



In the Matter of:

MICHAEL ANDERSON,

ARB CASE NO. 07-032

COMPLAINANT,

ALJ CASE NO. 2006-STA-028

v.

DATE: November 21, 2008

**ROBINSON TERMINAL WAREHOUSE
CORP.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

John E. Davidson, Esq., *Davidson and Kitzmann*, Charlottesville, Virginia

For the Respondent:

Thomas M. Beck, Esq., *Jones Day*, Washington, District of Columbia

FINAL DECISION AND ORDER

Michael Anderson complains that Robinson Terminal Warehouse Corp. violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA),¹ as amended, 49 U.S.C.A. § 31105 (West 2008), and its implementing

¹ The STAA has been amended since Anderson filed his complaint. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide whether the amendments apply to this case because even if they do apply, they would not affect our decision.

regulations, 29 C.F.R. Part 1978 (2007), when it suspended him from employment on December 16, 2005, for making safety complaints. An Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) on December 5, 2006, dismissing the complaint on the ground that Robinson suspended Anderson for refusing to improve his performance and his compliance with company policies. We affirm.

BACKGROUND

At all relevant times, Robinson was a wholly-owned subsidiary of The Washington Post that handled and stored newsprint. It had locations in Alexandria, Virginia; Springfield, Virginia; and College Park, Maryland. OSHA, Final Investigative Report, March 29, 2006. Robinson hired Anderson in May 1998. He worked as a warehouseman, then as a commercial driver. R. D. & O. at 8; Tr. (Hearing transcript) at 79. He occasionally complained about the quality of loading docks, clamp trucks and fork lifts used to handle paper rolls, and the trucks themselves. R. D. & O. at 18-19; Tr. at 249. In February 2005, Anderson injured his back at work, making it uncomfortable for him to drive when the trucks shook. R. D. & O. at 3; Tr. at 83-84.

On October 26, 2005, Anderson refused a run, calling the dispatcher, Richard Clutter, a “f---ing idiot.” R. D. & O. at 18-19, 25; Tr. at 181, 233, 253. Robinson’s operations manager, Willie Taylor, admonished Anderson, but arranged for him to take the run in a different truck. R. D. & O. at 19; Tr. at 182, 235, 253. Taylor also told Anderson that mechanics and other employees complained that Anderson operated clamp trucks and fork trucks recklessly, specifically that his truck loading techniques had damaged rolls of paper delivered to The Washington Post’s production facility. R. D. & O. at 19, 25; Tr. at 236, 253-54. Anderson said he would continue to operate the equipment as he had been, that “he did not give a f--- [if] he was sent home and if needed he would resign, he did not need this job.” R. D. & O. at 19, 25; Tr. at 237, 255; R. Ex. (Respondent’s Exhibit) 8 at 2.

On December 2, 2005, Anderson met with Kent Barnekov, president of Robinson. Anderson vaguely complained that “a lot of things . . . seemed to be getting out of hand;” the company was not “getting to things fast enough in order to correct them where the potential is something could go wrong;” and drivers were working long, possibly illegal, hours, which was hard on Anderson’s back. R. D. & O. at 4; Tr. at 92-96. Barnekov, in turn, raised issues with Anderson’s performance. Referencing the October 26, 2005 meeting with Clutter and Taylor, Barnekov told Anderson that he needed to change the way he operated equipment. R. D. & O. at 25-26; Tr. at 172-73, 280-81. Anderson replied that he “wasn’t going to change.” R. D. & O. at 26; Tr. at 281. Anderson also told Barnekov that he was “not going to participate” in the company’s merit review performance process, which he described as unfair and having no bearing on the way people did their jobs. R. D. & O. at 26; Tr. at 282.

Shortly after the meeting with Barnekov, Anderson called The Washington Post Company’s Ethics Hotline, repeating complaints he made to Barnekov. R. D. & O. at 4;

Tr. at 188, 283-84. Lionel Neptune, who was Vice President of Affiliates for The Washington Post Company, investigated the complaint. He interviewed Anderson and obtained a written response from Barnekov. R. Ex. 9 at 6. Barnekov's reply expressed concerns about Anderson's performance: "Having an employee . . . dictate the conditions of his employment is unacceptable." R. D. & O. at 26; R. Ex. 9 at 6. Barnekov said he would meet with Anderson to "clarify the specifics of his continued employment He will not tell management what he will or will not do, especially in relation to how he performs his job or his participation in job performance reviews." R. Ex. 9 at 6.

On December 14, 2005, Anderson contacted the Virginia State Police and asked for an inspection of the truck he was driving, because the mirrors were shaking, the passenger seat was broken, and there were cracks in the vehicle frame. R. D. & O. at 4; Tr. at 101. Trooper Robert Tershak's report confirmed several violations, and said they could be an "imminent hazard" that needed "immediate repair." C. Ex. (Complainant's Exhibit) 1. However, he did not put the truck out of service. Tr. at 48, 62-64, 220. Paul Cupka, Robinson's lead mechanic, responded to the inspection pad, and assured the trooper the repairs would be made the next day. Tr. at 221.

On December 16, 2005, Barnekov and Taylor met with Anderson to discuss Anderson's job performance and to obtain his commitment to improve in four areas: his failure to operate company equipment properly, his refusal to participate in the merit performance review process, his deviation from assigned tasks without authorization, and his improper and unauthorized modification of company equipment. R. D. & O. at 14-15; Tr. at 111, 262-63, 291-93; R. Ex. 10. Barnekov told Anderson that he could not come back to work unless he committed to improvement in those areas. Anderson refused and left the meeting. R. D. & O. at 15; Tr. at 113-14, 198, 263, 294-95.

Anderson came back as Barnekov and Taylor were meeting with Clutter and Bernie Owens, Robinson's facilities manager. Anderson returned his company identification, keys, and company-issued cell phone, and, as he left, told the managers that they could take his name out of the security system. Those present took this as Anderson's resignation from the company. R. D. & O. at 6, 15, 18, 20; Tr. at 114-16, 242-44, 264-65, 296-97. However, the next day Anderson obtained a doctor's recommendation that he take four to six weeks of medical leave for his back, and gave the document to Robinson's facilities manager on December 19, 2005. R. D. & O. at 6-7; Tr. at 122-25; C. Ex. 3.

On or about December 27, 2005, Barnekov had Taylor contact Anderson to set up a meeting after the New Year to discuss Anderson's employment status. If Anderson had reconsidered his resignation and was willing to commit to improving his performance, Barnekov would consider re-employing him. R. D. & O. at 7, 15, 20; Tr. at 128-29, 265-66, 297. The meeting was initially scheduled for January 3, 2006, and then re-scheduled for January 10, 2006, but, when Anderson asked to bring a lawyer, Barnekov refused. R. D. & O. at 7, 15, 20; Tr. at 129-30, 132, 298. Barnekov then wrote Anderson a letter confirming that he had resigned and/or abandoned his job as of December 16, 2005. R.

D. & O. at 15-16; Tr. at 299; C. Ex. 8. Robinson paid Anderson through January 11, 2006. C. Ex. 8.

On or about February 14, 2006, Anderson filed a complaint with OSHA, alleging that Robinson fired him for making safety complaints. Following an investigation, OSHA issued findings dismissing the complaint. Secretary's Findings, April 11, 2006. Anderson appealed and requested a hearing before an ALJ. The ALJ held an evidentiary hearing on July 24, 2006, and issued a decision on December 5, 2006. The ALJ ruled that, although Anderson had made protected safety complaints, Robinson suspended Anderson on December 16, 2005, for poor performance, and therefore did not violate the STAA. R. D. & O. at 27.

DISCUSSION

The Secretary of Labor has delegated to the Administrative Review 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 an employee and the respondent is an 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: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," 49 U.S.C.A. § 31105(a)(1)(A); "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).

It is not disputed that Anderson was an employee and Robinson was an employer under the STAA. Our analysis therefore begins with whether Anderson engaged in protected activity. He does not contend that he made a protected refusal to drive. 49 U.S.C.A. § 31105(a)(1)(B). His protection depends, then, upon whether he made a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order,” 49 U.S.C.A. § 31105(a)(1)(A). The ALJ found that Anderson made three such safety complaints, when: (1) he met with Robinson’s President and warned that the company was slow in correcting deficiencies and the drivers were possibly working illegal hours; (2) he called The Washington Post Company’s Ethics Hotline and repeated complaints he made to Barnekov; and (3) he contacted the Virginia State Police and asked for a truck inspection, because the mirrors were shaking, the passenger seat was broken, and there were cracks in the vehicle frame. R. D. & O. at 21-23. Substantial evidence in the record supports these findings, as well as the ALJ’s conclusion that Robinson had knowledge of these complaints. *Id.*

It is also clear that Anderson suffered an adverse action within the meaning of the STAA. Barnekov and Taylor met with Anderson on December 16, 2005, to discuss his job performance. Barnekov informed Anderson that he could not return to work unless he committed to improving his performance and compliance with company policies. We agree with the ALJ’s characterization of this action as a “suspension.” *Id.* at 24. It qualifies as “discipline” or an alteration of Anderson’s “pay, terms, or privileges of employment” under the STAA. Barnekov was willing to consider Anderson’s reemployment with Robinson through late December 2005 and early January 2006. The ALJ did not decide whether Anderson abandoned his job or Robinson discharged him. *See id.* We also need not decide that issue, because we agree with the ALJ that Anderson failed to prove that Robinson took adverse action against him because he had engaged in protected activity.

Finally, substantial evidence supports the ALJ’s ruling that Anderson’s performance, not his protected activity, was the reason for his suspension. On October 26, 2005, Robinson’s operations manager, Taylor, admonished Anderson for calling the dispatcher, Richard Clutter, a “f---ing idiot.” Taylor also told Anderson that he was operating company clamp trucks and fork lifts recklessly and damaging paper rolls. Anderson’s response was that he would continue to operate the equipment as he had been, and that “he did not give a f--- [if] he was sent home and if needed he would resign”

On December 2, 2005, Anderson met with Barnekov, who told Anderson that he needed to change the way he operated equipment and to participate in the company’s merit review performance process. Anderson flatly refused to change or to participate. In his reply to The Washington Post’s Neptune, Barnekov said having Anderson dictate the conditions of his employment was “unacceptable.” “He will not tell management what he will or will not do.”

On December 16, 2005, Barnekov again met with Anderson. This time Barnekov told Anderson he could not come back to work unless he committed to improvement in

four specific areas. Anderson refused, and returned his company identification, keys, and cell phone, and asked to be removed from the company security system. From late December 2005 through early January 2006, Barnekov was willing to reemploy Anderson if he would agree to improve his performance and his compliance with company policies. Anderson never agreed to do so, and has not proved that Robinson suspended him for making protected complaints.

CONCLUSION

Substantial evidence in the record supports the ALJ's findings of fact and he correctly applied the law when he held that Anderson did not prove that Robinson suspended him because he engaged in STAA-protected activity. Because the Board agrees that Robinson did not violate the STAA, it **AFFIRMS**, the ALJ's R. D. & O. and **DENIES** Anderson's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge