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: 11 March 2010

CASE NO.: 2010-STA-00007

In the Matter of:

KLEONA MYERS,
Complainant,

v.

AMS/BRECKENRIDGE/EQUITY, GROUP LEASING 1,
Respondent.

CASE NO.: 2010-STA-00008

In the Matter of:

RUSSEL BAXTER,
Complainant

v.

AMS/BRECKINRIDGE/EQUITY GROUP LEASING 1,
Respondent.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Currently pending before this Court is Respondent AMS/Breckenridge/Equity Group Leasing 1's Motion to Dismiss ("Motion") filed on January 27, 2010. This motion comes before the Court pursuant to 29 C.F.R. § 1978, "Rules for Implementing Section 405 of the Surface Transportation Assistance Act of 1982 (STAA)," 49 U.S.C. 2301 *et seq.*, The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18 *et seq.*, and Fed. R. Civ. P. 12(b)(6). The purpose of the STAA is to provide for employee protection from discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters. 29 C.F.R. § 1978.100.

Respondent asserts that it does not have the requisite level of control over the Complainants to be liable under the STAA because it does not have the power to hire, transfer, reprimand, or discharge the complainants, nor does it have the influence over another employer to take such actions.

On February 11, 2010 Complainants filed a Brief in Opposition to Respondent's Motion to Dismiss ("Brief in Opposition"), arguing that Respondent do not need to be Complainants' "direct employer" to be liable under the STAA and that rather, Respondent is liable on a "joint-employer" theory, the other employer being New Rising Fenix, Inc., which is not a party to this action.

On March 1, 2010 Respondents filed a Reply to Complainant's Brief in Opposition to Motion to Dismiss ("Reply"), again urging dismissal of the case on the grounds that is not

Complainant's employer – neither jointly nor as a principal – and that the STAA does not impose strict liability for its limited role in providing staffing functions to New Rising Fenix, Inc.

Findings of Fact and Conclusions of Law

Respondent alleges that at all times relevant to this cause of action, the following facts are true:

1. Respondent outsourced Payroll and Human Resources functions to the client company, New Rising Fenix, Inc.

2. These functions included total payroll distribution and management, filing of taxes, human resources and worker's compensation administration, and employee benefits.

3. Respondent was effectively the "employer" of Complainants for IRS purposes only.

4. New Rising Fenix, Inc. was solely responsible for the hiring and termination of all employees for whom Respondent performed Payroll and Human Resources functions, with Respondent retaining no control over these decisions.

5. New Rising Fenix, Inc. was solely responsible for providing equipment or products for their employees' use to perform all job duties in their job descriptions.

6. Respondent and New Rising Fenix, Inc. had a binding Staff Leasing Agreement that reflected this division of responsibility. (Exhibit A to Respondent's Motion).

7. The Staff Leasing Agreement delegates to New Rising Fenix, Inc. the responsibility to hire, train, and provide equipment to its trucker employees. New Rising Fenix, Inc. had an obligation to provide paperwork to Respondent reflecting the hiring, firing, or change in employment status of contracted employees. *See* Exhibit A, Section 4, "Responsibilities."

8. New Rising Fenix, Inc. terminated Complainants without discussion or consultation of Respondent, who did not actually hire, transfer, promote, reprimand, or discharge Complainants, nor did it exercise influence over New Rising Fenix, Inc. to do so.

9. With the exception of one sentence of allegations against Respondent naming it as a joint employer with vicarious liability, all of Complainant's allegations of discrimination, knowing acts and retaliation in Complainant's First Amended Complaint are against New Fenix, Inc. and its employees.

Complainant does not refute any of Respondent's specific factual allegations, but rather asserts that, as a matter of law, Respondent's actions with respect to Complainant's employment make it a "joint employer" for purposes of STAA liability. Complainant argues that the

existence of Respondent's Staff Leasing Agreement, whereby it is obligated to "furnish staffing," makes it a joint employer with New Rising Fenix, Inc.

The rules governing hearings in whistleblower cases contain no specific provisions for dismissal of complaints for failure to state a claim upon which relief may be granted. *See* 29 C.F.R. Parts 18 and 24 (2005). It is therefore appropriate to apply Fed. R. Civ. P. 12(b)(6) of the Federal Rules of Civil Procedure governing motions to dismiss for failure to state such claims. 29 C.F.R. § 18.1(a). Under Fed. R. Civ. P. 12(b)(6), all reasonable inferences are made in the non-moving party's favor. *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 03-STA-47, slip op. at 4 (ARB Apr. 26, 2005). Dismissal should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* slip op. at 5 (citation omitted).

Insofar as this motion alleges facts outside of the four corners of the complaint it shall be treated as a motion for summary decision pursuant to 29 C.F.R. §§ 18.40, 18.41. *See Demski v. Indiana Mich. Power Co.*, ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 3 (ARB Apr. 9, 2004). The standard for granting summary decision in whistleblower cases is the same as for summary judgment under the analogous Fed. R. Civ. P. 56(e). Summary decision is appropriate "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," therefore entitling the moving party to prevail as a matter of law. 29 C.F.R. §§ 18.40, 18.41. If the non-moving party fails to show an element essential to his case, that failure necessarily renders all other facts immaterial and summary decision is appropriate. *Rockefeller v. United States Dep't of Energy*, ARB No. 03-048, ALJ No. 2002-CAA-0005, slip op. at 4 (ARB Aug. 31, 2004), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

In whistleblower cases generally, as well as under the STAA, the crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer – that is, exercised control over or interfered with the terms, conditions, or privileges of the complainant's employment. *See Lewis v. Synagro Techs, Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, 14, slip op. at 8 n. 14, 9-10 (ARB Feb. 27, 2004) (environmental whistleblower acts) and cases cited therein. *See also BSP Trans, Inc., v. United States Dep't of Labor*, 160 F. 3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 V. 3d 1133, 1138 (6th Cir. 1994); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 03-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-

STA-14, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003) (all actions under the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C. § 31105 (2009). Such control, which includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is essential for a whistleblower respondent to be considered an employer under the whistleblower statutes. *Lewis*, slip op. at 7. If a complainant is unable to establish the respondent's requisite level of control to create an employer-employee relationship, the entire claim must fail. *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-10, slip op. at 9 (ARB Jan. 31, 2001) (environmental protection whistleblower acts).

Complainants argue that while Respondent may have had a limited role in their termination, knowing participation is not required to show liability under the STAA and Respondent's acts were sufficient to give rise to liability on a joint employer theory, citing *Palmer v. Western Truck Manpower, Inc.*, 1985-STA-16 (Sec'y, Mar. 13, 1992) *aff'd sub nom. Western Truck Manpower, Inc. v. United States Department of Labor*, 12 F. 3d 151 (9th Cir. 1993). In *Palmer*, Western was a leasing agent for truck drivers that leased driver services to client companies. Western prepared payroll, issued paychecks, withheld state and Federal taxes, made social security payments, maintained worker's compensation coverage, kept current medical records, and conducted all labor relations with the drivers, including negotiations of labor agreements and participation in grievance proceedings. The Secretary of Labor found that these actions were sufficient to hold Western liable under the STAA on a joint employer theory for the termination of an employee of the company that leased driver services from Western. *See Palmer*, 85-STA-16, slip op. at 2-5.

Palmer is factually distinguishable from the instant case because Western had additional and more significant responsibilities with respect to the terms of employment of the staff it leased than Respondent alleges it has in the instant case. Additionally, the employee that Western's client company elected to fire was actually fired by Western, who issued a letter notifying the employee that he was being removed from duty with "just cause." *Western Truck*, 12 F. 3d at 152. In *Palmer*, the Secretary found that Western individually violated the STAA and knowingly participated in its client company's violation of the STAA, so the affirmance of the case did not rest upon the Secretary's finding that the STAA does not require knowing

participation for the imposition of liability. *Id.* at 153. Rather, this question was left for another day. *Id.*

The Secretary has since affirmed its finding that the STAA does not require that a joint employer knowingly participate in the adverse action against an employee in order to be liable. *Cook v. Guardian Lubricants, Inc.*, 95-STA-43 (Sec'y May 1, 1996). However, in order to come within the purview of this rule, the complainant must first establish that the Respondent is, in fact, a joint employer. *See Wainscott v. Pavco Trucking, Inc.*, ALJ No. 2004-STA-0054, slip op. at 15 (April 13, 2005). As previously stated, the essential requirement of this inquiry is the alleged employer's control over hiring, transferring, promoting, reprimanding, or discharging the employee, or the ability to influence another employer to do so. *See also Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-53, slip op. at 4 (July 29, 2005).

Complainants ask this court to infer that Respondent's obligation "to furnish select staffing" in its agreement with New Rising Fenix, Inc. rises to the level of control required to establish joint employer liability under the STAA. Respondent asserts that the portions of its Staff Leasing Agreement that are required to be included and which are controlled by the state law of Florida (the relevant licensing authority) do not obligate it as an employer under STAA purposes. This Court takes judicial notice of Fla. Stat. § 468.525 (2009), which governs licensing requirements for employment leasing companies. The language at issue in Respondent's Staff Leasing Agreement essentially parrots these obligations. The provision asserts that "Company reserves a right of direction and control over leased employees . . . but not to the extent of prescribing how the work shall be performed . . . [and] retains the authority to hire, terminate, discipline, and reassign the leased employees. However, [New Rising Fenix, Inc.] has the right to accept or cancel the assignment of any leased employee. . ." *Compare* Respondent's Motion, Exhibit A *with* Fla. Stat. § 468.525(4)(a) and (4)(d).

The issue of whether Florida law governing employment leasing imposes a requisite level of control to determine employer liability under the STAA appears to be one of first impression. Instructive on this issue are a group of cases that have found that Florida's licensing requirements for employment leasing do not, standing alone, impose employer liability for purposes of the Fair Labor Standards Act (FLSA). *See Jeannaret v. Aron's East Coast Towing, Inc.*, 2002 WL 32114470 (S.D. Fla. 2002) (unpub.) *aff'd* 54 Fed. Appx. 685 (11th Cir. 2002) (unpub.); *Beck v. Boce Group, L.C.*, 391 F. Supp. 2d 1183 (S.D. Fla. 2005); *Salley v. PBS of*

Central Florida, Inc., 2007 WL 4365634 (M.D. Fla. 2007) (unpub.). Determining liability under the FLSA requires utilization of a multi-factor "economic realities test" that includes the factors relevant to the analysis under the STAA. *See Beck*, 391 F. Supp. 2d at 1187 (including but not limited to the nature and degree of control, the degree of work supervision and the right, directly or indirectly, to hire, fire, or modify employment). The United States Supreme Court has recognized that "under FLSA, employment is defined with striking breadth." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). I therefore find it would be reasonable to conclude that Respondent's obligations under Florida law governing employment leasing do not obligate it as an employer under the STAA, although I need not do so for purposes of this Order.

Notwithstanding my interpretation of the level of control imposed on Respondent by its obligations under Florida law, I find that Respondent's other contractual staffing obligations to New Rising Fenix, Inc. give rise to a genuine issue of fact as to whether it has the requisite level of control over the staffing employees to obligate it as an employer under the STAA. Specifically, Respondent's contractual obligations provide:

> . . . when the accurate and complete time records of any worker or uninsured subcontractor are not timely furnished to [Respondent], said worker is the sole employee of the Client Company for the time not properly reported to [Respondent]. *This destroys co-employment and creates dual employment*, which voids insurance coverage . . .
>
> . . . Client Company agrees to provide [Respondent] with all of the required hiring paperwork prior to the start of any new staff or uninsured contractor. If the required paperwork is not provided prior to start, the individual in question will not *become an employee* of [Respondent] and will not be covered by workers' compensation insurance, and also will entitle Equity to terminate this contract as of the date of breach.

Exhibit A to Respondent's Motion, "Responsibilities" (a) and (b) (emphasis added). Respondent's Staff Leasing Agreement does not define the terms "co-employment" or "dual employment." These specific terms of the contract have not been explained by either party. However, a cursory reading of these provisions gives rise to the impression that, if all parties are properly performing their contractual obligations, an employment relationship of unspecified nature exists between Respondent and Complainants, who are properly considered "employees" as designated by the terms of this agreement. Moreover, these provisions reflect that where all parties are not properly performing their obligations under the agreement, Respondent is released of some of its obligations and therefore relinquishes control and resultant liability that it otherwise has. As recognized above, the ability to control an employee is the essential element to establish employer liability under the STAA. Regardless of whether Respondent had

knowledge of the adverse action, it has not affirmatively shown that it did not have the ability to control complainants.

While the contractual provisions at issue might not ultimately prove sufficient after further fact-finding to obligate Respondent as an "employer" under the STAA, they are sufficient to obviate the possibility of summary decision, which requires that there are no genuine issues of material fact precluding judgment as a matter of law. Viewing all of the evidence and averments before me in the light most favorable to complainants, I find that they have successfully refuted Respondent's assertion that it cannot be liable because it is not an Employer within the meaning of the STAA.

Accordingly, Respondent's Motion to Dismiss is hereby **DENIED**. This case shall remain on the docket for the upcoming hearing scheduled for April 14, 2010 in Springfield, Missouri.

IT IS SO ORDERED.

ROBERT B. RAE
Administrative Law Judge

Washington, D.C.

SERVICE SHEET

Case Name: **MYERS KLEONA v. AMS/BRECKENRIDGE/EQUITY GROUP LEASING 1,**

Case Number: **2010STA00007**

Document Title: **ORDER DENYING RESPONDENT'S MOTION TO DISMISS**

I hereby certify that a copy of the above-referenced document was sent to the following this 11th day of March, 2010:

Maurice Williams

MAURICE WILLIAMS
LEGAL ASSISTANT

Regional Solicitor
U. S. Department of Labor
Two Pershing Square Building
Suite 1020
2300 Main Street
Kansas City, MO 64108
{Hard Copy - Regular Mail}

Directorate of Enforcement Programs
U. S. Department of Labor, OSHA
Room N-3119, FPB
200 Constitution Ave., N.W.
Washington, DC 20210
{Hard Copy - Regular Mail}

Bayley Reporting, Inc.
12945 Seminole Blvd., Bldg. 1
Suite 14
Seminole, FL 33778
{Hard Copy - Regular Mail}

Paul O Taylor
Truckers Justice Center
900 West 128th Street
Suite 104
Burnsville, MN 55337
{Hard Copy - Regular Mail}

Charles E Atkins
Occupational Safety and Health Administration
Two Pershing Square
2300 Main Street
Suite 1010
Kansas City, MO 64108
{Hard Copy - Regular Mail}

Rosalind Wright
Human Resources Coordinator
AMS/ Breckenridge/ Equity Group Leasing 1,
Employee Professionals
1409-8 Kingsley Ave.
Orange Park, FL 32073
{Hard Copy - Regular Mail}

Kleona Myers
Kleona Myers & Russell Baxter
9804 County Road 100
Carthage, MO 64836
{Hard Copy - Regular Mail}