In the Matter of:

MARK T. RIDGLEY, **ARB CASE NO. 05-063**

COMPLAINANT, **ALJ CASE NO. 04-STA-53**

v. **DATE: May 24, 2007**

C. J. DANNEMILLER COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Nancy Grim, Esq., Kent, Ohio, and Richard R. Renner, Esq., *Tate & Renner,* Dover, Ohio

For the Respondent:
Tod T. Morrow, Esq., *Buckingham, Doolittle & Burroughs, LLP,* Canton, Ohio

FINAL DECISION AND ORDER

This case arises from a complaint Mark T. Ridgley (Complainant) filed alleging that his employer, C. J. Dannemiller Company (Respondent), 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.A. § 31105 (West 1994), when it terminated his employment. On February 23, 2005, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in which he determined that, while Ridgley had engaged in protected activity under the STAA and the Respondent took an adverse action against him when it terminated his employment, Ridgley had not established that his termination was due to any discriminatory motive. We affirm that Ridgley engaged in protected activity, but was not

subjected to discrimination, under the STAA. Thus, we affirm the ALJ's R. D. & O. and deny Ridgley's complaint.

BACKGROUND

We summarize the ALJ's findings of facts. The Respondent is a small, family-run Ohio wholesale business that produces nuts and popcorn products that it sells and ships to its retail customers in its own fleet of trucks. Hearing Transcript (HT) at 166, 324. The parties stipulated that the Respondent is an employer subject to the STAA and that it employed Ridgley as a driver in 2003. HT at 12-14; R. D. & O. at 2; *see also* HT at 54. The Respondent has an Employee Policy, which provides that employees may be discharged for insubordination or use of abusive language. Respondent's Exhibit (RX) 2.

On Monday morning, December 1, 2003, Ridgley arrived at work and reviewed his route assignment or trip sheet, which described the number of deliveries he was to complete that day. HT at 406-407. Both Ridgley and his supervisor, Jim Dannemiller (Dannemiller), the president of the company, agreed that Ridgley's route assignment that day had more stops than usual. HT at 78-79, 407; RX 34. Ridgley expressed his concern to Dannemiller that he believed his assignment was longer than usual. Ridgley thought it might take over 14 hours to complete. HT at 77-78, 407, 476-477, 597. Dannemiller attempted to accommodate Ridgley's concern, but determined that no other employee was available to assist Ridgley in making his assigned deliveries and that it was not possible at that point in time to remove any deliveries from his assigned route. HT at 81-82, 407, 477, 479. In addition, Dannemiller concluded that it was not feasible for Ridgley to complete any other available delivery route or work assignment that day. HT at 82-84. Thus, Dannemiller assigned the route to another driver and told Ridgley he was free to go home. He asked Ridgley to call if he did not plan to come to work the following day. HT at 85, 408-409, 477.[1]

On Monday evening, December 1, 2003, Dannemiller called Ridgley at home to determine whether Ridgley planned to come to work on Tuesday morning. HT at 89, 410-411, 689. As Ridgley did not answer the call, Dannemiller left a message on Ridgley's answering machine. In the message, Dannemiller asked whether Ridgley would be "able" to work on Tuesday and noted that Ridgley's Monday route assignment had taken 8 hours and 20 minutes for the other driver to complete, "[s]o it wasn't quite as bad as it appeared I guess this morning." RX 5; HT at 89, 410-411. The ALJ found that a recording of the message "shows a calm and patient Mr. Dannemiller." R. D. & O. at

[1] Dannemiller testified that company drivers were guaranteed a full-time paycheck for eight hours of work a day, minimum, for 52 weeks of the year, even when there were not eight hours of work available to be performed on a particular day. *See* HT at 688-689. We note that there is no other contention or indication in the record that, when Dannemiller told Ridgley he was free to go home on the morning of December 1, 2003, he was taking any adverse action against Ridgley, but did so merely in an attempt to accommodate Ridgley's concern and because no other work assignment was available that day.

12. When Ridgley returned Dannemiller's call later that evening, he asked Dannemiller whether he had taken any stops off of the Monday route and Dannemiller replied that he had not. HT at 412. After Ridgley opined that he "found that hard to believe," Dannemiller asked Ridgley whether he was calling him a liar. When Ridgley replied that he was or, according to Dannemiller, that Dannemiller "had been lying to me for years," Dannemiller told Ridgley that he was fired. HT at 92, 412, 486-487, 690.

As the parties stipulated, Ridgley subsequently filed a timely complaint on or about April 19, 2004, and the Area Director of the Occupational Health and Safety Administration dismissed Ridgley's complaint on or about June 15, 2004. HT at 15; R. D. & O. at 2. Ridgley appealed and the case was forwarded to the Office of Administrative Law Judges for a hearing. After a hearing, the ALJ issued his R. D. & O., in which he determined that while Ridgley had engaged in protected activity under the STAA and the Respondent took an adverse action against him when it terminated his employment, Ridgley had not established that his termination was due to any discriminatory motive. Thus, the ALJ denied the complaint.

ISSUE

Did Ridgley prove by a preponderance of the evidence that the Respondent's legitimate, nondiscriminatory reason (insubordination) for Ridgley's job termination was a pretext and that the Respondent actually terminated Ridgley for engaging in protected activity in violation of the STAA?

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978 (2006). Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).[2] Pursuant to 29 C.F.R. § 1978.109(c)(1), the Board is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."

When reviewing STAA cases, the Administrative Review Board is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 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); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). Substantial evidence is that which is "more

[2] This regulation provides, "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

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.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

REQUIREMENTS OF THE STAA

The STAA provides in pertinent part:

> Prohibitions - (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of 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; 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.

DISCUSSION

Legal Framework

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, 2) his employer was aware of the 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. *BSP Trans, Inc.* 160 F.3d at 45 (1st Cir. 1998); *Clean Harbors Envt'l. Services, Inc.*, 146 F.3d at 21; *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). The complainant bears the burden of persuading the trier of fact that he was subjected to discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

As we explained in *Feltner v. Century Trucking, Ltd.*, ARB No. 03-118, ALJ Nos. 03-STA-1, 03-STA-2, slip op. at 4-5 (ARB Oct. 27, 2004) and *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004), 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. *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); *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 5-6 (ARB June 28, 2002). Under this burden-shifting framework, the complainant must first establish a prima facie case of discrimination. That is, the complainant must adduce evidence that he engaged in STAA-protected activity, that the respondent employer was aware of this activity, and that the employer took adverse action against the complainant because of the protected activity. Evidence of each of these elements raises an inference that the employer violated the 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 must prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but were a pretext for discrimination. *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002). The ultimate burden of persuasion that the respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Ctr.*, 509 U.S. at 502;

Densieski, slip op. at 4; *Gale v. Ocean Imaging & Ocean Res., Inc*., ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 8 (ARB July 31, 2002); *Poll*, slip op. at 5.

Although we have held repeatedly that the focus in a case tried on the merits should be on a complainant's ultimate burden of proof rather than the shifting burdens of going forward with the evidence, s*ee Feltner*, slip op. at 5; *Densieski*, slip op. at 5; *Williams v. Baltimore City Pub. Sch. Sys.*, ARB No. 01-021, ALJ No. 99-CAA-15 (ARB May 20, 2003), it appears in this case that the ALJ has erroneously equated Ridgley's threshold burden of adducing evidence to establish a prima facie case, and the Respondent's subsequent burden of production to articulate a legitimate, nondiscriminatory reason for the adverse action, with Ridgley's ultimate burden of proof. The ALJ misstated a STAA complainant's prima facie burden when he wrote that, in establishing a prima facie case, the complainant must "prove" protected activity, knowledge, adverse action, and causation and, if the complainant does so, that an employer must "prove" a legitimate, nondiscriminatory reason for the adverse action. R. D. & O. at 14-15, 20. The weighing of evidence like this is reserved to determine whether the complainant has proved his case by a preponderance of the evidence, not whether he established a prima facie case or whether the respondent articulated a legitimate, nondiscriminatory reason for the adverse action. Instead, at the evidentiary hearing the complainant initially must merely adduce some evidence as to each of these elements, and if the complainant does so, the respondent must merely "articulate" a legitimate, nondiscriminatory reason for the adverse action. *See Regan v. Nat'l. Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5-6 (ARB Sept. 30, 2004).

However, the ALJ's misstatement is harmless error in this case because the ALJ correctly placed the ultimate burden of proof on Ridgley and held that he did not prove that his termination was due to any discriminatory motive or his protected activity under the STAA. R. D. & O. at 19-23.

Ridgley engaged in protected activity under the STAA.

The ALJ found that Ridgley's statements or complaint to his supervisor, Jim Dannemiller, regarding the length of his December 1, 2003 route assignment and the extra stops on the route that day concerned workplace conditions subject to the federal hours of service regulations. R. D. & O. at 17; *see* 49 C.F.R. § 395.3 (2006).[3] The Secretary of Labor, the ARB, and federal courts have agreed that an "internal complaint to superiors conveying [an employee's] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA." *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 99-STA-37, slip op. at 6 (ARB Dec. 31, 2002), *aff'd Harrison v. Admin. Review Bd.*, 390 F.3d 752, 759 (2d Cir. 2004) (citing *Dutkiewicz v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 97-090, ALJ No. 95-STA-34, slip op. at 3-4 (ARB Aug. 8, 1997), *cited with approval in Clean Harbors Envtl. Servs., Inc.*, 146 F.3d at 19). Thus, the ALJ properly determined that

[3] Hours-of-service regulations limit the number of hours a commercial truck driver may operate his or her vehicle during any given day and seven-day period.

Ridgley's statements to Dannemiller were sufficient to infer a safety concern and constituted protected activity under the STAA. Furthermore, the ALJ found that Ridgley thereby brought safety matters to Dannemiller's attention and, therefore, Dannemiller had knowledge of Ridgley's protected activity. R. D. & O. at 19-20. We affirm the ALJ's findings that Ridgley engaged in protected activity under 49 U.S.C.A. § 31105(1)(B)(i)-(ii), (2), and that his supervisor, Dannemiller, was aware of his protected activity, as supported by substantial evidence. *See Harrison, supra; Dutkiewicz, supra; see also Clean Harbors, supra*.

Ridgley was not subjected to discrimination under the STAA.

Although Ridgley established protected activity, the ALJ found that he did not further prove by a preponderance of the evidence that the reason for his termination was a pretext to discriminate against him. R. D. & O. at 23-24. The ALJ accurately noted that the parties stipulated that the Respondent terminated Ridgley's employment or took adverse action against him. R. D. & O. at 19; *see* HT at 14-15. We affirm the ALJ's finding that the Respondent took adverse action against Ridgley as supported by substantial evidence. While Ridgley was subjected to an adverse action, however, the ALJ's finding that the Respondent had a legitimate, nondiscriminatory reason for terminating Ridgley is supported by substantial evidence and we, therefore, are bound by that finding.

The ALJ found that a review of the evidence established that the reason the Respondent terminated Ridgley's employment was not a pretext to discriminate against him, but that Ridgley was fired solely for insubordination when he called Dannemiller a liar. R. D. & O. at 13, 21. Specifically, the ALJ found "[t]he evidence is clear that Mr. Dannemiller had no intention to terminate Ridgley until his credibility and integrity were questioned." R. D. & O. at 21.

After reviewing the evidence, the ALJ found that it was not in the Respondent's interest to terminate Ridgley during the December holiday season, the company's busiest period of the year, due to the added burden it would face in discharging a needed driver at a company with so few drivers that even Dannemiller had to fill-in as a driver. R. D. & O. at 6, 13, 21. In addition, the ALJ found that while Ridgley had previously refused to perform route assignments, he had never been disciplined for doing so. R. D. & O. at 6; *see* HT at 510-513. Similarly, the ALJ found that the Respondent did not discipline or terminate Ridgley on the morning of December 1, 2003, for complaining about or not performing his route assignment, but accommodated his concern by allowing him to not drive and to go home. R. D. & O. at 21.

Furthermore, the ALJ found that when Dannemiller telephoned Ridgley later on the evening of Monday, December 1, 2003, he clearly expected and hoped that Ridgley would work on Tuesday and, therefore, was not intending to fire Ridgley. R. D. & O. at 21-23. As to the discussion regarding the actual length of the Monday delivery route

performed by another driver on the message Dannemiller left on Ridgley's answering machine and during their subsequent telephone conversation, the ALJ found that Mr. Dannemiller was merely informing Ridgley of the actual duration of the trip that day. R. D. & O. at 21. The ALJ found no evidence that the purpose of the message and conversation was so that Dannemiller could inform Ridgley that he should have driven the route, or was going to receive any type of disciplinary action for the events of Monday morning, or that his employment was terminated because another driver was able to make the route within the regulatory time constraints. *Id.* Consequently, the ALJ found that the evidence established that Ridgley was fired solely for a legitimate, nondiscriminatory reason, namely insubordination. R. D. & O. at 23.

Ridgely contends that the ALJ erred in finding that the Respondent fired him for a legitimate, nondiscriminatory reason. The ALJ found that Ridgley engaged in protected activity because he complained about the length of his Monday route assignment. Thus, Ridgley argues, the ALJ's finding that he was fired for calling Dannemiller a liar during a conversation regarding the actual length of his Monday route assignment establishes that the Respondent fired him in retaliation for his protected activity. In addition, Ridgley contends that well-established case-law holds that when an employee engages in impulsive behavior, such impulsive conduct does not remove the employee's rights to engage in protected activity or provide the employer with a legitimate, nondiscriminatory reason for adverse action.

As Ridgley notes, the Secretary has held:

> [T]he right to engage in statutorily-protected behavior permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts. A key inquiry is whether the employee has upset the balance that must be maintained between protected activity and shop discipline.

Kenneway v. Matlack, Inc., 88-STA-20, slip op. at 6 (Sec'y June 15, 1989). The Board has recently held that this "leeway for impulsive behavior" standard applies to situations that "involve impulsive conduct *incidental to the protected activity*." *See Harrison*, ARB No. 00-048, slip op. at 15, *aff'd on other grounds*, *Harrison*, 390 F.3d at 759 (emphasis added). Even more relevant, Ridgley notes that the Secretary has held that "[i]t is well settled that '[a]n employer may not provoke an employee to the point of committing an indiscretion and then seize on the incident as a legitimate rationale for discharge.'" *Assistant Sec'y & Moravec v. H C & M Transp., Inc.*, 90-STA-44, slip op. at 9 (Sec'y Jan. 6, 1992), citing *Monteer v. Milkyway Transp. Co., Inc.*, 90-STA-9, slip op. at 3 (Sec'y Jan. 4, 1991) and cases cited therein. Specifically, the Secretary held that an employee's "spontaneous" behavior that is "provoked by [an employer's] unlawful interference in [the employee's] protected activity" does not justify the employee's discharge. *Moravec*, slip op. at 10.

While the ALJ did not specifically address the Secretary's holding in *Moravec*, any error by the ALJ in this regard was harmless as the ALJ's findings of fact are supported by substantial evidence and establish that Dannemiller did not provoke Ridgley by unlawfully interfering in Ridgley's protected activity. As the ALJ found, when Ridgley originally complained about the length of his Monday route assignment, Dannemiller did not challenge Ridgley's concern or contention that the trip might be too long (and violate the federal hours of service regulations), or force him to nevertheless perform his assignment or discipline him for failing to perform his assignment, but accommodated his concern and allowed him to go home. Thus, the Respondent did not unlawfully interfere in Ridgley's protected activity when he originally complained.

Similarly, when. Dannemiller later, retrospectively raised the actual length of the Monday delivery route performed by another driver on the telephone, substantial evidence supports the ALJ's finding that it was not as a pretext to discriminate against or fire Ridgley. Clearly Dannemiller did so merely to explain to or inform Ridgley that his concern or perception about the length of Monday's trip was mistaken, but not to interfere in Ridgley's protected activity or to fire him. To the contrary, substantial evidence supports the ALJ's finding that the purpose of Dannemiller's phone call was to assure that Ridgley would work on the following Tuesday, as the company needed his services during the busy December holiday season. Thus, Ridgley's impulsive conduct was not incidental to his protected activity. *See Harrison*, ARB No. 00-048, slip op. at 15. Moreover, as the ALJ found, Dannemiller did not tell Ridgley that he should have driven the route, or was going to be disciplined or terminated for his failure to do so. Thus, the message Dannemiller left on Ridgley's answering machine during their subsequent telephone conversation did not unlawfully interfere in Ridgley's protected activity.

Consequently, the ALJ's finding that Ridgley was fired solely for a legitimate, nondiscriminatory reason, namely insubordination, is supported by substantial evidence. As insubordination is a legitimate, non-discriminatory reason for terminating Ridgley's employment, *see Clement v. Milwaukee Transp. Servs., Inc.*, 2001-STA-6 (ARB Aug. 29, 2003); *Schulman v. Clean Harbors Envtl. Servs., Inc.*, 1998-STA-24 (ARB Oct. 18, 1999); *Auman v. Inter Coastal Trucking*, 1991-STA-32 (Sec'y July 24, 1992), we affirm the ALJ's finding that Ridgley failed to establish that Dannemiller engaged in unlawful discrimination under the STAA.

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 Ridgley was not subjected to discrimination in violation of the STAA. Accordingly, we **DENY** Ridgley's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge