



In the Matter of:

JAMES HARRELL,

**ARB CASE NOS. 08-022
08-065**

COMPLAINANT,

ALJ CASE NO. 2003-STA-050

v.

DATE: May 14, 2010

SYSCO FOODS OF BALTIMORE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

George A. Rose, Esq., *Rose Law Firm, LLC*, Baltimore, Maryland

For the Respondent:

**Edward S. Mazurek, Esq., *Morgan, Lewis & Bockius, LLP*, Philadelphia,
Pennsylvania**

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Wayne C. Beyer, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

James Harrell filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on June 4, 2002. He alleged that his employer, Sysco Foods of Baltimore, violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified, 49 U.S.C.A. § 31105 (Thomson/West 2007), and its implementing regulations, 29 C.F.R. Part 1978 (2009), when Sysco Foods filed a suit in Howard County, Maryland, Circuit Court, for breach of a settlement agreement in retaliation for protected activities, including maintaining a prior STAA claim. The STAA protects from discrimination employees who report commercial motor vehicle safety rules violations or who refuse to operate a vehicle when such operation would violate

those rules. A Department of Labor (DOL) Administrative Law Judge (ALJ) found that Harrell prevailed on the merits and was entitled to relief. We reverse.

BACKGROUND

Sysco Foods, a commercial motor carrier engaged in transporting products on the highways, hired the Harrell in May 1989. Recommended Decision and Order (R. D. & O.) at 5; Tr. 27. While employed by Sysco Foods, Harrell filed several claims against his employer including a STAA complaint, a claim with the National Labor Relations Board, an employment discrimination claim with the Equal Employment Opportunity Commission, a claim in U.S. District Court for the District of Maryland, and various workers' compensation claims. *Id.*; Tr. 28-30. Harrell and four other complainants filed the STAA complaint on October 6, 2000, because of disciplinary points Sysco Foods issued under an attendance policy. RX 8, RX 12.

On July 2, 2001, Harrell and Sysco entered into a Settlement Agreement and General Release, which was filed with the U.S. District Court for the District of Maryland and a separate Agreement of Final Compromise and Settlement before the Workers' Compensation Commission for the State of Maryland. CX 2 and 3. The first document stated that it was to be read in *pari materia* with the second agreement.

Settlement Agreement and General Release before the U.S. District Court for the District of Maryland

In the agreement Sysco Foods agreed to pay Harrell \$1.00 and attorneys' fees in the amount of \$35,000.00, and to not contest Harrell's application for unemployment benefits, and Harrell agreed to release, acquit, and forever discharge Sysco Foods from any and all claims he had relating to his employment with Sysco Foods including any claim under OSHA among all of his other claims. *Id.* The parties agreed not to disparage each other and to maintain the terms of the agreement in confidence. The agreement required that Harrell resign his employment and to not voluntarily aid or assist any third party claims against Sysco Foods. The agreement states that it was "intended to and does resolve any and all claims of any nature whatsoever . . . by Mr. Harrell against the Company relating to or arising out of Mr. Harrell's employment with the Company." CX 2.

The agreement also provides that the disparagement and confidentiality portion of the settlement agreement "is a substantial and material provision of the Agreement and a breach of [that] paragraph [would] support a cause of action for breach of contract and will entitle the aggrieved parties to recover damages flowing from such breach specifically including, but not limited to, the recovery of any payments made pursuant to paragraph numbers 1 and 2 above as well as payments made pursuant to the Agreement of Final Compromise and Settlement pending before the Maryland Workers' Compensation Commission." The agreement states that the parties expressly agreed that the non-exclusive damages provision was not a penalty but was "fair and reasonable in light of the difficulty of proving prejudice to the Company in the event of . . . breach."

The agreement also severed Harrell's employment with Sysco effective July 2, 2001. Finally, the agreement stated that Harrell would not pursue any claims that were pending or could in the future be asserted against Sysco Foods and would take all reasonable and appropriate steps to effectuate dismissal, abandonment, or relinquishment of such claims and that he would not preserve or pursue any claims now or in the future.

Agreement of Final Compromise and Settlement before the Workers' Compensation Commission

This agreement settled Harrell's workers' compensation claims against Sysco Foods. It provided that Sysco Foods would pay Harrell \$149,999.00 with a credit for \$8,000.00 that had been previously advanced. It stated that in exchange, Harrell would accept the payment in final compromise and settlement for all his workers' compensation claims and released and waived any of his rights he had as a result of his employment. The agreement noted that the settlement was part of a global settlement of all claims.

Post-Agreement

After Harrell and Sysco entered into the agreement, Sysco attorneys disposed of all of Harrell's claims except the STAA claim. Tr. 40-43.

On December 11, 2001, Harrell wrote a letter in which he asserted that several of his Sysco supervisors had harassed him while he worked for Sysco and offered to assist a third-party in a claim against Sysco Foods. CX 7, RX 26, RX 27. Sysco Foods received a copy of this letter in mid-December 2001. RX 26, RX 27.

Harrell received a letter of merit from OSHA regarding his claim on January 17, 2002. Tr. 44, 55-56. Harrell did not take any steps to withdraw the STAA claim until he received the letter because he thought Sysco attorneys had already taken care of the withdrawal. Tr. 44, 55-56. Harrell wrote a letter to OSHA on January 23, 2002, stating that he wished to withdraw his claim because of his agreement with Sysco Foods, but that, at the same time, he did not wish to do so. RX 13, 14.

Sysco filed a complaint against Harrell for breach of the settlement agreement in the Circuit Court of Howard County on January 31, 2002, alleging that he breached the contract when he disparaged Sysco Foods, voluntarily aided and assisted third party claims against Sysco, and failed to take reasonable and appropriate steps to effectuate a dismissal of a claim that had been released. CX 1.

On June 4, 2002, Harrell wrote a letter of complaint alleging that Sysco Foods retaliated against him by filing a lawsuit against him because he filed the first STAA complaint. R. D. & O. at 9. OSHA found that the claim lacked merit. R. D. & O. at 9. Harrell objected and requested a hearing before a DOL ALJ.

In June and July 2002, the parties were involved in settlement discussions regarding Harrell's and the four other complainants' first STAA claim against Sysco. R. D. & O.

Approving Settlement and Dismissing Complaint at 2-3 (Sept. 30, 2002). During these discussions, Sysco Foods agreed that it would waive its breach of contract claim in the Howard County action relating to Harrell's failure to dismiss his STAA claim, and that it would so advise the Howard County judge. *Id.* at 3.

On September 30, 2002, after receiving proof that the Howard County Court had been notified that Sysco Foods waived its claims for breach of contract against Harrell for failure to take steps to dismiss the STAA action, the ALJ approved a settlement in the first STAA claim. *Id.* at 3. She found that it was fair and reasonable and was an appropriate and fair resolution of the issues presented and provided adequate relief to the five complainants. *Id.* at 4. The settlement expunged disciplinary points and warning letters that had been issued to the complainants from their personnel records and vacated all disciplinary points issued under the attendance policy. It also expunged points issued under the attendance policy from the personnel records of all other delivery associates at issue in STAA complaints against Sysco pending with OSHA.

Meanwhile, the Howard County Court conducted a trial and held that Harrell had breached the contract by disparaging Sysco Foods and aiding and assisting third-parties in claims against Sysco. R. D. & O. at 10. On September 22, 2003, the judge awarded nominal damages in the amount of \$1 because no non-speculative damages resulting from the breach of contract had been proven, and he found that the damages provision was a liquidated damages provision. R. D. & O. at 11. The case was appealed to the Court of Special Appeals of Maryland, which held on June 2, 2005, that the damages provision was a reasonable and enforceable remedy, not a liquidated damages provision, and found in favor of Sysco Foods and against Harrell in the amount of \$187,305.50, plus interest. R. D. & O. at 11-12; CX 15; RX 26.

The ALJ conducted a hearing in the instant claim and on November 29, 2007, found that Harrell had prevailed on the merits, proving that Sysco Foods had filed the Howard County lawsuit in retaliation because of Harrell's protected activity of failing to withdraw his first STAA complaint. R. D. & O. at 35. She found that Harrell was entitled to relief in the amounts of \$20,000.00 for mental or emotional distress, \$24,779.65 for litigations expenses in the Howard County suit, and \$187,305.50 for the judgment in the retaliatory Howard County action. R. D. & O. at 35.

JURISDICTION AND STANDARD OF REVIEW

The case is now before the Administrative Review Board (ARB or the Board) which automatically reviews an ALJ's STAA decision. 49 U.S.C.A. § 31105 (b)(2)(C); 29 C.F.R. § 1978.109 (c)(1) (2009). The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(a).

Under the STAA, the ARB is bound by the ALJ's findings of fact if substantial evidence on the record considered as a whole supports those findings. 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). 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.” *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); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ's conclusions of law, the ARB, as the Secretary of Labor's designee, acts with “all the powers [the Secretary] would have in making the initial decision” 5 U.S.C.A. § 557(b) (West 1996). Therefore, we review the ALJ's conclusions of law de novo. *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, -029, slip op. at 2 (ARB Oct. 31, 2003).

THE LEGAL STANDARDS

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. 49 U.S.C.A. § 31105(a)(1). 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.” *Id.*¹ The statute and regulations extend protection to former employees in limited circumstances, e.g., blacklisting. *Earwood v. Dart Container Corp.*, 1993-STA-016 (Sec'y Dec. 7, 1994).

To prevail on his STAA claim, Harrell must prove by a preponderance of the evidence that he engaged in protected activity, that Sysco Foods was aware of the protected activity and took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action. *Formella v. Schnidt Cartage, Inc.*, ARB No. 08-050, ALJ No. 2006-STA-035, slip op. at 4 (ARB Mar. 19, 2009) (citing *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004)). If Harrell does not prove one of these requisite elements, the entire claim fails. *See 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).

If the employer presents evidence of a nondiscriminatory reason for discharging them, employee can prevail if he proves, by a preponderance of the evidence, that the reason the employer proffered is a pretext for discrimination. *See Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 5 (ARB Nov. 27, 2002) citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In proving that an employer's asserted reason for adverse action is a pretext, the employee must prove not only that the respondent's

¹ Although STAA was amended, we are applying the pre-amendment version of law. *See* 49 U.S.C.A. § 31105 (Thomson/West Supp. 2009); 29 C.F.R. Part 1978 (2009).

asserted reason is false, but also that discrimination was the true reason for the adverse action. The employee bears the ultimate burden of persuading the ALJ that the employer discriminated against him. *Calhoun*, slip op. at 5, citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

DISCUSSION

Substantial evidence in the record supports the following pertinent facts.

Harrell filed several claims against Sysco including a STAA complaint, a claim with the National Labor Relations Board, an employment discrimination claim with the Equal Employment Opportunity Commission, a claim in U.S. District Court for the District of Maryland, and various workers' compensation claims. He also filed a STAA complaint along with four other complainants with the DOL. As a part of a settlement that Harrell entered into regarding the various claims before the U.S. District Court and the Maryland Workers' Compensation Commission, Harrell agreed to withdraw all of his pending claims, which would have included his STAA claim. He also agreed not to disparage Sysco and not to voluntarily aid third parties in litigation against Sysco.

Following this settlement, Harrell did not move to withdraw his STAA claim because he believed that the attorneys involved in the U.S. District Court case had taken care of it. When he learned that the case had not been withdrawn because he received a letter of merit from OSHA, he attempted to withdraw the claim. In approximately the same time period, Harrell assisted a third party in a claim against Sysco and disparaged Sysco, stating that his former supervisor harassed him while he was employed. Within two months of each of these occurrences, Sysco filed suit in the Circuit Court of Howard County, Maryland for breach of contract for the three reasons that he failed to withdraw his STAA claim, that he disparaged Sysco, and that he aided a third party in a claim against Sysco.

Harrell subsequently filed the instant STAA claim, alleging that the Howard County claim was in retaliation for his first STAA suit. Meanwhile, the parties were in settlement discussions regarding the first STAA suit and during this time Sysco agreed to waive its claims for breach of contract in the Howard County action based on Harrell's failure to withdraw the STAA claim. After receiving proof that the Howard County Court had been notified of Sysco's waiver of the complaint for breach of contract against Harrell for failure to take steps to dismiss the STAA action, the ALJ found the settlement of the first STAA claim to be fair and reasonable and to provide adequate relief to the five complainants based on their STAA complaints.

The Howard County Court found that Harrell had breached the contract by disparaging Sysco Foods and aiding and assisting third parties in claims against Sysco. The Court of Special Appeals of Maryland affirmed and enforced the damages provision, which called for the full settlement amount to be repaid, \$187,305.50.

Based on these facts we agree with the ALJ's conclusions that Harrell is a covered former employee under the STAA, that Harrell engaged in protected activity because he filed a STAA

complaint, and that Sysco knew of the STAA complaint because OSHA informed it that the complaint was still pending.

At this point, our conclusions of law diverge from those of the ALJ. She concluded that the Howard County suit against Harrell was retaliatory because it had to do with Harrell's pay, terms, or privileges of employment, that there was a causal relationship between the protected activity and the adverse action, that she could not separate the illegitimate from the legitimate reasons for filing the suit, and that Sysco did not establish that it would have brought the suit anyway. She also concluded that Sysco's waiver in the Howard County suit of its claim of breach of contract for Harrell's failure to withdraw the STAA claim did not change the result because the withdrawal may not have had its intended effect, the judge ordered specific performance of the entire contract without referencing any exception for the STAA claim, and that at the time the suit was brought, improper motives were a significant factor.

We do not agree. First, we hold that the ALJ erred when she concluded that Sysco retaliated against Harrell by filing suit for breach of contract in the Howard County Court. Rather, Sysco was enforcing a valid settlement that Harrell had willingly entered into in a separate action that resolved pending NLRB, EEOC, and workers' compensation claims which required him to dismiss all other pending litigation, including the first STAA complaint. Both sides were represented by counsel.

In the first STAA complaint, the Assistant Secretary participated and represented the interests of the five drivers. After hearings, the ALJ found the settlement before the OALJ to be fair, adequate, and reasonable. However, before she agreed to approve settlement, the ALJ required that the state court action be submitted for review and that Sysco waive Harrell's failure to dismiss his first STAA complaint as a basis for the Howard County action involving the breached settlement agreement. Thus, the first STAA complaint was settled and approved as fair, adequate, and reasonable by an ALJ, as required by the regulations. 28 C.F.R. § 1978.111(d)(2); *see also Poulos v. Ambassador Fuel Oil Co.*, 1986-CAA-001, (Sec'y Nov. 2, 1987) in which the Secretary limited review of a settlement agreement to whether the terms of the settlement are a fair, adequate, and reasonable settlement of the complainant's allegations that the respondent violated the STAA.

Sysco was entitled to the benefit of its bargain in the U.S. District Court and Maryland Workers' Compensation Commission global settlement agreement. It had paid substantial sums for the benefit of that bargain. Harrell breached the agreement because he failed to withdraw his STAA complaint, he assisted a co-worker in a complaint against the company, and he disparaged the company. The Howard County Court found against Harrell and ruled that he had breached the agreement, even after Sysco waived Harrell's breach regarding the STAA claim as a basis for its action. The Court of Special Appeals of Maryland required that Harrell repay the money he received in settlement because of his breach pursuant to the agreement's damages provision.

Although the appeals court's judgment may seem harsh because the amount awarded seems to exceed actual damages that resulted from the breach, we must defer to it. The ARB does not have jurisdiction to determine whether a party violated a settlement agreement; the state court was the proper jurisdiction for the claim. *White v. J.B. Hunt Transport, Inc.*, ARB No. 06-

063, ALJ No. 2005-STA-065 (ARB May 30, 2008). Accordingly, Sysco did not retaliate against Harrell when it filed an enforceable claim for breach of a settlement agreement.

Second, even assuming that Harrell's second OSHA complaint stated a valid cause of action for retaliation, it must fail. Harrell has the burden of proving retaliation. Sysco withdrew its claim for breach insofar as it was based upon Harrell's failure to dismiss his first STAA complaint. The Howard County and Special Court of Appeals rulings that Harrell breached the settlement agreement by aiding a third party in a claim against Sysco and disparaging the company, provide a legitimate, non-discriminatory reason for the suit. Accordingly, even if we were to agree with the ALJ that his failure to dismiss the first STAA complaint was a motivating factor in Sysco's enforcement suit initially, Sysco established by a preponderance of the evidence that it would have brought the meritorious litigation in any case.

We note that we encourage negotiated settlements of cases. See 29 C.F.R. § 1978.111(d)(2). A meritorious enforcement action by an employer ordinarily does not give rise to a viable retaliation complaint.

CONCLUSION

In summary, we find that the ALJ erred when she concluded that Sysco retaliated against Harrell when it filed suit against him because he breached his contract with it. Second, we conclude that even if it could be said that the action was retaliatory in part, Sysco established by a preponderance of the evidence that it would have brought the meritorious litigation absent Harrell's failure to withdraw the first STAA complaint, because of the other breaches of contract in which he engaged and which the Maryland state courts solely considered in reaching their decisions.

Accordingly, we **REVERSE** the ALJ's conclusions of law discussed above and **DENY** Harrell's complaint.

We also **DISMISS** ARB No. 08-065, regarding the ALJ's recommended attorney's fee order, because it is moot.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge