U.S. Department of Labor

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

In the Matter of:

JOHN GRIFFITH, **ARB CASE NO. 2019-0026**

COMPLAINANT, **ALJ CASE NO. 2017-STA-00046**

v. **DATE: December 15, 2020**

S.H.I. LOGISTICS,

RESPONDENT.

Appearances:

For the Complainant:
F. Douglas Hartnett, Esq.; *Elitok & Hartnett at Law, PLLC*; Washington, District of Columbia

For the Respondent:
Richard D. Greer, Esq.; *The Greer Law Firm, P.C.*; Birmingham, Alabama

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

DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended.[1] John Griffith (Complainant) filed a complaint with the United States Department of Labor's

[1] 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2019) (the STAA's implementing regulations).

Occupational Safety and Health Administration (OSHA) alleging that S.H.I. Logistics (Respondent) violated the STAA by not rehiring him to return to his position as a truck driver in retaliation for acts protected by the STAA. OSHA determined that Complainant's complaint lacked merit. Complainant objected and requested a hearing before an Administrative Law Judge (ALJ), who ruled in favor of the Respondent. For the following reasons, we affirm the ALJ's order.

BACKGROUND

Complainant was a truck driver for Respondent for two periods of employment: from August of 2013 to March of 2014, and from December of 2015 to May of 2016. Complainant voluntarily resigned after each period of employment.

The facts relevant to this case span both periods of employment. On October 30, 2013, during Complainant's first period of employment, Complainant was delivering product to one of Respondent's customers, Miller Coors, and objected to showing his commercial driver's license due to fear of potential identify theft.

On April 14, 2016, during Complainant's second period of employment, Complainant was transporting plants for Respondent. Complainant noted there were no e-tracks (fixtures to add stabilizing straps) in his assigned trailer to properly secure the plants but continued to transport the shipment. During transit, Complainant drove out of an underground tunnel with a steep embankment causing damage to the shipment and his assigned trailer. Complainant completed paperwork reporting 21 broken pots and dropped off the trailer to Respondent's terminal for repairs. The damage was fixed and Complainant was asked to make another delivery with the same trailer the next day.

In May of 2016, Complainant resigned a second time. At this time, Mr. Swalve, Respondent's president and owner, advised Complainant that he would not rehire him again following his second resignation.

On January 9, 2017, Complainant phoned Mr. Smith, Respondent's manager, and made a verbal request to be rehired as a truck driver. Mr. Smith advised that he would contact Mr. Swalve and get back to Complainant regarding reemployment.

After this initial conversation, Respondent did not contact Complainant again regarding his request for reemployment. On January 11, 2017, Complainant sent a fax addressed to Mr. Swalve requesting reemployment. On January 17, 2017, Complainant faxed identical letters to Mr. Swalve and Mr. Smith requesting reemployment. Mr. Swalve contends that around this time he received a handwritten letter from Complainant seeking reemployment on the conditions that he would not have to haul plants or show his commercial driver's license to Respondent's customers. Complainant denies the existence of his letter and contends that he did not send a handwritten letter to Mr. Swalve. On January 23, 2017, Complainant filed a complaint. After a formal hearing, the ALJ assigned to the case dismissed Complainant's claim. This appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board authority to hear appeals from ALJ decisions and issue agency decisions in cases arising under the STAA.[2] The Board 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.[3]

DISCUSSION

The STAA provides that a person may not discharge, discipline, or discriminate against an employee "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities.[4] Under the STAA, "[t]he Secretary may determine that a violation . . . has occurred only if the complainant demonstrates [by a preponderance of the evidence] that any

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[2] 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).

[3] 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).

[4] 49 U.S.C. § 31105(a)(1).

behavior [protected by the statute] was a contributing factor in the unfavorable personnel action alleged in the complaint."[5] A "contributing factor," is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision."[6] The ALJ found that Complainant did not establish by a preponderance of the evidence that his protected activity, the report of the April 2016 planting hauling incident, was a contributing factor in the Respondent's refusal to rehire him for a third term of employment.[7]

Complainant argues on appeal that the ALJ erred in determining that his protected activity was not a contributing factor in Respondent's decision not to rehire him. He argues that the ALJ's temporal proximity analysis was flawed because Mr. Swalve testified that he made the decision not to rehire Complainant at the time he voluntarily resigned the second time, within weeks of the plant hauling incident, and not when he sought reemployment eight months later. We note, however, that Mr. Swalve also testified he made a decision not to rehire Complainant when he sought reemployment in January of 2017 due to the conditions he placed on his employment if he were to be rehired.[8] The ALJ also correctly noted that Complainant did not submit evidence of disparate treatment and that a simple showing that Respondent hired an ex-employee for a third occasion was not enough to support a finding of disparate treatment.

We find the record supports the ALJ's finding that Respondent did not rehire Complainant solely because of non-retaliatory reasons. The ALJ noted that Mr. Swalve had warned Complainant that he would not be rehired after his second resignation. Complainant offered no evidence that Respondent ever retaliated

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[5] 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1978.109(a).

[6] *Beatty v. Inman Trucking Mgmt.*, ARB No. 2013-0039, ALJ No. 2008-STA-00020, slip op. at 8 (ARB May 13, 2014).

[7] Complainant also appeals the ALJ's finding that his internal reports made to management did not constitute as protected activity. However, as the ALJ found Complainant engaged in protected activity as a result of the April 14, 2016 plant hauling incident, and that Respondent failed to rehire Complainant for non-retaliatory reasons. We will limit our discussion to this finding.

[8] TR. at 56, 59.

against him for submitting other internal reports, including safety and maintenance issues, during his first two periods of employment. The ALJ credited the testimony of Mr. Swalve and Mr. Smith over Complainant's, and found that Complainant sent a hostile handwritten letter conditioning his reemployment on not having to haul plants or to show his commercial driver's license to Respondent's customers. The ALJ noted that the handwritten letter comports with Mr. Smith's testimony that he had a face-to-face conversation with Complainant after his second period of employment in which Complainant informed Mr. Smith that he disliked hauling plants because he believed it was unsafe and that he believed showing his commercial driver's license put him at risk for identify theft. The ALJ carefully went through the testimony and the record, made credibility findings,[9] and evaluated the other letters sent by Complainant via fax to determine why Respondent did not rehire Complainant for a third time. Substantial evidence in the record, including the letter Complainant sent Mr. Swalve, and the faxes Complainant sent to both Mr. Swalve and Mr. Smith, supports the ALJ's finding that these letters would discourage a reasonable employer from hiring an ex-employee. Substantial evidence also supports the ALJ's finding that Respondent chose not to rehire Complainant for non-retaliatory reasons and not for any protected activity. Therefore, we affirm the ALJ's finding that Complainant's protected activity was not a contributing factor to the Respondent's adverse employment action.

CONCLUSION

The ALJ's Decision and Order is supported by the substantial evidence in the record. Accordingly, we **AFFIRM** the ALJ's denial of relief.

SO ORDERED.

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[9] The Board will uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable." *Jacobs*, ARB No. 2017-0080, slip op. at 2; 29 C.F.R. § 1978.110(b). Complainant did not offer any evidence that the ALJ's credibility determinations were inherently incredible or patently unreasonable.