



In the Matter of:

JOEL P. JORDAN, II,

ARB CASE NO. 13-066

COMPLAINANT,

ALJ CASE NO. 2009-STA-062

v.

DATE: October 30, 2015

IESI PA BLUE RIDGE LANDFILL CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Kimberly H. Ashbach, Esq.; Ambler, Pennsylvania

For the Respondent:

Brad C. Mall, Esq.; Munck Wilson Mandala, L.L.P; Dallas, Texas

BEFORE: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge. Judge Corchado, concurring.

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 (STAA).¹ Joel P. Jordan, II filed a complaint with the United States Department of Labor alleging that his former employer, IESI PA Blue Ridge Landfill Corp. (IESI), discharged him in violation of the STAA. On March 15, 2010, an Administrative Law Judge (ALJ) issued a Recommended

¹ 49 U.S.C.A. § 31105(a) (Thomson Reuters Supp. 2015). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2015).

Decision and Order (R. D. & O.) dismissing the complaint. We remanded the case to the ALJ, and on May 31, 2013, the ALJ issued a Decision and Order on Remand (D. O. & R.) again denying Jordan's complaint. For the following reasons, we affirm the D. O. & R.\

BACKGROUND

IESI owns and operates a landfill and a waste hauling company that uses commercial motor vehicles to collect waste and deliver it to the landfill. On August 6, 2007, IESI hired Joel Jordan to work as a Safety and Traffic Coordinator. His supervisor was Chuck Blough, IESI's Region Safety and Compliance Manager. Jordan's job duties included managing accident investigations, but Jordan did not have supervisory authority.²

On October 30, 2007, Jordan had a heated exchange with Don Hallock, a landfill manager, about who was responsible for overseeing truck wait times. Blough explained to Jordan that the amount of time trucks needed to wait was Hallock's responsibility.³ On November 3, Stan Shoop, a driver, hit a light pole. Jordan ordered Shoop to take a drug and alcohol test, but Blough intervened and told Jordan that there were no Department of Transportation (DOT) laws requiring a test for that type of accident. Jordan then sent an e-mail to Blough stating "[i]f possible keep this between us. It will get around that the safety guy sent Stan for a drug alcohol test because of his accident. Maybe the drivers will think about that before they do something careless."⁴

On Friday November 9, 2007, Jordan and Doug Key, IESI's Operations Manager, began investigating an accident involving Mark Berkheimer, an IESI driver. Jordan had reason to believe that Berkheimer had impaired vision. Berkheimer asserted that he had a waiver allowing him to drive, but Jordan reviewed Berkheimer's file and concluded that it did not contain an exemption that allowed Berkheimer to drive with his impaired vision.⁵ Jordan informed Blough of his concerns, and suggested contacting Dr. Charlesworth, the doctor who signed Berkheimer's physical card, to see if Dr. Charlesworth actually existed. Blough told him to go ahead, and Jordan called Dr. Charlesworth's office and verified his existence. Blough told Jordan "to go to [Ken Murdock, IESI's hauling manager] and [Key] to talk about suspension and termination . . . and . . . go to [Berkheimer's] file and check to see that he had a valid physical card" ⁶ As

² Transcript (Tr.) at 19-20, 492.

³ *Id.* at 167-68, 363-64.

⁴ Respondent's Exhibit (RX) 4.

⁵ Tr. at 55-57.

⁶ *Id.* at 431-32.

Blough was leaving for vacation that day, he told Jordan not to proceed with anything else until he returned.

The following Monday, November 12, 2007, Jordan and Key went to Murdock, and Murdock told Jordan that he required more proof before removing Berkheimer. Murdock decided to schedule a Tuesday meeting with Jordan, Berkheimer, and Key to discuss the situation. At some point on Monday morning, Jordan went to Dr. Charlesworth's office and told him that doctors do not have discretion to grant waivers or exemptions for "hearing, insulin usage diabetes, [or] vision."⁷

Murdock called Blough later that evening and informed him of the events regarding Berkheimer and Jordan. Blough was upset that Jordan had not followed his directions, and he called Jordan and left a message repeating his demand that Jordan needed to stop what he was doing until Blough returned from vacation.⁸

Dr. Charlesworth informed Berkheimer that Jordan had come to his office. Berkheimer told Dr. Charlesworth not to release any more information until he spoke to his attorney. At the Tuesday, November 13th meeting, Murdock explained to Berkheimer that he was being suspended until the validity of his license was resolved. He told Berkheimer that they would have to terminate him if it was determined that he was not qualified to drive. Jordan told Berkheimer that he had visited his doctor, and the two had a heated exchange about Berkheimer's privacy rights. According to Jordan, he showed Murdock a fax sent to him by Dr. Charlesworth at 7:53 A.M. on Tuesday, November 13, 2007. Jordan testified that Murdock told him that the fax was not readable, so Jordan went back to Dr. Charlesworth's office on Tuesday afternoon to have a staff member transcribe the fax.⁹

Berkheimer called Dr. Charlesworth's office while Jordan was still there. Upon learning that Jordan was at the doctor's office, Berkheimer called and complained to Murdock and Joyce Stock, IESI's Director of Human Resources. After talking to Berkheimer, Murdock e-mailed Jordan and stated, "Are you at [Berkheimer's] doctor? If you are I suggest you back off."¹⁰ Murdock and Stock contacted Blough regarding Jordan's actions. Blough testified that it was around this time that he considered terminating Jordan's employment.¹¹ Blough sent Jordan an e-mail stating:

⁷ *Id.* at 85.

⁸ *Id.* at 438-39.

⁹ *Id.* at 112-13, 614-15, 770-88; RX 34.

¹⁰ RX 22.

¹¹ Tr. at 519.

What I expressly said on Friday when we spoke was not to pursue anything with the DOT stuff until I get back. I told you to speak with Ken about possible termination because of accidents. There are reasons I said this, namely I need to check with HR because of legal concerns I had because of who [we're] dealing with. I mentioned this during the call, I am sure of what I said. I know the DOT regs joel [sic], but what you fail to realize is that the DOT is not the only thing we need to comply with.^[12]

At a safety meeting on November 14, 2007, Jordan asked IESI drivers to provide him with copies of their birth certificates and social security cards. After hearing about this, Murdock told Jordan that he could not ask drivers for those materials. And prior to his discharge, Jordan also sent e-mails to the Federal Motor Carrier Safety Administration, the Pennsylvania State Police, and an aide for Pennsylvania State Representative Rob Kauffman requesting guidance on driver vision qualifications and mentioning his concerns about Berkheimer.¹³

On Friday, November 16, Murdock and Blough sent Jordan e-mails again instructing him to refrain from collecting social security cards and birth certificates. Blough told Jordan “[y]ou can’t just look at DOT regs, we also have to comply with other regulatory agencies and employee rights.”¹⁴ Jordan sent a reply to Blough:

Unbelievable!!!! If an individual comes to us for a job driving a COMMERCIAL MOTOR VEHICLE DOT applies first and foremost. This is twice now you have made that statement. I can ask for anything with in the the [sic] regulations. I am perfectly aware that just because I ask for it an individual does not have to hand it over. I am not violating anything by asking. What I am doing is showing due diligence by asking. In other words covering my assThe signals I am receiving is safety is the furthest thing from anybodies [sic] mind. I do not give a shit what anybody says it did not take a rocket scientist to figure out this Berkheimer story was bullshit To do this job correctly you can’t let the threat of a law suit cloud your judgment if you allow that you are in the wrong line of work.^[15]

¹² RX 23.

¹³ RX 20, 25, 40, 43, 46.

¹⁴ RX 17.

¹⁵ RX 18.

On Monday November 19, 2007, Blough, in consultation with Stock, Regional Vice President Ed Appuzzi, and Senior Manager Joe LoVerde, decided to discharge Jordan. Blough planned to meet with Jordan the morning of November 20, but the meeting did not take place. Blough discharged Jordan by phone on November 20 prior to Jordan's arrival at the landfill. IESI completed a termination form discharging Jordan for "unacceptable performance," "insubordination," and "violation of [a] company rule."¹⁶

Jordan filed a complaint alleging that his discharge violated the STAA. OSHA denied his complaint. On March 15, 2010, the ALJ issued the R. D. & O. applying the STAA burden of proof in effect prior to the August 3, 2007 amendments. We affirmed the ALJ's conclusion that Jordan engaged in STAA-protected activity and remanded the case, directing the ALJ to apply the proper standard.

On May 31, 2013, the ALJ issued the D. & O. R., holding that Jordan proved that his protected activity contributed to his discharge, but IESI proved by clear and convincing evidence that Jordan "was insubordinate and assumed authority beyond his job description, and that [IESI] would have taken the same action without the protected activity." D. & O. R. at 7.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978.¹⁷ The ARB "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."¹⁸ We are bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole.¹⁹ The ARB reviews the ALJ's conclusions of law de novo.²⁰

¹⁶ RX 6; Tr. at 478.

¹⁷ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. § 1978.109(a).

¹⁸ *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted).

¹⁹ 29 C.F.R. § 1978.109(c)(3).

²⁰ *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

DISCUSSION

The STAA provides that an employer may not discharge or otherwise retaliate against an employee with respect to the employee's compensation, conditions, or privileges of employment because the employee engaged in STAA-protected activity.²¹ To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he or she engaged in STAA protected activity; that he or she was subjected to adverse employment action; and that his or her protected activity was a contributing factor in that adverse action.²² If a complainant proves by a preponderance of the evidence that his or her protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same personnel action even in the absence of the protected activity.²³

The record indicates that Jordan engaged in STAA-protected activities, such as his complaints to IESI management about Berkheimer's driving qualifications. And IESI subjected Jordan to an adverse employment action by terminating his employment. But in concluding that STAA-protected activity contributed to Jordan's discharge, the ALJ did not clearly indicate which activities contributed to the termination. The language in the R. D. & O. could be read as a conclusion that Jordan's entire investigation into Berkheimer's qualifications was protected.²⁴ And in the D. O. & R., the ALJ held that what he describes as "the Berkheimer factor" contributed to Jordan's discharge.²⁵ This is confusing because the ALJ's description of the

²¹ 49 U.S.C.A. § 31105(a)(1); 29 C.F.R. § 1978.102(a).

²² *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104; ALJ Nos. 2008-STA-012, -041; slip op. at 9 (ARB Sept. 15, 2011). *See also White v. Action Expediting, Inc.*, ARB No. 13-015, ALJ No. 2011-STA-011 (ARB June 6, 2014); *Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ No. 2008-STA-020 (ARB May 13, 2014).

²³ *Salata*, ARB Nos. 08-101, 09-104; slip op. at 9.

²⁴ R. D. & O. at 47 ("The Complainant first engaged in protected activity on November 9, 2007, when he reported a potential safety violation regarding Mr. Berkheimer's driving qualifications to his supervisor, Mr. Blough, as well as two other of the Respondent's managers, Mr. Murdock and Mr. Key. *See* Tr. at 64, 69, 430-32. The Complainant continued investigating Mr. Berkheimer's qualifications in the following eleven days before he was terminated on November 20, 2007. The Respondent was clearly aware of the Complainant's protected activity prior to terminating him as the Complainant reported it to his supervisor and the Respondent's management staff.").

²⁵ D. O. & R. at 3 ("IESI argues that the evidence establishes that Jordan's alleged protected activity was not a contributing factor to his termination. However, I accept that Jordan was a 'safety man,' and in Blough's absence, he was the one designated with the responsibility for safety concerning the drivers. No one at IESI disputes that Berkheimer hit the wall at Burger King. Jordan argues that only Berkheimer, whose job was on the line, continued to claim that it never happened, despite clear evidence otherwise. After a review of all of the evidence, I again find that "the

actions Jordan committed in furtherance of his investigation of Berkheimer indicates that some of those actions are not protected by the STAA. For example, Jordan visited Berkheimer's doctor a second time after Blough told him not to do so. The ALJ found that this second visit was unnecessary and insubordinate:

Even assuming that Mr. Blough's instructions were not clear the first time, any ambiguity should have been clarified when Mr. Blough left the Complainant an angry message the following Monday. *Id.* 438-39. Mr. Blough again instructed the Complainant to stop proceeding with the investigation and wait until he returned from vacation. *Id.* Ignoring his superior's instructions, the Complainant returned to Dr. Charlesworth's office the following day. At this point there was no immediate safety concern as Mr. Berkheimer was suspended from driving. Even if Mr. Murdock told the Complainant that Dr. Charlesworth's letter was illegible, the Complainant could have easily respected his superior's instructions and waited until Mr. Blough returned from vacation to work on the case together. With no immediate safety concern, the Complainant's extra efforts were unnecessary and insubordinate.^[26]

Regardless of this ambiguity, the ALJ's determination that IESI proved by clear and convincing evidence that it would have fired Jordan even if he had not engaged in protected activity is supported by the record. IESI demonstrated by clear and convincing evidence that Jordan was insubordinate and his supervisor was dissatisfied with his job performance. The ALJ credited the testimony of Blough, his direct supervisor, who decided to discharge Jordan "due to a compilation of factors, which included 'the altercation with the landfill manager, his actions with Stan Shoop, as well as his actions where he basically told [Mr. Blough] that he didn't care about other regs.'"²⁷

Given that substantial evidence supports the ALJ's determination that IESI established by clear and convincing evidence that it would have terminated Jordan's employment regardless of any STAA-protected activity, the Board affirms the ALJ's decision dismissing Jordan's complaint on this basis.

Berkheimer factor," in which Jordan was acting as company safety officer, proves that the protected activity was a contributing factor in termination.").

²⁶ R. D. & O. at 49.

²⁷ D. O. & R. at 6, (citing Tr. at 471).

CONCLUSION

Accordingly, for the foregoing reasons, the ALJ's dismissal of Jordan's complaint is **AFFIRMED**.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Luis A. Corchado, *Administrative Appeals Judge*, concurring:

I concur that we should affirm the ALJ's dismissal and add a few observations for the record. First, the clear and convincing evidence in this case of "insubordination" includes Jordan committing the extreme act of physically going to an employee's personal doctor to collect personal medical information without proper authorization from the employee. It raises a question as to whether this was a lawful act considering all the medical privacy laws that exist. This act of going to the doctor's office is extricable from Jordan's protected activity of raising safety concerns. Second, it is not clear to me that Jordan's visit to the employee's doctor was protected activity under STAA and, as the majority points out, this may be the conduct which the ALJ labels "the Berkheimer factor" that ended Jordan's employment. Finally, if this was the conduct that the ALJ believed caused the end of Jordan's employment, then the ALJ did not properly find that there was a causal link between protected activity and unfavorable employment action. In the end, I could affirm dismissal on multiple grounds.

LUIS A. CORCHADO
Administrative Appeals Judge