



In the Matter of:

EARL S. CAWTHORNE,

ARB CASE NO. 08-083

COMPLAINANT,

ALJ CASE NO. 2008-STA-028

v.

DATE: May 7, 2009

UNITED STATES POSTAL SERVICE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Earl S. Cawthorne, *pro se*, Medical Lake, Washington

For Respondent:

Leigh Bonds, Esq., *United States Postal Service Law Department – Western Area*, Sandy, Utah

FINAL DECISION AND ORDER

Earl S. Cawthorne filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleged that the United States Postal Service (USPS), with whom he had a contract to haul mail, violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified,¹ when it suspended him without pay for his complaints concerning violations of a Department of Transportation (DOT) hours of service regulation² and for reporting a

¹ 49 U.S.C.A. § 31105 (West 2008).

² *See* 49 U.S.C.A. § 395.3 (West 2008).

workplace injury. 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 Cawthorne's complaint as the USPS is a Government entity and, therefore, not covered under the STAA. We affirm.

BACKGROUND

At all relevant times, Cawthorne was the President of Cawthorne Dump Trucking Services, Incorporated, which had a contract with the USPS to haul mail.³ Cawthorne himself drove a truck carrying mail.⁴ Cawthorne alleges that in October 2007 a USPS employee injured him during an altercation at a postal facility.⁵ On the same day, Cawthorne contends that he complained that a USPS official required that he exceed the maximum allowable driving hours that DOT regulations prescribe.⁶ The following day, USPS suspended him without pay from personally hauling mail.⁷ On November 1, 2007, Cawthorne filed the aforementioned complaint with OSHA, alleging that the USPS violated the STAA when it suspended him without pay in retaliation for voicing workplace safety concerns, for reporting a workplace injury, and for voicing concerns about possible violations of DOT hours of service regulations.⁸

OSHA investigated the complaint, but OSHA's Administrator concluded that OSHA lacked jurisdiction to investigate Cawthorne's complaint because Cawthorne was an independent contractor, not an employee of the USPS. The Administrator further determined that the USPS is not covered under the STAA because it is a branch of the United States Federal Government, not a commercial motor carrier. Thus, the Administrator dismissed the complaint.⁹

On February 12, 2008, Cawthorne requested a hearing before a Labor Department ALJ. By order dated February 20, 2008, the ALJ noted that if the Administrator's determination was correct, there would be no need for a hearing. Thus, the ALJ ordered that if the USPS believed the Administrator's determination was correct, it should file a motion to dismiss or for summary decision. In response, the USPS filed a motion to dismiss dated March 14, 2008, on the same

³ Respondent's Exhibit (RX) 1 at A 2, A 6.

⁴ Cawthorne's Oct. 19, 2007 Letter.

⁵ Cawthorne's Oct. 19, 2007 Letter; *see* Jan 23, 2008 OSHA Administrator's Findings.

⁶ Jan. 23, 2008 OSHA Administrator's Findings; *see also* 49 U.S.C.A. § 395.3.

⁷ *See* Jan. 23, 2008 OSHA Administrator's Findings; Cawthorne's Nov. 21, 2007 Complaint.

⁸ *See* 49 U.S.C.A. § 395.3.

⁹ *See* Jan. 23, 2008 OSHA Administrator's Findings.

basis as the Administrator's determination. On April 24, 2008, the ALJ issued his recommended decision, dismissing Cawthorne's complaint.

Citing ARB precedent in a case involving the U.S. Department of Energy, the ALJ wrote:

The STAA's definition of . . . "employer" explicitly excludes "the Government." 49 U.S.C. §31101(2)(B), §31101(3)(B). There is no ambiguity in these scope provisions, and therefore we can rely upon their plain meaning. Moreover, the United States is immune from suit absent an explicit statutory waiver of sovereign immunity. *United States Dep't of Energy v. State of Ohio*, 503 U.S. 607, 615 (1992) (any waiver of the government's sovereign immunity must be "unequivocal"). Here we have an explicit statutory invocation of such immunity.¹⁰

Therefore, because the USPS is a United States Government entity,¹¹ the ALJ dismissed Cawthorne's complaint.¹²

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or the Board) the authority to issue final agency decisions under, inter alia, the STAA and its implementing regulations at 29 C.F.R. Part 1978.¹³ The ARB automatically reviews an ALJ's recommended STAA decision.¹⁴ The ALJ's determination that the USPS is not covered under the STAA is a legal conclusion. In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision"¹⁵ Therefore, the Board reviews the ALJ's conclusions of law de novo.¹⁶ The

¹⁰ Recommended Decision and Order (R. D. & O.) at 3, citing *Rockefeller v. Carlsbad Area Office, U.S. Dep't of Energy*, ARB Nos. 99-022/063/067/068, ALJ Nos. 1998-CAA-010/11, 1999-CAA-001/4, slip op. at 6, 7 (ARB Oct. 31, 2000); see also *Moore v. U.S. Dep't of Energy*, ARB No. 99-094, ALJ No. 1999-CAA-014, slip op. at 3 (ARB July 31, 2001).

¹¹ See 39 U.S.C.A §§ 201-202 (West 1980).

¹² R. D. & O. at 3-4; see 49 U.S.C.A. § 31101(3)(B).

¹³ Secretary's Order 1-2002, 67 Fed. Reg. 64,672 (Oct. 17, 2002).

¹⁴ 29 C.F.R. § 1978.109(a), (c)(1) (2008).

¹⁵ 5 U.S.C.A. § 557(b) (West 1996). See also 29 C.F.R. § 1978.109(b).

¹⁶ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

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, and Cawthorne and the USPS submitted briefs.

DISCUSSION

The Legal Standards

The STAA provides that a “person” may not “discharge,” “discipline,” or “discriminate” against an “employee” “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activity.¹⁷ 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.”¹⁸

A “person” is defined under the STAA’s interpretive regulations as “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons.”¹⁹ “Thus the definition of ‘person’ does not exclusively restrict its coverage to ‘employers,’” but “[i]t is indisputable that the provision includes employers and that in most cases a ‘person,’ who is in the position to discharge, discipline or discriminate against an employee, will be an employer.”²⁰ “Employer” “means a *person* engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce; but does not include the Government, a State, or a political subdivision of a State.”²¹

Because the USPS is a United States Government entity, the STAA does not provide Cawthorne an avenue for relief against the USPS

Although the USPS, as a branch of the United States Government, ordinarily would be entitled to immunity from suit, that immunity has been expressly waived by the Postal Reorganization Act at 39 U.S.C.A. § 401(1) (West 2006), which permits the Postal Service “to sue and be sued in its official name.” Thus, contrary to the ALJ’s analysis pursuant to

¹⁷ 49 U.S.C.A. § 31105(a)(1).

¹⁸ *Id.*

¹⁹ 29 C.F.R. § 1978.101(i).

²⁰ *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 2003-STA-011, slip op. at 7 (ARB Oct. 14, 2003).

²¹ 49 U.S.C.A. § 31101(3)(A)-(B) (emphasis added).

Rockefeller, there is an explicit statutory waiver of sovereign immunity in regard to the USPS. “That waiver, however, is not absolute and instead is based upon the nature of the claims asserted.”²²

In *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484 (1994), the Supreme Court explained that in determining whether an individual can recover damages against the federal government, there are “two analytically distinct inquiries.”²³ “The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver, as in this case, the second inquiry comes into play – that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief.”²⁴

Thus, although Congress has waived the USPS’s sovereign immunity, the substantive law that Cawthorne relies upon, the STAA, provides that an “employer” is a “person” for purposes of coverage under the STAA’s antidiscrimination provisions, but “does not include the Government.”²⁵ Because the USPS is a United States Government entity, the STAA does not provide Cawthorne an avenue for relief against the USPS. Accordingly, the ALJ’s R. D. & O. dismissing Cawthorne’s complaint because the USPS is a Government entity and, therefore, not covered under the STAA is **AFFIRMED**.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

²² *Overall v. Tennessee Valley Auth.*, ARB No. 04-073, ALJ No. 1999-ERA-025, slip op. at 7 n.23 (ARB July 16, 2007); *see, e.g., Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004) (USPS not liable under Sherman Act because USPS not a “person” separate from the United States for purposes of antitrust laws); *Baker v. Runyon*, 114 F.3d 668 (7th Cir. 1997) (award of punitive damages against the USPS reversed because under Title VII it is an exempted governmental entity).

²³ *Meyer*, 510 U.S. at 484 (internal quotation omitted).

²⁴ *Id.*

²⁵ 49 U.S.C.A. § 31101(3)(B).