



**In the Matter of:**

**GLEN FRAUSTO,**

**ARB CASE NO. 05-122**

**COMPLAINANT,**

**ALJ CASE NO. 2005-STA-009**

**v.**

**DATE: August 24, 2007**

**BEALL CONCRETE ENTERPRISES,  
LTD.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Glen Frausto, *pro se*, White Settlement, Texas**

***For the Respondent:***

**Mark J. Levine, Esq., Maricarmen Guzman Dollar, Esq., *Levine von Sternberg, P.C.*, Houston, Texas**

**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). Glen Frausto filed a complaint alleging that his former employer, Beall Concrete Enterprises, Ltd., 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 Beall did not violate the STAA. We affirm.

**BACKGROUND**

There is substantial evidence in the record to support the ALJ's findings of fact. A brief summary follows. On June 2, 2004, Beall hired Frausto to drive a concrete mixer out of its main plant in Eules, Texas. Frausto's employment was contingent upon his

completion of a 90-day probationary period. During his probationary period, Frausto complained to Beall managers about truck defects such as cracked pedestals, bent bumpers, broken fuel gauges, and faulty brakes. Frausto also complained about not being issued safety glasses, and he apprised management of his difficulty working with other Beall employees.<sup>1</sup>

Bob Sweeney, Beall's Area Manager at the Eules plant, testified that during Frausto's probationary period, he received numerous complaints from other Beall employees about Frausto's behavior in the workplace. Sweeney and other Beall employees testified that Frausto engaged in bizarre behavior, instigated several inter-personnel conflicts, and disrupted production.<sup>2</sup> After Sweeney began receiving daily complaints about Frausto, he told Frausto to focus on his job, but Frausto did not change his behavior. On August 23, 2004, Frausto drove one of Beall's trucks to its plant in Alliance, Texas. While waiting for mechanics to repair his truck, Frausto was so disruptive that Alex Moody, Area Manager for the Alliance plant, drove him back to the Eules plant before the repairs were completed. Beall fired Frausto the following day.<sup>3</sup>

Frausto timely filed his STAA complaint. The Occupational Safety and Health Administration investigated the complaint and concluded that Beall did not violate the STAA. Frausto requested a hearing, which the ALJ conducted on May 3, 2005. Following the hearing, the ALJ issued an R. D. & O. in which he concluded that Frausto engaged in activity protected by the STAA but failed to prove a causal connection between this activity and his discharge. 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).

#### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the STAA.<sup>4</sup> When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence in the

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<sup>1</sup> Transcript (Tr.) 43-45, 52, 110, 115; R. D. & O. at 4-5, 9-10. Frausto failed to offer any evidence to support his assertions that he complained about flooding in the mechanic's work area or that Beall told mechanics not to repair vehicles. *Id.* at 10.

<sup>2</sup> Tr. 77-78, 80, 85-87, 127, 135-36.

<sup>3</sup> *Id.* at 115-19, 145-46; Respondent's Exhibits 1-2; R. D. & O. at 7-9.

<sup>4</sup> Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

record considered as a whole.<sup>5</sup> Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>6</sup>

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 . . . .”<sup>7</sup> Therefore, the Board reviews the ALJ’s legal conclusions de novo.<sup>8</sup>

## 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.<sup>9</sup> These protected activities include making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order.”<sup>10</sup>

To prevail on his claim, Frausto must prove by a preponderance of the evidence that he engaged in protected activity, that Beall was aware of the protected activity, that Beall discharged, disciplined, or discriminated against him, and that the protected activity was the reason for the adverse action.<sup>11</sup> If Frausto fails to prove any one of these elements, his claim must be dismissed.<sup>12</sup>

The ALJ concluded, and we agree, that Frausto engaged in protected activity when he complained about faulty brakes, as well as when he initially complained about

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<sup>5</sup> 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).

<sup>6</sup> *Clean Harbors Env’tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

<sup>7</sup> 5 U.S.C.A. § 557(b) (West 1996).

<sup>8</sup> *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

<sup>9</sup> 49 U.S.C.A. § 31105(a)(1).

<sup>10</sup> 49 U.S.C.A. § 31105(a)(1)(A).

<sup>11</sup> *BSP Trans., Inc.*, 160 F.3d at 45; *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-028, slip op. at 5 (ARB Sept. 30, 2005); *Densieski v. LaCorte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004).

<sup>12</sup> *Eash*, slip op. at 5.

cracked pedestals prior to being shown that those pedestals were not cracked.<sup>13</sup> The ALJ also found that Beall had knowledge of Frausto's protected activities, and he concluded that Beall subjected Frausto to adverse action by discharging him from employment. However, the ALJ concluded that Frausto failed to establish any causal connection between his protected activity and his discharge.<sup>14</sup> We concur.

We agree with the ALJ's conclusion that the "overwhelming and credible evidence" supports Beall's contention that it terminated Frausto's employment because he "engage[ed] in bizarre and disruptive behavior causing undue inter-personnel conflicts."<sup>15</sup> Frausto called five Beall employees to testify at his hearing, and four of these employees provided personal recollections of Frausto's disruptive behavior. The record supports the ALJ's findings that Sweeney counseled Frausto about his disruptive conduct, and that Beall terminated Frausto's employment because Frausto did not improve his behavior.<sup>16</sup> We therefore conclude that Beall did not violate the STAA because it fired Frausto for a legitimate, non-discriminatory reason and Frausto failed to prove that this reason was pretext.

#### 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 C.F.R. § 1978.109(c)(3). Additionally, the ALJ correctly applied the relevant law. Therefore, like the ALJ, we **DISMISS** Frausto's complaint because he has not proven that Beall violated the STAA.

**SO ORDERED.**

**DAVID G. DYE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

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<sup>13</sup> R. D. & O. at 9-10.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; Tr. 110, 115, 119.