



In the Matter of:

DAVID HALM,

ARB CASE NO. 11-005

COMPLAINANT,

ALJ CASE NO. 2009-STA-034

v.

DATE: September 28, 2012

SCHWAN'S HOME SERVICE, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

John E. Kerley, Esq.; Kerley & Associates, P.C., Springfield, Illinois

For the Respondent:

Richard A. Olmstead, Esq.; Kutak Rock, LLP, Wichita, Kansas

BEFORE: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Luis A. Corchado, 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 Schwan's Home Service hired David Halm on May 15, 2006, for flex-route work. Schwan's sells ice cream via door-to-door sales through

¹ 49 U.S.C.A. § 31105(a) (Thomson/West 2012). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2012). The STAA, and the implementing regulations, have been amended since Halm filed his complaint. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007).

customer service managers (CSM). Schwan's also operates a commission route for manager trainees (CSMT) as they build new routes for CSMs to take over. CSMTs operate both cold-door and warm-door routes. Cold-door sales involve potential customers who have not previously expressed an interest in Schwan's ice cream. Most routes were solo, but at the time at issue, Schwan's had a flex-route in which a particular route would be split between two CSMs.

Under the flex-route system, one morning driver logged in with a hand-held computer (HHC) and went on the truck delivery segment. The morning employee then handed off the truck and the HHC to the afternoon driver, who had completed 1-2 hours of warm-door work prior to receiving the truck and logging into the HHC. Flex-route drivers were required to use personal vehicles or provide their own transportation to the truck out in the field. After the switch, the morning driver then completed 1-2 hours of warm-door work and drove the afternoon driver's personal vehicle back to the station. Respondent's Exhibit (RX)-15 (flex agreement); Hearing Transcript (Tr.) at 31-33, 40. The flex-route allowed employees to work less, but it was not profitable to the company and was discontinued in 2008. Tr. at 41.

On January 23, 2007, Halm and his driving partner complained to their local general manager about the flex-routes and questioned whether the program violated DOT regulations. Tr. at 85-87, 89; Complainant's Exhibit (CX)-21. They also raised concerns about the use of personal cars, insurance, liability, and other safety issues concerning driving their own cars. Order Granting Respondent's Motion on Partial Findings and Dismissing Complaint (O.D.C.) at 7. Sometime in late January, Halm and his partner stopped using their personal vehicles for flex-routes and made the afternoon switch back at the station. According to Halm, when asked, the local general manager did not have an answer as to how to properly record on-duty time for the flex route's warm-dooring segment. Tr. at 89-90. On or about February 7 or 8, Halm spoke to Roger Cardoni, the director of human resources, about the use of personal vehicles. Tr. at 94. According to Halm, Cardoni was not able to give an answer on the question as to how to document on-duty times while in a personal vehicle warm dooring. Tr. at 97.

On February 15, 2007, Halm returned to the station to switch drivers. Todd Hindt, District General Manager, asked Halm about it. Schwan's Brief (Br.) at 7-8. Halm complained to Hindt about the old way of doing things and about horseplay, guns in personal vehicles, and hours-of-service violations. O.D.C. at 8-9. Hindt responded that switching back at the depot was unacceptable because of the level of wear-and-tear placed on the trucks and the fuel cost. *Id.* at 9. According to Halm, Hindt also did not have an answer as to how to record on-duty time. Tr. at 107-10, 219.

The following day (February 16, 2007), after checking with Roger Evert, Human Resource Manager, Hindt informed Halm that despite the fact that Schwan's could not require employees to use personal vehicles, the flex-route did require personal-vehicle use, and thus flex-route employees would have to drive personal vehicles or use another form of transportation to make the switch in the field. Drivers who did not want to use personal vehicles could work as a CSMT builder until a solo CSM route became available. But they had to choose one or the other. Halm told Hindt that he refused to do either. Hindt warned that Halm would be suspended if he refused both. RX-22.

Shortly thereafter (on or about Friday, February 16, 2007), Schwan's suspended Halm without pay. Hindt and Evert sent Halm a certified letter on February 19, 2007, giving Halm an ultimatum to respond by 5:00 p.m., February 23, 2007. The letter warned that failure to respond or to decline both positions would result in termination for "refusal to accept a route change or work assignment." RX-3.

Halm received and signed for the letter late on Friday, the 23rd. RX-18. Within an hour of receiving the letter, Halm responded via e-mail and voicemail to Evert, Cardoni, and Hindt. He also sent a reply letter by certified mail asking for more time. O.D.C. at 9. In one e-mail, he stated he would contact them again after contacting legal counsel. RX-18. According to Halm, neither Evert nor Cardoni responded. After the 5:00 p.m. deadline, Halm believed he had been terminated. Halm did not contact Schwan's the following week.

Schwan's terminated Halm's employment on or about March 1, 2007. CX-5; RX-17. Schwan's reasons for terminating Halm were his refusing to accept one of the alternatives and failing to appear or call the week of February 26-28. CX-5.

Halm filed a whistleblower complaint against Schwan's on August 9, 2007, alleging discharge in retaliation for protected activity relating to violations of DOT regulations. Specifically, Halm alleged that Schwan's flex-route program violated DOT hours-of-service regulations.

On March 20, 2009, OSHA dismissed the complaint. Halm timely objected. The case was set for hearing. After Halm presented his case in chief, Schwan's moved for judgment on partial findings under Federal Rule of Civil Procedure 52(c). Granting the motion, the ALJ found that Halm failed to establish any inference of causation between protected activity and his discharge. O.D.C. at 17. The ALJ reasoned that Halm had complained about hours-of-service violations before and no adverse action had been taken. *Id.* When Halm informed his supervisors at Schwan's that he and his partner were no longer going to use their personal vehicles, he was told that this would not be acceptable because of the additional fuel costs and wear and tear on the vehicles. *Id.* The ALJ found that there was no evidence that any of Halm's complaints concerning protected activity caused Schwan's ultimatum and eventual termination.

The ARB reviews an ALJ's findings of fact under the substantial evidence standard.² For the reasons we state below, we summarily affirm on the issue of causation.³ To prevail on a

² 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*

STAA whistleblower complaint, a successful complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity, (2) an adverse action was taken against him, (3) and that protected activity was a contributing factor in the adverse action. 49 U.S.C.A. § 31105; 29 C.F.R. § 1978.109(b)(2). The failure to prove any one of these elements necessarily requires dismissal of a whistleblower claim.⁴ As noted above, the STAA was amended in August 2007 to provide for “contributing factor” causation. *Supra* n.1. Reading the ALJ opinion, we are not certain whether the ALJ applied the “motivating factor” test or the STAA’s current standard, the “contributing factor” test.⁵ Nonetheless, we find substantial evidence supports the ALJ’s finding that protected activity was not a contributing factor in the decision to terminate Halm’s employment. Although Schwan’s terminated Halm shortly after his complaints about hours-of-service and record-keeping, substantial evidence supports the ALJ’s finding, that Schwan’s terminated Halm for refusing to drive either the flex-route or the alternative CSMT route, not because of protected activity.

CONCLUSION

The substantial evidence of record supports the conclusion that Halm’s alleged protected activity was not a factor in Schwan’s decision to terminate Halm’s employment. Accordingly,

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).

³ In summarily affirming the ALJ’s O.D.C., we limit our comments to the most critical points.

⁴ “A failure of proof on any one element of [a complainant’s] claim means that his entire case must fail” *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Nos. 07-021, 07-022; ALJ No. 2004-SOX-011, slip op. at 3 (ARB Jan. 13, 2010) (citing *Davis v. Rock Hard Aggregate, LLC*, ARB No. 07-041, ALJ No. 2007-STA-041 (ARB Mar. 27, 2009)). *Cf. Drago v. Jenne*, 453 F.3d 1301, 1308 (11th Cir. 2006) (in affirming the lower court’s dismissal of the plaintiff’s retaliation claim, the appellate court focused on the plaintiff’s failure to present sufficient evidence that the alleged adverse action was causally related to the alleged protected activity – assuming for purposes of the appeal, but explicitly not deciding, that the plaintiff’s conduct constituted statutorily protected activity).

⁵ We note that the ALJ appears to have applied a contributing-factor-causation standard when the standard of proof with regard to claims of whistleblower retaliation under the STAA at the time the cause of action accrued was a “motivating factor” standard. The error is harmless in this matter, however, because Halm did not satisfy the “contributing factor” standard, which is a less demanding causation standard of proof than “motivating factor.”

we **AFFIRM** the ALJ's order dismissing Halm's complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge