In the Matter of:

MICHAEL L. SMITH, **ARB CASE NO. 03-134**

COMPLAINANT, **ALJ CASE NO. 03-STA-32**

v. **DATE: October 19, 2004**

SYSCO FOODS OF BALTIMORE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Respondent:
Thomas B. Huggett, Esq., ***Morgan, Lewis & Bockius, LLP, Philadelphia, Pennsylvania***

FINAL DECISION AND ORDER DISMISSING COMPLAINT

Michael L. Smith filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2004), alleging that his employer, Sysco Foods of Baltimore (Sysco), violated the STAA when it terminated his employment on August 16, 2002. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) dismissing Smith's complaint. We affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C) to the Administrative Review Board ("ARB" or "Board"). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c)(2004). This matter is before us pursuant to the STAA's automatic review procedure. 29 C.F.R. § 1978.109(a).

Under the STAA, the ARB is bound by the ALJ's factual findings if substantial evidence on the record considered as a whole supports those findings. 29 C.F.R. § 1978.109(c)(3); *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 "more 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. 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 ARB, 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 2004). Therefore, we review the ALJ's conclusions of law de novo. *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).

DISCUSSION

The Legal Framework

As we explained in *Metheany v. Roadway Package Sys., Inc.*, ARB No. 00-63, ALJ No. 00-STA-11, slip op. at 6-7 (ARB Sept. 30, 2002), 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 Products, Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513 (1993); *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; *Poll*, slip op. at 5; *Gale v. Ocean Imaging and Ocean Res., Inc.*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 8 (ARB July 31, 2002).

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. R. D. & O. at 7. Instead, at the evidentiary hearing the complainant initially must merely adduce some evidence as to each of these elements. *See Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5-6 (ARB Sept. 30, 2004).

The first element a STAA complainant must establish is protected activity. STAA-protected activity occurs when:

> (A) the employee . . . 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 -
>
> > (1) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> >
> > (2) 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.

The Hearing

Sysco assessed its employees penalty points for coming to work late. Smith testified that he came to work late one day after a night in which he had run out of pain medication he had been taking for a tooth problem. Several months later he again came to work late because of a misunderstanding with his supervisor. Sysco terminated his employment shortly thereafter because by this time he had accumulated 25 penalty points, one more than the maximum allowed during one year. Transcript 14-42.

After Smith concluded his case, Sysco moved to dismiss the complaint because Smith had not presented any evidence that he had engaged in protected activity and therefore had not made a prima facie case of discrimination. Transcript at 47. The ALJ granted the motion because he found that Smith provided no evidence that he either filed a complaint related to vehicle safety or that he refused to operate a vehicle. R. D. & O. at

8. Furthermore, we note that though Smith was pro se, the burden of first establishing, and ultimately proving, the necessary elements of a whistleblower claim is no less for pro se litigants than it is for litigants represented by counsel. *Young v. Schlumberger Oil Field Services,* ARB No. 00-017, ALJ No. 2000-STA-25, slip op. at 10 (ARB Feb. 28, 2003).

CONCLUSION

We have reviewed the record and find that substantial evidence on the record as a whole supports the ALJ's finding that Smith did not present a prima facie case. Therefore, this finding is conclusive. 29 C.F.R. § 1978.109(c)(3). Thus, since Smith did not carry his initial burden to establish a prima facie case of discrimination, we **DENY** his complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge