



In the Matter of:

RICK JACKSON,

ARB CASE NO. 07-006

COMPLAINANT,

ALJ CASE NO. 2006-STA-004

v.

DATE: January 29, 2009

CPC LOGISTICS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Rick Jackson, *pro se*, Janesville, Wisconsin

For the Respondent:

John H. Dowell, Esq., *Harris Dowell Fisher & Harris LC*, Chesterfield, Missouri

ORDER DENYING RECONSIDERATION

On October 31, 2008, the Administrative Review Board (ARB or Board) issued a Final Decision and Order (F. D. & O.) in this case arising under the whistleblower protection provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 2005),¹ and its implementing regulations found at

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.

29 C.F.R. Part 1978 (2007). An Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) on October 2, 2006, finding that Rick Jackson, the Complainant, did not engage in protected activity and that the Respondent, CPC Logistics (CPC), fired Jackson for legitimate, non-discriminatory reasons. We affirmed the ALJ's R. D. & O. in part and reversed in part. Although we concluded that Jackson engaged in protected activity when he complained about the policy of logging local driving hours, we nevertheless found any error by the ALJ harmless as substantial evidence supported the ALJ's finding that Jackson failed to show any causation between his protected activity and his termination.

On December 5, 2008, the Board received Jackson's motion for reconsideration requesting the Board to reconsider its ruling and grant Jackson's request for relief. The ARB is authorized to reconsider earlier decisions. *Knox v. U.S. Dep't of Interior*, ARB No. 03-040, ALJ No. 2001-CAA-003, slip op. at 2 (ARB Oct. 24, 2005). As we said in *Knox*, the Board has adopted principles federal courts employ in deciding requests for reconsideration. We will reconsider our decisions under similar limited circumstances, which include: (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision. *Id.* at 3, citing *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992); *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 582-586 (D. Ariz. 2003). While the Board is authorized to reconsider its previous order, it refuses to grant motions for reconsideration that repeat arguments made on appeal. *McCloskey v. Ameriquest Mortgage Co.*, ARB No. 06-033, ALJ No. 2005-SOX-093, slip op. at 3 (ARB Mar. 26, 2008) (order denying motion for reconsideration); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 06-078, ALJ Nos. 2006-AIR-004, 005, slip op. at 4 (ARB Jan. 30, 2008) (same).

In his motion for reconsideration, Jackson states that the ARB's decision was mistaken on critical issues. Mot. at 1. We conclude that Jackson is invoking the fourth circumstance under which the Board will reconsider a final decision, "failure to consider material facts presented to the court before its decision."

Although Jackson states that his motion for reconsideration does not repeat his prior arguments, we disagree. Many of the arguments he makes in his motion for reconsideration he raised before the Board in the original appeal. Other contentions were not directly part of the ARB's consideration in the F. D. & O. and thus are not eligible for reconsideration.

The ALJ found that Richard Anderson, Division Manager, on the recommendation of Melvin Wilson, Jackson's supervisor, terminated Jackson's employment. Wilson testified that he recommended termination after receiving input from other drivers about Jackson's performance and the fact that Jackson had two accidents in three trips. Tr. 17, 19, 20. In his motion for reconsideration, Jackson points

to other testimony of Wilson to argue that Jackson's accidents and inability to get along with others were not the reasons why Wilson recommended to Anderson to terminate Jackson. The ALJ decided to credit Wilson's testimony that the accidents and Jackson's inability to get along with others were the reasons that he recommended that CPC terminate Jackson. R. D. & O. at 2-3, 10-11. Under the STAA, the ARB is bound by the ALJ's findings of fact if supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004). The Board found substantial evidence supported the ALJ's finding.

Jackson further argues that Michael Albano, a fellow driver from whom Wilson received input concerning Jackson, testified that he felt Jackson was not terminated because of what he said to Wilson. Mot. at 1-2. Jackson's argument misses the point. Albano's speculation about the significance of his negative feedback conveyed to Wilson is not relevant. Wilson testified as to the reasons for his recommendation and Anderson testified that he relied on Wilson's recommendation.

Jackson also argues that the Board should reconsider its ruling because CPC told an OSHA investigator that Terry Rohr, another fellow driver of Jackson, complained about Jackson to Wilson but that Rohr testified that he did not complain about problems with Jackson to Wilson. Mot. at 1. Jackson raised this argument in his briefs before the Board on appeal. Jackson's Brief on appeal at 1. Moreover, the Board's F. D. & O. did not rely on any communications from Rohr to Wilson in affirming the ALJ's R. D. & O.

Finally, in his motion for reconsideration, Jackson argues that he was not given a warning prior to his discharge. Mot. at 2. Jackson fails to cite to any authority for the proposition that a written or verbal warning prior to discharge was required.

For the above reasons, we do not find Jackson has satisfied the grounds for granting a motion for reconsideration. Accordingly, Jackson's motion is **DENIED**.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge