U.S. Department of Labor

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

In the Matter of:

SHAWN JENNINGS,

COMPLAINANT,

v.

MCLANE COMPANY, INCORPORATED,

RESPONDENT.

ARB CASE NO. 2017-0045

ALJ CASE NO. 2017-STA-00009

DATE: JAN - 7 2020

Appearances:

For the Complainant:
Robert J. Wiley, Esq.; Colin Walsh, Esq.; Austin, Texas

For the Respondent:
Raymond Perez, II, Esq.; *Jackson Lewis P.C.*; Atlanta, Georgia

Before: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie, *Administrative Appeals Judges.*

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended. 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2018) (the STAA's implementing regulations). Shawn Jennings filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on September 13, 2016, alleging that his employer, McLane Company, Incorporated, violated the employee

protection provisions of the STAA when it terminated his employment in retaliation for raising safety concerns. A Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) Granting Respondent's Motion for Summary Decision concluding that Complainant failed to demonstrate the existence of any disputed material fact on an essential element of the claim. Complainant appealed the ALJ's decision.

BACKGROUND[1]

Complainant began working as a driver for McLane in 2000. For fifteen years, Complainant was not written up for working instead of sleeping in the berth, a common practice according to Complainant. Complainant made several complaints of safety issues, including at a company-drivers meeting in November 2015. Thereafter, Complainant received his first infraction after an audit in December 2015 and another one in March 2016. On March 28, 2016, Complainant resigned his employment.

Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) on September 13, 2016 where he alleged that he was terminated in retaliation for reporting safety issues at every quarterly drivers' meeting since 2009. OSHA dismissed his complaint and Complainant requested a hearing before the Office of Administrative Law Judges.

The ALJ, in the D. & O. on May 4, 2017, concluded there was not an issue of material fact regarding whether Complainant was subjected to a hostile work environment or that Respondent acted in such a manner that would communicate to Complainant he would be terminated, an action amounting to a constructive discharge. The ALJ relied, in part, on *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002 (March 30, 2016).

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or Board) has jurisdiction to review the ALJ's STAA decision pursuant to Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); 29 C.F.R. Part 1978.

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[1] The following material is taken from the ALJ's order and the pleadings and depositions associated with the parties' summary decision motions.

The ARB reviews an ALJ's grant of summary decision de novo, applying the same standard that ALJs employ under 29 C.F.R. Part 18.[2] Pursuant to 29 C.F.R. § 18.72, an ALJ must enter summary judgment for a party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that the party is entitled to summary decision.

DISCUSSION

Our consideration of the larger issue of constructive discharge is limited by the posture of the case before us.[3] The ALJ disposed of the claim by summary decision. In deciding on such a motion, the evidence is viewed in the light most favorable to the nonmoving party. When deciding whether to grant a motion for summary decision, we do not weigh the evidence to determine the truth of the matters asserted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (observing "it is clear . . . that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.")

The Board has held that "a genuine issue exists if a fair-minded fact-finder could rule for the nonmoving party after hearing all the evidence, recognizing that in hearings, testimony is tested by cross-examination and amplified by exhibits and presumably more context." *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 7-8 (ARB Oct. 26, 2012); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. It is important to note that denying summary decision because there is a genuine dispute as to a material fact simply means that an evidentiary hearing is required to resolve those issues; it is not an assessment on the merits of any particular claim or defense. *Henderson*, ARB No. 11-013, slip op. at 9. We conduct de novo review to decide whether the ALJ was correct in his

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[2] *Siemaszko v. FirstEnergy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003- ERA-013, slip op. at 3 (ARB Feb. 29, 2012).

[3] Our colleague makes a compelling argument that the decision in *Dietz* was in error as a statement of the law of constructive discharge. However, we believe it premature to analyze *Dietz* considering the present posture of this case and the limited record presented. What is before us at this time is whether the ALJ's summary decision is appropriate in light of the evidence submitted and whether there is a genuine issue of material fact. We decline to go further.

conclusion that no evidentiary hearing was necessary because there was no dispute as to any material fact. Our review of the record in the instant case discloses several disputed material facts.

We note that the record contains conflicting evidence on the issue of possible constructive discharge that requires further proceedings for resolution before the ALJ. To establish constructive discharge, a complainant must show "working conditions [that] 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." *Brown v. Lockheed Martin, Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-049, slip op. at 10 (ARB Feb. 28, 2011). Specifically, we note that in his response to the motion for summary decision, Complainant submitted a declaration of Anthony Phelps, a Corporate Safety Inspector and Jennings's supervisor for seven years. Mr. Phelps stated that safety inspectors/dispatchers can target individuals for safety checks and that Jennings was one of the drivers targeted because he was vocal about things he thought were unsafe or illegal. Phelps Declaration at 2. He also stated that management tried to portray Jennings as a troublemaker and as disruptive and that he heard management state that they did not like Jennings and they wanted him fired. *Id.* In addition, the file contains the following deposition testimony of Jennings that after the first infraction on December 7, 2015, he went to an informal meeting where he was told that "You're on written notice. If you get another one within six months, you're terminated." Jennings Deposition at 131. He also noted that it was not McLane's policy that you "could" be terminated for a second infraction within six months, but rather that you would be terminated. *Id.* In addition, the file contains the declaration of Scott Braden, President of the Southwest Division during relevant time, in which he states that Jennings resigned because he was aware that his violations of FMSCA's hours-of-service requirements were terminable offenses. Braden Deposition at 5.

The record also contains the hearing transcript for proceedings before the Texas Workforce Commission (TWC). Although the ALJ correctly found that he was not bound by the decision of the TWC because it is based on different legal standards, he did not address the factual testimony provided during the proceeding that contradicts the declarations presented to support summary decision. Specifically, Carole Bennett, McLane's Human Resources Manager, testified that a major infraction such as this one requires one final waning and then termination for the second infraction,[4] and Danny Rimburg, Jennings's immediate supervisor,

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[4] TWC H. Tr. at 9.

testified that but for Complainant's quitting on March 28, he would have been fired.[5] The pleadings and evidence submitted in response to the motion for summary decision also includes the original complaint in which Jennings contends that he was given the ultimatum to quit or be fired and the Payroll Administrative Form "Stop payment" dated March 28, 2016 which states that Jennings payment were stopped due to termination.

While the ALJ extensively discussed the undisputed evidence supporting Respondent's motion for summary decision, he did not address any of the conflicting evidence. Viewing the evidence in the light most favorable to the nonmoving party, a reasonable fact finder could find that Jennings's resignation was a constructive discharge. Because Jennings has clearly alleged facts about which there remains genuine dispute, we conclude that the ALJ erred in granting summary decision for Respondent.

CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order Granting Respondent's Motion for Summary Decision is **VACATED** and this case is **REMANDED** to the ALJ for further proceedings consistent with this Decision and Order of Remand.

SO ORDERED.

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[5] TWC H. Tr. at 24.

BURRELL, Administrative Appeals Judge, dissenting

The ALJ granted McClane's motion for summary decision, concluding that there was no genuine issue of material fact that McClane did not constructively discharge Jennings. I would affirm the ALJ's order.

1. The constructive discharge standard

The ARB has held that a showing of "intolerable working conditions" is a required component of constructive discharge. *Martin v. Dep't of Army*, ARB 96-131, ALJ No. 1993-SDW-001 (ARB July 30, 1999) (analyzing constructive discharge and "intolerable" work atmosphere in terms of a reasonable person standard); *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at n.16 (ARB Oct. 31, 2007) ("We agree that constructive discharge can be found when a former employee proves that his resignation was 'compelled' by intolerable circumstances of employment."); *Hoffman v. Nextera Energy, Inc.*, ARB No. 12-062, ALJ No. 2010-ERA-011 (ARB Dec. 17, 2013).

The issue in this case is ARB's modification of the constructive discharge test in *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017. The ARB wrote as follows:

> The legal standard ordinarily used to determine what constitutes a constructive discharge is whether the employer has created "working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign." Constructive discharge is a question of fact, and the standard is objective: the question is whether a "reasonable person" would find the conditions intolerable, and the subjective beliefs of the employee (and employer) are irrelevant.
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> "But that is not the only method of demonstrating constructive discharge. When an employer acts in a manner so as to have communicated to a reasonable employee that [he] will be terminated, and the . . . employee resigns, the employer's conduct may amount to constructive discharge." Under this standard, an employee who can show that the "handwriting is

> on the wall" and the "axe is about to fall" can make out a constructive-discharge claim. . . .

Dietz, ARB No. 15-017, slip op. at 12–13 (internal citations omitted).

The majority mentions *Dietz* in a footnote but remands to the ALJ for further proceedings. At the least, I would clarify *Dietz*, or to the extent that *Dietz* stands for a second, mutually exclusive method of constructive discharge independent of a showing of intolerable working conditions, overrule it.

Dietz quoted the 7th Circuit's *EEOC v. Univ. of Chi. Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002), for the position that there are two methods of constructive discharge—a showing of intolerable working conditions and quitting under threat of termination—and that the second is independent of the first.

Following the *Univ. of Chi. Hosps.* decision, the 7th Circuit clarified that the "second method" was not independent of the first and that intolerable working conditions is a required component of constructive discharge. *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 332–33 (7th Cir. 2004).

In *Cigan*, the school district had identified problems with Cigan's performance and the superintendent had notified Cigan that he would not recommend renewing her contract after the end of the school year. Plaintiff subsequently retired, which improved her benefits package. *Id.* at 332. Plaintiff then sued for damages under a theory of constructive discharge, asserting that working conditions are irrelevant to the issue of constructive discharge when "a prospect of discharge lurks in the background."

The Court concluded that Cigan's theory of constructive discharge was difficult to reconcile with *Pa. State Police v. Suders*, 542 U.S. 129 (2004). The Court clarified that its precedent, *Univ. of Chi. Hosps.*, should not be read like a statute's text; rather, the language follows the facts appropriate to that case:

> This sentence [from *Univ. of Chi. Hosps.*] generalizes from a situation that met the normal standard: an employee arrived at work only to find that her office had been turned into a storage area, her belongings had been packed up, and her services were no longer wanted. We held that failure to sit in the corridor while waiting for someone to say "you have been fired" did not

> preclude an employment-discrimination suit. Just so when a professional employee is relegated to menial tasks and the employer makes it clear that no better treatment can be hoped for. . . .

Cigan, 388 F.3d at 333. Treating "unendurable conditions" as a requirement for constructive discharge, the 7th Circuit noted that Cigan did not make this showing. In fact, Cigan had given six months' notice of her retirement prior to the end of the academic year. *Id.* at 332-33. The 7th Circuit refused to treat the notice of intent to commence a process that may have resulted in Cigan's discharge as equivalent to constructive discharge when there were no other unbearable working conditions such as those present in *Univ. of Chi. Hosps.*

In *Chapin v. Fort-Rohr Motors, Inc.*, the 7th Circuit summarized the constructive discharge standard, as clarified:

> Our circuit has recognized two different forms of constructive discharge, but neither dispenses with the requirement that the work environment had become intolerable. *See Pa. State Police*, 542 U.S. at 141 ("Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes."); *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 333 (7th Cir. 2004); *Univ. of Chi. Hosps.*, 276 F.3d at 332.

Chapin, 621 F.3d 673, 679 (7th Cir. 2010).

Other circuits have also cited intolerable conditions as a component of constructive discharge. *Lee v. Cleveland Clinic Found.*, 676 Fed. Appx. 488, 495 (6th Cir. 2017) (constructive discharge requires a showing of intolerable conditions but finding a genuine issue of fact because of the harassment, racial slurs, and repeated prodding concerning plaintiff's retirement). The dissent in *Lee* cited the 7th Circuit's *Chapin* and *Cigan* cases for the position that a "prospect of discharge lurk[ing] in the background" does not create "intolerable or unbearable" working conditions. An employee cannot quit to short circuit an employer's disciplinary procedures and then litigate those processes as preordained.

Affirming the district court's grant of summary decision for the employer, the 5th Circuit in *Haley v. Alliance Compressor LLC*, 391 F.3d 644 (5th Cir. 2004), cited demotion, reduction in salary, reduction in job responsibilities, badgering, harassment, and humiliation as factors that may support a conclusion that working conditions were "so intolerable" that an employee would be forced to resign. *Id.* at 649–50. Haley had argued before the Circuit that the district court erred in granting summary decision because it refused to properly consider evidence that the employer intended to remove her. The Fifth Circuit agreed with Haley but concluded that the district court did not err in granting summary judgment even when considering the employer's intent to terminate her. Haley's belief that she was a victim of retaliatory discrimination did not create a material fact dispute. *Id.* at 652. Haley did not face the intolerable working conditions accompanying a threat of termination such as demotion or reassignment to degrading or menial work and in fact received a salary increase and was favorably accommodated during the time at issue. *Id.* at 652.

In line with the circuit courts of appeal, in particular the 7th Circuit, which provided the basis of *Dietz*'s holding, I would hold that constructive discharge based on a theory that termination was imminent requires a showing of intolerable work conditions. As the U.S. Supreme Court stated, "[t]he constructive discharge here at issue stems from, and can be regarded as an aggravated case of, sexual harassment or hostile work environment. . . . A hostile-environment constructive discharge claim entails something more: A plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Pa. State Police v. Suders*, 542 U.S. 129, 146–47 (2004).

2. Jennings did not show a genuine issue of material fact that he suffered intolerable working conditions and was forced to resign

The ARB reviews an ALJ's grant of summary decision de novo, applying the same standard that ALJs employ under 29 C.F.R. Part 18. Pursuant to 29 C.F.R. § 18.72, an ALJ may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

On the issue of adverse action, McClane moved for summary decision arguing that constructive discharge requires that Jennings prove that conditions were so difficult or unpleasant that he was forced to resign. McClane Mot. for Summ. Dec.

at 22. Specifically, McClane argued that facing discipline for repeatedly violating company policy is not evidence of an intolerable working condition. Jennings responded to McClane's motions citing *Dietz* and arguing that there was a genuine issue of fact as to whether Jennings would have been fired for the second violation. The ALJ granted McClane's motion, concluding that it was undisputed that Jennings faced neither a hostile work environment nor certain termination.

Reviewing the record, the particular allegations, and the undisputed facts of this case, I would, with the clarification to *Dietz* discussed above, affirm the ALJ's order on the grounds that Jennings did not demonstrate a genuine issue of material fact that he faced intolerable working conditions forcing him to quit. *Haley*, 391 F.3d at 653 n.2 (affirming ALJ's order granting summary judgment despite error); *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1361–62 (D.C.Cir.1982); *Canter v. Maverick Transp., LLC*, ARB No. 11-012, ALJ No. 2009-STA-054, slip op. at n.5 (ARB June 27, 2012) (affirming ALJ on alternate grounds despite error).

The ALJ identified as an undisputed fact that Jennings stated "he was treated fine by his lead and /or supervisor." D. & O. at 5. This is supported by the record and by Jennings' testimony. The record does not reveal a disputed issue of material fact as to whether Jennings faced unbearable working conditions forcing him to resign such as demotion, degrading or menial assignments, racial or other forms of harassment, taunting about quitting, threats to personal safety, and so on. Jennings testified that he felt that he was being targeted by McClane with compliance audits for complaining about safety problems. Jennings' Dep. at 105 (Jennings faced obstacles and hassles from various departments). Jennings further complained of abnormal activities such as his supervisor not being friendly and casual with him, paying less attention to him, and not looking him in the eye. Jennings' Dep. at 105-06. Jennings was concerned about his vacation pay being handled differently but he could not recall the details. Jennings' Dep. at 107. Jennings explained that he "cannot prove that anybody targeted me or was out to get me. Again, I state that procedural events happened that were unusual that didn't happen before I brought up that issue." Jennings' Dep. at 108. These unsupported and subjective allegations do not create a genuine issue of material fact that Jennings faced intolerable working conditions forcing him to quit.

Indeed, Jennings does not allege that he quit in the face of intolerable or unbearable working conditions. Jennings testified that he "had not been given an ultimatum to quit or be fired." Jennings' Dep. at 194. Jennings testified that no one threatened to terminate him for his violation. Jennings' Dep. at 149. Rather,

Jennings testified that he quit in lieu of being terminated for hours-of-service violations. Jennings' Dep. at 105 ("I quit in lieu of being fired [for] working out of the bunk..."). [6] The record reveals that it is undisputed that Jennings violated company policy and DOT rules (Jennings' Dep. at 61–71, 128–29, 220–21), was warned of the consequences for violating them in the future (Jennings' Dep. at 131), and violated that policy within a short time of the initial violation and warning (Jennings' Dep. at 132). Jennings preemptively contacted McClane to inform them that he was quitting. Jennings conceded that had he not been caught working out of the bunk in violation of hours rules, he would not have quit. Jennings' Dep. at 192–93.

Jennings resigned in lieu of a process that may have resulted in his termination, not that intolerable working conditions were present or the "axe was about to fall." The ALJ identified as undisputed that McClane had not yet made up its mind or held meetings concerning Jennings' discipline. While McClane's policy provides that second offenses require termination, employees with more than fifteen years of service receive a second layer of review by the president of the division. D. & O. at 6–7. This is supported by the record. McClane Mot. for Summ. Dec. (Braden Decl.; Rimberg Decl.).

The 7th Circuit's *Cigan* and *Chapin* cases make the point that one cannot short circuit a disciplinary process that may result in termination by quitting but litigating termination nonetheless. Allowing an employee to quit before a termination process concludes so that the employee can enjoy better future employment options but yet be free to pursue damages against the employer encourages jumping the gun. We do not know what McClane would have done in the first and second layers of its disciplinary processes. Moreover, the investigative and disciplinary processes that accompany a final personnel decision are often central to subsequent litigation. To counteract this incentivization to quit and litigate

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[6] Alternatively, Jennings claimed that he quit because McClane did not address what Jennings perceived to be safety violations. Jennings testified that he resigned because nothing had changed despite the multiple times that he had raised safety violations with McClane; the division was not "fixing these things." Jennings' Dep. at 145, 148, 188 ("I was resigning because there was multiple times that I had brought up the same safety issues.), 189–90 ("I left because Scott Braden refused to change any of the safety issues that anybody ever brought up and that I knew I was going to be fired for being caught twice in six months. That's why I quit, because I was tired of dealing with Scott Braden, with coming to work and having to deal with safety issues.... Quitting looked better for me in a future employment."); *see also id.* at 187–88.

discharge, the law of constructive discharge requires that hostile or intolerable conditions be present forcing the employee to quit.

Jennings argues that McClane's compliance audits were in retaliation for his safety complaints. It is difficult to see how McClane's safeguarding DOT's hours-of-service rules and employer policy can constitute evidence of an intolerable work environment or how Jennings's multiple violations can be transformed into McClane's hostile acts. It is undisputed that Jennings violated the hours-of-service rules multiple times. Jennings conceded that he had received a warning in December, after the first violation, that if he violated the rule again within six months, he would be fired. Jennings' Dep. at 131. Under these facts, it seems reasonable and not hostile for an employer to conduct audits of his time to ensure against violations. Department of Transportation rules require that both drivers and employers comply with hours-of-service rules. 49 C.F.R. § 395.

I respectfully dissent and would affirm the ALJ's grant of summary decision.