In the Matter of:

JOHN H. ATKINS,

COMPLAINANT,

v.

THE SALVATION ARMY,

RESPONDENT.

ARB CASE NO. 00-047

ALJ CASE NO. 2000-STA-19

DATE: February 28, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearance:

For the Complainant:
John H. Atkins, *Pro se, Salem, Oregon*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C.A. §31005 (1994).

The Respondent in this case, The Salvation Army, hired Complainant John Atkins as a truck driver on May 19, 1999. Atkins' job duties involved transporting donations from various drop-off locations in the Seattle, Washington area. On July 13, 1999, Respondent assigned Atkins to drive truck 263. The next day, July 14, 1999, Atkins advised Respondent that he could not continue to drive truck 263 because he could hear metal grinding against metal when he applied the brakes.[2/] Atkins claimed that Respondent's transportation supervisor, Colberg Rushing, pressured him to drive the truck anyway and, when he refused, Rushing reassigned him to drive truck 248.

Truck 248 had not yet been unloaded, so Atkins backed the truck up to the loading dock to remove its cargo. According to Atkins, when he backed up truck 248, he noticed that the brakes "slipped." The parties dispute whether Atkins brought truck 248's alleged defects to

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[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

[2/] Atkins filed a written report regarding the safety defects for truck 263.

Respondent's attention. In any event, Atkins proceeded to unload the truck, working with two helpers.

While Atkins was unloading truck 248, Rushing was test driving truck 263. After the test drive, Rushing informed Atkins that he did not find anything wrong with the brakes. By this time, all the trucks except truck 248 had been unloaded. Rushing did not believe that Atkins was working diligently enough, especially considering that Atkins had requested to leave early that day for a doctor's appointment. Therefore, Rushing told Atkins that it was going to be hard for him to leave early because he was so far behind. Apparently, Atkins found these statements offensive and announced that he was quitting. Although Rushing attempted to dissuade Atkins from this course of action, Atkins walked off the job and did not return.

Atkins subsequently filed a complaint with the Labor Department's Occupational Safety and Health Administration ("OSHA"), the agency charged with investigating complaints of the STAA's whistleblower protection provisions. 29 C.F.R. §1978.102(c) (2000). Atkins alleged that he had been harassed (by Rushing) and constructively discharged in retaliation for reporting safety defects on Respondent's vehicles. OSHA investigated the complaint, and determined that no unlawful discrimination had taken place. Atkins objected to OSHA's determination and the matter was referred to an Administrative Law Judge ("ALJ"), pursuant to 29 C.F.R. §1978.105.

The ALJ conducted a hearing and issued a Recommended Decision and Order ("RD&O") on March 23, 2000. The ALJ found that Atkins engaged in protected activity at least with regard to identifying alleged defects on truck 263. However, as to Atkins' allegation of harassment, the ALJ stated:

> Assuming he complained about both [trucks] 263 and 248, Complainant has failed to show that management took any adverse employment action against him, nor has he offered any specific evidence of harassment other than to simply allege that it occurred. Complainant himself testified that he simply accused Rushing of harassing him. One can surmise that Complainant is arguing that the harassment consisted of: 1) Rushing disagreeing with Complainant about the state of 263's brakes; 2) Rushing telling Complainant that he was not working at a pace which would allow him to leave early; and, 3) Rushing telling Complainant he did not want him to quit. This Court finds that Rushing's actions do not constitute harassment.

RD&O at 7.

With regard to Atkins' allegation that he had been constructively discharged, the ALJ found that Atkins had failed to prove that he was forced to resign his position. As a result, the ALJ found no basis upon which to conclude that Atkins had been subjected to an adverse action for engaging in protected activity, and therefore recommended that the complaint be dismissed.

JURISDICTION

The decision of the ALJ is before the Board pursuant to the automatic review procedures under 29 C.F.R. §1978.109(c)(1).

STANDARD OF REVIEW

Under the STAA implementing regulations, the 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). The Board reviews the ALJ's conclusions of law *de novo*. *Johnson v. Roadway Express, Inc.*, ARB No. 99-011, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000) citing *Roadway Express, Inc. v. Dole,* 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

The STAA states, in relevant part:

> (a) Prohibitions - (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, privileges or employment, because -
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> * * *
>
> (B) the employee refuses to operate a vehicle because -
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition . . . .

49 U.S.C.A. §31105(a).

To prevail on a claim under §31105(a), the complainant must first prove by a preponderance of the evidence that he or she engaged in protected activity, that his or her employer was aware of the protected activity, that the employer discharged, disciplined or discriminated against him or her, and that there is a causal connection between the protected activity and the adverse action. *BSP Trans., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transport Drivers, Inc.*, 836 F. 226, 228 (6th Cir. 1987).

We agree with the ALJ that Atkins engaged in protected activity when he reported safety defects on truck 263. However, Atkins must also establish that he was subjected to an adverse

action. Specifically, in order to make his case, Atkins affirmatively must prove by a preponderance of the evidence that he was harassed and/or constructively discharged.[3/]

With regard to the allegation of harassment, the record is devoid of any evidence that would support a finding of culpability on the part of Respondent. As the ALJ noted, Respondent may have expressed disagreement with Atkins at various times, but none of the incidents recounted by Atkins rise to the level of harassment. *See* RD&O at 7. We note particularly that Atkins' own testimony concerning the alleged harassing acts is unpersuasive with regard to his harassment claim.

As to the allegation that Atkins was constructively discharged, the ALJ correctly articulated the relevant standard, pointing out that:

> Constructive discharge occurs when, "looking at the totality of circumstances, a 'reasonable person in [the employee's] position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.'" *Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir. 1989), quoting *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (brackets in original) (quoting *Satterwhite v. Smith*, 744 F.2d 1380, 1381 (9th Cir. 1984). Whether conditions were so intolerable and discriminatory as to justify a reasonable employee's resignation is a factual question. *Thomas*, 877 F.2d at 1434. To establish constructive discharge, a complainant must at least show some "'aggravating factors,' such as a 'continuous pattern of discriminatory treatment.'" *Id*. quoting *Watson*, 823 F.2d at 361 (quoting *Satterwhite*, 744 F.2d at 1382).

RD&O at 6. *See also Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 and 9, slip op. at 22-23 (ARB Feb. 29, 2000); *Martin v. Dep't of Army*, ARB No. 96-131, ALJ No. 98-SDW-1, slip op. at 6-8 (ARB July 30, 1999).

In this case, Atkins alleged that Respondent constructively discharged him but proffered no evidence or testimony to prove the allegation. Rather, he proceeded as though a constructive discharge is self-evident from the undisputed facts of this case. Even if we construe the circumstances in the light most favorable to Atkins, we see no basis upon which to conclude that his working conditions were so intolerable on July 14, 1999, that he was constructively discharged.

[3/] In his brief before the Board on appeal, Atkins argues that Respondent failed to *disprove* that discrimination occurred because Respondent did not call various witnesses. This proposition attempts to turn the burden of proof on its head. It is well-settled that in a whistleblower case, it is the *complainant* who must demonstrate the elements of a *prima facie* case, including the fact that an adverse action occurred.

We note that, when Atkins complained about safety problems on truck 263, Respondent did not force him to drive it. Instead, Respondent assigned him to another truck. When Atkins requested permission to leave early on July 14, 1999, Respondent granted the request subject only to the reasonable condition that he complete his duties before leaving. *See* Tr. at 5, stipulation number seven. Although Rushing later commented that an early departure might be difficult because Atkins was so far behind in unloading truck 248, we do not find that a reasonable person in Atkins' position would have found this statement so oppressive that he would be forced to resign.[4/] Moreover, when Atkins announced that he intended to quit, Respondent did not rush to accept his resignation, but instead pleaded with him to stay. The ALJ concluded that the record in this case could not support a finding that Atkins was constructively discharged, and we agree.

On appeal to this Board, Atkins raises a number of other widely-divergent objections to the RD&O. For example, he asserts that Respondent generally had a poor track record with regard to truck repair and falsified vehicle repair records. Atkins claims that Respondent improperly refused to provide him with co-worker names and addresses during discovery. He asserts that Respondent's witnesses lied under oath, and suggests a broad conspiracy against him involving the OSHA investigator and ALJ to deny him his rights. But these allegations have no bearing on the dispositive issues in this case: whether Respondent (a) harassed Atkins for engaging in protected activity, or (b) constructively discharged him. As pointed out earlier in this opinion, Atkins cannot prevail in a whistleblower case unless he can first show that he has been subjected to an adverse action. The ALJ's fact-findings on these issues are amply supported by the record, particularly Atkins' own testimony. Even if we detected procedural error on the part of the ALJ in this case (and we do not), we conclude that a remand would not change the outcome of this case, and a remand therefore is not called for. *See Childers v. Carolina Power & Light. Co.*, ARB No. 98-077, ALJ No. 1997-ERA-32, slip op at 15-16 (ARB Dec. 29, 2000), citing *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir.), *cert. denied*, 119 S.Ct. 371 (1998) (remand unnecessary when it is clear that agency would have reached the same result had it applied correct reasoning); *FEC v. Legi-Tech, Inc.* 75 F.3d 704 (D.C. Cir. 1996) (remand is an unnecessary formality where the outcome on remand is clear).

Because Atkins has failed to prove that he was subjected to adverse action, we concur with the ALJ's recommendation and order that this complaint be **DISMISSED**.

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member

[4/] Atkins does not argue that unloading truck 248 was beyond the scope of his duties.