



In the Matter of:

RONALD LEE REGAN, Jr.,

ARB CASE NO. 03-117

COMPLAINANT,

ALJ CASE NO. 03-STA-14

v.

DATE: September 30, 2004

NATIONAL WELDERS SUPPLY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Scott G. Crowley, Esq., Crowley & Crowley, Richmond, Virginia

For the Respondent:

Michael J. Walton, Esq., Hunton & Williams, Richmond, Virginia

FINAL DECISION AND ORDER

Ronald Lee Regan, Jr., filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2004), alleging that his employer, National Welders Supply (NWS) terminated his employment because he complained about being pressured to drive in violation of the hours of service limitations set by the Department of Transportation (DOL). On January 28, 2003, a Department of Labor (DOL) Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.), dismissing Regan's complaint. The R. D. & O. is now before the Administrative Review Board (ARB) pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2004). We affirm the ALJ's conclusion, but on different grounds, and dismiss the complaint.

BACKGROUND

We adopt and summarize the ALJ's findings of fact. R. D. & O. at 26-34. Regan started work for NWS in August 2000 as a "slip-seat" (night shift) driver earning 36.5 cents a mile and \$14.60 an hour when on duty but not driving. He would usually start work between 3:00 and 4:00 p.m. and work several hours beyond midnight, Monday through Friday. RX 9. His base of operations was Chesterfield, Virginia, but he delivered liquid oxygen, nitrogen, and argon to customers in a five-state area.

In the fall of 2001, Regan obtained a regular run. On one Friday in November 2001, Regan had only six hours of duty time available,¹ but the dispatcher asked him to "top-line" or report being off duty,² so that Regan could preserve his remaining time to ensure that a scheduled delivery could be made. Regan refused, and the dispatcher responded, "that's fine." TR at 59-62. Another time the dispatcher asked Regan to do "city work" and record it as top-line. TR at 64. Regan again refused, and the dispatcher dropped the request. TR at 65-66.

On another day in December, Regan exceeded his hours limit and received a warning letter. RX 2. At a drivers' safety meeting in January 2002, Regan told the dispatcher that he was out of hours and thus could not return to headquarters. Regan was told to lay over, which he did for eight hours, but even so, when he drove back to headquarters, he was over the 70-hour cumulative limit. TR at 62-64. Regan exceeded his permitted hours twice more in January and received a five-point penalty.³ CX 4, RX

¹ As applicable to this case, 49 C.F.R. § 395.3 limited a driver's hours of service as follows: 70 duty hours in 8 days, 10 driving hours in 24 hours, or 15 duty hours in 24 hours. The company has a computer program that tracks drivers' hours, but each driver is expected to keep track of his own hours and report to the dispatcher when he is approaching the maximums permitted. *See* 49 C.F.R. § 395.8 (drivers must record their duty status for each 24-hour period as follows: off duty, sleeper berth, driving, and on-duty not driving).

² NWS has a written policy asking its drivers to record as "relieved of duty" the times when they are not responsible for watching their vehicles or performing work for the company. RX 7. Drivers call this practice "top-lining." For example, a driver could record an hour meal break as off duty, thereby preserving duty time. NSW policy states that during such off-duty time recorded the stop, drivers are "at liberty" to pursue their own activities. A driver asked to go into "relieved of duty" status is still paid for the time, but it does not count against the hours of service limitations. 49 C.F.R. § 395.3.

³ NSW has a bonus system under which a driver who avoids accumulating 15 points in a quarter and 15 points in a year can earn \$400.00. A driver can receive five points for driving or being on duty in excess of the hours of duty limitations. RX 19.

3. In February Regan exceeded the limitations four times and was assessed another five-point penalty. CX 4, RX 3.

The incident that provoked Regan's three-day suspension and the termination of his employment began on Wednesday afternoon, March 13, 2002. Dispatcher Barry Parrish instructed Regan to go to Cree Research with a load of nitrogen, then reload in Cary, North Carolina, deliver to Wilson, North Carolina, and then Garysburg, North Carolina. TR at 67. The Cary and Wilson stops were new to Regan, so he went first to Garysburg, then to Wilson, and then was going to reload in Cary, and go on to Cree. TR at 70. When Regan began to run out of time because he had trouble finding Wilson, he called the dispatcher, who became very upset because Regan did not go to Cree first, as instructed. Regan was told to return to Chesterfield.

The reason for the dispatcher's upset—and the instruction to go first to Cree—was that NWS monitors its customers' needs for the gases through a computer system. Its goal is to be sure that its customers do not run out. TR at 149-51. Cree needed the nitrogen as soon as possible, and the nitrogen needed to be medical grade, not the lower grade nitrogen that could be reloaded at Cary. So Regan's refusal to deliver first to Cree meant that an emergency delivery had to be scheduled, and Cree's tanks were at the warning level when a driver finally delivered the proper grade nitrogen. RX 5, 23

On Friday, March 15, Regan refused a dispatch because he was out of hours. The dispatcher asked him to take a run after midnight, when he would pick up eight hours to drive, but Regan declined because he did not want to work on his day off—Saturday. (Regan often worked normally into early Saturday morning.) TR at 79-80. After the dispatcher told Regan he considered his reaction a refusal to work, the dispatcher called Mike Hansen, the manager, who told Regan that he would be fired if he did not make the delivery. TR at 82. Regan agreed, but when Hansen called the dispatcher back, he had already found another driver to take the run. TR at 84. *See* CX 2.

Regan worked the next five days, and then got a memo from Hansen on March 21, suspending him for three days, beginning March 25, and assessing him ten penalty points. Regan served the suspension on March 25, 26, and 27, but appealed in a letter dated March 25, a copy of which was e-mailed to Pat Stinson, NWS's labor relations specialist. She forwarded it to Hansen late the next day. TR at 88, RX 6, CX 3. Hansen testified that he decided to fire Regan over the weekend of March 23-24 after further review of his work record. He added that he saw Regan's appeal of the suspension only after he had made the firing decision. TR at 256. In a telephone call sometime between March 26 and 28, Hansen fired Regan. TR at 95, TR at 228.

Regan filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that NSW suspended him and then terminated his employment in retaliation because he refused to operate its trucks in violation of DOT hours of service limitations. OSHA found no merit to Regan's complaint. He excepted and requested a hearing, which was held on March 12, 2003. The ALJ dismissed

Regan's complaint on the grounds that he had failed to establish a prima facie case. R. D. & O. at 41.

ISSUE

Whether Regan established by a preponderance of the evidence that NWS fired him in retaliation for engaging in protected activities.

STANDARD OF REVIEW

Under the STAA, the ARB is bound by the factual findings of the ALJ if supported by substantial evidence on the record considered as a whole. 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). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ's conclusions of law, the ARB, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C.A. § 557(b) (West 2004). Therefore, we review the ALJ's conclusions of law de novo. *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, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

DISCUSSION

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that there is a causal connection between the protected activity and the adverse action. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

A protected activity is established by proof that:

(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 -

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

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

49 U.S.C.A. § 31105.

Under subsection (A), at issue here, a protected activity may be the result of complaints or actions filed with agencies of federal or state governments, or the result of purely internal complaints to management, relating to a violation of a commercial motor vehicle safety rule, regulation, or standard. *Reed v. National Minerals Corp.*, 91-STA-34 (Sec'y July 24, 1992). For example, claims that an employer is pressuring its drivers to operate in violation of the hours of service limitations, 49 C.F.R. § 395.3, or a driver's warning to his dispatcher that he would exceed his hours of service limitation if he completed his run or started a new run may constitute protected activity. *See Hardy v. Mail Contractors of America*, ARB No. 03-007, ALJ No. 2002-STA-22 (ARB Jan. 30, 2004) (driver who refused to record off-duty time during his tour as instructed did not engage in protected activity); *Michaud v. BSP Transp. Inc.*, 95-STA-29 (ARB Jan. 6, 1997) (gathering evidence of violations of the hours of service limitations by copying drivers' time cards constitutes protected activity).

The ALJ concluded that Regan had failed to establish a prima facie case of retaliation because the exchanges between him and the dispatchers were not protected activities. R. D. & O. at 41. However, he erred in reaching this conclusion because he weighed the evidence presented by Regan with the evidence presented by NSW. While he accurately quoted the Board's admonition that a prima facie determination is not warranted in cases fully tried on the merits,⁴ the ALJ, in essence, required Regan to prove his prima facie case by a preponderance of the evidence.

As we explained in *Metheany v. Roadway Package Sys., Inc.*, ARB No. 00-63, ALJ No. 00-STA-11, slip op. at 6-7 (ARB Sept. 30, 2002), the Board adopts in STAA cases the framework of burdens of proof developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws, such as the Age

⁴ *See Williams v. Baltimore City Pub. Sch. Sys.*, ARB No. 01-021, ALJ No. 99-CAA-15 (ARB May 20, 2003). *But see Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 17-22 (ARB Feb. 28, 2003) (demonstrating that prima facie analysis may help to sharpen the issues remaining for decision in an environmental whistleblower case).

Discrimination in Employment Act. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 5-6 (ARB Jun. 28, 2002).

Under the burden-shifting framework of these cases, the complainant must first establish a prima facie case of discrimination. This burden requires the complainant to adduce evidence of each of the elements—protected activity, employer awareness, adverse action, and causal nexus—thus raising an inference of unlawful discrimination.

The burden then shifts to the respondent to articulate a legitimate, nondiscriminatory reason for the adverse action. At that stage, the burden is one of production, not persuasion. If the respondent carries this burden, the complainant then must prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but were a pretext for discrimination. *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002). The fact-finder may then consider the credibility of the parties' evidence establishing the complainant's prima facie case and inferences properly drawn therefrom in deciding that the respondent's explanation is pretext. *Reeves*, 530 U.S. at 146. The ultimate burden of persuasion that the respondent intentionally discriminated because of complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Ctr.*, 509 U.S. at 502; *Poll*, slip op. at 5; *Gale v. Ocean Imaging and Ocean Res., Inc.*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 8 (ARB July 31, 2002).

Here, the ALJ divided Regan's alleged protected activities into two time frames—fall of 2001 to January 2002 and March 2002. Regan described two incidents in which he refused the dispatcher's request to make top-line entries in his logbook, once to continue driving while venting gas, and the other to preserve enough on-duty hours to make a scheduled delivery. The third incident involved the safety meeting in January 2002 when Regan did not have hours available to return to NSW headquarters, and exceeded his hours, even though he did layover before returning.

The ALJ found that Regan had proved none of these allegations, but he also found that Regan was a credible witness who "presented straight-forward answers to both direct and cross-examination questions without equivocation" and that his "unrebutted testimony in the third incident established a violation of the regulations." Given these credibility findings, the ALJ should have found that Regan had established the first element of his prima facie case, that his internal complaints about violating his hours of service limitations constituted protected activity.⁵ Similarly, Regan also established the

⁵ Regan accused NWS of asking its drivers to "falsify" their books by "top-lining," that is, entering into their logbooks off-duty entries during their regular tours of duty. See 49

Continued . . .

other elements of the prima facie case—employer awareness, adverse action, and causation, even if only by a temporal proximity. *See* R. D. & O. at 2-3, 4-12; *Williams v. Southern Couches, Inc.*, 94-STA-44 (Sec’y Sept. 11, 1995) (a lapse of six weeks is not so distant as to negate the inference that complainant’s protected activity led to his discharge). *See also* *Jenkins*, slip op. at 23 (after a prima facie case is established, the fact-finder next considers the employer’s explanations or defenses of the actions it took).

Given this prima facie evidence, the burden of proof shifts to NWS to demonstrate that it suspended and later fired Regan for legitimate, non-discriminatory reasons. Again, the burden of proof at this point requires only that NWS adduce probative evidence. The record contains such evidence. NSW issued three warning letters and assessed Regan ten penalty points for exceeding his hours of service limitations. RX 2-4. NWS’s manager, Hansen, testified that he investigated the March 13, 2001 incident thoroughly before writing the March 21 suspension letter to Regan. RX 21. Hansen testified further that over the March 23-24 weekend he reviewed Regan’s other infractions, including a missed delivery and a refusal to drive on March 15, and concluded that the employee-employer relationship “was just not functioning.” TR at 224-30; RX 2-4. Hansen then called Regan on March 26 and fired him. TR at 228.

Because NWS adduced evidence of legitimate, non-discriminatory reasons for firing Regan, the burden of proof shifted back to him to demonstrate by a preponderance of the evidence that NWS’s reasons were pretext and that his protected activities were the real reason for his firing. At this point, we find that substantial evidence supports the ALJ’s findings of fact and resolution of the conflicting evidence and, accordingly, affirm them. R. D. & O. 26-34. We cannot, however, affirm his dismissal of the complaint based on Regan’s failure to establish a prima facie case. Without deciding whether Regan’s alleged internal complaints were in fact protected, we conclude that, as a matter of law, NSW did not discriminate against Regan in terminating his employment.

Initially, Regan was not disciplined for the four incidents prior to March 2002. Therefore, even if these were protected activities, no adverse action resulted. Regan did, however, receive warning letters from NWS on January 16, 2002, February 20, 2002, and March 7, 2002, for exceeding the hours of service limitations a total of eight times. RX

C.F.R. § 395.2 (on-duty time means from when a driver begins to work or is required to be in readiness to work until the driver is relieved from work and all responsibility for performing work). Federal guidance permits off-duty entries during a tour of duty under certain conditions. 62 Fed. Reg. 16370, 16422 (May 4, 1997). Also, while it is the employer’s choice whether the driver shall record stops made during a tour of duty as off-duty time, the employer may permit drivers to make the decision. In this case, Regan twice declined to top line, and the dispatcher did not pursue the matter. Because Regan’s complaint was dismissed on other grounds, we need not decide whether a driver’s refusal to make top-line entries would be protected activity.

2-4. He was assessed a total of ten penalty points within the first quarter of 2002. TR at 213.

Three incidents in March 2002 led to Regan's firing. First, Hansen testified that he heard the dispatcher tell Regan on March 13 to deliver his load of nitrogen to Cree Research but was informed the next day about "the very major problem" that resulted from Regan's inversion of the schedule. TR at 215-17. Hanson testified that Cree was NSW's second largest customer and that the proper grade nitrogen was delivered by a substitute driver in "the nick of time." TR at 217; RX 21. After consultation with the dispatchers and maintenance personnel, Hanson wrote the March 21 suspension letter, which also assessed Regan another ten penalty points. TR at 218-19; CX 1.

Second, Regan missed a delivery on March 14 to Sphinx Pharmaceutical, but "forgot" to tell the dispatcher. TR at 173-77; RX 9. NWS had to make an unscheduled, emergency delivery on Sunday, March 17 to prevent the customer from running out. TR at 250.

Third, Regan refused on Friday, March 15, 2002, to take a "relatively short run" to a hospital in Newport News because he was "out of hours for the day." TR at 220. After lengthy discussions with the dispatcher, to whom Regan admitted that he would have enough hours after midnight, and with Hansen, who told him that his scheduled work day normally extended into the early morning hours of Saturday, his day off, Regan agreed to come in. TR at 221, 237; CX 2. Hansen testified that after he reviewed the latter two incidents and discussed them with the dispatchers and the human resources manager, he decided to terminate Regan's employment. TR at 252-55.

We conclude that NWS fired Regan because he (1) exceeded his hours of service limitations too frequently; (2) failed to follow the dispatcher's instructions; (3) missed a delivery and did not notify the dispatcher; and (4) refused to make a delivery. Even if Regan engaged in protected activity, NWS did not terminate his employment because of that. Rather, NWS fired Regan due to poor work performance. Regan has therefore failed to meet his burden of establishing that NWS discriminated against him because he engaged in protected activity. Because Regan failed to establish causation, an essential element of his case, we **DENY** his complaint. *Clement v. Milwaukee Transp. Services, Inc.*, ARB No. 02-025, ALJ No. 2001-STA-6, slip op. at 9 (ARB Aug. 29, 2003).

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge