U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

WYATT DAVENPORT,

COMPLAINANT,

v.

LTI TRUCKING SERVICES INC.,

RESPONDENT.

ARB CASE NO. 2020-0026

ALJ CASE NO. 2016-STA-00015

DATE: July 22, 2020

Appearances:

For the Complainant:
Wyatt Davenport; *pro se*; Kansas City, Missouri

For the Respondent:
Jill R. Rembusch, Esq.; *Summers Compton Wells LLC*; St. Louis, Missouri

Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge*; James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended. 49 U.S.C. § 31105(a) (2007); see also 29 C.F.R. Part 1978 (2019) (the STAA's implementing regulations). Complainant alleged that Respondent terminated his employment as a truck driver because he made complaints about the safety of his truck. After a hearing, an Administrative Law Judge (ALJ) dismissed Complainant's complaint because she found that Complainant failed to prove by a preponderance of the evidence that he suffered any adverse action during his employment with Respondent. Complainant appealed to the Administrative Review Board (ARB or

Board) and the Board reversed because the ALJ committed reversible error in not addressing Complainant's blacklisting claim. The ALJ assigned to the case on remand found that Complainant failed in his burden to prove blacklisting and found that the record supported the prior ALJ's findings and conclusions. We have reviewed the ALJ's findings of fact and conclusions of law on remand and affirm.

BACKGROUND[1]

The Complainant, Wyatt Davenport, worked as a truck driver for the Respondent for six months from April 2015, until October 1, 2015. D. & O. I at 4. During his employment, Complainant complained to Respondent on many occasions that he was having negative symptoms including upset stomach, diarrhea, tightness of the chest, shortness of breath, body aches, and pains because something was wrong with his truck. *Id.* at 5, 12. Respondent inspected the truck several times and found no problem. *Id.* at 5.

On October 1, 2015, Complainant was driving the truck for Respondent and almost passed out from his symptoms. *Id.* Complainant had a mechanic inspect the truck but the mechanic did not find anything wrong with it. *Id.* Complainant returned to Respondent's location on October 4, 2015, and Respondent also inspected the truck and found no problems. *Id.* On October 5, 2015, Complainant asked Respondent to check the batteries, which it did, and a cracked battery was discovered. *Id.* at 5, 8. Complainant was concerned about his exposure to the battery and went to the hospital. *Id.* at 5. Complainant proceeded to see several medical professionals over a period of time and was diagnosed with a medical condition. *Id.* at 6. His symptoms continued. *Id.*

Complainant's medical provider determined that Complainant could not operate his vehicle because of his poor physical health and informed Respondent that Complainant was not cleared to return to work. *Id.* at 9, 13. Complainant also told Respondent that he could not work due to his physical condition. *Id.* Respondent does not permit drivers to drive if they are not medically released to work. *Id.* It was Respondent's policy that if a driver could not drive due to illness for more than a short period of time, it would send the driver home. *Id.* at 13. The

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[1] In ALJ Seller's Decision and Order on Remand (D. & O. on Remand), he adopted and incorporated the summary of evidence, findings of fact, and conclusions of law in ALJ Craft's Decision and Order (D. & O. I). For this reason, we cite D. & O. I for much of the background statement set forth here.

driver is then permitted to return to work after being cleared by a medical provider and passing a physical examination. *Id.*

At some point after it learned that Complainant was not cleared to drive, Respondent told Complainant that he could no longer use Respondent's truck. *Id.* at 6. Matthew Wilson, Respondent's Director of Safety, took Complainant's keys to the truck and informed Complainant that Respondent was providing him a bus ticket home. *Id.* at 6, 8. Complainant told Wilson that his doctors were all in the area of the workplace and asked Wilson if Respondent could pay for a hotel room for him to be able to stay in the area. *Id.* at 6. He also asked whether he was being fired. *Id.* Wilson told him that Respondent would not pay for a hotel room but that they were not firing him; Respondent was just sending him home until he was well enough to drive. *Id.* at 8, 9, 13. Complainant refused the bus ticket, left, and never returned to work for Respondent. *Id.* at 6. Complainant believed that he was fired even though Wilson told him that he could return after he was well. *Id.* at 13. However, Respondent did not fire Complainant but was sending him home until he obtained medical clearance to drive. *Id.*

A few days after sending Complainant home, Wilson received an email from an employee of Great West Casualties insurance company, informing Wilson that Complainant had written to the insurance employee that he was "trying to do this the right and legal way. [He understood] a lot more why people get AK-47s and go off." *Id.* at 10, 13 (citing Tr. 242); RX 2. In response to this statement, Respondent decided that if Complainant ever contacted it about returning to work, he would not be permitted to do so. *Id.* (citing Tr. 242; Wilson testified that LTI made the decision). Respondent never heard from Complainant about returning to work. *Id.*

Complainant applied for other work. Complainant alleged that LTI blacklisted him by telling other employers not to hire him because he had a "preexisting condition." D. & O. on Remand at 6-7. Complainant recorded one conversation he had with Mr. Melson of Melson Transportation.[2] CX 11; D. & O. 1 at 12. The recording does not establish that anyone with Respondent ever communicated with anyone at Melson Transportation. D. & O. on Remand at 7. When Complainant inquired whether Respondent told Melson Transportation that he had pre-existing ailments, Melson repeatedly replied "no." *Id.* (citing Tr. at 171). Melson explained to Complainant that his Human Resources officer pulls driver history reports before sending out reference forms to previous employers. *Id.* at 8 (citing Tr. at 172). Melson also told Complainant that he did not think that his

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[2] Melson is presumably the owner of Melson Transportation.

Human Resources or Safety officer spoke to anyone with Respondent and was not aware whether his Human Resources officer reached the point of contacting references. *Id.* (citing Tr. at 172-73). Melson speculated that the decision not to hire Complainant was based on the information contained in driver history reports. *Id.* (citing Tr. at 174). Finally, Melson explained to Complainant that his Human Resources officer mentioned that "the insurance would not approve" hiring Complainant (which meant that insurance would not approve Complainant to drive until he was medically cleared to return to work). *Id.*

On October 16, 2015, Complainant filed his complaint with the Occupational Safety and Health Administration (OSHA). OSHA determined that there was no reasonable cause to believe that Complainant's protected activity contributed to the termination decision. OSHA thus dismissed the complaint. D. & O. I at 2. Complainant objected to OSHA's determination and requested a hearing before an ALJ. *Id.*

After the hearing, ALJ Craft concluded that Complainant established that he engaged in protected activity, but failed to prove that Respondent took any adverse action against him when it sent him home. *Id.* at 12-13. The ALJ also found that even if she considered Complainant to have proven his case, Respondent proved that it would have fired Complainant absent his protected activity because of the statement he made about people taking AK-47s and "going off." *Id.* at 13-14. She credited Wilson's statement that Respondent would not have permitted Complainant to return to work for this reason alone had Complainant ever sought a return. *Id.* at 14. The ALJ made no findings with regard to blacklisting.

Complainant appealed to the Board, alleging error in the ALJ's finding that there was no adverse action and the Respondent's affirmative defense. In addition to appealing the finding that there was no termination, Complainant also argued that Respondent engaged in adverse action against him when it blacklisted him to prospective employers. Because we agreed with the Complainant that the ALJ failed to address the issue of blacklisting, which was an alleged adverse action in the case, we remanded for further fact finding on this issue.

On remand, the case was assigned to ALJ Sellers, who concluded that the record supported ALJ Craft's findings that Respondent did not terminate Complainant's employment and that Respondent proved that it would not have allowed Complainant to return to work based on the AK-47 comment even if Complainant had engaged in protected activity. ALJ Sellers further found that

Complainant failed to prove that any blacklisting occurred. Complainant has again appealed to the Board. Both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision pursuant to Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); 29 C.F.R. Part 1978. The ARB reviews questions of law de novo and is bound by the ALJ's factual determinations if the findings of fact are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.110(b).

DISCUSSION

Upon review of the ALJ's decision and the record evidence, we conclude that the ALJ's decision is a reasoned ruling supported by substantial evidence and consistent with applicable law.

1. Termination

Complainant alleges that when Respondent told Complainant to go home, Respondent was actually firing him. ALJ Sellers on remand concluded that the record supported ALJ Craft's findings that Respondent did not terminate Complainant's employment. ALJ Craft had found that Complainant could not work due to his physical symptoms and both Complainant and his medical provider informed Respondent that he could not work. She further found that because Complainant could not work, Respondent told him to go home until he was medically cleared to return to work, whereupon Complainant left Respondent voluntarily and never returned to work. Because these findings are supported by substantial evidence in the record, we affirm them.

Complainant's case compares with other cases in which we have affirmed ALJ decisions finding that no termination occurred. See *Prior v. Hughes Transp., Inc.*, ARB No. 04-044, ALJ No. 2004-STA-001, slip op. at 3 (ARB Apr. 29, 2005) (in which complainant gave the company mechanic a list of items he regarded as safety defects in the truck and then left never to return—the ARB affirmed the ALJ's finding that there was no adverse action because complainant abandoned his job); *Waters v. Exel N. Am. Road Transp.*, ARB No. 2002-0083, ALJ No. 2002-STA-00003

(ARB Aug. 26, 2003) (in which the ARB affirmed an ALJ finding that there was no adverse action because complainant abandoned his job and there was no discharge); and *Smith v. Jordan Carriers*, ARB No. 2005-0042, ALJ No. 2004-STA-00047 (ARB Aug. 26, 2006) (in which the ARB affirmed the ALJ's finding and conclusion that respondent did not fire complainant as complainant chose to sever his employment relationship for reasons other than faulty brakes).

Second, Respondent never told Respondent to "drive or go home" as is the case in many of our cases on this subject. Respondent's decision to send Complainant home was based on a company policy that if a driver cannot drive for an extended period of time he or she should be sent home until medically cleared to drive (and having passed a physical examination). See *Phillips v. MJB Contractors*, 1992-STA-00022 (Sec'y Oct. 6, 1992) (in which respondent told complainant to drive an unsafe vehicle or go home); *Klosterman v. E.J. Davies, Inc.*, ARB No. 2008-0035, ALJ No. 2007-STA-00019 (ARB Sept. 30, 2010) (in which respondent told complainant that if he did not want to drive his assigned vehicle after he reported a flat tire, he should leave).

Next, Respondent did not try to force Complainant to leave work or constructively discharge Complainant.[3] The evidence shows that Respondent had the truck examined at least two times and no problems were found until October 5, 2015, when Respondent found a cracked battery in the truck—four days after Complainant's last day of work with Respondent. The ALJ's findings lead to the conclusion that Respondent was attempting to discover and remedy any problems it found with Complainant's truck as they materialized. This is directly opposite of a constructive discharge situation like that in *Hollis v. Double DD Truck Lines, Inc.*, 1984-STA-00013 (Sec'y Mar. 18, 1985), in which the Secretary held that all of the events surrounding complainant's resignation led to the conclusion that he was constructively discharged because respondent had made his working conditions so unpleasant that a reasonable person would have felt compelled to resign. In *Hollis*, the complainant had sought correction of the unsafe conditions of his truck several

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[3] "Whether a constructive discharge has occurred depends on whether working conditions were rendered so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign." *Earwood v. D.T.X. Corp.,* 1988-STA-00021, slip op. at 3-4 (Sec'y Mar. 8, 1991) (in which the Secretary found that the respondent's "pervasive coercion to violate Department of Transportation regulations was intolerable" and "[i]n view of the totality of the circumstances, a reasonable person in Complainant's position would have felt compelled to quit.") (citing *Watson v. Nationwide Ins. Co.,* 823 F.2d 360 361- 362 (9th Cir. 1987); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887-888 (3d Cir. 1984)).

times and respondent continued to ask him to drive it knowing that it had uncorrected safety problems. Here, the ALJ found that both Respondent and Complainant looked for problems with the truck but none were found until October 5, 2015, after Complainant's last day of work with Respondent.

Finally, in this case there was no memorialization by Respondent that Complainant quit or was fired when he left, which supports that Respondent did not terminate Complainant's employment. See *Robinson v. Duff Truck Line, Inc.*, 1986-STA-00003, slip op. at 10 (Sec'y Mar. 6, 1987) (respondent put in the mail a letter advising complainant that his refusal to work due to bad weather conditions was considered a voluntarily quit); *Galvin v. Munson Transp. Inc.*, 1991-STA-00041, slip op. at 4 (Sec'y Aug. 31, 1992) (respondent's computer entries indicated that complainant was off of the truck for payroll purposes); *Klosterman*, ARB No. 2008-0035 (respondent memorialized the day before the quit/firing incident that it wanted to get rid of complainant and the day of the firing/quit wrote to the union steward that complainant had quit when he left after respondent told complainant to drive his assigned vehicle or leave).

This is a straightforward case in which Respondent did not fire Complainant even though Complainant chose to interpret his being sent home because he was not well enough to drive as a termination decision. Again, the ALJ so found and concluded and those findings and conclusions are supported by substantial evidence in the record and in accordance with law.

2. Affirmative Defense

ALJ Craft also found that even assuming that Complainant proved his case regarding the termination decision, Respondent proved that it would have refused to take Complainant back to work absent protected activity. Again, ALJ Sellers on remand found that ALJ Craft's findings were supported by the record. ALJ Craft found that Complainant's statement to the insurer that he understood why people take AK-47 weapons and go off concerned Wilson so much that he decided that Complainant would not be permitted to return to work. Substantial evidence supports this finding as Complainant conceded to making the statement at the hearing and Wilson credibly testified that it concerned him such that he would not allow Complainant to return. D. & O. I at 13-14. Thus, we affirm.

3. Blacklisting

Under the STAA, an employer "may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment" because he engages in protected activity. 49 U.S.C. "§31105(a)(1). The regulations at § 1978.102(b) specify that "[i]t is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee." Thus, if Respondent blacklisted Complainant because he engaged in protected activity, then it violated the STAA. ALJ Sellers on remand considered the matter and found that Complainant did not fulfill his burden to prove that Respondent blacklisted him by a preponderance of the evidence because Complainant failed to introduce or identify any evidence that Respondent blacklisted him other than mere speculation. D. & O. on Remand at 7-8. The ALJ noted that Complainant did not present any evidence of what his driver reports contained, that Respondent provided any negative information to be placed on his driver reports, or that anyone at Respondent actually communicated with anyone at a prospective employer. *Id.* at 8. Because substantial evidence in the record supports the ALJ's finding, we affirm.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's decision dismissing Complainant's complaint with respect to whether Respondent terminated Complainant's employment. We also **AFFIRM** the alternate finding that Respondent proved its affirmative defense with respect to the termination decision. Finally, we **AFFIRM** the ALJ's finding on remand that Complainant failed to prove by a preponderance of the evidence that Respondent blacklisted him.

SO ORDERED.