U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 16 October 2009

CASE NO. 2009-STA-00039

In the Matter of:

ORVILLE LEWIS, JR.,
Complainant,

v.

VIRGINIA COMMONWEALTH UNIVERSITY
POLICE DEPARTMENT,
Respondent.

RECOMMENDED ORDER GRANTING EMPLOYER'S MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINT

This matter arises under the employee-protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31101 et seq. ("the Act").

Procedural History

Complainant Orville Lewis, Jr. filed a complaint with the Area Administrator of the Occupational Safety and Health Administration on February 2, 2009, alleging that he had been the subject of discrimination by Respondent Virginia Commonwealth University Police Department. Although it is not entirely clear in the record, he apparently alleges that his employment with Respondent was terminated in retaliation for (1) his having expressed his belief that it was unsafe to speak with his supervisor at the latter's request while operating a bus; and (2) his having refused to allow passengers to disembark from the bus he was operating at a location he believed to be unsafe. After investigating the matter, the Area Administrator found the complaint to be without merit and dismissed it. Complainant requested a hearing, and the matter was forwarded to this Office.

On September 16, 2009, Employer moved for summary decision on two grounds: first, that Complainant, as an employee of Virginia Commonwealth University, was an employee of the Commonwealth of Virginia, and is statutorily excluded from the definition of a covered employee under the Act; and second, that the evidence requires a decision on the merits in Respondent's favor. Complainant requested additional time for discovery on the second ground urged by Respondent. By Order dated September 29, 2009, I bifurcated Employer's motion and directed Complainant to respond to the first grounds for summary decision – that Complainant was not an "employee" within the meaning of the Act. The hearing that had been scheduled for October 19, 2009 was canceled and discovery was stayed pending the ruling on the motion for summary decision on the basis that Complainant was not an "employee" under the Act.

Findings of Fact and Conclusions of Law

Respondent argues that Complainant, as an employee of Virginia Commonwealth University ("VCU"), is an employee of the Commonwealth of Virginia. In support of its position, Respondent submitted evidence by way of the affidavit of Sergeant Nicole V. Dailey of the VCU Police Department, supervisor of the operations that include the bus service provided to VCU students for which Complainant served as an operator. Sergeant Dailey testified that as a bus driver in the student transportation program, Claimant was a classified employee of the Commonwealth of Virginia.

Complainant does not dispute Respondent's position as a factual matter; indeed, he refers to Respondent as a "State Agency." Based on the uncontradicted testimony of Sergeant Dailey, supported by Claimant's reference to Respondent as a state agency, I find that there is no dispute of material fact whether Complainant was, while employed by Respondent, an employee of the Commonwealth of Virginia.

Title 42 U.S. Code Section 31105(a), the employee-protection provision of the Act, states in pertinent part:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—
>
> > (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 person 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.

In turn, 42 U.S.C. § 31105(j) defines "employee" for purposes of the Act as follows:

> In this section, "employee" means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who –
>
> (1) directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier; and
> (2) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

Based on the plain language of the statute, Complainant is not an "employee" entitled to protection under the Act because he is an employee of Virginia. Complainant argues, however, that because Virginia has an approved state plan under Section 18 of the Occupational Safety and Health Act of 1970, coverage under the Act is extended to employees of Virginia. Complainant misunderstands the import of an approved state plan. First, authority for a state plan arises under the Occupational Safety and Health Act, and does not arise under (and is therefore irrelevant to) the Surface Transportation Assistance Act. Second, approval of a state plan under the Occupational Safety and Health Act provides for a *relinquishment* of federal authority over the matters covered by the plan, rather than providing for *extension* of federal authority over employees who are excluded under the Surface Transportation Assistance Act. See 29 CFR § 1952.357(b)(1). Hence, even if the approved Virginia plan provides for protection of state employees who are subject to discharge or discrimination for doing what Complainant claims to have done here, the federal government has relinquished its authority over those matters and they must be pursued in the Commonwealth.

Accordingly, I conclude that as an employee of Virginia, Complainant is not an "employee" entitled to the employee-protection provisions of the Act, and his complaint must be dismissed.

RECOMMENDED ORDER

In light of the foregoing, IT IS ORDERED that Respondent's motion for summary decision is GRANTED, and that the complaint in this matter is DISMISSED.

A

Paul C. Johnson, Jr.
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.