

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 March 2008

Case No: 2008-STA-00002

In the Matter of

REBECCA S. CLAYPOOLE,
Complainant

v.

U.S. XPRESS ENTERPRISES, INC.,
Respondent

RECOMMENDED ORDER OF DISMISSAL

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended, 49 U.S.C. § 31101 *et seq.* and the regulations published at 29 C.F.R. Part 1978. The procedural regulations pertinent to this matter are set forth at 29 C.F.R. Part 18.

Rebecca S. Claypoole filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) alleging that U.S. Xpress Enterprises, Inc. terminated her employment in violation of the STAA. That complaint was investigated by OSHA and the complaint was denied on August 31, 2007. Ms. Claypoole, by letter mailed on September 29, 2007, requested a hearing before the Office of Administrative Law Judges. Her address was listed on the mailing envelope and on her letter as 3100 Areca Avenue, #6, Naples, Florida 34112.

By Notice dated November 23, 2007, this case was scheduled for hearing on January 22, 2008 at Ft. Myers, Florida. That hearing subsequently was continued pursuant to a motion of the respondent. By Order dated January 17, 2008, I rescheduled the hearing to be held at Ft. Myers, Florida on March 14, 2008. I provided in that order that the parties were to complete discovery by February 29, 2008 and file pre-hearing submissions 15 workdays prior to the scheduled hearing. That order was served on the complainant at 3100 Areca Avenue, #6, Naples, Florida 34112.

Respondent, through counsel, Russell W. Gray, filed a Motion for Expedited Status Conference on February 6, 2008. Mr. Gray explains in the motion that he had attempted to serve discovery requests upon the complainant at the address listed on the service sheet of the order scheduling the case for hearing, but that his attempt was unsuccessful as the mail was returned and marked as “undeliverable.” He attached to the motion copies of the envelope addressed to the complainant at that address. Respondent’s counsel also attempted to serve discovery requests upon the complainant on January 17, 2008 at P.O. Box 9925, Naples, Florida 34101, after Mr. Gray obtained this alternative address from the Department of Labor. Respondent’s counsel states that the U.S. Post Office’s website indicates that respondent’s mail had not been delivered, but that a notice was left for Ms. Claypoole. Also attached to the motion is a copy of the evidence documenting this attempt by respondent’s counsel. Mr. Gray finally explains that he unsuccessfully attempted to reach the complainant by telephone at two different numbers. For these reasons, he requested a telephone conference to discuss the matter.

Rather than conduct a telephone conference, I issued an Order to Show Cause on February 12, 2008 requiring the complainant to advise me within ten days of her current mailing address and her current telephone number or show cause why her complaint should not be dismissed. That order was sent to Ms. Claypoole by certified mail, return receipt requested, at the Areca Avenue address in Naples, as well as the post office box listed in the respondent’s motion. As of this date, I have received no response from the complainant. Also, complainant has not filed any pre-hearing submissions pursuant to the order setting the case for hearing dated January 17, 2008.

Conclusions

The record shows that all of the orders issued to the complainant and respondent’s discovery requests were properly mailed to complainant’s last known address. *See* 29 C.F.R. § 18.3. Since I have received no communication from the complainant, I have no choice but to dismiss her complaint. It is provided in 29 C.F.R. § 18.39(b) that a request for hearing may be dismissed upon its abandonment by the party who filed it. Moreover, an administrative law judge has the discretion under 29 C.F.R. § 18.6(d)(2)(v) to dismiss a STAA complaint after a complainant has ignored an administrative law judge’s discovery or other orders. *See Dickson v. Butler Motor Transit*, ARB No. 02-098, ALJ No. 01-STA-039, Slip Op. at 4 (ARB July 25, 2003). The Administrative Review Board has also held with respect to a complaint filed under the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1998) that it is proper to dismiss a complaint on the grounds of abandonment where the complainant has failed to provide a new mailing address and telephone number or respond to an order to show cause. *McCrumb v. Westinghouse Radiological Services, Inc.*, 89-ERA-42 (Sec’y Apr. 9, 1992). That Administrative Review Board has acknowledged the “inherent power” of the triers-of-fact to dismiss a case upon their own initiative. *Rose v. ATC Vancom, Inc.*, ARB No. 05-091 (Aug. 31, 2006).

In view of the complainant's failure to keep the Office of Administrative Law Judges and the respondent apprised of her current address and telephone number, I find that a dismissal under 29 C.F.R. § 18.39(b) on grounds of abandonment to be the proper course of action in this case. With such a finding, it follows that OSHA's August 31, 2007 determination regarding Ms. Claypoole's complaint is reinstated.

ORDER

For the above-stated reasons, IT IS HEREBY RECOMMENDED that the complaint filed by Rebecca S. Claypoole under the provisions of Section 405 of the Service Transportation Assistance Act, 49 U.S.C. § 31105, be dismissed on the grounds of abandonment under 29 C.F.R. § 18.39(b) and that the August 31, 2007 determination of the U.S. Department of Labor, Occupational Safety and Health Administration, be reinstated as the final order in this matter.

IT IS FURTHER ORDERED that the hearing scheduled for March 14, 2008 at Ft. Myers, Florida is cancelled.

A

DONALD W. MOSSER
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Order of Dismissal, along with the administrative file, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Suite S-5220, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, para. 4.c(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Order of Dismissal, the parties may file briefs with the Administrative Review Board (Board) in support of, or in opposition to, the administrative law judge's order, unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109 (c)(2). All further inquiries and correspondence in this matter should be directed to the Board.