In the Matter of:

JOSEPH MUZYK,

COMPLAINANT,

v.

CARLSWARD TRANSPORTATION,

RESPONDENT.

ARB CASE NO. 06-149

ALJ CASE NO. 2005-STA-060

DATE: September 28, 2007

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Joseph Muzyk, *pro se,* Orlando, Florida

For the Respondent:
Tim Carlsward, *pro se,* Orlando, Florida

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), and its implementing regulations, 29 C.F.R. Part 1978 (2007).[1] Section 31105 provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. The Administrative Review Board (Board or ARB) automatically reviews an Administrative Law Judge's (ALJ) recommended STAA decision pursuant to 29 C.F.R. § 1978.109(c)(1). On

[1] The STAA has been amended since Muzyk filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to this complaint, they would not affect our decision.

September 13, 2006, after a hearing held on February 15, 2006, an ALJ recommended dismissing Muzyk's complaint. We affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978.[2] We issued a Notice of Review and Briefing Schedule on September 20, 2006. Neither party elected to file a brief.

When reviewing STAA cases, the Board is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole.[3] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[4] We must uphold an ALJ's finding of fact that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice" had the matter been before us de novo.[5] We review the ALJ's conclusions of law de novo.[6]

BACKGROUND

The ALJ summarized the background in the Recommended Decision and Order (R. D. & O.). We restate the relevant facts. Carlsward Transportation, the Respondent, hired Joseph Muzyk as a minibus driver by on June 6, 2003. Carlsward operates a shuttle service using minibuses carrying passengers around the Orlando area. During this period in 2004, the Complainant was in lay-off status, but Carlsward intended to rehire him in October when the busy season started up.[7]

In the first week of August 2004, Carlsward temporarily took Muzyk out of lay-off status to drive a bus (# 6) back to the yard, and on the way, to shuttle passengers. Muzyk testified that,

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[2] Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

[3] 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

[4] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[5] *See Universal Camera Corp*., 340 U.S. at 488; *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

[6] *See Olson v. Hi-Valley Construction Co*., ARB No. 03-049, ALJ No. 02-STA-012, slip op. at 2 (ARB May 28, 2004).

[7] Tr. at 59.

during the trip, he was "overcome" by exhaust fumes. Muzyk testified that he informed Tim Carlsward who, according to Muzyk, told him to continue operating the vehicle because the diesel fuel was unlikely to catch fire.[8] Carlsward testified that Muzyk did not contact him on the 7th and that the first time he heard of the incident was on August 17th when Muzyk informed him about it after inquiring about workers' compensation.[9]

Muzyk testified that after discussing the matter with Carlsward, he saw that the bus was still in operation on August 17th. Muzyk, concerned about the well-being of other drivers, contacted Gary Bolton, another bus driver at Carlsward, and advised him "not to operate bus # 6" because Carlsward was not properly maintaining the vehicle, and "there is potential risk of accident or death."[10] According to Muzyk, Bolton questioned his motives and suggested that he was on a "vendetta" against Carlsward, which Muzyk denied.[11] On August 18, 2004, according to Carlsward, Bolton told him that Muzyk had threatened "to get [him]."[12] Neither party called Bolton to testify in this proceeding.

On August 19, 2004, Muzyk drove to Carlsward's bus depot where Carlsward parked his vehicles. Muzyk intended to take pictures of the minibus for a meeting with an attorney. Carlsward, at the time, was also driving to his office. While driving to the depot, Muzyk spotted Carlsward in his van at a traffic light. Muzyk slowed up in the hope that the light would turn green and Carlsward would proceed without noticing him. When the light turned green, Carlsward turned toward a complex of hotels and Muzyk followed him to see whether he was making a pick-up. Muzyk lost sight of Carlsward, however, and assumed he turned into one of the hotels. Muzyk then proceeded to the depot. Muzyk testified that Carlsward may have thought he was acting suspicious, and decided to follow him. Muzyk conceded that he was playing: "a little cat and mouse game, because [he] didn't want to disclose that [he] was taking a picture of his bus."[13]

As Carlsward drove by the parking lot where his busses were parked, he spotted Muzyk. Carlsward, drove up, and, according to Muzyk, he was upset about Muzyk's presence on his lot with a camera, and he asked what Muzyk was doing.[14] Muzyk admitted that he lied to Carlsward when he told Carlsward that he was just taking pictures of the trees knocked down a few days

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8 Tr. at 52, 96-97.

9 Tr. at 63-64.

10 Tr. at 47.

11 Tr. at 47-48.

12 Tr. at 66.

13 Tr. at 52.

14 Tr. at 49, 67.

before by Hurricane Charlie.[15] Carlsward testified that: "when he lied to me . . . it just clicked that I can't trust him to be around the vehicles because I'm fearful that he may try to sabotage something."[16]

Carlsward testified that Muzyk was not an employee at that time, but in a lay-off status, and he asked him to return the keys to the vehicles and his office and not to return to the lot unescorted.[17] According to Muzyk, Carlsward asked for the keys and stated that "he didn't like liars."[18] Carlsward testified that, as a result of Muzyk's pattern of behavior, he lost confidence in Muzyk's ability to safely and responsibly operate as a bus driver for his company. Consequently, he decided not to rehire him.[19]

DISCUSSION

Legal Standard

To prevail on his STAA complaint, Muzyk must prove by a preponderance of the evidence that he engaged in protected activity, that Carlsward was aware of the protected activity, that he suffered an adverse action, and that Carlsward took the adverse action because of his protected activity.[20] To show that the adverse action was taken "because of" protected activity, Muzyk must show that his protected activity was a "motivating" factor in Carlsward's decision to dismiss him.[21]

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15 Tr. at 49-50, 67-68, 99.

16 Tr. at 68, 102.

17 Tr. at 68.

18 Tr. at 98.

19 Tr. at 77-78, 101; RX2.

20 *Ridgley v. C. J. Dannemiller Co.*, ARB No. 05-063, ALJ No. 04-STA-053, slip op. at 5 (ARB May 24, 2007).

21 *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 04-CAA-005, slip op. at 4-5 & n.6 (ARB Nov. 29, 2006) (analogous Clean Air Act case); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-44 (1989) ("To construe the words 'because of' as colloquial shorthand for 'but-for' causation . . . is to misunderstand them. . . . [T]he words 'because of' do not mean 'solely because of' . . . . [A Title VII plaintiff must show only that an impermissible reason] played a *motivating* part in [the] employment decision.") (emphasis added); *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977) (employment discrimination plaintiff has "the burden . . . to show that his conduct was . . . a 'substantial factor' or to put it in other words, that it was a '*motivating factor*' in the [adverse action]") (citation omitted) (emphasis added). A complainant must prove more when showing that protected activity was a "motivating" factor than when showing that such activity was a

At the hearing stage, to prevail in an adjudication, a complainant must prove unlawful discrimination.[22] The trier of fact may conclude that the employer was not motivated, in whole or in part, by the protected conduct, and thus that the employee has failed to prove retaliation. If, however the trier of fact concludes that the employer was motivated by both a prohibited and a non-retaliatory reason (dual or mixed-motives), the employer can avoid an order of relief by proving, by a preponderance of evidence in STAA cases, that it would have reached the same decision even in the absence of protected activity.[23]

Discrimination

Muzyk contends that Carlsward Transportation violated the STAA when it refused to rehire him after he raised concerns about the safety of Carlsward's vehicles.

Adverse Action & Employment Relationship

Under other statutes, we have held that the crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms, conditions, or privileges of the complainant's employment.[24] Such control, which includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions

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"contributing" factor. *See Lopez*, ARB No. 04-158, slip op. at 5 n.6; *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 5-7 & n.15 (ARB Sept. 30, 2003).

[22] *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006). To secure an investigation, a complainant merely must raise an inference of unlawful discrimination, i.e., establish a prima facie case. To prevail in an adjudication, a complainant must prove unlawful discrimination. This is not to say, however, that the ALJ (or the ARB) should not employ, if appropriate, the established and familiar Title VII burden shifting pretext framework. *Id.* at 14.

[23] *See Korolev v. Rocor Int'l*, ARB No. 00-06, ALJ No. 98-STA-027, slip op. at 5 (ARB Nov. 26, 2002); *Somerson v. Yellow Freight Sys., Inc.*, ARB Nos. 99-005, ALJ No. 98-STA-009, slip op. at 20 (ARB Feb. 18, 1999). In STAA cases, as in cases arising under environmental whistleblower provisions, the employer needs to prove only by a preponderance of the evidence, that it would have taken the action in the absence of protected activity. *See Dartey v. Zack Co.*, 82-ERA-002, slip op. at 6 (Sec'y Apr. 25, 1983) (The ERA was amended in 1992 to require employer to prove by clear and convincing evidence it would take same action absent protected activity); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99, 100-01 (2003).

[24] *Fullington v. AVSEC Servs., LLC*, ARB No. 04-019, ALJ No. 2003-AIR-030, slip op. at 6-7 (ARB Oct. 26, 2005).

against a complainant, is essential for a whistleblower respondent to be considered an employer under the whistleblower statutes.[25]

The ALJ found that an employment relationship existed between Muzyk and Carlsward. Muzyk was in lay-off status prior to the temporary August 7th assignment, the same trip in which the exhaust incident occurred. At the latest, Muzyk's complaint to Carlsward took place on August 17th and the decision not to rehire him took place on August 19th, both of which occurred when Muzyk was back in lay-off status. Because Muzyk was working for Carlsward at the time of the exhaust incident and Carlsward conceded that before August 19th, he intended to rehire Muzyk when business picked up, we affirm the ALJ's finding of an employment relationship between Muzyk and Carlsward. Thus, we proceed to discuss adverse action.

The STAA provides that a person may not "discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment" because the employee engaged in STAA-protected activity.[26] The ALJ found that Carlsward's decision not to rehire Muzyk, though initially intending to do so, was an adverse action. We agree that refusing to rehire an employee affects "pay, terms, or privileges of employment."[27]

Protected Activity and Knowledge

The ALJ found that the safety concerns Muzyk raised were motivated by a reasonable apprehension of injury and thus protected by STAA.[28] Carlsward concedes that Muzyk informed him of his safety concerns over bus # 6 on August 17. The adverse action took place on August 19th. Therefore substantial evidence supports the ALJ's finding of protected activity and knowledge of that protected activity.

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[25] *Fullington*, slip op. at 7; *Lewis v. Synagro Techs., Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-012, 14, slip op. at 7 (ARB Feb. 27, 2004).

[26] 49 U.S.C.A. § 31105(a).

[27] *See Galvin v. Munson Transp.*, No. 91-STA-041 (Sec'y Aug. 31, 1992).

[28] 49 U.S.C.A. § 31105(a).

Causation & Dual-Motives

The ALJ found that although discrimination "played a role"[29] in the decision not to rehire Muzyk, Carlsward would have refused to rehire Muzyk absent any of Muzyk's safety-related complaints where Muzyk's suspicious and dishonest activity raised legitimate security and loss of confidence concerns for Carlsward. In so concluding, the ALJ noted that Muzyk's attempt to deceive his employer while hanging around the busses during a time when he had no business at the depot "cast a cloud of mistrust over his relationship with Carlsward."[30] The ALJ reasoned that in light of Bolton's August 18th report that Muzyk wanted to "get him," and Muzyk's deception during the August 19th encounter, Carlsward's concern for the security of his vehicles resulted in a loss of confidence in Muzyk.[31] Moreover, Muzyk conceded that he was playing: "a little cat and mouse game," because he did not want to disclose that he was taking pictures for the upcoming meeting with an attorney.[32] At the hearing, Muzyk also admitted that he lied to Carlsward about his reason for visiting the depot. Therefore, we find that substantial evidence supports the ALJ's finding that Carlsward would have terminated its employment relationship with Muzyk absent protected activity.

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[29] R. D. & O. at 14. The ALJ erred when he wrote, "Furthermore, behavior problems . . . do[] not axiomatically sever the causal link since legitimate reasons, alone, are not sufficient to end the inquiry if, despite the reasons alleged, the whistleblower would not have been terminated '*but for*' the protected activity." *Id.* at 11 (emphasis added) (citing *Consolidated Edison Co. of N.Y. v. Donovan*, 673 F.2d 61 (2d Cir. 1982)). The ARB has held, however, that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for' causation . . . is to misunderstand them. . . . [T]he words 'because of' do not mean 'solely because of' . . . . [A Title VII plaintiff must show only that an impermissible reason] played a *motivating* part in [the] employment decision." *Lopez*, slip op. at 4-5 & n.6; *Hopkins*, 490 U.S. at 240-44. Since the ALJ ultimately found that Carlsward discriminated against Muzyk, we find this error harmless.

[30] R. D. & O. at 14.

[31] R. D. & O. at 14-15. We note that the ALJ, in holding that Carlsward would have fired Muzyk absent protected activity, observed that Carlsward's action was "reasonable" and "justifiable" in addition to being legitimate and non-discriminatory. As we have noted before, the purpose of the STAA employee protection provision is specific to retaliation because of protected activity. *See Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. 14-15 & n.83 (ARB May 24, 2007), *citing Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000) ("[this] court does not sit as a super-personnel department" and will not second-guess an employer's decisions); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-1508 (5th Cir. 1988) (discrimination statute "was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers;" statute cannot protect employees "from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated").

[32] Tr. at 52.

CONCLUSION

Accordingly, we affirm the ALJ's finding that Carlsward would have ended its employment relationship with Muzyk absent any protected activity and **DENY** Muzyk's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge