U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

ALBERT TRAMMELL, **ARB CASE NO. 07-109**

COMPLAINANT, **ALJ CASE NO. 2007-STA-018**

v. **DATE: March 27, 2009**

NEW PRIME, INCORPORATED,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Albert A. Trammell, Sr., *pro se*, Knoxville, Tennessee

For Respondent:
Richard C. Foster, Esq., *Hicks, Casey & Foster, PC*, Marietta, Georgia

FINAL DECISION AND ORDER

Albert Trammell filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleged that his employer, New Prime, Incorporated, violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified,[1] when a co-employee

[1] 49 U.S.C.A. § 31105 (West 2008).). Congress has amended the STAA since Trammell filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-

assaulted him and New Prime terminated his employment after Trammell reported that the co-employee falsified driver's log records. The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. In a summary decision, a Labor Department Administrative Law Judge (ALJ) dismissed Trammell's complaint as untimely filed. We affirm.

BACKGROUND

New Prime, a commercial motor carrier engaged in transporting cargo, hired Trammell as a trainee truck driver in December 2000.[2] On March 16, 2001, Trammell accompanied a company trainer driver in a company truck.[3] Trammell accused the trainer driver of falsifying the driver's log book records, which allegedly led the trainer to strike him and knock him out of the truck's cab.[4] The record indicates that Trammell contacted the Labor Department by a letter dated December 11, 2001, wherein he claimed that another New Prime driver had assaulted him.[5] In response, OSHA wrote Trammell a letter stating that they had received his letter, but that while OSHA was responsible for enforcing the STAA, it had "no jurisdiction in situations such as yours" involving "assault cases." Furthermore, as "reporting violations such as falsifying Driver's Logs and driving over hours" are the responsibility of the Department of Transportation (DOT), OSHA informed Trammell that they had forwarded his letter to DOT.[6] The record indicates that in April 2001 DOT began to investigate New Prime about false reports of duty status, but there is no indication that Trammell instigated the investigation.[7] Finally,

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53, 121 Stat. 266 (Aug. 3, 2007). It is not necessary for us to determine whether the amendments are applicable to this case to rule on its merits because even if they were, they would not affect our decision since they are not applicable to the issues presented for our review.

[2] Dec. 13, 2007 New Prime Driver Employment History; *see* Jan. 17, 2007 OSHA Administrator's Findings at 1.

[3] Mar. 16, 2001 New Prime Driver Incident Report; Dec. 11, 2001 Letter of Trammell to Department of Labor (DOL).

[4] Jan. 12, 2007 Trammell Complaint; Jan. 30, 2002 OSHA letter to Trammell; Mar. 16, 2001 New Prime Driver Incident Report; Dec. 11, 2001 Letter of Trammel to DOL.

[5] Dec. 11, 2001 Letter of Trammell to DOL.

[6] Jan. 30, 2002 OSHA letter to Trammell.

[7] Nov. 16, 2001 DOT Enforcement Case Report; *see* 49 C.F.R. § 395.8(e)(2008). We note that with his brief to the Board, Trammell attached a number of exhibits. At least some of these documents were not previously submitted to the ALJ. When deciding whether to consider new evidence, the Board ordinarily relies upon the standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (2008), which provides that "[o]nce the record is closed, no additional evidence shall be accepted

New Prime submitted a Driver Employment History, which indicates that it terminated Trammell's employment on December 3, 2003.[8]

On January 12, 2007, Trammell filed the aforementioned complaint with OSHA, alleging that on March 16, 2001, while he was a trainer driver with New Prime, his trainer falsified records and then struck him, knocking him out of the cab of the truck.[9] OSHA investigated the complaint, concluded that the complaint was not timely filed and, therefore, dismissed the complaint.[10] On January 31, 2007, Trammell appealed the OSHA Administrator's findings. When New Prime averred that Trammell's claim was barred by the applicable statute of limitations, the ALJ noted the STAA's 180-day time limitation and also indicated that under the concept of equitable tolling, Trammell might be able to demonstrate circumstances that hindered him from timely filing the complaint.[11] On March 14, 2007, the ALJ issued an Order to Show Cause Why the Complaint Should Not Be Dismissed as untimely.

Trammell responded to the ALJ's show cause order in a letter dated March 27, 2007, stating that "I think my complaint is timely." Trammell further requested subpoenas from the ALJ's office so that he could obtain the documents he needed to prove that his claim is timely. By orders dated April 30, 2007, and June 4, 2007, the ALJ denied Trammell's requests to issue subpoenas as being non-specific, overly burdensome, and untimely. On June 1, 2007, New Prime filed a motion to dismiss the case on the basis that the complaint was not timely filed.

On August 10, 2007, the ALJ issued his Recommended Decision and Order Granting Summary Decision (R. D. & O.) and dismissed Trammell's complaint because Trammell did not

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into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c); *see, e.g., Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2003-SOX-015, Order Denying Stay, slip op. 5-6 (ARB June 9, 2006). Trammell has not established that his additional exhibits were not available at the time of the ALJ's consideration of his case. We therefore do not consider them in our review.

[8] Dec. 13, 2007 New Prime Driver Employment History.

[9] Trammell Jan. 12, 2007 Complaint. The ALJ read Trammell's complaint also to allege that New Prime fired him after he had reported the trainer's falsification of the records. Trammell's pleadings herein do not specifically allege that he was terminated for reporting the falsification. Trammell's last day of work was December 3, 2003. At any rate, since we decide this case on the issue of whether Trammell filed a timely complaint, we will not determine whether the co-employee's assault constitutes an adverse action. Suffice to say, Trammell alleges retaliatory adverse action on March 16, 2001, and December 3, 2001.

[10] Jan. 17, 2007 OSHA Administrator's Findings.

[11] R. D. & O. at 2.

provide evidence that he filed a timely complaint and because he did not provide a compelling reason to apply "equitable tolling" of the time limits.

The Administrative Review Board automatically reviews an ALJ's recommended STAA decision.[12] The Board "shall issue the final decision and order based on the record and the decision and order of the administrative law judge."[13] Although the Board issued a Notice of Review and Briefing Schedule permitting both parties to submit briefs in support of or in opposition to the ALJ's order, Trammell submitted a brief, but New Prime did not.[14]

We review an ALJ's recommended grant of summary decision de novo.[15] The standard that the ALJ applies also governs our review.[16] The standard for granting summary decision is

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[12] 29 C.F.R. § 1978.109(c)(1) (2008).

[13] 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050 (ARB Sept. 26, 2001).

[14] Counsel for New Prime did inform the Board that Trammell has also filed an action in United States District Court. On August 3, 2007, the President signed the Implementing Recommendations of the 9/11 Commission Act of 2007. Pub. L. 110-53. Section 1536 of this Act provides in pertinent part:

> Section 31105 of title 49, United States Code, is amended to read: . . .
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> (c) DE NOVO REVIEW. - With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

Trammell filed his STAA complaint in this case on January 12, 2007. The STAA amendment permitting de novo review in district court was signed on August 3, 2007. The United States Court of Appeals for the Eighth Circuit has recently held in *Elbert v. True Value Co.*, 550 F.3d 690 (8th Cir. 2008) that this amendment is not applicable retroactively to complaints filed prior to August 3, 2007. Accordingly, by order dated February 6, 2009, the Board ordered Trammell to show cause no later than February 27, 2009, why the Board should not proceed with its consideration of this case and issue the final agency decision. As Trammell has not timely responded to the Board's order, we shall proceed with consideration of this case and issue the final agency decision herein.

[15] *King v. BP Prod. N. Am., Inc.*, ARB No. 05-149, ALJ No. 2005-CAA-005, slip op. at 4 (ARB July 22, 2008).

[16] 29 C.F.R. § 18.40 (2008).

essentially the same as that found in the rule governing summary judgment in the federal courts.[17] Accordingly, summary decision is appropriate if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.[18] The determination of whether facts are material is based on the substantive law upon which each claim is based.[19] A genuine issue of material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[20]

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.[21] "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'"[22] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[23] Furthermore, 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."[24]

The Legal Standards

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint "related to a violation of a

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[17] Fed. R. Civ. P. 56.

[18] Fed. R. Civ. P. 56(c); 29 C.F.R. § 18.40(d); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[19] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[20] *Bobreski v. United States EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

[21] *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

[22] *Bobreski*, 284 F. Supp. 2d at 73 (quoting *Celotex Corp.*, 477 U.S. at 322).

[23] *Bobreski*, 284 F. Supp. 2d at 73.

[24] 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co.*, No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 17, 1995).

commercial motor vehicle safety regulation, standard, or order;" who "refuses 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;" or who "refuses 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."[25]

To prevail on this STAA claim, Trammell must prove by a preponderance of the evidence that he engaged in protected activity, that New Prime was aware of the protected activity and took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.[26] If Trammell fails to prove any one of these elements, we must dismiss his claim.[27]

Employees alleging employer retaliation in violation of the STAA must file their complaints with OSHA within 180 days after the alleged violation occurred.[28] The STAA limitations period is not jurisdictional and therefore is subject to equitable tolling.[29]

Because a major purpose of the 180-day period is to allow the Secretary to decline to entertain complaints that have become stale, complaints not filed within 180 days of an alleged violation will ordinarily be considered untimely.[30] The regulation provides for extenuating circumstances that will justify tolling of the 180-day period, such as when the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action or when the discrimination is in the nature of a continuing violation.[31] But filing a complaint, which does not seek remedies under the STAA, with an agency other than the Department of Labor does not justify tolling the 180-day period.[32]

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[25] 49 U.S.C.A. § 31105(a)(1).

[26] *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004).

[27] *Eash v. Roadway Express*, ARB No. 04-036, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005).

[28] 49 U.S.C.A. § 31105(b)(1).

[29] *See, e.g., Miller v. Basic Drilling Co.*, ARB No. 05-111, ALJ No. 2005-STA-020, slip op. at 3 (ARB Aug. 30, 2007).

[30] 29 C.F.R. § 1978.102(d)(2).

[31] 29 C.F.R. § 1978.102(d)(3).

[32] *Id. See also Hillis v. Knochel Bros., Inc.*, ARB Nos. 03-136, 04-081, 04-148, ALJ No. 2002-STA-050, slip op. at 6-7 (ARB Mar. 31, 2006).

DISCUSSION

The alleged STAA violations in this case occurred on March 16, 2001, when Trammell accused the New Prime trainer driver of falsifying the driver's log book records and assaulting him, and December 3, 2003, when Trammell's employment with New Prime was terminated. Trammell filed his complaint on January 17, 2007, more than 180 days after the alleged violations. As for Trammell's argument that he contacted OSHA within 180 days of the March 16, 2001 assault, the record contains only Trammell's December 11, 2001 letter to the Labor Department relating his account of the assault incident. Even if this letter could be considered to be a STAA complaint, it was not filed within 180 days of the alleged assault. Accordingly, Trammell's complaint is untimely. We must therefore determine whether Trammell is entitled to equitable tolling of the filing period.

As a general matter, in determining whether equity requires the tolling of a statute of limitations, the ARB is guided by the principles that courts have applied to cases with statutorily-mandated filing deadlines.[33] Accordingly, the Board has recognized three situations in which tolling is proper:

> (1) [when] the respondent has actively misled the complainant respecting the cause of action,
> (2) the complainant has in some extraordinary way been prevented from asserting his rights, or
> (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.[[34]]

When seeking equitable tolling of a statute of limitations, the complainant bears the burden of demonstrating the existence of circumstances supporting tolling.[35]

Without specifying a date, Trammell argues to us that he called OSHA within 180 days after March 16, 2001, the day he alleges that New Prime's trainer driver falsified his driver's log book records and assaulted him. He contends that OSHA informed him that it did not have jurisdiction over such matters, but referred him to the DOT, whose regulations, at 49 C.F.R. § 395.8(e), cover false reports or records of duty status. Trammell says that he then contacted the

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33 *Howell v. PPL Servs., Inc.*, ARB No. 05-094, ALJ No. 2005-ERA-014, slip op. at 4 (ARB Feb. 28, 2007).

34 *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981) (citations omitted).

35 *Herchak v. America W. Airlines, Inc*., ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 5 (ARB May 14, 2003), citing *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

DOT, which began an investigation in April 2001 regarding his complaint. Therefore, Trammell argues that under the third equitable tolling situation described above, he mistakenly filed a STAA complaint in the wrong forum within 180 days after the March 16, 2001 incident.[36] To avail himself of this equitable tolling circumstance, Trammell must prove that he mistakenly filed the precise statutory claim at issue in the wrong forum, but within the filing period.[37]

As earlier noted, a STAA regulation permits tolling the 180-day limitations period under certain circumstances, but not when the complainant files a non-STAA complaint with an agency other that the Labor Department.[38] Thus as we held in *Hillis*, if Trammell had timely filed "the precise statutory claim in the wrong forum," he could have established his entitlement to tolling of the limitations period[39]

But the record contains no evidence that Trammell filed a STAA complaint with DOT. True, DOT commenced an investigation of New Prime in April 2001 regarding violations of DOT regulations. The ALJ found no indication that Trammell instigated the investigation.[40] But even if Trammell did trigger the DOT investigation, he did so by complaining about violations of DOT regulations, not about the STAA's employee protection provisions. Therefore, he did not file the precise statutory claim and his actions do not justify tolling the 180-day limitations period.

We have reviewed the entire record herein. The ALJ thoroughly and fairly examined the evidence each party submitted. After viewing the evidence and drawing inferences in the light most favorable to Trammell, the ALJ awarded summary decision to New Prime. Since the record contains no evidence that Trammell filed a STAA complaint within 180 days of the alleged adverse actions and does not support Trammell's equitable tolling argument, the ALJ

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[36] Trammell Brief at 3. Later in his brief, Trammell contends that he could testify under oath regarding his call to OSHA and sought subpoenas to seek telephone records to prove his call to OSHA, but the ALJ denied his requests. Trammel, however, had the burden in opposing summary decision to set forth specific facts showing that there is a genuine issue of fact as to whether he filed a timely complaint.

[37] *Hillis*, slip op. at 6-7; *Immanuel v. Wyoming Concrete Indus., Inc*., ARB No. 96-022, ALJ No. 1995-WPC-003, slip op. at 3 (ARB May 28, 1997).

[38] *See* 29 CFR § 1978.102(d)(3).

[39] Slip op. at 6-7.

[40] R. D. & O. at 3; *see* Nov. 16, 2001 DOT Enforcement Case Report.

properly granted summary decision to New Prime. Thus, we **AFFIRM** his Recommended Decision and Order and **DENY** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge