In the Matter of:

ROY CHAPMAN,

COMPLAINANT,

v.

J.B. HUNT TRANSPORTATION COMPANY,

RESPONDENT.

ARB CASE NO. 05-097

ALJ CASE NO. 2004-STA-44

DATE: June 29, 2007

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Roy Chapman*, pro se*, Texas City, Texas

For the Respondent:
Byron L. Ames, Esq., *Tharpe & Howell*, Las Vegas, Nevada

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1997). Roy Chapman filed a complaint alleging that his former employer, J.B. Hunt Transportation Company (Hunt), violated the STAA by terminating his employment. After a hearing on the complaint, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in which he concluded that Hunt did not violate the STAA. We affirm.

BACKGROUND

Chapman began working for Hunt in April 2003. His drove Hunt's trucks from Houston to various destinations in the United States. He would remain out on the road

for as long as four weeks before returning to Houston, whereupon Hunt would assign him a different truck.[1] While on the road, Chapman communicated with Hunt by telephone or through his vehicle's on-board computer (OBC).[2] His supervisor was Phil Shank, who was based in Lowell, Arkansas. Shank's supervisor was Deb Beecher, Hunt's Team Leader for its Gulf Coast region.[3]

Throughout his employment with Hunt, Chapman occasionally informed its dispatchers, in messages transmitted through his OBC, that he could not deliver his loads on schedule.[4] Some of these messages contained statements by Chapman indicating his desire to operate his vehicle in a safe manner. Hunt did not threaten Chapman with discipline when he transmitted these messages.[5]

In early May 2003, Hunt informed Chapman that he would be suspended for three days because he had too many late deliveries or "service failures."[6] On May 15, 2003, Chapman spoke to Beecher and Shank by telephone to challenge the proposed suspension. Chapman argued that the late deliveries that caused the service failures were the result of illness and inclement weather.[7] Chapman contends that, during these conversations with Beecher and Shank, he also threatened to contact the Occupational Safety and Health Administration (OSHA).[8] Beecher agreed to remove the service failure caused by illness and revoked the suspension.[9]

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1 Tr. 10, 18-22.

2 *Id.* at 17-18.

3 *Id.* at 180-81.

4 *See, e.g.*, Respondent's Exhibit (RX) 11 at 269-70, 275, 277, 284, 287, 325-26, 329, 333-34, 349, 369, 371-72, 379, 388, 398-99 and 400.

5 R. D. & O. at 6.

6 Tr. 69-71.

7 *Id.* at 68-70.

8 *Id.* at 66-67, 72. Chapman also testified that he contacted OSHA in June 2003 "after Hunt told him that he had an excessive 'idle percentage,' which is the amount of time that the truck is idling." R. D. & O. at 4.

9 Tr. 76-77. Beecher did not remove the service failure caused by inclement weather because Chapman failed to notify his fleet manager that he would be late because of the weather. *Id.* at 70; R. D. & O. at 2.

On May 18, June 15, and November 13, 2003, Hunt received phone calls from members of the public who complained about Chapman's driving.[10] On November 27, 2003, Hunt received a complaint from a caller in Benton, Arkansas, indicating that Chapman had cut him off and straddled two lanes on the highway, preventing the caller from passing Chapman's truck.[11] This last call prompted Hunt to initiate a "multiple complaint review."[12] Hunt conducts multiple complaint reviews when it receives four complaints about a driver within one year.[13] Following the fourth complaint, the team leader, fleet manager, and safety manager confer with the driver to discuss the incidents. The driver also receives additional training after the conference.[14]

Beecher and Michael Agnew, Hunt's Safety Manager, conducted the multiple complaint review with Chapman on December 4, 2003.[15] Beecher contends that the meeting "went downhill very quickly" because Chapman became hostile and was not receptive to any criticism regarding his driving.[16] She testified that "there was no getting through to him. And he got rather loud, was yelling at us, and that's not professional."[17] As a result of Chapman's conduct during the multiple complaint review, Hunt terminated Chapman's employment the same day.[18]

Chapman filed his STAA complaint on December 18, 2003. OSHA investigated Chapman's complaint and issued a determination on April 14, 2004, finding no violation by Hunt. Chapman objected to OSHA's determination and requested a hearing before an ALJ, which was held in Las Vegas, Nevada on June 29, 2004. Chapman appeared at the hearing pro se.

Following the hearing, the ALJ found that "Chapman was not fired because he made safety-related complaints to Hunt or OSHA" but instead "was fired because he

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10 RX 9 at 19-20, 27.

11 *Id.* at 28; R. D. & O. at 9.

12 Tr. 191.

13 *Id.* at 183-84.

14 *Id.*

15 *Id.* at 149, 199-200; RX 16. One of Hunt's fleet managers also attended but did not participate. Tr. 199-200.

16 *Id.* at 200.

17 *Id.*

18 R. D. & O. at 4.

demonstrated an attitude of resistance to any instructions about improving his safe driving skills or habits."[19] The ALJ concluded that Hunt did not violate the STAA and recommended dismissal of Chapman's complaint.[20]

The case is now before the Administrative Review Board (ARB) pursuant to the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2006). The question we consider is whether substantial evidence in the record and the related legal analysis supports the ALJ's conclusion that Hunt did not violate the STAA by terminating Chapman's employment.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the STAA.[21] When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence in the record considered as a whole.[22] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[23]

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 . . .."[24] Therefore, the Board reviews the ALJ's legal conclusions de novo.[25]

DISCUSSION

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding

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19 *Id.* at 10.

20 *Id.*

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

22 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).

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

24 5 U.S.C.A. § 557(b) (West 1996).

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

pay, terms, or privileges of employment" because the employee has engaged in certain protected activities.[26] These protected activities include making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order."[27]

To prevail on his claim, Chapman must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) Hunt was aware of the protected activity; (3) Hunt discharged, disciplined, or discriminated against him; and (4) the protected activity was the reason for the adverse action.[28]

In STAA cases, the Board adopts 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, such as the Age Discrimination in Employment Act.[29] Under this burden-shifting framework, the complainant must first establish a prima facie case of discrimination. That is, the complainant must 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 respondent were not its true reasons but were a pretext for discrimination.[30] The ultimate burden of persuasion that

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[26] 49 U.S.C.A. § 31105(a)(1).

[27] 49 U.S.C.A. § 31105(a)(1)(A).

[28] *BSP Trans, Inc.*, 160 F.3d at 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Eash v. Roadway Express*, ARB No. 04-036, ALJ No. 1998-STA-28, slip op. at 5 (ARB Sept. 30, 2005); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004).

[29] *Feltner v. Century Trucking, Ltd*., ARB No. 03-118, ALJ Nos. 03-STA-1, 03-STA-2, slip op. at 4-5 (ARB Oct. 27, 2004); *Densienski*, slip op. at 4. *See Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *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).

[30] *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002).

the respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant.[31]

We concur with the ALJ's conclusion that Chapman engaged in protected activity on May 15, 2003, when he informed Hunt that his performance had been hindered by illness and inclement weather.[32] And there is no dispute that Hunt discharged Chapman. Nevertheless, Chapman cannot prevail on his claim because he failed to prove by a preponderance of the evidence that his protected activity was the reason for his discharge.

Hunt articulated a legitimate, nondiscriminatory reason for firing Chapman, i.e., because he was insubordinate and unprofessional during the multiple complaint review. Therefore, as indicated above, Chapman must prove that Hunt's articulated rationale is pretextual. He has failed to do so.

Chapman strongly disagreed with Hunt's instruction and criticism regarding his driving methods.[33] Nevertheless, the issue before us is not the merit of Hunt's suggestions. Hunt fired Chapman because of his insubordinate behavior during the multiple complaint review, and Chapman's insubordinate behavior does not constitute STAA-protected activity. Chapman has therefore failed to prove an essential element of his claim, i.e., that Hunt terminated his employment because he engaged in protected activity.

Chapman produced no direct or circumstantial evidence that Hunt fabricated complaints from the public to initiate the multiple complaint review. In contrast, the ALJ made a specific credibility finding about Beecher's description of Hunt's procedure for

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[31] *St. Mary's Honor Ctr.*, 509 U.S. at 502; *Densieski*, slip op. at 4; *Gale v. Ocean Imaging & Ocean Res., Inc.*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 8 (ARB July 31, 2002); *Poll*, slip op. at 5.

[32] R. D. & O. at 8. The ALJ found that Chapman did not threaten to contact OSHA during his May 15, 2003 conversations with Beecher or Shank and that, if he did contact OSHA in June 2003, Beecher was not aware of any of Chapman's alleged communications with OSHA before she fired him. *Id.* at 7.

[33] *See, e.g.*, Tr. 80-82 ("She fired me because I did not adhere to their company policy of running over anything that's in the road … And she says I violated company policy and what would I do in the future? I said, 'I'd do the same thing in the future, the same damn thing' is what I told her."), 82 ("I have a license. She does not. I have experience. She does not. So therefore, what I chose to do was the right thing.). *See also* R. D. & O. at 10 (Chapman demonstrated an "attitude of nearly total resistance to any safety instructions on the grounds that his own experience as a licensed truck driver should trump the safety policies of Hunt ….").

dealing with drivers who generate complaints.[34] We uphold an ALJ's credibility findings based on substantial evidence unless they are "inherently incredible or patently unreasonable."[35] We therefore conclude that Chapman has failed to prove that either the multiple complaint review, or Hunt's rationale for firing him, were pretextual.

Finally, we disagree with Chapman's contention that the ALJ "exhibited a biased and prejudiced attitude towards [him]" at the hearing.[36] Nothing in the record supports Chapman's allegation that the ALJ's conduct was improper. During the hearing, the ALJ allowed Chapman to present his case. The ALJ asked Chapman questions to elicit information regarding his claim. Chapman appeared pro se and, as we have noted in previous cases, ALJs "have some responsibility for helping unrepresented litigants."[37]

In sum, substantial evidence supports the ALJ's finding that Hunt established a legitimate, nondiscriminatory reason for terminating Chapman's employment, and well established legal precedent and analysis supports the ALJ's conclusion that Hunt did not violate the STAA.

CONCLUSION

We have reviewed the record and find that substantial evidence on the record as a whole supports the ALJ's factual findings and that they are therefore conclusive. 29

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[34] *Id*. at 9 ("The information from Mr. Chapman's OBC shows that he was in the area at the time these complaints were lodged and casts doubt on his claim that he was the victim of dishonest or mistaken motorists …. I find that Ms. Beecher's testimony regarding Hunt's procedure was credible and consistent with the evidence in the OBC communications.").

[35] *See, e.g., Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-24, slip op. at 5 (ARB Jan. 31, 2007) (citing *Negron v. Vieques Air Link, Inc*., ARB No. 04-021, ALJ No. 2003-AIR-10, slip op. at 4-5 (ARB Dec. 30, 2004)).

[36] *See* Complainant's Brief at 8 ("[I]t is clearly evident that Judge Karst exhibited previous knowledge of the case on trial; by questioning was leading the Complainant during testimony; defamed Complainant's character; and exhibited a biased and prejudiced attitude towards the Complainant." [sic]).

[37] *See, e.g., Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-30, slip op. at 7 (ARB Mar. 31, 2005) (citing *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.5 (ARB Feb. 29, 2000)). Nevertheless, although the ALJ has some duty to assist pro se litigants, he also has a duty of impartiality. A judge must refrain from becoming an advocate for the pro se litigant. *See, e.g., United States v. Trapnell*, 512 F.2d 10, 12 (9th Cir. 1975) (per curiam) ("The trial judge is charged with the responsibility of conducting the trial as impartially and fairly as possible.")

C.F.R. § 1978.109(c)(3). Additionally, the ALJ correctly applied the relevant law. Accordingly, we **ADOPT** the findings of fact and conclusions of law in the attached ALJ's R. D. & O. and **DENY** Chapman's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge