U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

DANIEL M. SALATA,	**ARB CASE NOS. 08-101** **09-104**
COMPLAINANT,	
	ALJ CASE NOS. 2008-STA-012
v.	**2008-STA-041**
CITY CONCRETE, LLC,	**DATE: September 23, 2010**
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:
James L. Blomstrom, Esq., *Harrington, Hoppe & Mitchell,* Youngstown, Ohio

For the Complainant, Salata I, ARB No. 08-101:
Daniel M. Salata, *pro se,* New Springfield, Ohio

For the Complainant, Salata II, ARB No. 09-104:
Vicki Messer-Salata, *lay representative,* New Springfield, Ohio

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge,* Wayne C. Beyer, *Administrative Appeals Judge,* and Luis A. Corchado, *Administrative Appeals Judge*

ORDER OF CONSOLIDATION AND FINAL DECISION AND ORDER

Daniel M. Salata filed his first complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on August 10, 2007. He alleged that his employer, City Concrete, LLC, violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified, and its implementing regulations, when City Concrete terminated his employment in retaliation for protected activities. 49 U.S.C.A. § 31105 (Thomson/West 2007); 29 C.F.R. Part 1978 (2009). A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed the complaint. On February 13, 2008, Salata filed a second complaint based on evidence that was developed in his first claim. We affirm the ALJ's decisions and deny the complaints in each case.

BACKGROUND

Salata I

We have fully reviewed the record and find that the ALJ's material findings of fact are supported by substantial evidence. Therefore, we hereby incorporate the facts as set for by the ALJ, Recommended Decision & Order (R. D. & O.) at 4-11 into our Final Decision and Order. We summarize the evidence by way of background.

Salata was a truck driver for City Concrete, first driving a rear-discharge truck and later, a front-discharge truck. R. D. & O. at 6-7; Hearing Transcript (Tr.) at 165, 280, 322, 365. On August 3, 2007, City Concrete sent Salata to deliver concrete to a jobsite at Youngstown State University (YSU) in truck #509. R. D. & O. at 7; Tr. at 115. Salata's truck had a difficult time climbing the grade to unload the concrete but did eventually make it up the hill to unload. R. D. & O. at 7; Tr. at 115. The customer did not want truck #509 to come back to deliver more concrete. *Id.* Salata's supervisors, George Lesko and Rick Flesher, told him to take another load of concrete to the YSU site. R. D. & O. at 7; Tr. at 116. Salata, again with difficulty and after multiple attempts, made it up the grade to deliver the concrete. Tr. at 116. The customer still did not want truck #509 to come back to the site and did not think it could climb the grade. Tr. at 36, 116. Salata's truck destroyed the grade, and they had to bring a machine to regrade it. R. D. & O. at 7; Tr. at 116. The customer called and complained to City Concrete's dispatcher and another truck was able to climb the "non-severe" grade. R. D. & O. at 7. Salata's supervisors sent Salata back to the site for a third time with another load of concrete. R. D. & O. at 7; Tr. at 117. On the way there, the truck broke down, and City Concrete's mechanic, Ed Knebel, temporarily repaired it. R. D. & O. at 7-8; Tr. at 117-18. Salata continued to take and deliver the third load of concrete to the YSU site. R. D. & O. at 8; Tr. at 118.

Salata then returned to City Concrete with the truck and spoke to John Annichenni, part-owner and president of City Concrete. R. D. & O. at 8; Tr. at 119. Salata told Annichenni that truck #509's engine had no power. R. D. & O. at 8; Tr. at 119. Annichenni told Salata to take

the truck to maintenance. R. D. & O. at 8; Tr. at 119. Salata filled out a vehicle inspection report (VIR) form stating that the truck should not be on the road until it was fixed but he never submitted this VIR to City Concrete. R. D. & O. at 8; Tr. at 119.

Annichenni then went upstairs to City Concrete's offices and asked what had been going on at the YSU job. Tr. at 230. His employees in the office told him that the customer did not want Salata back on the job because there was a problem with the truck, and it could not climb the grade. Tr. at 230. Then Annichenni's employees told him that Salata had had some problems with wet loads,[1] that he had had an accident at the plant, and about contractor job problems. R. D. & O. at 8; Tr. at 230. Annichenni began to consider whether Salata was careless and that he was still within the probationary period, after which it would be difficult to terminate his employment if necessary. R. D. & O. at 8; Tr. at 231. Annichenni wanted to investigate and wanted maintenance to find out if anything was wrong with the truck. R. D. & O. at 8; Tr. at 230-31. There is evidence that Salata was in an accident at the plant and that he had wet loads on two or three occasions. Tr. at 227, 264, 266-67, 270-71, 274-75, 280, 290-92, 299-300, 345-46, 356, 365, 366-67, 373, 375-80, 383, 388; RX G. There is also evidence that Salata did not know how to properly drive a front-discharge truck and that he needed to put the truck in low range to accelerate. Tr. at 322-25, 350-51, 360.

After Annichenni talked to his employees about Salata, he decided to talk to his partners about what to do, and they left the matter up to him. R. D. & O. at 8; Tr. at 232. Annichenni was skeptical about Salata's complaints about the lack of power in truck #509. R. D. & O. at 8; Tr. at 254. The maintenance shop made some adjustments tothe truck after the events of August 3, 2007, but did not find anything wrong with it. R. D. & O. at 8; Tr. at 231. Annichenni terminated Salata's employment. Tr. at 122. Knebel testified that there have been no serious complaints about truck #509 since Salata was terminated and that the truck has been in service. R. D. & O. at 8; Tr. at 318.

The following evidence was also offered at the hearing. From July 24, 2007, to August 1, 2007, Salata filled out and turned in seven white vehicle inspection reports (VIRs) to his employer regarding truck #509, a front discharge truck. Respondent's Exhibit (RX) D; Tr. at 322-23. He retained yellow copies of the VIRs for himself. On each of these VIRs, Salata wrote that the engine had no power. RX D. On the form for July 25, 2007, Salata checked a box that indicated that he did not find any defects. He testified that he checked this box because while he knew there was a problem and looked for the problem, he could not find it. Tr. at 155. On the rest of the VIRs, Salata's copies of the VIRs do not have the "no defects found" box checked. However, City Concrete's white copies for July 24, July 27, and August 1, 2007, each have the "no defects found" box checked.

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[1] A "wet load" is a load of concrete that has too much water mixed with it so that it is unusable and must be dumped. R. D. & O. at 9.

The mechanic for City Concrete, Ed Knebel, who also signs the VIRs, testified that it was possible that he could have marked something on the VIR forms, thinking that the issues raised had been addressed. R. D. & O. at 7; Tr. at 303. He testified that he checked over Salata's power complaints extensively. Tr. at 300. He made repairs to truck #509 on July 26, 2007, and August 1, 2007. Tr. at 300-01. He had other drivers in similar units drive truck #509, and they claimed that it drove similarly to their trucks. Tr. at 301. He stated that if other people drive a similar vehicle and they say that it drives the same as theirs, there is not much more he can do about it. Tr. at 302.

Michael Robertson, a court-qualified forensic document examiner, testified that the ink used for Salata's signature and the "x's" marked on the VIR form for July 24, 2007, were the same but that the "x's" were made on the white form after it was removed from the yellow copy. Tr. at 184-86. He testified that for the form dated July 27, 2007, the "x's" were likely printed by the mechanic, Knebel, using the same pen he used to sign the form. Tr. at 186. Finally, he testified that the inks in the "x's" and in Salata's signature were the same for August 1, 2007. Tr. at 187.

Salata filed his complaint on August 10, 2007. OSHA investigated and determined that Salata failed to demonstrate that his protected activity was a contributing factor in his termination. (Oct. 2, 2007).

The ALJ recommended that we dismiss Salata's claim, finding that Salata was terminated solely for legitimate, nondiscriminatory reasons, "the accident, wet load, and, Mr. Annichenni's belief that [Salata's] complaints about truck #509 were largely unfounded." R. D. & O. at 16-17.

Salata II

Salata filed a second claim on February 13, 2008, wherein he alleged that after his termination, City Concrete forged some of the paperwork that he had signed and turned in and that because of the forgeries, OSHA and the ALJ in his first claim did not have accurate evidence on which to base their decisions. City Concrete moved for summary decision, asserting that Salata had not stated a claim under the STAA. The ALJ granted the motion for summary decision, finding that Salata had not suffered an adverse employment action as a result of the alleged forgery. R. D. & O. at 4. He found that, even if there had been a forgery, OSHA and the ALJ in his first claim relied on false evidence does not constitute an adverse employment action. *Id.* Thus, he found that Salata failed to meet his burden to demonstrate that there remained a genuine issue of material fact for a hearing. He also found that Salata's other arguments pertained to allegations of error in the first claim and were not properly before him.

CONSOLIDATION OF ARB CASE NOS. 08-101 AND 09-104

In view of the substantial identity of the legal issues and the commonality of much of the evidence, and in the interest of judicial and administrative economy, Salata's appeals in his two complaints are hereby consolidated for the purpose of review and decision. *Levi v. Anheuser Busch Companies, Inc.*, ARB Nos. 06-102, 07-020, 08-006, ALJ Nos., 2006-SOX-037, -108, 2007-SOX-055, slip op. at 6 (ARB Apr. 30, 2008); *Harvey v. Home Depot*, ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-020, -036, slip op. at 8 (ARB June 2, 2006); *Agosto v. Consol. Edison Co. Inc.*, ARB Nos. 98-007, 152; ALJ Nos. 1996-ERA-002, 1997-ERA-054, slip op. at 2 (ARB July 27, 1999).

JURISDICTION AND STANDARD OF REVIEW

1. Generally

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978. 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).

In STAA cases, the Board automatically reviews an ALJ's recommended decision. 29 C.F.R. § 1978.109(c)(1). The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c).

Under the STAA, we are bound by the ALJ's fact findings in *Salata I* if substantial evidence on the record considered as a whole supports those findings. 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" and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

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 . . . ." 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

2. Specifically as to Summary Decisions

In *Salata II*, we review a recommended decision granting summary decision, which is subject to a de novo review. *Hardy v. Mail Contractors of America,* ARB No. 03-07, 2002-STA-022, slip op. at 2 (ARB Jan. 30, 2004). The standard for granting summary decision in our cases is set out at 29 C.F.R. § 18.40 (2010) and is essentially the same standard governing summary judgment in the federal courts. Fed. R. Civ. P. 56. Summary decision is appropriate if "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and a party is entitled to summary decision." 29 C.F.R. § 18.40(c). The determination of whether facts are material is based on the substantive law upon which each claim is based. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact arises when the resolution of the fact "could establish an element of a claim or defense and, therefore, affect the outcome of the action." *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002). "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'" *Bobreski*, 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

When a motion for summary decision is made, the party opposing the motion may not rest upon mere allegations or denials of such pleading. 29 C.F.R. § 18.40(c). Rather, the response must set forth specific facts showing that there is a genuine issue of fact for determination at a hearing. *Id.*

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.*[2] 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, Salata must prove by a preponderance of the evidence that (1) he engaged in protected activity, (2) City Concrete was aware of the protected activity, (3) City Concrete took an adverse employment action against him, and that (4) 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 Salata 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).

To determine if a claim may proceed on the merits, the ARB follows the well-settled *McDonnell-Douglas/Burdine* paradigm pertaining to the shifting burdens of production. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). First, the employee must present evidence of the material elements of his claim. Second, if the employee presents such evidence, the employer must present evidence of a legitimate, nondiscriminatory reason for discharging the employee. Once the employer presents evidence of legitimate, nondiscriminatory reasons, the employee must present evidence that the reasons the employer proffered are 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 *Burdine*, 450 U.S. at 253). Ultimately, even if the employee proves pretext, he bears the ultimate burden of proving that the adverse action was a contributing factor. Throughout the entire case, 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. at v. Hicks*, 509 U.S. 502, 507 (1993).

If, however, the ALJ concludes that the employer was motivated by both prohibited and legitimate reasons (has mixed or dual motives), the employer may escape liability by demonstrating by a preponderance of the evidence that the employer would have taken the same unfavorable personnel action in the absence of the protected activity. *Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-022, slip op. at 5-6 (ARB Nov. 30, 2009) (citing *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, 06-159; ALJ No. 2005-STA-063,

[2] The STAA was amended on August 3, 2007. 49 U.S.C.A. § 31105 (Thomson/West Supp. 2010). *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). The ALJ applied the pre-amendment law to his analysis. *See* 49 U.S.C.A. § 31105 (Thomson/West 2007); 29 C.F.R. Part 1978 (2009). Neither of the parties argued that the post-amendment law should apply in this case, so we are applying the pre-amendment law.

slip op. at 13 (ARB June 30, 2008) (citing *Muzyk v. Carlsward Transp.*, ARB No. 06-149, ALJ No. 2005-STA-060, slip op. at 5 (ARB Sept. 28, 2007))).

DISCUSSION

Salata I

After a careful review of the record as a whole, we conclude that substantial evidence supports the ALJ's findings of fact. *See* R. D. & O. at 5-17.

Salata reported the reason for the inability to climb the grade as "no engine power," and the ALJ found that such reporting was a protected complaint under the STAA. The events of August 3, 2007, stemming from Salata's inability to climb an uphill grade, immediately precipitated his termination. Thus, substantial evidence supports the ALJ's finding that Salata presented a prima facie case of discrimination based on his complaint.

The ALJ found that Salata did not refuse to drive. Salata testified that he completed delivery of three loads on August 3, 2007, and that he broke down delivering the last of the three loads. Annichenni told him to take the truck to maintenance after he returned from delivering the last load. Thus, the evidence supports the ALJ's finding that Salata did not refuse to drive truck #509.

The ALJ implicitly found, and we agree, that the customer's complaint instigated Annichenni to look into Salata's employment, which ultimately led to the termination decision. The ALJ found that Annichenni terminated Salata "solely because Mr. Annichenni foresaw problems based on the allegations he was advised of, that is the accident, wet loads, customer complaints, and his own skepticism about Mr. Salata's lack of power complaints related to #509." Because the ALJ found that the "no engine power" complaints were protected activity and also found that one of the reasons that Annichenni terminated Salata was because he was skeptical about the power complaints, we conclude that the reason for termination was at least partly connected to the protected activity.

The ALJ found that the mixed motive analysis was not implicated. R. D. & O. at 17. We disagree. Because City Concrete's adverse action against Salata was at least partly connected to Salata's protected activity, we find that the mixed motive analysis does apply. Thus, the burden shifted to City Concrete to prove by a preponderance of the evidence that it would have taken the adverse action even in the absence of protected activity.

Nevertheless, we agree with the ALJ's ultimate conclusion. The ALJ also explicitly found that the "no engine power" complaints had nothing to do with the termination of Salata's employment. Annichenni was not upset about the complaints of no power and did not fire Salata

because he made the complaints. Upon our review of the record, we find by a preponderance of the evidence that Annichenni would have terminated Salata's employment for the legitimate, non-discriminatory reasons of the accident and wet loads and affirm the ALJ's ultimate finding that Salata's complaints had no role in the termination.

The burden was on Salata to show that the termination of his employment was motivated by his protected activity. This he did not do. As the ALJ ruled, Salata's termination was "not motivated in any way by an unlawful motive." *Id.* Additionally, City Concrete proved by a preponderance of the evidence that it would have fired him in the absence of any protected activity.

We find that since "no engine power" or some variation of that was marked on Salata's VIRs on all of the days in question, whether "no defects found" was checked was immaterial to the resolution of his claim. He made valid complaints of "no engine power," which were unaffected by the three checked boxes – nevertheless, Salata was not fired for making these complaints. Thus, we accept the ALJ's recommendation and dismiss the claim.

Salata II

In *Salata II*, Salata avers that the alleged forgery of documents that were in evidence in the first claim constitutes a new adverse action against him. The issue of whether and what affect the changed-VIRs had was substantially discussed in the prefatory stage of the hearing in the first claim.

At the hearing, City Concrete's attorney raised a preliminary concern about Salata's attorney's expressed intent to ask a City Concrete witness, Ed Knebel, if he was aware of potential criminal liability regarding the alleged alterations. Salata's attorney thought Knebel should be advised of any potential criminal exposure. City Concrete's lawyer preemptively objected to any such discussion occurring. During the discussion of this controversially proposed advisement, the judge learned of the alleged alterations and the expert analysis that was performed. Tr. at 17-22. The alterations issue was again raised in Salata's direct testimony (Tr. at 104-111) in reference to alterations of July 27, 2007 and August 1, 2007 VIRs and cross-examination testimony (Tr. at 155-59). Additionally, the document expert, Michael Robertson, testified. Tr. at 176-98.

We agree with the ALJ that, even if there had been a forgery, OSHA and the ALJ in his first claim potentially relied on false evidence in the first claim does not constitute an adverse employment action. Additionally, even if the forms were changed after Salata turned them in, it had no effect on the outcome of the first claim because the ALJ found that turning in the VIRs was protected activity. Further, even assuming the VIRs were changed, it would not constitute an action relating to pay, terms, or privileges of employment. 49 U.S.C.A. § 31105(a)(1).

Finally, this was an evidentiary issue that was taken up at the first hearing and was adequately raised and litigated in the first case.

We also agree with the ALJ that Salata's other arguments pertaining to discovery and facts in *Salata I* were not properly before him and should be dismissed.

We therefore affirm the ALJ's recommended decision granting City Concrete's motion for summary decision in *Salata II*.

CONCLUSION

Substantial evidence supports the ALJ's findings that Salata's protected activity did not contribute to City Concrete's decision to discharge him in *Salata I*. Additionally, Salata failed to present a legally cognizable claim for determination at a hearing in *Salata II*. Accordingly, we **DENY** the complaints.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge