



In the Matter of:

TIMOTHY J. ELBERT,

ARB CASE NO. 07-031

COMPLAINANT,

ALJ CASE NO. 2005-STA-036

v.

DATE: November 24, 2010

**TRUE VALUE COMPANY, and
JOHN DOE and MARY ROE,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., Truckers Justice Center, Burnsville, Minnesota

For the Respondents:

Thomas F. Hurka, Esq., and Stephanie L. Sweitzer, Esq., Morgan, Lewis & Bockius LLP, Chicago, Illinois

BEFORE: Paul M. Igasaki, Chief Administrative Appeals Judge, E. Cooper Brown, Deputy Chief Administrative Appeals Judge, and Joanne Royce, Administrative Appeals Judge

ORDER DENYING RECONSIDERATION

Timothy J. Elbert filed a complaint alleging that his former employer, the True Value Company, violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified,¹ when it

¹ 49 U.S.C.A. § 31105 (Thomson/West 2007). The STAA has been amended since Elbert filed his complaint. See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is not necessary to decide whether the

terminated his employment. After an evidentiary hearing, a Labor Department Administrative Law Judge (ALJ) recommended that Elbert's complaint be dismissed as he failed to establish that True Value terminated his employment because he engaged in protected activity. On appeal to the Administrative Review Board (ARB), the Board affirmed the ALJ's decision as supported by substantial evidence.²

Subsequently, the Board received Elbert's motion for reconsideration requesting the Board to reconsider its ruling and grant Elbert's request for relief. The ARB will reconsider a prior decision under limited circumstances. Those include:

- (i) material differences in fact or law from that presented to the Board of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the Board's decision, (iii) a change in the law after the Board's decision, and (iv) failure to consider material facts presented to the Board before its decision.³

We do not grant reconsideration on motions that merely repeat arguments made on appeal.⁴

Elbert's motion does not argue any of the first three grounds for reconsideration: differences in fact or law, new material facts, or a change in the law since the ARB's decision. He appears to rely solely on the fourth ground, failure to consider and rule on material facts. But as Elbert merely repeats arguments he raised before the Board in his original appeal that the Board already considered in our prior decision, we will not address them again on reconsideration.⁵

amendments are applicable to this complaint, because they are not relevant to the issues presented by the case and thus, they would not affect our decision.

² *Elbert v. True Value Co.*, ARB No. 07-031, ALJ No. 2005-STA-036 (ARB Dec. 18, 2009).

³ *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Nos. 07-021, 07-022, ALJ No. 2004-SOX-011 (ARB Jan. 13, 2010) (Order Denying Reconsideration); *Carpenter v. Bishop Well Servs. Corp.*, ARB No. 07-060, ALJ No. 2006-ERA-035 (ARB Dec. 31, 2009); *White v. Gresh Transp. Inc.*, ARB No. 07-035, ALJ No. 2006-STA-048 (ARB Mar. 30, 2009) (Order Denying Reconsideration).

⁴ *McCloskey v. Ameriquest Mortgage Co.*, ARB No. 06-033, ALJ No. 2005-SOX-093, slip op. at 3 (ARB Mar. 26, 2008).

⁵ Elbert correctly asserts, however, that a "mistaken but sincere" defense has no place in STAA jurisprudence; an employer may not escape liability for discharging an employee for protected activity merely by claiming a "mistaken but sincere" belief that the employee's safety complaint was groundless. An employee's complaint based upon a reasonable, albeit

Under the STAA, the ARB is bound by the ALJ's findings of fact if supported by substantial evidence on the record considered as a whole.⁶ As the Board concluded, substantial evidence in the record supported the ALJ's findings of fact on the issues material to the resolution of this case. Thus, Elbert has not satisfied the grounds for granting a motion for reconsideration.

Consequently, Elbert's motion for reconsideration is **DENIED**.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

mistaken, belief that a potential or actual violation of a commercial motor vehicle safety regulation under 49 U.S.C.A. § 31105(a)(1)(A)(i) has occurred is sufficient to establish protected activity. See *Guay v. Burford's Tree Surgeons, Inc.*, ARB No. 06-131, ALJ No. 2005-STA-045, slip op. at 7 (ARB June 30, 2008); *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, 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 Env'tl. Servs., Inc.*, ARB No. 97-090, ALJ No.1995-STA-034, slip op. at 3-4 (ARB Aug. 8, 1997)), *cited with approval in Clean Harbors Env'tl. Servs., Inc.*, 146 F.3d 12, 19 (1st Cir. 1998). Accordingly, protection is not dependent upon the employer's belief in the accurateness of the employee's complaint. The primary consideration is assuring the right of employees to raise concerns, not the accuracy of those complaints. See *Passaic Valley Sewerage Comm'rs v. U. S. Dep't of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993).

We note that the Board's decision could be construed as approving this defense in holding in its original Final Decision and Order that "Elbert did not prove by a preponderance of evidence, as he must, that Gainer [Elbert's supervisor] knew about his protected activity when [Gainer] fired him." *Elbert*, slip op. at 9. But characterized more precisely, the facts in this case are not that Gainer did not know of Elbert's safety complaint or protected activity, but that Gainer did not believe in the accurateness of Elbert's complaint. Nevertheless, any error the Board made in this regard was harmless since the Board ultimately and properly held that "True Value avoids liability because substantial evidence supports the ALJ's finding that True Value would have terminated Elbert absent his protected activity." *Id.*

⁶ 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).