U.S. Department of Labor

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

In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

PROSECUTING PARTY,

and

ANTHONY CIOTTI,

COMPLAINANT,

v.

SYSCO FOODS OF PHILADELPHIA,

RESPONDENT.

ARB CASE NO. 98-103

(ALJ CASE NO. 97-STA-00030)

DATE: July 8, 1998

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C. §31105 (1994). The Assistant Secretary for Occupational Safety and Health alleged that Sysco Foods of Philadelphia (Sysco) suspended Anthony Ciotti (Ciotti) because of his refusal to drive in violation of STAA §31105(a)(1)(B). Following a hearing on the merits, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) finding that Ciotti had established a STAA violation and granting relief. We note that the ALJ's findings of fact are supported by substantial evidence on the record considered as a whole and are therefore conclusive. R. D. & O. at 3-5; 29 C.F.R. §1978.109(c)(3) (1997). We also accept the ALJ's credibility determinations, and agree that Sysco violated STAA by suspending Ciotti.

BACKGROUND

I. Procedural History

Ciotti filed a STAA complaint with the Occupational Safety and Health Administration (OSHA) on May 14, 1997. OSHA investigated the complaint, and on July 18, 1997, issued the

Secretary's Findings and Preliminary Order indicating that there was reasonable cause to believe that the complaint had merit. R. D. & O. at 2; ALJ Ex. 1. By letter dated August 14, 1997, Sysco requested a hearing. ALJ Ex. 2. After one continuance, the matter was tried on January 12, 1998, in Philadelphia, Pennsylvania, and post-hearing briefs were filed by February 27, 1998. R. D. & O. at 2. In his March 10, 1998, recommended decision, the ALJ ruled that Sysco violated the antiretaliation provisions of STAA and ordered the company to pay Ciotti one day's lost wages plus interest. R. D. & O. at 9.

II. Facts

Sysco, a food distribution company in Philadelphia, Pennsylvania, hired Ciotti as a truck driver and delivery person in August 1991. In this capacity, Ciotti regularly drove commercial straight trucks and commercial tractor-trailer combinations with gross vehicle weights approximating 30,000 pounds. These trucks were filled with product in Pennsylvania and then were emptied through deliveries in Delaware or New Jersey. Ciotti's job required him to work between 10 and 12 hours per day, five days per week. R. D. & O. at 3.

On Wednesday, April 23, 1997, Ciotti reported for work at 6:00 a.m. and was assigned to make 16 deliveries throughout New Jersey. By 9:00 a.m., Ciotti began to feel ill with stomach queasiness and nausea. He made frequent trips to the bathroom. R. D. & O. at 3; T. at 28 (Ciotti).[1/] At his sixth delivery, Ciotti realized that his symptoms had worsened. By telephone, he informed one of Sysco's driver transportation supervisors that, because of the way he was feeling, he was not sure he could safely continue driving the truck and making the deliveries. Sysco's driver supervisor advised Ciotti to do the best he could and to inform the office as to how he was progressing. R. D. & O. at 3.

After completing the sixth delivery, Ciotti realized that the truck ramp needed repair and called the driver transportation supervisor to report it. During that call, Ciotti also mentioned that he was still feeling ill. R. D. & O. at 3; T. at 31 (Ciotti). While waiting for the truck repairman to arrive, Ciotti realized that, as he was experiencing increasing queasiness and nausea, he could no longer continue safely to drive the truck as well as make the deliveries. He again reported his condition to the driver supervisor and asked to have someone sent either to relieve him or to help with the deliveries. R. D. & O. at 3-4; T. at 31-32 (Ciotti). After completing his telephone conversation with the supervisor, Ciotti found that the repair had been completed and that Milton Hernandez (Hernandez), one of Sysco's driver supervisors, had arrived to assist Ciotti with his remaining deliveries. R. D. & O. at 4; T. at 32 (Ciotti).

For deliveries seven through fifteen, Ciotti drove the truck to each delivery location while Hernandez followed in a minivan and unloaded the product. Ciotti was unable to offer much assistance in the unloading as he spent most of the delivery time in the bathroom. By the time the last delivery was to be made, Ciotti determined that his deteriorating physical condition combined with the growing darkness made it dangerous for him to continue even to drive the truck. He and

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[1/] Citations to the hearing transcript (T.) include the page number and the name of the person testifying.

Hernandez agreed that Ciotti would drive the minivan back to the distribution center while Hernandez drove the truck to complete the last delivery. When he reached the distribution center, Ciotti informed one of Sysco's driver supervisors that he was feeling ill and was going home. R. D. & O. at 4.

Later that night, Ciotti realized that his physical condition was deteriorating further. He telephoned the nighttime driver supervisor and router to inform him that, because of illness, he would not be available on the following day to drive or deliver the company's product. Accordingly, Ciotti did not report to work on Thursday, April 24, but visited his family doctor. After examining him, Joan Hurlock, M.D., diagnosed influenza and gave Ciotti a written order indicating that he was under her care and was not to return to work until Monday, April 28, 1997. R. D. & O. at 4; T. at 36, 43-45 (Ciotti).

Ciotti understood that the doctor was directing him not to return to work because it would be unsafe for him to operate heavy machinery in his condition. At approximately 2:00 p.m. on Thursday, April 24, Ciotti again telephoned Sysco's driver supervisor to report that, because he was too ill to drive the delivery truck safely, he would not be able to work the next day. As Ciotti was not scheduled to work on either Saturday or Sunday, April 26 and 27, he did not return to work until Monday, April 28. On April 30, Ciotti received a letter from Garren Lisicki, Sysco's Director of Transportation, suspending Ciotti for one day because of his absence from work on April 24 and 25. R. D. & O. at 4; Gov. Ex. 1.

Sysco had a progressive discipline policy designed to assure that an employee would be available for work when scheduled;[2/] if an employee was not available when scheduled, he or she would be charged with an "occurrence." T. at 94 (Munn); Gov. Ex. 2. Sysco's drivers were permitted five covered sick days per year which, when used, constituted the first five occurrences under the policy. T. at 104-106 (Munn). For each occurrence after the fifth, discipline of increasing severity was administered:

6th Occurrence - Verbal Warning
7th Occurrence - Written Warning
8th Occurrence - 1 Day Suspension
9th Occurrence - 3 Day Suspension
10th Occurrence - Termination

Gov. Ex. 2. An occurrence could cover more than one day's absence. For example, two consecutive days' absence due to sickness would constitute only one occurrence. T. at 95 (Munn). Ciotti's

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[2/] According to Charles Munn, Sysco's Vice President of Employee Relations, the attendance policy applied to Ciotti (set out in Government Exhibit 2) was in effect until July 1997. T. at 84, 89-90 (Munn).

absence on April 24 and 25 was his eighth occurrence of the year,[3] and in accordance with policy, Sysco suspended him for one day. Gov. Ex. 1 and 2.

DISCUSSION

The ALJ ruled that Sysco violated the antiretaliation provisions of STAA by suspending Ciotti for engaging in the protected activity of refusing to drive while impaired by illness. R. D. & O. at 8. Sysco challenges that ruling on review.[4]

The employee protection provisions of STAA provide in relevant part:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because --
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> * * * *
>
> (B) the employee refuses to operate a vehicle because --
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health . . . .

49 U.S.C. §31105(a) (1994). The elements of a violation of the STAA employee protection provision are "that the employee engaged in protected activity, that the employee was subjected to adverse employment action, and that there was a causal connection between the protected activity and the adverse action." *Clean Harbors Environmental Services, Inc. v. Herman*, 1998 WL 293060, *9 (1st Cir. June 10, 1998). *See also Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir. 1987).

The ALJ's ultimate conclusion in favor of Ciotti is factually and legally sound, as we discuss below. However, since this case was fully tried on the merits, it is not necessary to determine whether Ciotti presented a *prima facie* case and whether Sysco rebutted that showing. *See* R. D. and O. at 5-9. *U.S.P.S. Bd. of Governors v. Aikens*, 460 U.S. 711, 713-14 (1983); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Final Dec. and Ord., Feb. 15, 1995, slip op. at 11 n.9, *aff'd sub nom. Carroll v. U.S. Dep't of Labor,* 78 F.3d 352 (8th Cir. 1996). Once Sysco has produced evidence in an attempt to show that Ciotti was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves

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[3] Sysco's attendance policy applied to the 12 calendar months immediately preceding the date of the last incident. Gov. Ex. 2.

[4] Sysco does not raise before us the issue whether the Assistant Secretary for OSHA timely issued his determination that Sysco had violated STAA. We note, however, our agreement with the ALJ's conclusion that the Assistant Secretary's failure to complete the Preliminary Findings and Order within 60 days did not invalidate the litigation based upon those findings. R. D. & O. at 5-6. *See* 29 C.F.R. §1978.114 (1997); *Roadway Express, Inc.* v. *Secretary of Labor,* 929 F. 2d 1060, 1066-67 (5th Cir. 1991).

any analytical purpose to answer the question whether Ciotti presented a *prima facie* case. Instead the relevant inquiry is whether Ciotti prevailed by a preponderance of the evidence on the ultimate question of liability. If he did not, it matters not at all whether he presented a *prima facie* case. If he did, whether he presented a *prima facie* case is irrelevant. With that in mind we turn to the issues in this case.

There is no dispute that Ciotti was subjected to adverse action; he was suspended for one day. Therefore, this case turns on whether Ciotti engaged in protected activity and whether the suspension constituted retaliation for that protected activity. We discuss these issues below.

III. Protected Activity

Sysco concedes that "a driver engages in protected activity under the STAA when he refuses to drive a commercial vehicle when he is too sick to do so safely." Respondent's Brief in Opposition to the ALJ's Recommended Decision and Order (Res. Br.) at 9. This is because the motor carrier regulations provide in pertinent part:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the motor vehicle.

49 C.F.R. §392.3 (1997). However, Sysco argues that Ciotti failed to prove that he had engaged in protected activity, specifically, that he was, in fact, too sick to drive safely on April 24 and 25, 1997. Res. Br. at 9-14. According to Sysco, protected activity was not shown because there was: (1) no record medical evidence of Ciotti's illness; (2) contradictory testimony regarding Ciotti's symptoms on April 23; and (3) a history of Ciotti abusing sick leave. *Id*. at 10-13.

We find that there is substantial evidence to support the conclusion that Ciotti was too sick to drive safely on April 24 and 25. Ciotti testified that he had been examined by a doctor, found to be suffering from influenza, and ordered not to return to work until April 28.[5/] Although Sysco

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[5/] The Assistant Secretary offered documentary evidence of Ciotti's visit to his doctor, her diagnosis, and her orders, but the ALJ excluded this evidence as hearsay. T. at 40. An appellate court will ordinarily not reverse a judgment in a nonjury case because of the admission of incompetent evidence. On the other hand, a trial judge who, in the hearing of a non-jury case, attempts to make strict rulings on the admissibility of evidence, risks reversal by excluding evidence which is objected to, but which, on review, the appellate body believes should have been admitted. *Builders Steel Co.* v. *Commissioner of Internal Rev.*, 179 F.2d 377, 379 (8th Cir. 1950); *National Labor Relations Board* v. *Philadelphia Iron Works, Inc.*, 211 F.2d 937, 943 (3d Cir. 1954). Thus, in a non-jury hearing, it is more efficient for the trier of fact to take under advisement questions regarding the admissibility of evidence than it is to consider arguments (continued...)

characterized Ciotti's testimony as self-serving, the ALJ found it credible and sufficient to show that Ciotti was too ill to drive. Regarding Ciotti's symptoms, Sysco relies heavily on the conflict in testimony between Ciotti and Hernandez regarding whether Ciotti actually vomited on April 23. Contrary to Ciotti's testimony that he had not vomited, Hernandez testified that Ciotti told him that he had vomited twice. T. at 62 (Ciotti); T. at 76-78 (Hernandez). Ciotti repeatedly described the symptoms with which he suffered on the 23rd, including nausea and an inability to keep anything on his stomach. Given the symptoms described, this conflict in testimony does not undermine Ciotti's credibility. T. at 28, 29, 31, 61-62 (Ciotti).

Finally, Sysco argues that Ciotti's history of frequent absences on Mondays and Fridays means that he feigned illness on April 23. Ciotti's attendance record for a 12 month period was said to show that he had a proclivity for creating long weekends with his absences. Even if Sysco had established that Ciotti feigned illness on other dates,[6/] that evidence would not show that Ciotti was feigning illness on April 23-25. Moreover, the weight of the evidence is to the contrary. On the 23rd, Ciotti informed Sysco five different times that he did not feel well, and that the frequency and severity of his symptoms were making it difficult, and eventually impossible, to perform his work safely. The existence and extent of his impairment was borne out when, on April 24, the doctor ordered Ciotti to rest and not to return to work until April 28. We agree with the ALJ that Ciotti engaged in protected activity when he refused to drive for Sysco on April 24 and 25.

IV. Causal Connection Between Protected Activity and Suspension

Sysco also argues that the ALJ erred in finding a causal connection between Ciotti's protected activity and the suspension. The ALJ's finding on this point followed *Asst. Sectr'y & Curless* v. *Thomas Sysco Food Svc.*, Case No. 91-STA-12, Sec. Final Dec. and Ord, Sept. 3, 1991, *remanded for vacatur on grounds of mootness*, 983 F.2d 60 (6th Cir. 1993).

[5/](.. .continued)
concerning the admissibility of evidence at the time such questions are raised. He or she is then able to sift through that evidence after it has been received to determine what is admissible.

We disagree with the ALJ's exclusion, as hearsay, of the documentary medical evidence in this case. However, in light of our ultimate conclusion, it is unnecessary to remand the case for the inclusion of that evidence in the record.

[6/] Sysco argues that Ciotti feigned illness in the past. This contention is not supported by the record. Specifically, Sysco argues that Ciotti's absences in July and December 1996 were not due to illness or fatigue, but instead were concocted by Ciotti to produce long weekends away from work. Res. Br. at 11-12. However, no evidence on the issue was produced. In fact, Sysco admitted that it never questioned Ciotti about these absences or the conditions which made them necessary. Tr. at 108-109 (Munn). Ciotti, on the other hand, testified that the July 1996 absences were due to his asthma condition and those in December 1996 were due to exhaustion resulting from his transition from working nights to working days. Tr. at 51-52 (Ciotti); Gov. Ex. 1.

In *Curless*, the company's absentee policy permitted employees a certain number of days of excused absence in a rolling 12 month period; however, once an employee used these days, any subsequent unexcused absence, regardless of the reason, constituted an "incident." *Id*. at 2. Beginning with the fourth "incident," progressively greater discipline was imposed for subsequent incidents; for example, the fourth elicited a verbal warning, the sixth a written warning and a one day suspension, and the eighth required discharge. *Id*. at 2, fn. 3. Medicated with Valium and other substances, and under doctor's orders not to drive, Curless informed his employer of the doctor's instructions and that he would not be available to drive the following day. *Id*. at 1-2. Curless received a verbal warning for this absence, as it constituted his fourth "incident." *Id*. at 2. The company argued that it took adverse action against Curless, not for protected activity, but because he "ran afoul" of the absentee policy. The Secretary, however, held that the company's articulation of the cause for the punishment would not suffice. "Complainant 'ran afoul' of [the company's] policy <u>because</u> he engaged in protected activity." *Id*. at 6 [emphasis added]. Thus the Secretary held that a violation of STAA had occurred because the company took adverse action against an employee who refused to violate DOT regulations. *Id*. at 6-7.

Sysco argues that *Curless* is no longer viable because of the Supreme Court's holding in *Hazen Paper* v. *Biggins*, 507 U.S. 604 (1993). R. D. & O. at 6; *see* Res. Br. at 17-18. In *Hazen*, the Court rejected a claim under the Age Discrimination in Employment Act, finding that the employee was not discharged because of his age. The Court held that age was "analytically distinct" from years of service with the employer, and that it was plaintiff's years of service and not his age which formed the basis of the company's adverse action. Thus, there was no discrimination based on age. *Id*. at 611.

Hazen and the other cases cited by Sysco hold that an employer is not necessarily guilty of discrimination where the adverse employment action is motivated by a factor which, though it may be correlated with the protected trait or activity, is analytically distinct from it. Thus, Sysco argues that it did not discriminate against Ciotti because its suspension of him was motivated by its policy against excessive absences and not by Ciotti's refusal to drive while impaired by illness. Although Sysco's excessive absence policy is correlated with Ciotti's refusal to drive, it is "analytically distinct" from it, and thus there is no causal link between the protected activity and the adverse action.

Sysco's argument, although facially appealing, is fatally flawed. Here, there is no distinction, analytical or otherwise, between Ciotti's protected activity of refusing to drive while impaired by illness and his absence from work. They are the same thing. Ciotti's job is to drive a truck, and the regulations direct him not to drive when impaired. Therefore, for Ciotti to obey the law and refuse to drive while impaired *is* to be absent from work; they are two sides of the same coin. Taking adverse action against Ciotti because he was absent from work under these circumstances is the same as taking adverse action against him because of his protected activity.[7/] *Curless* is still good law, and

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[7/] We emphasize that a refusal to drive because of illness is not necessarily protected activity under STAA; it must be a refusal to drive because the illness impairs the driver's ability to drive safely. *See* 49 C.F.R. §392.3 (1997).

the ALJ appropriately relied on it in making the determination that the requisite causal link between the protected activity and the adverse action was shown.

Sysco also argues that it suspended Ciotti for a legitimate, non-discriminatory reason, namely, violation of its absenteeism policy. No violation of STAA can be found, according to Sysco, because Ciotti failed to show that the legitimate, non-discriminatory reason was pretext. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). As the Secretary's rulings in *Curless* and in *Self* v. *Carolina Freight Carriers Corp.*, Case No. 91-STA-25, Sec. Dec., Aug. 6, 1992, indicate, a policy which permits a company to take adverse action against employees for obeying the law is not "legitimate."

> To permit an employer to rely on a facially-neutral policy to discipline an employee for engaging in statutorily-protected activity would permit the employer to accomplish what the law prohibits.

Id. at 5.

Finally Sysco argues that, because it did not "attempt to coerce or cajole [Ciotti] into driving the truck when [he] claimed he was too sick to drive it," Sysco did not run afoul of the STAA employee protection provision. Res. Br. at 20. Sysco misses the point. Application of Sysco's absenteeism policy to Ciotti under the circumstances of this case presented Ciotti with an untenable choice. He could drive in violation of federal regulations prohibiting the operation of a commercial motor vehicle "while the driver's ability or alertness is so impaired . . . through . . . illness . . . as to make it unsafe for him/her to drive." 49 C.F.R. §392.3 (1997). Alternatively, he could refuse to drive and be suspended for a day. This is precisely the kind of situation that STAA's antiretaliation provision is designed to protect against. 128 Cong. Rec. 29192 (1988).

We emphasize that we are not holding that employers cannot take action against employees who feign illness.[8/] Here, however, the substantial evidence supports the conclusion that Ciotti's illness on April 23 was not fabricated, and that Sysco had reason to know that. Our decision is a narrow one: under STAA's employee protection provision an employer may not take adverse action against an employee who refuses to drive a commercial motor vehicle because illness has impaired his ability to drive safely.

In sum, we agree that Ciotti established that he was retaliated against for engaging in activity protected by the Surface Transportation Assistance Act. Accordingly, we accept the ALJ's findings, conclusions of law, and the remedial actions set out in the ALJ's order.

[8/] STAA does not preclude an employer from establishing reasonable methods or mechanisms for assuring that a claimed illness is legitimate and serious enough to warrant a protected refusal to drive.

ORDER

Respondent Sysco Systems, Inc. is ORDERED TO:

1) Pay Complainant Anthony Ciotti $302.17, plus interest calculated in accordance with 26 U.S.C. §6621 (1994); and

2) Expunge from Ciotti's personnel file the April 30, 1997, letter of suspension (Gov. Ex. 1).

SO ORDERED.

KARL J. SANDSTROM
Chair

PAUL GREENBERG
Member

CYNTHIA L. ATTWOOD
Acting Member