U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

THERON K. CARTER,

COMPLAINANT,

v.

MARTEN TRANSPORT, LTD.,

and

USIS COMMERCIAL SERVICES, INC.,

RESPONDENTS.

ARB CASE NO. 09-117

ALJ CASE NO. 2009-STA-031

DATE: July 21, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Theron Carter, *pro se*, Middleville, Michigan

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

ORDER AFFIRMING, IN PART, AND REMANDING, IN PART

Theron Carter filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) pursuant to the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified, 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2010). Carter alleged that his employer, Marten Transport, Ltd. (Marten), and USIS Commercial Services (USIS), a company

that maintains reports on employees in the trucking industry known as DAC reports, violated the STAA's employee protection provisions when they blacklisted him by retaining negative information about him in his DAC report that was accessed by Carter's prospective employers.

The STAA protects employees from discrimination when they report violations of commercial motor vehicle safety rules or when they refuse to operate a vehicle when such operation would violate those rules or it would be unsafe. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Carter's complaint. We agree with the ALJ's ultimate decision to dismiss some of the claims against Marten, but reverse the dismissal of the claims against USIS and remand this case for the reasons that follow.

BACKGROUND[1] AND PROCEDURAL HISTORY

From June 2 to June 14, 2005, Carter worked for Marten as a truck driver and made various complaints about his truck. Recommended Decision & Order – Dismissal of Complaint (R. D. & O.) at 2. After Marten terminated Carter's employment, Carter filed a complaint with the DOL under the STAA (First Complaint). *Id.* After a hearing on the matter, an ALJ found that Marten had violated the STAA and ordered Marten to reinstate Carter, to give him back pay and compensation for emotional distress, and to amend Carter's DAC report by deleting unfavorable information and showing only continuous employment. *Id.* The ARB affirmed the ALJ's order on June 30, 2008. *Id.*

On July 8, 2008, Carter filed a second STAA complaint, the complaint currently before us, alleging that the Respondents blacklisted him when they maintained negative information about Carter in his DAC report (Second Complaint). *Id.* In mid-August 2008, Marten and Carter engaged in settlement proceedings. *Id.*

On August 19, 2008, Sherrill Benjamin, OSHA Whistleblower Program Manager, Region V, approved a proposed settlement agreement and indicated that, upon execution, OSHA would accept the agreement as a resolution of the First and Second Complaints. *Id.* at 3. On August 20, 2008, Carter's counsel and Marten signed the agreement (Settlement). *Id.* On August 21, 2008, Carter personally signed the agreement. *Id.* USIS was not named in the Settlement nor did it sign it. The Settlement conspicuously did not mention USIS. Equally significant, by its express terms, the Settlement limited its release to "any conduct that occurred before the effective date" of the Settlement. Settlement at 2, 4.

On March 10, 2009, OSHA issued its Secretary's Findings addressing Carter's claims against Marten and USIS. *See* Secretary's Findings (Mar. 10, 2009). As to the claim against Marten, OSHA noted that a Settlement was reached between Carter and Marten and "deferred" to that Settlement in "closing" the case against Marten. Secretary's Findings (Mar. 10, 2009) at

[1] Because the decision below was a summary decision , we will rely on the facts that appear to be undisputed or taken in the light most favorable to the non-moving party (Carter).

2, R. D. & O. at 3. As to the complaint against USIS, OSHA found that "[i]t cannot be shown" that USIS took an adverse employment action against Carter because certain information was removed from the DAC report. OSHA "dismissed" the claim against USIS and expressly notified Carter that he had 30 days to file an objection to the Secretary's findings. Secretary's Findings at 2-3 (Mar. 10, 2009).

Carter filed a timely objection to the Secretary's findings. R. D. & O. at 3. In his objection, Carter asserted that Marten breached the settlement agreement by not paying him money allegedly still owed under the settlement and by not correcting his DAC report as the Settlement specified. Comp. Obj. to Secretary's Findings at 3 (Apr. 3, 2009). He also asserted that negative information in his DAC report about his work history at Marten prevented him from finding employment. R. D. & O. at 3-4. Carter specifically referred to employment information about him that he received on January 26, 2009, and March 27, 2009, and lost employment opportunities occurring after the Settlement was signed and after OSHA issued the Secretary's Findings. *See* Carter's Complaint at 3-4.

On April 24, 2009, the ALJ issued a show cause order requesting the parties to comment on the impact of the Settlement on the claims against Marten and USIS. In the show cause order, the ALJ determined that USIS was not an "employer" under STAA, but it was acting as Marten's agent. Consequently, the ALJ sought input as to whether the Settlement resolved the claims against Marten and USIS. Pursuant to an order dated June 9, 2009, the ALJ then extended the show cause order so the parties could specifically comment on whether the Secretary had approved the Settlement.

Applying contract principles, the ALJ analyzed the Settlement to determine if a contract was formed and whether it was reasonable. Ultimately, the ALJ dismissed Carter's Second Complaint because he found that Carter and Marten entered into a valid settlement agreement that settled both the First and Second Complaints. The ALJ found that the Settlement also settled the complaints regarding USIS, finding that it acted as one of Marten's agents and the Settlement expressly dismissed the claims against Marten's agents. Thus, the ALJ dismissed the Second Complaint against both of the Respondents.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under STAA. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board automatically reviews STAA decisions issued on or before August 31, 2009. 29 C.F.R. Part 1978.109(c)(1). The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c).

DISCUSSION

The ALJ below encountered an undoubtedly rare occurrence due to the Settlement that preceded Carter's request for a hearing. Understandably, the ALJ sought the parties' input on the impact of the Settlement as to Marten and USIS. Presumably, the ALJ attempted to take the necessary steps to determine if the claims before him were resolved and to make this determination without acting as a court of law resolving a contract dispute. In issuing a show cause order, the ALJ ruled that USIS was not an "employer" within the meaning of STAA and invited comment as to whether USIS was Marten's agent and released by the Settlement. The ALJ ultimately dismissed all the claims in the Second Complaint. On appeal, Carter argues pro se that the ALJ should not have dismissed the Second Complaint because the Respondents failed to comply with the settlement agreement requiring removal of information from the DAC report as well as the addition of information in 2009. As explained below, we find that the ALJ: (1) properly dismissed the claims against Marten to the extent that they were part of the Settlement, (2) erred in dismissing the claims against USIS and (3) should have determined whether Carter alleged to OSHA that Marten and USIS engaged in additional retaliatory acts subsequent to the settlement date and, if so, move forward with addressing those claims.

To decide any of the issues raised in this appeal, we must first review the regulatory authority OALJ and ARB have over settlements reached before OSHA issues its findings in a whistleblower investigation.

1. Review of Settlements Reached during Investigations

STAA settlements are addressed by 29 C.F.R. Part 1978.111(d)(1) and (d)(2). This case settled pursuant to Subsection 1978.111(d)(1) ("Investigatory Settlements"), which provides as follows: "[a]t any time after the filing of a section 405 complaint by an employee and before the finding and/or order are objected to, or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant, and the named person agree to a settlement." Under Subsection 1978.111(d)(2) ("Adjudicatory Settlements"), cases may only be settled if the participating parties agree to a settlement *and* such settlement is approved by the Administrative Review Board, United States Department of Labor, or the ALJ. The difference between these two provisions implies that ARB or ALJ approval is needed for Adjudicatory Settlements, but not for Investigatory Settlements. We found no regulations granting OALJ or ARB the authority to review the validity or reasonableness of STAA investigatory settlements. Additionally, the enforcement of a settlement is left to the Secretary. *See* 49 U.S.C.A. § 31105 (e) (the Secretary "shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred"). *See also* 29 C.F.R. § 1978.113 (containing similar language).

Neither the ALJ nor the ARB has the statutory or regulatory authority to enforce orders or settlements. Therefore, as to the claims included in the Settlement, the ALJ's only option was to ascertain whether there had been a settlement approved and signed under § 1978.111(d)(1) and, if so, dismiss such claims.

In this case, the record was clear as to the Settlement's status. OSHA approved the Settlement and indicated that upon execution, OSHA would accept the Settlement as a resolution of the Second Complaint. R. D. & O. at 3. The parties executed the Settlement on August 21, 2008. *Id.* On March 10, 2009, the Regional Administrator dismissed the complaint based on the Settlement. *Id.* With respect to Investigative Agreements, there is no regulatory requirement or authority for the ALJ or the ARB to delve into the validity or reasonableness of a settlement agreement.[2] The ALJ has no legal authority to entertain a repudiation claim as was done in this case. The ALJ has no legal authority to determine whether the parties complied with the terms of a settlement agreement. Once the ALJ was satisfied that the Settlement was approved and signed by the parties, he was required to end the litigation as to the claims resolved by the Agreement. The ALJ should then have moved forward in the administrative process as to the claims against any parties that did not sign the settlement agreement. This conclusion logically leads us to the next issue, that is, the dismissal of the claims against USIS.

2. The Dismissal of USIS

As the ALJ stated in his R. D. & O., USIS neither engaged in the settlement proceedings nor signed the settlement agreement. Nevertheless, the ALJ found that USIS "was acting as an apparent agent of Marten Transport" because it published Marten's work history for Carter and verified its DAC report for Carter with Marten in June 2008. R. D. & O. at 11.

For three reasons, we must vacate and remand the ALJ's dismissal of the claim against USIS. First, the ALJ insufficiently explained the legal and factual basis for his conclusion that USIS was acting as an "agent" within the meaning of the Settlement. The ALJ's opinion contains only two conclusory statements related to USIS's liability: (1) USIS was an "apparent agent" and (2) it was released by the Settlement. These statements are insufficient to allow us to review the ALJ's reasons for his conclusions. Second, there is no factual support for the ALJ's finding that USIS was Marten's "agent." The issue of agency is a mixed issue of fact and law.[3] Resolution of factual issues would include determining exactly what the parties did or did not do. In a summary decision, the facts supporting the alleged agency relationship must be undisputed.[4]

The third basis for a remand is the lack of sufficient legal or factual support for the ALJ's finding that the term "agent" in the Agreement included USIS and then enforcing the contract in

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[2] By finding a limitation on the reviewability of Investigative Agreements, we do not address either expressly or implicitly the parameters of review involving Adjudicatory Agreements. There is no Adjudicatory Agreement at issue in this case.

[3] *See, e.g., American Intern. Trading Corp. v. Petroleos Mexicanos*, 835 F.2d 536, 539 (5th Cir. 1987) (in a case applying Texas contract law, the Fifth Circuit explained that the factfinder determines the factual relationship of the parties and the court under the ascertained facts, then determines whether an agency relation exists as a matter of law).

[4] *See* 29 C.F.R. § 18.40 (2010).

USIS's favor. In deciding that USIS was an "agent" within the meaning of the Settlement, the ALJ essentially adjudicated a contract dispute without citing any legal authority allowing him to adjudicate a pure contractual dispute. If USIS believes that the Settlement between Carter and Marten protects it, it must seek legal redress elsewhere. More importantly, even if the ALJ could resolve a contract claim, the record is devoid of undisputed facts supporting the ALJ's determination as to the meaning of the term "agent." In fact, viewing the record in the light most favorable to Carter, it is disputable whether the parties intended to include USIS within the meaning of "agent" in the Settlement. There is no definition of that term in the Settlement. Carter disputed the dismissal of USIS. Carter specifically asserted a blacklisting claim against USIS, argued that USIS was separately subject to the STAA, and that USIS is culpable because of maintaining allegedly false records. R. D. & O. at 4-5. The record contains evidence showing that USIS arguably exercised independent decision-making when responding to Carter's request to correct allegedly false information.[5] USIS's claim that it was an agent merely highlights the contractual dispute that the ALJ cannot resolve. Response to Show Cause Order at 1, 4-5. In sum, because USIS failed to sign the Settlement and because the settlement did not mention USIS, the ALJ must proceed to address Carter's claim against USIS, absent intervention by a court of law.

In moving forward with the claims against USIS, the ALJ will have to determine whether USIS is a covered respondent under the STAA. The ALJ suggested in a footnote that USIS was not covered because it was not an employer under STAA. *See* D. & O. at 12 n.14.[6] Under the STAA, "a person may not . . . discriminate against an employee regarding pay, terms, or privileges of employment" because he engages in protected activity. 49 U.S.C.A. § 31105 (a)(1). A "person" is defined under the STAA regulations as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons." 29 C.F.R. § 1978.101(i). On remand, the ALJ must consider whether USIS is a covered respondent under the STAA and provide sufficient reasons for his conclusions.

If USIS is a covered respondent under the STAA, then the ALJ must determine whether Carter engaged in protected activity, whether USIS took adverse action against Carter, and if so, whether USIS took the adverse action because Carter engaged in protected activity. These issues present mixed questions of law and fact. USIS attempted to make the factual assertion that the negative entries were removed from Carter's DAC report by December 31, 2008, the date that USIS first received a request from an employer for a copy of the report. USIS [Response to] Order to Show Cause at 5. USIS stated that on December 31, 2008, the report only showed that Carter's work was "satisfactory." *Id.* Carter, however, has submitted a USIS work history report about him dated January 27, 2009, showing negative information in the DAC report, including

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[5] *See* Letter from USIS to Carter (June 26, 2008) (USIS conducted an independent investigation, concluded that the information was verified as accurate, and nowhere suggested that it was under Marten's direction or control).

[6] The ALJ made a similar comment in his order to show cause. *See also* Show Cause Order and Dismissal of Complaint (Apr. 24, 2009).

"excessive complaints" and "company policy violation." Thus, a genuine issue of material fact exists regarding whether USIS blacklisted Carter. A remand is required to resolve the factual issues.

3. Potentially New Claims

One additional issue requires a remand in this matter – whether Carter's objection to the Secretary's March 10, 2009 findings asserted new claims. Carter stated that he discovered on January 17 and 27, 2009, that Marten Transport was allegedly still providing a deceptive employment history to prospective motor carrier employers. R. D. & O. at 3, 4 (Complainant's Position). *See also* Complainant's Objection to the Secretary's Findings at 3-4. He also alluded to information provided on March 27, 2009. The Settlement released Marten from liability "for any conduct that occurred before the effective date" of the Settlement. If these alleged acts by Marten occurred after the effective date, then potentially they would form the basis for a new complaint. In dismissing the complaints against Marten and USIS, OSHA implicitly rejected, if not expressly rejected, Carter's claims that Marten and USIS continued their practice of allegedly false reporting.[7] Carter's objection to the Secretary's Findings then gave the ALJ jurisdiction to decide whether he had asserted new claims of discrimination against Marten and USIS that arose subsequent to the settlement. Again, determining whether Carter asserted new claims involves questions of fact surrounding the circumstances of the alleged "false reporting" by Marten and USIS in 2009. Therefore, we remand this matter for the ALJ's consideration and determination.

CONCLUSION

Accordingly, we affirm the ALJ's Dismissal of some of the claims against Marten as described in our decision, and reverse, vacate, and remand the dismissal of the claims against USIS and any new claims asserted against Marten and USIS.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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[7] OSHA expressly found that Marten contacted USIS to have negative information about "excessive complaints" removed and that USIS allegedly removed it; therefore, pursuant to OSHA's findings, adverse action could not be shown. Secretary's Findings at 2.