



In the Matter of:

LOREN J. GUAY,

ARB CASE NO. 06-131

COMPLAINANT,

ALJ CASE NO. 2005-STA-045

v.

DATE: June 30, 2008

BURFORD'S TREE SURGEON'S, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Loren J. Guay, *pro se*, Holiday, Florida

FINAL DECISION AND ORDER

Loren Guay complained 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 2007), that his employer, Burford's Tree Surgeon's, Inc. (BTS), violated the STAA when it terminated his employment on December 6, 2004.

On May 24, 2005, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, found that Guay's claim had no merit. Guay filed his objections to the Secretary's findings on June 20, 2005. A United States Department of Labor Administrative Law Judge (ALJ) held a hearing on April 4, 2006, in Tampa, Florida. The ALJ concluded that BTS did not violate the STAA because Guay did not prove he engaged in protected activity and he did not demonstrate that BTS's articulated reason for terminating his employment was pretext. The Administrative Review Board (Board or

ARB) automatically reviews an ALJ's recommended STAA decision. *See* 29 C.F.R. § 1978.109(c)(1)(2007). We affirm.

BACKGROUND

For convenience, we briefly restate certain background facts. More details are provided in the ALJ's Recommended Decision and Order (R. D. & O.).

BTS is a utility right of way contractor that performs tree trimming, herbicide spraying, grounding of trench lines, and other related right of way work. Transcript (Tr.) at 252. BTS contracted with Progress Energy to handle tree trimming for the utility company in Florida, North Carolina, and South Carolina. Recommended Decision and Order (R. D. & O.) at 3; Tr. at 253-54. BTS hired Guay on January 14, 2004. *See* Respondent's Exhibit (RX) 1 (Guay's Application for Employment and Employment Contract with BTS).

In his initial orientation, BTS provided Guay with its Disciplinary Procedures Policy, which detailed disciplinary processes including immediate dismissal or suspension without pay for infractions including violations of major safety rules, reporting to work under the influence of drugs, failure to follow a supervisor's instruction, and insubordination. RX 1. Additionally, within 90 days of being hired, each BTS employee attends a one-day training program, conducted by Keith Owens, Human Resource Administrator, and Dennis Jones, Safety Director. R. D. & O. at 4. At the meeting, Owens explains that BTS has a zero tolerance drug use policy. *Id.* Additionally, he details the proper procedure for reporting safety issues. *Id.* BTS instructs employees to report problems first to an immediate supervisor, but if that is not possible or adequate, then to call a provided phone number, nicknamed "the silver bullet." R. D. & O. at 4-5. The "silver bullet" is Owens's direct line. *Id.* Owens provides every employee with a copy of this phone number on his business card and instructs him or her to call that number if there is any problem with safety. *Id.*

Wayne Poole, BTS supervisor for Florida; Christy James Winter, Guay's supervisor; and Guay all testified that they attended one of these training programs and received the "silver bullet." Tr. at 106, 176, 221. Guay also testified that he knew to report safety violations either to the supervisor or to use Owens's phone number, but that he had never used the "silver bullet." Tr. at 106.

Winter described Guay's work performance as "adequate." Tr. at 163. But Guay received multiple reprimands, verbal and written, for tardiness. R. D. & O. at 3. Guay also received a formal written reprimand on October 15, 2004, for "failure to perform the duties of a top paid foreman." RX 5 (Oct. 15, 2004 Warning Notice). Guay filed a complaint with OSHA alleging that the reprimand was in retaliation for refusing to perform an unsafe task, but OSHA dismissed his complaint as untimely. As detailed in

the R. D. & O., Guay had other documented disciplinary incidents, but Guay's current appeal concerns only his allegations of BTS employee drug use.¹

In January, the first month Guay worked at BTS, he noticed employees using drugs, notably a "group of guys . . . smoking a joint right at the job site." Tr. at 63. Guay reported his observations to Donnie Tanney, the general foreman. *Id.* Tanney told Guay, "don't worry about it." *Id.* Guay testified that he then began to have "some very bad problems with Donnie Tanney" including "intimidation." Tr. at 65. Guay stated that he did not go to Bob Smith, Tanney's supervisor, because he knew that Smith used drugs as well. Tr. at 66.

Poole started working for BTS in April 2004. R. D. & O. at 11. Shortly thereafter, Guay informed Poole that "half these crews out here are all on dope." Tr. at 68. Guay told Poole the names of multiple employees he suspected were using drugs. Tr. at 105. However, Guay was only able to provide Poole with nicknames and Poole was unable to act upon the information. Tr. at 105-06.

Guay also recounted an incident in Orlando, where the crew was lodged in a hotel. Tr. at 73. Guay testified that he visited a co-worker's room where the "marijuana smoke was thick." *Id.* Guay also testified that his supervisor, Winter, was in that room. *Id.* The following morning, Guay observed another incident involving drug use. In the parking lot of the hotel, Guay overheard a fellow employee ask "where he could get an eight ball." Tr. at 74. Guay also said he witnessed an employee, nicknamed Ray-Ray, "higher than a kite." *Id.*

The crew traveled to a "greyhound race track parking lot," where they received their work orders for the day. Tr. at 74-75. Upon arriving, Ed Sikes, a co-worker, approached Guay and asked him for a bottle of Windex. Tr. at 75. Sikes informed Guay that Ray-Ray had gotten into an automobile accident and they needed Guay "to pee in [the Windex bottle] so we can give them that urine test because he's higher than hell." *Id.* Guay refused and testified that another employee named "Jim" urinated in the bottle for Ray-Ray. Tr. at 76.

In November 2004, Guay started working on a contract with Progress Energy. While at the work site, Winter informed Guay that Owens wanted to talk. Tr. at 80. Owens told Guay that he had been late for work too many times and was a "trouble maker." *Id.* Guay protested the charges and told Owens that BTS employees were using drugs. Tr. at 80 - 82. Owens told Guay that the "silver bullet" existed for this problem, but Guay responded that "this silver bullet . . . is all a bunch of crap." Tr. at 82. Guay told Owens that he witnessed his supervisors doing drugs, that he went and complained

¹ See R. D. & O. at 5-9 ("Pine Tree Incident"), 9-11 ("Bucket Tree Incident").

about the drug use, and that he was now being “harassed.” *Id.* Guay testified that he was scared that he was going to be hurt or fired for reporting drug use. Tr. at 82-83.

Owens instructed Guay to fax him a list of names of employees Guay suspected were using drugs. Tr. at 83. Guay agreed but said it would take some time because he only knew nicknames. Tr. at 83-84. The next day Guay reported to work. *Id.* When he arrived, Jeff Garner, a co-worker, approached Guay and told him that Smith and Winter knew that “Loren Guay had said that you guys are doing drugs” and had told the crew that they needed to get “cleaned up because [they] were getting drug tested.” Tr. at 85. Upon learning that the crew already knew that Guay had reported them, he “immediately” made a phone call to Don Harrelson, the representative for Progress Energy. *Id.*

The following morning Guay met Harrelson in a parking lot in Newberry, Florida. Tr. at 87. Guay told Harrelson that he had watched BTS employees “do dope” and he tried reporting it to BTS supervisors. *Id.* Guay told Harrelson that “every time [he] makes a move, ten times more problems happen for [him].” Guay then gave Harrelson a list of names of BTS employees who Guay claimed were using drugs. Tr. at 89.

Harrelson forwarded the list of names to Michael Burford, President and Owner of BTS, who gave them to Owens. Tr. at 257. Owens told Burford that he was waiting on a fax from Guay. *Id.* Guay never faxed the names to Owens or Burford. *Id.* After asking Owens if Guay was familiar with the safety protocol and the “silver bullet,” Burford decided to terminate Guay’s employment for insubordination. Tr. at 258. The following Monday Poole fired Guay. Tr. at 94, 129.

Additionally, after receiving the list of names, Owens ordered the entire crew under Winters to undergo drug testing. Tr. at 157. On December 6, Owens met with Winter’s crew and drove to the drug testing facility. Tr. at 158. Of the eighteen employees tested, two failed the test and two refused to take the test. Tr. at 158. BTS fired those four employees. *Id.*

On December 9, 2004, Guay filed a complaint with DOL OSHA alleging that BTS terminated his employment in retaliation for his complaints about BTS employees’ drug use. After an investigation, OSHA concluded that Guay’s termination was not due to his protected complaints. Guay appealed and was granted a hearing on April 4, 2006. The ALJ denied Guay’s complaint because she concluded that Guay did not engage in protected activity because he did not have a reasonable belief or good faith in making complaints about drug use to Progress Energy, and that even if they were protected complaints, BTS terminated Guay’s employment for insubordination, a legitimate non-discriminatory basis. The Board automatically reviews STAA cases.²

² See 29 C.F.R. § 1978.109(c)(1).

JURISDICTION AND STANDARD OF REVIEW

By authority of 49 U.S.C.A. § 31105(b)(2)(C), the Secretary of Labor has delegated her jurisdiction to decide this matter to the Administrative Review Board (ARB).³

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.⁴ 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."⁵

In reviewing the ALJ's conclusions of law, the ARB, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision" ⁶ Therefore, we review the ALJ's conclusions of law de novo.⁷

DISCUSSION

The STAA 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 activities. These protected activities include making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order."⁸

³ See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). See also 29 C.F.R. § 1978.109(c).

⁴ 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

⁵ *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. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

⁶ 5 U.S.C.A. § 557(b) (West 2007).

⁷ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, 2001-STA-029, slip op. at 2 (ARB Oct. 31, 2003).

⁸ 49 U.S.C.A. § 31105(a)(1)(A).

To prevail on his claim under the STAA, Guay must prove by a preponderance of the evidence that he was a covered employee; that he engaged in protected activity; that BTS was aware of the protected activity; that BTS discharged, disciplined, or discriminated against him; and that the protected activity was the reason for the adverse action.⁹ If Guay fails to prove any one of these elements, his complaint must be dismissed.¹⁰

Protected Activity

1. Complaint

The protected activity in this case is limited to Guay's report of drug use within BTS to Progress Energy.

The STAA protects employees who have filed a complaint or begun a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order," or who have testified or will testify in such a proceeding.¹¹ Under the complaint clause, 49 U.S.C.A. § 31105(a)(1)(A), the complainant must at least be acting on a reasonable belief regarding the existence of a violation.¹² Thus, 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."¹³

Guay complained to a third party, Progress Energy, BTS's customer. The ALJ did not address the question whether the complaint clause of the STAA, 49 § 31105(a)(1)(A), includes complaints made to a third party. Instead, the ALJ found that since Guay "is not entitled to relief on the merits, it is not necessary to decide this issue."

⁹ *BSP Trans, Inc. v. U.S. 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); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004).

¹⁰ *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005).

¹¹ 49 U.S.C.A. § 31105(a)(1)(A).

¹² *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 3 (ARB July 31, 2003).

¹³ *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 5 (ARB Dec. 31, 2002).

R. D. & O. at 20, n. 24. Since BTS did not object to this approach by the ALJ on appeal, we will assume for purposes of deciding this appeal that Guay made an appropriate complaint.

2. Reasonable Basis

Guay must prove by a preponderance of the evidence that he engaged in protected activity, i.e., his complaints concerned a potential or actual violation of a commercial motor vehicle safety regulation or that he had a reasonable belief of such violation. Thus, protected activity has two elements: (1) the complaint itself must involve a purported violation of a regulation relating to commercial motor vehicle safety, and (2) the complainant's belief must be objectively reasonable.¹⁴

In determining whether Guay engaged in protected activity, the ALJ stated “the Complainant need show only that he reasonably perceived a violation of the Act or regulations pertaining thereto. He need not prove an actual safety violation, but he must establish that his complaints were made in good faith.” R. D. & O. at 20, *citing Ashcraft v. Univ. of Cincinnati*, ALJ No. 1983-ERA-007 (Sec’y July 1, 1983). Thus, for a finding of protected activity under the complaint clause of the STAA, Guay must be acting on a reasonable belief regarding the existence of a safety violation.¹⁵ However, “where the complainant has a reasonable belief that the respondent is violating the law, other motives he may have for engaging in protected activity are irrelevant.”¹⁶ Thus a complainant need not demonstrate that he was motivated by a safety concern rather than some other personal concern when he engaged in protected activity, only that his belief that a safety violation occurred is reasonable.

In evaluating protected activity, the ALJ found that Guay “did not have a reasonable basis for his allegations of drug use, that his allegations were made in bad faith and with malicious intent, and thus he did not engage in protected activity.” R. D. & O. at 23. This conclusion erroneously relies, at least in part, on a finding of improper motivation.

¹⁴ See *Luckie v. United Parcel Serv.*, ARB No. 05-026, 2003-STA-039, slip op. at 13 (ARB June 29, 2007).

¹⁵ See *Bethea v. Wallace Trucking Co.*, ARB No. 07-057, 2006-STA-023, slip op. at 8 (ARB Dec. 31, 2007); *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-031, slip op. at 11 (ARB Sept. 14, 2007); *Luckie*, ARB No. 05-026, slip op. at 13; *Leach*, ARB No. 02-089, slip op. at 3.

¹⁶ *Diaz-Robainas v. Florida Light & Power Co.*, 1992-ERA-010, slip op. at 15 (Sec’y Jan. 19, 1996).

In determining whether Guay had a reasonable belief that he was engaging in protected activity, we examine several important factors. First, the evidence demonstrates that Guay had a reason to believe drugs were being used. He stated that he witnessed employees smoking joints his first month at BTS. Tr. at 63. He also witnessed drug use by employees at a hotel. Tr. at 73. He overheard employees looking for drugs and noticed others who were obviously under the influence. Tr. at 74. Co-workers asked him to help cover for others in taking a drug test. Tr. at 76. These allegations are corroborated by the fact that after Guay complained about drug use, and BTS tested its employees, two tested positive for drugs and two refused to be tested. Tr. at 158.

Second, the Federal Motor Carrier Safety Regulations prohibit all drivers from using “any controlled substance.”¹⁷ The STAA protects drivers who report a “violation of a commercial motor vehicle safety regulation.”¹⁸

Third, Guay reported his belief that BTS employees were using drugs. He first told his supervisor when he began working in January of 2004. Then he told his new supervisor, Poole, when he began working for BTS. He also told Owens in response to a performance review. Tr. at 63, 68, 83.

Guay clearly had a reasonable belief that co-workers were using drugs. Throughout the record Guay details suspected and actual BTS employee drug use. In addition, the drug tests BTS had conducted indicated that employees were using drugs.

The ALJ’s finding that Guay’s “allegations were neither reasonable nor in good faith, but were made to [BTS’s] major customer in an effort to seek revenge for disciplinary actions” conflates the issue of reasonableness of his belief with a question of motive. R. D & O. at 23. Under the STAA, Guay’s motivation for making his complaint is immaterial. All that is required of a complainant, under the STAA, is that he reasonably believe that a violation of motor vehicle safety rules, regulations, or standards is occurring.

Substantial evidence on the record as a whole demonstrates that Guay had a reasonable belief that his coworkers were violating a motor carrier regulation. The ALJ’s error in finding that Guay did not engage in protected activity, however, is harmless since Guay has failed to demonstrate that BTS’s stated reason for terminating Guay’s employment was pretext.

¹⁷ 49 C.F.R. § 382.213(a) (West 2008).

¹⁸ 49 U.S.C.A. § 31105(a)(1)(A).

Causation

Even if Guay engaged in protected activity while employed at BTS, his termination was the result of his insubordinate act in December 2004. The ALJ found that Guay's "allegations of drug use, in and of themselves, did not factor into Mr. Burford's decision to terminate [Guay's] employment. Rather, it was [Guay's] refusal to follow company policy . . . and [it was] his failure to provide Mr. Owens with the names of the alleged drug users . . . that got him fired." R. D. & O. at 24.

A complainant is not automatically immune to adverse action after engaging in protected activity. Even if an employee engages in protected activity, an employer may discipline the employee for insubordination.¹⁹ When the respondent presents evidence of a nondiscriminatory reason for adverse employment action, the burden shifts to the complainant to prove, by a preponderance of the evidence, that the legitimate reason the employer proffers is a pretext for discrimination.²⁰ In proving that a respondent's asserted reason for adverse action is a pretext, the employee must prove not only that the respondent's asserted reason is false, but also that discrimination was the true reason for the adverse action. At all times the complainant bears the ultimate burden of persuading the trier of fact that the employer discriminated against him.²¹

Guay does not dispute that BTS company policy provides specific methods for dealing with complaints. Guay attended training, which detailed the proper procedure for reporting safety concerns. Tr. at 106. Guay was aware of the "silver bullet" and knew of the phone number to contact HR if it was inappropriate to go to a supervisor. *Id.* More importantly, Guay contacted Owens days prior to meeting with Harrelson to inform him of employees using drugs. Tr. at 83-84. Owens did not institute any type of disciplinary action, and instead requested that Guay provide him with actual names of employees whom Guay accused of drug use. *Id.* Guay promised to fax him a list of those names. Tr. at 84. Despite his promise, Guay did not subsequently reveal any names to Owens.

Burford stated that he fired Guay for insubordination, specifically his failure to provide Owens with the list of employee names after being told to do so and promising to comply. Tr. at 258-59. Burford also testified that if Guay had provided the names to Owens and gone to Progress Energy as well, BTS would not have terminated Guay's

¹⁹ See, e.g., *Clement v. Milwaukee Transport Serv.*, ARB No. 02-025, 2001-STA-006, (ARB Aug. 29, 2003); *Logan v. United Parcel Serv.*, 1996-STA-002 (ARB Dec. 19, 1996); *Schulman v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 99-015, ALJ No. 1998-STA-024 (ARB Oct. 18, 1999).

²⁰ See *Calhoun*, ARB No. 00-026, slip op. at 5.

²¹ See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

employment.²² Guay has provided no evidence to demonstrate that Burford was not being truthful.

Thus, substantial evidence supports the ALJ's findings that Burford has provided a legitimate non-discriminatory rationale for terminating Guay's employment. Therefore, we agree with the ALJ that Guay did not prove pretext.

CONCLUSION

We have reviewed the record and determine that the ALJ's finding that Guay's complaints to Progress Energy did not constitute protected activity is not supported by substantial evidence, nor is it in accordance with law because the ALJ erroneously concluded that Guay's motivation was relevant to the issue whether his complaint of drug use was reasonable and in good faith. However, substantial evidence does support the ALJ's conclusion that Guay did not establish that BTS's proffered rationale for firing him was pretextual. Therefore, we **DENY** Guay's complaint.

SO ORDERED.

DAVID G. DYE
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

²² See Tr. at 259. The attorney seems to have misspoken when asking Burford this question, but taken in context we read the sentence as "If Mr. Guay had provided the information to Mr. Owens as he had promised to do and also went to [Progress] would you have terminated him?"