U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 March 2022

CASE NO.: 2021-STA-00053

OSHA CASE NO.: 5-1680-21-070

In the Matter of:

JOSEPH CVRK, III,
Complainant

v.

AIRGAS USA, LLC,
Respondent

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

A. PROCEDURAL BACKGROUND

Complainant, Joseph J. Cvrk III, ("Complainant"), filed a complaint with the Occupational Safety and Health Administration ("OSHA") on April 29, 2021, under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "Act"). (OSHA Complaint File at 7, 9). In his complaint, Complainant alleged that on January 14, 2020, he made safety a safety complaint to the Vice President of Safety at Airgas, USA, LLC, Mary Anstad, waited two weeks for a reply, then when he received no reply, he filed a complaint with the FMSCA against Airgas for "operating illegally." (OSHA Complaint File at 4, 7). He alleged that 13 days after filing the complaint, he and four other drivers were laid off, then brought back to work in June 2020. (OSHA Complaint File at 7). He alleged that his safety complaints were not addressed, and he quit employment with respondent, Airgas USA, LLC ("Respondent" or "Airgas") on July 30, 2020. (OSHA Complaint File at 7).

On May 12, 2021, OSHA dismissed Complainant's claim due to untimeliness because the complaint was not filed withing the 180-day statutory filing period. (OSHA Complaint File at 9). Additionally, it states that the evidence did not demonstrate that Respondent violated the STAA and the complaint was also "dismissed for the lack of a valid adverse action recognized" under the STAA. (OSHA Complaint File at 9).

On June 10, 2021, Complainant, representing himself, objected to OSHA's findings and requested a hearing before an Administrative Law Judge ("ALJ"). (Complainant's Objections to Findings and Request for Hearing before an ALJ ("Hearing Request")). This case was subsequently assigned to me and by Notice of Assignment and Pre-Hearing Order, issued August

9, 2021, I notified the parties of certain hearing related deadlines and requested they provide dates of availability for hearing.

On January 27, 2022, Respondent timely filed a "Motion for Summary Decision ("Motion") Pursuant to 29 C.F.R. § 18.72," in accordance with the deadline provided in my Pre-Hearing Order. By Order to Show Cause Regarding Motion for Summary Decision Directed to Complainant, Joseph Cvrk, III, issued January 28, 2022, I provided Complainant an explanation of summary decision and notification of the opportunity to respond. On February 1, 2022, Complainant responded, opposing the Motion for Summary Decision and providing several documents in support of his opposition ("Response"). On February 3, 2022, Respondent filed an email in Reply to Complainant's Opposition ("Reply").

The following Order is based on consideration of the record, pleadings, materials and arguments submitted by the parties, and relevant law.

B. RESPONDENT'S ARGUMENTS

Respondent moves for summary decision on the basis of (1) timeliness and alternatively, (2) the lack of adverse action. First, it argues that Complainant resigned from his employment with Respondent on July 30, 2020, and did not file his complaint until April 29, 2021, "approximately 273 days after his resignation and the last possible date on which an alleged violation of the STAA may have occurred" and no evidence presented at hearing could overcome the untimeliness of the complaint. (Motion at 2). Second, Respondent argues that even if Claimant could overcome the untimeliness of the claim, "he cannot overcome the undisputed fact that he did not suffer an adverse employment action, having resigned voluntarily." (Motion at 2). Additionally, in response to Complainant's raising of an issue regarding his 401(k), Respondent states that the issue Complainant raised about the 401K does not extend the filing period and "cannot serve as an adverse action" because it is unrelated to "'firing, demoting, denying overtime or a promotion, or disciplining'" (Reply). Finally, Respondent asserts the complaint made to the Federal Motor Carrier Safety Administration (FMCSA) in March 2020 is unrelated to Complainant's failure to timely file the OSHA complaint, at issue here. (Reply). For these reasons, Respondent asserts it is entitled to summary decision as a matter of law.

C. COMPLAINANT'S ARGUMENTS

In response, Complainant argues that Respondent's withdrawal of $342.23 from Claimant's 401K on February 24, 2021, constitutes an adverse employment action of retaliation that extends the 180-day limitation on filing a complaint. (Response). He also asserts that following his complaint to the Federal Motor Carrier Safety Administration (FMCSA) on March 27, 2020, he was laid off 13 days later, then called back to work June 12, 2020, where he worked 7 weeks without medical insurance or contributions to his 401K. (Response). He stated that "between the lack of safety and maintenance issues with semi-trucks and trailers and no health insurance or 401K made is so unbearable I quit the morning of July 30, 2020, without a notice." (Response). Therefore, summary decision should not be granted.

D. FINDINGS OF FACT AND CONCLUSTIONS OF LAW

1. Summary Decision Standard

The standard of review for summary decision is the same as the standard for summary judgment in the federal courts, Rule 56 of the Federal Rules of Civil Procedure. *Fredrickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, ALJ No. 2007-SOX-013, slip op. at 5 (ARB May 27, 2010); *Hasan v. Burns Roe Enter., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001). The Rules of Practice and Procedure for Administrative Hearings before the OALJ provide that an ALJ "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." 29 C.F.R. § 18.72(a).

The party moving for summary decision must show that there is insufficient evidence to support an essential element of the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Then, the burden shifts to the non-moving party, who must present affirmative evidence beyond the pleadings to show a genuine issue of material fact exists for hearing. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). If the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact and that the party is therefore entitled to summary decision as a matter of law, the ALJ may enter summary decision for either party. 29 C.F.R. § 18.72(a); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB Jun. 28, 2011); *see Catrett*, 477 U.S. 317. The ALJ may consider both the materials cited in the Motion for Summary Decision and other materials in the record. 29 C.F.R. § 18.72(c)(3).

A material fact is a fact whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact is a fact that if resolved, "could establish an element of a claim or defense and, therefore, affect the outcome of the action." *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046 slip op. at 4 (quoting *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003). A genuine issue exists when a reasonable fact-finder could rule for the non-moving party, based on the evidence presented. *Id*. at 252. Sufficient evidence is any significant probative evidence. *Id*. at 249 (citing *First Nat'l Bank of Ariz. V. Cities Serv. Co.*, 391 U.S. 253, 290 (1968). However, mere allegations are insufficient to defeat a motion for summary decision. *Anderson*, 477 U.S. at 257; *Cante v. New York City Dept. of Ed.*, ARB No. 08-012, ALJ No. 2007-CAA-004, slip op. at 9 (ARB July 31, 2009) citing *Webb v. Carolina Power & Light Co*., No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 14, 1995); *Henderson v. Wheeling & Lake Erie Ry.*, ARB Case No. 11-013, ALJ Case No. 2010-FRS-012 (Oct. 26, 2012). Further, granting a motion for summary decision is inappropriate when there is not enough information submitted to determine if material facts are at issue. *Anderson*, 477 U.S. at 249.

In considering a motion for summary decision, an ALJ must consider the facts in the light most favorable to the non-moving party, here, Complainant. *Anderson*, 477 U.S. at 255; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The ALJ must draw all reasonable inferences in favor of the non-moving party and may not weigh evidence or make credibility determinations. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed. R. Civ. P. 50 and 56). If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there is no genuine issue of material fact, and the moving party is entitled to summary decision. *Catrett*, 477 U.S. at 322-23.

2. Applicable Law

The STAA prohibits an employer from discharging, disciplining, or discriminating against an employee because the employee engaged in activity protected by the STAA. 49 U.S.C. § 31105. These protected activities include: making a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order (§ 31105(a)(1)(A)); refusing to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health. (§ 31105(a)(1)(B)(i)); or refusing to operate a vehicle because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition (§ 31105(a)(1)(B)(ii)).

An employee who believes that he or she has been retaliated against may file a complaint "within 180 days after an alleged violation of STAA occurs." 29 C.F.R. § 1978.103(d). Thus, in order to proceed, an employee's complaint must be timely filed.

To prevail on a claim of unlawful discrimination under the whistleblower protection provisions of the STAA, the complainant must establish in part, not only that he or she engaged in protected activity, but he must also demonstrate by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action by the employer.[1] *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20 and 21, 8 (ARB May 13, 2014). Thus, the employee must establish that he suffered an adverse action because of his protected activity. In prohibiting an adverse action by an employer, the regulations state that "no person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected action, and that "it is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee or someone acting on the employee's request engaged in protected action." 29 C.F.R. § 1978.102§ 1978.102(a), (b).

[1] Whistleblower complaints under the STAA are governed by the legal burdens and framework described in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[1] 49 U.S.C. § 42121 (2)(B) (2011).

3. Undisputed Material Facts

The following material facts are undisputed:

- Complainant filed a safety complaint with Respondent in January 2020. (OSHA Complaint File at 7; Motion at 1).

- Complainant filed a complaint with FMCSA on March 27, 2020. (Response Exhibit C, Reply).

- Complainant voluntarily quit or resigned on July 30, 2020. (Motion 1; Response).

- Complainant, Joseph J. Cvrk III, filed his retaliation complaint with OSHA on April 29, 2021, alleging Respondent, Airgas, violated the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (Motion at 1; Respondent's Exhibit A; OSHA Complaint File at 7, 9).

4. Timeliness

The STAA sets forth the time limit for filing a complaint. It states an employee who believes that he or she has been retaliated against may file a complaint "within 180 days after an alleged violation of STAA occurs." 29 C.F.R. § 1978.103(d).

Under the STAA, time for filing a complaint "may be tolled for reasons warranted by applicable case law." 29 C.F.R. § 1978.103(d). Under case law, there are specific and limited circumstances in which tolling may be appropriate, specifically including when, (1) the defendant has actively misled the plaintiff respecting the cause of action; (2) the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *Tierney v. Sun-Re Cheese, Inc.*, ARB No. 00-052, ALJ No. 2000-STA-12 (ARB Mar. 22, 2001) (citing *School Dist. of Allentown v. Marshall,* 657 F.2d 16 (3d Cir. 1981).

The undisputed facts here reveal Complainant's subject retaliation complaint to OSHA was untimely and there is no basis upon which to toll the deadline for filing the complaint. Accordingly, for the reasons below, Respondent is entitled to summary judgement as a matter of law.

Complainant asserts that "between the lack of safety and maintenance issues with the semi-trucks and trailers and no health insurance or 401K made it so unbearable" that he quit. (Response). Complainant essentially asserts that quitting employment with Respondent on July 30, 2020 was a constructive discharge. To establish constructive discharge, "the complainant must prove that working conditions were so difficult or unpleasant that a reasonable person in

the employee's shoes would have found continued employment intolerable and would have been compelled to resign." *Cole v. R. Construction Co.*, ARB Nos. 12-037 and 12-039, ALJ No. 2011-STA-022, slip. op. at 2 (ARB July 31, 2013) (citing *Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-049, slip op. at 10 (ARB Feb. 28, 2011). Looking at the facts in the light most favorable to the Complainant by considering the Complainant's statement that work was "unbearable" as sufficient to establish constructive discharge, Complainant still filed his complaint with OSHA on April 29, 2021. (OSHA Complaint File at 9). This is 274 days between Complainant's resignation on July 30, 2020, and filing the complaint on April 29, 2021, 94 days more than the 180-day limit set forth in the regulations.

Complainant next asserts that Respondent withdrew $342.23 from his 401K on February 24 2021, and this tolls the 180 day limit for filing. However, this does not meet any of the criteria for which the STAA statute of limitations can be tolled. It is undisputed that Complainant voluntarily left employment with Respondent on July 30, 2020. There is no assertion nor any evidence that Respondent actively misled Complainant regarding this retaliation claim. There is also no evidence nor any assertion of any extraordinary circumstance in which Complainant was prevented from filing this claim. Finally, there is no indication in the record that Complainant raised this precise claim in the incorrect forum. He did file a claim with the FMCSA, however, undisputed evidence of record indicates that the complaint to the FMCSA was for "operating illegally," and the letter from FMSCA indicates that the complaint was because Complainant believed Respondent "may be in regulatory noncompliance," rather than for retaliation. (OSHA Complaint File at 7; Complainant's Exhibit C). There is simply no indication that Complainant filed in an incorrect forum.

Significantly, Complainant does not assert that the withdrawal of $342.23 on February 24, 2021, from Complainant's 401K account of which the remaining balance of $6945.94 remains undisturbed, constitutes retaliation for any safety complainant, nor do any facts of record suggest this or create this inference, even when considered in the light most favorable to Complainant. *See Anderson*, 477 U.S. at 256 (The non-moving party, cannot rely upon "mere allegations or denials" of the non-moving party's pleadings). Here, in the light most favorable to Complainant, Complainant did not present any affirmative evidence or even present any pleadings that the withdrawal of $342.23 was in retaliation for some prior safety complaint, he only asserted that it should toll the 180-day limitation on filing. (Reply). Indeed, the only safety complaints could be the January 2020 safety complainant to Respondent, and the filing of the FMCSA complainant in March 2020, which is 10 and 11 months prior the February 24, 2021 withdrawal and seven months after Complainant voluntarily quit work on July 30, 2020. Nothing of record supports even an inference that the 401K withdrawal was in retaliation for any protected activity of Claimant.

To the contrary, the record supports that Complainant voluntarily quitting on July 30, 2020 is the only potential adverse action of record, when considered in the light most favorable to the Complainant, and this happened 274 days before he filed his complainant. Considering the facts in the light most favorable to the Complainant, there is nothing of record, nor any evidence

provided, to toll the applicable 180-day time limitation on the filing of the instant whistleblower complaint with OSHA. Accordingly, Complainant's claim was untimely filed, and Respondent is entitled to summary decision as a matter of law.

E. CONCLUSION

In sum, I find there are no issues of material fact regarding the instant whistleblower complaint. The undisputed facts clearly establish that Complainant's complainant was untimely filed under the STAA. Additionally, the undisputed evidence also establishes that nothing tolls the 180-day time period to file a retaliation claim under the STAA. As a result, Respondent is entitled to summary decision as a matter of law.

ORDER

Based on the foregoing, it is **ORDERED** that Respondent's Motion for Summary Decision is **GRANTED** and the Complaint of Joseph J. Cvrk, III, is hereby **DISMISSED**.

It is **FURTHER ORDERED** that the hearing scheduled to begin on **March 8, 2022 and continuing through March 11, 2022**, is **CANCELLED** and all outstanding motions are **DENIED** as moot.

SO ORDERED.

NATALIE A. APPETTA
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 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).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV.

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 with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

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

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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:

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