U.S. Department of Labor

Administrative Review Board 200
Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

ROBERT GORDON,

COMPLAINANT,

v.

BRINDI TRAILER AND SERVICE, INC., AND ROBERTO URBINA BRINDI,

RESPONDENTS.

ARB CASE NO. 2017-0054

ALJ CASE NO. 2016-STA-00019

DATE: March 13, 2020

Appearances:

***For the Complainant*:**
Paul O. Taylor, Esq.; *Truckers Justice Center*, Burnsville, Minnesota

For the Respondents:
Roman Avshalumov, Esq.; *Helen F. Dalton & Associates, P.C*; Forest Hills, New York

Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge*, James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges.*

DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended. 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2019) (the STAA's implementing regulations). Robert Gordon filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on May 15, 2012,

alleging that Respondents Brindi Trailer and Service (Brindi Trailer) and Roberto Urbina Brindi (Urbina)[1] violated the employee protection provisions of the STAA by terminating his employment in retaliation for raising safety concerns. Following a hearing on his complaint, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) concluding that Respondents violated the STAA, ordering Respondents to reinstate Gordon, and awarding damages and attorney's fees. Respondents appealed the D. & O. to the Administrative Review Board (ARB or Board). For the following reasons we reverse the ALJ's ruling and dismiss the complaint.

BACKGROUND

Brindi Trailer is a motor carrier that transports property on interstate highways. At all times relevant to this matter it operated only one vehicle—a 2001 Volvo truck that pulled a trailer—and was based in Brooklyn, New York. Urbina is the sole owner of Brindi Trailer. Gordon began working as a driver for Urbina in September 2011. He was Urbina's only employee. Gordon lived in Edwardsville, Pennsylvania. On at least one occasion during his employment he drove Urbina's vehicle to his home in Edwardsville and to visit his wife. Transcript (Tr.) 201. The parties dispute whether Gordon had permission for such trips.

From the time he began working for Urbina, Gordon expressed dissatisfaction with the condition of Urbina's truck, which by February 3, 2012, had been driven 602,218 miles. Gordon asserts that Urbina disregarded his complaints about the truck and directed him to avoid inspection sites. *Id*. at 171, 245-46. On February 11, 2012, Gordon told Urbina "that he was resigning from his job because Brindi would not repair" the truck. Complainant's Brief at 2. Gordon did not resign on that date.

On February 15, 2012, Gordon picked up a load in Ridgeland, South Carolina that needed to be delivered to Taunton, Massachusetts by February 20, 2012. Tr. 66, 112, 143, 203; Respondent's Exhibit (RX) 16. On February 18, 2012, Gordon drove to Brooklyn and met with Urbina to receive paperwork and money for tolls. Gordon asserts that at this meeting he again complained about the condition of the truck. After this meeting Gordon drove the truck approximately 200 miles on the public highways to his home in Edwardsville.

While at his home, but prior to February 20, 2012, Gordon called the Pennsylvania Department of Transportation (PennDOT) and requested an inspection of Urbina's truck. According to Gordon, he chose to have the truck inspected in Pennsylvania close to his home in case the vehicle was taken out of service. Tr. 184-

[1] Respondents refer to themselves in their Petition for Review as "Brindi Trailer and Service, Inc.," "Roberto Urbina Brindi," and "Mr. Urbina."

85. PennDOT informed him that the truck could not be inspected on private property and instructed him to drive to a state police inspection site in Luzerne, Pennsylvania.

On the morning of February 20, 2012, Gordon drove Urbina's vehicle ten miles from his home to the inspection site in Luzerne. *Id.* at. 187-88. Gordon remained in the vehicle while it was inspected. Inspectors identified several violations and generated a Driver/Vehicle Examination Report. *Id.* at 194; RX 16. Gordon signed and received a copy of the report, removed some items from the truck, and called his mother for a ride home from the inspection. *Id.*

The parties dispute how they communicated during and following the vehicle inspection. Gordon testified that he called Urbina during the inspection on February 20th and told him what he had done. According to Gordon, Urbina started cursing at him, asked him why he didn't go around the inspection site, and told him to "pack [his] stuff and get out of the truck." Tr. 192-93. Gordon also testified that Urbina did not contact him after February 20th. *Id.* at 202. Urbina testified that it was not Gordon but a state trooper who told him that his truck had been impounded and that he called Gordon several times before reaching him on or about February 23, 2012. He asserts that he asked Gordon about company property that was missing from the truck but Gordon provided him with no explanation, and they have not spoken since then. *Id.* at 118-120. He also testified that he did not fire Gordon. *Id.* at 82.

Gordon testified that he is currently incapable of working as a truck driver. *Id.* at 152. He indicated that he has not worked since February 20, 2012 and currently uses a cane and walker to assist in walking. *Id.* at 196, 270. According to Fahirje Urbina, Roberto's wife, her husband employed no other drivers after Gordon. *Id.* at 288.

Gordon filed a complaint with OSHA alleging Respondents discharged him in violation of the STAA. On January 20, 2016, OSHA determined that Respondents discharged Gordon and thereby violated the STAA. Respondents objected to the OSHA determination and requested a hearing before an ALJ. The ALJ conducted a hearing on July 28, 2016. All parties were represented by counsel. Gordon testified on his own behalf. Roberto Urbina, Fahirje Urbina, and Mike Desena, an employee at one of Gordon's previous employers, testified on behalf of Respondents.

On June 13, 2017, the ALJ issued a D. & O. in which she concluded that Respondents violated the STAA. She found that "the testimony of both Complainant and Mr. Urbina lack credibility on certain key points." D. & O. at 16. She did not credit the testimony of either Gordon or Urbina regarding communications during or after the February 20, 2012 inspection. Instead, she concluded that (1) Gordon's "actions of packing up and removing his belongings, as well as arranging for his own

ride home after the February 20, 2012 inspection was an ambiguous departure;" (2) no evidence was presented indicating that Gordon "provided any definitive indication to Mr. Urbina that he intended to quit or resign on February 20, 2012;" and (3) therefore Urbina interpreted Gordon's actions "as abandonment, i.e., a quit or resignation and therefore must be deemed to have discharged" him. *Id.* at 21-22. Respondents appealed the ALJ's ruling to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to hear appeals from ALJ decisions and issue agency decisions in cases arising under the STAA. Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (March 6, 2020). The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence. 29 C.F.R. § 1978.110(b); *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019) (citation omitted). We uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable." *Jacobs*, ARB No. 2017-0080, slip op. at 2 (quotations omitted).

DISCUSSION

The STAA provides that an employer may not discharge or otherwise retaliate against an employee with respect to the employee's compensation, conditions, or privileges of employment because the employee engaged in STAA-protected activity.[2] The employee activities the STAA protects include: making a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order,"[3] "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security,"[4] or "refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition."[5]

Complaints filed under the STAA are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation

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[2] 49 U.S.C.A. § 31105(a)(1); 29 C.F.R. § 1978.102(a).

[3] 49 U.S.C. § 31105(a)(1)(A).

[4] 49 U.S.C. § 31105(a)(1)(B)(i).

[5] 49 U.S.C. § 31105(a)(1)(B)(ii).

Investment and Reform Act for the 21st Century (AIR 21).[6] To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action.[7] Once the complainant has established that the protected activity was a contributing factor in the employer's decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[8]

Gordon engaged in STAA-protected activity pursuant 49 U.S.C. §§ 31105(a)(1)(A) and 31105(a)(1)(B)(i) when he called the Pennsylvania State Police and presented Urbina's vehicle for inspection. The record contains government-issued evidence that Urbina's vehicle was not safe to drive. The vehicle was placed out of service and cited with multiple code violations including defective brakes, a damaged windshield, and inspection avoidance. D. & O. at 20; RX 16. We agree with the ALJ's conclusion that Gordon's motivation for scheduling the inspection does not render those acts unprotected. D. & O. at 20, citing *Nichols v. Gordon Trucking, Inc.*, ARB No. 1997-0088, ALJ No. 1997-STA-00002, slip op. at 2 (ARB July 17, 1997) ("A complainant's motivation in making safety complaints has no bearing on whether the complaints are protected.").

Although Gordon testified about safety problems with the vehicle, he drove it to his home on February 18, 2012, and from his home to the state police inspection site two days later. Additionally, the ALJ found that Gordon provided inconsistent testimony about his safety concerns. Therefore, to the extent that turning the vehicle in for inspection constitutes a refusal to drive, we cannot conclude that Gordon did so because he had a reasonable apprehension of serious injury to himself or the public because of the condition of Urbina's vehicle.

More importantly, we disagree with the ALJ's conclusion that Urbina subjected Gordon to an adverse employment action. The ALJ found that Gordon "removed belongings from the truck on February 20, 2012," and this act, "as well as arranging for his own ride home after the February 20, 2012 inspection was an ambiguous departure." D. & O. at 21. The ALJ then concluded that "Urbina treated Complainant's actions on February 20, 2012 as a resignation" because Gordon "did not drive for Respondents after the February 20, 2012 inspection" and "no evidence

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[6] 49 U.S.C. § 31105(b)(1); *see* 49 U.S.C. § 42121.

[7] 49 U.S.C. § 42121(b)(2)(B)(iii).

[8] 49 U.S.C. § 42121(b)(2)(B)(iv).

has been presented to support finding Complainant provided any definitive indication to Mr. Urbina that he intended to quit or resign on February 20, 2012." *Id*. These facts do not establish that Urbina terminated Gordon's employment.

Gordon's departure was not ambiguous. He knew that the vehicle would be impounded, that Urbina had no other vehicles for him to drive, and he arranged to have the vehicle inspected close to his home. Tr. 183-185, 287. On February 20, 2012, during the inspection, he was still Urbina's employee. But what happened after that date is unclear, and neither party provided clarification to the ALJ. In presenting his case to the ALJ, Gordon asserted that he had only one instance of communication with Urbina on that date, i.e., a phone call informing Urbina of the inspection. The ALJ concluded that she could not rely on Gordon's assertion that this phone call took place, and according to Gordon, he had no other contact with Urbina.

The record contains evidence that Gordon did not drive for Urbina after February 20, 2012, is physically incapable of driving, and was going to resign shortly after February 11, 2012. *See, e.g*., Tr. 169-70, 261. There is also evidence in the record that Urbina was dissatisfied with Gordon's actions. But none of this information shows that Urbina took any steps to remove Gordon as an employee of Brindi Trailer. While the ALJ finds to the contrary, this is not a case in which an employer has chosen "to treat an equivocal statement or action by an employee as a resignation" or "to interpret an employee's actions as a voluntary quit or resignation." D. & O. at 22. Instead, this is a case in which neither party presented credible evidence to establish what took place after an employee engaged in STAA-protected activity.

All parties in this case were represented by counsel, and each has its respective burdens of proof. Having found neither Gordon nor Urbina to be credible witnesses, the ALJ did not make findings of fact supported by substantial evidence that Urbina took adverse action against Gordon on or after February 20, 2012. The ALJ erred as a matter of law because, without those findings, she cannot conclude that Urbina discharged Gordon.

As the complainant in this case, Gordon bears the initial burden of establishing the elements of his claim. Because he has not proven that Respondents committed the adverse act alleged in his complaint, he has failed to meet that burden and his complaint must be dismissed.

CONCLUSION

The record does not support the ALJ's conclusion that Respondents subjected Gordon to an adverse employment action in retaliation for engaging in STAA-protected activity. Accordingly, we **REVERSE** the ALJ's Decision and Order,

VACATE the ALJ's award of relief, and **DISMISS** Gordon's complaint.

SO ORDERED.