



In the Matter of:

NANCY YOUNG,

ARB CASE NO. 00-075

COMPLAINANT,

ALJ CASE NO. 2000-STA-28

v.

DATE: February 28, 2003

SCHLUMBERGER OIL FIELD SERVICES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Nancy Young, *pro se*, Corpus Christi, Texas

For the Respondent:

Tonya Beane Webber, Esq., Melissa M. Ricard, Esq., *Porter, Rogers, Dahlman & Gordon*, Corpus Christi, Texas

FINAL DECISION AND ORDER

This case involves the whistleblower protection provision of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (West 1997), and implementing regulations, 29 C.F.R. Part 1978 (2002). Nancy Young alleges that Schlumberger Oil Field Services violated § 31105 when it terminated her employment during a Reduction in Force (RIF). A Labor Department Administrative Law Judge (ALJ) conducted an evidentiary hearing. He found that Young did not prove essential elements of her case. Therefore, he recommends that her complaint be dismissed. *Young v. Schlumberger Oil Field Services*, 2000-STA-28 (Aug. 10, 2000) (R. D. & O.). Young appealed. We concur that dismissal is warranted.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review the R. D. & O. and to issue the final agency decision pursuant to 29 C.F.R. § 1978.109(c)(1) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

We review the ALJ's findings of fact under the substantial evidence standard. "The findings of the administrative law judge with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be considered conclusive." 29 C.F.R. § 1978.109(c)(3). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 477 (1951).

ISSUES ON APPEAL

- A. Whether substantial evidence supports the ALJ's findings that Young did not prove essential elements for each of her claims.
- B. Whether the ALJ erred in failing to give Young greater assistance.

BACKGROUND

Schlumberger Oil Field Services is a corporation which does business nationwide. It provides a wide range of services to customers engaged in the search for and production of oil and gas. Schlumberger uses a large fleet of commercial motor vehicles (CMVs or trucks).

In early 1998, Schlumberger began equipping its CMVs with on-board computers. Soon, in April 1998, Schlumberger hired Young to assist in developing appropriate software and software applications for its computer system in the Alice District in southern Texas. Shortly after she started, Young's supervisor asked her (or permitted her, the record is unclear) to help mechanics in the Alice District install the computers. Thereafter, Young spent a large part of her time working on computer installation instead of developing software programs and working with computer-generated data.

Meanwhile, Young's counterpart in the Southeast Texas District, Paul Rose, never involved himself with computer installation. Rose worked with managers who needed computer data for planning and evaluation. He developed appropriate software programs and generated data in forms useful to

the managers.

Unfortunately, the oil industry experienced a financial downturn in early 1998. The industry slump meant less work for Schlumberger. It responded by downsizing its operations. It downsized by consolidating districts, eliminating positions, and RIFing staff. Schlumberger made RIF decisions based on the employees' experience, expertise in light of the company's future needs, and past performance. If two or more employees competing for a single position were equally competent, Schlumberger broke the tie based on seniority.

Eventually, in early 1999, Schlumberger merged the Alice District and the Southeast Texas District into its Central Region and closed each district's headquarters office. As a result, the company needed only one CMV computer data specialist. The two candidates for the position were Young and Rose.

Guy Lombardo, a company manager who had worked with them both, applied the RIF criteria and concluded that Rose was better qualified than Young. The "start up" phase, when Young's installation skills had been useful, was ending. Henceforth the CMV computer system would be operating on a routine basis, and data and software management skills would be at a premium. Rose had been doing this kind of work successfully throughout the installation phase, whereas Young had concentrated on hardware installation. Lombardo also ranked Rose above Young in past performance. He based this judgment on the fact that Rose promptly and correctly produced data that Lombardo requested, but Young did not. Rose also had greater seniority than Young. On July 6, 1999, Schlumberger notified Young that she was being RIF'd.

DISCUSSION

A. The Merits of Young's Complaint.¹

Section 31105(a)(1) applies to two forms of protected activity: employee

¹ Young contends that the ALJ should have ruled in her favor and awarded her relief. Her brief, however, is mostly a narrative account of the evidence as Young sees it. It contains almost no explicit argument as to how or why the ALJ's findings and conclusions are not supported by substantial evidence.

However, because Young is acting *pro se*, we have construed her assertions concerning the merits of her complaint liberally and in light of the substantial evidence standard of review. See Section B, *infra*.

complaints about unsafe conditions and employee refusals to operate vehicles based on safety concerns.² Young contends that she engaged in both forms of protected activity and that this conduct motivated Schlumberger to choose her for the RIF rather than Rose.

1. Safety Complaints

(a) Young's internal safety complaints

² 31105(a) Prohibitions.– (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; or

(B) the employee refuses to operate a vehicle because–

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105(a)(2).

Young asserts that Schlumberger fired her instead of Rose because her supervisors and managers were annoyed with complaints she made to them about unsafe working conditions.

To prevail on a claim based on safety complaints to the employer, the employee must prove that (1) she engaged in protected activity by filing a complaint or beginning a proceeding within the meaning of § 31105(a)(1)(A), (2) her employer was aware of her protected activity, (3) her employer discharged, disciplined, or discriminated against her, and (4) a causal connection exists between the protected activity and the adverse employment action. *Bates v. West Bank Containers*, ARB No. 99-055, ALJ No. 98-STA-30, slip op. at 6 (ARB April 28, 2000); *BSP Trans., Inc. v. United States Dep't Labor*, 160 F.3d 38, 45-46 (1st Cir. 1998).

The ALJ found that Young had complained to her supervisors about a “myriad” of conditions she considered unsafe or unlawful.³ However, the ALJ also found that Young failed to prove a causal connection between her internal complaints and Schlumberger’s decision to RIF her. “I find that Respondent acted in a non-discriminatory manner when Complainant was reduced in force for a legitimate business reason. I further find that Complainant’s selection for reduction in force was not motivated by her ‘complaints’ or activity.” R. D. & O. slip op. at 53.

Linda Clark and Liese Borden, two personnel managers, presented evidence about Schlumberger’s business decisions during the financial downturn. Both were involved in the Texas RIF process and the termination of Young’s employment. They testified that the company retained or fired employees based on the employees’ skills, performance, and seniority. R. D. & O. slip op. at 39, 41. Borden testified that the decision to retain Rose rather than Young was based on their respective skills and performance ratings. *Id.* at 41.

³ “Her testimony centered on problems with CMVs, such as inoperable speedometers and alleged falsification of electronic and paper logs. Her safety concerns included improper . . . wiring of electrical circuits which caused unit [truck] fires; electrical shorts causing cellular phones and batteries to die out; distractive keypad mountings; wire harnesses; and unsafe emergency exits, fire protection and hearing protection.” R. D. & O. slip op. at 50. “I agree with Respondent that Complainant engaged in a ‘shotgun approach’ of uncorroborated allegations, which for the most part, were either refuted, rebutted or corrected by Respondent.” *Id.* at 52.

Applying the RIF criteria to Rose and Young based on his personal knowledge of their qualifications and performance, Lombardo ranked Rose higher than Young. R. D. & O. slip op. at 55. Young's own description of her experience and expertise, *id.* at 49, 55, corroborates Lombardo's assessment. Lombardo also denied that Young's safety complaints played any role in the company's decision to keep Rose instead of Young. *Id.* at 23.

For her part, Young did not present evidence to counter Schlumberger's testimony that the company applied the RIF criteria to Young and Rose. And she did not attempt to rebut the company's evidence concerning Rose's experience and performance.

The only evidence supporting Young's claim of retaliatory animus is her testimony that Lombardo and others became angry when she described her safety concerns to them. R. D. & O. slip op. at 7. For example, Young testified that when she complained to Lombardo that driver logs were being falsified, he became furious and told her, "no matter what; you will falsify these logs; you will do what I say." *Id.* Young also testified that when she complained about being ordered to drive CMVs that lacked working speedometers, Lombardo responded angrily: "[Y]ou will drive a commercial motor vehicle. You will drive any unit without a working speedometer." *Id.* at 49.

The ALJ found that Young's testimony was neither credible nor plausible. R. D. & O. slip op. at 49, 50. He did, however, find the Schlumberger witnesses credible and persuasive. *Id.* at 47, 48, 49. Young has not offered any reason why we should not accept these credibility determinations. And, even if Lombardo did react angrily to her complaints, substantial evidence still supports the ALJ's finding that the RIF assessment was the sole basis for Young's termination.

(b) Young's complaint to the Texas Department of Public Safety

Young also contends that Schlumberger RIF'd her because she made safety complaints to the Texas Department of Public Safety (Texas DPS) in May 1999. The elements of a claim based on safety complaints to an entity other than the employer are the same as those based on safety complaints to the employer. The employee must prove that (1) she engaged in protected activity by filing a complaint or beginning a proceeding within the meaning of § 31105(a)(1)(A), (2) her employer was aware of her protected activity, (3) her employer discharged, disciplined, or discriminated against her, and (4) a causal connection exists between the protected activity and the adverse employment action. *Calhoun v. United Parcel Service*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 4 (ARB Nov.

27, 2002).⁴

Neither Lombardo nor Wayne Fulin, Young's immediate supervisor prior to her termination, was aware that Young made safety complaints to the Texas DPS. Both testified that Young did not tell them she made these complaints. They knew only that Young had been consulting with someone at the Texas DPS about the meaning of truck safety regulations. They did not object to this. R. D. & O. slip op. at 43, 47, 55. Other record evidence, including letters written by Young herself, corroborates Lombardo and Fulin's testimony. *Id.* at 47.

Based on this evidence, the ALJ found that Young failed to prove an essential element of her claim, *i.e.*, that Schlumberger was aware that she engaged in the protected activity of reporting safety violations to the Texas DPS. R. D. & O. slip op. at 47. This finding is supported by substantial evidence.

2. Young's refusal to drive

(a) Refusal to drive in violation of law

Young contends that Lombardo and others repeatedly ordered her to drive CMVs without a valid license. She further contends that her refusals to do so contributed to Schlumberger's decision to RIF her. R. D. & O. slip op. at 48.

Section 31105(a)(1)(B)(i) prohibits employers from taking adverse employment action against employees who refuse to operate a vehicle in violation of commercial motor vehicle safety laws.⁵

⁴ Section 31105(a)(1)(A) does not expressly distinguish between internal and external complaints. The distinction arose in litigation over the meaning of the terms "filing a complaint or beginning a proceeding." *See e.g., Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 19–21 (1st Cir. 1998) (discussing and rejecting putative distinction between internal and external complaints).

⁵ (a) Prohibitions.–(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because–

(B) the employee refuses to operate a vehicle because–

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health

The ALJ found that Young failed to prove that she was ever ordered to drive without a proper license. R. D. & O. slip op. at 48-49. The only evidence Young offered was her own testimony that she was often asked but always refused. Young identified no specific instance when this happened and provided no details about any particular incident. The ALJ found her testimony too vague and conclusory to raise a colorable claim of refusal to drive in violation of law.

One of the supervisors Young claimed had ordered her to drive a CMV testified that he never issued such orders. He had no reason to do so because driving a CMV was not necessary for Young to accomplish her work. Lombardo testified he never issued such an order. He felt that Young was already over-involved with the trucks at the expense of her software and data management responsibilities. R. D. & O. slip op. at 48.

The ALJ found the company witnesses more plausible than Young. Furthermore, the ALJ considered Young's accusations that Lombardo ordered her to drive implausible on their face. "Complainant's accusation that Mr. Lombardo yelled at her and demanded she drive CMVs without a CDL stretches incredulity too far to assign any probative weight to such an allegation." R. D. & O. slip op. at 49.

His finding that Young failed to prove she engaged in this form of protected activity, R. D. & O. slip op. at 49, is supported by substantial evidence.

(b) Refusal to drive based on apprehension of injury

Young contends that she was ordered to drive trucks that lacked working speedometers and whose computerized speed gauges were inoperative. She says that she refused to obey these orders out of a reasonable apprehension of injury. Her reasonable refusals, she argues, played a part in Schlumberger's decision to RIF her.

Subsection 31105(a)(1)(B)(ii) protects employees who refuse to operate vehicles because of a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." To prevail under this provision, the employee must show that her apprehension was objectively reasonable and that she sought but was unable to obtain correction of the problem. 42 U.S.C.A. § 31105(a)(2).⁶

⁶ "[A]n employee's apprehension of serious injury is reasonable only if a

The ALJ found that Young's testimony that she repeatedly refused orders from her supervisors to drive CMVs without working speedometers was insufficient to support her claim under § 31105(a)(1)(B)(ii). "The record is silent with regard to any vehicle that may have suffered a non-working speedometer and on-board computer simultaneously. Complainant failed to show that if required to drive such a vehicle that she sought correction of the malfunction and was unable to correct the unsafe condition." R. D. & O. slip op. 49.

In addition, two of Young's supervisors testified that they did not order Young to drive unsafe vehicles. R. D. & O. slip op. at 20, 28, 48-49. Schlumberger's testimony, matched against Young's, constitutes substantial evidence supporting the ALJ's conclusion that Schlumberger did not violate § 31105(A)(1)(b)(ii).

B. Young's Pro Se Status

Young, who is not a lawyer, represented herself below and on this appeal. Her brief to this Board contains little argument. It is mostly a narrative account of Young's view of the evidence. However, because Young has acted without assistance of counsel, we have construed her assertions concerning the ALJ's conduct of the hearing liberally. See note 1, *supra*.

Young contends that the ALJ "belittled" her and failed to help her make her case. Young Br. at 3-4.⁷ We construe these allegations as an argument that

reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition."

49 U.S.C.A. § 31105(a)(2).

⁷ "The Judge even stated that he would have a conference with me if he felt that I in fact needed counsel as a result of my shortcomings. However, he instead never followed through with this statement, and he just proceeded to get on my case for not understanding what he was trying to get across." Young Br. at 3-4.

Whether and in precisely what terms the ALJ made such a promise is not reflected in the written record. However, it is not necessary to know more about any promise the ALJ might have made to dispose of the underlying issue—was the assistance this ALJ provided to Young legally sufficient.

the ALJ breached a duty to assist Young due to her *pro se* status.

We agree with the proposition that ALJs have some responsibility for helping *pro se* litigants. See e.g., *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52 (ARB Feb. 29, 2000), slip op. at n. 5 (“[p]ro se complainants are by nature inexpert in legal matters, and we construe their complaints liberally and not over technically”); *Pike v. Public Storage Companies, Inc.*, ARB No. 99-072, ALJ No. 1998-STA-0035 (ARB Aug. 10, 1999) (*pro se* litigants may be held to a lesser standard than legal counsel in procedural matters); *Saporito v. Florida Power & Light Co.*, 1994-ERA-35 (ARB July 19, 1996) (a *pro se* complainant is entitled to a certain degree of adjudicative latitude). Cf. *Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173 (1980) (papers submitted by *pro se* litigants must be construed liberally in deference to their lack of training in the law).

However, “the burden of proving the elements necessary to sustain a claim of discrimination is no less” for *pro se* litigants than for litigants represented by counsel. *Pike, supra*; cf. *Saporito, supra* (although *pro se* complainants should be given some adjudicative latitude, they must still allege and prove a set of facts sufficient to establish the violation alleged); *Griffith, supra*, quoting *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983) (“At least where a litigant is seeking a monetary award, we do not believe *pro se* status necessarily justifies special consideration While such a *pro se* litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forgo expert assistance.”)

Although the ALJ has some duty to assist *pro se* litigants, he also has a duty of impartiality. A judge must refrain from becoming an advocate for the *pro se* litigant. See, e.g., *United States v. Trapnell*, 512 F.2d 10, 12 (9th Cir. 1975) (per curiam) (“The trial judge is charged with the responsibility of conducting the trial as impartially and fairly as possible.”) “Helping” the *pro se* litigant to get material evidence into the record risks undermining the impartial role of the judge in the adversary system. Jessica Case, Note: *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L. J. 701 (2002); MODEL CODE OF JUDICIAL CONDUCT, CANON 3 (1990) (A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently).

The ALJ devoted much of the second and third days of the hearing to eliciting testimony from Young to clarify the meaning of her written complaint and to connect her factual allegations and testimony to the evidentiary requirements of § 31105(a)(1). See Tr. 604–834.

The ALJ also repeatedly reminded Young of the essential elements of her claims. See, e.g., Tr. 101 (“One of the elements of your case is timing . . . Timing, if it’s [protected conduct] remote in time, begins to work against you. If it’s closer to time of discipline or discharge, it begins to work for you. So when you start relying upon something that occurred a couple of years before your discharge, it becomes remote and what we call stale.”); Tr. 107 (“Well, if there’s anything relevant in there [diary written during employment] that you can testify about, you can do so, but it’s not a substitute for proof. I’m not going to allow you to introduce these work books and then rest your case, because then you would definitely lose your case.”); Tr. 204 (“And I’m not using this forum as a forum to try to show that the Respondent was in violation of any federal motor carrier rules and regulations at any time that does not affect your case. That’s not your burden here.”)

We find and conclude that the ALJ’s advice to Young about the elements of her case and the relevancy of evidence satisfied his duty to assist her while also satisfying his duty to remain impartial and fair to both sides. Therefore, Young’s contention that the ALJ did not adequately assist her must fail.

CONCLUSION

Substantial evidence supports the ALJ’s findings that Young did not prove essential elements for each of her claims. Therefore, we affirm his conclusion that Young did not establish that Schlumberger RIF’d her because of protected activity. We also find and conclude that the ALJ did not breach a duty to assist Young. Because Schlumberger did not discriminate against Young in violation of § 31105(a)(1) and Young was adequately assisted by the ALJ, the complaint is **DISMISSED**.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge