



**In the Matter of:**

**ASSISTANT SECRETARY OF LABOR  
FOR OCCUPATIONAL SAFETY AND HEALTH,**

**PROSECUTING PARTY,**

**and**

**JEFFREY FREEZE,**

**COMPLAINANT,**

**v.**

**CONSOLIDATED FREIGHTWAYS, INC.,**

**RESPONDENT.**

**ARB CASE NO. 04-128**

**ALJ CASE NO. 2002-STA-4**

**DATE: August 31, 2005**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Prosecuting Party:*

**Andrea J. Appel, Esq., Catherine Oliver Murphy, Regional Solicitor, United States Department of Labor, Philadelphia, Pennsylvania**

*For the Complainant:*

**James W. Harris, Esq., York, Pennsylvania**

*For the Respondent:*

**Vincent Candiello, Esq., Christopher M. Scalia, Esq., Morgan, Lewis & Bockius LLP, Harrisburg, Pennsylvania**

## FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act (STAA)<sup>1</sup> and its implementing regulations.<sup>2</sup> Subsection 31105(a)(1)(A) prohibits employment discrimination against any employee for engaging in protected activity, including filing a complaint or beginning a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order or testifying or intending to testify in such a proceeding. STAA subsection 31105(b)(3)(B) authorizes an award of costs, including attorney fees, to an employee who establishes that his or her employer violated STAA's employee protection provision.

In 2001, Jeffrey Freeze filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, Consolidated Freightways Corporation, retaliated against him for engaging in activities protected by STAA subsection 31105(a)(1)(A). OSHA dismissed the complaint because the alleged retaliation occurred more than 180 days before Freeze filed the complaint, and subsection 31105(b)(1) requires that complaints be filed no later than 180 days after the alleged violation occurred. Freeze objected to OSHA's determination and requested a hearing before a Labor Department Administrative Law Judge (ALJ).

Consolidated Freightways moved to dismiss the complaint as untimely. After hearing oral argument on Consolidated Freightways's motion to dismiss, the ALJ concluded that Freeze's complaint was untimely but that Freeze should be permitted to amend the complaint to include allegations against Consolidated Freightways based on more recent events. Accordingly, the ALJ remanded Freeze's complaint to OSHA "for the purpose of Complainants' filing with said office, on or before sixty (60) days hereof, an amended complaint (to include allegations of acts of discrimination occurring within a period of timeliness for complaint filing under the [STAA])."<sup>3</sup>

Freeze subsequently filed an amended complaint that OSHA investigated. On September 13, 2002, OSHA found that Consolidated Freightways had subjected Freeze to a hostile work environment in violation of section 31105(a) and issued a preliminary

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<sup>1</sup> 49 U.S.C.A. § 31105 (West 1997).

<sup>2</sup> 29 C.F.R. Part 1978 (2005).

<sup>3</sup> *Freeze v. Consolidated Freight, Inc.*, 2002-STA-00004 (Feb. 5, 2002)(order remanding matter to OSHA). Inasmuch as neither STAA nor its implementing regulations vest ALJs with authority to compel OSHA to conduct investigations, the better course for the ALJ would have been to dismiss the untimely complaint. Freeze could then have filed a new and timely complaint with OSHA that OSHA would have investigated. *See* 49 U.S.C.A. § 31105(b)(2)(A). OSHA's investigative findings and Preliminary Order could then have become final by operation of law when, as happened here, neither party objected. *See* 49 U.S.C.A. § 31105(b)(2)(B).

order directing Consolidated Freightways to pay Freeze compensatory damages and attorney fees.

On January 22, 2003, after the parties agreed that the OSHA findings and order should be made final, the ALJ issued an Order Making the Regional Administrator's Findings and Preliminary Order Final. We construe this Order as a Recommended Decision and Order (R. D. & O.) on the merits within the meaning of 29 C.F.R. § 1978.109(a). On February 13, 2003, the ALJ issued a Supplemental Recommended Decision and Order Awarding Attorney Fees to the Complainant in the amount of \$21,317.11.

The Administrative Review Board "shall issue the final decision and order based on the record and the decision and order of the administrative law judge" in cases arising under section 31105.<sup>4</sup> Accordingly, the Board issued Orders to Show Cause why it should not approve the ALJ's Recommended Decision and Order on the merits and the Supplemental Recommended Decision and Order awarding attorney fees. The Board received postal cards indicating that both parties had received the Orders to Show Cause. Counsel for Complainant Freeze advised the Board that Freeze would not be filing a brief concerning the R. D. & O. on the merits. Consolidated Freightways did not respond to the Orders to Show Cause.

Under the STAA, the ARB is bound by the ALJ's findings of fact if supported by substantial evidence on the record considered as a whole.<sup>5</sup> In reviewing the ALJ's conclusions of law, the ARB, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . ."<sup>6</sup> Therefore, we review the ALJ's conclusions of law de novo.<sup>7</sup>

Since the parties agreed that OSHA's finding be made final and the R. D. & O. incorporates those findings, substantial evidence supports the findings and they are

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<sup>4</sup> 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 00-STA-050 (ARB Sept. 26, 2001).

<sup>5</sup> 29 C.F.R. §1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004).

<sup>6</sup> 5 U.S.C.A. § 557(b)(West 2005).

<sup>7</sup> *Roadway Express, Inc v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 29, slip op. at 2 (ARB Oct. 31, 2003).

therefore conclusive. Accordingly, we **AFFIRM** the Recommended Decision and Order and the Supplemental Recommended Decision and Order awarding attorney fees in the amount of \$21,317.11.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**