U.S. Department of Labor

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

In the Matter of:

MICHAEL WOOD, **ARB CASE NO. 08-082**

COMPLAINANT, **ALJ CASE NO. 2008-STA-025**

v. **DATE: March 16, 2009**

AGGREGATE INDUSTRIES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Michael Wood filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleged that his employer, Aggregate Industries, violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified,[1] when its leave policy required him to use a vacation day on a day he was absent due to illness. 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. A Labor Department Administrative Law Judge (ALJ) granted Aggregate's Motion for Summary Decision, as Wood failed to allege that he suffered any adverse employment action. We affirm.

[1] 49 U.S.C.A. § 31105 (West 2008).

BACKGROUND

Aggregate, a commercial motor carrier engaged in transporting various products on the highways, employed Wood as a truck driver since 1992.[2] Aggregate has a "Time Off Policy," which states that if a driver needs to be absent due to illness, the driver is to use his sick day leave or, if his sick day leave is exhausted, he is to use his other remaining paid leave days, including personal leave days first and vacation leave days second, as applicable.[3] Otherwise, the driver is subject to a penalty for an "unplanned day off" under the company's "Working Rules of Conduct and Performance," which sets out a progressive point value discipline system for unsatisfactory conduct and performance.[4]

On May 15, 2007, Wood informed his dispatcher that he was ill and needed to leave work early to go to see a physician.[5] Although Wood's complaint, filed in July 2007, states that he became ill on "July 12, 2002," a physician's letter which Wood also submitted indicates that Wood went to see the physician on May 15, 2007.[6] The physician advised that Wood could not return to work until May 17, 2007.[7] In an affidavit from Megan Wassenberg, Aggregate's Human Resources Manager, Wassenberg states that Wood left work early due to illness on May 15, 2007, was absent due to the same illness on May 16, 2007, and was required to use a personal day off from his accrued bank of paid time off for his May 16, 2007 absence.[8] But Wassenberg further states that Wood was not assessed any points under Aggregate's Working Rules Procedure for his May 2007 absence because he used a personal day for a documented illness.[9]

On July 11, 2007, Wood filed the aforementioned complaint with OSHA, alleging that Aggregate's Time Off Policy violates the STAA as it required him to use a vacation day for his

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[2] Apr. 7, 2008 Affidavit of Megan Wassenberg, Human Resources Manager for Aggregate; Dec. 12, 2007 OSHA Administrator's Findings at 1.

[3] *See* Apr. 1, 2006 Aggregate "Time Off Policy;" June 8, 2007 Aggregate "Time Off Procedure;" July 26, 2007 Aggregate "Time Off Procedure."

[4] May 1, 2007 Aggregate Working Rules of Conduct and Performance.

[5] *See* Wood July 17, 2007 Complaint.

[6] May 15, 2007 Letter of Steven Thompson, MD.

[7] *Id*.

[8] Apr. 7, 2008 Affidavit of Megan Wassenberg, Human Resources Manager for Aggregate.

[9] *Id*.

absence due to illness.[10] OSHA investigated the complaint, concluded that Aggregate had not violated the Act, and dismissed the complaint.[11] On January 10, 2008, Wood appealed the OSHA Administrator's findings, and the ALJ sent a Notice of Hearing on January 29, 2008, notifying the parties that a hearing was scheduled on April 28, 2008.[12]

By letter dated March 7, 2008, Wood requested that the ALJ grant him an extension of time to allow him to try and obtain legal counsel or, alternatively, to dismiss his case without prejudice.[13] The ALJ denied Wood's request by Order dated March 24, 2008, but provided Wood a list of employment law attorneys practicing in his residential area and ordered Wood to inform him by April 23, 2008, of his efforts to obtain counsel. Furthermore, the ALJ rescheduled the hearing to April 29, 2008. Subsequently, Aggregate filed a Motion for Summary Decision on April 7, 2008, arguing that Wood failed to allege or establish that he suffered any adverse employment action. Wood failed to respond to Aggregate's Motion for Summary Decision and failed to submit any affidavits or other materials in support of his claim.[14]

On April 24, 2008, the ALJ issued his recommended decision and order granting Aggregate's Motion for Summary Decision.[15] The ALJ concluded that Wood failed to allege that he suffered an adverse employment action and, therefore, that Aggregate is entitled to summary decision on this issue.[16] Consequently, the ALJ recommended that Aggregate's Motion for Summary Decision be granted and that Wood's complaint be dismissed.

The Administrative Review Board automatically reviews an ALJ's recommended STAA decision.[17] The Board "shall issue the final decision and order based on the record and the decision and order of the administrative law judge."[18] Although the Board issued a Notice of

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[10] Wood July 17, 2007 Complaint.

[11] Dec. 12, 2007 OSHA Administrator's Findings.

[12] Wood Jan. 10, 2008 Letter; Jan. 28, 2008 Notice of Hearing.

[13] Wood Mar. 7, 2008 Letter.

[14] *See* Recommended Decision and Order Granting Respondent's Motion for Summary Decision (R. D. & O.) at 1.

[15] *Wood v. Aggregate Indus.*, 2008-STA-025.

[16] R. D. & O. at 5.

[17] 29 C.F.R. § 1978.109(c)(1) (2008).

[18] 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).

Review and Briefing Schedule permitting either party to submit briefs in support of or in opposition to the ALJ's order, neither party filed a brief.

We review an ALJ's recommended grant of summary decision de novo.[19] That is, the standard the ALJ applies, also governs our review.[20] The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[21] 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.[22] The determination of whether facts are material is based on the substantive law upon which each claim is based.[23] 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."[24]

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.[25] "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.'"[26] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[27] 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."[28]

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

20 29 C.F.R. § 18.40 (2008).

21 Fed. R. Civ. P. 56.

22 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).

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

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

25 *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 (Dec. 13, 2002).

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

27 *Bobreski,* 284 F. Supp. 2d at 73.

28 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).

DISCUSSION

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 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."[29]

To prevail on this STAA claim, Wood must prove by a preponderance of the evidence that he engaged in protected activity, that Aggregate was aware of the protected activity, that Aggregate took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.[30] If Wood fails to prove any one of these elements, we must dismiss his claim.[31]

The ALJ's Findings

The ALJ found that Wood failed to allege that he suffered an adverse employment action.[32] Specifically, the ALJ determined that Wood's use of a paid vacation day for an illness-related absence is not a tangible employment action that caused a significant change in his employment status or benefits.[33] Moreover, as the ALJ found, Wood has not alleged that he was

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[29] 49 U.S.C.A. § 31105(a)(1).

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

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

[32] R. D. & O. at 5.

[33] In interpreting the STAA's whistleblower protection provisions and statutes that similarly require the complainant to prove retaliatory "discipline" or "discrimination" regarding "pay, "terms, or privileges of employment," the Board has long required complainants to prove a "tangible employment action," namely one that resulted in a significant change in employment status, such as firing or failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *See, e.g., Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 7-12 (ARB Nov. 27, 2002) (holding that an

otherwise disciplined for his absence or that points were assessed against him or that he received a verbal or written warning under Aggregate's "Working Rules of Conduct and Performance" discipline system. In addition, the ALJ properly found that Wood has not alleged that he lost wages at the time of his absence or thereafter as a result of using a vacation day. Finally, the ALJ also properly found that there is no evidence that Aggregate applied its "Time Off Policy" or "Working Rules of Conduct and Performance" to Wood in a discriminatory manner that violates the Act.[34]

Thus, as Wood failed to carry his burden of setting forth specific facts from which some issue of material fact could be discerned, the ALJ found that Aggregate carried its burden of showing that no issue of material fact exists as to whether Wood suffered an adverse employment action and, therefore, that it is entitled to decision on this issue as a matter of law. Therefore, as Aggregate is entitled to summary decision on this issue, the ALJ properly determined that all other factual issues are immaterial and there can be no genuine issue of material fact. [35] Consequently, the ALJ granted Aggregate's Motion for Summary Decision.

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 Wood, the ALJ awarded summary decision to Aggregate because he found that no issue of fact existed as to whether Wood suffered an adverse employment action. The record supports these findings, and the procedures the ALJ followed satisfy the requirements of the regulations. Further, Wood has raised no objection to the ALJ's decision on automatic review to us.

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employer's instructions, monitoring practices, and break restrictions did not constitute adverse actions); *Jenkins v. U.S. Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 20-21 (ARB Feb. 28, 2003) (decided under environmental whistleblower statutes that employment evaluation without material disadvantage (i.e., reduced pay) with no change in performance standards, title, grade, or pay were not actionable).

The ALJ further determined, alternatively, that Wood has not alleged an employment action that is materially adverse such that a reasonable employee in his situation would have been dissuaded from engaging in protected activity. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), *but see Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 9-24 (ARB Sept. 30, 2008)(C.J. Douglass and J. Transue, concurring).

[34] R. D. & O. at 6.

[35] *Eash*, slip op. at 5; *see also Seetharaman v. Gen. Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 4 (ARB May 28, 2004), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

CONCLUSION

The ALJ properly concluded that Wood failed to establish that there was a material issue of fact regarding the issue whether he suffered an adverse employment action. Accordingly, Wood's complaint is **DISMISSED**.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge