



MICHAEL WILCOX,

ARB CASE NO. 08-093

COMPLAINANT,

ALJ CASE NO. 2007-STA-011

v.

DATE: February 27, 2009

UNITED PARCEL SERVICE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Michael Wilcox filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that when his former employer, United Parcel Service (UPS), terminated his employment, it violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA).¹ After a hearing, a Department of Labor Administrative Law Judge (ALJ) recommended that Wilcox's complaint be dismissed. We affirm.

BACKGROUND

Wilcox began working as a full-time driver for the Wilkesboro, North Carolina UPS facility in 1985. While Wilcox was a driver at UPS, Terry Ward, Business Manager, supervised Wilcox. Debra Neiters, in turn, supervised Ward. Neiters, the top official at the Wilkesboro

¹ 49 U.S.C.A. § 31105 (West 2008). The STAA has been amended since Wilcox 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.

UPS facility, reported to Charlie Stephenson, Division Manager. At the relevant time of Wilcox's employment at UPS, John Vinkler was the District Labor Manager. Although Vinkler was not Neiters's direct supervisor, he did have authority to override a termination decision by Neiters. Transcript (Tr.) at 291.

In the normal course of the day, each driver began with an 8:30 a.m. pre-communications meeting (PCM). During the PCM, supervisors informed the drivers of updates and took care of administrative tasks before the driver began the day. On January 6, 2006, during a PCM, Ward handed out UPS's annual Motor Vehicle Driver's Certification (MVDC) form in which a driver lists traffic citations received, if any, for the previous year. Joint Exhibit (JX)-5; Tr. at 75, 265-66. Wilcox listed "none" on his MVDC form to indicate that he had not received any traffic citations in the previous twelve months. JX-1. In fact, Wilcox had received a traffic citation on February 14, 2005. JX-2, at 1. Wilcox was not the only driver with discrepancies on his 2005 MVDC report. A fellow driver, David Denny, left his 2005 MVDC form blank. JX-12. Denny had, in fact, received a citation for driving under the influence (DUI) in the previous twelve months and had lost his permanent driver's license.

In mid-February, UPS took Wilcox's normal delivery truck out of service and assigned him the P-500, an older delivery truck that lacked many of the comforts of his normal truck. Wilcox complained to Ward, Neiters, UPS mechanics, and his union representative that the P-500 UPS assigned was unsafe. According to Wilcox, the P-500 would bottom out or rest against the frame because of suspension problems, would veer off in one direction and was too loud in the driver area. Tr. at 40-45, 128, 135; JX-10; R. D. & O. at 8. Wilcox did not refuse to drive the P-500, but did submit daily inspection reports on February 15, 16, and 17 concerning defects with the truck. On February 17, 2006, Wilcox filed a grievance with his union representative concerning the unsafe conditions of the P-500. JX-15, Tab 7. Wilcox also filed a complaint with the North Carolina Department of Transportation. Tr. at 45, 115-16. Neiters testified that she could not recall when she had spoken with Wilcox regarding the P-500. Neiters, however, signed the February 17 grievance on the 17th, the day she received it. JX-15, Tab 7; Tr. at 162.

Timothy Cox, a mechanic at UPS, testified that after Wilcox's February 15 complaint, he inspected the truck and found all new parts in the suspension. After the February 16 complaint, Cox put on a new engine cover, and after the February 17 complaint, Cox put on new tires. With each complaint, Cox testified that he felt the P-500 was safe to drive. Cox Dep. at 14-28.

On or about February 17, Neiters received a memorandum, dated February 15, from Vinkler and Julie Tullis, manager at UPS's West Carolina Health and Safety Department. Tr. at 161. The memorandum indicated that one or more of Neiters's employees had discrepancies with their 2005 MVDC forms. JX-3; Tr. at 161. Vinkler and Tullis's memorandum requested that Neiters hold a PCM to give the employees with discrepancies a chance to correct their reports, and if they did not do so, to discharge them for dishonesty. JX-3.

At the hearing, Neiters testified that she could not remember whether there was a PCM meeting for employees to correct their MVDCs. Tr. at 170. Ward testified that he did not see the memorandum and did not think a PCM meeting was held for employees to correct their forms. Tr. at 282-83. Kiser, the business agent for Teamsters Local Union 61, testified that

Neiters indicated at Wilcox's local hearing that there was a PCM meeting but that Wilcox did not attend. Tr. at 245. Wilcox too testified that Neiters indicated at the hearing that there was a PCM but that he did not attend. Tr. at 60.

When Wilcox and Denny failed to correct their forms, Neiters scheduled a termination meeting for March 1, 2006. Attending Wilcox's termination meeting were Wilcox; Jerry Sturgill, union representative; Terry Ward; and Neiters. Both Ward and Neiters testified that Neiters gave Wilcox an opportunity to correct the mistake in the MVDC form before informing him of his termination for dishonesty. Tr. at 172 (Neiters); Tr. at 272 (Ward); JX-6 (statement by Ward). During his deposition, Wilcox testified that Neiters informed him that he was terminated first and then asked about the MVDC form. JX-15, at 103-105. At the hearing, Wilcox stated that Neiters did not give him an opportunity to correct his MVDC form at the March 1 meeting. Tr. at 56-57, 77-79 (testimony of Wilcox). Sturgill testified that Neiters did not give Wilcox an opportunity to correct his report until after informing him that he had been terminated. Tr. at 146.

Following the meeting, Neiters drafted a request for a termination letter for Wilcox and Denny. Termination letter requests went from Neiters to Charlie Stephenson, then eventually to Vinkler for final approval. Tr. at 221-24 (testimony of Vinkler); Tr. at 289-91 (testimony of Neiters). The termination letter for Wilcox was sent out on March 3 with Vinkler's approval. JX-4.

Wilcox grieved the termination. As part of the grievance, there was a local hearing followed by an area panel hearing. Safety complaints were not discussed at either of the grievance meetings. Tr. at 98.

UPS subsequently reversed its decision concerning Denny. At Denny's local hearing, Denny informed the reviewers that prior to filling out the MVDC report, he had informed Ward about his DUI. Tr. at 206-07, 274-75.

On August 21, 2006, Wilcox filed a complaint with the North Carolina Department of Labor alleging that UPS had illegally discharged him. The North Carolina Department of Labor referred the case to OSHA, which dismissed the case on December 18, 2006. Wilcox filed an objection and an ALJ held a hearing on October 24, and 25, 2007. As noted, the ALJ recommended that Wilcox's complaint be dismissed. Under STAA regulations, the ALJ's Order is automatically sent to the Administrative Review Board (ARB) for review. 29 C.F.R. § 1978.109(a) (2008).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the STAA.² When reviewing STAA cases, the ARB is bound by the ALJ's

² Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

factual findings if those findings are supported by substantial evidence in the record considered as a whole.³ Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁴

In reviewing the ALJ’s legal conclusions, the Board, as the Secretary’s designee, acts with “all the powers [the Secretary] would have in making the initial decision”⁵ Therefore, the Board reviews the ALJ’s legal conclusions de novo.⁶

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;” or 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.”⁷

To prevail on this STAA claim, Wilcox must prove by a preponderance of the evidence that he engaged in protected activity, that UPS was aware of the protected activity, that UPS took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.⁸ If Wilcox fails to prove any one of these elements, we must dismiss his claim.⁹

³ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. U.S. Dep’t of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995).

⁴ *Clean Harbors Env’tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

⁵ 5 U.S.C.A. § 557(b) (West 1996).

⁶ *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

⁷ 49 U.S.C.A. § 31105(a)(1).

⁸ *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004).

⁹ *Eash v. Roadway Express*, ARB No. 04-036, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005).

Protected Activity

Substantial evidence supports the ALJ's finding that Wilcox engaged in protected activity when he reported to UPS mechanics and Neiters that the P-500 truck was unsafe, rode rough, bottomed out, and was too loud in the driver area.¹⁰ Furthermore, the ALJ correctly concluded that Wilcox's report to Neiters and complaint with the North Carolina Department of Transportation were protected activities.

Causation

There is no dispute that Neiters was aware of Wilcox's protected activity before the March 1 termination meeting or that Wilcox's termination was an adverse action. Neiters testified she could not recall when she had spoken with Wilcox regarding the P-500. Nonetheless, at the very latest, she knew of his complaint on February 17 when she signed his grievance. JX-15, Tab 7; Tr. at 162. Therefore, Wilcox could prevail if he proved by a preponderance of the evidence that UPS terminated him because of his protected activity.

Wilcox presented no direct evidence that UPS retaliated because of protected activity. Even so, he can succeed if he proves by a preponderance of evidence that the reason UPS proffered for his termination – dishonesty – was not the true reason for the adverse action, but instead was a pretext for retaliation.¹¹ To establish pretext, it is not sufficient for Wilcox to show that the action taken was not “just, or fair, or sensible . . . rather he must show that the explanation is a phony reason.”¹²

The ALJ found that Wilcox did not prove pretext.¹³ Substantial evidence supports this finding. As noted above, when UPS fired Wilcox, it also fired Denny for the same perceived dishonesty in relation to his MVDC forms. Later Neiters and Vinkler discovered that Denny had actually informed his supervisor of his traffic violation soon after it happened.¹⁴ As a result, UPS reversed its decision with regards to Denny. Neiters and Vinkler testified that because Denny had informed his supervisor of the DUI beforehand, he did not engage in dishonesty in

¹⁰ Recommended Decision and Order Dismissing Claim (R. D. & O.) at 40.

¹¹ See *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 14 (ARB May 27, 2007).

¹² *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-038, slip op. at 9 (ARB July 31, 2002) (citation omitted).

¹³ R. D. & O. at 45-46.

¹⁴ Denny left his 2005 MVDC form blank. JX-12. The regulations at 49 C.F.R. § 391.27 do not require an employee to list traffic violations on the MVDC if the employer has already been informed of the citation.

leaving the MVDC form blank. Tr. at 180 (Neiters); 207 (Vinkler). Although UPS reconsidered its decision to terminate Denny, Denny and Wilcox were not similarly situated for the purpose of showing UPS's reason for terminating Wilcox was a pretext.

There is disagreement among the parties as to whether and when Wilcox was given an opportunity to correct his MVDC form. The ALJ found that Neiters gave Wilcox an opportunity to correct his MVDC report and any missing entries on March 1. R. D. & O. at 44-45. In so finding, the ALJ credited Ward and Neiter's testimony over that of Sturgill. R. D. & O. at 45 n.3. Substantial evidence supports this finding. Both Ward and Neiters testified that Neiters gave Wilcox an opportunity to correct the MVDC form before informing him of his termination for dishonesty. Tr. at 172 (Neiters); Tr. at 272 (Ward); JX-6 (statement by Ward). Wilcox himself testified during his earlier deposition that Neiters gave him an opportunity to correct his MVDC, but that this opportunity occurred after Neiters informed him UPS was terminating his employment. Wilcox Dep. at 103-05; R. D. & O. at 10. Even if Neiters did not give Wilcox an opportunity to correct his form, Wilcox still fails to preponderate a showing that UPS's reason for terminating him was a pretext for discrimination in violation of the STAA. As the ALJ found, Denny and Wilcox were treated exactly the same. Sturgill testified that Denny's termination took place in the same manner as Wilcox's. Tr. at 151; R. D. & O. at 45.

Thus, the record contains substantial evidence to support the ALJ's finding that UPS terminated Wilcox for dishonesty and not for his protected activity. Therefore, since Wilcox did not prove that UPS fired him because of his protected activity, as he must, we **AFFIRM** the ALJ's recommendation and **DISMISS** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge