

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 May 2009

CASE NO.: 2009-STA-00026

In the Matter of

RONALD OLIVERI, JR.,
Complainant,

v.

NORTH STAR FOOD SERVICE,
Respondent.

**RECOMMENDED ORDER DISMISSING COMPLAINT AND
REQUEST FOR HEARING; AND CANCELING HEARING**

A hearing in the above-captioned case is scheduled to commence on June 9, 2009 in Allentown, Pennsylvania. On May 18, 2009, Complainant's counsel sent correspondence that reads in its entirety:

As you may recall, a Hearing in the above matter was scheduled for June 9, 2009. Please be advised that Mr. Oliveri has filed a lawsuit in federal court asserting his claims under the Surface Transportation and Assistance Act (the "Act"), as well as related state law claims, as is his right under the Act. I have enclosed a courtesy copy of the Complaint. As a result, it is my understanding that the Department of Labor's proceedings in this matter will terminate.

Please contact me if you have any questions about the status of this matter.
Thank you for your assistance.

Letter from Complainant's counsel dated May 15, 2009.

Counsel did not move to dismiss Complainant's case or otherwise cite to prevailing law or regulation for her conclusions. Nevertheless, I construe the correspondence to represent a motion to withdraw the complaint and for the entry of an Order dismissing Complainant's action before the Office of the Administrative Law Judges ("OALJ").

Complainant filed a complaint under the Act with the Occupational Safety and Health Administration of the Department of Labor (“OSHA”) on or about October 17, 2008. On February 24, 2009 OSHA issued its findings after investigation of the complaint. Complainant appealed that determination to OALJ and requested a hearing on March 20, 2009. The case was assigned to me and by notice issued March 27, 2009, I scheduled a hearing in the matter to commence on April 8, 2009. Complainant’s counsel notified me that a conflict prevented attendance at the hearing, and requested additional time to complete discovery. After conferring with a member of my staff, the parties agreed that the hearing would commence on June 9, 2009.

On August 3, 2007, the President of the United States signed amendments to the Surface Transportation Assistance Act, 49 U.S.C. § 31105. Specifically, the Act was amended to provide for de novo review in the following circumstances:

With respect to a complaint under [the Act], if the Secretary of Labor has not issued a final decision within 210 days after filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo reviewed in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

49 U.S.C. §31105(c).

I note that the date of the originally scheduled hearing, April 8, 2009, represents the 174th day that this complaint was pending with the Secretary. I granted a continuance of that hearing at the request of Complainant’s counsel. In addition, almost one month lapsed between the date OSHA issued its findings and the date that Complainant’s counsel filed his request for a hearing before OALJ. In a conference call with my law clerk, Matthew Epstein, Esq., Complainant’s counsel represented that efforts were being made to settle this case and other related State claims. At no time did Complainant’s counsel advise me or my staff that Complainant intended to remove his complaint to federal district court. Complainant filed his complaint in federal district court on May 15, 2009, which is the 210th day after Complainant filed his complaint with OSHA.

Although I do not find that Complainant’s actions demonstrate “bad faith” under the Act, counsel’s failure to advise me and my staff of Complainant’s clear intention to remove the case to federal district court represents discourtesy to this forum. By leading me to believe that Complainant’s request for a continuance was to allow Complainant to conduct discovery in the adjudication of his claim before OALJ, Complainant wasted resources of OALJ by imposing the need to adjust my calendar, reschedule and notice the hearing at a remote site, find space for the hearing, make travel arrangements, and secure travel authorization. It is disappointing, to say the least, that Complainant’s counsel deemed it unnecessary to make full disclosure of the intention to remove the case from my jurisdiction.

I find it appropriate to dismiss Complainant’s request for review of OSHA’s determination and request for a hearing with prejudice. The hearing is canceled.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey