In the Matter of:

GERALD W. CROWELL,	**ARB CASE NO. 04-173**
COMPLAINANT,	**ALJ CASE NO. 2002-STA-033**
v.	**DATE: December 29, 2006**
AMERICOACH TOURS,	**DATE REISSUED: January 16, 2007**
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Florence M. Johnson, Esq., *Perkins, Johnson & Settle,* Memphis, Tennessee

For the Respondent:
William P. Dougherty, Esq., *Young & Perl, PLC,* Memphis, Tennessee

FINAL DECISION AND ORDER

Gerald W. Crowell complained that Americoach Tours 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 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2006), when it terminated his employment. On August 31, 2004, a Department of Labor (DOL) Administrative Law Judge (ALJ) recommended dismissal of Crowell's complaint . We affirm.

BACKGROUND

The ALJ thoroughly discussed the facts of this case as presented at two hearings on October 17, 2002, and July 24, 2003. Recommended Decision and Order (R. D. & O.) at 4-13. We summarize briefly.

Americoach hired Crowell as a bus driver on June 30, 2000, and fired him for cause on August 14, 2001, after a customer complained about his behavior on a week-

long, Upward Bound bus tour for high school students. Americoach had previously issued several disciplinary memoranda to Crowell during his employment, including a September 7, 2000 warning of a duty log violation, Respondent's Exhibit (RX) 6; a September 9, 2000 failure to report for duty, RX 7; an October 17, 2000 notice of six months' probation, RX 8; a May 31, 2001 warning about an expired medical card, RX 9; and a June 29, 2001 infraction for operating a bus without the maintenance-fuel book, RX 11.

In April 2001 while on a trip to New York City, Crowell called the Americoach dispatcher, Ira Watson, to complain that he was in danger of exceeding the number of hours he was permitted to drive because there was no place to park in Manhattan and he had to "keep circling the block." Hearing Transcript (TR) at 26, 106-11, 136. Larry Gardner, Americoach's operations manager, told Crowell to find a place to park his bus, no matter what the charge. TR at 136-37. Crowell did so and was later reimbursed for the $40.00 cost. TR at 52-53, RX 19.

In July 2001, Crowell was one of two drivers on an educational bus trip following the route of the Underground Railroad from Little Rock, Arkansas to Detroit, Michigan and Canada. On the first day, Crowell called Gardner to complain that the teen-agers on his bus were disorderly and distracting and that he feared it was unsafe to keep driving. TR at 29-31. Gardner asked if a relief driver was needed, but Crowell later indicated that "we've got everything worked out" and continued on the tour. TR at 29-31, 58-59, 81-84, 180-82, 193-94, 209-12.

On the second day, Steve Williams, the other driver, reported to Gardner that Crowell might refuse to drive that day. TR at 183-84, RX 18. Gardner then attempted to obtain a relief driver, but Williams called back later to say that Crowell had agreed to drive. TR at 140.

After the tour concluded, Gardner received a telephone call from Gloria Billingsley, the program director. She complained that Crowell had used profanity in front of the teen-agers and had attempted to obtain money from her to continue driving the bus in Toronto. TR at 141, 213-16. She furnished Gardner with a detailed written statement on August 13, 2001. RX 3. Williams, the other driver, wrote to Gardner that Crowell had threatened not to drive in Toronto and had asked Billingsley, "what's in it for me," if he continued. RX 4. Americoach fired Crowell by letter dated August 14, 2001, on the grounds of his "past record" and this "very serious customer service complaint." RX 21.

Crowell filed a complaint with DOL's Occupational Safety and Health Administration (OSHA) on August 15, 2001, alleging that Americoach had discriminated against him in violation of section 31105 of the STAA. After an investigation, OSHA dismissed the complaint on April 26, 2002, and Crowell requested a hearing. RX 1. He appeared pro se at the October 17, 2002 hearing. Following his testimony, the ALJ granted Americoach's motion to dismiss on the grounds that Crowell had failed to present a prima facie case. Subsequently, the ALJ vacated, as improvidently granted, his

order dismissing the complaint. He determined that Crowell had established a prima facie case and rescheduled the hearing for July 24, 2003. Crowell appeared with counsel.

JURISDICTION

This case is now before the Administrative Review Board (ARB) under the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1). We issued a Notice of Review and Briefing Schedule on September 15, 2004. Neither party elected to file a brief.[1]

The Secretary of Labor has delegated her jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C) to the ARB. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c).

When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States 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). The ARB defers to an ALJ's credibility findings that "rest explicitly on an evaluation of the demeanor of witnesses." *Stauffer v. Wal-Mart Stores, Inc.*, No. 99-STA-2, slip op. at 9 (ARB July 31, 2001) quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983). This is so because the ALJ "sees the witnesses and hears them testify while . . . the reviewing court look[s] only at cold records." *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991).

The ARB reviews the ALJ's legal conclusions de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

DISCUSSION

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 activities. These protected activities include: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," § 31105(a)(1)(A); "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle

[1] Crowell's attorney, Florence M. Johnson, filed a motion to withdraw as counsel before the ALJ on the grounds that Crowell's conduct and lack of response rendered it "unreasonably difficult" for her to represent him. The ALJ, however, had already forwarded the case to the ARB pursuant to 29 C.F.R. § 1978.109. Thus, the motion to withdraw is now before us. There being no objection, the motion is granted.

safety or health," § 31105(a)(1)(B)(i); or "refus[ing] 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," § 31105(a)(1)(B)(ii).

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that the protected activity was the reason for the adverse action.[2] *BSP Trans, Inc.*, 160 F.3d at 45; *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 03-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

We have reviewed the record and find that substantial evidence on the record as a whole supports the ALJ's factual findings. Those findings are therefore conclusive. 29 C.F.R. § 1978.109(c)(3).

We agree with the ALJ that Crowell engaged in protected activity when he reported safety concerns regarding his hours of service and the disruptive behavior of his passengers to Watson and Gardner. R. D. & O. at 16-17. 49 U.S.C.A. § 31105(a)(1)(A). *See Regan*, slip op. at 5 (protected activity may result from "purely internal complaints to management, relating to a violation of a commercial motor vehicle safety rule, regulations, or standard"). We also agree that Crowell's testimony raised an inference of protected activity when he complained that Gardner's July 20, 2001 memorandum to all

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[2] As the ALJ stated, in STAA cases the ARB has adopted the burdens of proof framework developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 5-6 (ARB June 28, 2002). Under this burden-shifting framework, the complainant must first establish a prima facie case, that is, adduce evidence that he engaged in STAA-protected activity, that the respondent employer was aware of this activity, and that the employer took adverse action against the complainant because of the protected activity. Only if the complainant makes this prima facie showing does the burden of production shift to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. If the respondent carries this burden, the complainant then must prove by a preponderance of the evidence that the reasons offered by the employer were not its true reasons but were a pretext for discrimination. *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002). The ultimate burden of persuasion that the employer intentionally discriminated because of the complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1992); *Safley v. Stannards, Inc.*, ARB No. 05-113, ALJ No. 03-STA-54, slip op. at 5 (Sept. 30, 2005).

drivers, in his opinion, directed them to falsify their work logs "to avoid all discrepancies." R. D. & O. at 18-19.

There is no dispute that Americoach managers were aware of Crowell's complaints, that the disciplinary memoranda and ultimate discharge were adverse actions, and that Americoach submitted evidence showing that it terminated Crowell's employment for cause. Therefore, Crowell had the burden of proof to demonstrate that Americoach's reason for firing him was pretext and that the bus company intentionally discriminated against him because of his protected activity. *Calmat Co. v. United States Dep't of Labor*, 364 F.3d 1117, 1122 (9th Cir. 2004); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 095, ALJ No. 02-STA-35, slip op. at 15-16 (ARB Aug. 6, 2004).

The ALJ thoroughly and fairly discussed the relevant facts underlying the reason for Crowell's discharge. He determined that Crowell was simply not credible in denying that he used profanity or tried to extort money on the Upward Bound bus tour because his testimony was contradicted by Billingsley's detailed written complaint and a collaborating memorandum from Williams, the other driver. The ALJ correctly applied the legal standards to conclude that Americoach had established an independent legitimate non-discriminatory basis for firing Crowell and that Crowell failed to prove that his discharge was in retaliation for his protected activity. R. D. & O. at 20. *See Hogquist v. Greyhound Lines, Inc.*, ARB No. 03-152, ALJ No. 03-STA-31, slip op. at 5 (ARB Nov. 30, 2004)(back-up driver fired for failure to comply with company rules on logging time and seeking payment for trips).

CONCLUSION

Substantial evidence in the record supports the ALJ's findings of fact. He applied the correct law to those findings. Therefore, we adopt and attach the ALJ's Recommended Decision and Order and **DISMISS** Crowell's complaint.

SO ORDERED.

DAVID G. DYE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge