

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 January 2009

Case No: 2008-STA-00055

In the Matter of:

KENNETH J. MENELEE,
Complainant,

v.

TANDEM TRANSPORT CORPORATION and
LOWE'S COMPANIES, INC.,
Respondents

APPEARANCES:

Kenneth J. Menefee, *Pro se*

Justin A. Morocco, Esquire
For Tandem Transport Corporation

Jaime Landrum Powell, Esquire
For Lowes, Inc.

BEFORE: JOSEPH E. KANE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION
AND DISMISSING COMPLAINT

This case involves alleged violations of the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA"), 49 U.S.C. § 31101, *et. seq.*, and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978. On February 22, 2008, Kenneth J. Menefee ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA"), alleging that his employer, Tandem Transportation and Lowes Companies, Inc., ("Respondents") violated the Act by terminating his employment.

Procedural History

Complainant's complaint was contained in a letter dated February 22, 2008 and received by OSHA on March 7, 2008, in which Complainant alleged that he was terminated on November 9, 2007 because of his "repeated requests of the Lowes [distribution center] to properly stack the loads on the trailer according to Tandem Transport's guidelines and procedures for all load pick-up" and for his "persist[ence] with ensuring that all documents were appropriately signed by Lowes [distribution center] and stores of which [sic] often times became drawn and cumbersome." On May 5, 2008, Complainant further alleged that he was fired for asking whether a run was legal.

On May 6, 2008, OSHA, acting on behalf of the Secretary of Labor, issued written findings and a preliminary order pursuant to 29 C.F.R. § 1978.104. OSHA found that most of Complainant's complaints were not protected under the STAA. To the extent Complainant did engage in protected activity, OSHA determined that there was no causal nexus between such activities and Complainant's termination. Complainant timely filed an objection and the matter was referred to the undersigned for a formal hearing pursuant to 29 C.F.R. § 1978.105.

On December 3, 2008, Respondents filed a "*Motion to Dismiss or in the Alternative . . . for Summary Decision.*" Respondents contend that Complainant was terminated solely for legitimate reasons, including poor performance and inappropriate behavior, and that he did not engage in any activity protected by the STAA. Respondent's motion is not accompanied by any supporting affidavits.

Applicable Law

I. *The STAA*

The STAA, 49 U.S.C. § 31105(a)(1), prohibits covered employers from retaliating against employees who engage in certain protected activity relating to commercial motor vehicle safety and security. "Congress enacted the STAA to combat the increasing number of deaths, injuries and property damage resulting from commercial trucking accidents." *Roadway Express, Inc. v. United States Dep't of Labor*, 495 F.3d 477, 480 (7th Cir. 2007) (citing *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 282 (1987) (internal quotations omitted); see also *Brinks, Inc. v. Herman*, 148 F.3d 175, 179 (2d Cir. 1998) ("Congress sought to assure that employees are not forced to drive unsafe vehicles or commit unsafe acts and to provide protection for those employees who are discharged or discriminated against for exercising their rights and responsibilities") (internal quotations omitted).

Courts and the Board have generally applied the familiar *McDonnell-Douglas* burden-of-proof framework to STAA retaliation cases. *Bettner v. Admin. Review Bd.*, 539 F.3d 613, 621 (7th Cir. 2008) (citing *Feltner v. Century Trucking, Ltd.*, ARB No. 03-118 (Oct. 27, 2004)); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987); *Blackann v. Roadway Exp., Inc.*, 159 Fed. Appx. 704, 707 (6th Cir. 2005). Under this framework, the complainant may proceed under either the direct or indirect method of proof. *Bettner v. Crete Carrier Corp.*, ARB

No. 06-013, slip op. at 14 (May 24, 2007), *aff'd*, 539 F.3d at 621; *Hasan v. United States Dep't of Labor*, 400 F.3d 1001, 1004 (7th Cir. 2005). If the employee elects to proceed under the indirect method of proof, he must first establish a prima facie case of retaliation by demonstrating: (1) that he engaged in protected activity; (2) that his employer was aware of his protected activity; (3) that his employer took adverse employment action against him; and (4) that a causal link exists between his protected activity and the employer's adverse action. *Moon*, 836 F.2d at 229; *Coates v. Southeast Milk, Inc.*, ARB No. 05-050, slip op. at 6 (July 31, 2007). The employer must then come forward with a legitimate non-discriminatory reason for taking the adverse action, which the employee must prove was in fact a pretext for illegal discrimination. *Moon*, 836 F.2d at 229; *Bettner*, 539 F.3d at 621.

However, recent amendments to the STAA state that complaints shall be “governed by the legal burdens of proof set forth in [49 U.S.C. §] 42121(b),” the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. Under this framework, an employee must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. 49 U.S.C. § 42121(b)(2)(B)(iii). If the employee establishes these four elements, the employer may avoid liability if it can prove “by clear and convincing evidence” that it “would have taken the same unfavorable personnel action in the absence of that [protected] behavior.” 49 U.S.C. § 42121(b)(2)(B)(iv).

“This ‘independent burden-shifting framework’ is distinct from the *McDonnell-Douglas* burden-shifting framework applicable to Title VII claims.” *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008); *See also Jones v. United States Dep't of Labor*, 148 Fed. Appx. 490, 495 (6th Cir. 2005) (*citing Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999)). Accordingly, I will use the general framework provided by 49 U.S.C. § 42121(b)(2)(B)(iv). However, the Board has held that the framework set forth at 49 U.S.C. § 42121(b) does “not foreclose use, as appropriate, of ‘established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof.’” *Peck v. Safe Air International, Inc.*, ARB No. 02-028, slip op. at 9 (Jan. 30, 2004) (*quoting Kester v. Carolina Power & Light Co.*, ARB No. 02-007, slip op. at 5-8 (Sept. 30, 2003)). Therefore, in discussing the causation element of Complainant’s claim, I will invoke, as appropriate, principles and terminology used in pretext analysis in Title VII retaliation cases.

II. Summary Decision

Respondents’ motion asserts that there is no evidence to support Complainant’s claims; therefore, it is properly considered as a motion for summary decision rather than a motion to dismiss. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). My December 5, 2008 Order notified Complainant that I would be treating the motion as one for summary decision, fulfilling any notice requirement imposed by Rule 12(d) of the Federal Rules of Civil Procedure.

The standard for granting summary decision under the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges is similar to that found in Fed. R. Civ. P. 56, which governs summary judgment in the federal courts. *Saporito v. Cent. Locating Servs, Ltd.*, ARB No. 05-004, slip op. at 6 (Feb. 28, 2006). “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. . . .” 29 C.F.R. § 18.40(d)(emphasis added).

The determination of whether a fact is material is based on the substantive law upon which the claim is based. *Saporito*, slip op. at 5 (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A material fact is one that might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine if the evidence is such that a reasonable factfinder could return a verdict for either party. *Id.* “[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.” *Reddy v. Medquist, Inc.*, ARB No. 04-123, slip op. at 5 (Sep. 30, 2005) (*citing Celotex* 477 U.S. at 322-23 (1986)). “When a motion for summary decision is made and supported . . . a party opposing the motion may not rest upon the mere allegations or denials of [the] pleading[s]. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.” 29 C.F.R. § 18.40(c).

Discussion and Analysis

I. Whether Complainant Engaged in Protected Activity

Complainant must first demonstrate that he engaged in activity protected by the STAA. The Act protects employees in the following five scenarios:

- (A) (i) the employee, or another person at the employee’s request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the [employer] perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

- (B) the employee refuses to operate a vehicle because--
 - (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
 - (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

49 U.S.C. § 31105(a)(1). Subparagraphs (A) and (B) protect activity that is substantially similar to activity protected by the prior version of the statute codified at 49 U.S.C. § 31105(a)(1), subparagraphs (A) and (B) (2006). The amended statute protects three additional categories of activity described at Subparagraphs (C), (D), and (E). *Sacco v. Hamden Logistics, Inc.*, ALJ No. 2008-STA-43 (Nov. 17, 2008) (*citing* Pub.L. 110-53, Title XV, § 1536, 121 Stat. 464 (Aug. 3, 2007)).

Complainant alleges that he had “multiple discussions with Tandem management regarding the irresponsible and negligent loading procedure by Lowe’s staff,” and that he “continually questioned Tandem’s way of deciding how the loads were to be picked up and delivered because it required frequent long hour drives to meet delivery time constraints.” Complainant alleges that “Tandem continually disregarded [his] questioning of Lowes’ documentation procedures.” Complainant explains:

I believed that Lowes did not want to address safety and regulatory issues and possibly perceived that I was going to contact federal regulators regarding their employee’s constant negligence and inability to follow safety codes. I believe Tandem perceived an additional threat as to the frequent questioning, picture taking, and possible termination of a contract with Lowes.

Complainant does not allege that he refused to drive a truck at any time. Therefore, subparagraph (B) is inapplicable. Complainant does not make any allegations with respect to accurately reporting hours; therefore, subparagraph (C) is also inapplicable. Additionally, Complainant does not present any evidence of a pending safety or security investigation or any factual basis for finding that Respondents perceived that Complainant was about to testify in any proceeding; therefore, subparagraph (D) is not applicable. Although Complainant speculates that Lowes “possibly perceived” that he was going to “contact federal regulators,” he does not identify the basis for this suspicion, nor does he present evidence that he in fact contacted or intended to furnish information to any of the agencies listed in subparagraph (E), nor is there evidence that an accident or injury occurred which resulted in injury or death to any individual or

damage to property in connection with motor vehicle transportation. Therefore, subparagraph (E) is also inapplicable.

This leaves subparagraph (A), which is substantially similar to the former version of the statute codified at 49 U.S.C. § 31105 (a)(1)(A)(2006). That provision has been construed by courts and the Board to extend to “an employee’s internal complaint to superiors conveying his reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation.” *Clean Harbors Env’t Serv., Inc. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998) (citing *Stiles v. J.B. Hunt, Transp. Inc.*, No. 92-STA-34 (Sec’y Sep. 24, 1993)).

Complainant’s vague references to, “irresponsible and negligent loading procedure[s],” “frequent long hour drives,” “documentation procedures,” “negligence and inability to follow safety codes,” frequent questioning,” and “picture taking” do not establish a material issue of fact as to whether Complainant engaged in protected activity as defined by subparagraph (A). Addressing 49 U.S.C. § 42121 in the context of a Sarbanes-Oxley whistleblower case, the Fourth Circuit has held that “the employee’s communications must identify the specific conduct that the employee believes to be illegal,” and that “[g]eneral inquiries do not constitute protected activity.” *Welch v. Chao*, 536 F.3d 269, 276-77 (4th Cir. 2008) (internal quotation marks, omissions, and citations omitted). Complainant fails to identify the action that he believed to be illegal, nor does he present any evidence supporting a reasonable belief that any of the complained-of acts were illegal. While Complainant need not establish that an actual violation occurred, he must present more than vague statements that he had “discussions” with and “question[ed]” his supervisors. Without more detail as to the nature and content of Complainant’s discussions and questioning, I am unable to determine whether such activity is protected under the STAA.

Complainant has also filed various documents as part of his pre-hearing submission, including delivery receipts, bills of lading, vehicle weight certificates, violation documents, work orders, trip activity logs, photographs, and other documents, some of which contain various notations such as, “Every time I delivered a truck to this particular store [sic].” To the extent these submissions can properly be considered as responsive material under 29 C.F.R. § 18.40, I am unable to discern how they support Complainant’s allegation that he engaged in activity protected by the STAA. Similarly, Complainant’s reference in his responsive brief to “multiple statements from [himself]” is of no help. The record contains no statements or affidavits from Complainant or any other person in support of his claim.

Complainant was given explicit notice that he must submit evidence and set forth “specific facts” in support of his claim to avoid summary decision. In light of his failure to do so, Complainant has not shown that a genuine issue of fact exists as to whether he engaged in protected activity under the STAA.¹

¹ Complainant’s response in this case exemplifies the concerns expressed by the court in *Jacobsen v. Filler*, 790 F.2d 1362 (9th Cir.1986) regarding the pitfalls associated with a trial court assisting a *pro se* litigant in appropriately responding to a motion for summary judgment:

II. *Whether Respondents Knew that Complainant Engaged in Protected Activity*

To demonstrate a causal connection between his protected activity and his termination, Complainant must necessarily show that his employer knew of his protected activity. Specifically, he “must show that an employee with authority to take the adverse action, or an employee with substantial input in that decision, knew of the protected activity.” *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, slip op. at 9 (Sep. 30, 2003). Complainant’s allegation that he made complaints to unspecified supervisors is sufficient to create the existence of a material issue of fact on this issue.

III. *Whether Complainant Suffered an Unfavorable Personnel Action;*

Complainant must next establish that he was subjected to a “materially adverse,” employment action. *Melton v. Yellow Trans., Inc.*, ARB No. 06-052, slip op. at 20 (Sep. 30, 2008) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). Termination from employment is, without question, materially adverse. Since Complainant has alleged and Respondents do not dispute that Complainant was terminated, Complainant has established this element of his claim.

IV. *Whether Complainant’s Protected Activity was a Contributing Factor in his Termination.*

Complainant must next demonstrate that his protected activity was a “contributing factor” in the unfavorable personnel action. A contributing factor is “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *Allen v. Stewart Enter., Inc.*, ARB No. 06-081 (July 27, 2006) (citing *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)).

An employee establishes a prima facie case of unlawful discrimination under the STAA by proving: (1) that he engaged in protected activity; (2) that his employer was aware of his protected activity; (3) that his employer took adverse employment action against him; and (4) that a causal link exists between his protected activity and the employer’s adverse action. See *Moon*, 836 F.2d at 229; *Blackann*, 159 Fed Appx. at 707; *Coates v. Southeast Milk, Inc.*, ARB No. 05-050, slip op. at 6 (July 31, 2007). I have already analyzed the first three elements of the

It is not sensible for the court to tell laymen that they must file an ‘affidavit’ without at the same time explaining what an affidavit is; that, in turn impels a rudimentary outline of the rules of evidence. Unlike the conversion of a 12(b)(6) motion into a motion for summary judgment, which only requires notice of what the motion now is, [the rule] requires advice as to what the motion must mean. To give that advice would entail the district court’s becoming a player in the adversary process rather than remaining its referee.

Id. at 1365-66; see also *Martin v. Harrison County Jail*, 975 F.2d 192, 193 (5th Cir. 1992) (holding that the language of the summary judgment rule is itself sufficient and that no additional assistance from the court should be required).

prima facie case and found that Complainant has failed to present sufficient evidence with respect to the protected activity element. This would subject the claim to dismissal pursuant to 29 C.F.R. § 18.40. Nonetheless, in the interest of judicial economy, I will proceed to discuss the causation element of Complainant's claim.

Initially Complainant need only "proffer evidence sufficient to raise the inference that [his] protected activity was the likely reason for the adverse action." *Blackann*, 159 Fed Appx. 704, 709 (6th Cir. 2005) (Cole, J., concurring) (citing *Avery Dennison Corp.*, 104 F.3d at 861 (citations omitted)). "Although no one factor is dispositive in establishing a causal connection, evidence that defendant treated the plaintiff differently from similarly situated employees or that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant to causation." *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000); *Blackann*, 159 Fed Appx. 704 at 709 (Cole, J., concurring)(citing *Moon*, 836 F.2d at 230). At this stage, the court does not consider the employer's alleged nondiscriminatory reason for taking the adverse employment action; to do so would bypass the burden-shifting analysis and deprive the plaintiff of the opportunity to show that the nondiscriminatory reason was in actuality a pretext designed to mask discrimination. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 660-61 (6th Cir. 2000). As with other elements of Complainant's claim, his failure to set forth adequate details or specific facts in support of his claim precludes any finding that a causal connection existed between any protected activity and Complainant's termination.

Assuming that Complainant could establish that he engaged in protected activity and that there was a causal connection between his protected activity and his termination, an inference would arise that Complainant's termination was discriminatory, and Respondents would be required to come forth with one or more legitimate non-discriminatory reasons for their actions. *Bettner*, 539 F.3d at 621; *Moon*, 836 F.2d at 229. Tandem asserts that Complainant was fired because of his overall performance and attitude toward customers, as well as his expulsion from Lowes facilities, making it impossible for him to carry out his job responsibilities. Lowes asserts that Complainant was barred from Lowes facilities because of his uncooperative and disruptive behavior at a Lowes facility. If true, these are legitimate non-discriminatory reasons for terminating Complainant. Accordingly, Respondents have rebutted any inference that could arise had Complainant successfully demonstrated a causal link between his protected activity and his termination.

Once the employer offers a legitimate non-discriminatory reason for the challenged action, any presumption or inference of illegal discrimination dissolves, and the burden falls to Complainant to prove by a preponderance of the evidence Respondents' asserted reasons are pretextual and that illegal discrimination was a factor that motivated the Respondents to terminate Complainant. *Bettner*, 539 F.3d at 621; *Moon*, 836 F.2d at 229. An employee can demonstrate pretext by showing that the proffered reason: (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct. *Imwalle v. Reliance Med. Prod., Inc.*, 515 F.3d 531, 545 (citing *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)); *Blackann*, 159 Fed Appx. at 709 (6th Cir. 2005) (Cole, J., concurring).

Although Complainant alleges that the asserted reasons for his termination have no basis in fact, he does not provide any additional details or facts to establish that illegal retaliation was a contributing factor in Respondents' decisions. Accordingly, even if Complainant could establish the necessary threshold elements of his claim, he has failed to demonstrate that a material issue of fact exists on the ultimate question of whether his protected activity was a contributing factor in Respondents' decision to terminate his employment.

Conclusion

In an order dated December 5, 2008, Complainant was advised of the potential consequences of Respondents' motion for summary decision. The order quoted 29 C.F.R. § 18.40, advising Complainant of his obligation to respond to the motion and "set forth specific facts showing that there is a genuine issue of fact for the hearing." "In considering a motion for summary judgment, the district court is not required to scour the record in search of evidence to defeat the motion; the nonmoving party must identify with reasonable particularity the evidence upon which the party relies." *Winters v. Fru-Con, Inc.*, 498 F.3d 734, 744 (7th Cir. 2007); *Wardle v. Lexington-Fayette Urban County Gov't*, 45 Fed. Appx. 505, 509 (6th Cir. 2002). Complainant's response failed to set forth any specific facts or identify the evidence that supports Complainant's claims. Thus, Complainant has failed to show that there is genuine issue of fact as to whether he engaged in protected activity, whether there was causal connection between that activity and his termination, and ultimately, whether his protected activity was a contributing factor in Respondents' termination of Complainant's employment.

Accordingly, IT IS HEREBY RECOMMENDED that summary decision be entered in favor of Respondents pursuant to 29 C.F.R. § 18.40(d) and that Complainant's claim be DISMISSED.

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JOSEPH E. KANE
Administrative Law Judge

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

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision 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.

