

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Yusim v. Department of Labor

645 F. App'x 967 (11th Cir. 2016) · Decided March 16, 2016

SUMMARY

The Eleventh Circuit reviewed a petition challenging the Department of Labor Administrative Review Board’s handling of a retaliation complaint under the Surface Transportation Assistance Act. The court held that it lacked jurisdiction to review the Department’s discretionary refusal to intervene in the petitioner’s bankruptcy-related efforts. It also upheld dismissal of the retaliation complaint because the former employer was no longer operating or able to provide relief authorized by the statute.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                          |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States Court of Appeals for the Eleventh Circuit                                                                                                                                                                                                                                                                  |
| WRITING FOR THE COURT | Per curiam; Anderson; Rosenbaum; Wilson                                                                                                                                                                                                                                                                                  |
| JURISDICTION          | Federal                                                                                                                                                                                                                                                                                                                  |
| DECIDED               | March 16, 2016                                                                                                                                                                                                                                                                                                           |
| DISPOSITION           | dismissed                                                                                                                                                                                                                                                                                                                |
| PROCEDURAL POSTURE    | Petition for review of an Administrative Review Board order affirming an Administrative Law Judge's dismissal of a retaliation complaint under the Surface Transportation Assistance Act.                                                                                                                                |
| STANDARD OF REVIEW    | Under the Administrative Procedure Act, the court reviews the ARB's legal conclusions for whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and reviews factual findings for substantial evidence. The court reviews its own subject-matter jurisdiction de novo. |
| PRECEDENTIAL VALUE    | Nonprecedential unpublished Eleventh Circuit decision                                                                                                                                                                                                                                                                    |
| PARTIES               | Michael Yusim v. United States Department of Labor                                                                                                                                                                                                                                                                       |

TOPICS

- judicial review of agency action
- administrative procedure act
- retaliation
- whistleblower
- appellate procedure

PRACTICE AREAS

## QUESTIONS PRESENTED

1. Whether the Eleventh Circuit had APA jurisdiction to review the Department of Labor's refusal to intervene in Yusim's efforts to withdraw the reference of his STAA claim from the bankruptcy court.
2. Whether the ARB's dismissal of Yusim's STAA retaliation complaint was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law because the employer was no longer operating and lacked assets from which statutory relief could be paid.
3. Whether the STAA authorized the Department of Labor or ARB to grant declaratory relief stating that Yusim accurately reported his hours.

## HOLDINGS

1. The court lacked APA jurisdiction to review the Department of Labor's decision not to intervene because intervention was not a discrete action that the agency was legally required to take.
2. The ARB's dismissal was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law because Midnight Sun was no longer operating as a business, had no assets from which damages could be paid, and therefore could not be an employer under the STAA at the time of the ARB's decision.
3. The STAA did not authorize the Department of Labor to provide the requested declaratory relief.

## KEY QUOTATIONS

*"We lack jurisdiction under the APA to review the Department of Labor's decision not to intervene in Yusim's attempts to withdraw the reference of his STAA claim from a bankruptcy court because it was not a discrete action that the agency was required to perform by law." (969)*

*"The ARB could not provide any of the relief authorized under § 31105(b)(3) once Midnight Sun was no longer operating as a business and had no assets from which damages could be paid." (969)*

## FACTUAL BACKGROUND

Yusim alleged that his former employer, Midnight Sun Tours, discharged him in retaliation for accurately reporting his hours on duty, in violation of the STAA. Midnight Sun later declared bankruptcy, ceased operating as a business, and had no assets from which damages could be paid. Yusim sought the Department of Labor's intervention in efforts to withdraw the reference of his STAA claim from the bankruptcy court and argued that the ARB should decide the merits and provide declaratory relief.

## PROCEDURAL HISTORY

Yusim filed a retaliation complaint under the STAA. After OSHA issued written findings, the matter proceeded through the Department of Labor's administrative process, and an ALJ dismissed the complaint. The Department of Labor's Administrative Review Board affirmed. Yusim petitioned the Eleventh Circuit for review, challenging both the Department's refusal to intervene in his efforts to withdraw the bankruptcy reference and the dismissal of his STAA complaint.

## DISPOSITION

dismissed

## CASES CITED

- Koch Foods, Inc. v. Secretary, U.S. Department of Labor, 712 F.3d 476, 480 (11th Cir. 2013)
- Alexis v. U.S. Attorney General, 431 F.3d 1291, 1293 (11th Cir. 2005)
- Fanin v. U.S. Department of Veterans Affairs, 572 F.3d 868, 877-78 (11th Cir. 2009)

## OPINION

### PER CURIAM.

PER CURIAM: Michael Yusim, proceeding pro se, petitions for review of an order from the Department of Labor’s Administrative Review Board (“ARB”) affirming an Administrative Law Judge’s (“ALJ”) dismissal of Yusim’s retaliation complaint under the Surface Transportation Assistance Act (“STAA”), 49 U.S.C. § 31105.

First, Yusim argues that the Department of Labor improperly refused his request for it to petition a district court to withdraw the reference of his STAA retaliation claim from a bankruptcy court’s jurisdiction once his former employer, Midnight Sun Tours (“Midnight Sun”), declared bankruptcy.

Second, Yusim argues that the ARB improperly dismissed his STAA complaint because it should have considered the merits of his STAA claim. After review of the record and the parties’ briefs, we dismiss the petition for review in part and deny it in part.

I. When considering a petition for review from a STAA proceeding, we apply the standards of review from the Administrative Procedure Act (“APA”). Koch Foods, Inc. v. Sec’y, U.S. Dep’t of Labor, 712 F.3d 476, 480 (11th Cir.2013).

The ARB’s legal conclusions must be affirmed unless they are arbitrary, capricious, an abuse of discretion, or not in accordance with the law. 5 U.S.C. § 706(2)(A). The ARB’s factual findings must be accepted unless they are unsupported by substantial evidence in the record as a whole. Id. § 706(2)(E).

We are obliged to review our own jurisdiction whenever we may be lacking jurisdiction and determine our subject matter jurisdiction de novo. Alexis v. U.S. Att’y Gen., 431 F.3d 1291, 1293 (11th Cir.2005). A valid claim under the APA must challenge an agency action, which includes an agency order or relief, the denial thereof, or the failure to act. Fanin v. U.S. Dep’t of Veterans Affairs, 572 F.3d 868, 877 (11th Cir.2009); 5 U.S.C. § 551(13).

The APA also grants a court the authority to compel an agency to conduct an action that has been “unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). An APA claim premised on an agency’s failure to act can only proceed if the plaintiff asserts that the agency failed to take a discrete action that it was required to take. *Fanin*, 572 F.3d at 877-78.

An employee who alleges that he was discharged in violation of the anti-retaliation provision in the STAA can file a complaint with the Occupational Health and Safety Administration (“OSHA”). 49 U.S.C. § 31105(b)(1); 29 C.F.R. § 1978.103(c).

After an investigation, OSHA issues written findings about whether there is reasonable cause to believe that the employer violated the STAA. 29 C.F.R. § 1978.105(a). A party may object to the written findings and request a hearing before an ALJ. *Id.* § 1978.106(a). If the employer objects, then the Department of Labor ordinarily acts as the prosecuting party before the ALJ.

*Id.* \*969§ 1978.108(a)(1). Otherwise, the Department of Labor “may participate as a party or participate as amicus curiae at any stage of the proceeding.” *Id.* We lack jurisdiction under the APA to review the Department of Labor’s decision not to intervene in Yusim’s attempts to withdraw the reference of his STAA claim from a bankruptcy court because it was not a discrete action that the agency was required to perform by law.

Yusim has not shown that the agency was required to intervene on his behalf. See *Fanin*, 572 F.3d at 877-78. Indeed, the Department of Labor has discretion to decide whether to participate as a party in a STAA proceeding when the complainant objects to OSHA’s written findings. 29 C.F.R. § 1978.108(a)(1).

Therefore, we dismiss Yusim’s petition for review to the extent that he challenges the Department of Labor’s refusal to intervene on his behalf. II. The STAA prohibits an employer from discharging the driver of a commercial motor vehicle for accurately reporting his hours on duty. 49 U.S.C. § 31105(a)(1)(C); see also 49 U.S.C. § 31101(2) (defining an employee for purposes of the STAA).

If the Department of Labor concludes that an employer violated 49 U.S.C. § 31105(a), then it can take affirmative action to abate the violation, reinstate the employee to his prior position, and order the employer to pay compensatory damages, punitive damages, and reasonable costs. *Id.* § 31105(b)(3)(A)-(C).

The STAA defines an employer as a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle. *Id.* § 31101(3). The ARB’s legal conclusion that Yusim’s complaint should be dismissed was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

The ARB could not provide any of the relief authorized under § 31105(b)(3) once Midnight Sun was no longer operating as a business and had no assets from which damages could be paid.

Indeed, Midnight Sun was not an employer under the STAA at the time of the ARB's decision because it did not operate a business that owned or leased a commercial motor vehicle.

Yusim argues that the ARB could have granted him relief by declaring that he accurately reported his hours, but the STAA does not state that the Department of Labor can provide such declaratory relief. Because the ARB's decision to dismiss the STAA complaint was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, we deny Yusim's petition for review to the extent that he challenges the ARB's decision to dismiss his complaint.

Accordingly, we dismiss Yusim's petition for review in part and deny his petition for review in part. DISMISSED IN PART, DENIED IN PART.