U.S. Department of Labor

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

In the Matter of:

DUANE HALGRIMSON,

COMPLAINANT,

v.

CONTRACT TRANSPORTATION SERVICES,

RESPONDENT.

ARB CASE NO. 09-103

ALJ CASE NO. 2009-STA-024

DATE: March 24, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Duane Halgrimson*, pro se*, Wellington, Nevada

Before: Paul M. Igasaki*, Chief Administrative Appeals Judge*; E. Cooper Brown*, Deputy Chief Administrative Appeals Judge; and* Luis A. Corchado*, Administrative Appeals Judge*

FINAL DECISION AND ORDER

Duane Halgrimson filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on January 23, 2009. Halgrimson alleged that his employer, Contract Transportation Services (CTS), violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified, when it terminated his employment on June 18, 2008. 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2010).

The STAA protects employees from discrimination when they report violations of commercial motor vehicle safety rules or when they refuse to operate a vehicle when such operation would violate those rules or it would be unsafe. A Department of Labor

Administrative Law Judge (ALJ) dismissed Halgrimson's complaint after granting CTS's motion for summary decision because he found that the complaint was untimely with no grounds for equitable modification and that Halgrimson failed to allege or show that he engaged in protected activity. We agree with the ALJ and affirm his Recommended Decision and Order (R. D. & O.).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under STAA. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board automatically reviews STAA decisions issued on or before August 31, 2009. 29 C.F.R. § 1978.109(c)(1). The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c).

An ALJ's recommended decision granting summary decision is subject to a de novo review. *Hardy v. Mail Contractors of America,* ARB No. 03-07, 2002-STA-022, slip op. at 2 (ARB Jan. 30, 2004). The standard for granting summary decision in our cases is set out at 29 C.F.R. § 18.40 (2010) and is essentially the same standard governing summary judgment in the federal courts. Fed. R. Civ. P. 56. Summary decision is appropriate if "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and a party is entitled to summary decision." 29 C.F.R. § 18.40(c). The determination of whether facts are material is based on the substantive law upon which each claim is based. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact arises when the resolution of the fact "could establish an element of a claim or defense and, therefore, affect the outcome of the action." *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

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 moving party is entitled to judgment as a matter of law. *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). "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.'" *Bobreski*, 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

When a motion for summary decision is made, the party opposing the motion may not rest upon mere allegations or denials of such pleading. 29 C.F.R. § 18.40(c). Rather, the response must set forth specific facts showing that there is a genuine issue of fact for determination at a hearing. *Id.*

DISCUSSION

The STAA provides, "[a]n employee alleging discharge, discipline, or discrimination in violation of . . . this section . . . may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred." 49 U.S.C.A. § 31105(b)(1); *see also* 29 C.F.R. § 1978.102(d). Halgrimson filed his complaint on January 23, 2009, 219 days after CTS terminated his employment on June 18, 2008. Therefore, his complaint was untimely. We agree with the ALJ that Halgrimson failed to present sufficient grounds to apply equitable modification of the filing deadline.

To prevail on a claim under the STAA, the Complainant must prove that: (1) he engaged in protected activity; (2) CTS knew of his protected activity; and (3) CTS took adverse employment action against him because of the protected activity. *See Peters v. Renner Trucking & Excavating*, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009). On summary decision, Halgrimson had to present "specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). In response to CTS's motion for summary decision, Halgrimson did not allege, or proffer any information or evidence to show, that he engaged in any protected activity prior to the date CTS terminated his employment. In fact, Halgrimson admitted in an affidavit that he did not make a complaint prior to CTS's decision to terminate his employment. R. D. & O. at 12. In the absence of protected activity prior to the termination, Halgrimson's claim fails as a matter of law because he cannot show that protected activity caused CTS to take any adverse action against him.

Therefore, given Halgrimson's failure to timely file his complaint, coupled with his failure to present facts showing that there is genuine issue of fact for a hearing, we agree with the ALJ that the complaint must be dismissed.

CONCLUSION

Accordingly, we affirm the ALJ's order granting summary decision and **DENY** Halgrimson's complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge