



In the Matter of:

RICK JACKSON,

ARB CASE NO. 07-006

COMPLAINANT,

ALJ CASE NO. 2006-STA-004

v.

DATE: October 31, 2008

CPC LOGISTICS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Rick Jackson, *pro se*, Janesville, Wisconsin

For the Respondent:

John Dowell, Esq., *Harris Dowell Fisher & Harris LC*, Chesterfield, Michigan

FINAL DECISION AND ORDER

Rick Jackson complains that CPC Logistics (CPC) violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended 49 U.S.C.A. § 31105 (West 2005)¹ and its implementing regulations, 29 C.F.R. Part 1978 (2007), when it discharged him for complaining about violations of hours of service logging regulations

¹ The STAA has been amended since Jackson filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to this complaint, they would not affect our decision.

for local trips. An Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) on October 2, 2006, finding that Jackson failed to engage in protected activity and that CPC fired him for legitimate, non-discriminatory reasons. We affirm in part and reverse in part.

BACKGROUND

The following background facts appear in the record. CPC hired Jackson on May 16, 2005, and terminated his employment on May 31, 2005. CX 5 (termination letter). CPC assigned Jackson to work as a team driver making cross-country runs with Terry Rohr, Driver Trainer, and Michael Albano. CPC Post-hearing Br. at 2. Jackson was supervised by Melvin Wilson who in turn reported to Richard Anderson, Division Manager. Occupational Safety and Health Administration (OSHA) Statement at 1, 2; Tr. 33. Anderson made the final decision to terminate Jackson's employment.

Jackson's complaint primarily centered upon his belief that CPC drivers logged local trips incorrectly. According to Jackson, CPC's logging policy violated STAA rules and regulations. OSHA Order at 1.² Jackson alleges that he discussed CPC's improper logging with other drivers and conveyed his concerns to supervisors at CPC. Jackson claims that on his very first day of work, he advised Rohr that Rohr was not logging local trips correctly. OSHA Statement at 1; R. D. & O. at 4. According to Jackson, Rohr told him that if he, Jackson, did not do things a certain way, he would be terminated. OSHA Statement at 1, 2. Jackson claims he had similar conversations about logging local trips with Albano, Wilson, and Anderson. OSHA Statement at 1, 2; R. D. & O. at 4-5. Rohr testified he could not recall discussing disagreements about logging procedure with Jackson. Tr. 63; R. D. & O. at 3. Wilson also testified that he could not recall conversing with Jackson about local logging practices. CX 12 at 41, 44; R. D. & O. at 6. Both Albano and Anderson, however, recalled discussing the local logging policy with Jackson. R. D. & O. at 4-5.

CPC assigned Jackson a trip to California on May 25, 2005. During the trip he had problems with Albano. Albano reported these problems to Wilson, who in turn spoke with Anderson. Tr. 76. Albano criticized Jackson's performance and ability to get from point A to point B in a timely fashion. Tr. 75-76; R. D. & O. at 4. Wilson reported problems with Jackson's sleeping and the ability of others to sleep in the truck's sleeper compartment. Furthermore, during his two weeks working at CPC, Jackson had two accidents. On May 31, 2005, when Jackson returned from California, Anderson terminated him. CX 5; OSHA Statement at 2.

Jackson filed his OSHA complaint on August 22, 2005. OSHA issued its determination that CPC had not violated STAA on November 3, 2005. Jackson filed objections. The ALJ held a hearing on July 11, 2006, and issued an Order denying Jackson's claim on October 2, 2006.

² We think Jackson meant United States Department of Transportation rules and regulations. See 49 C.F.R. Part 395.

DISCUSSION

The Secretary of Labor has delegated to the Administrative Review Board (ARB or Board) the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part 1978. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).

To prevail on a claim of unlawful discrimination under the STAA's whistleblower protection provisions, the complainant must allege and later prove by a preponderance of the evidence that he is a covered employee and the respondent is a covered employer; that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him regarding pay, terms, or privileges of employment; and that the protected activity was the reason for the adverse action. *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 12-13 (ARB May 24, 2007); *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005); *Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-053, slip op. at 3-4 (ARB July 29, 2005); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. Nat'l Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004). If the complainant fails to allege and prove one of these requisite elements, his entire claim must fail. *Cf. Forrest*, slip op. at 4.

The employee activities the STAA protects include: (1) making a complaint or initiating a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order," 49 U.S.C.A. § 31105(a)(1)(A); (2) "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 or health," 49 U.S.C.A. § 31105(a)(1)(B)(i); 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 unsafe condition," 49 U.S.C.A. § 31105(a)(1)(B)(ii).

Coverage and Adverse Action

Coverage of Jackson and CPC under STAA is not disputed. OSHA Order at 1. CPC terminated Jackson's employment on May 31, 2005. Termination constitutes an adverse action.

Protected Activity

Jackson did not allege any refusal to drive and thus any activity, if protected, would fall under the complaint clause of § 31105(a)(1)(A). Internal complaints about violations of commercial motor vehicle regulations may be oral, informal, or unofficial. *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-031, slip op. at 14 (ARB Sept. 14, 2007); *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 6 (ARB Dec. 31, 2002). However, such complaints cannot be implied. They must be communicated to a manager or supervisor. *Harrison*, slip op. at 6.

While there is a question whether Jackson informed Wilson about his logging concerns, Jackson did discuss logging violations with Anderson. Anderson testified that Jackson informed him that another driver was telling him to log illegally.³ Anderson testified: “I don’t recall the exact date, but he did call me at one time to complain that he was being forced to log illegally.” CX 15 at 10-11. Anderson informed Jackson the correct way to log and for Jackson to tell him if other drivers asked him to do anything illegal. Tr. 137; R. D. & O. at 5.

The ALJ held that “[i]f the internal communications are oral, they must be sufficient to give notice that a complaint is being filed.” R. D. & O. at 7 (citing *Clean Harbors Env’t Servs., Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998)). The ALJ found Jackson’s statements were insufficient to put CPC on notice that a complaint was being filed, and thus the ALJ concluded that Jackson did not engage in protected activity. R. D. & O. at 9-10.

We find that Jackson’s statements to Anderson, found both in deposition and hearing testimony, that he was forced to complete logs in a manner he reasonably believed was illegal constitute protected activity under the Act. Nevertheless, because the ALJ went on to find a lack of causation between Jackson’s termination and the alleged protected activity, and we affirm that finding, we find any error concerning protected activity harmless.

Causation

Jackson alleged that CPC terminated him because he complained of being forced to log local driving times in a manner that he reasonably believed was a violation of STAA rules and regulations. OSHA Order at 1. The ALJ found, however, that CPC fired Jackson for legitimate, non-discriminatory reasons and did not retaliate against Jackson in violation of the STAA. R. D. & O. at 10-11. We find that substantial evidence supports this finding.

Albano testified that he had several performance problems with Jackson and that he conveyed those problems to Wilson. CX 14 at 30-31, 37; Tr. 76-77, 85. Wilson in turn conveyed problems with Jackson to Anderson. Wilson specifically concluded that Jackson was not working out and that he did not see room for improvement. R. D. & O. at 10-11. Wilson testified:

[He] had two accidents in three trips. [He] couldn’t sleep in the truck. And the other drivers said [he wasn’t] conducive to the operation. . . . They couldn’t sleep. And [he], it just didn’t work out. It’s a team operation.

³ Tr. 137; R. D. & O. at 10. CPC was audited by Tom Rauschenberger of the Illinois Department of Transportation who enforces both state and federal compliance. CPC passed all tests except one driver was cited for not logging local driving times. According to Rauschenberger, the subject matter of the violation was not directly in the regulations but a matter of interpretation. R. D. & O. at 3; CX 12 at 48-49 (describing federal DOT interpretation of logging city driving times).

Tr. 17, 19, 20, 50-51; R. D. & O. at 2-3. Anderson decided to terminate Jackson after talking with Wilson to see how Jackson was doing on the job.⁴ Anderson testified that he terminated Jackson at the conclusion of the California trip based on this information. Tr. 138-39; CX 15 at 6-7. Anderson further testified that logging practices were not mentioned in the discussion of Jackson's discharge. Tr. 138. For these reasons, we find that substantial evidence supports the ALJ's finding that CPC did not retaliate against Jackson for engaging in protected activity.

CONCLUSION

Accordingly, we **AFFIRM** the R. D. & O. and **DENY** Jackson's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

⁴ Tr. 138; R. D. & O. at 5. Anderson testified at his deposition that he did not learn of at least one of Jackson's accidents until after he terminated Jackson. CX 15 at 19-20.