



In the Matter of:

MARTIN KERCHNER,

ARB CASE NO. 08-066

COMPLAINANT,

ALJ CASE NO. 2007-STA-041

v.

DATE: June 30, 2010

GROCERY HAULERS, INC.,

REVISED: March 8, 2011

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Martin Kerchner, pro se, Avenel, New Jersey

For the Respondent:

Dion Y. Kohler, Esq., Brandon M. Cordell, Esq., Jackson Lewis LLP, Atlanta, Georgia

Before: Paul M. Igasaki, Chief Administrative Appeals Judge, E. Cooper Brown, Deputy Chief Administrative Appeals Judge.

AMENDED FINAL DECISION AND ORDER

Martin Kerchner filed a complaint with the United States Department of Labor alleging that his former employer, Grocery Haulers, Inc. (GHI), violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA or Act), 49 U.S.C.A. § 31105 (Thomson/West Supp. 2005); 29 C.F.R. Part 1978 (2009), when it terminated his

employment.¹ Pursuant to objections Kerchner filed with the Department of Labor's Office of Administrative Law Judges, a Department of Labor Administrative Law Judge (ALJ) ruled against Kerchner with respect to his complaint of retaliatory discharge but found that he stated a timely complaint of unlawful blacklisting. Recommended Decision & Order (R. D. & O.) at 44. The ALJ remanded the blacklisting complaint to OSHA for investigation. *Id.*

On appeal to the Administrative Review Board (ARB or Board), the ARB affirmed the ALJ's R. D. & O. in part and reversed in part, remanding the blacklisting complaint to the ALJ for further proceedings. Shortly thereafter, GHI filed a motion for reconsideration of the ARB's final decision and order. For the reasons stated in the reconsideration order accompanying this Amended Decision and Order, we grant GHI's motion for reconsideration and issue this Amended Decision and Order affirming, in part, and reversing, in part, the ALJ's R. D. & O.

BACKGROUND

GHI is a privately held trucking company that specializes in food distribution services throughout the greater New York, New Jersey, and mid-Atlantic areas. GHI employed Kerchner as a truck driver from December 2000 until it suspended him and ultimately terminated his employment in August 2005.

On August 11, 2005, Kerchner reported for work at 9:00 p.m. At about 12:30 a.m. on August 12th, Kerchner entered the dispatch office for his next assignment. When the dispatcher gave Kerchner an assignment, which Kerchner believed to be less lucrative than his typical assignments, he became agitated and refused the assignment. When management learned of the refusal, they fired Kerchner for violating company policy.

On August 25, 2005, Kerchner filed a complaint with OSHA alleging that GHI terminated his employment because he complained about unsafe working conditions. During OSHA's investigation, Kerchner further claimed that he was blacklisted from employment with a different trucking company, Silver Line, when he applied for a job with that company in September 2005. OSHA dismissed Kerchner's STAA complaint finding that he failed to prove his case of retaliatory discharge against GHI and, construing his blacklisting complaint as a complaint against Silver Line, found that his blacklisting complaint was untimely.

Kerchner objected to OSHA's findings, and timely requested a hearing before the Office of Administrative Law Judges. An ALJ heard the case on October 2, 2007. Based upon the evidence and presentation of the parties, the ALJ issued a R. D. & O recommending that Kerchner's complaint of retaliatory suspension and discharge against GHI be dismissed based upon her determination that neither the suspension nor the discharge were causally related to any protected activity and thus did not constitute STAA violations. As to Kerchner's complaint of blacklisting, the ALJ concluded that OSHA misconstrued Kerchner's blacklisting complaint as a

¹ Congress amended the STAA in 2007 after Kerchner filed his complaint with OSHA. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007).

complaint against Silver Line instead of a complaint against GHI and Local 863. Accordingly, the ALJ concluded that Kerchner timely filed his blacklisting complaint and recommended that the blacklisting complaint be remanded to OSHA for investigation.

The Board has automatic review of the ALJ's Recommended Decision and Order. 29 C.F.R. § 1978.109(a).

DISCUSSION

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under 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). When reviewing STAA cases on appeal, the ARB is bound by the ALJ's findings of fact if substantial evidence on the record considered as a whole supports those findings. The Board reviews the ALJ's conclusions of law *de novo*. *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038 (ARB Feb. 19, 2004).

I. Kerchner's Complaint of Retaliatory Discharge

The ALJ found that Kerchner engaged in protected activity while employed by GHI, and GHI took adverse action when it suspended him and terminated his employment. But the ALJ further determined that GHI took these adverse actions because Kerchner refused to drive on August 12, 2005, and that the STAA did not protect Kerchner's refusal to drive on that date.

The record has been reviewed, and we find that the ALJ's factual findings in the adjudication of the whistleblower retaliation complaint are supported by substantial evidence on the record as a whole and are therefore conclusive. The record fully supports the ALJ's well-reasoned decision, and we therefore adopt the reasoning and legal analysis expressed by the ALJ in the retaliation complaint. Specifically, the record supports the ALJ's determination that Kerchner's actionable adverse actions were his suspension and termination and that these resulted from his refusal to drive. R. D. & O. at 25, 31, 33.

Further, the record supports the ALJ's determination that his refusal to drive was based on reasons unrelated to protected activity. Under the STAA an employee is protected for refusing to drive if that refusal is based on a violation of a federal safety regulation or on a reasonable apprehension of serious injury to the driver or others. 49 U.S.C.A. § 31105(a)(1)(B); *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 4 (ARB July 31, 2003). The ALJ found that Kerchner did not refuse to drive due to fatigue or a reasonable apprehension of serious injury to himself or others; rather, he refused to drive because he did not want that particular assignment. R. D. & O. at 42-43. We affirm.

II. Kerchner's Blacklisting Complaint

The ALJ also concluded that Kerchner timely filed his blacklisting complaint against GHI with OSHA. OSHA erroneously identified Silver Line, the third-party employer to whom

Kerchner had applied for work subsequent to GHI's termination of his employment, as the party-respondent. Therefore, OSHA did not investigate the complaint because it concluded that Kerchner's blacklisting complaint was untimely. The ALJ, to the contrary, found that the record evidence supported Kerchner's contention that he properly and timely asserted his blacklisting complaint against GHI. R. D. & O. at 6-7. In light of the documentary evidence Kerchner submitted detailing the dates and times of his correspondence with OSHA, and in which he identified GHI as the party against whom he asserted the blacklisting complaint, we find that substantial evidence of record supports the ALJ's finding that Kerchner timely filed his blacklisting complaint. See Respondent's Exhibit-17, at 37.

The ALJ, in light of her determination that GHI was the proper party respondent to the blacklisting complaint and that Kerchner had timely filed the complaint, recommended that the blacklisting complaint be remanded to OSHA for investigation since OSHA had failed to investigate this complaint because of its erroneous timeliness determination. The ALJ noted that the prevailing STAA regulations "do not provide explicit authority to remand a matter to OSHA, neither do they preclude such action." R. D. & O. at 8 n.7. The ALJ contrasted the implementing regulations of SOX and AIR 21, which preclude an ALJ from remanding a complaint to OSHA but require, instead, that the ALJ maintain jurisdiction to hear the case in its entirety.²

On remand from the ALJ, OSHA dismissed Kerchner's blacklisting complaint. Kerchner requested an ALJ hearing but later withdrew his complaint after failing to secure legal representation. Accordingly, on October 2, 2009, the ALJ dismissed Kerchner's blacklisting complaint, and on November 30, 2009, the ARB affirmed the dismissal. *Kerchner v. Grocery Haulers Inc.*, ARB No. 10-003, ALJ No. 2009-STA-052 (ARB Nov. 30, 2009) (*Kerchner II*).

We conclude that the ALJ erred in remanding the blacklisting complaint to OSHA for investigation. While the STAA regulations in effect when Kerchner filed his complaint³ do not expressly prevent an ALJ from remanding a complaint to OSHA for reconsideration, in *Freeze v.*

² The AIR 21 and SOX regulations provide:

Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation . . . nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the administrative law judge shall hear the case on the merits.

29 C.F.R. § 1979.109(a)(2009) (AIR 21); 29 C.F.R. § 1980.109(a)(2009) (SOX).

³ The STAA regulations adopted on August 31, 2010, expressly provide that complaints may not be remanded to OSHA for further investigation or adjudication. 75 Fed. Reg. 53544, 53557 (Aug. 31, 2010)(29 C.F.R. § 1978.109(c).

Consolidated Freightways, Inc., ARB No. 04-128, ALJ No. 2002-STA-004 (Aug. 31, 2005), the ARB wrote that “neither STAA nor its implementing regulations vest ALJs with authority to compel OSHA to conduct investigations.” Slip op. at 2 n.3. Accordingly, where, as here, a complainant has alleged ongoing retaliation after he has filed his initial complaint that OSHA has either failed or refused to consider, the ALJ should afford the complainant the opportunity to submit supplemental pleadings pursuant to 29 C.F.R. § 18.5(e)(2009).

Although we conclude that the ALJ erred in remanding the blacklisting complaint to OSHA’ because OSHA considered and rejected this complaint, and because Kerchner withdrew his blacklisting complaint before the ALJ and the ARB affirmed the ALJ’s dismissal, the issue of the ALJ’s error in remanding the blacklisting the complaint is moot.

CONCLUSION

Accordingly, we affirm in part and reverse in part the R. D. & O. We affirm the ALJ’s recommendation dismissing Kerchner’s complaint of retaliatory suspension and discharge in violation of the whistleblower protection provisions of the STAA. With respect to Kerchner’s blacklisting complaint, we affirm the ALJ’s finding that the complaint was timely filed but reverse the ALJ’s order remanding the complaint to OSHA for investigation. Because Kerchner withdrew his blacklisting complaint, the ALJ dismissed the blacklisting complaint, and the ARB affirmed the dismissal, the ALJ’s error in remanding the complaint to OSHA is moot.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge