U.S. Department of Labor

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

In the Matter of:

SUSAN MARIE BERG,

COMPLAINANT,

v.

S&H EXPRESS,

RESPONDENT.

ARB CASE NO. 2017-0075

ALJ CASE NO. 2015-STA-00014

DATE: June 4, 2020

Appearances:

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

For the Respondent:
Zachary E. Nahass, Esq.; *CGA Law Firm*; York, Pennsylvania

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

DECISION AND ORDER

PER CURIAM. Susan Marie Berg, Complainant, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on March 13, 2013, against S&H Express, Respondent. Complainant alleged that Respondent, her employer, had violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified, when it terminated her employment. 49 U.S.C. § 31105 (2007), as implemented at 29 C.F.R. Part 1978 (2019). Complainant argued that she was fired because she engaged in activity protected by the STAA. The STAA

prohibits employers from discriminating against employees when they report violations of commercial motor vehicle safety rules or when they refuse to operate a vehicle when such operation would violate those rules. 49 U.S.C. § 31105(a).

A Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) concluding that Complainant failed to prove by a preponderance of the evidence that any protected activity contributed to the termination decision because she found that the decision-makers did not know that Complainant had engaged in protected activity and concluded that Respondent fired Complainant for reasons wholly unrelated to her protected activity. Because we conclude that the ALJ's finding that there was no contributing factor causation in this matter is supported by substantial evidence in the record, we affirm the ALJ's decision.

BACKGROUND

Complainant worked for Respondent as a truck driver from September 6, 2011, until November 12, 2012. D. & O. at 2. During her employment, Complainant received three documented reprimands for being late and/or failing to communicate with dispatch, in addition to four other disciplinary incidents in 2012. *Id.* at 25.

On November 7, 2012, Complainant called and informed her dispatcher, Tina Bailey, that she was experiencing tooth pain and that she needed to stop work early due to it. D. & O. at 11, 22. Bailey told her supervisor, Sharon Mergler, about Complainant's tooth pain and that Complainant was having difficulty doing her job that day. *Id.* at 11 (citing Tr. 72). After talking to Complainant and Bailey, Mergler instructed Bailey to bring Complainant in so she could go home early and see a dentist. *Id.* at 11, 22. At some point both Bailey and Mergler asked Complainant to try to locate an empty trailer to bring to the terminal on her way back to the work yard before leaving for the day. *Id.* at 5 (citing Tr. 372-74). Complainant refused "to wait at the customer's lot to receive an empty trailer based on her increasing tooth pain." *Id.* at 21. However, Complainant did not tell Mergler or Bailey that it would be unsafe if she continued to operate a motor vehicle. *Id.* at 22. After Complainant drove the truck back to the terminal, she spoke with Bailey and Mergler and informed them that she had made a dentist appointment for the next morning (from a customer's telephone) and that she would be unable to work the next day. *Id.* at 6 (citing Tr. at 377–78); *Id.* at 22. They told Complainant to let them know what the dentist said. *Id.* (citing Tr. at 377). Complainant then drove herself home. *Id.* at 22.

Complainant visited her dentist the next day. *Id.* at 6 (citing Tr. at 379; CX 1). The dentist prescribed Complainant pain medication for a couple of days, which made Complainant feel drowsy. *Id.* (citing Tr. at 381; CX 2). Complainant would have been unable to drive safely while on the medication. *Id.* at 6 (citing Tr. at 382); *Id.* at 21. After her dentist appointment, Complainant did not call the office. *Id.* at

23. Respondent unsuccessfully tried to contact Complainant to make sure that she was alright. *Id.* at 23. Complainant did not work November 8 to 9, 2012 (Thursday and Friday), because she was taking the medication.

The following Monday, November 12, 2012, Mergler met with Patrick Heenan, Respondent's Vice President of Operations, to discuss firing Complainant. D. & O. at 12. Respondent had already been weighing the decision to fire Complainant prior to Complainant calling out early on November 7, 2012, because of problems with lateness and lack of communication. *Id.* at 17 (citing Tr. at 558, 560-61); *id.* at 26. Complainant had a history of late deliveries that Respondent had addressed over the months prior to November 7-9, 2012. *Id.* at 25. Mergler, Heenan, and Bailey decided together that Complainant would be fired. *Id.* at 12.

After the termination decision was made, Mergler, Heenan, and Bailey met with Complainant to tell her that she was being fired for repeated lateness and lack of communication. *Id.* at 12 (citing Tr. at 127); *Id.* at 17. Respondent recorded the termination as being for repeated instances of lateness, for which Respondent had disciplined her for on multiple occasions prior to November 2012. *Id.* at 25 (citing RX 1, p. 84). According to company policy, termination was the next step in the process for a driver like Complainant, who had received a verbal warning, a written reprimand, and a three-day suspension for late loads. *Id.* at 25. Respondent does not always strictly adhere to its progressive discipline policy and has made exceptions in the past. *Id.* at 17. Respondent did not issue a formal written discipline to Complainant for every late load and waited a month from Complainant's suspension in September to fire her because Respondent wanted her to succeed. *Id.* at 12. Mergler instead had informal conversations with Complainant about late loads. *Id.*

On March 13, 2013, Complainant filed a complaint with OSHA alleging that Respondent terminated her employment in violation of the STAA. On November 3, 2014, OSHA sent Complainant a preliminary order dismissing her complaint. Complainant filed timely objections to OSHA's order and requested a hearing before an ALJ, who held a hearing on June 12, and August 12-13, 2015.

In her D. & O., the ALJ concluded that Complainant engaged in protected activity when she refused to drive because it would have violated a motor vehicle safety regulation had she continued to drive with her increasing tooth pain and when she refused to drive because it would have violated a motor vehicle safety regulation to drive while under the influence of prescription narcotic drugs. D. & O. at 21. The ALJ found that while Respondent took adverse action against Complainant when it fired her, it did not blacklist her because the ALJ found insufficient evidence to support any causation between Complainant's protected activity and Respondent's submission of Complainant's disciplinary record to HireRight, a third-party independent company that Respondent uses to pull prospective drivers' records before hiring. *Id.* at 13 (citing Tr. at 171); *Id.* at 23-24.

Having considered the evidence of contributing factor, the ALJ found that none of Complainant's alleged protected activity contributed to her termination or to the decision to submit an employment report about Complainant to a third-party company. D. & O. at 24; 24-27. The ALJ found that Complainant did not communicate the safety-related nature of her refusal to drive because of her tooth pain, so Respondent did not know about this instance of protected activity. *Id.* at 22, 27. Regarding Complainant's protected activity based on the narcotic prescription medication, the ALJ found that Complainant never told Respondent that she was taking any medication. *Id.* at 23. Thus, causation could not be established based on either instance of protected activity because of an affirmative showing that there was no knowledge. *Id.* at 27. The ALJ concluded that Respondent fired Complainant on grounds wholly unrelated to her protected activity—namely, "for lateness and lack of communication." *Id.* at 26.

The ALJ concluded that Complainant was not entitled to relief. Complainant filed a timely petition for review. Both parties filed briefs on appeal.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to issue agency decisions under the FRSA. 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. 13,186 (Mar. 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

On appeal, Complainant objects to the ALJ findings and conclusions that certain protected activities were not also considered protected under different STAA provisions, that the ALJ required Complainant to prove knowledge as an element of her case, that the decision-makers had no knowledge of protected activity, and that there was no contributing factor causation. Additionally, the Complainant objected to the ALJ's statement that refusals to operate under the STAA provisions at 31105(a)(1)(B)(ii) must relate to the "vehicle's hazardous safety or security condition." Citing D. & O. at 21 n.8.

To prevail on a STAA claim, an employee must prove by a preponderance of

the evidence that she engaged in protected activity which was a contributing factor in unfavorable personnel action taken against her. 49 U.S.C. § 42121(b)(2)(B)(iii). STAA complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). 49 U.S.C. § 31105(b)(1); *see* 49 U.S.C. § 42121 (2000).

1. Protected Activity

Under the STAA, there are several ways to satisfy the protected activity element, even with the same activity.[1] In this case, both of the applicable protected activity provisions concern the STAA's "refusal to operate" provisions at 49 U.S.C. §§31105(a)(1)(B)(i) and (a)(1)(B)(ii). To be protected, a refusal must be based on a reasonable concern about a condition that impairs the driver's ability to operate safely and employees must communicate that the impaired condition exists to the employer.[2] *Wrobel v. Roadway Express, Inc.*, ARB No. 2001-0091, ALJ No. 2000-STA-00048, slip op. at 3 (ARB July 31, 2003); *Garcia v. AAA Cooper Transp.*, ARB No. 1998-0162, ALJ No. 1998-STA-00023, slip op. at 4-5 (ARB Dec. 3, 1998); *Barr v. ACW Truck Lines, Inc.*, No. 1991-STA-00042, slip op. at 3 (Sec'y Apr. 22 1992).

The first such provision relevant to this case, provides that an employee engages in protected activity if she "refuses to operate a vehicle because [t]he operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." Section 31105(a)(1)(B)(i). Under this provision, the protection afforded includes refusals where the operation of a vehicle would violate safety laws under the employee's reasonable belief of the facts at the time she refuses to operate a vehicle, and the reasonableness of the refusal must be subjectively and objectively determined. *Jeanty v. Lily Transp.*

---

[1] For example, in *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 1999-0107, ALJ No. 1999-STA-00021, slip op. at 9-11 (ARB Nov. 30, 1999), the Board reversed an ALJ's grant of summary decision because "a complainant who produces sufficient evidence in support of a future fatigue claim could establish that a refusal to drive was protected activity" under either (i) or (ii) of 49 U.S.C. §31105(a)(1)(B).

[2] While the ALJ found protected activity regarding both of Complainant's refusals, the ALJ also made findings contrary to this conclusion—that Complainant did not communicate the safety-related nature of her refusals. D. & O. at 21-23. Because a refusal to operate based on the condition of an employee is protected only if the employee communicates the safety-related nature of the impairment, this raises the question whether Complainant even engaged in STAA-protected activity in this case. See *Jeanty*, ARB No. 2019-0005, slip op. at 6-7. However, as Respondent has not appealed (or disputed) the ALJ conclusions that Complainant engaged in protected activity, and because we resolve this case on the element of causation, we need not remand for the apparent contradiction.

Corp., ARB No. 2019-0005, ALJ No. 2018-STA-00013 slip op. at 4-5 (ARB May 13, 2020).

The ALJ found that both of Complainant's refusals were protected under 31105(a)(1)(B)(i). D. & O. at 21. On November 7, 2012, the ALJ found that Complainant refused to drive in violation of 49 C.F.R. §392.3, because of her tooth pain and refused to drive in violation of 49 C.F.R. §392.4 when she refused to drive on November 8-9, 2012, because she was taking prescription narcotics. D. & O. at 21. Because we assume protected activity as not challenged on appeal, we decline to address Complainant's argument that the ALJ should have found that there would have also been a violation of 29 C.F.R. §392.3 in regards to the November 8-9 protected refusal as well.

The other relevant refusal provision provides that an employee engages in protected activity if she "has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition . . . ." 49 U.S.C. § 31105(a)(1)(B)(ii). The Act states that for purposes of Section 31105(A)(1)(B)(ii), an "employee's apprehension of serious injury" is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. 49 U.S.C. §31105(a)(2). "To qualify for the protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." *Id.*

As argued by Complainant, the reasonable apprehension provision is applicable if the complainant has an objectively reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition, which may include a driver's physical condition. *Eash v. Roadway Express, Inc.*, ARB No. 2004-0036, ALJ No. 1998-STA-00028, slip op. at 7, 8-9 (ARB Sept. 30, 2005) (driver fatigue may satisfy this provision of the STAA). We have explained that the clause, "a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition," covers more than just mechanical defects of a vehicle—it is also intended to ensure "that employees are not forced to commit . . . unsafe acts." *Melton v. Yellow Transp., Inc.*, ARB No. 2006-0052, ALJ No. 2005-STA-00002, slip op. at 6 (ARB Sept. 30, 2008) (quoting *Garcia*, ARB No. 1998-0162, slip op. at 4). Thus, a driver's physical condition could cause her to have a reasonable apprehension that operation of the motor vehicle would pose a risk of serious injury to the employee or the public if she drove in that condition. *Id.* (citing *Somerson v. Yellow Freight Sys., Inc.*, ARB Nos. 1999-0005, -0036, ALJ Nos. 1998-STA-00009, -00011, slip op. at 14 (ARB Feb. 18, 1998)).

In *Wrobel*, the Board clarified how the "correction of the unsafe condition" requirement of the reasonable apprehension provision of section 31105(a)(1)(B)(ii)

applies in a case involving refusal to drive based on an assertion about the employee's physical condition. The Board explained:

> The reasonable apprehension provision expressly requires that the employee had "sought from the employer, and been unable to obtain correction of the unsafe condition." . . . Thus, in order to show that he had sought and been unable to obtain correction of the unsafe condition, Wrobel would have had to provide Roadway with adequate information that it was unsafe for him to drive. The mere assertion that he was "sick," particularly under the circumstances presented [evidence casting significant doubt on the credibility of the assertion that he was sick] was inadequate to do so.

Wrobel, ARB No. 2001-0091, slip op. at 6 n.4. Thus, the ALJ erred as a matter of law when she stated that Complainant's refusals to operate because of her physical condition could not constitute protected activity under 31105(a)(1)(B)(ii) because her refusals did not relate to the vehicle's condition. See D. & O. at 21 n.8. However, because the ALJ found protected activity and the consideration of additional protected activity under different STAA provisions would not change the ultimate finding that there was no contributing factor causation in this matter on these facts, we decline to address that element further.

2. Causation

Having set forth the correct standards for protected activity under 31105(a)(1)(B)(i) and (ii), we turn to the issue of whether the ALJ correctly decided that protected activity did not contribute to any adverse action, which is dispositive of this matter. In short, the ALJ concluded that while Complainant engaged in protected activities on two occasions and was fired in close temporal proximity to that protected activity, there was no contributing factor causation because Respondent fired Complainant for her documented history of disciplinary problems including many occurrences of lateness and lack of communication.

Supporting her ultimate conclusion, the ALJ found that Respondent initiated a series of disciplinary actions related to Complainant's lateness and lack of communication months in advance of her termination. *Id.* at 25. Complainant had four other disciplinary incidents in 2012, and three documented reprimands for being late and/or failing to communicate with dispatch. *Id.* (RX 1, pp.66-88).[3] Respondent was already weighing the decision to fire Complainant on November 7, 2012, prior to her calling out for her tooth issue. *Id.* at 26; Tr. at 558, 560-61.

---

[3] Although the ALJ cited CX 1, pp. 66-88, we note that Complainant's disciplinary action referenced is at RX 1, 66-88. Therefore, we consider this citation a typographical error and find support for the ALJ's findings at RX 1.

Termination was the next step in Respondent's progressive discipline policy that Complainant had been going through. *Id.* at 25 (citing Tr. at 527-28; RX 3, p. 18). Complainant delivered late loads the week of November 5-9, 2012, before she called off that week for the tooth issues. *Id.* Respondent recorded "lateness" as the basis for her firing, for which she had been disciplined multiple times in 2012. *Id.* (citing RX 1, p. 84). The ALJ found no shifting reasons in Respondent's expression that it fired her for late loads and lack of communication and noted that both were documented. *Id.* at 26 n.12 (citing RX 1, pp. 66, 70, 72 (showing communication issues)).

Additionally, the ALJ found that failure to discipline her for every late load was not evidence of pretext. *Id.* The ALJ noted that company practice permitted a degree of flexibility as to discipline because Respondent wanted its drivers to succeed. *Id.* (citing Tr. at 151, 551). However, because Complainant had gone through the progressive discipline policy and been given a three-day suspension in September, the next step in the policy was termination. *Id.* at 25 n.11 (citing RX 3, p. 18).

The ALJ also found that evidence that Complainant was not late on any given occasion was not evidence of pretext. *Id.* at 26. The ALJ found that Respondent believed that Complainant had late loads the week she was fired even if Respondent was incorrect about whether the untimeliness was for reasons outside of Complainant's control. *Id.* The ALJ noted that ALJs "do not sit as 'super-personnel departments' who second-guess an employer's decisions." *Id.* (citing *Carney v. Price Transport*, ARB No. 2004-0157, ALJ No. 2003-STA-00048, slip op. at 7 n.3 (ARB May 31, 2007) (quoting *Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000)).

Evidence in the record supports the ALJ findings. First, Bailey's, Lyons', and Mergler's witness testimony, which the ALJ found to be credible, supports the ALJ's findings and conclusions that Complainant did not communicate the safety-related nature of her refusal on November 7, 2012, or tell Respondent that she had been prescribed or was taking a prescription drug that would cause her to be unable to drive. D. & O. at 22, 23; Tr. at 129, 131, 174-75, 210-11, 290-91, 316, 331, 382, 522. The ALJ found Complainant's testimony to be not credible for several reasons, most notably because Complainant signed a DOL investigative document stating that she had had no disciplinary issues with Respondent, even though Complainant had signed at least six disciplinary reports from Respondent during her employment. D. & O. at 18-19. We defer to the ALJ's credibility findings in this matter as they are not "inherently incredible or patently unreasonable." The finding that Respondent had no knowledge of any protected activity, which is supported by substantial evidence in the record, makes causation in this matter an impossibility.

Witness testimony that the ALJ found credible also supports the ALJ's findings that Respondent's actions against Complainant were because of late loads and lack of communication. D. & O. at 25-26; supported by Tr. at 127, 284, 289, 312. Additionally, company logs show late loads during Complainant's last week of employment and for other weeks. These logs support the ALJ's finding that the Respondent believed that Complainant had late, unexcused, loads. *Id.* (citing RX 1, pp.3, 33, 49, 59-61). We hold that substantial evidence supports the ALJ's findings of fact and her conclusions are in accordance with law.[4]

We also agree with the ALJ's conclusion that the evidence does not show pretext and commend her analysis. The ALJ appropriately found that that there was no pretext based on company practice which permitted a degree of flexibility as to discipline for the goal of success for its drivers. *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 11-12 (ARB Jan. 22, 2020) (ARB reversed an ALJ decision which improperly focused on whether the respondent's justifications for terminating the complainant had merit, rather than on whether the respondent violated the underlying statute). We confirm that it is not within the authority of the Board or ALJs to "sit as a super-personnel advocate" who second-guesses an employer's decisions. *Id.* at 11. Our responsibility is to determine whether the whistleblower protection statute in this case has been violated, not whether the employer acted the best it could have, made every right decision, or did as we would have done. The ALJ found no such violation occurred in this case, which finding is supported by substantial evidence in the record.

CONCLUSION

As substantial evidence supports the ALJ's factual determination that Respondent did not take any adverse action against Complainant because she engaged in protected activity, we **AFFIRM** the ALJ's conclusion of law that Respondent did not violate the STAA. Accordingly, the complaint in this matter is **DENIED.**

SO ORDERED.

Judge Thomas H. Burrell, *concurring*:

---

[4] We also affirm the ALJ's conclusion that there was no blacklisting because substantial evidence shows that there was no causation between Respondent's submitting the disciplinary history report to HireRight and Complainant's protected activities for the same reasons stated above that there was no causation between the protected activity and the termination decision. D. & O. at 24.

I concur with the majority opinion. I write separately to emphasize a point concerning Respondent's termination of Complainant for multiple violations of a policy notwithstanding that the employer did not take action following each instance of the policy violation. While an employer's action after a series of violations may be indicative of pretext, it may also be the proverbial "straw that broke the camel's back." A fact-finder is permitted to find such even though the employer has a progressive discipline policy, as the ALJ did in this case. D. & O. at 25-26. *See Simpson v. Equity Transp. Co., Inc*., ARB No. 2019-0010, ALJ No. 2017-STA-00076 (ARB May 13, 2020) (ARB agreeing with Respondent that employer may discipline an employee on a cumulative-events theory even though it did not take a disciplinary action on each event comprising the ultimate basis for the adverse action).