



In the Matter of:

FREDERICK J. ANDREWS,
COMPLAINANT,

v.

GRIFFIN INDUSTRIES, INC.,
RESPONDENT.

ARB CASE NO. 07-034

ALJ CASE NO. 2005-STA-052

DATE: December 31, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Respondent:

Christopher A. Griffin, Esq., Crestview Hills, Kentucky

FINAL DECISION AND ORDER

Frederick J. Andrews filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleged that when his former employer, Griffin Industries, Inc. (Griffin), terminated his employment, it violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified.¹ The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse

¹ 49 U.S.C.A. § 31105 (West 2008). The STAA has been amended since Andrews filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is not necessary to decide whether the amendments are applicable to this complaint, because they are not relevant to the issues presented by the case and thus, they would not affect our decision.

to operate a vehicle when such operation would violate those rules. After a hearing, a Labor Department Administrative Law Judge (ALJ) recommended that Andrews's complaint be dismissed. We affirm.

BACKGROUND

Andrews drove trucks for Griffin, a company that provides cooking oil removal service to restaurants and food service operations. He drove an assigned route, picking up used cooking oil from customers near Doswell, Virginia, and delivering the oil to Durham, North Carolina, for processing and recycling. On December 30, 2004, while Andrews was driving his assigned route, his supervisor, Bill Walsh, called and asked him to drive an additional route that day. When Andrews returned to the Doswell office, he told Walsh that he would not drive the additional route because he had safety concerns with the vehicle he had been driving. He also told Walsh that he was concerned that driving the additional route would cause him to exceed the maximum allowable driving hours prescribed by Department of Transportation (DOT) regulations.² Because of Andrews's refusal to drive an additional shift on December 30, Walsh told him that he would have to drive the requested route on December 31. But Andrews refused to work on December 31 because it was a company holiday.³ While Griffin paid employees for all holidays, it expected them to work on holidays when pickups were required. Griffin paid employees who worked on holidays both holiday pay and pay for the hours worked.⁴

Andrews returned to work on January 2, 2005. On January 10, 2005, Andrews met with Walsh and Gray Bradford, General Manager for the Doswell region. Bradford informed Andrews that Griffin was terminating him for insubordination, specifically for not driving the route that Walsh asked him to drive on December 31, 2004.

On May 20, 2005, Andrews filed the aforementioned complaint with OSHA, alleging that Griffin violated the STAA by discharging him. OSHA investigated the complaint, concluded that Griffin had not violated the Act, and dismissed the complaint. On July 27, 2005, Andrews filed objections to OSHA's findings and requested a hearing before one of the Labor Department's administrative law judges. Andrews appeared pro se at the hearing on December 8, 2005. On December 8, 2006, the Administrative Law Judge (ALJ) issued her recommended decision, concluding that Andrews failed to prove that Griffin violated the STAA and that Griffin terminated Andrews for a legitimate, non-discriminatory reason.⁵

² See 49 C.F.R. § 395.3.

³ Although December 31 is not usually a legal holiday, December 31, 2004, was a company holiday because January 1, 2005, the New Year's Day holiday, fell on a Saturday.

⁴ Transcript (Tr.) at 78-79.

⁵ *Andrews v. Griffin Indus., Inc.*, 2005-STA-052.

The Administrative Review Board automatically reviews an ALJ's recommended STAA decision.⁶ The Board "shall issue the final decision and order based on the record and the decision and order of the administrative law judge."⁷ The Board issued a Notice of Review and Briefing Schedule permitting either party to submit briefs in support of or in opposition to the ALJ's order. Griffin filed a brief in support of the ALJ's recommended decision. Andrews did not file a brief.

Under the STAA, we are bound by the ALJ's fact findings if substantial evidence on the record considered as a whole supports those findings.⁸ In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . ."⁹ Therefore, the Board reviews the ALJ's conclusions of law de novo.¹⁰

DISCUSSION

The Legal Standard

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "refuses 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;" or who "refuses 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."¹¹

⁶ 29 C.F.R. § 1978.109(c)(1)(2007).

⁷ 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050 (ARB Sept. 26, 2001).

⁸ 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

⁹ 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

¹⁰ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

¹¹ 49 U.S.C.A. § 31105(a)(1).

To prevail on this STAA claim, Andrews must prove by a preponderance of the evidence that he engaged in protected activity, that Griffin was aware of the protected activity, that Griffin took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.¹² If Andrews fails to prove any one of these elements, we must dismiss his claim.¹³

Protected Activity

Substantial evidence supports the ALJ's finding that on December 30 Andrews refused to drive the additional route because he reasonably believed that continuing to drive that truck could result in injury to himself or others because of the condition of the truck.¹⁴ Griffin did not refute Andrews's testimony that he had complained to Walsh about steering, suspension, and leakage problems with the vehicle. In fact, Walsh made plans to obtain a replacement truck for Andrews to drive on December 31 so that

¹² *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004)

¹³ *Eash v. Roadway Express*, ARB No. 04-036, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005).

¹⁴ Recommended Decision and Order Dismissing Claim (R. D. & O.) at 12-13. Andrews explained why he initially drove the allegedly unsafe vehicle, but later refused to drive it:

Q What actually was wrong with the truck, the one you drove on the 30th?

A Okay. It always had a steering problem. It had a crack in the tank, always had a slow leak. The – and I think the suspension on the left side of it was not good. You can visibly see it in the daytime, but at that time of night in [Doswell] it's kind of dark. They have a few light [sic], but you can't really, you know, see what's wrong, you know, with the truck.

So, I mean, he posted the truck up for me to drive and I've taken the risk, you know, on several occasions to drive that truck. But, like I said, when I did take that run I noticed that the truck was worse off than when he sent it to Durham back in November.

Tr. at 19-20.

Andrews would not have to operate a vehicle that he considered unsafe. We therefore accept the ALJ's conclusion that Andrews engaged in protected activity on December 30.

Substantial evidence also supports the ALJ's finding that Andrews did not sufficiently prove that continuing to drive on December 30 would have violated the maximum driving time regulation. Andrews submitted seven driving logs in support of this claim, but the total hours reflected in the logs do not demonstrate that the additional route would have put him in excess of the maximum allowable hours.¹⁵

Furthermore, the ALJ correctly concluded that Andrews's refusal to drive on December 31 was not protected activity. The ALJ found that Andrews refused to drive Griffin's truck on December 31 "because he did not want to work on the holiday, not because of safety issues with the truck."¹⁶ Andrews's testimony reveals that he was primarily concerned with his entitlement to a day off. Moreover, he never inquired about the availability of another truck or communicated to Griffin that he would drive the route if a safe truck were available.¹⁷

Causation

There is no dispute that Griffin was aware of Andrews's protected activity on December 30 and that Andrews's termination was an adverse action. Therefore, Andrews could prevail if he proved by a preponderance of the evidence that Griffin terminated him because of his protected activity.

Andrews presented no direct evidence that Griffin retaliated because of protected activity. Even so, he can succeed if he proves by a preponderance of evidence that the reason Griffin proffered for his termination – insubordination – was not the true reason for the adverse action, but instead was a pretext.¹⁸ To establish pretext, it is not sufficient for Andrews to show that the action taken was not "just, or fair, or sensible . . . rather he must show that the explanation is a phony reason."¹⁹ The ALJ found that Andrews did not prove pretext.²⁰ Substantial evidence supports this finding.

¹⁵ R. D. & O. at 14; CX-3.

¹⁶ R. D. & O. at 16.

¹⁷ *Id.*

¹⁸ See *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 14 (ARB May 27, 2007).

¹⁹ *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-038, slip op. at 9 (ARB July 31, 2002) (citation omitted).

²⁰ R. D. & O. at 17.

As noted above, when asked to drive on December 31, Andrews never inquired about the availability of another truck. Nor did he tell Walsh that he would drive the route if a safe truck were available. Moreover, Walsh did not reject Andrews's concerns about driving the route, but in fact tried to accommodate them. When Andrews initially raised the issue of the safety of the truck on December 30 and the possibility that he would be driving in excess of allowable hours, Walsh offered him the option of driving another route on December 31. Walsh also began the process of obtaining a replacement truck for him to drive on December 31. Andrews, however, was adamant that he should not have to drive on a holiday even though it was Griffin's policy and routine practice that employees must work on holidays when asked.

Thus, the record contains substantial evidence to support the ALJ's finding that Griffin terminated Caldwell for insubordination, and not for his protected activity. Therefore, since Andrews did not prove that Griffin fired him because of his protected activity, as he must, we **AFFIRM** the ALJ's recommendation and **DISMISS** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge