



In the Matter of:

DONALD J. FORMELLA,

ARB CASE NO. 08-050

COMPLAINANT,

ALJ CASE NO. 2006-STA-035

v.

DATE: March 19, 2009

SCHNIDT CARTAGE, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For Complainant:

**Timothy Huizenga, *Legal Assistance Foundation of Metropolitan Chicago,*
Chicago, Illinois**

FINAL DECISION AND ORDER

Donald J. Formella filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleged that when his former employer, Schnidt Cartage, Inc., terminated his employment, it violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified.¹ The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a

¹ 49 U.S.C.A. § 31105 (West 2008). The STAA has been amended since Formella filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is not necessary to decide whether the amendments are applicable to this complaint, because they are not relevant to the issues presented by the case and thus, they would not affect our decision.

vehicle when such operation would violate those rules. After a hearing, a Labor Department Administrative Law Judge (ALJ) recommended that Formella's complaint be dismissed. We affirm.

BACKGROUND

Schnidt is a company that delivers freight in Chicago.² Formella began driving trucks for Schnidt in October 2005. Formella testified that on February 23, 2006, he was assigned a different tractor from the one he normally drove. After inspecting it, he noticed that the rear tires had "mismatched tire treads." Formella thought that this could possibly cause him to lose control of the truck. He testified that he believed that driving a truck with different tread patterns violated federal regulations pertaining to tires. Formella reported his concerns to the company dispatcher.³ A few minutes later, he met with Linda Markus, Schnidt's Vice President. He told her that the truck did not comply with federal and state safety regulations. Paul Landowski, the company safety officer who had joined Formella and Markus, testified that Formella said that he could not drive the truck because it would be "illegal" and "unsafe" to do so.⁴ According to Formella, Marcus then informed him that if he was not happy working for Schnidt, he should quit. He replied that he would not quit and that she could fire him. She then fired him.⁵

Marcus told a different story. She said that she was in the dispatcher's office talking to another driver, Charles Miehle, who was threatening to quit because of a confrontation that he had with Formella earlier that morning. Formella interrupted and began to tell her that the truck was not safe. They then went into Markus's office. According to Marcus and Landowski, as Formella told them about his concern with the tires, he became very loud, boisterous, vehement, angry, and upset. Both Markus and Landowski felt threatened.⁶ Markus testified that she told Formella that if he was not happy working at Schnidt, maybe he needed to work elsewhere. But he "just kept going on and kept getting louder and louder" until, finally, she terminated him.⁷ Marcus testified that she terminated Formella because of his "volatile condition," his "anger," his "unstableness."⁸

² Transcript (T.) at 64.

³ *Id.* at 29-35.

⁴ *Id.* at 151-152.

⁵ *Id.* at 36.

⁶ *Id.* at 68-73, 150-153.

⁷ *Id.* at 73.

⁸ *Id.* at 74.

But on Schnidt's response to Formella's claim for unemployment benefits, Markus wrote that Formella had been discharged because he "threatened several employees with bodily harm."⁹ The employees Markus was referencing were Miehle and Richard Osten.¹⁰ According to Miehle, Formella was unhappy that Miehle did not want a union and, in an "ugly conversation," confronted him about this on February 23. This incident, which occurred before the Formella-Markus meeting later that morning, upset Miehle enough that he wanted to leave work.¹¹ Osten testified that Formella had threatened to kill him because Osten had moved Formella's truck, which had been blocking another driver from leaving the premises. This incident also occurred before Formella shouted at Markus.¹² On cross-examination, however, Markus admitted that she had not been that Formella had threatened Osten when she fired him.

Formella filed his complaint with OSHA on February 23, 2006. OSHA dismissed the complaint, Formella appealed, and the ALJ conducted a hearing on November 16, 2006, in Chicago. As noted, the ALJ recommended that Formella's complaint be dismissed.¹³ This matter is now before us pursuant to the STAA's automatic review provisions.¹⁴ Formella filed a brief with us. Schnidt did not.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.¹⁵ Under the STAA, the ARB is bound by the ALJ's findings of fact if substantial evidence on the record considered as a whole supports those findings.¹⁶ Substantial evidence is "more than a mere scintilla. It means such relevant

⁹ Complainant's Exhibit (CX) 15.

¹⁰ T. at 93.

¹¹ *Id.* at 212-214.

¹² *Id.* at 180.

¹³ Recommended Decision and Order (R. D. & O.), *Formella v. Schnidt Cartage, Inc.*, 2006-STA-00035 (ALJ Jan. 30, 2008).

¹⁴ 29 C.F.R. § 1978.109(a) (2007).

¹⁵ Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

¹⁶ 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁷ Substantial evidence does not, however, require a degree of proof “that would foreclose the possibility of an alternate conclusion.”¹⁸ Also, whether substantial evidence supports an ALJ’s decision “is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion.”¹⁹ We review the ALJ’s conclusions of law de novo.²⁰

DISCUSSION

The Legal Standard

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 STAA protects an employee who makes a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order;” who “refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;” or who “refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.”²¹

To prevail on his STAA claim, Formella must prove by a preponderance of the evidence that he engaged in protected activity, that Schnidt was aware of the protected activity and took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.²²

¹⁷ *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. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

¹⁸ *BSP Trans., Inc. v. U.S. Dep’t of Labor*, 160 F.3d 38, 45 (1st Cir. 1998).

¹⁹ *Dalton v. U.S. Dep’t of Labor*, 58 Fed. App. 442, 445, 2003 WL 356780 (10th Cir. Feb. 19, 1993), citing *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989).

²⁰ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, -029, slip op. at 2 (ARB Oct. 31, 2003).

²¹ 49 U.S.C.A. § 31105(a)(1).

²² *See Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004).

If Schnidt presents evidence of a nondiscriminatory reason for discharging him, Formella can prevail if he proves, by a preponderance of the evidence, that the reason Schnidt proffered is a pretext for discrimination.²³ In proving that an employer's asserted reason for adverse action is a pretext, the employee must prove not only that the respondent's asserted reason is false, but also that discrimination was the true reason for the adverse action. Formella bears the ultimate burden of persuading the ALJ that Schnidt discriminated against him.²⁴

Substantial Evidence Supports the ALJ's Decision.

The ALJ found that when Formella told Landowski (and Markus) that he could not drive the truck, his refusal to do so was a STAA-protected activity because he had an objectively reasonable apprehension that the unmatched tire treads could cause him to lose control of the truck and thus posed a serious danger to himself or the public. Substantial evidence supports this finding. And since Schnidt discharged Formella, he obviously suffered an adverse employment action.²⁵

But the ALJ found that Schnidt discharged Formella because of his "provocative, intemperate, volatile, and antagonistic conduct" toward Markus and Landowski, not because he refused to drive the truck. Therefore, he recommended that Formella's complaint be denied.²⁶ Formella argues to us that the ALJ erred because the record demonstrates that his demeanor and conduct did not exceed the leeway to which a whistleblower is entitled when voicing a safety complaint, and, therefore, he should not lose the protection that the STAA affords him.²⁷ Formella is correct that, under certain circumstances, a whistleblower must be afforded leeway in presenting his safety concerns. The ALJ was fully aware of this and cited relevant case law on this issue.²⁸

²³ See *Calhoun v. United Parcel Serv*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 5 (ARB Nov. 27, 2002) citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

²⁴ *Calhoun*, slip op. at 5, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

²⁵ R. D. & O. at 9.

²⁶ *Id.* at 10.

²⁷ Complainant's Brief at 7-14.

²⁸ R. D. & O. at 10-11, citing *Kenneway v. Matlack, Inc.*, 1988-STA-020, slip op. at 6 (Sec'y June 15, 1998) ("[The] right to engage in statutorily-protected behavior permits some leeway for impulsive behavior, which is balanced against employer's right to maintain order and respect in its business by correcting insubordinate acts; [the] key inquiry is whether [the]

Even so, substantial evidence supports the ALJ's finding that Formella was provocative, intemperate, volatile, and antagonistic, and thus crossed the line of permissible behavior. Markus testified that Formella was so loud that men in the adjoining warehouse ran in "to see what was happening and if somebody needed help."²⁹ As noted, she described Formella as vehement, angry, upset, and threatening.³⁰ Landowski, who was in Markus's office at the time, also felt threatened. "He was in my face."³¹ Moreover, as the ALJ notes, Formella's hostility toward Miehle and Osten shortly before he met with Markus corroborates the fact that Formella was angry and upset that morning.

Formella also points out that the ALJ found that Markus gave different reasons for discharging Formella. On the one hand, Markus testified that she fired Formella because of his volatile, angry, unstable condition during their meeting on February 23. On the other hand, in responding to his unemployment benefits claim in March, she wrote that Formella had been discharged because he had threatened to harm other employees, namely Miehle and Osten. Formella argues that since the record shows that Schnidt offered inconsistent reasons for firing him, a preponderance of evidence exists, and the ALJ should have found, that these reasons were a pretext for firing him and that the company really terminated him because of his protected concern about the mismatched tire treads.³²

But the ALJ correctly concluded that even if he disbelieved Markus's explanation for discharging Formella, this would not compel him to find that Schnidt fired him because of protected activity.³³ He explained that even if Markus was embellishing or misrepresenting why she fired Formella, he "still find[s]" that Schnidt terminated Formella for his behavior, not for his protected activity."³⁴ Again, since substantial evidence supports this finding, we reject Formella's argument.

Thus, the record contains substantial evidence to support the ALJ's finding that Schnidt terminated Formella for his loud and threatening conduct, not for his protected

employee has upset the balance that must be maintained between protected activity and shop discipline . . .").

²⁹ T. at 128.

³⁰ *Id.* at 73, 129.

³¹ *Id.* at 150, 153.

³² Complainant's Brief at 14-18.

³³ R. D. & O. at 11, citing *Hicks*, 509 U.S. at 511.

³⁴ R. D. & O. at 11.

activity. Therefore, since Formella did not prove by a preponderance of evidence that Schnidt fired him because of his protected activity, as he must, we affirm the ALJ's recommendation and **DENY** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge