U.S. Department of Labor

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

In the Matter of:

WILLIAM E. GRIFFIN,

COMPLAINANT,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE d/b/a CF MOTORFREIGHT,

RESPONDENT.

ARB NO. 97-148

ALJ CASE NOS. 97-STA-10
97-STA-19

DATE: January 20, 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), 49 U.S.C.A. §31105 (West 1996). Complainant, William E. Griffin (Griffin), alleged that his employer, CF Motorfreight (CF), violated the STAA when it removed him from driving duties, discontinued his pay, and blacklisted him with another employer.[1/] In a Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) found that CF had a legitimate, nondiscriminatory reason for taking these actions and recommended that the complaint be denied. The ALJ's findings of fact, R. D. and O. at 3-12, are supported by substantial evidence on the record as a whole, and therefore are conclusive. 29 C.F.R. §1978.109(c)(3). We accept the ALJ's recommendation and dismiss the complaint.

BACKGROUND

Griffin began working for CF as a line haul driver in 1984. RX 4 at 27.[2/] In 1995, Griffin complained that tractors and trailers which he was assigned to drive were unsafe in various ways. RX 4 at 68-188. He filed a grievance under the applicable collective bargaining

---

[1/] CF initially placed Griffin on medical leave of absence with pay and later changed his status to medical leave of absence without pay.

[2/] "RX" refers to Respondent's Exhibit; "CX" refers to Complainant's Exhibit, and "T." refers to the transcript of hearing. Griffin appeared *pro se* and did not testify at the hearing. His deposition is in the record as RX 4 and RX 34.

agreement concerning the assignment of the allegedly unsafe equipment. He also filed a STAA complaint, No. 96-STA-8 (the earlier STAA complaint), in which he alleged numerous incidents of harassment concerning tractor trailer units with mechanical defects and improperly loaded freight. R. D. and O. at 9.[3/] Griffin continued to work as a truck driver for CF during the pendency of the grievance and the earlier STAA complaint.

CF's Manager of Human Resources, Brad Eagelston, met with Griffin on July 5, 1995 to discuss his harassment complaint. T. 135. Griffin said that there was a conspiracy among CF supervisors to load his trailers improperly and assign him unsafe equipment. T. 135-136. When Griffin again complained of this type of harassment in 1996, Eagelston joined him during a pre-trip inspection of the assigned tractor and trailer. T. 139. The inspection revealed no problems with the equipment. Griffin accused Eagelston of arranging for the equipment to meet safety regulations so as to debase Griffin's complaints, but Eagelston assured Griffin that he had not done so. *Id.*

In the course of the proceedings on the earlier STAA complaint, Griffin wrote a letter on May 12, 1996 to the presiding ALJ, Mollie Neal, in which he presented his view of CF's harassment. RX 1. Griffin listed 51 persons allegedly involved in harassing him, including employees of CF, the Occupational Safety and Health Administration, which initially investigated his STAA complaint, the Federal Highway Administration, the Equal Employment Opportunity Commission (EEOC), the National Labor Relations Board (NLRB), United States Senator Sam Nunn's office, United States Representative Cynthia McKinney's office, and of various businesses and institutions in Atlanta, Georgia, where Griffin resides. *Id.* Griffin alleged, among other things, that CF was responsible for the mislabeling of his daughter's photograph in the program for a debutante ball, RX 1; RX 4 at 390-392; RX 34 at 189, for his music teacher ceasing to teach him, RX 1; RX 4 at 378, and for the fact that he no longer was being asked to chaperon events for his children's school band. RX 1; RX 4 at 382-383. He alleged that an EEOC employee was investigating him and that other EEOC investigators were posing as employees of several Atlanta stores. RX 1; RX 4 at 400.

Eagelston saw a copy of the letter to ALJ Neal and immediately sought a professional's help in determining whether Griffin posed a potential danger. T. 140-141. A psychiatrist, Richard Wyatt, reviewed the letter and provided a written opinion that

> collectively his claims of harassment are so numerous and unusual that they raise the question if Mr. Griffin has developed a delusional disorder with his employer as its center. This situation raises a concern for potentially dangerous behavior during employment activities, *e.g.*, truck driving.

[3/] Case No. 96-STA-8 is pending before this Board on review of a recommended decision and order by a different ALJ.

RX 2; T. 141-142. Dr. Wyatt recommended that Griffin undergo a neuropsychiatric examination before returning to work. RX 2.

Eagelston was present during Griffin's deposition in his earlier STAA complaint on May 20 and 21, 1996. Griffin made statements about his driving that disquieted Eagelston. Referring to a conversation with the District Attorney, Griffin said, "So it looks like what they want is an accident, we have to give them an accident." RX 4 at 142.[4/] Later, Griffin stated, "Eventually I'm going to go out there and I'll probably have an accident. There may be one day that I've missed something." RX 4 at 199. Also, Griffin said, "It's just like ValuJet. You just can't get anybody to do anything and then after people get hurt or somebody is killed then everybody wants to get up and do something. Same situation." RX 4 at 340.

Griffin also made other alarming comments at the deposition. Off the record, Griffin commented that CF's counsel, Deborah Craytor, was responsible for breaking into his house and stealing his car and some documents. T. 143-144. Also, Griffin asked whether Craytor formerly worked for the NLRB, which is one of the agencies that Griffin accused of conspiring with CF to harass him. T. 144; RX 1.

These remarks led Eagelston to consult a company, IMG, whose specialty is assessing whether employees are a threat. T. 38, 144-145. IMG's Dr. Harley Stock, a board certified forensic psychologist, RX 10, reviewed Griffin's letter to ALJ Neal, statements Griffin made at his deposition, and the informal assessment made by Dr. Wyatt, and concluded that there was a "significant issue of whether [Griffin] was fit for duty." T. 54-56. Stock suggested that CF remove Griffin from driving, with continued pay, pending a full psychological evaluation. T. 57, 145. Stock assisted CF in writing a letter advising Griffin that he was being taken out of driving service effective May 28, 1996. T. 58; RX 12.

Under protest, Griffin signed a "consent for fitness for duty evaluation" form. RX 13.[5/] Stock arranged for a neuropsychologist to conduct psychological tests of Griffin. T. 59. The tests had only marginal validity because Griffin "tried to place himself in an unrealistically favorable light." T. 64; RX 25 at 9. When taking one of the tests, Griffin was very defensive and denied even minor faults, shortcomings, or mistakes. RX 25 at 9-10. Another test showed

---

[4/] See R. D. and O. at 10-11 for the ALJ's discussion of Griffin's unsuccessful attempt to delete the words, "we have to give them an accident" as a transcription error. At the hearing in this case, Griffin accused CF of bribing the recording company for including those words in the transcript. T. 178.

[5/] Stock explained to Griffin that the results of the psychological tests and the clinical interview would be discussed in a report released to CF and that the "normal psychologist/patient relationship is waived, confidentiality and privilege do not exist." T. 51; RX 13. Stock also informed Griffin of the possible outcomes of the psychological evaluation, including that he could be found temporarily unfit for duty, with mandatory counseling prior to returning to work. T. 47, 52, 65-66; RX 13.

that Griffin was unusually insensitive to social cues and may not understand other people's reaction toward him. *Id*. at 10.

Stock conducted an interview and forensic threat assessment with Griffin for more than seven hours. T. 60. After reviewing the results of the psychological tests and conducting the interview, Stock diagnosed Griffin with delusional disorder, paranoid type. RX 25 at 10. Stock explained that in "the persecutory type of delusional disorder, the individual believes that they are being spied upon, followed, harmed, harassed, that their life is being impinged . . . . these people can have potential for violence . . . because they believe that they are harmed, harassed, or hurt, and then they act out against those they believe are aggressing against them." T. 68. Stock concluded that Griffin "was temporarily unfit for duty under the [Federal Motor Carrier Safety Regulations] criteria and that he needed mandatory psychological counseling." T. 71; RX 25 at 11. Stock believed that Griffin's mental disorder was likely to interfere with his ability to safely operate a vehicle because Griffin attributed his problems to CF and his coworkers. In addition, Stock found that:

> because of his paranoid delusions [Griffin] believed that other cars on the road were following him, and this could be anybody. And my concern was that a motorist who happened to be on the highway heading in the same direction of Mr. Griffin for a long period of time, who got off on a rest stop and then reappeared behind Mr. Griffin, that he would clearly interpret that as someone who was following him and that he may use his vehicle to harm them.

T. 71.

In an interim report, Stock recommended that CF find Griffin temporarily unfit for driving duty pending mandatory psychological treatment. RX 15 at 3. Stock recommended two local psychiatrists who had agreed to treat a person with Griffin's diagnosis. T. 76.

In a meeting and in a letter handed to Griffin, Eagelston stated that effective June 17, 1996, CF would designate Griffin's leave of absence as a qualified medical leave and make contributions to the Health and Welfare plan for up to 12 weeks, make pension payments for up to 12 weeks, continue his pay for up to 12 weeks, and reimburse any of the cost of the recommended psychiatric treatment that is not covered under his health benefits plan. RX 17; T. 149. As Stock had suggested, CF made these promises contingent upon Griffin (1) making arrangements for an appointment with one of the recommended psychiatrists, (2) participating in a treatment program as recommended by the selected psychiatrist, (3) signing a release allowing the treating psychiatrist to advise CF that Griffin is participating in the treatment program, and (4) not returning to CF's Atlanta Service Center until he was notified of his return-to-work date. RX 17; T. 150-151. *Id*. The letter stated that the company would discontinue Griffin's pay if CF did not receive written confirmation from either of the recommended doctors

indicating that Griffin had scheduled an appointment, or if Griffin did not continue to participate in the recommended treatment program. RX 17.[6/]

Under the applicable collective bargaining agreement, the union had the right to have Griffin examined by another psychologist or physician. T. 152; RX 14 at Article 46. Griffin did not seek treatment with either of the two psychiatrists recommended by Dr. Stock or seek a second opinion as provided in the collective bargaining agreement. T. 153. The company discontinued paying Griffin, effective October 12, 1996, because he did not seek or undergo treatment. T. 154; RX 26. After that date, Griffin remained on medical leave without pay. T. 154.

Griffin applied to work as a driver for Super Service, which sent CF a form to verify Griffin's employment. T. 157. CF completed the form by indicating only Griffin's dates of employment, from November 1984 to the present (on leave). RX 31 and RX 34, Ex. 1. Super Service hired Griffin on October 31, 1996. T. 123.

In early November, CF followed up with a letter advising Super Service that "we believe we are obligated to elaborate on Mr. Griffin's status with CF Motor freight. Mr. Griffin is currently on an unpaid medical leave of absence, as a result of medical information indicating that he is temporarily unfit for service under the Federal Motor Carrier Safety Regulations." RX 32. The personnel director for Super Service, Steve Nail, questioned Griffin about the follow up letter, and Griffin replied that CF was trying to kill him and that he had several suits pending against the company. T. 124, 126. Nevertheless, Griffin remained employed by Super Service until January 7, 1997, when he was fired for insubordination and willful disregard, including refusing a dispatch, acting insubordinate toward his dispatcher, and driving 260 miles out of route. T. 127-128; CX 31.

Griffin filed this complaint, alleging that because of his earlier safety complaints and earlier filed STAA complaint, CF removed him from driving service, discharged him, and blacklisted him with Super Service.

DISCUSSION

[6/] Stock spoke with Griffin on the telephone about the test results, T. 78, and also sent him a requested written interpretation of the psychological tests and forensic psychological evaluation. RX 28. Griffin said he did no receive the letter and Stock resent it by certified mail. T. 78. There were three attempts to deliver the certified letter but it was returned unclaimed. *Id.* Stock also sent a later certified letter but it too was returned unopened. *Id.*

The ALJ explained to Griffin, who appeared *pro se*, that as the complainant, he bore the burden of establishing a violation of the STAA.[7/] *See, e.g.*, T. 22-23. Notwithstanding the ALJ's explanations, Griffin maintained that "if respondent can't justify relieving me from duty, I feel I don't have to take . . . the stand, because I feel like I don't have to defend myself if they don't have a case. Now, if testimony reveals that they do have a case against me, I will take the stand." *Id.* T. 28. The ALJ explained that Griffin appeared to have a misimpression concerning the burden of proof and reiterated that "[t]he burden is upon you to come forward with evidence. There is no burden upon the respondent to come forward with any evidence. . . in this case." Griffin, nevertheless, chose not to testify.

The ALJ deferred ruling on CF's motion for a directed verdict, T. 24-25, and CF presented testimony and documentary evidence. In light of the fact that CF presented its case, it is not particularly useful here to analyze whether the complainant established a *prima facie* case. *Compare* R. D. and O. at 12-14. There is no question that CF managers, including Eagelston, were aware of Griffin's safety complaints and earlier STAA complaint. CF clearly took adverse actions when it removed Griffin from service and discontinued his pay.[8/] The critical inquiry is whether retaliatory animus motivated these adverse actions.

The applicable Federal Motor Carrier Safety Regulations provide that "A person is physically qualified to drive a commercial motor vehicle if that person . . .(9) Has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his ability to drive a commercial motor vehicle safely." 49 C.F.R. §391.41(b) (1996). Therefore a regulatory basis exists for an employer to examine a truck driver's psychological fitness to drive, and if justified, to remove the driver from service.

We are mindful that in some contexts, an employer's "order that [a complainant] undergo a psychological evaluation" of fitness to work may be based "solely on retaliatory animus for his protected activity." *Robainas v. Florida Power & Light Co.,* Case No. 92-ERA-10, Sec. Dec. and Remand Ord., Jan. 19, 1996, slip op. at 5 (under the analogous employee protection provision of the Energy Reorganization Act of 1974). In *Robainas*, the employer ordered a psychological evaluation of fitness for duty when an employee threatened to go to the press with his safety complaint. The Secretary found that the employer's asserted reason for the evaluation, that it feared the employee would engage in sabotage, was a pretext for discrimination because

---

[7/] The STAA provides in relevant part, 49 U.S.C.A. §31105(a)(1):

> A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--
>
> (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding[.]

[8/] On the facts of this case, we find that CF's letter advising Super Service that Griffin was on a medical leave of absence was not an adverse action under the STAA. *See* R. D. and O. at 13. In addition, we find that CF did not have a discriminatory motive in providing this information.

the employee was not violent and had never threatened sabotage or harm. Slip op. at 9-10. *See also Robainas v. Florida Power & Light Co. (Robainas II)*, Case No. 92-ERA-10, Sec. Order Denying Motion for Reconsideration, Apr. 15, 1996, slip op. at 6 ("The record does not substantiate that Florida Power observed, or that Robainas engaged in, abnormal or aberrant behavior suggestive of any risk to public health and safety.").

In a different case, however, the Secretary found that the employer adequately explained the reasons for examining an employee's psychological fitness for duty because the employee's immediate supervisor, union officials, and managers had observed the employee's unusual statements and behavior, including excited and hostile reactions. *Mandreger v. Detroit Edison Co.*, Case No. 88-ERA-17, Sec. Dec. and Order, Mar. 30, 1994, slip op. at 16. *See also Robainas II,* slip op. at 4 (noting that in *Mandreger*, referral to counseling "was warranted because the testimony and evidence substantiated Mandreger's aberrant behavior in the workplace.").

Robainas and *Mandreger* show that we examine the evidence in each case carefully to determine if the employer observed unusual or threatening behavior prior to referring an employee for a psychological evaluation of fitness for duty. In this case, CF observed unusual behaviors that justified removing Griffin from service pending a psychological evaluation, including Griffin's letter to ALJ Neal, and his statements at the deposition.

Griffin's letter to the ALJ listed numerous witnesses who may have knowledge of CF's possible discrimination against him, including (1) employees of businesses in Atlanta who allegedly were "spies" for the EEOC, (2) EEOC employees who allegedly investigated and spied on Griffin, (3) FHA and NLRB officials, and (4) employees of a United States Senator and a member of the United States House of Representatives. CF rightly was concerned about the allegations that Griffin observed EEOC employee John Fitzgerald in numerous places (other than an EEOC office) and that Fitzgerald was "influenced by [CF] and is harassing my family in behalf of [CF]." RX 1 at 5. The letter outlined a broad conspiracy that reached into many facets of Griffin's and his family's life, including CF's alleged inducement to his music teacher to cease giving Griffin music lessons, RX 1 at 6-7, CF's alleged large donation to the local high school band to induce the band to not include Griffin in activities as a member of the band's booster club, *id*. at 7, the implied involvement by CF in not granting Griffin's son an appointment with his high school guidance counselor and in the failure of colleges to receive documents from the guidance office, *id.*, and CF's involvement in some mishaps at the debutante ball in which Griffin's daughter was a sub-debutante. *Id.* at 8. We agree with the ALJ that a lay person lacking psychological training justifiably would be concerned about Griffin's fitness to drive in light of the broad conspiracy he alleged. R. D. and O. at 15.

The ALJ also found that Griffin's deposition statements justified examining his fitness to drive, and we agree. *See* R. D. and O. at 15. Griffin drove heavy tractor trailer units that can cause great harm if not operated safety. *See* T. 55 (Dr. Stock noted that Griffin "drove a truck over the road and obviously had an instrument of potential lethality"). At the deposition, Griffin spoke about the need for accidents before a company will ensure safety and implied that he could

arrange an accident. In addition, Griffin articulated his belief that CF's attorney had conspired to arrange a break-in at Griffin's house and to steal documents and his car. *See* R. D. and O. at 15. CF justifiably was worried about Griffin's psychological state.

In this case, we find that the decision to assess Griffin's fitness under the motor carrier regulations was both legitimate and prudent, as expert opinion bore out. The first expert CF consulted, psychiatrist Wyatt, reviewed the letter to the ALJ but did not meet with Griffin. On the basis of only the letter, Wyatt opined that Griffin may have a delusional disorder and the potential for dangerous behavior during employment activities. RX 2.

CF did not stop with Wyatt's opinion, but rather arranged for Dr. Stock to review all the relevant documents and examine Griffin personally. Griffin objects that Stock, who is not a physician, improperly assessed whether he was medically fit to drive. The motor carrier regulations do not require that only a medical doctor may assess medical fitness to drive in the context of a driver's possible mental disorder. See 49 C.F.R.§391.43(a)(1) ("[T]he medical examination shall be performed by a licensed medical examiner as defined in §390.5 of this subchapter.") and 49 C.F.R. §390.5 (*"Medical examiner . . .* includes *but is not limited to*, doctors of medicine, doctors of osteopathy, physician assistants, advanced practice nurses, and doctors of chiropractic.") (emphasis added). Stock is a board certified forensic psychologist who specializes in assessing the threat posed by employees, R. D. and O. at 3, and the ALJ properly relied upon his testimony and documentary evidence. In turn, Stock relied upon the extensive psychological tests administered by a qualified neuropsychologist and a lengthy personal interview with Griffin to conclude that Griffin had a delusional disorder, paranoid type. Like the ALJ, we accept Stock's unrefuted expert testimony.

Stock advised CF to remove Griffin from service because he posed a danger to other drivers and to continue to pay him so as to minimize the disruption to his life. T. 76, 147. CF placed Griffin on a medical leave of absence under the Family and Medical Leave Act of 1993, codified at 29 U.S.C. §2611-2654. Neither that act nor the applicable collective bargaining agreement, RX 14, required CF to pay Griffin while on medical leave. Indeed, company policy was not to pay employees on medical leave. T. 151. Nevertheless CF continued Griffin's pay, in accordance with Stock's advice. It seems unlikely that a company bent on getting rid of an employee because of his safety complaints would go out of its way to pay him when it was not required.

Stock also advised, and CF agreed, that Griffin's continued pay should be contingent upon his seeking and receiving psychiatric treatment. RX 17; T. 76, 150. There is no doubt that Griffin refused to seek treatment. Therefore, we find that the company legitimately ceased paying Griffin and placed him on medical leave without pay.

Griffin remained on medical leave without pay through the time of the hearing, T. 7-8, even though the Family and Medical Leave Act requires only 12 weeks of unpaid medical leave. 29 U.S.C. §2612(a) (Supp. V 1993). Again, CF's actions were not consistent with a desire to

eliminate an employee because he made safety complaints. Therefore we affirm and ALJ's findings and DISMISS the complaint.[9/]

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

[9/] Griffin made other arguments in his written "closing argument," filed post hearing, that we have considered and rejected.