In the Matter of:

KENNETH DENSIESKI, **ARB CASE NO. 03-145**

COMPLAINANT, **ALJ CASE NO. 2003-STA-30**

v. **DATE: October 20, 2004**

LA CORTE FARM EQUIPMENT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Kenneth Densieski*, pro se, Riverhead, New York*

For the Respondent:
Wayne J. Schaefer, Esq., *Certilman Balin Adler & Hyman, LLP., East Meadow, New York*

FINAL DECISION AND ORDER

Kenneth Densieski complained that La Corte Farm Equipment violated 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), and its implementing regulations, 29 C.F.R. Part 1978 (2004), when it terminated his employment on December 20, 2002. With modification of the analysis, we affirm the Administrative Law Judge's Recommended Decision and Order (R. D. & O.) issued on August 22, 2003, that La Corte violated the STAA. We award Densieski reinstatement and back pay.

BACKGROUND

Densieski began employment delivering farm and law equipment for La Corte, a John Deere dealer, in Riverhead, New York, in 1999. Hearing Transcript (T.) at 7, 19,

90. On Thursday, December 19, at approximately 1:20 p.m., Densieski received a phone call from Tom Rubing, La Corte's manager, to return to the dealership to pick up an additional delivery, a "bucket"[1] for Huntington, New York. At the time, he already was loaded up to make a delivery and had three scheduled pickups. T. at 7.

Densieski proceeded back to the office and spoke with Rubing and Peter La Corte, the owner. He complained to them that for about three weeks the brake buzzer had been going off on the truck he was driving. Densieski had previously notified Kenneth Hamilton, who was his immediate supervisor and the service manager, but it had not been fixed. Densieski noticed drops of fluid leading from the clutch pedal. T. at 8-9, 67. He asked Rubing and La Corte to come out and take a look, but Rubing told him to load up and do his deliveries. T. at 8-9; 95.

On the 19th, Densieski also contended that a 4-ton trailer that the company used had been previously overloaded, requiring replacement of the leaf springs. A week before, while taking a wheel off to repair a blown tire, he noticed that the bolt holding the two sets of leaf springs to the trailer body had no nut on it. He also brought that to Hamilton's attention, but Hamilton told him to mind his own business. He tried to advise Rubing on the problem on the 19th. T. at 9.

Densieski then proceeded to Huntington as directed. By about 3:50 p.m., the floorboards were "inundated with brake fluid." Hamilton told Densieski to return, although he had three pickups and deliveries left to do. T. at 10. He got back about 5:20 p.m., when only Bob Reid, the owner's son-in-law, was there. Densieski showed Reid the leaking brake fluid and complained about the buzzer going off. Densieski said it was imperative that he speak with management. *Id.*

The next morning, Friday, December 20, Rubing gave Densieski his paycheck They walked outside and Rubing informed Densieski that his services were no longer required. Densieski showed Rubing the leaking fluid. T. at 9-10. Another salesman drove the truck later that day. T. at 11.

Densieski filed a Complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on January 14, 2003, alleging that La Corte discharged him in violation of the STAA. After an investigation, OSHA issued a report on March 3, 2003, that the Complaint was without merit. Densieski appealed and requested an evidentiary hearing. An ALJ held the hearing on June 9, 2003, and July 28, 2003, in New York, New York. We now consider his R. D. & O. under the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2004).

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[1] Presumably a motorized loader.

ISSUES

The questions before us are: (1) whether Densieski proved by a preponderance of the evidence that La Corte violated the STAA by taking adverse action against him for making safety complaints; and (2), if so, whether Densieski should be reinstated with back pay.

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).

When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, 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 defined as "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)).

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 . . .." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's legal conclusions de novo. *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

I. Merits of the Complaint

The STAA, 49 U.S.C.A. § 31105(a)(1), provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The protected activity includes making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," § 31105(a)(1)(A), or "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." § 31105(a)(1)(B)(i).

Section 31105(a)(1)(A) is applicable here. Department of Transportation (DOT) regulations, 49 C.F.R. Part 393—Parts and Accessories Necessary for Safe Operation (2003) includes subparts on brakes. See §§ 393.40-53. 49 C.F.R. § 393.40(a) provides

that "A . . . truck must have brakes adequate to control the movement of, and to stop and hold, the vehicle or combination of vehicles." Other subparts, for example, deal with tubing and hose connections, §§ 393.45-46, and warning devices, § 393.51. An allegation of leaking brake fluid clearly is within the ambit of DOT's safety regulations. *Cf. Metheany v. Roadway Package Sys., Inc.*, ARB No. 00-63, ALJ No. 00-STA-11, slip op. at 9 (ARB Sept. 30, 2002) (transportation of trailer with disabled brakes violation of DOT regulations); *Atkins v. The Salvation Army*, ARB No. 00-047, ALJ No. 2000-STA-19, slip op at 1 (ARB Feb. 28, 2001) (driver heard metal grinding against metal when he applied brakes).

To prevail on a STAA claim, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that there was a causal connection between the protected activity and the adverse action. *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

As we explained in *Regan*, slip op at 5-6, the Board in STAA cases adopts the framework of burdens of proof and production 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. *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); *Metheany*, slip op. at 6-7.

Under the burden-shifting framework of these cases, the complainant must first establish a prima facie case of discrimination. This burden requires the complainant to adduce evidence of each of the elements–protected activity, employer awareness, adverse action, and causal nexus–thus raising an inference of unlawful discrimination. *Regan*, slip op at 6.

The burden then shifts to the 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. *Id.; Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002). The fact-finder may then consider the credibility of the parties' evidence and inferences properly drawn therefrom in deciding that the respondent's explanation is pretext. *Reeves*, 530 U.S. at 146; *Regan*, slip op at 6. The ultimate burden of persuasion that the respondent intentionally discriminated because of complainant's protected activity

remains at all times with the complainant. *St. Mary's Honor Ctr.*, 509 U.S. at 502; *Regan*, slip op at 6; *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).

While our focus in a case tried on the merits is on a complainant's ultimate burden of proof rather than the shifting burdens of going forward with the evidence, s*ee Williams v. Baltimore City Pub. Sch. Sys.*, ARB No. 01-021, ALJ No. 99-CAA-15 (ARB May 20, 2003); *but see Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 17-22 (ARB Feb. 28, 2003) (demonstrating that prima facie analysis may help to sharpen the issues remaining for decision in an environmental whistleblower case), in this instance it appears that the ALJ may have improperly left the burden of persuasion on La Corte. For example, after asking Densieski and Rubing questions on the first day of the hearing (both appeared pro se), the ALJ in this case told the parties that the timing of Densieski's employment termination created the inference that La Corte had discriminated against him. T. at 46, 51. Because Rubing had already advanced legitimate, non-discriminatory reasons for the adverse action (Densieski caused disharmony and was late to work, T. 11-12, 46-47), it is not clear whether the ALJ was placing the burden of going forward under *McDonnell Douglas*, or the ultimate burden of proof on La Corte when he told Rubing, "[T]he burden has shifted from [Densieski] to you. He has showed [sic] me enough to make what's a prima facie case . . .." T. at 51. Likewise, in his decision, the ALJ writes, "Based on a review of the record evidence as a whole, I am unable to conclude that Respondent has produced evidence sufficient to overcome the inference of discriminatory discharge of Complainant." R. D. & O. at 4.

Because of this potential for confusion, we review the evidence ourselves, deferring to the ALJ's factual findings that are supported by substantial evidence.

Densieski engaged in protected activity when he raised safety complaints about the truck he drove. See 49 C.F.R. §§ 393.40-53. On the afternoon of December 19, 2002, he complained that the brake warning buzzer had been going off for three weeks. T. at 7. He did not want to drive the extra distance to Huntington, because he saw the brake fluid, and the trip doubled the time and added weight to the load. T. at 23, 45. He testified that he should have refused to drive, because it was unsafe, but he was going to keep his job. T. at 22. When he got to Huntington, the brake fluid covered the floorboards. At that point, he called Hamilton, who told him to return without finishing his pickups and deliveries. T. at 24.

La Corte was aware of safety complaints. Densieski conveyed his concern to Rubing about the truck brake buzzer going off the day before Rubing terminated his employment and showed him the leak the day of the termination. T. at 7, 10, 36. Less clear was whether his complaint to Hamilton that overloading the trailer had damaged the springs had been communicated to Rubing. T. at 8-9, 33, 44, 60.

La Corte offered legitimate, non-discriminatory reasons for terminating Densieski's employment. Rubing denied that the complaint about the leaky brake pedal was the reason for his firing. T. at 11-12. Densieski had blanket authority to have repairs

made. T. at 11. Rubing testified that he thought the real reason Densieski did not want to make the additional delivery of the bucket to Huntington was that he would be late getting back. T. at 29. Rubing made up his mind Thursday night, December 19, before he saw the brake fluid, that he would fire Densieski the next day. T. at 36. Densieski griped about everybody at the dealership. T. at 11. He charged that the paperwork for his deliveries was not done. He groused that the equipment was not set up correctly. The disharmony he caused was the reason he was discharged. T. at 11-12, 46-47. Also, he was frequently late for work; for example, three out of the four days the week he was fired. T. at 11-12.

Yves Boutges, the assistant manager of La Corte's service department, corroborated Rubing's testimony. Densieski complained about machinery not being set up properly, about the delivery schedule, and about the sales department not doing paperwork. The general feeling was that Densieski was a pain. T. at 76-77. He was regularly late. T. at 84. However, some of his complaints related to safety, like the truck lights, in which case he would take another vehicle. T. at 76-77.

Nevertheless, we hold that Densieski met his ultimate burden of proving discrimination. The record is devoid of evidence that he was disciplined or even admonished for his tardiness or disharmony with colleagues. It is clear that some of his complaints about co-workers were safety related, e.g., his allegation that Hamilton was not a competent mechanic. His complaint about the brake buzzer and fluid on December 19, 2002, and his inability to complete his pickups and deliveries that day obviously triggered his discharge. See R. D. & O. at 4.

La Corte suggests that we reach the mixed or dual motive test. Brief of the Respondent in Opposition to the Recommended Decision and Order of the Administrative Law Judge, at 7-8. Under that test, if a complainant demonstrates that the respondent took adverse action in part because he or she made protected complaints, the burden shifts to the respondent to prove that the complainant would have been disciplined even if he or she had not engaged in protected activity. *Charles v. Estes Express Lines*, ARB No. 03-133, ALJ No. 2003-STA-15, slip op. at 4 (ARB Aug. 26, 2004). *See also St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502 (1993). Applying a dual motive analysis, La Corte failed to prove that it would have discharged Densieski regardless of his safety complaints. No prior action was taken on his allegedly chronic tardiness or the dissention his non-protected grousing caused. The precipitating event was his safety complaints of December 19. We agree with the ultimate conclusion of the ALJ and rule that Densieski prevailed on the merits of his STAA complaint.

II. Remedies

Consequently, we next consider remedies. Under 49 U.S.C.A. § 31105(b)(3)(A), "If the Secretary [of Labor] decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person to—(ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and (iii) pay compensatory damages, including back pay.

Reinstatement, i.e., reestablishment of the employment relationship, is a usual component of the remedy in discrimination cases. *McCuistion v. Tennessee Valley Auth.*, 89-ERA-6, slip op. at 23 (Sec'y Nov. 13, 1991) (under analogous provisions of the Energy Reorganization Act (ERA)). In lieu of reinstatement, front pay is awarded if reinstatement would cause a dysfunctional work environment because of hostilities between the parties. *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995). In *Dutile v. Tighe Trucking, Inc.*, 93-STA-31 (Sec'y Oct. 31, 1994), the Secretary held that "when a complainant states . . . that he does not desire reinstatement, the parties or the ALJ should inquire as to why. If there is such hostility between the parties that reinstatement would not be wise because of irreparable damage to the employment relationship, the ALJ may decide not to order it. If, however, the complainant gives no strong reason for not returning to his former position, reinstatement should be ordered." Slip op at 4-5**.**

In the instant matter, Densieski testified that he was not looking for reinstatement, "[N]ot for being fired for having brake fluid on the floor." T. at 52. La Corte had not approached him about it, so he assumed that it would not happen. T. 60. Rubing did not testify as to the feasibility of reinstatement.

On this record, there is not substantial evidence that Densieski's reinstatement would cause irreparable animosity between the parties. Therefore, we order La Corte to reinstate Densieski to his previous position under the same terms, conditions and privileges of employment, retroactive to the date of discharge, with no loss of seniority or benefits.

Densieski is also entitled to back pay. 49 U.S.C.A § 31105(b)(3)(A)(iii). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992), citing *Hufstetler v. Roadway Express, Inc.*, 85-STA-8, slip op. at 50 (Sec'y Aug. 21, 1986), *aff'd sub nom., Roadway Express, Inc., v. Brock*, 830 F.2d 179 (11th Cir. 1987). Following the practice that the Secretary initiated, this Board calculates back pay awards to successful whistleblower complainants in accordance with the make whole remedial scheme embodied in § 706 (g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e et seq. (West 1988). *See, e.g., Polgar v. Florida Stage Lines*, ARB No. 97-056, ALJ No. 94-STA-46, slip op. at 3 (ARB Mar. 31, 1997) (citing *Loeffler v. Frank*, 489 U.S. 549 (1988)).

The ALJ awarded back pay from December 20, 2002 (the date of discharge) to April 28, 2003 (the date of his reemployment with another company), less the amount he received in unemployment insurance. R. D. & O. at 5; T. at 69-72; CX 2. We adopt that ruling. In addition, Densieski is entitled to the difference between his rate of pay with La Corte and what he has earned with his subsequent employer. The ALJ considered this to be front pay, but since we have ordered reinstatement, it is more properly considered back pay. Regardless, substantial record evidence supports the ALJ's finding that the amount is $120.00 per week commencing with his reemployment and continuing, and we

so order. R. D. & O. at 5; T. at 70-72. This obligation will cease as of the date of reinstatement or the date Densieski declines a good faith offer of reinstatement.

CONCLUSION

Thus, we have found for Densieski on the merits of his Complaint and ordered reinstatement and back pay as calculated above.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge