse employment action, he is unable to establish an essential element of his complaint. Accordingly, the motion will be granted, and the complaint will be denied.

Legal Standards

Summary Decision

Summary decision may be entered for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issue as to any material fact and that a party is entitled to decision as a matter of law. 29 C.F.R. § 18.72(a); *see also* Fed. R. Civ. P. 56(c). In cases before this Office, the standard for summary decision is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure. *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB June 28, 2011). The primary purpose of summary judgment is to isolate and promptly dispose of unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

[1] Mr. Towe filed an additional document styled a "Petition to Deny Autobahn Freight Lines Motion to Dismiss Summaries and Facts." Although the OALJ procedural rules do not permit a party to file a reply brief without permission of the presiding judge, 29 C.F.R. § 18.33(d), I have considered it in light of Mr. Towe's status as a self-represented litigant.

The initial burden is on the moving party to demonstrate that there is no genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. Once this burden is met, the non-moving party must establish the existence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The non-moving party may not rest upon mere allegations or denials, but instead must cite to particular materials in the record or show that materials cited do not establish the absence of a genuine dispute. 29 C.F.R. § 18.72(c); *see Anderson*, 477 U.S. at 250. A dispute of a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*at 249. In assessing a motion for summary decision ,all evidence is viewed the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson*, 477 U.S. at 255; *Mara*, ARB. No. 10-051, slip op. at 5.

Filings by pro se litigants should be construed "liberally in deference to their lack of training in the law and with a degree of adjudicative latitude." *Zavelata v. Alaska Airlines, Inc.*, ARB No. 15-080, ALJ No. 2015-AIR-016, slip op. at 11(ARB May 8, 2017). However, while an ALJ "must accord a party appearing pro se fair and equal treatment, [] a pro se litigant 'cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance.'" *Pik v. Credit Suisse, AG*, ARB No. 11-034, ALJ No. 2011-SOX-006, slip op. at 4-5(ARB May 31, 2012) (citation omitted). Thus, while "an ALJ has some duty to assist pro se litigants, a judge also has a duty of impartiality and must refrain from becoming an advocate for the pro se litigant." *Id.*at 5. Ultimately, "pro se litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel." *Id.*; *see also Witbeck v. CH2M Hill Ltd.*, ARB No. 15-077, ALJ Nos. 2013-SOX-1, 2014-SOX-40, slip op. at 6 (ARB Mar. 15, 2017). In this case, in spite of my giving him notice of how to respond to Respondent's motion, Complainant did not submit any evidence in the form of affidavits, declarations, or documents to support his opposition. In light of his pro se status, however, I will accept the assertions in his opposition brief as if they were supported by admissible evidence.

Surface Transportation Assistance Act

To prevail in a STAA whistleblower complaint, the complainant must prove by a preponderance of the evidence that he or she engaged in protected activity, suffered an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 31105(b)(1) (adopting the legal burdens of proof at 49 U.S.C. § 42121(b)(2)(B)(i)); 29 C.F.R. § 1978.109(a); *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024, slip op. at 5 (ARB Apr. 25, 2013); *Blackie v. Smith Transp.*, Inc., ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 8 (ARB Nov. 29, 2012). If a complainant meets this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same

unfavorable personnel action in the absence of a complainant's protected behavior. 49 U.S.C. § 42121(b)(2)(B)(iii), (iv); *Tablas*, ARB No. 11-050, slip op. at 6; *Blackie*, ARB No. 11-054, slip op. at 8.

Undisputed Facts[2]

At all relevant times, Complainant Jackie Towe was a truck driver employed by Respondent Autobahn Freight Lines, Ltd. He worked at Respondent's location in Sikeston, Missouri. In the course of his employment, Mr. Towe discovered that a certain model of Freightliner semi-trucks had gearbox problems, and because Autobahn had purchased many of that model, he offered to help Respondent identify which trucks had gearbox problems.

Mr. Towe made a trip to Respondent's terminal in Romulus, Michigan in November of 2018 to inspect trucks for the gearbox issue. [Affidavit of Amy Morris, Exhibit A to Respondent's Motion for Summary Decision ("Morris affidavit") at ¶ 18; Complainant's opposition ("Opp." at ¶ 9.] He was scheduled to make a return trip in January of 2019, driving a load from Missouri to Michigan when he did so. [Morris affidavit at ¶¶ 20-21.] However, before Mr. Towe made the trip, Amy Morris, the Romulus terminal manager, decided that Freightliner, not Autobahn, should be dealing with the gearbox issue. [*Id.* at ¶ 24.] Ms. Morris further decided that Respondent would not pay for lab testing supplies that Mr. Towe had requested. [*Id.* at ¶¶ 25, 27.] Ms. Morris still expected that Mr. Towe would drive the planned load to Michigan and test drive the trucks. [*Id.* at ¶ 27.] When Mr. Towe was informed by Shelley Taylor that Respondent would not pay for the lab testing supplies, but that Mr. Towe could still go to Michigan to test drive the trucks, Mr. Towe responded that if he couldn't do the testing, there was no reason for him to go to Michigan. [Affidavit of Shelly Taylor, Exhibit D to Respondent' Motion for Summary Decision ("Taylor affidavit") at ¶ 16.] Ms. Taylor repeated that Complainant could still come to Michigan and test drive the trucks, but he disagreed and insisted that he had to do the lab testing. [*Id.* at ¶¶ 17-18.] Ms. Taylor then told Mr. Towe that his services were no longer needed. [*Id.* at ¶ 19; Opp. at ¶ 10.] She did not tell him that his employment was terminated. [Taylor affidavit at ¶ 21; Morris affidavit at ¶¶ 34-36; OSHA investigative statement of Complainant, Exhibit B to Respondent's Motion for Summary Decision ("Investigative statement") at p. 3, second paragraph.]

Ms. Taylor did not have the authority to terminate Mr. Towe's employment. [Morris affidavit at ¶ 38.] Ms. Morris did have that authority, but did not exercise it. Had she believed that Mr. Towe should have been discharged, she would have consulted with others before doing so, and would have personally informed him that he had been terminated. [*Id.* at ¶¶ 39-43.]

[2] The parties addressed several issues in their respective pleadings, but because this order is based on a finding that there is no dispute of material fact that Complainant did not suffer an adverse employment action, only facts related to that issue, and some background facts, will be listed here.

After the conversation between Ms. Taylor and Mr. Towe, Ms. Morris called Amire Hazire, the United States Division Manager, and told Ms. Hazire that she was unsure whether Complainant would be delivering the load to Romulus as scheduled. [Morris affidavit at ¶¶ 44-45] Ms. Hazire thereafter contacted Mr. Towe, who told her that he thought he had been fired; but Ms. Hazire told Mr. Towe that he had not been fired, and she still had a load for him to deliver to Michigan. Mr. Towe did not accept that load. [*Id.* at ¶¶ 46-47.]

Subsequently, Mr. Towe received a call from dispatch who advised him that they had a run for him from Canada. He refused the run because it "wasn't a good fit." [Investigative statement at page 3, third paragraph.] A day or two later, Ms. Hazire called Mr. Towe and told him to put Sikeston, Missouri drivers in trucks, but Complainant told Ms. Hazire that he could not do that because it would endanger them as Autobahn was not addressing the gearbox problem. [*Id.* at page 3, fourth paragraph.] He continued to receive voice mail message about loads that needed to go out, but he never returned any of the calls. [*Id.* at page 3, fourth paragraph; Morris affidavit at ¶ 50.]

Based on Mr. Towe's refusal to accept loads in January 2019, and his failure to return phone calls, Ms. Morris considered him to have abandoned his job as a no-call/no-show. [Morris affidavit at ¶ 50.]

Discussion

As stated above, to prevail on his complaint under the STAA, Complainant must demonstrate, among other things, that he suffered an adverse employment action. The adverse employment action he claims to have suffered was the termination of his employment. To overcome Respondent's motion for summary decision, he must show that there is a dispute of material fact over whether he was terminated.

In this case, the undisputed facts establish that Mr. Towe was not terminated from his employment with Autobahn. Although it may have been reasonable for him to have thought he had been discharged, after he was informed that his services "were no longer required," it is undisputed that the phrase was used to say that his services were not required to test the Freightliner trucks in Romulus, Michigan. The person with authority to fire Mr. Towe did not do so, and did not utilize the established procedures for doing so. In addition, Complainant was contacted subsequent to the conversation with Ms. Taylor and was offered additional runs, which he refused. Furthermore, he received a number of voice mail messages after the conversation, with instructions indicating that Autobahn still considered him to be a lead driver in Sikeston, Missouri. Complainant refused all runs, and ultimately refused to return telephone calls. At no time, however, did anyone at Autobahn decide to terminate his employment. Respondent took no action to do so, and indeed offered Complainant additional runs and called him repeatedly about assigning work to other drivers; this behavior, occurring after the telephone call between Ms. Taylor and Mr. Towe, demonstrates that Autobahn believed that Mr. Towe was still employed.

Accordingly, I find that Complainant has failed to show a dispute of material fact over whether he suffered an adverse employment action; as the undisputed evidence shows that he was not terminated, his complaint must be denied.

ORDER

Based on the foregoing, IT IS ORDERED that Respondent's motion for summary decision is GRANTED, and the complaint of Jackie A. Towe under the STAA is DENIED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/ksw
Newport News, Virginia

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, 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).