



In the Matter of:

**DAVID SACCO and
ANTHONY SACCO,**

COMPLAINANTS,

v.

HAMDEN LOGISTICS, INC.,

RESPONDENT.

ARB CASE NO. 09-024

**ALJ CASE NOS. 2008-STA-043
2008-STA-044**

DATE: December 18, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

David Sacco, *pro se*, West Haven, Connecticut

Anthony Sacco, *pro se*, Branford, Connecticut

For the Respondent:

Harry Schochat, Esq., *Law Offices of Harry Schochat*, Woodbridge, Connecticut

FINAL DECISION AND ORDER

David and Anthony Sacco filed separate complaints with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on December 3, 2007. Each alleged that their employer, Hamden Logistics, Inc. (HLI), violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified,¹ and its implementing regulations,² when it terminated their employment in

¹ 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2008).

retaliation for protected activities. The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed the complaints. We affirm.

BACKGROUND

David Sacco began working for HLI, a commercial motor carrier engaged in transporting products on the highways, in June 2007.³ Anthony Sacco began working for HLI on July 20, 2007.⁴

David Sacco testified that he complained to his terminal manager, Robert Tenbrink, and HLI's owners, Charles and Cheera Leroux, regarding cash payments he was required to make to allegedly illegal workers, hours of service violations he was allegedly required to make, logbooks he was required to doctor, and safety issues related to his truck and vehicle inspection reports.⁵ Anthony Sacco testified that he complained to Tenbrink and Charles Leroux about having to work in excess of 70 hours in a seven-calendar-day period approximately four or five times, one of them occurring on October 24, 2007.⁶ He also testified that he complained about not being paid for a day that he was required to add to a route.⁷

On December 1, 2007, David Sacco discovered, when he arrived at work, that Tenbrink had given his route to another employee, Thomas Connolly.⁸ He testified that he told Tenbrink that if he interfered with his job, he would be sorry.⁹ Tenbrink testified that David Sacco

² 29 C.F.R. Part 1978 (2009).

³ Secretary's Findings at 1 (Mar. 10, 2008) (David Sacco).

⁴ Secretary's Findings at 1 (Anthony Sacco).

⁵ Tr. at 52, 56, 59-60, 69, 71, 77-78, 80-81, 110-11, 113.

⁶ Tr. at 196, 201. Though not elsewhere stated in the record, 49 C.F.R. Part 395.3(b)(2008) states that a property-carrying driver cannot drive for any period after having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or after having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week. Thus it appears that Anthony Sacco's testimony does not evidence a violation of the hours of service regulations. But this has no bearing on the outcome of this case.

⁷ Tr. at 196-97.

⁸ Tr. at 100.

⁹ Tr. at 105.

threatened to kill him and burn down his home with his wife and children inside if he interfered with his job.¹⁰ David Sacco then left the premises. A short time later, he spoke with a police officer to whom Tenbrink had reported his threats.¹¹ The police officer told David that he should come to the premises or be arrested.¹² David arrived and told the police officer his version of the events.¹³ The police officer then went to talk to Tenbrink, who decided not to press charges, but who told the police officer that David was fired.¹⁴ The police officer then went to David and told him that he was fired and was no longer allowed on the premises.¹⁵ At some point later that day, Tenbrink called Anthony Sacco and fired him as well.¹⁶

David and Anthony Sacco allege that because of their respective complaints HLI retaliated against them by terminating their employment.¹⁷ After finding no reasonable cause to believe that HLI had violated the STAA, OSHA dismissed the complaints.¹⁸ The Saccos requested a hearing.¹⁹

After consolidating the cases and a one-day hearing, the ALJ issued a Recommended Decision and Order Dismissing the claims (R. D. & O.) because he found that the Saccos did not prove by a preponderance of the evidence that their protected activities were a contributing factor in their terminations.

¹⁰ Tr. at 272.

¹¹ Tr. at 106, 272-73.

¹² Tr. at 106.

¹³ *Id.*

¹⁴ Tr. at 276.

¹⁵ Tr. at 107.

¹⁶ Tr. at 214, 335.

¹⁷ Secretary's Findings at 1 (David Sacco); Secretary's Findings at 1 (Anthony Sacco).

¹⁸ *Id.*

¹⁹ *See* 29 C.F.R. Part 1978.105(a).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or the Board) her authority to issue final agency decisions under the STAA.²⁰ The Board automatically reviews an ALJ's recommended STAA decision.²¹ The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."²²

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.²³ 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"²⁴ Therefore, the Board reviews the ALJ's conclusions of law de novo.²⁵

Although the Board issued a Notice of Review and Briefing Schedule permitting the parties to submit briefs in support of or in opposition to the ALJ's order, neither party has done so.

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. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" or 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

²⁰ Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

²¹ 29 C.F.R. § 1978.109(c)(1).

²² *Id.*

²³ 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 Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

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

²⁵ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."²⁶

To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity and took an adverse employment action against him, and that his protected activity was a contributing factor in the employer's decision to take adverse action.²⁷ If the employee does not prove one of these requisite elements, the entire claim fails.²⁸

If HLI presents evidence of a nondiscriminatory reason for discharging them, the Saccos can prevail if they prove, by a preponderance of the evidence, that the reason HLI proffered is a pretext for discrimination.²⁹ In proving that an employer's asserted reason for adverse action is a pretext, the employee must prove not only that the respondent's asserted reason is false, but also that discrimination was the true reason for the adverse action. The Saccos bear the ultimate burden of persuading the ALJ that HLI discriminated against them.³⁰

If, however, the ALJ concludes that the employer was motivated by both a prohibited and a legitimate reason (has mixed or dual motives), the employer may escape liability by demonstrating by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of the protected activity.³¹

²⁶ 49 U.S.C.A. § 31105(a)(1).

²⁷ *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)); 49 U.S.C.A. § 31105(b)(1) (the Aug. 3, 2007 amendments to the STAA apply the contributing factor standard from 49 U.S.C.A. § 42121(b)(2)(B)).

²⁸ *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).

²⁹ *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).

³⁰ *Calhoun*, slip op. at 5, citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

³¹ 49 U.S.C.A. § 42121(b)(2)(B). The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) provides the governing burden of proof under the amended statutes at 49 U.S.C.A. § 31105(b)(1).

DISCUSSION

After a careful review of the entire record, we conclude that substantial evidence supports the ALJ's findings of fact.³²

The ALJ found that with the exception of Anthony Sacco, none of the witnesses were completely credible; he found that David Sacco and Charles Leroux were especially self-serving, presenting and accentuating facts they believed would be most helpful and "glossing over or omitting facts that might prove inconvenient to them."³³ He based much of his credibility determination on the demeanor of the witnesses at the hearing. We give great deference to an ALJ's credibility determinations that rely on witness demeanor, and the parties have not suggested any reason why we should not defer to the instant determinations.³⁴ Further, the parties have not offered any evidence that detracts from the ALJ's findings.

Substantial evidence supports the ALJ's finding that the Saccos engaged in protected activity when they complained to their employer about hours of service violations. There is no dispute that HLI discharged both David and Anthony Sacco, thus subjecting them to adverse action.

Nevertheless, the Saccos cannot prevail because they did not prove by a preponderance of the evidence that their protected activities contributed to their terminations. The ALJ found that HLI articulated a legitimate, nondiscriminatory reason for firing David Sacco, i.e., that David Sacco made threats to kill Tenbrink and his family. He found that David Sacco's protected activity, on the other hand, "provoked no hostile reaction and no immediate adverse employment consequences."³⁵ He noted that after his protected complaints, David Sacco continued working for HLI for some time. He was not discharged until the day he threatened the lives of Tenbrink and his family. The ALJ found that David Sacco's threats "severed any possible causal connection between his termination and prior protected activity."³⁶ Therefore, the temporal proximity of the threats to David's termination and the lack of any adverse consequences following David's complaints about hours of service violations constitutes substantial evidence that David Sacco's protected activity did not contribute to HLI's decision to fire him.

³² See R. D. & O. at 10-17 (and transcript pages cited therein).

³³ R. D. & O. at 10.

³⁴ See *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. 12-14 (ARB June 29, 2006) (citations omitted).

³⁵ R. D. & O. at 15.

³⁶ *Id.*

The ALJ found that Tenbrink fired Anthony Sacco after his brother threatened Tenbrink and because of the threats. He noted that while firing Anthony for his brother's actions may not have been fair, it did not implicate the STAA because the discharge was not related to any protected activity. Substantial evidence supports this finding. Anthony Sacco's discharge was removed in time from his hours of service complaints, but occurred contemporaneously with his brother's termination. Indeed, Anthony Sacco admitted at the hearing that he felt that he was terminated because HLI was malicious and vicious and "attach[ed] him with the problem they had with [his] brother."³⁷ Thus, substantial evidence supports the ALJ's finding that Anthony would not have been discharged on December 1, 2007, if it were not for his brother's threats to Tenbrink.

CONCLUSION

Substantial evidence supports the ALJ's findings that the Saccos' protected activity did not contribute to HLI's decision to discharge them. Accordingly, we **DENY** the complaints.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

³⁷ Tr. at 234.