



In the Matter of:

REGINA KENNEDY,

ARB CASE NO. 09-145

COMPLAINANT,

ALJ CASE NO. 2009-STA-049

v.

DATE: April 28, 2011

**ADVANCED STUDENT
TRANSPORTATION,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Regina Kennedy, *pro se*, Wilmington, Delaware

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

FINAL DECISION AND ORDER OF REMAND

The Complainant, Regina Kennedy, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration, alleging that the Respondent, Advanced Student Transportation (AST), terminated her employment in violation of the employee protection provisions of the Surface Transportation Assistance

Act of 1982, as amended and re-codified (STAA),¹ and its implementing regulations.² Specifically, Kennedy alleged that AST fired her because she informed her supervisor that she would not drive a school bus that she believed to be unsafe because it would not accelerate to a speed of more than 5-7 miles per hour.³

After an investigation, an OSHA Regional Administrator, acting for the Secretary of Labor, found that there was no reasonable cause to believe that AST fired Kennedy in violation of the STAA's whistleblower provisions.⁴ Kennedy requested a formal hearing, and the case was assigned to a Department of Labor Administrative Law Judge (ALJ). The ALJ ultimately concluded that AST did violate the STAA when it terminated Kennedy's employment after she refused to drive a bus that she believed to be unsafe, and he ordered AST to reinstate her to her bus driver job.⁵ But because Kennedy, who was acting pro se, did not provide any evidence of her lost wages, the ALJ refused to order back pay.⁶ Upon review of the record, we conclude that the ALJ properly found that AST violated the STAA when it terminated Kennedy's employment, but we reverse his finding that Kennedy is not entitled to back pay (or other damages) and remand the case to the ALJ to calculate the back pay AST owes to Kennedy (and other damages, if any).

BACKGROUND

AST hired Kennedy as a school bus driver on June 6, 2008.⁷ On the morning of September 12, 2008, AST assigned Kennedy to drive bus number 2 to pick up students and deliver them to the Delaware College Prep Academy.⁸ Her route consisted of 14 stops.⁹

¹ 49 U.S.C.A. § 31105 (Thomson/West Supp. 2009).

² 29 C.F.R. Part 1978 (2010).

³ Administrative Law Judge Exhibit (ALJ-X) 1; Final Investigative Report at 1.

⁴ ALJ-X 1 Secretary's Findings at 2.

⁵ Recommended Decision & Order (R. D. & O.) at 13.

⁶ *Id.* at 12.

⁷ *Id.* at 2.

⁸ *Id.* at 3.

⁹ *Id.*

Kennedy noticed no problems with the bus when she initially started driving it. But, after she picked up her first student, she noticed that the bus was driving slower than normal, although still at a speed that she felt was safe. She picked up her second student at the Elsmere Library stop. Kennedy started to turn right at a corner near the library, and she noticed that the bus would not go very fast and that it “felt like the transmission was slipping.” She pumped the accelerator, but that did not help. She put the bus in neutral and then back into drive, but when she accelerated, the bus would only drive 5-7 miles per hour.¹⁰

Kennedy called her supervisor, Kevin Martinez, to report the problem.¹¹ She testified that she told him that she was at the Elsmere Library, that the bus was underperforming, that it would only go 5-7 miles per hour, and that she thought the transmission was slipping.¹² She told him that the bus was not safe to drive.¹³ Martinez told Kennedy that there were no other buses available.¹⁴ She again told Martinez that the bus was unsafe and that she could not drive it.¹⁵ Martinez replied “okay” and hung up the phone.¹⁶ Although Kennedy did not specifically tell Martinez that she would not continue driving, she assumed that Martinez would send a replacement bus because she had indicated that continuing to drive the bus was a hazard.¹⁷ But Martinez did not specifically state that he would do so.¹⁸ She further testified that Martinez did not direct her to resume her route.¹⁹

Martinez testified that Kennedy called him from the second stop and indicated that the bus was not moving, and she wanted another bus.²⁰ Martinez stated that she told

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 4.

¹⁸ R. D. & O. at 3.

¹⁹ Hearing Transcript (Tr.) at 29.

²⁰ Tr. at 32.

him that the bus was going slow, and she felt that it was not safe.²¹ He further testified that he asked her how slow and she just responded that it was going slow; she did not indicate how slow.²² He asked her to carry on.²³ She asked for another bus, but he told her that there were no other buses available.²⁴ He “asked her to carry on with her run and when we got a chance we would get to her if at all possible.”²⁵ In response, “[s]he just said ‘okay.’”²⁶

Although Kennedy’s route was within the city limits with a speed limit generally of no more than 25 miles per hour and did not involve any major highways, she was concerned, in particular about two left hand turns that she would be required to make to complete her route.²⁷ She was worried that because she was forced to travel at such a low speed she might not be able to safely cross multiple lanes of traffic with no turning arrow and that oncoming traffic might not be able to see her turn, resulting in an accident.²⁸

Kennedy testified that she waited at the school for about 40 minutes, when an AST employee called her to find out where she was. Kennedy told that employee that she was still waiting at the Elsmere Library for a new bus. Martinez then got on the phone and berated her and yelled obscenities at her. He asked her why she had not continued with her route as he had instructed her to do. She responded that she had already told him that the bus was a hazard and unsafe to drive and that she could not drive the bus. Martinez hung up the phone. A replacement bus arrived at the library 10-15 minutes later. Kennedy got on the new bus and completed her route.²⁹

Kennedy did not see the original bus leave the library.³⁰ She received a call from the AST office requesting her to report there when she finished her route.³¹ Upon her

²¹ R. D. & O. at 5.

²² *Id.* at 32-33.

²³ R. D. & O. at 5.

²⁴ *Id.*

²⁵ Tr. at 33.

²⁶ *Id.*

²⁷ R. D. & O. at 3-4.

²⁸ *Id.*

²⁹ *Id.* at 4.

³⁰ *Id.*

arrival, Martinez handed Kennedy a letter informing her that AST had terminated her employment because she disregarded a direct order from a supervisor and put students in jeopardy when they were forced to remain at their bus stops for an hour waiting for her to pick them up.³²

Martinez testified that a mechanic brought a replacement bus to Kennedy and drove the original bus back to the bus terminal.³³ Martinez then took the bus out for a drive, and he stated that he drove the bus on the highway, traveling 60 miles an hour.³⁴ He said that he also had another mechanic take the bus for a drive at 35 miles per hour.³⁵ Martinez concluded that the bus was in good condition, and he believed that it was operating safely and functioning properly.³⁶ Martinez stated that he terminated Kennedy's employment because she put the children she had on the bus at risk, a number of children were waiting at their stops for about one hour, and Kennedy disregarded his order to continue her route and pick up the students.³⁷ He averred that Kennedy's complaint regarding her safety concerns with the bus did not influence his decision to terminate her employment.³⁸

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final administrative decisions in STAA cases to the Administrative Review Board.³⁹ The ALJ forwarded the case to the Board pursuant to the STAA's automatic review provisions.⁴⁰ In response, the

³¹ *Id.* at 5.

³² *Id.*

³³ *Id.* at 6.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 6-7.

³⁸ *Id.* at 7.

³⁹ Secretary's Order 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(c).

⁴⁰ 29 C.F.R. § 1978.109(a).

Board issued a Notice of Review and Briefing Schedule. Kennedy filed a brief in response to the Board's order; AST did not.

In reviewing STAA cases, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole.⁴¹ The ARB reviews the ALJ's conclusions of law de novo.⁴²

The ARB generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable."⁴³ In weighing the testimony of witnesses, the ALJ as fact finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of their testimony, and the extent to which their testimony was supported or contradicted by other credible evidence.⁴⁴ The ALJ found Kennedy's testimony to be credible based on his "firsthand observation of the behavior, demeanor, candor and consistency of the witnesses."⁴⁵ The ALJ noted that Kennedy "told her story multiple times during the trial and her testimony was consistent and unequivocal throughout."⁴⁶ We have found no reason to depart in this case from our general practice, and therefore we affirm the ALJ's determination that Kennedy was a credible witness.

DISCUSSION

A. Merits of Kennedy's Complaint

Pursuant to the STAA whistleblower provisions applicable to the facts of this case, a person may not terminate an employee's employment because the employee refuses to operate a vehicle because the employee reasonably fears that driving the vehicle could cause serious injury to the employee or the public because of the vehicle's

⁴¹ 29 C.F.R. § 1978.109(c)(3); *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted).

⁴² *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

⁴³ *Mailloux v. R & B Transp.*, ARB No. 07-084, ALJ No. 2006-STA-012, slip op. at 8-9 (ARB June 16, 2009).

⁴⁴ *Id.* at 9.

⁴⁵ R. D. & O. at 7.

⁴⁶ *Id.*

unsafe condition.⁴⁷ An employee's fear is considered reasonable if a reasonable employee in the same circumstances would conclude that the vehicle's unsafe condition poses a real danger of accident, injury, or serious health impairment.⁴⁸ Further, to qualify for protection under this refusal to drive provision, the employee must have unsuccessfully attempted to have the employer correct the vehicle's hazardous condition.⁴⁹

To be entitled to relief under the STAA's whistleblower provisions, the employee must also demonstrate that the refusal to drive the unsafe vehicle was a contributing factor in the employer's termination of the employee's employment.⁵⁰ But, even if the employee establishes that his or her protected refusal to drive contributed to the adverse action the employer took, the employer may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same adverse action even if the employee had not engaged in the protected refusal to drive the unsafe vehicle.⁵¹

Here, we conclude that Kennedy established that her refusal to drive the school bus was protected. As the ALJ acknowledged, "whether . . . a complainant was reasonably apprehensive that driving a vehicle could result in possible injury to herself or the public must focus on the information available to the complainant" when he or she refused to drive the vehicle.⁵² The ALJ described the information available to Kennedy when she pulled her bus over at the Elsmere Library and refused to continue driving:

the bus could only drive 5 to 7 miles per hour; she had to travel on at least one road with a 35 mile per hour speed limit; and the impending danger associated with making a left-hand turn with no turning arrow across three opposing traffic lanes could result in an accident.^[53]

The ALJ concluded that based on this information Kennedy reasonably believed that she was putting herself, the students on the bus, and the driving public in danger. As the ALJ

⁴⁷ 49 U.S.C.A. § 31105 (a)(1) (B) (ii).

⁴⁸ 49 U.S.C.A. § 31105 (a) (2).

⁴⁹ *Id.*

⁵⁰ 49 U.S.C.A. § 31105 (b)(1); 49 U.S.C.A. § 42121 (b)(2)(B)(iii).

⁵¹ 49 U.S.C.A. § 31105 (b)(1); 49 U.S.C.A. § 42121 (b)(2)(B)(iv).

⁵² R. D. & O. at 9, citing *Caimano v. Brink's Inc.*, 1996-STA-004, slip op. at 22 (Sec'y Jan. 26, 1996).

⁵³ R. D. & O. at 9.

stated, even if, as Martinez alleges, he subsequently found the bus to have no safety defects, this fact alone would not preclude a finding that Kennedy's belief that the bus was unsafe was reasonable, based on her experience with the bus when she refused to drive.⁵⁴ Accordingly, relying upon Kennedy's credible testimony, he found that she was reasonably apprehensive about driving her bus when she refused to continue her route. The ALJ also found that Kennedy had alerted AST to the unsafe condition and tried unsuccessfully to convince it to remedy the problem by providing her with a safely functioning bus. As the ALJ noted, Kennedy's request that AST provide a new bus is sufficient to meet her obligation to seek correction of the unsafe condition.⁵⁵

We find that the evidence, quoted above, supporting the ALJ's finding that Kennedy's apprehension was reasonable and that she requested AST to remedy the unsafe situation to be substantial and in accordance with law. Accordingly, we affirm it.

Martinez averred that he terminated Kennedy's employment because she put the children on the bus and those waiting at the bus stops to be picked up at risk and because "she disregarded one of my orders, basically, to carry on and pick up the students."⁵⁶ Thus, it is indisputable that Kennedy has established that her protected refusal to drive the bus contributed to Martinez's termination of her employment.

Nevertheless, AST can avoid liability if it can prove by clear and convincing evidence that it would have fired Kennedy even if she had not engaged in a protected refusal to drive the bus. Clear and convincing evidence denotes a conclusive demonstration; it indicates "that the thing to be proved is highly probative or reasonably certain."⁵⁷ "Highly probative" evidence is that which would "instantly tilt [] the evidentiary scales in the affirmative when weighed against [the opposing evidence]."⁵⁸

⁵⁴ R. D. & O. at 10, citing *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 81-83 (2d Cir. 1994).

⁵⁵ R. D. & O. at 10, citing *Pettit v. American Concrete Prods., Inc.*, ARB No. 00-053, ALJ No. 1999-STA-057, slip op. at 5 (ARB Aug. 27, 2002). Although Kennedy did not testify that she explicitly informed AST that she would not drive the bus, we agree with the ALJ that when she informed AST that the bus would only travel at 5-7 miles per hour, was unsafe to drive, was a hazard, and that she was stopped at Elsmere Library, her communications were sufficient to alert AST that she could not safely operate her bus and that she would not drive it.

⁵⁶ Tr. at 37.

⁵⁷ BLACK'S LAW DICTIONARY 577 (7th ed. 1999).

⁵⁸ *Duprey v. Florida Power & Light*, ARB No. 00-070, ALJ No. 2000-ERA-005, slip op. at 6 (ARB Feb. 27, 2003), citing *Colorado v. New Mexico*, 467 U.S. 310, 315-317 (1984).

AST “bears the risk that ‘the influence of legal and illegal motives cannot be separated.’”⁵⁹ In this case the only incident AST cited as a basis for its decision to terminate Kennedy’s employment was her September 12, 2008 refusal to continue to drive a bus she reasonably believed to be unsafe. The only reason that AST gave for the termination other than that Kennedy refused an order to drive the bus, i.e., the protected activity, was that she put the children on the bus and those waiting at the bus stop at risk. But as the ALJ noted, Martinez adduced no evidence that Kennedy’s actions put any child at risk,⁶⁰ nor did he proffer any evidence, other than his own testimony, supporting his claim that he actually believed, when he terminated her employment, that she had put children at risk. There is certainly no indication that Kennedy was not capable of supervising the two children who were on the bus, or that the pre-Kindergarten and Kindergarten-aged children were waiting at the bus stops with no supervision. Even if Martinez truly believed that the children were at risk, this is a case where the purported legal motives (concern for the children) and illegal motives (protected refusal to drive) cannot be separated, given that the direct cause of Kennedy’s inability to continue with the route was the protected activity in which she engaged. Therefore, AST cannot avoid liability for Kennedy’s complaint because it has failed to establish by clear and convincing evidence that it would have terminated Kennedy’s employment even if she had not refused to continue to drive her route.

B. Entitlement to Back Pay and Special Damages

The ALJ recognized that because Kennedy was appearing pro se, he had some responsibility to give her guidance as she litigated her complaint.⁶¹ At the hearing the ALJ stated, “I’m going to try to help you out here because you don’t have a lawyer. . . . So I’m going to try to explain as much as I can to you about what your job is here to sustain your burden under the Act.”⁶² The ALJ proceeded to explain to Kennedy her burden of proof to establish the elements of her STAA complaint.⁶³ But the ALJ did not mention, much less explain, the evidence necessary to establish the relief to which Kennedy would be entitled should she prevail.

⁵⁹ *Abdur-Rahman v. DeKalb Cnty.*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003, slip op. at 11 (ARB May 18, 2010), citing *Mackowiak v. Univ. Nuclear Sys.*, 735 F.2d 1159, 1164 (9th Cir. 1984).

⁶⁰ R. D. & O. at 11.

⁶¹ R. D. & O. at 7-8.

⁶² Tr. at 5.

⁶³ Tr. at 8.

The ALJ did acknowledge in the R. D. & O. that “[a]n award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA.”⁶⁴ The ALJ also stated:

Back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. *Polewsky v. B&L Lines, Inc.*, 90-STA-21, slip op. at 5 (Sec’y May 29, 1991). Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require “unrealistic exactitude.” *Cook v. Guardian Lubricants, Inc.*, 95-STA-43 (ARB May 30, 1997), slip op. at 11-12, n.12; Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co.*, 90-STA-37 (Sec’y June 3, 1994); *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec’y Oct. 1, 1993).^{65]}

Nevertheless, the ALJ concluded that, in this case, he could not award Kennedy any back pay.⁶⁶ He stated that the award must be based on the evidence of record and since Kennedy had failed to submit any evidence, his hands were tied.⁶⁷ Although we sympathize with the ALJ’s concern that he not become the advocate for a pro se party, in this case we find that it would not be overreaching for the ALJ to explain to Kennedy that she must submit evidence in support of her claim of back pay (and any other damages), just as he explained to her the burden of proof she must carry to prevail on her complaint. We find this to be especially compelling given the STAA’s statutory command that, “If the Secretary of Labor decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary of Labor **shall order** the person to—(iii) pay compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination,”⁶⁸

⁶⁴ R. D. & O. at 12, citing *Ass’t Sec’y & Moravec v. HC & M Transp., Inc.*, 1990-STA-044 (Sec’y Jan.6, 1992).

⁶⁵ R. D. & O. at 12.

⁶⁶ The ALJ did order ASTI to reinstate Kennedy “to her previous position of employment with ASTI under the same terms regarding rate of pay, conditions, and privileges, with no loss of seniority or benefits, as if she had remained a driver with ASTI since September 12, 2008.” R. D. & O. at 12.

⁶⁷ In particular, the ALJ noted that Kennedy failed to provide “prior paychecks, multiple timesheets for her usual hours worked, [and/or] her contract with ASTI that states her annual rate of pay.” R. D. & O. at 12.

⁶⁸ 49 U.S.C.A. § 31105 (b)(3)(A)(iii)(emphasis added).

Accordingly, we **AFFIRM** the ALJ's finding that Kennedy has carried her burden of establishing that AST terminated her employment in violation of the STAA's employee protection provisions, and we **REMAND** this case to permit Kennedy to submit evidence of the back pay and other damages to which she is entitled and for the ALJ to conduct further proceedings as necessary to award relief as the STAA mandates.⁶⁹

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

⁶⁹ We note that while the case was pending before the Board, Kennedy wrote to the ALJ complaining that AST had not complied with the ALJ's order to reinstate her with the same rate of pay, conditions, and privileges of employment. The ALJ forwarded the letter to the ARB. The STAA provides that if a party fails to comply with certain orders including orders of reinstatement, "the Secretary of Labor shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred." 49 U.S.C.A. § 31105 (e). Accordingly, Kennedy should address any concerns she has with AST's compliance with the ALJ's reinstatement order to the U.S. Department of Labor/OSHA, The Curtis Center-Suite 740, West 170 S. Independence Mall West, Philadelphia, Pennsylvania 19106-3309.