U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 November 2014

Case No.: **2014-FRS-30**

In the Matter of:

CURTIS J. WAGER,
Complainant,

v.

CSX TRANSPORTATION,
Respondent.

DECISION AND ORDER GRANTING THE RESPONDENT'S MOTION FOR SUMMARY DECISION, DISMISSING THE CLAIM

This claim is before me on the Respondent's motion for summary decision filed on October 1, 2014. The motion was accompanied by a memorandum in support and seven exhibits. The motion was served on the Complainant on September 30, 2014. Under the scheduling order governing these proceedings, the Complainant's response was due on October 31, 2014. *See* Order on Telephone Conference Held on January 28, 2014, issued on March 13, 2014. As of the date of this decision and order, more than 45 days have passed since the response was due. But the Complainant has neither responded to the motion, nor requested an extension of time to do so.

The standard for summary decision under the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges is similar to the standard that governs summary judgment in federal courts under Fed. R. Civ. P. 56.[1] The Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise … show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."[2] A material fact is one whose existence affects the outcome of the case.[3] The nonmoving party creates a genuine issue of fact by producing sufficient evidence to require a hearing to resolve the parties' differing versions.[4] The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case."[5] The burden then shifts to the nonmoving

[1] *See* 29 C.F.R. §§ 18.1, 18.40 (2014), and Fed. R. Civ. P. 56(c).
[2] 29 C.F.R. § 18.40(d).
[3] *Reddy v. Medquist, Inc.*, ARB No. 04-123, slip op. at 4 (Sep. 30, 2005) (SOX) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).
[4] *Id.*
[5] *Celotex v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

party, who must go beyond the pleadings and present affirmative evidence to show a genuine issue of material fact exists.[6]

Having reviewed the motion, I find that the Respondent has provided sufficient evidence to meet its burden if not rebutted. The Complainant has failed to respond, and thus has not provided any affirmative evidence to show a genuine issue of material fact. Thus I find that the Respondent's motion should be **GRANTED**.

IT IS THEREFORE ORDERED that the Respondent's Motion for Summary Decision filed on October 1, 2014, is **GRANTED**. The claim is **DISMISSED**.

Digitally signed by Alice Craft
DN: CN=Alice Craft, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

Alice M. Craft
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points

[6] *Anderson*, *supra*, 477 U.S. at 257.

and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1982.110(a) and (b).