



In the Matter of:

DAVID BETHEA,

ARB CASE NO. 07-057

COMPLAINANT,

ALJ CASE NO. 2006-STA-023

v.

DATE: December 31, 2007

WALLACE TRUCKING CO.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

David Bethea, *pro se*, Bennettsville, South Carolina

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified.¹ On January 9, 2006, David Bethea (Complainant or Bethea) filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Wallace Trucking Company (Respondent or Wallace Trucking) violated STAA when Wallace Trucking fired Bethea on August 10, 2005.

¹ See 49 U.S.C.A. § 31105(a) (West 1997). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2007). The STAA has been amended since Bethea filed his complaint. See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is unnecessary for us to determine whether the amendments apply to Bethea's complaint because they are not implicated by the issues presented and thus, even if the amendments were applicable to this complaint, they would not affect our decision.

On March 31, 2006, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, found that Bethea's claim had no merit. Bethea filed his objections to the Secretary's findings on April 12, 2006. A hearing was held on September 6, 2006, in Florence, South Carolina. The Administrative Law Judge (ALJ) concluded that Wallace Trucking did not violate STAA because Bethea did not prove that he engaged in protected activity. The Administrative Review Board (Board or ARB) automatically reviews an ALJ's recommended STAA decision.² We affirm.

BACKGROUND

Bethea alleges that he was terminated on August 10, 2005, because he complained about hours of service violations, a fuel leak, and for filing a workers' compensation claim. Bethea also alleges that Wallace Trucking forced him to falsify his logs. The ALJ's February 21, 2007 decision provides a detailed accounting of the facts. We briefly summarize.

Hours of Service Complaints and Pressure to Falsify

Bethea testified that he reported general hours of service concerns to Wallace Trucking and that he was asked to violate the hours of service regulation.³ Wallace testified, however, that the hours of service problem stemmed from Bethea's inability to properly calculate his hours.⁴

Much of the controversy in this case centers on the events on or near July 22, 2005. In the context of attempting to show an hours of service violation, Bethea claims that on July 22nd he went on duty at 6:00 a.m. Later that day, at about 3:00 p.m., Wallace Trucking assigned Bethea a backhaul dispatch located an hour away. Bethea alleges that when he informed Wallace Trucking that this afternoon assignment would violate the hours of service rules, Wallace dispatch told him to take his time off on the road.⁵ Wallace counters Bethea's factual summary. Wallace claims that Bethea went on duty at 10:00 a.m. on the 22nd, a fact verified by Bethea's own log.⁶ In response to Wallace, Bethea states that Wallace Trucking forced him to

² See 29 C.F.R. § 1978.109(c)(1).

³ See ALJ's February 21, 2007 Recommended Decision and Order (R. D. & O.) at 5-6; Hearing Transcript (Tr.) at 186, 190, 196-97. Bethea testified that Wallace Trucking pressured him to violate the hours of service regulation, an allegation which he stated that the daily logs support. When the ALJ asked about specific complaints that Bethea made to Wallace Trucking, Bethea identified being forced to drive on Good Friday. See Tr. at 35-39, 43-45.

⁴ See R. D. & O. at 14; Tr. at 135-36.

⁵ See Tr. at 47, 190, 201-02, 204-05.

⁶ Bethea's log indicates that on July 22, 2005, he came on duty at 10:00 a.m. and drove to Etowah, Tennessee where he was detained from 11:00 to 3:00 p.m. See R. D. & O. at 16; RX-1 (Respondent's Exhibits) (Daily Logs for Bethea). In a handwritten note dated January 12, 2006,

falsify his log on July 22nd.⁷ Wallace denies Bethea's accusation and testified that no driver was ever asked to work extra hours or to falsify their logbooks.⁸

Fuel leak

Bethea further testified that on July 22nd, while waiting in Etowah, another driver informed him that he had a fuel leak, and when he went to check it out there was a "puddle" of fuel below the leak.⁹ Bethea testified that he called Bud Baldwin, general manager, and informed Wallace Trucking of the leak and, in turn, that they informed him that they found a backhaul for him in Chattanooga, Tennessee. Bethea testified that when he learned that the backhaul needed to be picked up between 4:00 and 10:00 p.m., he complained to Wallace Trucking that "to go down to Tennessee and sit around five, six hours smelling the fuel leak, leaking on private property, that could cause a problem."¹⁰

At Bethea's state employment appeal, Bethea testified that he told Baldwin he could get the truck fixed and that Baldwin then advised him to bring the truck back to the yard in North Carolina because it would be cheaper.¹¹ Baldwin denied Bethea's version of the encounter and testified that when Bethea told him that he had a fuel leak in response to a request to pick up a backhaul, that he questioned whether Bethea wanted to pick up the load to which Bethea replied "no, really, I don't."¹² Baldwin further testified that Bethea told him he could make it home, to which Baldwin queried if he could make it home why not pick up the load before coming home. Baldwin testified that, in response to this, Bethea stated he did not want to get tied up waiting around having to smell a fuel leak.¹³

Bethea wrote to a state investigator "7-22-05 I was dispatched at 10 AM." *See* R. D. & O. at 23; RX-5 (N.C. DOL Investigation Filings) at C-1.

⁷ *See* R. D. & O. at 5; Tr. at 191, 196, 201-02, 204-05. Bethea's allegation of falsification counters Bethea's own testimony. Bethea testified that he never violated the hours of service rules, but was asked to violate the rules. *See* Tr. at 189-90, 202; R. D. & O. at 23.

⁸ *See* R. D. & O. at 14; Tr. at 136, 198, 201-02, 204-05. Wallace Trucking also submitted affidavits from Bud Baldwin and Toni Baldwin stating that they had never directed Bethea to violate the hours of service regulation. *See* RX-7, 8 (affidavits from Wallace Trucking).

⁹ *See* CX-9 (Complainant's Exhibits) (Transcript State Employment Appeal) at 5-6; R. D. & O. at 6; Tr. at 46.

¹⁰ Tr. at 46; R. D. & O. at 6.

¹¹ *See* CX-9 (Transcript State Employment Appeal) at 7.

¹² CX-9 (Transcript State Employment Appeal) at 3.

¹³ *See* CX-9 (Transcript State Employment Appeal) at 5.

At the hearing before the ALJ, Bethea testified that he informed the manager that it would not be possible to get the truck fixed, pick up the load and return to North Carolina to which the dispatcher replied that he should take his time off on the road if needed.¹⁴ Bethea denied having told the Respondent that the leak was not bad enough to require being repaired before driving.¹⁵ At the hearing before the ALJ, Bethea testified that the leak was minor.¹⁶ Bethea's inspection report for July 22nd indicated a fuel leak in the right tank and Bethea checked the box certifying that he detected "no defect[] or deficienc[y] in this motor vehicle as would be likely to affect the safety of its operation or result in its mechanical breakdown."¹⁷

Upon returning the truck to the yard, Charlie Wallace, President of Wallace Trucking, testified that neither his general manager nor the head mechanic could find a fuel leak.¹⁸ When Bethea saw the truck on the 26th, he was asked to point out the fuel leak to the mechanics. He could not do so. Bethea alleged that Wallace had washed the truck and replaced the tank.¹⁹ Wallace counters that Bethea fabricated the fuel leak.²⁰

Workers' Compensation Claim

Bethea also claims that the Respondent fired him because he filed a workers' compensation claim. Bethea testified that on the morning of the 25th he reported to personnel a groin injury which occurred on the 21st while Bethea was lowering the landing gear on his trailer. Wallace Trucking filed the claim as a workers' compensation claim with their provider. After visiting the doctor, Bethea needed exploratory surgery for kidney stones. Wallace testified that upon following up on the workers' compensation claim, Bethea's doctor informed him that the injury was not work related.²¹

¹⁴ See R. D. & O. at 6-7; Tr. at 46, 47.

¹⁵ See Tr. at 124; R. D. & O. at 6.

¹⁶ See R. D. & O. at 6, 15; Tr. at 126.

¹⁷ RX-1 (Bethea's Daily Logs); R. D. & O. at 16-17. Bethea also submitted an unsigned inspection report as CX-3 which does not contain the check mark next to the box. The ALJ found this to be an altered original. The original submitted to Wallace Trucking is signed and contains a check in the box indicating no safety hazard. See R. D. & O. at 8.

¹⁸ See R. D. & O. at 15; Tr. at 143-44.

¹⁹ See R. D. & O. at 7; Tr. at 126-27. The Respondent concedes that a little over a month later there was a fuel leak on Bethea's truck and the tank was replaced. See R. D. & O. at 15; Tr. at 67, 150.

²⁰ See R. D. & O. at 15; Tr. at 145.

²¹ See R. D. & O. at 15-16; Tr. at 146. While there is some question as to when and exactly

Wallace Trucking terminated Bethea on August 10, 2005. Wallace Trucking claims that it fired Bethea for poor job performance, insubordination for refusing to pick up the load, untruthfulness about the fuel leak and workers' compensation claim, damaged vehicles, and scheduling conflicts.²² The ALJ found against Bethea. The Board automatically reviews STAA cases.²³

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under STAA.²⁴ When reviewing STAA cases, the Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole.²⁵ Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²⁶ 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..."²⁷ The Board reviews the ALJ's legal conclusions de novo.²⁸

DISCUSSION

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that: 1) he engaged in protected activity,²⁹ 2) his employer was aware of the

what was known about Bethea's condition, the record indicates that Wallace was informed on August 4, 2005, that Bethea's condition was not work-related. *See* R. D. & O. at 16; RX-5 (N.C. DOL Investigation Filings) at 10, 13; CX-9 (Transcript State Employment Appeal) at 7-8.

²² *See* R. D. & O. at 15; Tr. at 148, 173, 174; RX-5 (Wallace's Response to Bethea's N.C. DOL filing dated Jan. 10, 2006).

²³ *See* 29 C.F.R. § 1978.109(c)(1).

²⁴ *See* Secretary's Order No. 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

²⁵ *See* 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).

²⁶ *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)).

²⁷ 5 U.S.C.A. § 557(b) (West 2007).

²⁸ *See id.*; *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

²⁹ A person may not retaliate against an employee because:

protected activity, 3) the employer discharged him, or disciplined or discriminated against him with respect to pay, terms, or privileges of employment, and 4) there is a causal connection between the protected activity and the adverse action.³⁰ The complainant bears the burden of persuading the trier of fact that he was subjected to discrimination.³¹

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.³² 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

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because –

(i) the operation violates a regulation, standard, or order of the United States related to the commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105(a) (2005).

³⁰ See *BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *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)); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 228 (6th Cir. 1987).

³¹ See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

³² See *Feltner v. Century Trucking, Ltd.*, ARB No. 03-118, ALJ Nos. 2003-STA-001, 2003-STA-002, slip op. at 4-5 (ARB Oct. 27, 2004); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004). See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Ctr.*, 509 U.S. at 513; *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).

respondent employer was aware of this activity, and that the employer took adverse action against the complainant because of the protected activity. Evidence of each of these elements raises an inference that the employer violated STAA. Only if the complainant makes this prima facie showing does the burden shift to the employer respondent to articulate a legitimate, nondiscriminatory reason for the adverse action. At that stage, the burden is one of production, not persuasion. If the respondent carries this burden, the complainant then may 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.³³ The ultimate burden of persuasion that the respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant.³⁴

Credibility

As a preliminary matter, the ALJ found that based on Bethea's demeanor, Wallace was more credible than Bethea. Specifically, the ALJ found Bethea to be not credible and Wallace to be credible and further that Wallace's testimony is supported by the record whereas Bethea's is not.³⁵ Substantial evidence supports these findings.

As noted by the ALJ, in addition to contradictory testimony by Wallace Trucking, Bethea's own statements contain inconsistencies. The record also supports serious doubts over whether a fuel leak ever existed. Bethea could not point out the leak to Wallace after returning to the yard. To account for his failure, he accused Wallace of replacing the tank and washing down the truck to hide the spray from the leak. Moreover, Bethea stated he learned of the leak before the backhaul fell through but also that he learned of it after the backhaul fell through.³⁶ Bethea's original inspection log contained a check by the box confirming that the leak was not a safety hazard. In a state investigation, Bethea submitted an altered, unsigned copy with the box unchecked as his inspection report for the 22nd.³⁷ On the one hand, Bethea testified that the leak was minor.³⁸ At the employment appeal, however, Bethea testified that the leak was making a puddle of gasoline and that if he had picked up the second backhaul, he was worried about the smell of gasoline and leaking fuel on private property.³⁹

³³ See *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 4 (ARB Nov. 27, 2002).

³⁴ See *St. Mary's Honor Ctr.*, 509 U.S. at 507; *Densieski*, slip op. at 4-5.

³⁵ See R. D. & O. at 22.

³⁶ See R. D. & O. at 6 n.7; Tr. at 46, 128, 130.

³⁷ See CX-3 (Bethea's Altered Inspection Report for 22nd).

³⁸ See R. D. & O. at 6, 15; Tr. at 126.

³⁹ See CX-9 (Transcript State Employment Appeal) at 5.

Bethea's log indicates that he began work at 10:00 a.m. But when that time conflicted with his alleged hours of service claim, he, for the first time late in the hearing, claimed that he was pressured to and did in fact falsify his log, and that he really began work at 6:00 a.m. Earlier in testimony, however, he stated he never violated the hours of service regulation.⁴⁰ Moreover, countering Bethea's testimony is a handwritten note written by Bethea dated January 12, 2006, in which Bethea wrote to a state investigator "7-22-05 I was dispatched at 10 AM."⁴¹ Substantial evidence supports the ALJ's credibility findings.

Protected Activity

Bethea raised several potential instances of protected activity.⁴² The ALJ considered Bethea's claims of reporting hours of service concerns, allegedly being forced to falsify logs, reporting a fuel leak, and filing a workers' compensation claim. For a finding of protected activity under the complaint clause of the STAA, Bethea must at least be acting on a reasonable belief regarding the existence of a safety violation.⁴³ The ALJ concluded that Bethea did not have a reasonable belief of a violation and thus did not engage in protected activity.⁴⁴ We find that the ALJ's conclusion is supported by substantial evidence and is in accordance with law.⁴⁵

⁴⁰ See Tr. at 189-90, 201-02, 204-05.

⁴¹ See R. D. & O. at 23; RX-5 (N.C. DOL Investigation Filings) at C-1.

⁴² Both Bethea and Wallace discuss pre-July 2005 scheduling conflicts as part of the controversy surrounding Bethea's termination. We conclude that several pre-July concerns Bethea raised are not protected activity covered by STAA. STAA does not protect voicing concerns about scheduling, which does not implicate hours of service rules, or not receiving reimbursement for a part. See 49 U.S.C.A. § 31105.

⁴³ *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-031, slip op. at 11 (ARB Sept. 14, 2007); *Leach v. Basin W., Inc.*, ARB No. 02-089, ALJ No.2002-STA-005, slip op. at 3 (ARB July 31, 2003).

⁴⁴ See R. D. & O. at 20-23. The ALJ concluded that Bethea's accusations of pressure to falsify were raised for the first time late in the hearing but were within his original complaint and accordingly allowed the amendment to Bethea's complaint. See R. D. & O. at 2 n.3; 29 C.F.R. 18.5(e). The ALJ found that Bethea's post-hearing complaints about refusing to work, however, were not within his original complaint. See R. D. & O. at 3 n.5. The original complaint asserted that Bethea's protected activity was raising concerns about hours of service violations, the fuel leak and filing a workers' compensation claim. See R. D. & O. at 3 n.5; CX-7 (Bethea's Documents accompanying his Jan. 9, 2006 OSHA Complaint). The Board has held that a claim for refusing to work under STAA does not relate back to a claim under the complaint prong of STAA. See *Roberts v. Marshall Durbin Co.*, ARB No. 03-071, 03-095, ALJ No.2002-STA-035, slip op. 9-10 (ARB Aug. 6, 2004); 29 C.F.R. § 18.5(e). Thus, the ALJ found the claims of retaliation for refusing to work untimely. Nonetheless, the ALJ went on to comment that had he found the complaints timely, he would not find the Complainant's testimony credible and thus would not have found protected activity. See R. D. & O. at 3-4 n.5. The ALJ concluded that Bethea did not prove that picking up the

Hours of service complaint

The ALJ concluded that Bethea did not reasonably believe that Wallace Trucking violated the hours of service regulation by permitting or requiring Bethea to drive in excess of the allowed hours.

Department of Transportation (DOT) regulations in effect at the time stated that no motor carrier shall permit or require a driver to drive “[m]ore than 11 cumulative hours following 10 consecutive hours off duty; or . . . [f]or any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty” No motor carrier shall permit or require a driver to drive “[h]aving been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or . . . [h]aving been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.” The consecutive days can be reset if there is an “off duty period of 34 or more consecutive hours.”⁴⁶

The ALJ noted that it is undisputed that Bethea did in fact voice hours of service concerns before his termination.⁴⁷ STAA protects against retaliation for making complaints “related to a violation of a commercial motor vehicle safety regulation, standard, or order.”⁴⁸ Had the ALJ found that Bethea reasonably believed there was a violation of the DOT hours of service regulation, Bethea’s concerns would constitute protected activity. The ALJ found, however, that Bethea did not have a reasonable belief that Wallace Trucking had violated the regulation.⁴⁹ The ALJ found that Bethea had provided no testimony to substantiate the claim that Wallace Trucking directed him to violate the hours of service regulation.

backhaul would have violated the law or that he reasonably believed would have constituted a safety hazard to him or others. We concur with the ALJ’s legal conclusion that Bethea’s late refusal to work claim is untimely.

⁴⁵ In his brief, Bethea argues that the ALJ erred in not finding protected activity and retaliation. Bethea argues that the ALJ should have accepted the state DOL’s conclusion that protected activity had been proven. As the ALJ noted, the state determination was under a state statute, which may indeed protect filing workers’ compensation claims. *See* R. D. & O. at 13. STAA, however, does not.

⁴⁶ 49 C.F.R. § 395.3 (2005) (as amended 68 Fed. Reg. 22,516, Apr. 28, 2003).

⁴⁷ R. D. & O. at 20.

⁴⁸ 49 U.S.C.A. § 31105(a)(1)(A).

⁴⁹ 49 C.F.R. § 395.3 (2005) (as amended 68 Fed. Reg. 22,516, Apr. 28, 2003). Wallace Trucking submitted the daily logs from August 2004 to August 2005. RX-6 (daily logs). The ALJ noted that there were a few instances where Bethea’s logs appear to show that he drove more than 11 hours or was on duty more than 14 hours in violation of the hours rules. The ALJ found that there were a “number of discrepancies and errors in the logs . . . [and he] cannot actually determine if in

Bethea testified that late in a work day, dispatch would assign him new assignments.⁵⁰ The ALJ found that this fact did not establish that Bethea was given an assignment that violated the hours of service regulation or that Wallace Trucking ever made Bethea drive beyond the allowed hours. Specifically, as to Bethea's claims of hours of service violations on the 22nd, Wallace Trucking's daily logs indicate that Bethea had only logged approximately 40 hours of duty time on the week of the 22nd, including the hours worked on the 22nd.⁵¹ The ALJ noted Wallace's testimony that Bethea was responsible for keeping his hours because he was the only one who actually knew how he was spending his time on the road.⁵² Dispatch relied on the information that Bethea provided to determine how to schedule its assignments. Moreover, Wallace also testified that Bethea was permitted to take layovers when necessary and the ability for drivers to take layovers when needed was designed to prevent driving over hours of service.⁵³

Having found that Bethea did not reasonably believe Wallace violated the hours of service rules, the ALJ concluded that the Bethea did not engage in protected activity when raising hours of service concerns. The Board finds that substantial evidence supports the ALJ's conclusion that Bethea did not engage in protected activity and that it is in accordance with law.

Fuel leak

The ALJ likewise concluded that Bethea did not prove by a preponderance of the evidence that he in fact reasonably believed that he was complaining about a safety violation when he reported the alleged leak to Wallace Trucking.⁵⁴

fact any violations occurred.” R. D. & O. at 14 n.13.

⁵⁰ See R. D. & O. at 21; Tr. at 42-43.

⁵¹ See R. D. & O. at 16; RX 1 (Bethea's Daily Logs). If Bethea had accumulated approximately 40 hours on July 22nd, it is difficult to see how he could have had a reasonable belief that Baldwin's request would put him over either the 60 or 70 hour cap. See Tr. at 113-21. The ALJ did not credit Bethea's assertion that he began work at 6:00 a.m. on the 22nd.

⁵² See R. D. & O. at 21.

⁵³ See R. D. & O. at 22; Tr. at 75, 200. In fact, elsewhere Bethea complained about the frequent layovers as potential adverse actions, and this tends to work against his later claim that he believed Wallace Trucking frequently pressured him to violate hours of service rules. See Tr. at 91, 93. Bethea was familiar with the layover procedure when he got afternoon assignments, and thus, as the ALJ found, would not have had a reasonable apprehension of Wallace Trucking pressuring Bethea to violate the hours of service regulation with afternoon assignments.

⁵⁴ See R. D. & O. at 22.

As noted above, the ALJ found that the Bethea was not credible and his claim that he did in fact have a fuel leak on the 22nd is not supported by the record. The only evidence to support his claim that there was a fuel leak is his inspection report and his oral report to Wallace on the 22nd. Wallace counters that his mechanics could not find a leak, and when they asked Bethea to point out the leak, Bethea could not do so.⁵⁵ Bethea resolves this discrepancy by accusing Wallace of washing the truck and changing the tank.

The ALJ found that Bethea failed to establish that there was a fuel leak and therefore failed to prove that he reasonably believed that he was reporting a violation of a safety regulation and thus did not engage in protected activity in doing so.⁵⁶ Substantial evidence supports this finding, and it is in accordance with law. Therefore we affirm the ALJ's finding that Bethea did not engage in protected activity in reporting the alleged fuel leak to Wallace Trucking.

Falsifying Records

The ALJ found that there was no credible evidence to support Bethea's claim that he was directed to falsify his logbook on July 22nd. This finding is also supported by substantial evidence. At the hearing, the falsification allegation came up only after Wallace had pointed out that Bethea's driving time on the 22nd would not have violated the rules as he reported on duty at 10:00 a.m.⁵⁷ To counter this discrepancy, Bethea testified that he really came on duty at 6:00 a.m. and was told to falsify the logbook.⁵⁸ The ALJ concluded that Bethea failed to prove by a preponderance of evidence that he engaged in protected activity by complaining that he was required to falsify his logbook. We find substantial evidence supports the ALJ's finding that Bethea did not reasonably believe that Wallace directed him to falsify his logbooks. Furthermore, the ALJ's conclusion that Bethea did not engage in protected activity by accusing Wallace Trucking of pressuring him to falsify his logbooks is in accordance with law.

Workers' Compensation

The ALJ concluded that Bethea's filing of a workers' compensation claim is not protected activity under STAA.⁵⁹ STAA provides that an employer may not discriminate against

⁵⁵ See R. D. & O. at 22-23.

⁵⁶ See R. D. & O. at 22-23. We note that the ALJ, in reaching this finding, observed that the tank was in fact replaced a little over a month later. See R. D. & O. at 15. The OSHA findings indicate that before the tank was replaced other drivers drove the truck without complaint. See Mar. 31, 2006 OSHA findings at 2-3.

⁵⁷ See R. D. & O. at 23; Tr. at 190-91, 201-04.

⁵⁸ See R. D. & O. at 23; Tr. at 190, 201-02, 204-05. Bethea also testified that he never violated the hours of service regulation, but was asked to violate the rules. See Tr. at 190.

⁵⁹ See R. D. & O. at 23.

an employee-operator of a commercial motor vehicle because the employee has engaged in making a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order.⁶⁰ Filing a workers' compensation claim is not a complaint related to a violation of a motor vehicle safety regulation. We concur with the ALJ's conclusion that Bethea's workers' compensation claim is not protected activity.

The ALJ, therefore, considered Bethea's complaints about hours of service, an alleged fuel leak, a workers' compensation claim, and alleged pressure to falsify records and concluded that Bethea has failed to prove that he engaged in protected activity in any of his claims. We affirm.

A finding of protected activity is necessary for Bethea's claim of retaliation to survive. Bethea's failure to establish that he engaged in protected activity is fatal to his claim. Nonetheless, the ALJ went on to note that even if Bethea had engaged in protected activity, he did not prove the other elements of his whistleblower claim. The ALJ's additional conclusion is also supported by substantial evidence and in accordance with law.

Adverse Action, Knowledge and Causation

Termination is an adverse action.⁶¹ While it is undisputed that Wallace knew about the hours of service concerns, the alleged fuel leak complaint, and the workers' compensation claim, the ALJ found that Bethea had not proven by a preponderance of evidence that Wallace knew of a complaint that Bethea alleged he was directed to falsify his logbook. As stated above, the record supports the ALJ's conclusion that Bethea was never ordered nor did Bethea ever raise a complaint about being directed to falsify his logbooks.⁶² The ALJ found that Wallace has provided a legitimate, non-discriminatory reason for terminating Bethea and that Bethea has failed to prove those reasons are pretext or that other record evidence supports a finding that Wallace unlawfully retaliated against Bethea.⁶³ We affirm.

⁶⁰ See 49 U.S.C.A. § 31105(a)(1)(A).

⁶¹ See *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-011, slip op. at 7 (ARB June 29, 2007). The ALJ concluded that Bethea's complaints of adverse actions occurring before July 13, 2005, were time barred because Bethea's complaint was filed on January 9, 2006. STAA has a 180-day filing deadline from the time of the alleged adverse action. See 49 U.S.C.A. § 31105(b)(1). Thus, Bethea's complaints about being repeatedly placed in layover situations and working on Good Friday as retaliation for his alleged protected activity are time barred. See R. D. & O. at 1-2 n.1. The ALJ did not discuss equitable tolling and no party has addressed equitable tolling before the Board. We therefore concur with the ALJ and conclude that any potential adverse actions occurring before July 2005 are time barred.

⁶² See R. D. & O. at 24.

⁶³ Wallace claims that it fired Bethea because of poor job performance, insubordination for refusing a backhaul, and untruthfulness regarding the fuel leak and workers' compensation claim. See R. D. & O. at 24; RX-5 (N.C. DOL Investigation Filings). Wallace Trucking supports this

Bethea's Other Arguments

In his brief to the Board, Bethea alleges that the ALJ's failure to enforce a discovery order, accepting and excluding exhibits and negotiating a settlement agreement constitute error.⁶⁴ In support of his arguments, Bethea cites two cases neither of which appears to be relevant to any of Bethea's arguments. Bethea claims that the ALJ erred in not compelling Wallace to turn over its daily logs and employee handbook. The record shows that Wallace did comply with the discovery request and submitted both the daily logs and at least some portion of the employee handbook to the ALJ.⁶⁵ Bethea fails to specify which exhibits were erroneously included or excluded.⁶⁶ As to Bethea's claim that the ALJ erred in negotiating or drawing up a settlement agreement, Bethea has not given the Board any indication of how the ALJ's involvement in the settlement agreement negotiation constitutes error. Where a party fails to develop the factual basis of a claim on appeal and, instead, merely draws and relies upon bare conclusions, the argument is deemed waived.⁶⁷

assertion with record support of the untruthfulness about the fuel leak, testimony of damaged trucks, and scheduling conflicts. Wallace testified that it is the culmination of all these events together with the perceived untruthfulness over the workers' compensation claim which "broke the camel's back." R. D. & O. at 12, 24.

⁶⁴ Bethea Brief to ARB dated Mar. 19, 2007.

⁶⁵ The R. D. & O. shows that the ALJ took notice of the employee manual and gave a great deal of consideration to the daily logs and the contents therein. *See* R. D. & O. at 13, 17-19; CX-13 (employee manual). While it may be true that Bethea did not receive all 12 months worth of daily logs, the R. D. & O. shows that the ALJ did in fact consider all 12 months and any potential violations contained therein. The ALJ noted that although there appeared to be a few instances of violations, the logs as a whole contained many errors and discrepancies and thus were not entitled to weight. Even if Bethea had copies of the logs for the remaining months, Bethea has not shown us how this would change the ALJ's conclusion, given the fact that he considered all the logs and any potential violations therein. Finally, the ALJ's error, if any, is harmless as the Board is upholding the ALJ's determination that there was no causation.

⁶⁶ *See* R. D. & O. at 13. The ALJ excluded exhibit 15 as not being relevant for Bethea's STAA claim. Exhibit 15 involves a North Carolina Retaliatory Employment Discrimination Act (REDA). Under STAA, a complaint about workers' compensation is not protected and accordingly the ALJ did not consider the contents of the discussion suggesting protected activity was "proven" under that state statute.

⁶⁷ *Hasan v. Sargent & Lundy*, ARB No. 05-099, ALJ No. 2002-ERA-032, slip. op. at 8-9 (ARB Aug. 31, 2007).

CONCLUSION

The ALJ's findings of fact are supported by substantial evidence and his legal analysis correctly applied the STAA. Therefore, we **AFFIRM** the ALJ's determination that Bethea was not subjected to discrimination in violation of the STAA. Accordingly, we **DENY** Bethea's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge