



In the Matter of:

ROBERT E. GERMANN,

ARB CASE NO. 99-114

COMPLAINANT,

ALJ CASE NO. 1999-STAA-15

v.

DATE: August 1, 2002

CALMAT COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Robert T. Geile, Esq., *Law Offices of Milton J. Silverman, San Diego, CA*

For the Respondent:

David A. Radovich, Esq., Cheryl A. Orr, Esq., *Musick, Peeler & Garrett, LLP, San Diego, CA*

FINAL DECISION AND ORDER

This case arises from a complaint by Robert E. Germann (“Germann”) alleging that his employer, CalMat Company (“CalMat”), violated the employee protection (“whistleblower”) provisions of the Surface Transportation Assistance Act (“STAA” or “Act”) of 1982, as amended and recodified, 49 U.S.C. § 31105 (1994), when it twice suspended him without pay. On August 6, 1999, a Department of Labor Administrative Law Judge (“ALJ”) issued a Recommended Decision and Order (R. D. & O.) in which she concluded that CalMat had violated the Act. CalMat appealed. We **AFFIRM** and hold that the ALJ correctly declined to defer to the outcome of a grievance arbitration, did not commit prejudicial error in various evidentiary rulings, and applied the correct legal standard to the facts presented.

BACKGROUND

CalMat is in the business of mixing and transporting cement products on public highways. It operates a facility in San Diego, California where the following events occurred.

On April 24, 1998, Jack Gunther, a CalMat sales agent, persuaded Tony Contreras, David Scott, and Jim Truman, CalMat drivers, to deliver cement mixer truckloads to a job site. By doing so, Scott and Contreras violated the Federal Motor Carrier Safety Administration regulations that prohibit driving after having been on duty for fifteen hours. 49 C.F.R. § 395.3 (2001); Transcript (“TR”) 10-12; R. D. & O. at 5.

Complainant Germann, a fifteen-year employee of CalMat and the shop steward, became aware of the over-hours violations on or about April 25, 1998. On April 27, he confronted Contreras about the violations and later that day spoke to Barry Coley, CalMat’s Regional Vice President, about the violations. Germann also contacted the California Highway Patrol (“CHP”) and was referred to Larry Moss, a motor carrier specialist. He called Moss again and made a formal complaint prompting Moss to visit the San Diego facility and investigate. Finally, Germann complained to Benny White, a CalMat manager, about the hours infractions and also, on April 29, told White that he had filed the complaint with the CHP. TR 52-57, 147-150, 334-335; Complainant’s Exhibits (“CEX”) 25; R. D. & O. at 7, 40.

During White’s investigation of the over-hours violation he spoke with Contreras twice. On April 30, 1998, the second occasion, Contreras claimed that Germann had threatened and harassed him by means of obscenities and an ethnic slur when they had earlier discussed the over-hours violations. White took Contreras to the CalMat office where Dickerson, Vice President of Human Resources, and Coley were located. There Contreras spoke with Dickerson alone. Dickerson then conferred with Coley, and they decided to suspend Germann pending investigation of Contreras’ complaint. TR 336. On May 1, 1998, White orally advised Germann that he was suspended without pay pending an investigation into Contreras’ complaint. R. D. & O. at 1, 8, 16; TR 329, 733-34. Jeff Dyer, CalMat’s Director of Labor Relations, conducted this investigation and interviewed numerous persons. R. D. & O. at 13-16. On May 18, 1998, the Occupational Safety and Health Administration informed Coley that Germann had filed a STAA complaint. CEX 16; TR 337-38.

On May 22, 1998, CalMat, at the conclusion of its investigation, advised Germann in writing that the suspension pending investigation was being changed to a disciplinary suspension without pay. Respondent’s Exhibit (“REX”) 79. In addition to the Contreras harassment incidents, CalMat also contended that Germann had encouraged, intimidated and harassed Contreras and other employees to engage in a work slow down. REX 79, Allegations I, III. However, CalMat’s investigation was inconclusive regarding an allegation that Germann had sabotaged company equipment and products. REX 79, Allegation II.

The Arbitration

On May 22, 1998, Local No. 36 of the International Brotherhood of Teamsters (“Union”) filed a charge against CalMat with the National Labor Relations Board claiming, among other things: “The Employer has discriminated against Robert E. Germann by suspending him without justification.” REX 80. CalMat and the Union agreed on an arbitrator to hear and decide the grievance regarding Germann’s suspension. The hearing was scheduled for November 24, 1998, but, on November 19, 1998, CalMat terminated Germann’s employment. The subject of the arbitration hearing was then amended to include the termination. REX 88 at 2. The parties stipulated to the following issue: “Did the Company violate the Collective Bargaining Agreement when it suspended

the grievant on May 1, 1998 or when it discharged the grievant on November 19, 1998?” REX 88 at 3.

The arbitration panel was composed of a Teamsters Union Local 481 official, a CalMat management official, and the arbitrator. Each had a vote, with the majority vote determining the outcome. REX 88 at 3. The parties were given full opportunity to present evidence and call witnesses who were sworn and available for cross-examination. The parties chose to make oral arguments at the conclusion of the arbitration in lieu of filing post-hearing briefs. REX 88 at 2.

The Chairman of the arbitration panel framed the issue as “whether or not the grievant engaged in stopping the employer’s work for any reason or did the grievant tell or encourage others to not perform their normal work. In effect, did the grievant slowdown or interfere with the normal productivity of the company.” REX 88 at 16.

CalMat argued that Germann was dissatisfied with the terms of the recently negotiated collective bargaining agreement, and, in order to show his dissatisfaction, tried to convince employees to “slowdown” their work. To carry out this plan Germann, it was alleged, intimidated, threatened, and used vulgar language and ethnic slurs. REX 88 at 5; REX 86 at 218-19. The Union argued that Germann was an activist steward who represented the Union members to the fullest extent of his ability. The Union claimed that CalMat did not want such an activist steward and had concocted its allegations to hide its true motives. REX 88 at 6.

In a decision issued February 1, 1999, three weeks before the STAA hearing in front of the ALJ, the arbitration panel, by a vote of two to one, found that CalMat did not violate the collective bargaining agreement when it suspended Germann on May 1 or when it later discharged him. REX 88 at 20. The Chairman’s tie-breaking decision was based upon, among other things, a finding that Germann attempted to coerce Contreras into slowing down his work and upon the language of the collective bargaining agreement which prohibited stewards from stopping co-workers for any reason or telling them that they could not work on a job. REX 88 at 16, 19.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to decide this matter by authority of 49 U.S.C. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(2001). *See also* Secretary’s Order 2-96 (April 17, 1996), Fed. Reg. 19,978 (May 3, 1996).

Under the STAA, the Administrative Review Board is bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Transp., 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). Substantial evidence is that which is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Clean Harbors Env’tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ’s conclusions of law, the Board, as the designee of the Secretary, acts with “all the powers [the Secretary] would have in making the initial decision . . .” 5 U.S.C. §

557(b) (1994). *See also* 29 C.F.R. § 1978.109(b). Therefore, the Board reviews the ALJ's conclusions of law *de novo*. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

ISSUES

1. Whether the ALJ erred in refusing to defer to the outcome of the arbitration decision.
2. Whether the ALJ erred in admitting certain evidence and whether she was thereby biased.
3. Whether the ALJ applied the correct legal standard when concluding that CalMat violated the STAA.

DISCUSSION

I. Deference to Arbitration Decision

The Department of Labor's implementing regulations permit an employee who files a STAA complaint to seek remedies pursuant to a collective bargaining agreement. 29 C.F.R. § 1978.112(a). While stating that the Secretary's jurisdiction to adjudicate STAA complaints is independent of the jurisdiction of other agencies or bodies, the regulations allow the Secretary to defer to the outcome of other proceedings such as a collective bargaining agreement arbitration. 29 C.F.R. § 1978.112(c). The decision to defer to the outcome of an arbitration must be made on a case-by-case basis and only where it is clear that the arbitration "dealt adequately with all factual issues, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the Act." *Id.*

We indicated above that the grievance arbitration concerned whether CalMat had violated the terms of the collective bargaining contract when it suspended (and later terminated) Germann. More precisely, the ultimate issue for the arbitrators involved an interpretation of the "steward clause" in the contract. REX 88 at 14. The record of the arbitration clearly indicates that neither the subject matter of the hearing nor the decision of the arbitrators addressed the employee protections provided by the STAA. The ALJ, therefore, properly declined to defer to the outcome of the arbitration because she found:

The issues are significantly different under applicable law and facts on the STAA suspension issue are substantially far more detailed and more fully evidenced here, with scant coverage in the arbitration proceeding where these factual issues were not adequately dealt with.

R. D. & O. at 4.

We are convinced that the ALJ fully examined the record of the arbitration proceedings. We conclude that the ALJ's decision not to defer to the outcome of the arbitration was correct. Her determination not to defer is fully consistent with the standard we enunciated recently: "Under judicial and administrative precedent, this Board defers to the outcome of another proceeding only

if the tribunal has given full consideration to the parties' claims and rights under the STAA." *Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 98-STA-8, slip op. at 9 (ARB July 28, 1999). See also *Brame v. Consolidated Freightways*, No. 90-STA-20, slip op. at 3, n. 3 (Sec'y June 17, 1992). We therefore affirm the ALJ's decision not to defer to the outcome of the arbitration proceeding.

II. The Evidentiary Issues

CalMat asserts that the ALJ committed prejudicial error by admitting hearsay and irrelevant evidence over its objection. CalMat claims that these evidentiary rulings were not only erroneous but had the additional effect of creating a bias against CalMat. Furthermore, the company argues, this error was so prejudicial that it is entitled to a new hearing before a different ALJ. CalMat Brief at 17-18.

The ALJ erred when she informed the parties early in the hearing that hearsay would be permitted. TR 89. DOL's STAA regulations specify that hearings will be conducted in accordance with The Rules of Practice and Procedure for Administrative Hearings. 29 C.F.R. § 1978.106(a). Under these Rules, hearsay evidence is inadmissible. 29 C.F.R. § 18.802. The ALJ acknowledged her error and indicated that she disregarded the evidence erroneously admitted. R. D. & O. at 4. Upon analysis of the record herein, including the ALJ's R. D. & O., we conclude that Respondent is not entitled to a new hearing before a different ALJ. We begin our discussion with an analysis of the specific evidentiary rulings to which Respondent objects. We then proceed to an examination of the purported effect the inadmissible evidence had on the ALJ.

A. Hearsay Objections

As noted above, hearsay evidence is inadmissible in STAA proceedings before an ALJ. After contending that the Judge was hostile toward its counsel's hearsay objections (for which we find no support in this record), Respondent specifies instances in which hearsay was improperly admitted. It takes exception to the entirety of the R.D. & O. at 6. This portion of the ALJ's decision is part of the "Background Facts" section. As such, it does not specify findings of fact but merely recites and paraphrases the direct testimony of Complainant Germann who describes how, on April 25, 1998, he learned about the over-hours violations. He testified that another employee, Bill Wimberly, told him about the violations, that he looked at the time cards of the drivers involved in the incident, and that he later talked to one of the drivers, David Scott, about the event. Two days later, Germann continued, he spoke to Tony Contreras, another one of the drivers involved. CalMat also complains of Germann's testimony concerning what the company dispatchers were telling drivers about the fifteen-hour rule ("as long as you're out of the yard and you get stuck out at a job it's alright." TR 135).

Respondent complains of further inadmissible hearsay when Alan Buckley, another CalMat driver, was permitted to recount an incident wherein he was subjected to a racial epithet spoken by supervisor Curt Hartwell at a time, not specified, prior to the over-hours violations of April 24, 1998. Buckley testified that Hartwell had, to his knowledge, not been disciplined for the racial incident. R. D. & O. at 37; TR 85-93. Likewise, the testimony of CalMat driver Robert Sengle was objectionable hearsay according to Respondent. Sengle related a 1997 incident wherein he was the

target of a vulgar racial epithet from another employee who, he later was told, was disciplined but apparently not suspended like Germann. R. D. & O. at 38; TR 93-102. Finally, Respondent directs us to the testimony of Jeffrey Winkler, alleging that it, too, was inadmissible hearsay. Winkler was a CalMat driver. He testified that a supervisor, Bowman, in replying to an inquiry about Germann's suspension, stated that "they're [CalMat] going to get rid of all the troublemakers," and that Germann had "brought it on himself." R. D. & O. at 38; TR 107-08.

We conclude that Germann's testimony about what Wimberly, Scott, Contreras, and the dispatchers said to him concerning the April 24 over-hours violations was hearsay evidence, and it was error for the ALJ to admit it over Respondent's continuing objections. Germann's testimony about the time cards was also inadmissible hearsay since it was Germann, not the custodian of the time cards, who testified. 29 C.F.R. § 18.803(a)(6). Winkler's testimony also was hearsay, which the ALJ erred in admitting. The testimony from Buckley, however, was not hearsay since it was not offered to prove the truth of the assertion but to show inconsistent treatment by CalMat. 29 C.F.R. § 18.801(c). The Sengle testimony as to what he had been told about the resulting discipline was hearsay.

Nevertheless, although we agree with Respondent that the specified hearsay was inadmissible, we do not agree that its admission was prejudicial (reversible) error. We hold that it was harmless error because a "substantial right" of CalMat was not affected by the admission of this hearsay evidence. Pertinent portions of 29 C.F.R. § 18.103 read as follows:

Rulings on evidence.

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected,

* * *

(2) . . . A substantial right of the party is affected unless it is more probably true than not true that the error did not materially contribute to the decision or order of the judge. Properly objected to evidence admitted in error does not affect a substantial right if explicitly not relied upon by the judge in support of the decision or order.

In support of our holding, we find that part of the objectionable hearsay -- Germann's testimony about what Wimberly, Scott, Contreras, and the dispatchers said and what the time card showed -- cannot be said to have affected CalMat's substantial rights. This evidence related solely to the fact that on April 24, 1998, CalMat drivers had exceeded the daily on-duty time limitations for commercial vehicle drivers and that Germann came to know about the violations. The parties to this controversy had, however, already stipulated to the fact of the violations. CalMat Brief at 13. This testimony, therefore, can hardly be said to have affected a substantial right of CalMat's. CalMat appears to concede this point but speculates that the hearsay somehow influenced the ALJ because, it claims, Germann became "more sympathetic as a shop steward concerned about safety on the

highways.” *Id.* Contrary to CalMat’s assertion, we find no record support for this contention that the ALJ became biased. Admitting Germann’s testimony was harmless error.

Respondent’s argument that the Winkler hearsay testimony (“they’re going to get rid of all the troublemakers”) is prejudicial error also must fail, but for a different reason than discussed above. The ALJ explicitly indicated that she would not rely upon this evidence. R. D. & O. at 38. Therefore, any substantial rights of CalMat were not affected, and the error here is also harmless. 29 C.F.R. § 18.103(2). Furthermore, had the ALJ not explicitly discounted the Winkler evidence, we would nevertheless find no substantial right of CalMat affected since this evidence could not be said to have materially contributed to the ALJ’s decision. Evidence of pretext, to which the Winkler testimony would pertain, is apparent in numerous other parts of this record, as we discuss, *infra*. See R. D. & O. at 45-55. Finally, the Sengle hearsay testimony must also be seen as harmless error since Sengle also testified that, of his own knowledge, the employee who had harassed him apparently had not been suspended. TR 102.

B. Relevancy Objections

CalMat contends that the ALJ committed error in admitting certain irrelevant evidence that, it asserts, had “the most prejudicial impact.” Calmat Brief at 14. Specifically, the company complains about the relevance of testimony from Carolyn Vallese, Edward Sigler, and Larry Moss. We begin this discussion with a definition.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

29 C.F.R. § 18.401. Generally, all relevant evidence is admissible and irrelevant evidence is inadmissible. 29 C.F.R. § 18.402.

Complainant Germann called Carolyn Vallese and Edward Sigler to rebut portions of the testimony of Jeffrey Dyer, CalMat’s Director of Labor Relations, who investigated the Germann-Contreras confrontations which led to Germann’s suspension. Vallese was a CalMat driver, and she recounted that Contreras had sexually harassed her for two or three months. He asked her to go to Mexico with him and whether she needed a boyfriend. She testified that she told investigator Dyer about this harassment because Contreras was claiming harassment by Germann and she thought that CalMat should know about Contreras harassing her. She directly contradicted Dyer’s earlier testimony by denying she told him that she had, perhaps, joked around about sex and maybe encouraged Contreras. R. D. & O. at 15, 39. Sigler testified that he observed Contreras harassing Vallese and other women and that, at Vallese’s urging, he told Contreras to stop bothering her. R. D. & O. at 40. CalMat properly objected to this testimony and to the earlier testimony of Larry Moss. Moss was a CHP motor vehicle specialist who, among other things, testified that he investigated the over-hours violations and that Germann had told him that “they’re at it again,” *i.e.*, CalMat was continuing to permit violation of the hours limitation after April 24, 1998.

Respondent characterizes the Vallese-Sigler and, to a lesser extent, the Moss testimony as “prejudicial,” “inflammatory,” “utterly [and] . . . entirely irrelevant,” and “speculative.” CalMat Brief at 14-18. According to the Respondent, this caused the ALJ to be distracted, resentful, and piqued so that the entirety of the proceedings were “infected.” Therefore, Respondent concludes, CalMat is entitled to a new hearing and ALJ.

We find this argument unpersuasive. Respondent’s complaint about the irrelevant evidence’s effect on the ALJ is only speculation, without any support in the record or the R. D. & O. We conclude that the Vallese-Sigler testimony, insofar as it contradicted evidence concerning Dyer’s investigative methods and his testimony, was relevant and therefore admissible. The ALJ believed Vallese and Sigler, especially Vallese. R. D. & O. at 47. As the fact finder, a primary concern for the ALJ is assessing the credibility of witnesses. Dyer’s credibility concerning what various employees told him was critical. The credibility of Contreras, whose testimony articulated CalMat’s proffered legitimate, non-discriminatory reasons for the suspension, was also critical. However, the testimony concerning Contreras’ sexual harassment of Vallese was irrelevant and erroneously admitted. Nevertheless, the error was harmless because we find ample record support for the ALJ’s suspicions concerning Contreras’ credibility. R. D. & O. at 45-55. Likewise, the Moss testimony regarding possible continuing violations and CalMat officials not understanding the law was irrelevant, but constitutes harmless error since, again, no substantial rights of CalMat were affected. 29 C.F.R. § 18.103(2).

C. The Effect of The Inadmissible Evidence

Respondent urges us to order a new hearing and a different ALJ because the prejudicial effects of the improperly admitted evidence so adversely affected the ALJ’s decision-making ability that CalMat was deprived of a fair hearing and decision. CalMat Brief at 11-18. CalMat argues, essentially, that the ALJ became biased as a result of the improperly admitted evidence.

We disagree. Because we conclude that admission of the objectionable evidence constitutes harmless error, and because this evidence certainly cannot be characterized as inflammatory, we are not persuaded that the ALJ became biased. Therefore, we find it unnecessary to extensively discuss or analyze the prerequisites for a finding of judicial bias.

Nevertheless, we note that CalMat would be hard pressed to show bias. Assuming, *arguendo*, that the ALJ had committed prejudicial error in admitting the evidence of which CalMat complains, CalMat could still not prove the two necessary elements for establishing bias. A party claiming bias must first overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *High v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-075, ALJ No. 96-CAA-8 (ARB Mar. 13, 2001). In this regard, speculation regarding the potential effect that evidence may have had upon the ALJ standing alone cannot overcome the presumed integrity of an ALJ. Second, a party seeking to establish judicial bias must show the existence of a “significant (and often determinative) ‘extrajudicial source’ factor.” *Liteky v. United States*, 510 US 540, 554-555 (1994). “[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.” *Id.* Additionally, “opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair

judgment impossible.” *Id.* Judicial rulings are “proper grounds for appeal, not for recusal.” *Id.* CalMat asserts evidentiary rulings, not significant extrajudicial factors or favoritism, as its basis for contending judicial bias. Its argument, therefore, would also fail under the *Liteky* criteria.

III. Legal Standards for Evaluating STAA Discrimination Cases

The whistleblower provisions of STAA provide in relevant part:

(a) Prohibitions-

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges or employment, because --

(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 . . .

49 U.S.C. § 31105(a).

The Secretary has adopted the familiar Title VII framework for analyzing discrimination complaints arising under the STAA. *See Byrd v. Consol. Motor Freight*, ARB No. 98-064, ALJ No. 97-STA-9, slip op. at 4-5 (ARB May 5, 1998) (articulating STAA burdens of proof and production); *Yellow Freight v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994) (adapting *McDonnell Douglas* burden-shifting rules to the STAA); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (claim for retaliatory discharge under STAA governed by Title VII framework).

In order for Germann to prevail on his STAA complaint he must establish, by a preponderance of the evidence, that CalMat suspended him because he engaged in protected activity. Germann may proceed initially by showing that his protected acts *likely* motivated the resulting adverse action. Under this, the inferential or “pretext” approach, the complaining employee, Germann, is required to prove that: 1) he engaged in protected activity; 2) the employer, CalMat, was aware of the activity; 3) he suffered an adverse employment action; and 4) there existed a “causal link” between the adverse action and the protected activity. *See Shannon v. Consol. Freightways*, ARB No. 98-051, ALJ No. 96-STA-15, slip op. at 5 (ARB Apr. 15, 1998).

Should Germann succeed in establishing the elements of this “prima facie” case and thus create an inference of discrimination, CalMat may rebut the inference by producing evidence that it disciplined Germann for legitimate, non-discriminatory reasons. Germann then must prove, by a preponderance of the evidence, that the reasons articulated by CalMat were not the true reasons for the suspension and that the protected activity *was* the reason. *Shannon v. Consol. Freightways*, ARB No. 98-051, slip op. at 5. *Accord St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506-508 (1993);

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-256 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-805 (1973); *Byrd v. Consolidated Motor Freight*, ARB No. 98-064, ALJ No. 97-STA-9, slip op. at 5 (ARB May 5, 1998). The burden of persuasion lies with Germann at all times. *Accord St Mary's Honor Ctr. v. Hicks*, 509 U.S. at 506.

Alternatively, Germann might also prevail if he were able to adduce stronger, more “direct” evidence of retaliatory intent with, for instance, an admission by CalMat that it suspended Germann, in part at least, because of his protected action. Under these circumstances, the fact finder employs the so-called “dual motive” analysis. Germann would again have to prove his case of discrimination by a preponderance of the evidence and also withstand CalMat’s opportunity to demonstrate that it would have suspended Germann even if he had not engaged in the protected activity. *See Shannon v. Consol. Freightways*, ARB No. 98-051, slip op. at 5-6; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 237-258 (1989); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-287 (1977).

The ALJ found that Germann engaged in protected activity when he complained both to Coley, CalMat’s Regional Vice President, and also to the CHP about the over-hours violations. R. D. & O. at 16-17. She found that Germann engaged in protected activity when he complained to CalMat manager White about the over-hours incidents and told him about filing the CHP complaint. R. D. & O. at 18. She found CalMat had been aware of these acts and had suspended Germann on May 1 and May 22, 1998. She then determined that there was sufficient evidence to infer that Germann’s activities were the “likely” reason for the suspensions. In making a finding of causation based on the protected acts and the suspension, the ALJ noted the close temporal connection between these events as well as the actions of some CalMat officials on April 30 and May 1. She ruled that Germann had, therefore, established a prima facie case of discrimination prohibited by the STAA. R.D. & O. at 45.

The ALJ found that CalMat had presented evidence of a legitimate non-discriminatory reason for its suspension of Germann. She noted that CalMat had written EEO policies, Work Rules and a Code of Ethics and that Germann’s use of obscenities and an ethnic slur violated these policies. The ALJ found, therefore, that CalMat had “made a showing sufficient to meet its burden of producing evidence of lawful motive for the adverse actions taken.” R. D. & O. at 45.

Although the ALJ alludes to “dual motive” analysis (R. D. & O. at 48, 53, 55), she actually analyzed the evidence under the “pretext” framework and concluded that Germann’s protected activity was the more likely reason for the suspension. R. D. & O. at 55. She disbelieved CalMat. As the Supreme Court has recongnized:

The fact finder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant’s proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . [though the] plaintiff at all times bears “the ultimate burden of persuasion.”

St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 511.

The ALJ explained that the evidence regarding the confrontation between Contreras and Germann was essentially Contreras' word against Germann's, but Contreras' testimony was less than credible. R. D. & O. at 48-50. Then she found that Dyer's testimony about his investigation also lacked credibility because he "read into these [investigatory] interviews what wasn't stated, or unambiguously stated." R. D. & O. at 47. Additionally, the ALJ pointed out that CalMat chose to suspend Germann immediately, prior to any investigation; gave him a twenty-two day suspension which was severe beyond the criteria of CalMat's own progressive discipline standard; and, based the written disciplinary suspension upon an erroneous record of prior disciplinary actions which had been prepared by CalMat's Human Relations office. R. D. & O. at 48, 53, 54. The ALJ also found further evidence of CalMat's disparate treatment of Germann in that White had handled other incidents involving vulgar, derogatory language and physical altercations differently, and that Dyer had failed to investigate Vallese's claim of harassment. R. D. & O. at 44, 55.

Based upon our review of the record we hold that substantial evidence supports the ALJ's findings that a preponderance of the evidence proves that Germann engaged in protected activity, that CalMat's proffered reasons for the suspension were pretextual, and that Germann was suspended as a result of his protected acts. Therefore, these findings are conclusive, and they bind this Board. 29 C.F.R. § 1978.109(c)(3); *BSP Transp. Inc. v. United States Department of Labor*, 160 F.3d at 46; *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d at 44.

CalMat argues that the ALJ committed legal error by incorrectly applying a "dual motive" analysis. By doing so, it asserts, the ALJ improperly imposed the ultimate burden of persuasion on CalMat even though, they argue, Germann had not proven retaliation by a preponderance of the evidence. We reject this contention and hold that the ALJ correctly applied the *McDonnell Douglas* pretext model to the facts herein.

Our examination of the Recommended Decision and Order leads us to conclude that, although the ALJ mentions the "dual motive" framework, she did not apply it. As discussed above, the ALJ based her decision that CalMat had discriminated on a finding that CalMat's proffered reason for its action was pretext and that a preponderance of evidence established that the protected activities were the more likely reason for the adverse actions. R. D. & O. at 55. However, even assuming that the ALJ analyzed this case under the "dual motive" framework, it would have been harmless error. In *Francis v. Bogan, Inc.*, No. 86-ERA-8 (ALJ Mar. 21, 1986), the ALJ found that the employer's reason for demoting the complainant was pretextual, but throughout his analysis there were mingled references (confusing and misplaced, we believe) to the dual motive methodology and case law. Slip op. at 11-16. On appeal, the Secretary noted that the complainant "was entitled to prevail and no further discussion of dual motives was appropriate. The ALJ's apparent reliance on *Mt. Healthy* [the U.S. Supreme Court's first decision concerning "dual motive" analysis], however, was harmless given the explicit finding of pretextuality." *Francis v. Bogan, Inc.*, No. 6-ERA-8, slip op. 5 n.1 (Sec'y April 1, 1988).

CONCLUSION

For the reasons stated herein, we **AFFIRM** the August 6, 1999 Recommended Decision and Order of the Administrative Law Judge.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge