

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 June 2009

CASE NO.: 2008-STA-41

In the Matter of:

DANIEL M. SALATA
Complainant

v.

CITY CONCRETE, LLC
Respondent

**RECOMMENDED ORDER GRANTING RESPONDENT'S MOTION FOR
SUMMARY DECISION**

This case arises under Section 405 of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C. § 31105, and its implementing regulations, 29 CFR Part 1978. Daniel Salata (Complainant) initially filed a complaint on August 10, 2007 alleging that City Concrete, LLC (Respondent) discriminated against him in violation of the STAA. See, *Salata v. City Concrete, LLC*, 2008-STA-12 (ALJ June 18, 2008). A formal hearing was held by Administrative Law Judge (ALJ) Richard A. Morgan, who issued a Recommended Decision and Order Denying Relief on June 18, 2008. This claim is currently pending before the Administrative Review Board (ARB).

On February 13, 2008, Complainant filed the instant complaint, alleging a violation of the STAA connected to his initial claim. On February 27, 2008, the Occupational Safety and Health Administration (OSHA) dismissed the complaint, finding that Complainant failed to establish a prima facie case. Specifically, OSHA determined that Complainant failed to raise any allegations of protected activity or to demonstrate that he suffered an adverse employment action. Complainant appealed. The case was forwarded to the Office of Administrative Law Judges (OALJ) for a hearing.

On April 3, 2009, Respondent filed a Motion for Summary Decision. Respondent argues that Complainant has failed to state a prima facie case for relief under the whistleblower protection provisions of the STAA. Respondent frames the issue in the instant case as whether, as a result of allegedly forged and/or falsified Records of Duty Status and Vehicle Inspection Reports (RODS-VIRS), OSHA and Judge Morgan issued decisions based on inaccurate evidence. Respondent argues that the alleged forgery does not "constitute a complaint or refusal to operate a vehicle for safety reasons." See, Respondent's Brief at 8. Respondent further notes

that Complainant has not argued that he suffered an adverse employment action, aside from his prior termination, related to the allegedly falsified documents. According to Respondent, Complainant is asking the court to “pre-empt” the ARB’s decision and to reconsider an issue which was present in the previously filed claim.

Complainant, by and through his representative, Vicki Messer-Salata, filed an Objection and Opposition to Respondent’s Motion for Summary Decision on May 7, 2009. Complainant asserts that a grant of summary decision is improper because he has presented a prima facie case for relief under the STAA. Complainant, however, has not presented a cohesive argument in support of his claim. Complainant generally alleges that during the course of discovery in his first claim, it became apparent that Respondent’s copies of the RODS-VIRS differed from those retained by Complainant. Complainant argues that the discrepancy amounts to a forgery or alteration by Respondent. It is Complainant’s contention that there is a genuine issue of material fact as to whether Respondent submitted altered or fabricated documents to OSHA and the Office of Administrative Law Judges.

STATEMENT OF THE CASE

The instant dispute arises out of a previously filed STAA claim. In the initial claim, Complainant, who was represented by counsel, argued that he engaged in protected activity by making verbal truck repair requests and completing daily vehicle inspection reports. He further alleged that, as a result of those protected activities, and his refusal to drive a truck until it was repaired, he was terminated. Respondent argued that Complainant was terminated for legitimate non-discriminatory reasons. Respondent asserted that Complainant was terminated because he ruined concrete loads (“wet loads”),¹ was involved in an accident causing damage to a concrete truck, and was unable to operate a front-discharge concrete truck despite claiming experience with the same.

During the course of discovery in the first claim, it was determined by counsel for both parties that the RODS-VIRS completed by Complainant differed from the copies retained by Respondent. Specifically, on several dates, Complainant had written “no engine power” on the RODS-VIRS. This phrase appeared on both the white copy, Respondent’s copy, and the yellow copy, Complainant’s copy. On Respondent’s white copy, however, a box marked “no defects found” was checked. The “no defects” box was not checked on the yellow copy retained by Complainant.

Judge Morgan held a formal hearing on March 19-20, 2008 in Canfield, Ohio. During the hearing, evidence pertaining to the alleged forgery was presented, including the testimony of a forensic document examiner. Judge Morgan issued a Recommended Decision and Order Denying Relief on June 18, 2008, finding that Complainant engaged in protected activity, but that he was discharged for legitimate non-discriminatory reasons.

During a deposition in this proceeding, when asked to describe his complaint in the present case, Complainant stated, “[t]hat someone at City Concrete might have forged some

1. A “wet load” occurs when too much water is added to the concrete mix. Determining the appropriate water ratio was part of the driver’s daily duties.

paperwork after I signed it and turned it in. . . .”² See, Deposition of Daniel Salata, p. 16. During the deposition, Complainant admitted that he raised the issue of the alleged forgery during his first complaint. *Id.* at 20. Complainant further stated that the forgery was committed *after* he was terminated by Respondent. [Emphasis added]. *Id.* at 17. According to Complainant, his current complaint is based on the idea that, as a result of the allegedly forged RODS-VIRS, neither OSHA nor Judge Morgan had accurate evidence when they issued their respective decisions. *Id.* at 21.

STANDARD OF REVIEW

29 CFR § 18.40 (d) provides that an administrative law judge may enter summary decision for either party if the pleadings, affidavits, material obtained in discovery or otherwise, 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. In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

The moving party bears the initial burden to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party meets this burden, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact. The non-moving party may not rest upon mere allegations, but must present affirmative evidence in order to defeat a properly supported motion for summary decision. *Anderson*, 477 U.S. at 247; *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

DISCUSSION

Under the STAA, a complainant must establish a prima facie case of discrimination. A complainant must first adduce evidence that he engaged in protected activity. STAA protected activity occurs when:

(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

(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.

2. Complainant also stated that Respondent made him work over the hours that he was legally allowed to work. He testified, however, that the excessive number of hours that he worked had nothing to do with his termination. See, Deposition of Daniel Salata, p. 18.

49 U.S.C. § 31105. After demonstrating protected activity, the complainant must show that the respondent was aware of this activity, and that the respondent took adverse action against the complainant because of the protected activity. Evidence of each of these elements raises an inference that the respondent violated the STAA.

Only if the complainant makes this prima facie showing does the burden shift to the respondent to articulate a legitimate, nondiscriminatory reason for the adverse action. At that stage, the burden is one of production, not persuasion. If the respondent carries this burden, the complainant must then prove, by a preponderance of the evidence, that the reasons offered by the respondent were not its true reasons but were a pretext for discrimination. *Calhoun v. United Parcel Service*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002). The ultimate burden of persuasion that the respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Ctr.*, 509 U.S. at 502; *Poll*, slip op. at 5; *Gale v. Ocean Imaging and Ocean Res., Inc.*, ARB No. 98-143, ALJ No. 97- ERA-38, slip op. at 8 (ARB July 31, 2002).

In the instant proceeding, Respondent has met its burden of showing that Complainant cannot establish an essential element of the case. Assuming *arguendo* that the forgery and/or falsification of the RODS-VIRS constitutes protected activity under the STAA, Complainant has not suffered an adverse employment action as a result of the alleged forgery.³ During his deposition, Complainant asserted that the alleged forgery resulted in "adverse employment consequences" because "it made OSHA decide that I had marked there was no defects when in reality I didn't." See, Deposition of Daniel Salata, p. 21. Complainant's allegation that OSHA, and by extension Judge Morgan, relied on false evidence does not constitute an adverse *employment* action. Rather, Complainant has argued that a mistake in a determination of fact has been made as a result of the alleged falsification. This argument is properly addressed to the ARB on appeal; it cannot serve as the foundation for a separate STAA complaint before this court.

The only actual adverse employment action that has been alleged by Complainant was his termination, which served as the basis for his initial complaint. This termination, however, cannot be construed as an adverse employment action related to the forgery claim. During his deposition, Complainant testified that the RODS-VIRS were forged *after* he was terminated. See, Deposition of Daniel Salata, p. 17. Thus, in addition to the fact that his first termination was already litigated, the temporal sequence of events precludes the termination from constituting an adverse employment action in the instant case.

Complainant has argued that there remains a genuine issue of material fact as to whether Respondent forged or altered the RODS-VIRS. While it may very well be true that Respondent

3. There is no evidence that Complainant engaged in protected activity under the whistleblower protection provisions of the STAA. There is no allegation that Complainant refused to operate a vehicle because of a safety concern. As such, Complainant could only have engaged in protected activity by filing a complaint or initiating a proceeding related to a violation of commercial motor vehicle safety. 49 U.S.C. § 31105(a)(1)(A). The instant claim is based on an allegation that Respondent forged and/or falsified some of Complainant's RODS-VIRS. It is not apparent, and Complainant has not demonstrated, how the alleged forgery of the RODS-VIRS constitutes a complaint related to a commercial motor vehicle safety or security regulation.

altered the documents, any alleged alteration does not establish an element of Complainant's prima facie case. Thus, even if Respondent did alter the documents, this fact does not help Complainant establish that he engaged in protected activity, that Respondent was aware of this activity, and that he suffered an adverse employment action as a result.

Complainant raises several other "arguments" in his Brief. Most of these arguments, however, pertain to allegations of error occurring during the hearing in connection with his initial STAA complaint.⁴ First, Complainant contends that his counsel was not given time to conduct discovery. Specifically, it is Complainant's allegation that he was not permitted to have the RODS-VIRS inspected by a forensic document examiner because copies of the documents in question were not returned to Complainant's counsel until the start of the hearing. Complainant further alleges that Judge Morgan erred in failing to find that the alleged forgery did not amount to a violation of the law. He also asserts that Judge Morgan mischaracterized some of the testimony and/or facts. Complainant concludes by arguing that he was denied due process, and that the Federal Rules of Civil Procedure and the Federal Rules of Evidence were not properly applied at the hearing before Judge Morgan.

All of the aforementioned arguments raised by Complainant are not properly before this court. Complainant's arguments are allegations of error related to Complainant's first complaint, over which the instant court does not have jurisdiction. Complainant's first complaint is currently pending before the ARB. Complainant's arguments are appropriately addressed to the ARB; they do not form the basis for a separate STAA claim.⁵ This court will not, as Respondent suggests, "pre-empt" the ARB's ruling by reviewing determinations made by Judge Morgan.

Thus, even construing the evidence in the light most favorable to Complainant, there are no allegations that fall within the whistleblower protection provisions of the STAA.⁶ Respondent has met its burden to show that Complainant cannot establish a prima facie case. Complainant has not met his burden to demonstrate that there remains a genuine issue of material fact. As such, Respondent is entitled to summary decision.

4. Complainant also discusses in his Brief the circumstances under which it is proper to toll the statute of limitations. It is not immediately clear why Complainant has presented this "argument." Complainant was terminated on August 8, 2007. The instant claim was filed on February 13, 2008, within the 180 day period required by 29 C.F.R. § 1978.102. Thus, the complaint is timely and there is no need to address any statute of limitations issues.

5. In his Brief, Complainant has suggested that he has, in fact, raised some of these issues on appeal to the ARB.

6. It is noted that Complainant is proceeding without the benefit of counsel. Nonetheless, the burden of first establishing, and ultimately proving, the necessary elements of a whistleblower claim is no less for pro se litigants than it is for litigants represented by counsel. *Young v. Schlumberger Oil Field Services*, ARB No. 00-017, ALJ No. 2000-STA-25, slip op. at 10 (ARB Feb. 28, 2003).

RECOMMENDED ORDER

IT IS HEREBY ORDERED that Respondent's Motion for Summary Decision is GRANTED.

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DANIEL L. LELAND
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.