



Issue Date: 28 June 2005

CASE NO.: 2005-STA-16

IN THE MATTER OF

SCOTT DENDY

Complainant

v.

HAR-CON CONSTRUCTION CORPORATION

Respondent

**RECOMMENDED DECISION AND ORDER
GRANTING SUMMARY DECISION**

On April 15, 2005, Respondent filed a Motion for Summary Judgment arguing that: (1) Complainant has not shown that he suffered any adverse employment action; (2) Respondent was not aware of any protected activity by Complainant; and (3) that Complainant's contempt for this matter evidences his intent that this matter be dismissed.

On April 15, 2005, an Order issued to Complainant to show cause, by April 22, 2005, why Respondent's motion should not be granted. On April 22, 2005, a telephonic conference call was held with the parties in which the show cause date was extended to May 9, 2005 and to allow Complainant to seek representation. On May 5, 2005, Counsel for Complainant was enrolled and an extension to respond to the show cause order was granted to June 9, 2005.

On June 9, 2005, by facsimile, Complainant filed a brief in response to Respondent's motion with attached documentary evidence, statements and affidavits. Complainant cataloged his alleged protected activity while employed with Respondent and his perception that his employment had been terminated.

On June 14, 2005, Respondent filed a reply to Complainant's Response. Respondent reiterates that Complainant is on workers' compensation leave, has not been terminated from his employment with Respondent and is eligible to return to his job upon completing his workers' compensation leave.

DISCUSSION

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d)(2001). See, e.g. Stauffer v. Wal Mart Stores, Inc., Case No. 99-STA-21 (ARB Nov. 30, 1999)(under the Act and pursuant to 29 C.F.R. § 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); Webb v. Carolina Power & Light Co., Case No. 93-ERA-42 @4-6 (Sec'y July 17, 1995). This section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party (i.e., Complainant), and Respondent must be entitled to prevail as a matter of law. Gillilan v. Tennessee Valley Authority, Case Nos. 91-ERA-31 and 91-ERA-34 @ 3 (Sec'y August 28, 1995); Stauffer, supra.

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. Id. at 324. Again, the determination of whether a genuine issue of material fact exists must be made by viewing all evidence and factual inferences in the light most favorable to Complainant. Trieber v. Tennessee Valley Authority, Case No. 87-ERA-25 (Sec'y Sept. 9, 1993).

The purpose of a summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Where the record taken as a whole could not lead a trier of fact

to find for the non-moving party, there is no genuine issue for trial. Id. 587.

In considering the appropriateness of a motion for summary decision under the employee protection provisions of the Energy Reorganization Act, provisions which are analogous to those applicable in this matter, the Secretary has noted that where there is no protected activity nor any discrimination as a result of protected activity, there is no cause of action. Richter v. Baldwin Assocs., Case No. 84-ERA-9 @ 3 (Sec'y Mar. 12, 1986). Under Richter, "any facts which are probative of whether a complainant engaged in protected activity or whether adverse action taken against the complainant was in retaliation for a protected activity are material facts. A dispute as to such probative facts demands the denial of a motion for summary decision and requires that a hearing be held to resolve the disputed facts." Id. The Secretary amplified this standard in Bassett v. Niagara Mohawk Power Co., Case No. 86-ERA-2 (Sec'y. July 9, 1986), wherein she stated that "it is not required that every element of a legal cause of action be set forth in an employee's . . . complaint." Id. @ 4. Here, there is no affirmative evidence that any discriminatory termination has been implemented against Complainant.

Lastly, the U.S. Supreme Court has cautioned that "summary procedures should be used sparingly . . . where motive and intent play lead roles . . . It is only when witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." Pollar v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 Sup. Ct. 486, 491 (1962).

Accordingly, in order to withstand Respondent's Motion, it is not necessary for Complainant to prove his allegations. Instead, he must only allege the material elements of his **prima facie** case. Bassett, @ 4. Whether the alleged acts actually occurred or whether they were motivated by the requisite animus are matters which cannot be resolved conclusively until after the parties have presented their evidence at a formal hearing.

Complainant provided a sworn affidavit which reflects various alleged threats made to him by Respondent's supervisors. He does not affirm that any official of Respondent ever acted to fulfill any alleged threat or to terminate his employment with Respondent. Complainant apparently continues in his workers' compensation leave status.

Complainant has produced only hearsay statements from third-party witnesses who have been purportedly informed by others, who have no authority to implement adverse employment action, that Complainant no longer has a job with Respondent. The principals who have the requisite authority to terminate Complainant's employment affirm that he has not been terminated, is presently on workers' compensation leave, and upon release from such leave, may return to his former job. Since it is evident from the record before me that Respondent has not terminated Complainant, or implemented any other adverse action, hearsay evidence aside, I find and conclude that Complainant has not established that he has suffered adverse employment action, much less discriminatory action. There is no cause of action under the STAA when there has been no adverse employment action.

Accordingly, Respondent's Motion for Summary Decision is hereby **GRANTED**. Further, Complainant's complaint is **DISMISSED**.

ORDERED this 28th day of June, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).