U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

WYATT DAVENPORT,

COMPLAINANT,

v.

LTI TRUCKING SERVICES INC.,

RESPONDENT.

ARB CASE NO. 2017-0070

ALJ CASE NO. 2016-STA-00015

DATE: OCT 31 2019

Appearances:

For the Complainant:
Wyatt Davenport; *pro se*; Kansas City, Missouri

For the Respondent:
Jill R. Rembusch, Esq.; *Summers Compton Wells LLC*; St. Louis, Missouri

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Thomas H. Burrell, *Administrative Appeals Judges*

DECISION AND ORDER REMANDING FOR SUPPLEMENTAL FINDINGS OF FACT

PER CURIAM. This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended. 49 U.S.C. § 31105(a) (2007); *see* 29 C.F.R. Part 1978 (2019) (implementing the STAA).

Complainant alleged that Respondent terminated his employment as a truck driver because he made complaints about the safety of his truck. After a hearing, the Administrative Law Judge (ALJ) dismissed Complainant's complaint because she found that Complainant failed to prove by a preponderance of the evidence that he suffered any adverse action during his employment with Respondent. We have reviewed the ALJ's findings of fact and conclusions of law and remand for supplemental findings.

BACKGROUND

The Complainant, Wyatt Davenport, worked as a truck driver for the Respondent for six months from April 2015, until October 1, 2015. D. & O. at 4. During his employment, Complainant complained to Respondent on many occasions that he was having negative symptoms including upset stomach, diarrhea, tightness of the chest, shortness of breath, body aches, and pains because something was wrong with his truck. *Id.* at 5, 12. Complainant was given a replacement truck but experienced similar symptoms. Respondent inspected both trucks more than once but found no problem. *Id.* at 4, 5.

On October 1, 2015, his last time driving for Respondent, Complainant almost passed out from his symptoms. *Id.* at 5. Complainant had a mechanic inspect the truck but the mechanic did not find anything wrong with it. *Id.* Complainant returned to Respondent's location on October 4, 2015, and Respondent also inspected the truck and found no problems. *Id.* On October 5, 2015, Complainant asked Respondent to check the batteries, which it did, and a cracked battery was discovered. *Id.* at 5, 8. Complainant was concerned about his exposure to the battery and went to the hospital. *Id.* at 5. Complainant proceeded to see several medical professionals over a period of time and was diagnosed with digestive conditions apparently unrelated to his employment. *Id.* at 6. His symptoms continued. *Id.*

Complainant's medical provider determined that he could not operate his vehicle because of his poor physical health. *Id.* at 13. Complainant's treating physician informed Respondent that Complainant was not cleared to return to work. *Id.* at 9, 13. Complainant also told Respondent that he could not work due to his physical condition. *Id.* Respondent does not permit drivers to drive if they are not medically released to work. *Id.* It was Respondent's policy that if a driver could not drive due to illness for more than a short period of time, it would send the driver

home. *Id.* at 13. The driver is then permitted to return to work duties after being cleared to work by a medical provider and passing a physical examination. *Id.*

At some point after it learned that Complainant was not cleared to drive, Respondent told Complainant that he could no longer use Respondent's truck. *Id.* at 6. Matthew Wilson, Respondent's Director of Safety, took Complainant's keys to the truck and informed Complainant that Respondent was providing him a bus ticket home. *Id.* at 6, 8. Complainant told Wilson that his doctors were all in the area of the workplace and asked Wilson if Respondent would pay for a hotel room to allow him to stay in the area. *Id.* at 6. He also asked whether he was being fired. *Id.* Wilson told him that Respondent would not pay for a hotel room but that they were not firing him, Respondent was just sending him home until he was well enough to drive. *Id.* at 8, 9, 13. Complainant refused the bus ticket, left, and never returned to work for Respondent. *Id.* at 6. Complainant believed that he was fired even though Wilson told him that he could return after he was well. *Id.* at 13.

A few days after sending Complainant home, Respondent received an email from an employee of Great West Casualties insurance company, informing Respondent that Complainant had written to her saying that he was "trying to do this the right and legal way. [He understood] a lot more why people get AK-47s and go off." *Id.* at 10, 13 (citing Tr. 242); RX 2. In response to this statement, Respondent decided that if Complainant ever contacted it about returning to work, he would not be permitted to do so. *Id.* Respondent never heard from Complainant about returning to work. *Id.*

Complainant applied for many jobs after leaving Respondent's employment. *Id.* at 6. Complainant applied for a job with Melson Transportation, which told him that it refused to hire him because Respondent "informed them that he had a 'pre-existing condition.'" *Id.* (citing Tr. 60). Melson Transportation later clarified that they refused to hire him because he had a "pre-existing case." *Id.*

Complainant recorded the second conversation he had with Melson Transportation. CX 11. On the recording, a Melson Transportation representative tells Complainant that he was not hired because of a "pre-existing case," or a "pre-existing circumstance," at first implying that Respondent told him about it and then stating that he "didn't think" his employees "necessarily spoke to anybody" at Respondent, but that they looked at Complainant's work history reports and possibly received a reference form from Respondent. Tr. 170, 172, 173, 174.

On October 16, 2015, Complainant filed his complaint with the Occupational Safety and Health Administration (OSHA). OSHA determined that there was no reasonable cause to believe that Complainant's protected activity contributed to the termination decision. OSHA thus dismissed the complaint. D. & O. at 2. Complainant objected to OSHA's determination and requested a hearing before an ALJ. *Id.*

The ALJ held several prehearing telephone conferences in this matter. In a telephone conference on August 3, 2016, Complainant asked the ALJ if it was possible to show and if it was part of her jurisdiction "to show how [Respondent] retaliated against [him] from moving forward to seek future jobs." Teleconference at 34. The ALJ told him that she thought it "may very well be relevant to the damages that he needed to prove," to which Complainant responded, "Yes, ma'am." *Id.* at 35.

During the hearing, on November 2, 2016, Complainant testified that he applied for a job with Melson Transportation and was told that he was not hired because Respondent had reported that Complainant had a pre-existing condition or case. Tr. 59-62. At the hearing on April 17, 2017, Complainant testified that he believed a subsequent employer, Trucking Experts, fired him because they called Respondent and Respondent in retaliation told them about issues he had with Respondent. Tr. 158-59. He again brought up the alleged retaliation relating to Melson Transportation and entered the recording of his conversation with an employee of Melson Transportation about Respondent's alleged blacklisting into the record. Tr. 161-77. In his closing argument to the ALJ, Complainant asserted that Respondent "[t]old other trucking companies not to hire me . . . ." Br. at 4.

After the hearing, the ALJ concluded that Complainant established that he engaged in protected activity when he reported odors in his assigned trucks. The ALJ further concluded that Complainant had failed to prove that Respondent took any adverse action against him when it sent him home. *Id.* at 12-13. The ALJ also found that even if she considered Complainant to have proven his case, Respondent proved by clear and convincing evidence that it would have fired Complainant absent his protected activity because of the statement he made about people taking AK-47s and "going off." *Id.* at 13-14. She credited Wilson's statement that Respondent would not have permitted Complainant to return to work for this reason alone had Complainant ever sought a return. *Id.* at 14. The ALJ made no findings with regard to blacklisting. Based on the finding that there was no adverse action, the ALJ denied the complaint. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision pursuant to Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (ARB)), 84 Fed. Reg. 13,072 (Apr. 3, 2019); 29 C.F.R. Part 1978. The ARB reviews questions of law de novo but is bound by the ALJ's factual determinations if the findings of fact are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.110(b). As the United States Supreme Court has recently noted, "[t]he threshold for such evidentiary sufficiency is not high." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). Substantial evidence is "'more than a mere scintilla.' It means—and means only—'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citing and quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

Complainant now appeals to the Board, alleging that the ALJ erred in finding that there was no adverse action and in finding that the Respondent met its affirmative defense. In addition to appealing the finding that there was no termination, Complainant also argues that Respondent engaged in adverse action against him when it blacklisted him to prospective employers. The Respondent opposes the appeal. Our review of this matter is hampered because the ALJ failed to make the necessary findings of fact concerning Complainant's allegations that Respondent had blacklisted him because of his protected activity. As explained more fully below, we must remand for this reason alone.

Under the STAA, an employer "may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment" because he engages in protected activity. 49 U.S.C. §31105 (a)(1). The implementing regulations specify that "[i]t is a violation for any person to intimidate, threaten, restrain, coerce, *blacklist*, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee." 29 C.F.R.

§ 1978.102(b) (emphasis added). Thus, if Respondent blacklisted Complainant because he engaged in protected activity, then it violated the STAA by doing so.[1]

The ARB construes arguments for self-represented litigants "'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude." *Taylor v. Greyhound Lines*, ARB No. 06-137, ALJ No. 2006-STA-019, slip op. at 3 (ARB Apr. 30, 2007) (citations omitted). At the same time, we are charged with a duty to remain impartial; we must "refrain from becoming an advocate for the pro se litigant." *Id.*

The record in this matter amply supports our conclusion that Complainant raised the issue before the ALJ as to whether Respondent had blacklisted him. The Complainant first raised blacklisting as an adverse action when he asked the ALJ in an August 2016 conference call whether she had jurisdiction over the matter of Respondent blacklisting him to prospective employers to prevent him from getting work. In response the ALJ told him that it "might very well be relevant to the damages that he needed to prove."[2] Complainant also raised the issue at both evidentiary hearings, in documentary evidence (CX 11), in his closing arguments to the ALJ, and in his petition for review[3] and brief to the Board.[4] In this situation, it was incumbent upon the ALJ to make findings of fact as to whether Complainant had established by a preponderance of the evidence that Respondent had blacklisted

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[1] *See Pickett v. Tennessee Valley Auth.*, ARB Nos. 00-56, -59, ALJ No. 2001-CAA-018, slip op. at 5-7 (ARB Nov. 28, 2003)(describing "blacklisting" as a discriminatory practice motivated at least in part by protected activity whereby "an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment").

[2] This answer was not legally complete in that it did not mention the possibility that blacklisting in and of itself may constitute an adverse action by Respondent. This omission did not discourage Complainant from introducing evidence concerning the alleged blacklisting and making arguments to that effect, but the absence of prejudicial effect upon Complainant's presentation of his case does not end our analysis. This misconception that blacklisting was only relevant if there was a finding that Respondent had violated the STAA may explain the failure of the ALJ to enter findings as to whether Respondent had actually blacklisted Complainant.

[3] In the petition for review, Complainant asserts that Respondent engaged in retaliation against him when it "hindered [his] chances of seeking employment by unlawfully telling other trucking companies not to hire [him]." Petition at 5.

[4] In his brief to the Board, Complainant asserts that Respondent retaliated against him by telling unlawful information to Melson Transportation and other companies, which hindered his efforts to secure future employment. Br. at 5.

Complainant in retaliation for STAA protected activity. *See* 29 C.F.R. § 1978.109(a). In the absence of such findings, we cannot complete our regulatory obligation to determine whether Respondent has violated the STAA.

CONCLUSION

Accordingly, we hereby **REMAND** this matter to the Office of Administrative Law Judges for assignment to an ALJ for the entry of supplemental findings of fact as to whether Respondent blacklisted Complainant in retaliation for STAA-protected activity. If the ALJ finds that Respondent blacklisted Complainant, the ALJ will also enter supplemental findings of fact as to whether Complainant's protected activity was a contributing factor to this action and whether Respondent would have taken the same action in the absence of any protected activity. The ALJ may, as a matter of discretion, make the necessary findings based on the existing record or re-open the evidentiary record if necessary to receive additional evidence or testimony. The ALJ should transmit all supplemental findings of fact to the Board within 120 days of the date of issuance of this Order.

SO ORDERED.