



In the Matter of:

JOSHUA J. ISRAEL,

ARB CASE NO. 09-115

COMPLAINANT,

ALJ CASE NO. 2005-STA-051

v.

DATE: November 17, 2011

SCHNEIDER NATIONAL CARRIERS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Joshua J. Israel, *pro se*, Shakopee, Minnesota

For the Respondent:

James C. Hardman, Esq., Little Canada, Minnesota

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended.¹ On June 4, 2005, Joshua Israel (Complainant or

¹ 49 U.S.C.A. § 31105(a) (Thomson/West 2007). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2007). They have been amended since Israel filed his complaint. 29

Israel) filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Schneider National Carriers (Respondent or Schneider) violated the STAA when it retaliated against him for complaining about unsafe training conditions. On July 20, 2005, OSHA dismissed Israel's complaint because he failed to establish a prima facie case. OSHA Findings at 2. Israel objected, and an Administrative Law Judge (ALJ) held a hearing on August 30, 2005. Shortly before the hearing, Schneider terminated Israel's employment.

On January 17, 2006, the ALJ issued an order dismissing Israel's complaint. Recommended Decision & Order (R. D. & O) (date Jan. 17, 2006). The ALJ determined that (1) Israel failed to prove that Schneider violated the STAA, and (2) that Israel was fired for legitimate, non-discriminatory reasons. The ARB, pursuant to automatic review of 29 C.F.R. § 1978.109(a) (2007), affirmed in part and remanded in part. Final Decision & Order of Remand (F. D. & O.) (dated July 31, 2008). The ARB affirmed the ALJ's determination that Schneider did not retaliate against Israel for protected activity. *Id.* at 8. The ARB concluded, however, that the ALJ prejudiced Israel by consolidating his recent termination into the hearing without giving Israel adequate opportunity to prepare the termination claim. *Id.* at 12-14. The ARB remanded for further proceedings on Israel's termination claim. F. D. & O. at 14-15. After further proceedings on remand, the ALJ determined that Schneider did not violate the STAA and recommended that the complaint be dismissed. R. D. & O. on Remand (dated June 29, 2009). The case returns to us on automatic review, and we affirm.

BACKGROUND

The ALJ's decisions and the ARB's Order of Remand provide a detailed accounting of the facts and proceedings below. This aspect of the case concerns Israel's termination claim. Those facts are briefly summarized below.

A. *Facts*

Israel began working at Schneider on December 24, 2004. As set out in prior decisions in this case, Israel filed at least three complaints with Schneider from January to March 2005 concerning his working conditions. See ALJ's R. D. & O. at 3-15; ARB F. D. & O. of Remand at 2-5. In May 2005, Israel was assigned to take an empty trailer to a shipper and load the truck himself. Israel refused the assignment because of an injured back. He told his supervisor, Becky Collar, that if he took the assignment, he might not be able to drive. Collar told Israel that company policy required drivers to be able to load or unload a trailer on occasion. Because he was unable to perform this function, Collar decided that he could not drive until he was cleared to perform the duties required by the company's manual. F. D. & O. at 3-4; see also Respondent's Exhibit (RX) 3.

C.F.R. Part 1978 (2011). The STAA was also amended after Israel filed his complaint. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007).

Collar told Israel to file a workers' compensation claim. By the end of May 2005, Israel had entered non-work status, filed a workers' compensation claim, and begun seeing a doctor. Israel received a work-ability report on May 25, 2005, and faxed a copy of the report to the workers' compensation adjuster. F. D. & O. at 4; Tr. at 122-23; Complainant's Exhibit (CX) 10, 11. The insurance provider handling Schneider's workers' compensation claims denied Israel's claim as untimely. TTr. at 88-89; Tr. at 258.² While he was in non-work status, in June, Israel also filed an unemployment claim. TTr. at 146. The company believed that Israel was filing for unemployment at the same time he was collecting workers' compensation, and began an inquiry into his claim for unemployment benefits. TTr. at 86-87.³

Collar discussed with Israel the importance of maintaining communications with the company, but by the end of May or early June 2005, Israel and company officials were communicating less. TTr. at 110. Israel filed a STAA whistleblower complaint with OSHA on June 4, 2005.

A human resources representative recommended in late June that the company issue a three-day notice to encourage Israel to notify the company of his health-status. RCX-5. On June 22, 2005, Collar called Israel to inquire into his current medical status and ability to drive. Collar also asked him to remove his personal belongings from the truck because the company wanted to place the truck back into service. TTr. at 101. Israel was concerned that the request occurred shortly after his June 4 OSHA complaint and asked Collar if Schneider was terminating his employment. Tr. at 126-27. Collar responded that they wanted to put the truck back into service to generate revenue and that Israel was not being terminated. Tr. at 273; TTr. at 101.

On June 22, Israel spoke with Collar's new boss, Kimani Jefferson. Israel told Jefferson that he could take an assignment if it did not involve loading or unloading a trailer, and that he had an approaching doctor's appointment that would determine his medical status and ability to drive. Tr. 129. Jefferson postponed reassigning the truck until he received Israel's medical results. TTr. at 122. Israel's medical test was inconclusive, and he required a follow-up appointment. Tr. 130. Israel faxed the medical report to the company. Jefferson received only a fax cover letter and not the report itself. Tr. at 305-07. Jefferson called Israel to ask him to re-fax the report but never reached him. Tr. at 307. Israel testified that Jefferson gave him a number to call if he had any concerns and that he called but did not leave a message for Jefferson. Tr. at 130-31.

Following the June dialogue, Israel again fell out of communication with company officials. Collar testified that she twice tried calling Israel in July. TTr. at 101-02. On one of the occasions, at Jefferson's request, Collar left Israel a message to clean out his personal belongings by a certain day. Tr. at 274-75, 307-08, 324-25. Collar also asked Israel to return the

² "TTr. at ___" refers to pages of the transcript of telephonic proceedings conducted by the ALJ on December 18, 2008. "Tr. at ___" refers to pages of the transcript of proceedings before the ALJ on August 30, 2005.

³ At the initial hearing, Israel denied that he received workers' compensation benefits. Tr. at 106; CX-12; Israel Br. at 25.

truck keys. Tr. at 274-75; TTr. at 101-102. See also TTr. at 127-128 (Jefferson testifying about the importance of getting the truck keys from Israel). Israel testified that by the time he had received the call, he had already cleaned out his belongings but had not informed anyone because he had complied with the request within the time frame. Tr. at 34.

From the time of Collar's last call to his discharge, Israel had no further communications with Schneider. Tr. at 134; RX 19. After five or six weeks with no contact from Israel, Jefferson contacted legal counsel and issued a termination letter on August 16, 2005. Tr. at 308-09; RX 19. Jefferson terminated Israel due to Israel's failure to communicate with the company for an extended period of time, and for refusing to return the keys when requested. Tr. at 309-310, 317.

B. Administrative proceedings

Israel filed a complaint with OSHA on June 4, 2005. On July 20, 2005, OSHA issued a decision finding no violation. On August 4, 2005, the ALJ issued a Notice of Hearing and Pre-Hearing Order requiring that the parties file pre-hearing statements five days before the August 30 hearing. Israel filed his pre-hearing statement on August 15, 2005. F. D. & O. at 9. Schneider terminated Israel the following day, on August 16, 2008.

Schneider filed its pre-hearing statement on August 23, 2005, and included evidence and argument surrounding the termination. Israel was served the statement the following day. Israel's original complaint with OSHA did not include the termination claim. At the hearing, the ALJ consolidated the termination claim with the original OSHA complaint. After a hearing, the ALJ entered an order dismissing Israel's complaint.

On July 21, 2008, we entered an order directing the ALJ to conduct proceedings on Israel's termination claim. See ARB F. D. & O on Remand at 14. The ALJ held a hearing on the termination claim on December 18, 2008.⁴ Following supplemental briefing, the ALJ issued a decision on June 29, 2009. The ALJ determined that Israel "failed to establish that his protected activity contributed to his work suspension and eventual discharge." R. D. & O. on Remand at 23. The case is before us for a second time on automatic review.

⁴ The ALJ initially scheduled a telephone hearing for December 19, 2008, but in November 2008, she notified the parties that the hearing would be held one day earlier, on December 18, 2008. TTr. at 6-7. During the telephone hearing on December 18, Israel argued that he was unprepared for the hearing, that he did not receive proper notice, and that outstanding pre-hearing motions prevented him from going forward. He also argued that he had limited time to participate because of work obligations. The ALJ overruled his objections. The hearing proceeded for four hours, and the ALJ left the record open for post-hearing submission of further evidence. ALJ's R. D. & O on Remand at 4.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB 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, the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, 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 defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). The ARB reviews the ALJ's legal conclusions de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

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 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 or security regulation, standard, or order." *Id.*

Throughout this proceeding, the ALJ used the burden-shifting standard employed under Title VII pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See R. D. & O. at 16; R. D. & O. on Remand at 18. However, the STAA was amended since Israel filed his 2005 complaint. On August 3, 2007, the burden of proof standard was amended as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). The Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to state that STAA whistleblower complaints will be governed by the legal burdens set out in AIR 21, 49 U.S.C.A. § 42121(b)(Thomson/West 2007), which contains whistleblower protections for employees in the aviation industry. See 49 U.S.C.A. 31105(b)(1) ("All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b)."). Under that standard, complainants must show by a "preponderance of evidence" that a protected activity was a "contributing factor" to the adverse action described in the complaint. 49 U.S.C.A. § 42121(b)(2)(B)(i); see also Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Act of 1982, 75 Fed. Reg. 53544, 53545, 53550 (Aug. 31, 2010). The employer can overcome that showing only if it demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545; see also *id.* at 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii). Under the circumstances in this case, we need not address the applicability of the 2007 amendment to STAA because it would not change the result.

Reviewing the ALJ's analysis in its entirety, we conclude that the ALJ found that Schneider terminated Israel *solely* for *lack of communication* and *failure to return the keys* and that no other factors played a role. See ALJ's R. D. & O. on Remand at 20 ("The preponderance of evidence supports the conclusion that Complainant did not communicate with his managers. I further find that Respondent's demand for the return of the keys to an expensive asset is reasonable. Even if another set of keys was available for the truck, I fully credit the explanation that the company wanted all keys accounted for when a truck was in service."); *id.* at 23 (ALJ determines, without finding that protected activity contributed to Israel's termination, that "Complainant's refusal to contact his supervisors to discuss his situation was the motivating factor for his discharge."); *Id.* (ALJ finds that "Mr. Jefferson credibly testified that he believed that Complainant resigned his position by failing to communicate with his managers."). We understand these findings by the ALJ to mean that protected activity played no role in the company's decision to terminate Israel. See also ALJ's R. D. & O. on Remand at 23 ("Complainant failed to establish that his protected activity contributed to his work suspension and eventual discharge."). That determination is fully supported by the ALJ's findings and the substantial evidence in the record supporting those findings. See ALJ's R. D. & O. on Remand at 18-20 & 23; *id.* at 10-14.

The record reflects that Israel's supervisor, Becky Collar, left a voicemail for Israel to return the keys in July. Tr. at 274-76. Communication was clearly important to Schneider managers, and Collar conveyed this importance to Israel. TTr. at 110 (Collar testifies that "as his leader, [she] expected to talk to [Israel] on a regular basis."); *id.* at 111, 117. See also *id.* at 119 (Jefferson testified that conversations with Israel were primarily by phone); *supra* at 3. Israel claims that he followed Schneider's policy in communicating, at least with respect to his medical status and reports. However, while Israel claims he faxed his medical report and followed Schneider's communication policies (Israel Br. at 21; Mot. to Supp. at 2-3; Mot. to Vac. at 6-7), Jefferson testified that he did not receive the full report, only a fax cover sheet, and that Israel did not respond to phone messages from Jefferson requesting that a full copy of the medical report be faxed to the company. TTr. at 119-120; see also *supra* at 3. Israel admitted that he did not communicate with Collar or Jefferson directly after the July voicemails. Tr. at 134; RX 19; see also TTr. at 91, 127-128, 136-137 (Jefferson testifying about the importance of getting the truck keys from Israel). Based on these facts, Jefferson testified that the sole reason for Israel's termination stemmed from Israel's failure to communicate with the company, and refusing to return the truck keys when he was asked to do so.⁵

⁵ The ALJ also found that Israel did not suffer an adverse action when the company failed to give advance notice of his termination or administer progressive discipline despite the fact that the human resources representative recommended a three-day letter. R. D. & O. on Remand at 16. The ALJ found that Schneider had no policy requiring Israel receive advance notice of his termination or requiring progressive discipline. *Id.* (ALJ finding that "evidence does not show that company policy established a progressive discipline program, or any other policy that required prior notice of termination. There is no evidence of a management-labor agreement establishing such a policy, and Complainant admitted that his employee handbook was silent regarding such a policy."). Substantial evidence supports this finding. See TTr. at 117 (Collar); TTr. at 129 (Jefferson). In any event, Israel has not shown how failing to receive advance notice or a three-day letter is an adverse

Q (Counsel for Schneider): And you were the signatore of the termination letter?

A (Kimani Jefferson testifying): Yes, I was.

Q: And did that indicate that the termination was based on lack of communications and also the failure to return the keys?

A: Yes.

Q: And was there any other reason that you were aware of or you used to terminate the employment?

A: No

TTr. at 120. The ALJ found Jefferson's testimony in all respects reliable and credible. See ALJ R. D. & O. on Remand at 19, 22-23. Thus substantial evidence fully supports the ALJ's determination that Israel's protected activity played no role in Schneider's decision to terminate him.⁶

action affecting pay, terms, or privileges of employment or otherwise resulted in discrimination as prohibited by the STAA.

⁶ The ALJ made additional findings and conclusions on issues Israel raised that go beyond the termination issue. See ALJ R. D. & O. on Remand at 16 (unemployment compensation), and 17-18 (accommodating impairment and workers' compensation). We need not review these new issues, however, because not only do they exceed the order on remand, but also are issues that could have been raised and addressed in prior proceedings since the events occurred prior to Israel's August 16, 2005 termination.

The ALJ also determined that the DAC Report did not constitute an adverse action against Israel. ALJ R. D. & O. on Remand at 17. The DAC Report is "a form by trucking companies to track drivers' records . . . [that is] sent to [and] maintained by a private entity." ALJ R. D. & O. on Remand at 5, n.6. The ALJ found that the DAC Report was "originally made in September 2005," which was one month after Israel's termination. ALJ's R. D. & O. on Remand at 17. The ALJ determined that the DAC Report the company filed did not constitute an adverse action because it did not contain false information as Israel alleged. *Id.* at 17; see also REX 1. The ALJ found that the Report accurately reflected that Israel left the company because he "resigned/quit or . . . terminated [his] lease," and "not because of any violation of company policy." ALJ's R. D. & O. on Remand at 17. The ALJ also found that the Report did not reflect that Israel had any accidents. *Id.* at 17. The ALJ's findings of fact are supported by substantial evidence on the record considered as a whole and his legal conclusions are fully in accordance with applicable law.

CONCLUSION

For the reasons outlined above, we **AFFIRM** the ALJ's order that Israel's termination did not violate STAA, and **DISMISS** Israel's complaint. In light of our ruling, other evidentiary and legal issues Israel raised on appeal are moot.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge