



In the Matter:

MARK A. POLL,

ARB CASE NO. 99-110

COMPLAINANT,

ALJ CASE NO. 96-STA-35

v.

DATE: June 28, 2002

R. J. VYHNALEK TRUCKING,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection (whistleblower) provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 1997), and the regulations set out at 29 C.F.R. Part 1978 (2001). The relevant federal motor carrier safety administration regulations appear at 49 C.F.R. Parts 395 and 396 (2001).

Complainant Mark Poll filed a complaint of unlawful discrimination against his former employer R. J. Vyhnalek Trucking in October 1995, which after investigation the Regional Administrator for the Occupational Safety and Health Administration found to be without merit. Poll timely appealed the finding. An Administrative Law Judge (ALJ) convened a hearing on April 15, 1999, and on July 16 issued a Recommended Decision and Order (R.D.O.). The ALJ recommended that the complaint be dismissed based upon findings (i) that Poll failed to establish by a preponderance of the evidence that the owner of the respondent trucking company, Robert Vyhnalek, discharged him because of protected activity and (ii) that Mr. Vyhnalek in fact discharged Poll for a legitimate, nondiscriminatory reason. Neither party has filed briefs on review of the ALJ's R.D.O.¹

¹ Under 29 C.F.R. § 1978.109, an ALJ's recommended decision is forwarded to the Administrative Review Board (ARB or the Board) immediately upon issuance together with the record in the case, and the ARB issues a final agency decision and order based on the record, including the ALJ's recommended decision. Parties "may" file briefs in support of or in opposition to the ALJ's recommended decision within 30 days of its issuance. Even in the event

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Standard of Review

Pursuant to the STAA implementing regulation at 29 C.F.R. § 1978.109(c)(3), an ALJ's factual findings are conclusive if they are supported by substantial evidence on the record considered as a whole. *BSP Trans., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

In reviewing an ALJ's conclusions of law, the Administrative Review Board, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C.A. § 557(b) (West 1996), quoted in *Goldstein v. Ebasco Constructors, Inc.*, Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992 (applying analogous employee protection provision of Energy Reorganization Act, 42 U.S.C. § 5851); see 29 C.F.R. § 1978.109(b). The Board accordingly reviews questions of law *de novo*. See *Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir.1993); *Roadway Express, Inc. v. Dole*, 929 F.2d at 1063. See generally *Mattes v. United States Dep't of Agriculture*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano*, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's recommended decision by higher level administrative review body).

Background

Overview

Robert Vyhnalek has owned R. J. Vyhnalek Trucking for nearly 30 years. The company hauls freight, for example meat and produce in refrigerated trailers. Hearing Transcript (T.) 94-95. It operates a fleet of 21 truck tractors and 40 trailers serving about 40 states, and maintains a contingent of 21 drivers and seven miscellaneous employees. *Id.* Vyhnalek employed Poll from July 6, 1995, though August 26, 1995, when he discharged him. Poll's final day of actual work was August 19.

Poll charges that, as a condition for receiving his paychecks, Mr. Vyhnalek required him to falsify his driver's daily logs and driver's vehicle inspection reports in order to show compliance with federal motor carrier safety regulations and that he complained to Mr. Vyhnalek about the practice. The applicable regulation governing maximum driving time provides that

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that the parties choose not to file briefs, the ARB will review the record and issue a final agency decision. *Tucker v. Connecticut Winpump Co.*, ARB Case No. 02-005, ALJ Case No. 2001-STA-53, Fin. Dec. and Ord., Mar. 15, 2002, slip op. at 4.

no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive: (i) More than 10 hours following 8 consecutive hours off duty; or (ii) For any period after having been on duty 15 hours following 8 consecutive hours off duty. 49 C.F.R. § 395.3(a). Another applicable regulation governing hours worked provides that no motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, for any period after having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week. 49 C.F.R. § 395.3(b). Drivers are required to record their duty status as provided under 49 C.F.R. § 395.8. Failure to complete or preserve these records and making false reports of duty activities render drivers and carriers liable to prosecution. 49 C.F.R. § 395.8(e). Drivers must conduct inspections of their vehicles and document safety defects and deficiencies under 49 C.F.R. §396.11 and 49 C.F.R. § 396.13.

Poll testified as to the extent of the alterations of the logs and reports required by Vyhnalek Trucking: “Changing mileage where the mileage was either more to changing it to less mileage, changing the amount of drive-time hours, changing locations as to where I was according to what my actual log was and in certain cases I was just required to completely falsify the whole log.” T. 11-12. According to Poll, Vyhnalek Trucking prohibited drivers from documenting equipment defects and deficiencies on the driver’s vehicle inspection reports. Poll testified that on one occasion he operated a truck tractor with a brake booster or caliper that had broken loose between 200 and 250 miles before Mr. Vyhnalek repaired it and that Mr. Vyhnalek refused to permit him to report the condition on the vehicle inspection report. T. 12-14.

Poll also testified that although he maintained an accurate, honest logbook while on the road, Emily Korinek, Vyhnalek Trucking safety officer, and occasionally Rose Vyhnalek required him to alter the logs upon his return to the terminal. T. 27-28, 79-81. Rose Vyhnalek denied directing records falsification; rather she attested to providing drivers with an opportunity to “correct” errors in their logs. T. 113-114. Korinek did not testify. Poll testified that he complained about the falsifications three weeks before his discharge, stating to Mr. Vyhnalek that he no longer would comply with the company’s falsifications requirements. T. 22.

While Poll charges that Robert Vyhnalek discharged him because of his protected complaints, Mr. Vyhnalek testified that he discharged Poll because of his record of accidents during his tenure as a driver for the company, and particularly because of the third and final accident which occurred on August 19, 1995. T. 96-99. Mr. Vyhnalek testified that after the first two accidents he warned Poll, “You’ve got to be more careful. I mean, you can’t everytime I send you out with a trailer, it comes back skinned up.” T. 97-98. Mr. Vyhnalek disputed Poll’s explanation of the manner in which the August 19 accident occurred. T. 90-92. Poll testified that the accident occurred inexplicably when he was inside a truck stop eating dinner and filling out his logs. T. 74-76. Mr. Vyhnalek testified to the presence of creosote at the point of impact, specifically “[t]he truck came back to the shop it had creosote stuck into the vehicle at the point of the accident so, it’s awful hard to believe that creosote would run into the vehicle.” T. 99.

Poll and Mr. Vyhnalek agree for the most part about the substance of the August 26 telephone conversation during which Mr. Vyhnalek discharged Poll. Poll testified that Mr.

Vyhnalek accused him of damaging the truck; specifically Vyhnalek refused to pay Poll his wages until he determined the manner in which the truck had sustained damage. Poll then asked “well, does this mean I’m fired? You know, because if it is, then I guess I need to take a look and find another job.’ And, at that point he [Vyhnalek] goes ‘well, then I guess you need to go find another job.’” T. 92 (Poll).

The Administrative Law Judge’s Decision

The ALJ found that Poll engaged in protected activity based upon Poll’s testimony and on a negative inference: “The evidence is contradictory as to whether complainant was required to falsify [his driver’s daily logs and vehicle inspection reports], but as respondent did not call Emily Korinek as a witness, and she was the individual who respondent [sic] identified as requiring the falsification, I draw the inference that complainant’s testimony in this regard is truthful.” R.D.O. at 4. The ALJ “assumed for the sake of argument” that coerced falsification of the subject records constituted a violation of the commercial motor vehicle safety regulations, and that even if not Poll’s “reasonable belief that he was being asked to violate a commercial motor vehicle safety regulation is sufficient to bring his [internal] complaint” about such a practice within the protection of the STAA whistleblower provision. *Id.*, citing *Yellow Freight Sys. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). The ALJ also found that Vyhnalek knew about Poll’s complaint and that Poll’s discharge constituted adverse employment action. R.D.O. at 4.

According to the ALJ, Poll failed to establish causation, however, due to the intervening accident. The August 19, 1995, accident, which followed the protected complaint by about two weeks (*see* T. 22) and preceded the discharge (on August 26) by a matter of days, constituted a legitimate, nondiscriminatory reason for discharge. Poll thus failed even to meet his initial burden of establishing a *prima facie* showing of unlawful discrimination.

Alternatively, the ALJ observed that even if he was to find an inference of retaliation, the record supported a further finding that the August 19 accident in conjunction with the previous two accidents constituted the real reason for the discharge. The ALJ considered Mr. Vyhnalek’s testimony that the accidents motivated him to discharge Poll to be “very credible.” R.D.O. at 4. The ALJ concluded, “a preponderance of the evidence fails to prove that complainant was fired because of his protected activity.” *Id.*

Analysis

We have reviewed the administrative record in its entirety. The ALJ’s summary of the evidence is accurate for the most part. His factual findings are supported by substantial evidence, and we adopt them. 29 C.F.R. § 1978.109(c)(3). As the ALJ correctly noted, STAA section 31105, *inter alia*, prohibits any person from discharging an employee or discriminating against an employee with respect to pay, terms or privileges of employment because the employee “has filed a complaint or begun a proceeding *related to* a violation of a commercial

motor carrier safety regulation, standard, or order, or has testified or will testify in such a proceeding” 49 U.S.C. § 31105(a)(1)(A) (emphasis added).

The legal analysis applicable to the factual predicate presented here is the pretext model. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 793 (1973); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994) (adapting *McDonnell Douglas* burden shifting rules to the STAA); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (same). Under this model a complainant first must create an inference of unlawful discrimination by establishing a *prima facie* case. A complainant meets the associated burden by showing that the respondent is subject to the applicable statute, that complainant engaged in activity protected by the statute of which the respondent was aware, that complainant suffered adverse employment action and that a nexus existed between the protected activity and adverse action. The burden then shifts to the respondent to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. Should respondent meet this burden, the inference of discrimination disappears, leaving the single issue of discrimination *vel non*. In order to prevail ultimately, complainant must prove by a preponderance of the evidence that respondent’s proffered reasons for taking adverse action were a pretext for discrimination. As stated by the Supreme Court in *St. Mary’s Honor Center* the ultimate burden of persuading the trier of fact that the complainant was untimely discriminated against “remains at all times” with the complainant. 450 U.S. at 507.

“[R]ejection of the defendant’s proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.” *St. Mary’s Honor Center v. Hicks*, 509 U.S. at 511. Indeed, proof that an explanation is incredible constitutes a piece of indirect evidence, which “becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination.” *Id.* at 517. “[O]nce the employer’s justification has been eliminated, discrimination may well be the most likely alternative explanation Thus, a plaintiff’s *prima facie* case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 147-148.

Our specific disposition follows:

Based on Poll’s testimony and the negative inference drawn from Korinek’s failure to testify, the ALJ found that respondent required Poll to falsify his driver’s daily logs and vehicle inspection reports. The record supports this finding, as well as further findings that about two weeks before the August 19, 1995, accident Poll complained to Mr. Vyhnalek about the coerced records falsifications and stated that he no longer would comply, T. 22, that Vyhnalek was aware of the complaint having been its recipient and that the complaint constituted protected activity in that it “related to a violation of a commercial motor carrier safety regulation, standard, or order” 49 U.S.C. § 31105(a)(1)(A) (emphasis added). R.D.O. at 4. Under a “related to” criterion a complaint need not address an actual regulatory violation in order to be protected. *Yellow Freight Sys. v. Martin*, 954 F.2d at 357. Rather, the complaint must be specific in relation to a given practice, condition, directive or event, and the complainant reasonably must

believe in the existence of a hazard. *See Sprague v. American Nuclear Resources, Inc.*, 134 F.3d 1292, 1296 (6th Cir. 1998); *Stone & Webster Eng'g v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997); *Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1507 (10th Cir. 1985); *Consolidated Edison Co. v. Donovan*, 673 F.2d 61, 63 (2d Cir. 1982). The record supports a finding that Poll met these standards. Poll satisfied the element of adverse employment action in that discharge falls expressly within the statutory prohibition. 49 U.S.C. §31105(a)(1)(A).

The ALJ's recommended dismissal turned principally on Poll's failure to make a *prima facie* showing with respect to the causation element, specifically that a nexus existed between the protected activity and the adverse action. The burden in making a *prima facie* showing, even with respect to causal connection, "is not onerous." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 252-253. A complainant generally satisfies this element by showing (i) the sequence of events, *i.e.*, that the protected activity preceded the adverse action, and (ii) employer knowledge of the complainant's protected activity prior to taking adverse action. *Carroll v. United States Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996), *citing Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) ("[o]ur cases hold that "temporal proximity is sufficient as a matter of law to establish the [causation] element in a *prima facie* case of retaliatory discharge"); *Bechtel Construction Co. v. Sec'y of Labor*, 50 F.3d 926 (11th Cir. 1995); *Burrus v. United Telephone Co.*, 683 F.2d 339, 342 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982). By the same token, proximity in time may not suffice in the presence of strong countervailing evidence. *E.g., Fox v. Certainteed Corp.*, No. 98-1948, 1999 WL 1111495 at **6, **9 (6th Cir. Nov. 23, 1999); *Moon v. Transport Drivers, Inc.*, 836 F.2d at 229-231.

The three-week period between protected complaint and discharge in the instant case is sufficiently proximate to meet the burden² but for the complicating presence of the intervening accident, which the ALJ found compelling.

We consider the accident somewhat less compelling in light of case precedent and the three week period at issue here. The accident simply does not represent the confluence of compelling evidence to the contrary cited by courts that have rejected the inference. For example, in *Moon v. Transport Drivers, Inc.*, despite the complainant's showing that his discharge followed his safety complaint, the respondent defeated the inference of retaliation by showing that it frequently "invited" complainant and other drivers "to air their safety concerns," complainant admitted "that he felt free . . . to complain about vehicle problems," that respondent provided "a replacement truck whenever complainant voiced [his] concerns" and that respondent "repeatedly emphasized, at the drivers' meetings which [complainant] attended, the importance of maintaining complete and accurate logs." 836 F.2d at 230. *See Fenton v. HiSAN, Inc.*, 174 F.3d 827, 833 (6th Cir. 1999) ("series of events constitutes 'compelling evidence' that the defendant company encouraged complaints about the relevant grievance . . . and handled

² *See, e.g., Keys v. Lutheran Family and Children's Service of Missouri*, 668 F.2d 356, 358 (8th Cir. 1981) (less than two months separating protected activity and adverse action); *Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981) (twenty three days separating activity and action).

plaintiff's complaints in a manner consistent with its explicitly stated company policies[;] inference arising from the proximity of . . . events is negated").

We adopt the ALJ's recommendation instead by employing his alternative analysis. Assuming Poll established a *prima facie* case, respondent met its burden of production by articulating a legitimate, nondiscriminatory reason for discharging him, namely the accident(s). The ALJ stated: "Robert Vyhnalek testified that he fired complainant because he had two previous accidents prior to the accident at the truck stop [and] that complainant was fired because of these three accidents . . ." R.D.O. at 3, *citing* T. 96. The ALJ ultimately found:

[T]he evidence clearly shows that complainant's accident on August 19, the third accident he had been involved in since he began working for respondent on July 6, was the reason he was fired. Complainant did not deny that the first two accidents were his fault, and it is certainly reasonable that Mr. Vyhnalek believed that the third accident was also complainant's fault despite his assertion that an unknown vehicle had struck his trailer.

R.D.O. at 4.

At this juncture the issue of whether Poll had established a *prima facie* case becomes irrelevant: "The presumption of [retaliatory discharge], having fulfilled its role of forcing the [respondent] to come forward with some response, simply drops out of the picture." *St. Mary's Honor Center v. Hicks*, 509 U.S. at 510-511. *See United Parcel Service, Inc. v. Administrative Review Board, U.S. Dep't of Labor*, No. 97-3544, 1998 WL 739812 at **4 (6th Cir. Oct. 6, 1998) (where employer satisfies burden of production, "*McDonnell Douglas* framework falls by the wayside"). We then proceed to decide whether Poll proved that the proffered legitimate reason is mere pretext rather than the true reason for the discharge. The answer is that Poll failed to prove pretext. Given the occurrence of the accidents and Mr. Vyhnalek's testimony as to motivation, which the ALJ credited,³ the evidence of timing is inadequate to sustain Poll's ultimate burden of proof by a preponderance of the evidence.

³ Although Vyhnalek's practice of mandating records falsification gives us pause generally in assessing the ALJ's credibility finding, we consider the finding sufficiently specific to withstand scrutiny. The ALJ cited Poll's failure to "deny that the first two accidents were his fault" and Vyhnalek's reasonable belief "that the third accident was also [Poll's] fault despite his assertion that an unknown vehicle had struck his trailer." R.D.O. at 4. The ALJ reasoned: "Although Mr. Vyhnalek did not inform complainant at the time he fired him that his three accidents formed the basis for his dismissal, he also did not refer to [Poll's] complaint about the falsification of logs made three weeks earlier. Mr. Vyhnalek's testimony that he fired [Poll] because of these accidents is therefore very credible." *Id.* We note in conjunction with the finding of records falsification that pursuant to ARB practice the Office of Motor Carriers, Federal Highway Administration, U.S. Department of Transportation will receive service of this decision.

We adopt the ALJ's R.D.O. as explained above. The complaint of unlawful discrimination hereby **IS DISMISSED**.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge