U.S. Department of Labor

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

In the Matter of:

CHRISTOPHER L. BUIE,

COMPLAINANT,

v.

SPEE-DEE DELIVERY SERVICE, INC.,

RESPONDENT.

ARB CASE NO. 2019-0015

ALJ CASE NO. 2014-STA-00037

DATE: OCT 31 2019

Appearances:

For the Complainant:
Christopher L. Buie; *pro se*; Omaha, Nebraska

For the Respondent:
Bridget R. Penick, Esq., and Kendra D. Simmons, Esq.; *Fredrikson & Byron, P.A.*; Des Moines, Iowa

Before: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie, *Administrative Appeals Judges.*

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended.[1] Complainant drove a delivery truck for the Respondent. The Respondent suspended Complainant and a month later discharged him for the stated reason that he consistently failed to complete his route on time even after the Respondent twice shortened the route.

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[1] 49 U.S.C. § 31105(a) (2007) as implemented at 29 C.F.R. Part 1978 (2018); *see* 49 U.S.C. § 42121 (2000) (providing standards referenced in the STAA).

Respondent's Exhibit 45; Decision and Order Dismissing Complaint (Dec. 6, 2018) (D. & O.) at 2-6.

Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), claiming that the Respondent violated the STAA when it discharged him in retaliation for refusing to speed to complete his route on time. *See* Respondent's Exhibits 1, 11. OSHA dismissed the complaint. Respondent's Exhibit 2. Complainant objected to OSHA's determination and requested a hearing before a Department of Labor Administrative Law Judge (ALJ).

The ALJ denied[2] the complaint after a hearing because he found that Complainant had failed to prove by a preponderance of the evidence that he had engaged in protected activity or that protected activity contributed to the Respondent's decision to suspend and then discharge him. However, even if the Complainant had established that protected activity contributed to his suspension and subsequent discharge, the ALJ found that Respondent established by clear and convincing evidence that it would have suspended and discharged Complainant in the absence of the protected activity based on Complainant's consistent inability to complete his route on time. D. & O. at 14-15. Complainant appealed. For the reasons stated below, we affirm the ALJ's denial of the complaint.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or Board) has jurisdiction to review the ALJ's STAA decision pursuant to Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); 29 C.F.R. Part 1978. The ARB reviews questions of law de novo and 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). An ALJ's credibility findings, reviewed for substantial evidence, may be set aside if they are inherently incredible or patently unreasonable.[3]

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[2] We are cognizant of the fact that the ALJ's order specifies that the complaint is "dismissed." That being noted, 29 C.F.R. § 1978.109(d)(2) specifically provides that "[i]f the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint." As such, we will use the terminology prescribed by regulation to describe the action below.

[3] *See Knox v. Nat'l Park Serv.*, ARB No. 10-105, ALJ No. 2010-CAA-002, slip op. at 5 (ARB Apr. 30, 2012).

BACKGROUND

The justiciable facts are not in dispute. Complainant drove a package delivery and pick-up route from the Respondent's Omaha, Nebraska facility from 2005 until his April 1, 2013 discharge. Complainant's performance reviews from October, 2008, to his April, 2013 discharge note problems completing his route on time. *See* Respondent's Exhibit 14; D. & O. at 3. When in March 2009, Complainant received a speeding ticket, the Respondent, consistent with company policy, gave him a written reprimand. Joint Exhibit 1 at Stipulation 23; D. & O. at 3. Further, the ALJ noted testimonial and documentary evidence showing time gaps between deliveries that Complainant could not explain. D. & O. at 3. Even after the Respondent reduced Complainant's routes in February and again in November of 2012, in an effort "to accommodate his inability to perform his duties adequately," Respondent's Exhibit 45, Complainant still had difficultly complying with directives to complete the route by specified times. D. & O. at 3-4. Consequently, the Respondent's Regional Manager, Timothy Zuehlke, and another manager suspended Complainant from March 1-3, 2013, and Zuehlke ultimately discharged Buie on April 1, 2013, for "blatant disregard for company expectations and standards." Respondent's Exhibit 45.

DISCUSSION

The STAA provides that a person may not "discharge," "discipline," or "discriminate" against an employee "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. 49 U.S.C. § 31105(a)(1). The legal burden of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century also governs STAA complaints. *Id.* § 31105(b)(1); *see id.* § 42121. To prevail on a STAA claim, a Complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action. *Id.* § 42121(b)(2)(B)(iii). If the employee makes such a showing, the employer can avoid relief by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Id.* § 42121(b)(2)(B)(ii).

Protected Activity

Under the STAA, a complainant engages in protected activity by filing a complaint or refusing to operate a vehicle for safety reasons.[4] The ALJ determined that under the facts of this case Complainant did not establish that he had engaged in protected activity. In support of that finding, the ALJ initially noted that Complainant never refused to drive his vehicle. D. & O. at 8. Next, considering Complainant's complaints to his supervisors that he would have to speed in order to complete his route on time, the ALJ found that Complainant did not prove that he thereby engaged in protected activity because he did not establish that the Respondent scheduled his run in a manner that required him to speed or that the Respondent required him to speed.

Complainant argues on appeal that the ALJ's findings are not supported by substantial evidence. Complainant's Brief at 10-13. However, the record shows that the ALJ properly relied on evidence that Complainant's supervisor repeatedly drove the route and returned *within the time allotted*, and on the lack of evidence that the supervisor had to speed to do so. D. & O. at 9-11. The ALJ found no evidence corroborating Complainant's testimony that the Respondent's manager implied, without stating, that Complainant should speed to timely complete his route. Moreover, the ALJ noted that Complainant did not take the opportunity he had at his post-discharge unemployment insurance hearing, to elicit any supporting testimony from the manager who allegedly implied he should speed and who was a witness at the hearing. D. & O. at 11.

The ALJ also determined that Complainant's asserted belief that the Respondent was violating a commercial motor vehicle regulation, standard, or order while subjectively reasonable, was not objectively reasonable where an experienced driver employed by the Respondent in the same circumstances as Complainant would have known three facts. First, the Respondent had an explicit policy against speeding. Second, the Respondent enforced that policy against employees who violated it, including reprimanding Complainant when he was ticketed. Third,

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[4] The STAA prohibits an employer from discharging, disciplining, or discriminating against an employee because the employee files a complaint related to a violation of a commercial motor vehicle safety or security regulation, standard, or order under 49 U.S.C. § 31105(a)(1)(A)(i), or when the employee refuses to operate a vehicle when the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security at 49 U.S.C. § 31105(a)(1)(B)(i).

Respondent also took appropriate action such as putting governors on its vehicles to limit their speed to 60 mph, to prevent its employees' ability to violate the speeding policy. D. & O. at 8, 10-12. The ALJ stated:

> It simply does not make any sense for an employee who knew these three facts to believe that Respondent, which obviously had a no speeding policy and took that policy seriously, would nevertheless schedule a driver's run so that it could only be completed if the driver were to speed. Any such belief would be patently unreasonable based on these three facts alone. Moreover, as outlined above, in March 2013, [the supervisor] repeatedly ran Complainant's route in a timely fashion and there was no evidence that speeding was necessary for him to accomplish this.

D. & O. at 11.

Complainant argues that the ALJ's findings cannot stand because the ALJ refused to consider specific evidence and failed to recognize that the Respondent's directives were goals not expectations or directives. Complainant also argued that the ALJ erroneously credited other witnesses over Complainant's testimony. We reject these arguments as they amount to a request that the Board reweigh the evidence and make credibility findings which we will not do. Complainant's Brief at 13-17.

The ALJ also found that Complainant did not engage in protected activity on November 25, 2009, when Buie filed a complaint in response to the then-Branch Manager's preventing him from leaving an office during a conversation concerning his inability to complete routes within specified times. Although his complaint concerning this incident contained a statement that he felt pressured to speed, the ALJ found that that complaint was unreasonable for the reasons cited above. The ALJ's finding that Complainant failed to meet his burden to establish that he engaged in protected activity is supported by substantial evidence, and we affirm it.

Engaging in protected activity is a required element of a successful STAA claim, and we may affirm the ALJ's denial of the complaint on the basis of his finding that Complainant failed to meet his burden to prove that he engaged in protected activity. *Harris v. C & N Trucking*, ARB No. 04-175, ALJ No. 2004-STA-037, slip op. at 2 (ARB Jan. 31, 2007). But Complainant also raises arguments on appeal addressing the ALJ's additional findings and conclusions on the issues of

causation and same action defense. We will, in an abundance of caution, next review these findings.

Causation

On causation, the ALJ resolved an evidentiary dispute by crediting the testimony of Zuehlke, one of the managers who suspended and discharged Buie, over Complainant's contrary testimony to find that Zuehlke had no knowledge of Buie's complaints at the time he made the decision to discharge him. The ALJ indicated that, having observed both witnesses, he found Zuehlke the more credible witness as he answered questions directly, in a straightforward manner, and without hesitation, while Complainant's answers in support of his argument that his complaints did contribute to his suspension and discharge were inconsistent and did not make sense. The ALJ concluded that Complainant's alleged protected activity, assuming it had been proved, was not a contributing factor to the discharge decision. D. & O. at 11-14. Complainant argues that the ALJ's resolution of the evidence is incorrect because he did not consider other evidence that Complainant deems credible. We conclude that the ALJ's credibility determinations are supported by substantial evidence and not inherently incredible or patently unreasonable and we uphold them.

Even if Zuehlke had knowledge of Buie's complaints about being pressured to speed, the ALJ credited the fact that Respondent did not take any disciplinary action against him for 2-3 years despite his inability to complete his route on time. Respondent even made his route shorter on two occasions to accommodate him. The ALJ found that "[i]t simply does not make sense that Complainant's complaints about being required to speed" could be "a factor, any factor" in his suspension and termination. We agree and affirm the ALJ's finding that had Complainant engaged in protected activity, that activity did not contribute to Complainant's suspension and termination.

Same Action Defense

The ALJ found that the Respondent would have taken the same adverse action in the absence of any protected activity. D. & O. at 8, 14-15. On appeal, Complainant argues that the ALJ failed to consider the issue of pretext and that Respondent's taking action against Complainant in 2013 after many years of untimely route completion is "illogical." Complainant also argues that other employees did not complete their routes on time but were not discharged.

Upon review of the ALJ's D. & O. and the evidence, we conclude that the ALJ's decision is a reasoned ruling supported by substantial evidence and consistent with applicable law. The ALJ, acting within his discretion, rationally credited the Respondent's testimonial and documentary evidence showing that Complainant's suspension and discharge "had nothing to do with his complaints that his route required him to speed to complete it on time and he would not speed." D. & O. at 14. Specifically, the ALJ noted that performance reviews from 2009, until his discharge in 2013, "consistently noted problems with completing his route on time." *Id.* Until Complainant's March 1, 2013, suspension, Respondent had taken no disciplinary action against him "for consistently taking longer to complete his route than [the] Respondent expected." *Id.* The ALJ found that Respondent "frequently counseled complainant regarding his late return times and tried to accommodate him by twice cutting down the size of his route and scheduling his last pick-ups earlier." *Id.* The ALJ's finding that Respondent would have taken the same action in the absence of the alleged protected activity is supported by substantial evidence and is in accordance with law. We thus affirm it.[5]

CONCLUSION

Accordingly, the ALJ's decision in this matter is **AFFIRMED**, and the complaint is hereby **DENIED**.

SO ORDERED.

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[5] Complainant also argues that the ALJ committed several procedural, evidentiary, and substantive errors. Complainant's Brief at 22-30. The Respondent argues that none of the alleged errors caused unfair prejudice to Complainant's case. Complainant's arguments do not disturb our decision that the ALJ's D. & O. is well reasoned and supported by substantial evidence and that it is consistent with applicable law. In particular, Buie claims that the ALJ refused to consider his claim to have suffered a hostile work environment. Even if we were to agree with Buie that the ALJ erred in failing to consider that he suffered harassment qualifying for a hostile work environment claim, that error would be harmless as our analysis above precludes a finding that Buie suffered a hostile work environment in retaliation for engaging in protected activity. *Lewis v. U.S. Envt'l Prot. Agency*, ARB 04-117, ALJ No. 2003-CAA-005, -006 (ARB June 30, 2008).