U.S. Department of Labor

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

In the Matter of:

MYKHAYLO HOLOVATYUK,

COMPLAINANT,

v.

EM CARGO, LLC,

RESPONDENT.

ARB CASE NO. 2021-0046

ALJ CASE NO. 2020-STA-00071

DATE: January 12, 2022

Appearances:

For the Complainant:
Mykhaylo Holovatyuk; *pro se*; Palm Coast, Florida

For the Respondent:
E. Jason Tremblay, Esq., David S. Wayne, Esq., and Alexander L. Reich, Esq.; *Saul Ewing Arnstein & Lehr LLP*; Chicago, Illinois

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. Mykhaylo Holovatyuk (Complainant) filed a complaint under the Surface Transportation Assistance Act of 1982[1] (STAA), as amended, and its implementing regulations, alleging that his former employer, EM Cargo, LLC (Respondent), had violated the STAA's whistleblower protection provisions by terminating his employment. After a hearing, an Administrative Law Judge (ALJ)

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[1] 49 U.S.C. § 31105 (2007).

found that Respondent had not violated the STAA and denied the claim. Complainant appealed the ALJ's decision. We affirm.

BACKGROUND

Respondent is a trucking company based in Chicago, Illinois and is owned by Egidijus Majus.[2] The drivers who work for Respondent sign independent contractor agreements and equipment rental agreements to use trucks owned by Respondent.[3] Respondent deducted $1,200 per week from Complainant's pay for the truck rental.[4]

On October 12, 2019, Complainant began a route from Pennsylvania that ended in Orlando, Florida on October 14.[5] He then began an intended week-long break at his home in Florida but did not inform Respondent of his plan to take off for a week.[6] On October 16, a dispatcher for Respondent asked Complainant via text when he would work again, but Complainant did not respond.[7] On October 17, the dispatcher texted him again, to which Complainant responded "don't call me when I have days off if it's non-emergency situation."[8] On October 17, Majus texted Complainant telling him he had to start working the next day, to which Complainant responded that he would return on October 21.[9] Majus told Complainant that he needed to drop off the truck in Chicago or that Respondent would pick it up in Florida.[10] Complainant responded, "If you don't like something – Send me notice of lease termination in writing by mail as agreement requires."[11]

On October 20, Complainant sent an email to Majus, stating:

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2 Decision and Order (D. & O.) at 3.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

> I'm requesting EM Cargo, LLC identification number that I need to fill out IRS Form SS-8 to establish my employment status in company. This issue arose, when I got info about company's different attitude to drivers. I have to work 4 weeks without days off, 34-h 'restarts,' can't refuse to haul cheap loads (any load) and can get only 3.5 days of home time…I came home on 10/14/19 and on 10/17/19 you start to send me messages, trying to force me put on the road from 10/18/19, threatened to take back truck, despite on contract provision…So, definitely, you treat me as employee and this will be a question for IRS, DOL, etc.[12]

Majus responded that he does not share the requested information over phone or email and told Complainant to schedule an in-person appointment.[13] Complainant replied that he wanted the information via mail.[14] Majus responded, "You will be terminated from this company due to not making truck weekly payments and not returning tractor to the terminal location."[15] Complainant replied that Respondent should send him the notice of termination.[16] Complainant and Majus continued to argue regarding his termination in the email chain, which ended on October 21 with Majus stating "You need to sign termination documents in order to be eligible to receive your deposit."[17]

Complainant returned the truck to the company lot on October 23rd.[18] Majus testified that he estimates that Respondent lost roughly $5,000 to $6,000 in the week that Complainant had the truck and did not take on any loads.[19] Respondent created two termination forms. The first, created on October 23, states he was terminated for "poor communication between driver and dispatch."[20] The second, created on October 24 when Complainant refused to sign the first, states:

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12 *Id.* at 4.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

> Driver was holding tractor belonging to EM CARGO LLC in Florida and not coming back on duty. We asked him to return tractor belonging to EM CARGO LLC in our yard. However, driver refused to answer to the EM CARGO LLC owner phone calls and was sending text sms, saying that due to some personal issues he cannot come back to work as it was required. Due to the poor communication with a driver, company can no longer afford to work with him.[21]

In March 2020, Majus received a reference form for Complainant from a third-party recruiting company.[22] In all categories, Majus selected scores of 2 or 3 out of 5 to rate Complainant and stated that he would not recommend Complainant for a similar role.[23] He further wrote that Complainant left the company due to poor communication skills.[24]

On December 10, 2019, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent violated the employee protection provisions of the STAA when it terminated him in retaliation for refusing to drive over authorized hours of service. On June 1, 2020, OSHA dismissed the complaint. Complainant filed objections to the findings and requested a hearing. An ALJ held a hearing on December 8, 2020.

On June 8, 2021, the ALJ issued a Decision and Order Denying the Complaint. The ALJ considered Complainant's allegation that he had engaged in protected activity by emailing Majus about the 34-hour restart rule, a regulation requiring a driver to be off-duty for 34 or more hours after driving 70 hours within eight consecutive days.[25] The ALJ found it was unclear if Complainant was referring to specific events in October 2019 or commenting on Respondent generally failing to abide by the 34-hour rule.[26] Based on the circumstances surrounding the October 20 email, the ALJ found no evidence of a recent violation of the rule, as

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21 *Id.*

22 *Id.* at 5.

23 *Id.* at 5, 10.

24 *Id.* at 10.

25 *See* 49 C.F.R. § 395.3.

26 D. & O. at 7-8.

Complainant had already not worked for over 34 hours before emailing Respondent.[27]

The ALJ therefore considered whether Complainant was generally commenting that Respondent did not allow him to take required time off. The ALJ noted that Complainant had only mentioned the 34-hour rule once in the entire email chain without providing any additional information.[28] The ALJ found that that the entire context of the email was too vague to establish Complainant was making a safety complaint and that he was emailing Majus only because of a dispute over his employment status.[29] Thus, the ALJ found Complainant failed to prove he had engaged in a protected activity.[30]

The ALJ discussed the rest of Complainant's claim *arguendo*. The ALJ considered the three adverse employment actions alleged by Complainant. The ALJ found that Complainant's termination was an adverse action and also found that Majus' negative evaluation on the reference form was an adverse action because it could have prevented Complainant from finding employment.[31]

The ALJ considered Complainant's allegation that Respondent failed to pay required interest[32] on an escrow account holding a security deposit from Complainant. The independent contractor agreement stated that Complainant "agrees and authorizes" Respondent to "withhold escrow/security deposit funds" at a minimum of $2,500.[33] The lease agreement also provided that Complainant "shall deposit" a first payment of $2,500.[34] Majus, however, testified that drivers were not required to pay any security deposit and that there was no escrow account.[35]

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27 *Id.* at 8.

28 *Id.*

29 *Id.*

30 *Id.* at 9.

31 *Id.* at 9, 11.

32 Carriers must pay interest on escrow funds on a quarterly basis if the leasing agreement requires them. 49 C.F.R. § 376.12(k).

33 D. & O. at 9.

34 *Id.*; Joint Exhibit (JX) 2.

35 D. & O. at 9.

Further, Complainant's checking account statements did not show a withdrawal of $2,500 around the start of his employment, and indicated that Respondent's last payment to Complainant on January 10, 2020 was $2,024.63—equal to the pay he had earned during his final week of work.[36] The ALJ therefore found that Complainant failed to prove the alleged adverse action.[37]

The ALJ then considered whether Complainant's reference to the 34-hour rule in the October 20th email contributed to the adverse employment actions. For the termination, the ALJ found temporal proximity between the reference and the termination but found that several other factors undercut its weight.[38] On October 17th, Complainant told Majus to "send me termination documents if you want" after Majus asked him when he would restart work and return the truck.[39] On October 18th, Majus told Complainant, "I can terminate you whenever I decide."[40] The ALJ found this demonstrated that both parties already had contemplated ending the employment relationship.[41]

Further, the ALJ noted that Majus referenced his issue with Complainant failing to return the truck in the same email that terminated him and that the 34-hour rule is referenced only once in an email requesting tax information.[42] The ALJ found that Respondent's general premise for firing Complainant was the same, even if it used different wording at times.[43] Though Complainant argued he did not have to inform Respondent of his vacation because he was an independent contractor, the ALJ stated that failing to notify an employer about taking time off has consequences and that Respondent reasonably needed to know about his vacation to

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36 *Id.* at 10; JX 10, 11.

37 D. & O. at 10.

38 *Id.* at 12. The termination occurred on the same day as the email. *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* at 13.

plan accordingly.[44] The ALJ therefore found that Complainant failed to prove his reference to the 34-hour rule contributed to his termination.[45]

The ALJ then considered whether his reference to the 34-hour rule contributed to his poor reference. The ALJ noted there was less temporal proximity because Majus filled out the reference form five months after Complainant's October 20th email.[46] Majus also listed only Complainant's communication skills as a reason for his termination and does not mention any protected activity.[47] The ALJ remarked that it was understandable for Majus to rate Complainant low in areas such as "reliability" and "communications" after his actions.[48] The ALJ therefore found that Complainant failed to prove his alleged protected activity contributed to his poor evaluation.[49]

Lastly, the ALJ considered whether Respondent proved that it would have terminated Complainant in the absence of his alleged protected activity. The ALJ found that the decision to fire him was reasonable and expected given the loss of revenue by not having the truck on the road.[50] The ALJ therefore found that Respondent proved its affirmative defense by clear and convincing evidence.[51]

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44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.* at 13-14.

49 *Id.*

50 *Id.* at 14-15.

51 *Id.* at 15.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated his authority to the Administrative Review Board to issue final agency decisions in STAA cases.[52] The Board reviews an ALJ's factual determinations under the substantial evidence standard.[53] The Board reviews the ALJ's legal conclusions de novo.[54]

DISCUSSION

The STAA whistleblower statute provides that an employer may not discharge or otherwise retaliate against an employee for making a complaint about the existence of a commercial motor vehicle safety violation.[55] To prevail on a STAA complaint, the complainant must prove by a preponderance of the evidence that (1) they engaged in a protected activity, (2) that the employer took an adverse employment action against them, and (3) that the protected activity was a contributing factor to the adverse employment action.[56] If the complainant successfully meets their burden, the employer may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.[57]

Complainant contests several of the ALJ's findings, including the finding that he failed to prove that had he engaged in a protected activity. Complainant

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[52] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[53] 29 C.F.R. § 1978.110(b) (2020). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Menter v. N. Cty. Transp.*, ARB No. 2005-0104, ALJ No. 2004-STA-00061, slip op. at 1-2 (ARB Oct. 24, 2007).

[54] *Olson v. Hi-Valley Constr. Co.*, ARB No. 2003-0049, ALJ No. 2002-STA-00012, slip op. at 2 (ARB May 28, 2004).

[55] 49 U.S.C. § 31105(a)(1)(A) (2007).

[56] 29 C.F.R. § 1978.109(a) (2020); *Estate of Ayres*, ARB Nos. 2018-0006, -0074, ALJ No. 2015-STA-00022, slip op. at 6 (ARB Nov. 18, 2020).

[57] 29 C.F.R. § 1978.109(b) (2020); *Blackie v. Smith Transp., Inc.*, ARB No. 2011-0054, ALJ No. 2009-STA-00043, slip op. at 8 (ARB Nov. 29, 2012).

contends that his "34-h 'restarts'" reference in his October 20, 2019, email related to a specific safety regulation and was therefore a protected activity. The STAA protects employees who make complaints "related to a violation of a commercial motor vehicle safety regulation."[58] Covered safety complaints include oral, informal, or unofficial "internal complaint[s] to superiors conveying [an employee's] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation."[59]

We agree with the ALJ's finding that Complainant's reference to the 34-hour restart rule in the October 20th email was not a protected activity. The purpose of the email was to seek tax information because Complainant believed his work schedule made him an employee of Respondent, rather than an independent contractor. Further, Complainant makes only a vague reference to the 34-hour restart rule among a list of other issues. Complainant wrote that he had "to work 4 weeks without days off, 34-h 'restarts.'" It is uncertain whether Complainant is stating that Respondent forced him to work four weeks straight without allowing any required 34-hour rest period, or that he worked so frequently during those four weeks that he had to take the required rest time. Complainant did not further discuss the rule or any alleged violation in his email exchange with Majus, making it impossible to discern whether or not he was making a safety complaint to his supervisor. Accordingly, the ALJ's finding that Complainant failed to prove that he had made a safety complaint to his employer is supported by substantial evidence, and Complainant's claim is denied.

Complainant also contested the ALJ's findings that he failed to prove that his reference to the 34-hour restart rule had contributed to his termination and subsequent negative referral and that Respondent proved that it would have committed the same adverse actions absent his alleged protected activity. However, Complainant's behavior, including failing to tell his employer he was taking a week off, keeping a truck that could have been used by another driver, and being argumentative and disrespectful toward his employer, reasonably caused Respondent to end the employment relationship and give his work performance low ratings. While Complainant may expect more leeway in his work as an independent contractor, his actions caused harm to the business that could have been easily

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[58] *Dick v. Tango Transp.*, ARB No. 2014-0054, ALJ No. 2013-STA-00060, slip op. at 7 (ARB Aug. 30, 2016).

[59] *Harrison v. Roadway Express, Inc.*, ARB No. 2000-0048, ALJ No. 1999-STA-00037, slip op. at 6 (ARB Dec. 31, 2002).

prevented with basic communication with his employer. Therefore, the ALJ's findings that Complainant failed to prove contribution and that Respondent proved its affirmative defense are supported by substantial evidence.[60]

CONCLUSION

Because Complainant failed to prove several required elements of his STAA claim, we **AFFIRM** the ALJ's Decision and Order Denying the Complaint.[61]

SO ORDERED.

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[60] Complainant also contests the ALJ's finding that Complainant failed to prove he had paid a deposit for his truck rental and, therefore, that Respondent could not have committed an adverse action by failing to pay required interest on it. We note that Complainant failed to produce evidence that he had made a deposit or that an escrow account holding the deposit existed. We therefore affirm the ALJ's finding.

[61] In any appeal of this Decision and Order that may be filed with the Courts of Appeals, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board (ARB)).