



In the Matter of:

FERNANDO D. WHITE,

ARB CASE NO. 12-058

COMPLAINANT,

ALJ CASE NO. 2011-STA-032

v.

DATE: May 31, 2013

AMERICAN MOBILE PETROLEUM, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Elizabeth H. Scherer, Esq.; Atlanta, Georgia

For the Respondent:

Dean R. Fuchs, Esq.; Schulten, Ward & Turner, Atlanta, Georgia

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

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2012) (STAA), and its implementing regulations at 29 C.F.R. Part 1978, 77 FR 44121-01, 2012 WL 3041790 (F.R.) (July 27, 2012). Complainant Fernando White, a trucker, filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent American Mobile Petroleum, Inc. (AMP) violated the STAA when it terminated his employment. OSHA dismissed the complaint. White requested a hearing before an Administrative Law Judge (ALJ).

On February 16, 2012, prior to a hearing, the ALJ granted summary decision in favor of AMP, and dismissed the complaint. ALJ's Decision and Order Granting Respondent's Motion for Summary Judgment and Dismissing Complaint (dated Feb. 16, 2012)(D. & O.). White petitioned the ARB for review. We reverse the ALJ's order granting summary decision, and remand.

BACKGROUND

A. Facts

The following facts taken from the record are undisputed.

AMP hired White as a commercial fuel truck driver on August 8, 2010. He worked for the company for five days until he was terminated on August 13, 2010. D. & O. at 2.

On August 10-11, 2010, White was assigned to train with AMP experienced truck driver Robert Carroll. *Id.* After two days of training, Carroll refused to work further with White. *Id.* White met with company president and co-owner James Parchman after the August 11 training session. White told Parchman that Carroll had asked him, among other things, to drive the posted speed limit in heavy traffic. Compl. Dec. at 6. Parchman told White that it was probably a personality conflict, and assigned him to another trainer. D. & O. at 2; Parchman Dep. at 6; Compl. Dep. at 62. On August 12, 2010, White trained with another AMP trucker, Ari Glover. D. & O. at 2. During that shift, White alleged that Glover directed him to exceed the posted speed limit. *Id.*; see also Compl. Dep. 71.

The next day, on August 13, Parchman telephoned White and told him that Glover did not want to train him. D. & O. at 2. Parchman fired White. *Id.*

B. Proceedings below

White filed a complaint with OSHA on January 18, 2011. In the complaint, White "alleged that he was terminated because he would not drive over the speed limit when told to do so by another driver, whom the Complainant alleged was his supervisor." Resp. Appendix at A (Whistleblower Application at 1 and Case Activity Worksheet). OSHA dismissed the complaint on April 11, 2011. White requested a hearing with an ALJ.

AMP moved to dismiss White's complaint, or in the alternative for summary decision. On February 16, 2012, the ALJ entered a decision granting AMP's motion for summary decision, and dismissed the complaint. The ALJ determined that, viewing the evidence in White's favor, White failed to show that he engaged in protected activity that contributed to his termination.

The ALJ determined that any complaints White made to the trainers, Carroll and Glover, could not be imputed to Parchman, who fired him. D. & O. at 2. The ALJ also determined that there is no evidence that White told Parchman at the August 11 meeting that he was directed to exceed the speed limit. *Id.* at 3. The ALJ stated, “Both parties agreed that Mr. Parchman concluded that there may have been a personality conflict; agreed to pay him and sent him home. Complain[ant] was told that another trainer would be assigned to him.” *Id.*

The ALJ stated that on August 12, White alleged that Glover ordered him to exceed the speed limit, and that after the training session Glover “refused to conduct any further training with Complainant.” *Id.* The ALJ stated that later that day when Parchman fired White over the phone, “Complainant maintains that he told Mr. Parchman that Mr. Glover had ordered him to exceed the speed limit.” *Id.* The ALJ determined, however, that

[e]ven if that is true, Complainant has failed to show that Mr. Parchman was aware of that fact prior to terminating Complainant’s employment. Consequently I conclude that Claimant has failed to establish that he engaged in protected activity of which Mr. Parchman was aware prior to Mr. Parchman firing Complainant.

Id.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under STAA. Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

An ALJ’s grant of summary decision is reviewed de novo. *Elias v. Celadon Trucking Svcs., Inc.*, ARB No. 12-032, ALJ No. 2011-STA-028, slip op. at 3 (ARB Nov. 21, 2012). Under 29 C.F.R. § 18.40(d)(2012), the ALJ may grant summary decision where “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 that a party is entitled to summary decision.” *Id.* “The burden is on the moving party ‘to demonstrate the absence of any material factual issue genuinely in dispute.’” *Id.* The ARB “views the evidence in the light most favorable to the nonmoving party, and then determines whether there are any genuine issues of material fact and whether the movant established that it was entitled to judgment as a matter of law.” *Id.* In ruling on a motion for summary decision, neither the ALJ nor the Board weighs the evidence or determines the truth of the matters asserted. *Id.* The burden of producing evidence “is not onerous

and should preclude [an evidentiary hearing] only where the record is devoid of evidence that could reasonably be construed to support the [complainant's] claim.” *Id.*, (quoting *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008)); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). “Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.” *Elias*, ARB No. 12-032, slip op. at 3.

DISCUSSION

The STAA prohibits an employer from discharging or discriminating against an employee because the employee has engaged in certain protected activity. 49 U.S.C.A. § 31105(a)(1). To prove a STAA violation, White must show by a preponderance of evidence that his safety complaints to his employer were protected activity, that the company took an adverse employment action against him, and that his protected activity was a contributing factor in the adverse action. *Williams v. Dominos Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). If White proves by a preponderance of evidence that his protected activity was a contributing factor in the adverse personnel action, his employer can avoid liability if it “demonstrates by clear and convincing evidence” that it would have taken the same adverse action in any event. *Id.* at 5 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)).

The ALJ’s grant of summary decision in this case turns principally on the determination that any protected activity by White did not contribute to his termination, as company President Parchman, who fired White, was not aware of White’s safety complaints when he fired him. *D. & O.* at 3. There is, however, a genuine issue of material fact whether Parchman knew about White’s safety complaint, e.g., being required to exceed the speed limit during his training session with Glover, on August 13 when Parchman fired him.

Parchman states in his deposition that White told him that during his training he was asked to exceed the speed limit. Parchman Dep. at 15, 31. Parchman states in his deposition as follows:

Q: Did Mr. White report to you what his interpretation of events were during those four days of training?

A [Parchman]: I believe on the last day he came into my office and said that he was asked to drive faster than the speed limit, and I told him that, no, if he was asked to do it, don’t do it, that he did the right thing by not doing it. And that was really about the only thing he said to me.

Parchman Dep. at 15; see also *id.* at 31 (Parchman stating that White told him that during training he was directed to exceed the 55 mph speed limit on the highway). This information is reiterated in White's deposition, where White states that he told Parchman on August 13 that his trainer Ari Glover tried to get him to "be illegal just like the rest of them." White Dep. at 80. White stated that Parchman replied, "I don't want to hear it." *Id.* While this statement, e.g., "be illegal," may not constitute a clear safety complaint directed to Parchman, other evidence viewed in White's favor precludes summary decision as to Parchman's knowledge. White stated in his deposition that during the August 13 phone conversation, he played an audiotape of Glover from the training earlier that day. *Id.* at 80-81. White stated that during the conversation and while the recording of Glover was playing on the phone, he told Parchman: "And I said, what he's [Glover] telling me to do there is illegal." *Id.* at 80.

Viewing this record evidence in White's favor shows that White conveyed his safety complaint to Parchman at the time he was fired. This record evidence thus belies the ALJ's ruling that there was no genuine issue of material fact that Parchman was not informed of White's safety complaints before firing him. D. & O. at 3. This genuine issue of material fact – that White complained to Parchman about being asked by his trainer to exceed the speed limit – precludes summary decision. Based on this evidence in the record, the ALJ erred in granting summary decision.

CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order Granting Respondent's Motion for Summary Judgment and Dismissing Complaint is **REVERSED**, and the case is **REMANDED** for further proceedings.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Judge Corchado concurring:

I agree that this matter should be remanded but on different grounds. I certainly agree with the summary disposition standard described in the majority opinion. See *Hasan v. Enercon Servs., Inc.*, ARB No. 10-061, ALJ Nos. 2004-ERA-022, -027; slip op. at 4 (ARB July 28, 2011). I also appreciate the majority's exercise of caution on the record before us. However, like the ALJ, I find that the proffered evidence in the record

fails to raise a sufficient issue of fact on the issue of causation. It is undisputed that the Respondent hired White on August 8, 2010, and he was fired only five days later on August 13, 2010. See Complainant's Brief in Support of Petition for Review of Decision and Order, p. 8. It is undisputed that, on August 10 and 11, 2010, the Respondent assigned White to drive with Robert Carroll, but a conflict arose with Mr. Carroll. *Id.* at 8-9. White admits that James Parchman, a manager for the Respondent, wrote off White's conflict with Carroll as a "personality conflict" and, significantly, Parchman reassigned White to another driver and allowed him to continue driving for the Respondent. It is undisputed that White also had some difficulty with the newly assigned driver, Arrie¹ Glover, and finished his shift early morning on August 13, 2010. *Id.* at 9; Declaration of White ¶ 27. The last critical undisputed fact is that, at approximately 2:00 p.m., on August 13, 2010, Parchman initiated a call to White to fire him after the troubles with Glover and did fire White. *Id.*

There is no admissible evidence in the record that Glover spoke to Parchman about any of White's alleged safety complaints, even assuming for this motion only that White engaged in protected activity while driving with Glover. White sought to depose Glover and requested a subpoena to compel Glover's appearance at a deposition. The record is unclear as to why the ALJ did not issue the subpoena for Glover. It is possible that the ALJ believed that the Respondent was going to secure Glover's presence. See Appendix Exhibit E (Pre-Hearing Order #3, dated November 2, 2011), p. 2. But it appears that the Respondent intended to secure the appearance of other witnesses but not Glover. See Respondent American Mobile Petroleum, Inc.'s Brief in Opposition to Complainant's Petition for Review of Decision and Order, p. 3. Glover did not appear for a deposition. His testimony would pertain to a critical chain of events in this matter. Therefore, I agree to a remand because White should have been permitted to depose Glover before the ALJ ruled on the Respondent's motion for summary decision. See 29 C.F.R. § 18.40(d)(2012).

LUIS A. CORCHADO
Administrative Appeals Judge

¹ There was a discrepancy in the record regarding the spelling of Glover's first name. The majority opinion refers to him as "Ari" Glover, *supra* at 2.