U.S. Department of Labor

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

In the Matter of:

WALTER MOORE, **ARB CASE NO. 99-047**

COMPLAINANT, **ALJ CASE NO. 98-CAA-16**

v. **DATE: June 25, 2001**

U.S. DEPARTMENT OF ENERGY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:

For the Complainant:
Edward A. Slavin, Jr., *St. Augustine, Florida*

For the Respondent:
Pamela Arias-Ortega, *U.S. Department of Energy, Albuquerque, NM*

FINAL DECISION AND ORDER

BACKGROUND

Complainant Walter Moore filed this case under the employee protection ("whistleblower") provisions of the Clean Air Act, 42 U.S.C.A. §7622 (West 1995), and the Surface Transportation Assistance Act ("STAA"), as amended and recodified, 49 U.S.C.A. §31105 (West 1997).

The relevant facts of this case are undisputed. Moore is a special agent in the Department of Energy's ("DOE") Transportation Safeguards Division ("TSD") and is responsible for transporting and guarding nuclear weapons and materials. In order to improve labor-management relations in TSD, DOE engaged a panel of outside consultants to review TSD's operations. The panel was headed by Gordon Moe.

[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

On June 9, 1998, Moe presented the panel's preliminary findings to the managers and employees of TSD. The presentation was recorded on two videotapes. One tape consists of the panel's findings and recommendations. The other is a question and answer session.

Moe explained that, although the transportation system was functioning well, the operation was plagued by a fundamental lack of trust and respect between special agents and TSD management. According to Moe, the lack of trust was symptomatic of other problems such as too little leadership. Moe also expressed his view that it was inappropriate for special agents to ridicule and condemn management in public or at meetings.

Moore was not present for the June 9th presentation because he had been off work on disability since April 20, 1998. However, when Moore learned that the presentation had been recorded, he requested and received copies of the videotapes which he viewed at home. Moore seized on Moe's opinion regarding the criticism of management and interpreted the comment as an attempt either to "gag" employees or prevent them from raising safety concerns. As a result, Moore filed a complaint with the Occupational Safety and Health Administration[2/] alleging that DOE violated his rights under both the CAA and STAA. OSHA found no merit to Moore's complaint. Moore objected to that determination and the matter was referred to an Administrative Law Judge ("ALJ").

DOE immediately moved for dismissal of the STAA portion of the complaint on the grounds that STAA does not apply to federal employees. With regard to the CAA claim, DOE asserted that Moore had not established a *prima facie* case of discrimination and moved for summary judgment. The ALJ granted both motions. This appeal followed.[3/]

JURISDICTION

We have jurisdiction pursuant to the CAA, 42 U.S.C.A. §7622, and 29 C.F.R. §24.8.

DISCUSSION

The gravamen of Moore's appeal is that the ALJ erred in summarily dismissing his complaint without affording him an opportunity for additional discovery and a trial. We review a grant of summary judgment *de novo*, that is, our review is governed by the same standard used by the ALJ. *Han v. Mobile Oil Corporation*, 73 F.3d 872, 874-875 (9th Cir. 1995). That standard is contained in 29 C.F.R. §18.40(d), which provides that summary decision may be ordered "if the pleadings, affidavits, material obtained by 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."

[2/] OSHA is the Department of Labor agency responsible for investigating complaints under the employee protection provision of the Clean Air Act and STAA.

[3/] Moore contests only the dismissal of his CAA claim and appears to concede that STAA is inapplicable to federal employees.

The standard for granting summary decision under §18.40 is essentially the same one used in Fed. R. Civ. P. 56 - the rule governing summary judgment in the federal courts. With regard to Fed. R. Civ. P. 56, the Supreme Court has stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."

Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In order to survive a motion for summary decision under the CAA, the complainant must make a showing sufficient to establish the elements of a *prima facie* case of retaliation: 1) that he engaged in protected activity; 2) that the respondent knew about the protected activity; 3) that the respondent took adverse action against him; and 4) that there is evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action. *Carroll v. Bechtel Power Corp.*, No. 91-ERA-46 (Sec'y Feb. 15, 1995), *aff'd sub nom. Carroll v. Dep't of Labor,* 78 F.3d 352 (8th Cir. 1996), citing *Dartey v. Zack Co.*, No. 82-ERA-2, slip op. at 7-8 (Sec'y April 25, 1983). Because, as the ALJ correctly held, Moore failed to make a showing sufficient to establish that DOE took adverse action against him, DOE is entitled to summary decision.

Moore asserts that Moe's statements created a hostile work environment that discourages him from raising safety concerns in the future. We have previously determined that the following factors are to be weighed in a hostile work environment claim:

> (1) the complainant suffered intentional discrimination because of his or her membership in the protected class;
> (2) the discrimination was pervasive and regular;
> (3) the discrimination detrimentally affected the complainant;
> (4) the discrimination would have detrimentally affected a reasonable person of the same protected class; and
> (5) the existence of respondeat superior liability.

Berkman v. U.S. Coast Guard Academy, ARB No. 98-056, ALJ Nos. 97-CAA-2 and 97-CAA-9 (ARB Feb. 29, 2000).

Moore has neither alleged nor offered facts to support an allegation that any of these factors are present here. Nor has he alleged the existence of facts that would show that Moe's statements otherwise materially affected his employment. As a result, Moore failed to establish an element essential to his case.

As for Moore's assertion that he should have been given an opportunity for further discovery, we note that a party is not entitled to postpone a ruling on a motion for summary judgement in order to engage in further discovery when that party has offered no more than speculation as to what facts might be uncovered and it is clear that further discovery would be no more than a fishing expedition. *Netto v. Amtrak*, 863 F.2d 1210, 1216 (5th Cir. 1989). Instead, the party seeking further discovery is required to state with some precision the materials he hopes to obtain with further discovery, and exactly how he expects those materials would help him in opposing summary judgment. It is not enough simply to assert that something will turn up. *E.E.O.C. v. American Home Products Corp.*, 199 F.R.D. 620, 631 (D. Iowa 2001) and cases cited therein.

There is no question that, if this case had gone to hearing, Moore would have had the burden of proving the elements of a violation of the CAA. *See Dysert v. Sec'y of Labor*, 105 F.3d 607 (11th Cir. 1997). When Moore failed to allege facts sufficient to establish an essential element of his case, the ALJ could properly grant Respondent's motion for summary judgement unless Moore could show that further discovery would enable him to defeat the motion. Moore made no such showing. Moreover, the ALJ reviewed the videotapes and concluded that no reasonable person could have found Moe's statements to be "hostile, threatening, chilling, gagging, or adverse." Recommended Decision and Order Granting Summary Judgment at 6. Having reviewed the record on appeal, we concur with this conclusion.

As the Supreme Court has noted, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matshushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). Therefore, we concur with the ALJ's recommendation that Respondent's motion for summary judgment should be granted and the complaint dismissed.

SO ORDERED.

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member