U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In The Matter of:

PAUL H. ANDREAE,

COMPLAINANT,

v.

DRY ICE, INCORPORATED,

RESPONDENT.

ARB CASE NO. 97-087

ALJ CASE NO. 95-STA-24

DATE: July 17, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

On March 31, 1997, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. and O.) dismissing this case arising under the "whistleblower" provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. §31105 (West 1996).[1/] Upon review, we agree that the complaint must be dismissed. *See* 29 C.F.R. §1978.109(c) (1996).

Complainant, Paul H. Andreae, was employed as a truck driver from November 29, 1994, until December 9, 1994, at the Milwaukee, Wisconsin location of Dry Ice, Incorporated. Andreae alleges that the manager, Stan Jackson, fired him on December 8 because he complained about having to drive a truck with defective wiper blades and side mirrors. Jackson testified that he fired Andreae because of poor and aggressive driving habits, lack of trustworthiness, and customer complaints about Andreae's behavior in making deliveries. Transcript (T.) at 49-50, 53-56. The ALJ found that Andreae failed to establish a *prima facie* case under the STAA and alternatively, that Jackson's reasons for the discharge were not a pretext for retaliation. R. D. and O. at 8-10. We agree that Andreae failed to meet his burden of proof.

The relevant facts are thoroughly summarized by the ALJ, R. D. and O. at 3-6, and because her factual findings are supported by substantial evidence on the record as a whole, they

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[1/] The ALJ's citation to the STAA at 49 U.S.C. §2305 is outdated.

are conclusive. 29 C.F.R. §1978.109(c)(3). In addition, the ALJ accurately described the burdens of proof and persuasion applicable under the STAA, except that she failed to incorporate the principle set forth in *United States Postal Serv. v. Aikens*, 460 U.S. 709 (1983), which has been repeatedly emphasized and applied in recent decisions by the Board and the Secretary of Labor. *See, e.g., Jones v. Consolidated Personnel Corp.*, ALJ Case No. 96-STA-1, ARB Case No. 97-009, Jan. 13, 1997; *Etchason v. Carry Cos.*, Case No. 92-STA-12, Sec. Dec., Mar. 20, 1995, citing *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 11, *aff'd*, 78 F.3d 352 (8th Cir. 1996). As the Supreme Court stated in *Aikens*:

> Because this case was fully tried on the merits, it is surprising to find the parties and the [court] still addressing the question whether [the plaintiff] made out a *prima facie* case. . . .
>
> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The [court] has before it all the evidence it needs to decide the [ultimate question of discrimination].

460 U.S. at 713-14, 715 (emphasis added). Thus, because Dry Ice presented rebuttal evidence, the answer to the question whether Andreae made a *prima facie* showing in this case is not useful, and we decline to discuss the ALJ's finding on that particular point.

It is undisputed that Jackson was aware of Andreae's internal safety complaints and that Andreae was fired shortly after raising the complaints. The critical factual inquiry is whether retaliatory animus motivated the adverse employment action. In short, the ALJ was required to decide which party's explanation of Jackson's motivation she believed. *Aikens*, 460 U.S. at 716.

In making her findings relevant to causation and motivation, the ALJ evaluated the entire record and decided to credit Jackson's explanation. We find no reason to disturb the ALJ's credibility assessment, as Jackson's testimony is candid, consistent with the record, and inherently probable. The record shows that within Andreae's brief employment with Dry Ice, he was involved in an altercation with another driver; was observed taking another employee's lunch without permission; and was reasonably suspected of misappropriating the company credit card.[2/] In addition, as the ALJ discussed, Jackson routinely encouraged Andreae and the other drivers to make written reports of safety defects affecting the vehicles. R. D. and O. at 8, 9. Although the ALJ erred in stating that the Secretary had held such evidence to be singularly dispositive, it is highly relevant evidence that militates against a finding of retaliatory

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[2/] There is ample support that Jackson's negative perception of Andreae was reasonable. Andreae himself testified that the circumstances surrounding his use of the credit card had been "twisted around," making it appear that he had misused the credit card, T. at 37-38, and Andreae never explained or told Jackson otherwise. Further, another employee corroborated that Jackson genuinely mistrusted Andreae. Andreae's Brief dated Sept. 19, 1995, at 1.

motivation. *See Ake v. Ulrich Chemical, Inc.*, Case No. 93-STA-41, Sec. Dec., Mar. 21, 1994, slip op. at 6-8, citing *Moon v. Transportation Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). Considering all the evidence, Jackson's explanation that he decided to promptly discharge an unreliable and untrustworthy employee is entirely believable, and Andreae failed to prove that retaliation for reports about safety defects was a factor in Jackson's decision. *See Etchason*, slip op. at 3-5.[3/]

Accordingly, the complaint IS **DISMISSED**.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[3/] Contrary to Andreae's arguments, the facts that: (1) Jackson never told Andreae about the customer complaints, and (2) new wiper blades for Andreae's vehicle had been ordered and received by the repair shop a month earlier, do not overcome other evidence and disprove Jackson's explanation or prove improper motive. Also, Andreae mistakenly contends that Jackson's criticism of his inordinately long trip to Wausau is irrelevant because he was paid a flat rate. Jackson was reasonably concerned with efficiency and customer satisfaction. Finally, although Andreae complains that Dry Ice failed to call certain witnesses, we note that Andreae bore the burden of proving that Dry Ice violated the STAA. *See St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2756 (1993).