



In the Matter of:

BRADLEY COXEN,

ARB CASE NO. 04-093

COMPLAINANT,

ALJ CASE NO. 03-STA-13

v.

DATE: February 28, 2006

UNITED PARCEL SERVICE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Bradley Coxen filed a complaint with the United States Department of Labor alleging that his employer, United Parcel Service (UPS), violated the employee protection provision of the Surface Transportation Assistance Act (STAA)¹ when it terminated his employment. After a hearing, a Department of Labor Administrative Law Judge (ALJ) recommended that the complaint be dismissed because Coxen did not adequately prove his case. Substantial evidence in the record supports the ALJ's recommendation. Therefore, we must deny this complaint.

BACKGROUND

Coxen began driving commercial motor vehicles for United Parcel Service in 1985. UPS is a nation-wide parcel delivery service. At all relevant times Coxen worked out of UPS's Pueblo, Colorado office.

On December 28, 2000, after a verbal disagreement with his supervisor, Carl Dunn, Coxen complained that he felt ill and could not drive his route that day. Dunn

¹ 49 U.S.C.A. § 31105 (West 1997).

later told Coxen to leave work and go home. When Coxen reported to work the next day, Dunn told him that he would not be permitted to drive until his doctor released him to return to work. Eventually, a UPS doctor diagnosed Coxen as suffering from situational hypertension and released him to return to work on January 5, 2001.

Meanwhile, on December 30, 2000, Coxen filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that UPS, through Dunn, violated the STAA by retaliating against him when he refused to drive on December 28 because he was ill. OSHA investigated this complaint and finding that it had no merit, dismissed it.

Coxen continued to deliver packages for UPS until January 2002 when a knee condition necessitated that he take workers' compensation leave until he improved. Then, on April 23, 2002, while still on leave, Coxen presented this letter to Dunn:

Under article 3 of the contract, having been repeatedly discriminated against by Carl Dunn for the mere fact of being on the feeder qualified list, I Brad Coxen am requesting to be removed from said list. I am saddened by the fact that I must remove my name from this list as a defensive measure to prevent Carl Dunn from using my presence on this list as a reason to overlook language in our shared contract. I am further dismayed by these practices being overlooked and condoned by my union and supervisors above Carl in U.P.S., among these managers are Randy Johnson, George Brooks, Bill Norris, and Lori Rezagholi. Carl has been allowed to lie, cheat, and steal the dignity and respect away from others and myself that would normally be present working at U.P.S. Any one of these infractions would have terminated hourly careers but seemed to be overlooked in the management ranks.[²]

The accusations in the letter offended Dunn, and he considered them to be insubordinate. Therefore, he told Randy Johnson, UPS's West Division Manager, and Lori Rezagholi, the company's District Labor Manager, about the letter and faxed copies to them. Johnson thought the comments constituted "gross insubordination" because of the "derogatory," "inflammatory," and "antagonistic" remarks about Dunn, himself, and other UPS managers.³ After consulting with Rezagholi, Johnson terminated Coxen's employment on May 3, 2002. He informed Coxen that under Article 17(i) of the collective bargaining agreement, termination is warranted for "serious offenses" (which the bargaining agreement does not specify) and that the "unprofessional and derogatory

² Respondent's Exhibit (RX) 3.

³ Hearing Transcript (TR) 380-381.

comments toward your immediate manager” in the April 23rd letter constituted insubordination and violated company policy.⁴

Coxen filed a grievance with his local union, asserting that he had not been “disobedient.” Coxen and Chris Rodriguez, a union representative, attended the local grievance hearing on May 21, 2002. Also present were Dunn, Johnson, and Rezagholi. At the start of the hearing Johnson asked if anyone present had a recording device. All except Coxen answered that they did not have a recording device. Coxen refused to answer. Rezagholi informed him that he had to answer. He continued to refuse. Johnson then again terminated Coxen’s employment under Article 17 for insubordination because of his refusal to answer.⁵ Johnson also denied the grievance and upheld the May 3 termination.

Coxen immediately filed the instant STAA case with OSHA. He alleged that UPS violated the STAA because its real reason for terminating his employment was the protected December 2000 STAA complaint, not because he had been insubordinate. Three days later, on May 24, he also filed a grievance challenging the second termination. That grievance, like the first one, also went to a local panel. And again, Coxen refused to answer whether he had a recording device. And again Johnson terminated Coxen’s employment and denied the grievance.⁶ The collective bargaining agreement permitted Coxen to appeal both of the termination grievances to the “state panel,” consisting of three union panelists and three company panelists. This panel heard both grievances on September 4, 2002. The panel denied both grievances and upheld the terminations.

In the meantime, OSHA investigated Coxen’s May 21, 2002 STAA complaint (the instant complaint) and dismissed it. Coxen objected and requested a hearing before a United States Department of Labor Administrative Law Judge (ALJ).⁷ After a two-day

⁴ RX 4; RX 18 at 184-185.

⁵ According to Rezagholi, UPS and the Teamsters, which represents UPS drivers, have an “agreement” that prohibits the parties from recording grievance hearings. TR 276. Coxen testified that after he refused to answer Johnson’s question, and Johnson terminated his employment, he and his union representative, Rodriguez, left the hearing room. Rodriguez informed Coxen that he could return to the hearing but that he “had to get rid of [his] recording device” because of an “agreement between the local union and the company.” But Coxen did not return because he did not believe such an agreement existed and because he did not believe Rodriguez. TR 208-209. Furthermore, the record contains evidence that someone at UPS had previously informed Coxen about the recording device policy and that his employment could be terminated for violating the policy. Complainant’s Exhibit (CX) C1 at p. UPS 0307.

⁶ Johnson did not issue a letter of termination as he had done the two previous times. This third termination is not at issue here.

⁷ See 29 C.F.R. §§ 1978.103, 1978.104, 1978.105 (2005).

hearing, the ALJ issued a Recommended Decision and Order (R. D. & O.) dismissing Coxen’s complaint. We automatically review ALJs’ STAA decisions.⁸ Neither Coxen nor UPS filed a brief despite being invited to do so.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her jurisdiction to decide this matter to the Administrative Review Board (ARB or Board).⁹ When reviewing STAA cases, the ARB is bound by the ALJ’s factual findings if those findings are supported by substantial evidence on the record considered as a whole.¹⁰ Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹¹ In reviewing the ALJ’s legal conclusions, the Board, as the Secretary’s designee, acts with “all the powers [the Secretary] would have in making the initial decision . . .” Therefore, the Board reviews the ALJ’s legal conclusions de novo.¹²

DISCUSSION

1. The Legal Standard

The STAA provides that an employer may not “discharge,” “discipline” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activity. The protected activity includes filing a complaint or beginning a proceeding “related to a violation of a commercial motor vehicle safety regulation, standard, or order.”¹³

⁸ See 29 C.F.R. § 1978.109(a).

⁹ 49 U.S.C.A. § 31105(b)(2)(C). See Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). See also 29 C.F.R. § 1978.109(c).

¹⁰ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep’t of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir.1995).

¹¹ *Clean Harbors Env’tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

¹² 5 U.S.C.A. § 557(b) (West 1996). See *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

¹³ 49 U.S.C.A. § 31105(a)(1)(A).

To prevail on this STAA claim, Coxen must prove by a preponderance of the evidence that he engaged in protected activity, that UPS was aware of the protected activity, that UPS took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.¹⁴

When Coxen filed his December 30, 2000 complaint with OSHA, alleging that UPS had violated the STAA, he engaged in protected activity.¹⁵ And since UPS terminated his employment twice, Coxen certainly suffered adverse action. Therefore, we must decide whether substantial evidence supports the ALJ's finding that Coxen did not prove by a preponderance of evidence that UPS fired him because he filed the December 2000 STAA complaint.

2. Coxen Did Not Prove that UPS's Reasons for Terminating his Employment Were Pretexts.

Coxen did not adduce a "smoking gun," that is, direct evidence that links his protected act of filing the December 2000 STAA complaint with UPS's decision to terminate his employment. Therefore, Coxen must rely upon circumstantial (indirect) evidence.¹⁶

Coxen might prevail here if he proved by a preponderance of the evidence that UPS's reason for both of the terminations – insubordination – was not believable and was really a pretext for discrimination. Upon such a showing, the ALJ could reasonably have inferred that UPS was concealing its real reason for firing Coxen – the December 2000 STAA complaint. The ALJ could then have concluded that UPS retaliated against Coxen in violation of the STAA.¹⁷ But she found that Coxen did not prove pretext.¹⁸

¹⁴ *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

¹⁵ See 49 U.S.C.A. § 31105(a)(1)(A).

¹⁶ See, e.g., *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980) ("[t]he presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive"); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("[T]he question facing triers of fact in discrimination cases is both sensitive and difficult . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes" for use in establishing intentional discrimination).

¹⁷ See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-148 (2000) (applying pretext analysis to Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. § 623, et seq. (West 1999)); *Densieski v. LaCorte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004) (in STAA cases, the ARB adopts the burden

The ALJ fairly and thoroughly analyzed Coxen's evidence and concluded that he presented various "theories" why UPS's reason for terminating his employment was a pretext.¹⁹ Coxen's strongest argument is that his April 23, 2002 letter to Dunn cannot be deemed insubordination because UPS company policy expressly encourages, indeed requires, its employees to report situations where company standards or laws are being violated.²⁰ Coxen pointed out that UPS urges employees to "use whatever method of communication with which you feel most comfortable."²¹ Therefore, according to Coxen, UPS cannot characterize the letter as insubordination because it was his "duty" to write it. Furthermore, Coxen urges that the letter was "extremely professionally written" and that he believed everything therein to be true.²²

On its face, Coxen's argument seems meritorious. The ALJ, however, examined the letter in a broader context. She found that the letter was primarily a request to be taken off the "feeder qualified list."²³ It was not meant to communicate Coxen's concerns about Dunn. It offered no information to warrant an investigation nor did it even request an investigation. Nor was it a grievance because it was not submitted on the appropriate grievance form and was not filed through the union.²⁴ The ALJ found that

of proof and production framework developed for pretext analysis under the various federal discrimination statutes such as the ADEA).

¹⁸ R. D. & O. at 5-11.

¹⁹ Coxen was pro se at the hearing. He did not actually verbalize these theories or arguments at trial. Nor did the parties give closing arguments or submit post-hearing briefs. And, as noted, neither party filed a brief with us. Nevertheless, the ALJ acted properly when she liberally construed Coxen's testimony and other evidence and formulated arguments ("theories") regarding pretext. See *Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 10 and cases cited therein (ARB Feb. 28, 2003).

²⁰ TR 112, 185. See CX B 27, UPS Code of Business Conduct, at p. 1: "It is also each employee's responsibility to report to the company any situation where our standards or the laws are being violated. Any employee disclosing, in good faith, violations or suspected violations of legal requirements or UPS business standards will not be subjected to retaliation or retribution." And at p. 3: "[I]t is your personal responsibility to communicate this concern [about legal or ethical matters] to the company."

²¹ *Id.* at p. 8.

²² TR 112.

²³ The record does not inform what the "feeder qualified list" is.

²⁴ TR 273-274, 388.

the letter “merely launched an attack” on Dunn and accused other managers of overlooking Dunn’s behavior.²⁵

Moreover, the ALJ found that Coxen knew about the various options by which he could make management aware of his concerns about ethics and the law. In fact, he had previously employed these options in reporting about Dunn. Though company policy does indeed urge employees to use “whatever means of communication with which you feel most comfortable,” UPS specifies those means of communication. Employees are told to voice their concerns to their supervisor or use the Open Door Policy to speak to another manager. They are told that the Human Resources or Employee Relation managers are available to listen to them. They can also contact management anonymously via the UPS Help Line which is available all day, every day.²⁶ The record shows that Coxen had used the Help Line to complain about Dunn, and had contacted other management officials about Dunn. He had also used the grievance procedure to complain about Dunn.²⁷

Thus, substantial evidence supports the ALJ’s findings that Coxen’s April 23, 2002 letter to Dunn was not, as Coxen argues, a company-required or authorized method of communicating Coxen’s concerns about Dunn. Therefore, we agree with the ALJ that Coxen did not prove this particular theory of pretext.

Coxen also advanced another reasonable theory that terminating his employment for insubordination was a pretext. Article 17 of the collective bargaining agreement permits UPS to suspend or discharge an employee without a warning letter or a local level grievance hearing for certain offenses such as dishonesty, drinking, possession of drugs, and gross negligence. Section (i) of Article 17 also permits UPS to suspend or discharge without warning or a local level hearing for “other serious offenses.”²⁸ According to the May 3, 2002 termination letter, Coxen’s employment was terminated because he committed an Article 17 (i) “other serious offense.” The termination letter specifies that the unprofessional and derogatory comments contained in his April 23, 2002 letter to Dunn constituted insubordination.²⁹ Therefore, a reasonable reading of the termination letter is that Coxen’s employment was terminated for the serious offense of insubordination.³⁰

²⁵ R. D. & O. at 6-7.

²⁶ See CX B 27 (UPS Code of Business Conduct) at pp. 7-9.

²⁷ R. D. & O. at 8-9.

²⁸ RX 18 at 184-185.

²⁹ RX 4.

³⁰ Rezagholi, UPS’s District Labor Manager, testified that insubordination was a serious offense. TR 270.

Coxen contends that since “insubordination” is not defined in either UPS’s Code of Business Conduct or in the collective bargaining agreement, or in his termination letters, it therefore cannot be a “serious offense.”³¹ Thus, he urges, terminating his employment for insubordination was a pretext, and his employment was actually terminated because he filed the December 2000 STAA complaint against UPS.

While Coxen is correct in asserting that neither UPS policy documents nor the collective bargaining agreement define insubordination, this fact does not necessarily prove pretext. The collective bargaining agreement, which governs employee discipline, does not compel UPS to define insubordination. Moreover, the ALJ found that when the state panel denied Coxen’s grievances and upheld both terminations, it, in effect, concurred with UPS that insubordination was a “serious offense.”³² This finding, though based solely on Coxen’s reluctant admission that the state panel’s role is to interpret the collective bargaining agreement, is nevertheless reasonable and is not contradicted by countervailing evidence.³³ Therefore, substantial evidence supports the ALJ’s finding that even though insubordination is not defined in any of the relevant documents, that fact alone does not prove that UPS’s reason for terminating Coxen’s employment – insubordination – was a pretext.

Likewise, Coxen’s remaining pretext theories are not persuasive because the record does not support them either. For instance, he argues that his written request to be removed from the feeder qualified list resulted in termination while other employees making the same request suffered no adverse action. But, as the ALJ found, other employees asking to be removed from the list simply requested that UPS remove their names. They did not also attack their managers like Coxen had done.³⁴

Coxen also contended that UPS did not terminate the employment of drivers who had been involved in serious or avoidable accidents. Under Article 17(d) and (g), serious or avoidable accidents, like “other serious offenses,” are grounds for termination. Since these drivers’ employment was not terminated under Article 17, but his was, Coxen maintains that UPS’s reason for terminating his employment was a pretext. But the record shows that UPS did terminate the employment of drivers involved in serious or avoidable accidents, although, after pursuing grievances or otherwise demonstrating remorse or new behavior, their terminations were reduced to suspensions.³⁵

³¹ TR 244, 258.

³² R. D. & O. at 6, 11; RX 10 at 32-33.

³³ TR 258-261.

³⁴ R. D. & O. at 6.

³⁵ *Id.* at 7-8.

Finally, Coxen points out that when Rezagholi testified at the state panel hearing, she mentioned the December 28, 2000 disagreement that he had with Dunn. Since this argument led to his filing the December 30, 2000 STAA complaint, that STAA complaint must have been a factor in the decision to terminate his employment. But as the ALJ notes, the record of the state panel proceedings clearly shows that when Rezagholi mentioned the December 28 incident, she was merely citing it as an example of Coxen's past conduct toward UPS management. She did not tell the state panel that Coxen had filed a STAA complaint.³⁶ Furthermore, Rezagholi, Dunn, and Johnson testified that the December 30, 2000 STAA complaint had nothing to do with their decision to terminate his employment.³⁷

CONCLUSION

Substantial evidence supports the ALJ's finding that Coxen did not prove by a preponderance of the evidence, as he must, that UPS terminated his employment because he filed the December 30, 2000 STAA complaint. Put another way, the record does not support Coxen's various theories that UPS's reason for terminating his employment was a pretext. Therefore, we must **DENY** Coxen's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

³⁶ *Id.* at 8.

³⁷ TR 278, 340-341, 382.