



In the Matter of:

AHARON EVANS,

ARB CASE NO. 07-068

COMPLAINANT,

ALJ CASE NO. 2007-STA-004

v.

DATE: March 27, 2009

**GAINNEY TRANSPORTATION
SERVICES, INCORPORATED,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD:

Appearances:

For the Complainant:

Aharon Evans, *pro se*, Lakewood, Washington

For the Respondent:

**Joseph J. Vogan, Esq., *Varnum, Riddering, Schmidt & Howlett, LLP*,
Grand Rapids, Michigan**

FINAL DECISION AND ORDER

Aharon Evans filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleged that Gainney Transportation Services, Incorporated (Gainney) violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA),¹ and its

¹ 49 U.S.C.A. § 31105 (West 2008), 29 C.F.R. Part 1978 (2007). The STAA has been amended since Evans 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

implementing regulations, when it terminated his employment because he raised safety concerns about his working conditions. After an evidentiary hearing, a Labor Department Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) dismissing Evans's complaint.

BACKGROUND

The ALJ's recitation of the facts is correct and complete. We summarize briefly. Evans started driving for Gainey in May 2006. His initial trainer/manager was Colton Jameson, whom Evans described as a "he/she."² Jameson complained in a letter to Gainey that Evans made "several offensive remarks to me, not only personal but professional" and told "me that I acted like a woman." Jameson added that Evans commented: "If you people screw me over at all, I'll make sure you pay for it, don't mess with what is important to me."³ Gainey reassigned Evans to another manager/trainer, James Beck, who completed his training.⁴

Evans's first truck, a Freightliner, developed air conditioning problems in July 2006. Evans complained about the lack of air conditioning. He noted in his daily logs that while driving in extreme heat, he became fatigued.⁵ Gainey directed Evans to have the problem repaired on July 3, 2006, and the truck was in the shop until July 8, 2006.⁶ On July 15, 2006, Evans refused to deliver a load because he had been unable to sleep on his rest break. Gainey assigned another driver and sent Evans to a hotel.⁷

Because of Evans's continuing complaints about the air conditioning in his tractor, Gainey later assigned Evans to another truck, a Kenworth, which Evans admitted was "nice," except for some diesel odor.⁸ On his daily logs from July 22 through July 25 and July 31 through August 5, 2006, Evans reported that the vehicle's condition was satisfactory, but diesel fumes were in the cab on August 5.⁹ On July 29, 2006, Evans

whether the amendments apply to this case because even if they did apply, they would not affect our decision.

² Hearing Transcript (TR) at 75-76.

³ Respondent's Exhibit (RX) 14.

⁴ TR at 67.

⁵ RX 8 at 19-20; ALJX 5 at 13; TR at 102.

⁶ RX 9 at 4-7. *See* RX 11 at 9, RX 8 at 12; TR at 77-82.

⁷ RX 9 at 23-26; TR at 115-18, 168-69.

⁸ RX 8 at 21; TR at 84-86, 171-72.

⁹ RX 8 at 22-26, 30-36.

refused to drive because of diesel fumes but admitted that he had not specifically complained to Gainey. However, Gainey had the truck repaired on July 31, 2006.¹⁰

In an August 3, 2006 letter to the owner of the company, Harvey Gainey, Evans wrote the following in relevant part:

GTS, Inc. Operations is in trouble. The attitudes and values of Mike McGlynn are lopsided. Core values attract like values and attitudes. Are you a hypocrite or a business man?

Stage actors, hypo-crypts, adopt whatever behavior satisfies the audience. He who has the purse makes the rules. You have the purse. You make the rules. Sycophants will adopt whatever behavior is needed to narcotically stun the threat - You have sycophants, Mr. Gainey. . . .

Operations is in crisis management, and Mike McGlynn is demanding I risk my life 24/7 so the GTS, Inc. profit margin stays put.

Life on the margins is high risk. . . . In fact, GTS Operations is so deeply embedded into running on margins that I bet you can't fix it in 12 months. . . .

You are rich. Act now and stay rich. Ignore me and watch.^[11]

Evans testified that he wrote the letter because of the problems he had faced with his tractor's air conditioning, but conceded that he did not mention any of these safety complaints or his refusals to drive because of the fumes in the letter.¹²

This letter prompted an August 9, 2006 meeting between Evans, Harvey Gainey, Thurman Taylor, the company's driver relations director, and Steve Steinberg, Evans's driver manager. Steinberg testified that Evans said he wrote the letter because the company had done nothing about the air conditioning problems. Steinberg then left the meeting to retrieve the intra-company messages showing that the system had been repaired. Taylor testified that Evans was rude and disrespectful during the discussion. He asked Gainey if he knew the meaning of the word, sycophant, and when Gainey said he did and offered to get a dictionary to prove his understanding, Evans responded, "that

¹⁰ RX 12 at 8-14; TR at 121-23, 174-75.

¹¹ RX 13.

¹² TR at 125-26.

would be the Gainey definition.”¹³ Taylor added that Evans then told Gainey that he was a hypocrite and that his company was run by a bunch of idiots, sycophants. At that point, Taylor testified, Gainey threw up his hands and stated, “I don’t have time for this,” and left the meeting. Taylor added that he then fired Evans because of his insubordination.¹⁴

Evans filed his complaint with OSHA on August 14, 2006. After OSHA dismissed the complaint, Evans filed objections and requested a hearing. The hearing was held on December 28, 2006, in Seattle, Washington.

JURISDICTION AND STANDARD OF REVIEW

This case is before the Administrative Review Board (ARB) pursuant to the automatic review regulation.¹⁵ The Secretary of Labor has delegated her jurisdiction to decide this matter to the ARB.¹⁶ Under the STAA, the ARB is bound by the ALJ’s factual findings if substantial evidence in the record considered as a whole supports those findings.¹⁷

Substantial evidence is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁸ Substantial evidence does not, however, require a degree of proof “that would foreclose the possibility of an alternate conclusion.”¹⁹

In reviewing the ALJ’s conclusions of law, the ARB, as the designee of the Secretary of Labor, acts with “all the powers [the Secretary] would have in making the

¹³ TR at 178-81.

¹⁴ TR at 200-05.

¹⁵ See Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). See also 29 C.F.R. § 1978.109(a).

¹⁶ 49 U.S.C.A. § 31105(b)(2)(C).

¹⁷ 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).

¹⁸ *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

¹⁹ *Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, 088, ALJ No. 2005-STA-040, slip op. at 3 (ARB Nov. 7, 2007), citing *BSP Trans, Inc. v. United States Dep’t of Labor*, 160 F.3d 38, 45 (1st Cir. 1998).

initial decision . . .”²⁰ Therefore, we review the ALJ’s conclusions of law de novo.²¹

DISCUSSION

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 making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order”²² Protection is also afforded where an employee “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”²³

To prevail on his STAA complaint, Evans must prove by a preponderance of the evidence that he engaged in protected activity, that Gainey management was aware of his protected activity, that he suffered an adverse employment action, and that Gainey took the adverse action because of Evans’s protected activity.²⁴ If Evans does not prove one of these requisite elements, his entire claim fails.²⁵

The ALJ’s Analysis

The ALJ cited the relevant law correctly and noted the Department of Transportation regulation that a driver shall not drive while his ability or alertness is so impaired or likely to become impaired through fatigue, illness, or any other cause, as to make it unsafe to drive.²⁶

The ALJ credited Evans’s statements that he felt unsafe driving due to heat exhaustion during July 2006 because of the lack of air conditioning in his tractor and that he refused to drive on two occasions because of fatigue brought on by diesel fumes. The

²⁰ 5 U.S.C.A. § 557(b) (West 1996).

²¹ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, 2001-STA-029, slip op. at 2 (ARB Oct. 31, 2003).

²² 49 U.S.C.A. § 31105(a)(1)(A).

²³ 49 U.S.C.A. § 31105(a)(1)(B)(i).

²⁴ *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, 59, ALJ No. 2005-STA-063, slip op. at 8 (ARB June 30, 2008).

²⁵ *West v. Kasbar, Inc. /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

²⁶ 49 U.S.C.A. §§ 31105(a)(1)(A), (a)(1)(B)(i); 49 C.F.R. § 392.3. Recommended Decision and Order (R. D. & O.) at 4-5.

ALJ found that these complaints to his supervisors about the air conditioning constituted protected activity.²⁷ While Evans did not report his safety concerns directly to Taylor, the man who fired him, the ALJ found that Gainey was aware of the problems.²⁸ The ALJ also found that Evans's refusals to drive were protected activities.²⁹

The ALJ then addressed causation, noting: "An employer's discharge decision must be motivated by retaliation to be actionable."³⁰ In concluding that Evans failed to meet his burden to prove by a preponderance of the evidence that Gainey acted with a discriminatory purpose, the ALJ relied on several factors.³¹

First, the ALJ credited Gainey's prompt responses to Evans's complaints about the air conditioning malfunctions and the diesel fume odor. The ALJ found that Gainey acknowledged the problems, directed Evans several times to seek and obtain repairs, put Evans up at motels overnight, and assigned him a new truck and other loads.³²

Second, the ALJ noted that other drivers had complained of both air conditioning and diesel fume problems, that such complaints were not unusual and were not grounds for discharge, and that Gainey did not discipline Evans when he refused to drive because of the diesel fumes but rather assigned him other loads. Thus, the ALJ concluded that no evidence suggested that Evans was fired for lodging complaints about the trucks he drove.³³

Third, the ALJ considered Evans's history of insubordination, starting with his offensive behavior toward his first manager, followed by his insulting letter to Harvey Gainey, and his rude remarks at the August 9, 2006 meeting. The ALJ found that Evans had established a pattern of rude and offensive behavior during his employment.³⁴

Fourth, the ALJ considered the lack of temporal proximity between Evans's firing and his complaints about the air conditioning and the diesel fumes, and the close temporal proximity between Evans's insulting letter and inappropriate behavior at the August 9, 2006 meeting and his discharge that same day. The ALJ found that all of

²⁷ R. D. & O. at 5. *See* 49 U.S.C.A. § 31105(a)(1)(A).

²⁸ R. D. & O. at 7.

²⁹ R. D. & O. at 5. *See* 49 U.S.C.A. § 31105(a)(1)(B)(i).

³⁰ *Id.* at 5.

³¹ *Id.* at 8.

³² *Id.* at 6.

³³ *Id.*

³⁴ *Id.*

Evans's safety concerns had been resolved well before his firing on August 9, 2006. The ALJ also found that Evans admitted that he did not include his safety concerns in the letter he wrote to Harvey Gainey nor did he raise these concerns at the August 9 meeting. The ALJ concluded that this evidence failed to establish a connection between Evans's firing and his protected activity.³⁵

Evans Failed to Prove Retaliation

Gainey does not dispute the ALJ's conclusions that Evans engaged in activities that the STAA protects and that Gainey was aware of those activities. Substantial evidence supports the ALJ's factual findings regarding these two elements, and the ALJ correctly applied the law. Therefore, we affirm these conclusions.

The ALJ found that Gainey had good reason to fire Evans because of his insubordinate behavior and concluded that Evans did not meet his burden of proof to show that Gainey fired him in retaliation for his safety complaints.³⁶ The record evidence supports the ALJ's conclusion.

Evans testified that his problems with his tractor's air conditioning in July motivated him to write the August 3, 2006 letter to Gainey, yet he said nothing about that issue in his letter. He also admitted that he did not mention any of his safety concerns about the air conditioning or the diesel fumes during the brief meeting with Harvey Gainey, Steinberg, and Taylor on August 9.³⁷ Rather, he complained that the company had done nothing about the malfunctioning system, but when Steinberg left the meeting to obtain the inter-company messages that proved it had, Evans then verbally attacked Gainey and other managers.

Taylor testified that Evans's blatant insubordination at the meeting plus the offensive nature of the August 3 letter prompted Taylor to terminate Evans.³⁸ Taylor had known about Evans's rude behavior from the beginning of his employment because Taylor had reassigned Evans to a different trainer after Jameson complained about being unable to work with him.³⁹ But Taylor stated that going into the meeting, he intended to work with Evans as "I had from day one, get to the bottom of what the letter was all about, and save his job."⁴⁰

³⁵ *Id.* at 8.

³⁶ *Id.*

³⁷ TR at 130-31, 178-81.

³⁸ TR at 205.

³⁹ TR at 193.

⁴⁰ TR at 205.

Contrary to Evans's assertions, the record shows the air conditioning system in his tractor was fixed twice by July 22, 2006, when Evans received a new truck.⁴¹ Similarly, the diesel fumes in the new truck were eliminated over the weekend of July 29-31, 2006, while Evans stayed at a motel.⁴² Thus, Gainey had addressed and resolved all of Evans's safety concerns prior to his August 3 letter and the August 9 meeting which led to his discharge. As Evans admitted, the safety issue was not even raised at the meeting.

CONCLUSION

We have reviewed the entire record herein. The record contains substantial evidence to support the ALJ's finding that Gainey terminated Evans for insubordination, and not for his protected activity. Therefore, since Evans did not prove by a preponderance of evidence that Gainey 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

WAYNE C. BEYER
Chief Administrative Appeals Judge

⁴¹ RX 8 at 21-22; RX 9 at 23, RX 11 at 9; TR at 83-85, 171-72, 196-97.

⁴² RX 12 at 6-8.