



Issue Date: 04 November 2019

Case No.: 2020-STA-00002

In the Matter of:

BRUCE NORTON,
Pro se Complainant,

v.

UNITED PARCEL SERVICE, INCORPORATED,
Respondent.

ORDER VACATING SECRETARY'S DISMISSAL ORDER
ORDER TO SECRETARY TO COMPLETE INVESTIGATION OF COMPLAINT
ORDER OF REMAND TO SECRETARY

This matter arises from a complaint filed under the provisions of Section 31105 of the Surface Transportation Assistance Act of 1982, U.S. Code, Title 49, § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 ("STAA") and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 1978. Per 29 CFR §1978.107, the proceeding will be held in a manner consistent with the procedural rules set forth in federal regulations at 29 CFR Part 18, Subpart A (29 CFR §18.10 to §18.95).

Procedural History

Complainant filed a complaint alleging retaliation by the Respondent for reporting a health and safety violation to his supervisor. On July 3, 2018, the Regional Administrator for the Occupational Safety and Health Administration, (OSHA), on behalf of the Secretary of Labor, issued "Secretary's Findings." The "Secretary's Findings" were signed by the Regional Supervisory Investigator. The Findings provided a very short, single paragraph stating that,

it has come to OSHA's attention that Complainant and Respondent have settled the above referenced complaint. The parties have not submitted the settlement agreement for OSHA to review. Therefore, OSHA was unable to review the settlement agreement and ensure that it is consistent with public policy.

Consequently, this complaint is dismissed.

Per the above, the results of any investigation were not provided other than the above.

On July 3, 2019, the Regional Supervisory Investigator forwarded the complaint to the Chief Administrative Law Judge, Office of Administrative Law Judges, U. S. Department of Labor. On September 30, 2019, Complainant wrote the Chief Judge a letter stating, "I wish to file an objection to the letter dated September 12, 2019. Complainant and Respondent have not settled the above complaint! I wish to appeal the findings and the dismissal of my complaint."

The complaint was assigned to the below Administrative Law Judge. A Notice of Assignment was issued on October 18, 2019 advising the parties that the undersigned Judge was assigned to this complaint.

Federal Regulation

Pursuant to 29 CFR 1978, the Secretary is to complete an investigation of the complaint and report on the complaint. It appears that no investigation was completed, or that it was not accurate.

PART 1978—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE EMPLOYEE PROTECTION PROVISION OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982 (STAA), AS AMENDED

§1978.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the respondent of the filing of the complaint by providing the respondent with a copy of the complaint, redacted in accordance with the Privacy Act of 1974, 5 U.S.C. 552a and other applicable confidentiality laws. The Assistant Secretary will also notify the respondent of the respondent's rights under paragraphs (b) and (f) of this section. The Assistant Secretary will provide a copy of the unredacted complaint to the complainant (or complainant's legal counsel, if complainant is represented by counsel) and to the Federal Motor Carrier Safety Administration.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent may request a meeting with the Assistant Secretary to present its position.

(c) Throughout the investigation, the agency will provide to the complainant (or the complainant's legal counsel, if complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The agency will also provide the complainant with an opportunity to respond to such submissions.

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of this title.

(e)(1) A complaint will be dismissed unless the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint.

2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The employee engaged in a protected activity, either actual activity or activity about to be undertaken;

(ii) The respondent knew or suspected, actually or constructively, that the employee engaged in the protected activity;

(iii) The employee suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity, giving rise to the inference that it was a contributing factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel, if complainant is represented by counsel) will be so notified and the investigation will not commence.

(4) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, an investigation of the complaint will not be conducted or will be discontinued if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, the Assistant Secretary will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.

(f) Prior to the issuance of findings and a preliminary order as provided for in §1978.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the respondent (or the respondent's legal counsel, if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials to the complainant, the agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality

laws. The respondent will be given the opportunity to submit a written response, to meet with the investigators, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent must present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon thereafter as the Assistant Secretary and the respondent can agree, if the interests of justice so require.

§1978.105 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of the filing of the complaint, written findings as to whether there is reasonable cause to believe that the respondent has retaliated against the complainant in violation of STAA.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order providing relief. Such order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, with the same compensation, terms, conditions and privileges of the complainant's employment; and payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant has incurred). Interest on backpay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The preliminary order may also require the respondent to pay punitive damages up to \$250,000.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

Conclusion

In this matter, the Regional Administrator on behalf of the Secretary stated that the matter had settled, and therefore the complaint as dismissed. That appears to be inaccurate, based on the fact that the Regional Administrator stated that she was unable to review any settlement documents to ensure it was consistent with public policy and according to Complainant's appeal letter that the matter did not settle. Inasmuch as no investigation summary, report, or statements were included in the Secretary's Findings, and no settlement documents were reviewed in the Secretary's Findings, it appears there has been no investigation. Complainant is entitled to an investigation per the above Regulations as a basis for the Secretary's Findings.

Based on the above, this matter is returned to the Secretary of Labor, Regional Administrator for OSHA, for a proper investigation. The Secretary's dismissal of the complaint is vacated.

ORDER

It is hereby **ORDERED** that:

1. The Complaint filed by Bruce Norton is **REMANDED** to the Regional Administrator for OSHA.

2. The Regional Administrator is Ordered to complete an investigation per 29 CFR 1978 and include the investigation findings in the Supplemental Secretary's Findings.
3. The Secretary's Findings dismissing the complaint based on inaccurate information that the matter had settled, is **VACATED**.
4. No hearing will be held at this time while the complaint is pending before the Regional Administrator for OSHA, as the court will not have jurisdiction while it is pending before the Regional Administrator and the file has been returned to the Regional Administrator.

SO ORDERED.

Dana Rosen
Administrative Law Judge

DR/mjw
Newport News, Virginia