U.S. Department of Labor

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

In the Matter of:

MARION CARNEY, **ARB CASE NO. 04-157**

COMPLAINANT, **ALJ CASE NO. 03-STA-48**

v. **DATE: May 31, 2007**

PRICE TRANSPORT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:
Marion Carney, *pro se*, Dothan, Alabama

FINAL DECISION AND ORDER

Marion Carney filed a complaint with the United States Department of Labor alleging that his employer, Price Transport (Price), violated the employee protection (whistleblower) provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2006), when it terminated his employment on February 10, 2003. After a hearing, a Department of Labor Administrative Law Judge (ALJ) recommended dismissal of Carney's complaint. We affirm.

BACKGROUND

The ALJ thoroughly discussed the facts of this case as presented at the hearing on April 28 and 29, 2004. We summarize briefly.

Price hired Carney as a driver of commercial motor vehicles in October 2002 and fired him on February 10, 2003, after Price discovered that Carney had tied off the turbo hose on one of Price's trucks. Tr. 218-223. Price is engaged in interstate delivery of goods by tractor-trailer throughout the continental United States. According to D. E. Price, the firm's owner, 40 percent of the firm's deliveries are time-sensitive. The firm maintains a place of business in Winter Haven, Florida. The majority of the firm's business is hauling fruit, produce and frozen juice from Florida and transporting chicken and textiles from Douglas, Georgia to Los Angeles, California. Tr. 458.

Pursuant to U.S. Department of Transportation (DOT) regulations in effect at the time Carney was driving for Price, a truck driver could be on duty no more than 15 hours following an 8-hour rest period. 49 C.F.R. § 395.3(a)(2)(2002). Of those fifteen hours, drivers could drive no more than 10 hours following an 8-hour rest period. They also could not exceed 70 hours of on-duty service in an 8-day period. 49 C.F.R. § 395.3(b)(2). DOT regulations also required that drivers keep logs of their duty status for each 24-hour period. 49 C.F.R. § 395.8(a). Because D. E. Price could not control his drivers when they were on the road, he required that each driver contact the firm between 8 a.m. and noon daily to report his progress. Tr. 76-78.

Carney testified before the ALJ that Hope McGuire, Price's clerk, showed him how to falsify his logs in November 2002 after she discovered hours-of-service violations in his logs. Tr. 253-264. McGuire, however, testified that she never told any driver to falsify his logs. Tr. 111-122. Willie Fantroy, who also drove for Price, estimated that he had falsified his logs about 5% of the time to cover up the fact that he had driven illegally, but he averred that Price never asked him to drive illegally. Fantroy also testified that approximately 25% of the time he did not report his true location when he called Price because he was taking time for personal pursuits. Tr. 194-201.

On December 26, 2002, Carney picked up a load of tomatoes in Palmetto, Florida, scheduled for delivery to Blaine, Washington, on December 31. On December 27, Carney called D. E. Price from his home in Dothan, Alabama, but failed to call in on December 28. On December 29, Carney called D. E. Price from a truck stop near Dothan to report a malfunctioning alternator that required repair. D. E. Price asked him why he had not called sooner, but Carney did not explain his failure to call. He then told Carney,

"If you're late with that load of tomatoes, after you've been lost for 48 hours, and it costs any money, it's going to be taken out of your payday." Tr. 468. Carney did not reach Blaine until January 2, but Price was not charged for a late delivery because the receiver was closed for the New Year's Day holiday and therefore unable to take delivery before January 2.

D. E. Price testified that Carney drove illegally on his trip to Blaine after wasting 48 hours in Dothan when he should have been on the road and that Carney falsified his log book entry to cover up the hours-of-service violation. Tr. 473-474. According to D. E. Price, Carney could have completed the trip from Dothan to Blaine legally if he had begun driving as soon as his alternator was repaired. D. E. Price denied telling Carney to falsify his log entries. Tr. 472-477; RX-4, p. 42.

Carney always drove the same truck, which was worth approximately $101,000. Price had an extended warranty on the truck, which could be voided if anyone tampered with the engine or turbo hose. Tr. 477-481. It could cost from $10,000 to $15,000 to repair a turbo charger. D. E. Price testified that Carney complained after every trip that his truck had insufficient power. Tr. 481-484.

On February 10, 2003, after Carney returned from a delivery, the mechanic who was responsible for routine maintenance of Price's fleet, inspected Carney's truck and called D. E. Price's attention to a tied-off turbo hose. D. E. Price testified that when he accused Carney of tampering with the engine, Carney admitted that he had tied off the hose. Price immediately fired him. Carney, however, remained at Price's office, pleading to have his job back. Tr. 484-488. D. E. Price had instructed all his drivers not to tamper with the truck engines and had previously terminated another driver for modifying the turbo hose on his truck. Tr. 551-552. At the hearing Carney denied that he tampered with the turbo hose. Tr. 268-269.

After his termination, Carney wrote to Price, stating "what I did would not have caused damage, but nevertheless, I was wrong. We all make mistakes and I am real sorry for what I have done . . . ." He also stated that he would pay for damage "caused by me." Tr. 381-389; RX-6, pp. 1, 6. At the hearing Carney testified that he made these statements solely to get his job back and that he did not know who modified the turbo hose. Tr. 389-391.

In December 2002 Carney first complained to Price about unsafe driving conditions, including driving long hours and exceeding the hours of service requirement. Tr. 223. Also, in January 2003, after making the Blaine, Washington delivery for Price, Carney called the DOT safety line to report excessive miles driven and illegal loads. Tr.

271-273. Carney also complained to D. E. Price about truckloads of produce that he transported from California because he had to "run harder" driving produce from the west to east coast, and he became tired while waiting for the produce to be loaded onto his truck. Tr. 245-250. D. E. Price did not recall receiving a letter from Carney complaining about hours-of-service violations, but he did recall that Carney informed him that he had reported Price to DOT. Tr. 488-490.

Carney filed this whistleblower action with the Occupational Safety and Health Administration (OSHA) in February 2003, alleging that his termination violated the whistleblower protection provisions of the STAA. As required by regulation, OSHA investigated Carney's claim and found it lacked merit. ALJX-1. Carney then requested a hearing with the Office of Administrative Law Judges. *See* 29 C.F.R. § 24.4. The ALJ conducted a hearing on April 28 and 29, 2004, and issued a Recommended Decision and Order (R. D. & O.) on July 29, 2004. The ALJ concluded that Price fired Carney for reasons unrelated to his protected activity and dismissed his complaint. Carney thereafter filed a pro se petition for review of the ALJ's recommended decision.[1]

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). 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). 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. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. U.S. 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). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (*quoting Richardson v. Perales*, 402 U.S. 389, 401 (1971)). 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. 5 U.S.C.A. § 557(b) (West 1996). *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

[1] It was not necessary for Carney to file a petition to invoke the Administrative Review Board's review of the R. D. & O because the Board automatically reviews all ALJs' recommended STAA decisions. 29 C.F.R. § 1978.109(c)(1).

DISCUSSION

1. The ALJ did not err in denying Carney's procedural requests.

Carney alleges that the ALJ did not require Price to comply with his discovery requests or impose sanctions for the firm's failure to comply. In this regard, Carney contends that Price destroyed "bills of lading, fuel receipts, averages of each driver's miles driven per week and the beginning and current odometer reading for Willie Fantroy's truck." In his Order Denying Complainant's Motions [for Default Judgment and Summary Judgment] issued on February 19, 2004, the ALJ stated "that if [Carney] had any evidence to support his allegation that Respondent deliberately or unlawfully destroyed documentation he would be allowed to produce such evidence at the formal hearing." Order at 2. Furthermore, in his Order Compelling Discovery issued March 5, 2004, the ALJ reiterated that the parties would be given the opportunity to present evidence on "the alleged destruction of fuel tickets, bills of lading and/or logs" at the hearing, and stated that "[a]n adverse inference will be invoked if it is determined that such documentation has been deliberately destroyed to avoid its production and is relevant and material to Complainant's case." Order at 4. When Price produced some of the missing documents at the hearing, the ALJ stated that the adverse inference rule still applied, but that even with the adverse inference it was up to Carney to show that these documents were relevant to his case. Tr. at 20-21. The documents Carney requested appear to relate to the issue of protected activity, an issue that the ALJ resolved in Carney's favor. Therefore, if the ALJ erred by not invoking an adverse inference, such error was harmless. Carney offered no evidence at the hearing in support of his allegation the Price had deliberately destroyed documents.

2. Carney did not establish that Price's legitimate, nondiscriminatory reason for firing him was pretext for a discriminatory firing in violation of the STAA.

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." 49 U.S.C.A. § 31105(a)(1)(A). At issue are the Department of Transportation's Hours of Service regulations for drivers, 49 C.F.R. Part 395 (2002).

To prevail on this STAA claim, Carney must prove by a preponderance of the evidence that he engaged in protected activity, that Price was aware of the protected

activity, that Price took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action. *BSP Trans, Inc.*, 160 F.3d at 45; *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Regan v. Nat'l Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003). If the employee fails to prove any one of these elements, the claim must be dismissed. *Eash v. Roadway Express*, ARB No. 04-036, ALJ No. 1998-STA-28, slip op. at 5 (ARB Sept. 30, 2005).

Substantial evidence in the record supports the ALJ's finding that Carney reported safety concerns regarding his hours of service to both D. E. Price and the DOT. He properly concluded that Carney's complaints constituted protected activity. R. D. & O. at 39-40; 49 U.S.C.A. 31105(a)(1)(A). Moreover, there is no dispute that D. E. Price was aware of Carney's complaints about hours of service violations, that Carney's termination was adverse action, and that Price gave a legitimate, nondiscriminatory reason for terminating Carney's employment. The burden of proof, therefore, shifts back to Carney to prove by a preponderance of the evidence that Price's reason for firing him was pretext and that Price intentionally discriminated against him because of his protected activity. *Calmat Co. v. U.S. Dep't of Labor*, 364 F.3d 1117, 1122 (9th Cir. 2004); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 095, ALJ No. 02 STA-35, slip op. at 15-16 (Aug. 6, 2004).

After reviewing the record, we conclude that the ALJ fairly and thoroughly analyzed the witnesses' testimony and that that there is substantial evidence in the record to support the ALJ's finding that Price fired Carney for the legitimate business reason that he "tampered with [Price's] equipment which could void a mechanical warranty or otherwise cause severe damage." R. D. & O. at 42-43. In reaching this conclusion, the ALJ found credible the testimony of both Price and Fantroy that clamping turbo hoses increases pulling power in mountainous regions, but creates a likelihood of equipment failure, and that Carney and other employees had been warned repeatedly not to tamper with the turbo hose. R. D. & O. at 42.[2] The ALJ found that Carney's attempt to explain

[2] Carney has also filed with the Board a Motion to Allow Newly Discovered Evidence and to Exclude Testimony of Willie Fantroy. When deciding whether to consider new evidence, the Board ordinarily relies upon the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (2006), which provides that "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." Carney has not established that the evidence concerning Fantroy was not available at the time of the ALJ's hearing. In fact, he admits that his attorney had the evidence and

his apparent admission to clamping off the turbo hose as an attempt to get his job back "strains credulity beyond reason." R. D. O. at 31.[3] Also, the uncontroverted testimony of both D. E. and Lawanda Price that the firm fired another employee, who had not engaged in protected activity, for the same offense that Carney committed is substantial evidence that the firm did not subject Carney to disparate treatment. R. D. & O. at 42. Finally, the ALJ found no evidence that Price exhibited discriminatory animus toward Carney in response to his protected activity. R. D. & O. at 42. Price never disciplined Carney for any of his complaints about hours of service, and, according to Carney's own testimony, Price directed him to return to work in January 2003, after Price knew that Carney had contacted DOT. R. D. & O. at 41.

Accordingly, we concur with the ALJ that Price terminated Carney for legitimate, non-discriminatory reasons unrelated to his protected activity.

---

failed to introduce it. Motion at p. 4. Even if we were to consider this additional evidence, Carney is raising arguments with regard to Fantroy's testimony for the first time on appeal. Under our well-established precedent, we decline to consider arguments that a party raises for the first time on appeal. *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-23, slip op. at 7 (ARB Sept. 29, 2006). We therefore decline to consider this additional evidence.

[3] We further note that while Carney testified that he had not tampered with the equipment, he made no attempt to show that D. E. Price did not believe that Carney had tied off the turbo hose. To establish pretext, it is not sufficient for a complainant to show that the action taken was not "just, or fair, or sensible . . . rather he must show that the explanation is a phony reason." *Gale v. Ocean Imaging & Ocean Res., Inc.*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 10 (ARB July 31, 2002) (citing *Kahn v. U.S. Sec'y of Labor*, 14 F.3d 342, 349 (7th Cir. 1994)). *Accord Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000) ("[t]his court does not sit as a super-personnel department and will not second-guess an employer's decisions"); *Skouby v. The Prudential Ins. Co.*, 130 F.3d 794, 795 (7th Cir. 1997) (same); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-1508 (5th Cir. 1988) (discrimination statute "was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers;" statute cannot protect employees "from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated"). Thus, even if Carney did not tie off the hose, since he did not establish that D. E. Price did not believe that he tied off the hose, Carney has failed to carry his burden of establishing that the non-discriminatory reason Price proffered was a pretext for discrimination.

CONCLUSION

Substantial evidence in the record as a whole supports the ALJ's findings of fact, and the ALJ properly applied the relevant law. Carney failed to prove that Price fired him in retaliation for his making a protected safety complaint under the STAA. Therefore, for the reasons stated in the R. D. & O., summarized here, we **DISMISS** Carney's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge