



In the Matter of:

TERRY CHARLES,

ARB CASE NO. 03-133

COMPLAINANT,

ALJ CASE NO. 2003-STA-15

v.

DATE: August 26, 2004

ESTES EXPRESS LINES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Terry Charles, pro se, Brown Summit, North Carolina

For the Respondent:

Davis L. Terry, Esq., Poyner & Spruill, Charlotte, North Carolina

FINAL DECISION AND ORDER

Terry Charles complained that Estes Express Lines violated 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), and its implementing regulations, 29 C.F.R. Part 1978 (2003). With some modification, we affirm the Administrative Law Judge's Recommended Decision and Order (R. D. & O.) issued on July 25, 2003 that Estes did not violate the STAA.

BACKGROUND

We adopt and summarize the ALJ's findings of fact. Charles was a commercial driver and began driving a truck for Estes in 1990. During the relevant time period, Charles was assigned a "halfway" run from the Estes terminal in Greensboro, North Carolina, to locations in Virginia, where he would meet another driver and exchange trailers. The meeting place changed from Gainesville to New Baltimore and then to Opal, Virginia, with the round trip distance shortened from 520 to 480 miles. Estes

expected Charles to complete the run within the ten hours between 9:30 p.m. and 7:30 a.m. He complained that he could not make the trip on time without speeding, and, although he returned late, he wrote in his logs that he arrived on time. R. D. & O. at 3, 5. Charles's lawyer sent a letter to Estes on September 19, 2002, claiming that Charles's supervisors had pressured him into driving illegally and requesting that the mileage lost from the longer Gainesville/New Baltimore trip be restored. *Id.* at 7-8; Respondent's Exhibit (RX) 22.

Estes introduced evidence that the assigned run was safe. A local safety manager for Estes rode with Charles on two nights. Charles completed the runs on time, without speeding. *Id.* at 4, 7-8. The runs were legal according to the Rand-McNally Milemaker, a planning guide that the trucking industry and government enforcement agencies used to determine travel time based on speed limits and distance. *Id.* at 7, 11. Also, Charles admitted to a colleague that on occasion he returned late, not because he could not make the runs on time, but because he did not want to arrive at home too early, which would disturb the dog whose barking would then wake up his wife and daughter. Accordingly, he slept in the truck before returning to the Greensboro terminal. *Id.* at 9.

Estes suspended Charles and then terminated his employment on September 24, 2002, for reasons unrelated to his complaints and late arrivals. *Id.* at 7-9, 12-15. On that day, an outside contractor selected Charles for random drug testing, and rather than proceeding immediately to the testing center as company and federal regulations required, he said he had other plans. Even after Estes gave him a five-day suspension for failing to comply, Charles made a detour and arrived late. Failing to report for drug testing as directed was a terminable offense. At a later meeting in the management office, Charles stood aggressively and refused several instructions to be seated. William McPherson, the Estes terminal manager in Greensboro, then terminated Charles's employment. *Id.* at 7-9.

Charles filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on October 8, 2002, alleging that, in violation of the STAA, Estes retaliated against him for making safety complaints. Following an investigation, OSHA denied relief on December 23, 2002. On January 20, 2003, Charles appealed and requested an evidentiary hearing. An ALJ held the hearing on May 7, 2003, in Winston-Salem, North Carolina. We now consider his R. D. & O. under the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2003). The question before us is whether Charles proved by a preponderance of the evidence that Estes violated the STAA by taking adverse action against him for making safety complaints.

DISCUSSION

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, *inter alia*, the STAA and the implementing regulations at 29 C.F.R. Part § 1978. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 2002). We are bound by the factual findings of the ALJ if those

findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991). However, the Board reviews questions of law de novo. See *Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express*, 929 F.2d at 1063.

The STAA, 49 U.S.C.A. § 31105(a)(1), 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 protected activity includes making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order.” § 31105(a)(1)(A). Charles asserts that the following Department of Transportation (DOT) regulations were pertinent. 49 C.F.R. § 395.3 (2001) provided that “[N]o motor carrier shall permit or require any driver used by it to drive nor shall any driver drive . . . [m]ore than 10 hours following 8 consecutive hours off duty.” 49 C.F.R. § 395.8(a) (2001) stated that “every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24 hour period.” 49 C.F.R. § 395.8(e) (2001) provided that “making of false reports in connection with such duty activities shall make the driver and/or the carrier liable to prosecution.” Charles’s argument is that he was fired for complaining that he could not complete his runs within 10 hours and so was forced to exceed the speed limit or falsify his return times.

To prevail under the STAA, a complainant must prove by a preponderance of the evidence that he or she engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. *Schwartz v. Young’s Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sec’y v. Minnesota Corn Processors, Inc.*, ABR No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003).

We agree with, and accordingly adopt, the ALJ’s ruling that Estes did not suspend and then fire Charles on account of his complaints about the time it took to do his run. Substantial evidence supports the ALJ’s conclusion that Estes suspended Charles for five days on September 24, 2002, because he initially refused to proceed immediately for random drug testing as company policy and federal regulations required. R. D. & O. at 7-9, 13-14. Thereafter, McPherson decided to discharge Charles.

Upon returning to the terminal after his drug testing, Charles would not sit as directed but instead exhibited aggressive body language and continued to wear his mirrored sunglasses. At that point McPherson terminated Charles for the conduct he had exhibited that day, which included “bad attitude,” disruptive behavior and failure to follow directions.

Id. at 9 (citations to hearing transcript omitted). *See also id.* at 15.

Thus, Estes disciplined and then discharged Charles for legitimate, non-discriminatory reasons. He failed to establish unlawful discrimination under the STAA.

We disagree with, and therefore do not adopt, two portions of the ALJ's analysis. First, according to the ALJ, "[A]lthough the evidence shows that there is no factual basis to support any of Charles' complaints and that he knew his complaints were untrue, he engaged in protected activity by making complaints" However, to be protected under whistleblower law, the complainant must have a reasonable, good faith belief that a violation exists. *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000) (complainant must prove that he actually believed that respondent was violating environmental laws and that such belief was reasonable); *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1994). Under the substantial evidence test, we adopt the ALJ's finding that Charles knew the runs he complained about were safe and legal, R. D. & O. at 11, but must draw a different legal conclusion, viz. that his complaints were not protected. Hence, he failed to prove unlawful discrimination for that reason as well.

Second, it was unnecessary for the ALJ to reach the dual motive test. *Id.* at 13-15. If a complainant demonstrates that the respondent took adverse action in part because he or she made protected complaints, the burden shifts to the respondent to prove that the complainant would have been disciplined even if he or she had not engaged in protected activity. *Spearman v. Roadway Express, Inc.*, 92-STA-1 (Sec'y June 30, 1993). *See also St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). However, "[W]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." *Mitchell v. Link Trucking, Inc.*, ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001). Here, the ALJ said that the case "could" be analyzed as a mixed motive case because Charles's lawyer's September 19, 2002 letter, RX 20, was followed within five days by Charles's September 24, 2002 suspension and discharge. R. D. & O. at 13. However, the ALJ actually found that "Charles . . . has presented no evidence to indicate that Estes' decision to terminate him was motivated by the September 19, 2002 letter." *Id.* at 13. We adopt that factual finding under the substantial evidence test. Inasmuch as Charles failed to prove that protected activity was a factor in the adverse actions, the ALJ need not have proceeded to determine whether Estes would have taken adverse action anyway. Nevertheless, the evidence does support his conclusion that Estes would have suspended and terminated Charles's employment, regardless of the complaints he and his attorney made. *Id.* at 13-15.

CONCLUSION

In sum, Charles failed to prove unlawful discrimination under the STAA, and we affirm the ALJ decision and **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge