



In the Matter of:

ROCCO TESTA,

ARB CASE NO. 08-029

COMPLAINANT,

ALJ CASE NO. 2007-STA-027

v.

DATE: March 19, 2010

**CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Arthur Z. Schwartz, Esq., *Schwartz, Lichten & Bright, P.C.*, New York, New York

For the Respondent:

Paul Limmiatis, Esq., *Con Edison*, New York, New York

FINAL DECISION AND ORDER

Rocco Testa filed a complaint with the United States Department of Labor alleging that when his former employer, Consolidated Edison Company of New York, Inc. (Con Ed), discharged him, it violated the employee protection provisions of the Surface Transportation

Assistance Act (STAA or Act) of 1982, 49 U.S.C.A. § 31105 (Thomson/West 2007).¹ A Department of Labor Administrative Law Judge (ALJ) found that Testa proved by a preponderance of the evidence that Con Ed discriminated against Testa in violation of the Act when it terminated his employment because the legitimate reason Con Ed offered was mere pretext. The ALJ further found that Testa failed to establish and litigate the amount of damages claimed at hearing and awarded no damages. We affirm in part and reverse in part.

BACKGROUND

Testa began working as a mechanic for Con Ed in 1975. Transcript (Tr.) at 17. Con Ed supplies electric, gas, and steam power to the greater New York area. During the summer of 2005, Testa was a mechanic at Con Ed's 110th street garage. As a mechanic for Con Ed, Testa repaired Con Ed equipment including pumps, generators, cranes, and trucks. Tr. at 18.

In April of 2005, Rudy Cunningham became the supervisor of the 110th street garage. Tr. at 398. Testa reported to Cunningham, and Cunningham reported to Daniel O'Keefe, manager of the transportation department. Tr. at 735. O'Keefe in turn reported to Mary Adamo, general manager.

Over the course of his career at Con Ed, Testa was a vocal advocate for safety and successfully implemented several safety measures. Tr. at 23-50, 189; Recommended Decision and Order (R. D. & O.) at 3. Con Ed has several mechanisms for employees to voice safety complaints including an ombudsman, an environmental health and safety department, an auditing department, and an ethics hotline. In 2005, Ed Conway was the safety ombudsman at Con Ed and in this capacity he received and forwarded safety complaints and concerns to management. Tr. at 22, 215-16.

1. Truck Inspection and Repair

On the morning of July 28, 2005, an employee brought in a 56,000-pound boom truck, #60644, for service. The truck needed repairs and an inspection as the New York State inspection sticker was set to expire on July 31st. Tr. at 406. Cunningham asked Testa and Frank Lawson to repair the tires and perform several required inspections on truck #60644. Both Testa and Cunningham were certified to do state inspections. When Testa used a hydraulic machine to lift the truck off the ground to change the tires, he noticed that a brake was not holding a wheel that was spinning. Tr. at 88. Testa and Lawson worked on the truck to identify the problem. Testa determined the slack adjuster was not working properly, so he went to Con Ed's vehicle monitoring system (EZVMS) and, according to his testimony, failed the inspection for the truck. Tr. at 89-90. Testa also claimed that at this time he entered several comments into the EZVMS detailing the problems with the tires and brakes and listing the status of the truck as "not to be driven." Tr. at 91. Around 6:45 p.m., Cunningham called the shop and spoke with Lawson.

¹ Congress amended the STAA in 2007 after Testa filed his complaint with OSHA. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007).

Lawson informed Cunningham about the tires and the slack adjuster. Tr. at 417. Cunningham responded that Lawson should leave the back plates off and that he would look at the brakes in the morning. Tr. at 417-18. Testa then packed up for the evening and asked Lawson to leave an out-of-service note on the vehicle. Tr. at 90; Complainant's Exhibits (CX)-13.

The next morning, on July 29, 2005, Cunningham arrived at the shop and saw Lawson's note. Tr. at 418-19. Cunningham and Clive Johnson looked at the brakes. Together, they determined that one of the slack adjusters on the wheel was not working properly. Tr. at 421, 423-24, 426. Cunningham performed a manual adjustment of the automatic slack adjuster allowing the brake to function and arranged for the brakes to be replaced. *Id.*

After Cunningham and Lawson's inspection, an employee of another Con Ed department called the 110th street garage to ask whether he could use truck #60644 to make deliveries of PVC pipe or large metal plates that Con Ed used to cover street construction sites. Tr. at 428-29, 436-37. Cunningham felt that the truck was safe to go out and agreed to let an employee take the truck to make a delivery on its way to a vendor, Spring Tech, to get the brakes repaired. Tr. at 99, 428, 430, 434.

Testa learned that the truck was going out and voiced his objections to Bobby Zahn, a union steward. Together, Testa and Zahn disputed Cunningham's decision to send the truck out on the job and complained to Cunningham that the truck should be or should have been towed to Spring Tech for repair. Tr. at 93, 97-98, 300, 347, 351-52, 536. After the dispute with Cunningham, Zahn reported the release of the truck to Conway, the safety ombudsman, as a safety violation. Tr. at 99-100, 114-15, 329; CX-15. Later that afternoon, Testa also complained to Conway about the decision to release the truck. Tr. at 100, 114-15. Spring Tech returned the truck on August 1st with new brake parts. On August 2nd, Testa replaced the state inspection sticker. Tr. at 106-07.

2. Investigation and Audit

Conway forwarded Zahn and Testa's complaint concerning the decision to release the truck to Joe Moyik, of the environmental health and safety department, for investigation. Tr. at 115. Moyik began his investigation of Zahn and Testa's complaint in late August or early September and concluded in November of 2005 that there was no safety violation. CX-16. One of the documents from which Moyik drew his conclusion contained a handwritten comment that the truck was safe to drive because the brake shoe had more than a 1/4 inch of lining remaining on the brake pad. When Cunningham gave Moyik the document, he did not inform him that the comment written on the invoice was his. Moyik assumed this to be the conclusion of Spring Tech. Tr. at 458-59. Accordingly, Moyik concluded that the truck was safe to drive. CX-16.

When Zahn and Testa received the results of Moyik's investigation, they were concerned about the handwritten comments on the invoice. Zahn obtained the original invoice without the comments and complained to Conway that Moyik's investigation was based on forged documents. Tr. at 119-20, 204, 333. Given the allegation of forgery, Conway e-mailed Bill Conner from Auditing requesting an independent review.

A. Safe to Drive and Allegation of Forged Documents

After receiving Conway's e-mail, Conner interviewed the parties involved. Conner interviewed those who worked on the brakes and the vendor who tested and replaced the brakes on the truck. Respondent's Exhibit (RX)-26. The vendor reported that the brakes were working properly. Accordingly, Conner concluded that the truck was safe to drive.

After interviewing Cunningham and speaking with Spring Tech, Conner learned that Spring Tech did not write the comments on the invoice upon which Moyik relied. Tr. at 575; CX-19 at 6. Nonetheless, Conner concluded that because the document Moyik relied upon was a personal document and not an official company record, Zahn's allegation that Cunningham falsified the document to alter the investigation was without merit. CX-19 at 6; Tr. at 575.

When submitting the case to Conner, Conway recommended that Conner also interview O'Keefe and Adamo. RX-14. In the subsequent interview, Adamo informed Conner that it was her opinion that Testa was out to get Cunningham. RX-16; Tr. at 631-32. Conner testified that it was unusual for Auditing to investigate a company officer but that Conway told him that she might have valuable information. Tr. at 563, 631-32.

B. EZVMS Falsification

During the course of Conner's investigation, he became aware of a discrepancy in the date on which Testa claimed he entered one of the comments concerning #60644 into the EZVMS system. The time stamped EZVMS printout indicated that Testa entered "replace 4 tire no stock go to 16 st needs 4 more cuts and patch N steering tire" on July 28th and "needs rear brakes and 4 tires" on July 28th, but that the comment "need rear brakes and slack adjuster left rr brake not working no[t] to be driven" was entered on August 1st. CX-24. Testa testified that he was "almost 100% positive" he entered all the comments on the 28th. Tr. at 127. Cunningham testified that he looked at the comments on the morning of the 29th and the comment that the truck was not to be driven was not there. Tr. at 502-03.

C. Second Inspection

When Conner interviewed Testa concerning the second state inspection of truck # 60644 that Testa performed on August 2nd, Testa conveyed to Conner that he did not do a full inspection because Spring Tech had just replaced all new brakes and parts. Tr. at 125. Based on Testa's statement, Conner concluded that Testa "admitted to Auditing that he placed the inspection sticker on the windshield without re-inspecting the brakes." CX-19 at 7.

D. Termination

In May of 2006, Conner submitted his report to his supervisors in Auditing. CX-19. Conner's report concluded that the allegation that Moyik's report was based on forged documents was without merit, that the truck was safe to drive when released, that Testa falsified documents and lied about this fact in the audit interview, and that Testa failed to perform a second inspection before putting on the New York State sticker.

Conner's report went from Auditing to Mary Adamo. After Adamo held a termination discussion group, Adamo decided to terminate Testa. Adamo's stated reasons for termination were the falsification of a company document, the improper reinspection, and being uncooperative in the investigation. Tr. at 683, 693-94. Adamo testified that she felt Testa was trying to set up the supervisor as not considering a safety hazard. Tr. at 685. Adamo also took into consideration Conner's conclusion that Testa did not inspect the vehicle when it came back from the vendor. Tr. at 693-94. Adamo terminated Testa on July 6, 2006.

3. Proceedings before OSHA and OALJ

Testa filed a complaint with the Occupational Safety and Health Administration (OSHA) on July 7, 2006. Testa also grieved with his union. In January of 2007, a union arbitrator awarded Testa reinstatement and back pay for all time lost except 90 days, which the arbitrator felt was appropriate as a suspension for Testa's conduct. CX-30. In February of 2007, OSHA dismissed the complaint, finding no violation of the STAA and further finding that the arbitrator dealt with the matter adequately. OSHA Findings and Order at 1, 3. Testa objected to OSHA's findings, and the case was referred to the Office of Administrative Law Judges (OALJ) on February 21, 2007.

The ALJ assigned to the case held four days of hearing in June and July of 2007. Pursuant to a Recommended Decision and Order issued December 4, 2007, the presiding ALJ found that the company's reasons for terminating Testa were unfounded and thus pretext for discrimination in violation of the STAA. The ALJ further found that Con Ed, Testa's employer, terminated Testa in retaliation for engaging in protected activity. Notwithstanding having concluded that Con Ed violated the STAA's whistleblower protection provisions in terminating Testa's employment, the ALJ nevertheless declined to award damages on the grounds that Testa failed to establish the amount of the damages to which he was entitled.

The ARB has the case on automatic review. 29 C.F.R. § 1978.109(a) (2009) ("The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee.").

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under STAA. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(a). Under the STAA, the ARB is bound by the ALJ's findings of fact 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. 2001-STA-038, 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 Env'tl. 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). 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). The Board reviews the ALJ's legal conclusions de novo. See *id.*; *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity,² (2) his employer was aware of the protected activity, (3) the employer discharged him, or disciplined or discriminated against him with respect to pay, terms, or privileges of employment, and (4) there was a causal connection between the protected activity and the adverse action. *BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998).

In STAA cases, the Board generally applies 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. *Feltner v. Century Trucking, Ltd.*, ARB No. 03-118, ALJ Nos. 2003-STA-001, -002, slip op. at 4-5 (ARB Oct. 27, 2004); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004). 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 STAA. Only if the complainant makes this prima facie showing does the burden shift to the respondent employer 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 inference of discrimination drops from the case and the complainant is left with his or her burden to prove discrimination. A complainant can prove discrimination by proving the employer's reasons were pretext. *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 4 (ARB Nov. 27, 2002); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Densieski*, ARB No. 03-145, slip op. at 4-5.

1. Coverage

Before turning to the merits of Testa's claim, we resolve the issue of whether Testa is a covered employee under the STAA. The STAA defines a covered employee as "a driver of a commercial motor vehicle (including an independent contractor when personally operating a

² Under the STAA in effect in 2006 when Testa filed his complaint, a person may not retaliate against an employee because: "the employee, or another person at the employee's request, 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..." 49 U.S.C.A. § 31105(a)(1)(A).

commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who (A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier.” 49 U.S.C.A. § 31101(2)(A). The term “commercial motor vehicle” is defined in the statute as “a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle[:] (A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater . . .” § 31101(1); *Bauman v. U.S. Cargo & Courier Serv.*, ARB No. 01-016, ALJ No. 1999-STA-045 (ARB June 29, 2001).

Testa is a mechanic for Con Ed, which employs several maintenance and service vehicles in providing gas and steam power to the greater New York area. The record contains evidence that the truck Testa was working on was a 56,000-pound boom truck that transported heavy material such as PVC pipes or metal plates on highways in furtherance of Con Ed’s business operations. Tr. at 80-81. Therefore, we conclude that Testa was a covered employee under the STAA.³

2. Protected Activity, Knowledge, and Adverse Action

The ALJ found that Testa engaged in protected activity, that Con Ed had knowledge of that protected activity, and that Testa’s termination was an adverse action. R. D. & O. at 16-17. Con Ed does not appear to contest this finding on appeal. We agree with the ALJ that Testa engaged in protected activity when he and Zahn raised safety issues concerning the brakes, that Con Ed was aware of that protected activity when Zahn and Testa approached Cunningham and elevated the issue to the ombudsman, and that Testa suffered an adverse action when Con Ed terminated his employment.

3. Adamo’s Termination Decision

The facts are well stated in the ALJ opinion. Adamo, a senior manager of Con Ed, decided to fire Testa after receiving the auditor’s report. She relied on three factors in reaching the termination decision: (1) Testa falsified documents, (2) Testa lied in the investigation and was being uncooperative, and (3) Testa failed to do a proper state inspection. Tr. at 683. The ALJ did not accept Con Ed’s stated reasons for the termination.

A. Falsification of EZVMS Entry and Falsehood in Audit Interview

The ALJ found that Con Ed relied on a very small and insignificant “falsification” to fire a 30-year employee. R. D. & O. at 18. The ALJ reasoned that Testa’s alleged falsehood served no purpose, and thus Con Ed’s purported reliance on this reason as a termination factor suggested pretext. Con Ed challenges the ALJ’s finding of pretext. It argues that as the issue was going into investigation, Testa backdated his comment to bolster his position – the comment would be the only written record before Cunningham sent the truck out establishing that

³ The ALJ appears to have followed old STAA case law in finding Testa was a covered employee. R. D. & O. at 14-15. Congress amended the statute to define coverage for employees under STAA. 49 U.S.C.A. § 31101. Because we also conclude Testa is a covered employee under 49 U.S.C.A. § 31101, any error by the ALJ in finding coverage under old case law is harmless.

someone flagged the truck as unsafe. Resp. Br. 20. Con Ed claims Testa's dishonesty was a serious infraction of Con Ed's standards of business conduct and argues on appeal that the ALJ substituted his judgment for that of the company. Resp. Br. 2. Con Ed argues that the ALJ's findings of pretext and unlawful discrimination constitute mere conclusions that are unsupported by substantial evidence. Resp. Br. at 15. We disagree.

We find substantial evidence supports the ALJ's finding of pretext. As the ALJ noted, there was little significance to the alleged falsification of the date of the EZVMS comment because there was little doubt of Testa's view of the status of the truck on the 28th as this view was communicated by telephone to Cunningham on the 28th, by a note left on the truck that Cunningham saw the next morning, and verbally to Cunningham on the morning of the 29th. Moreover, on the 29th, Testa and Zahn elevated their dispute with Cunningham on the decision to release the truck to the safety ombudsman. Testa and Zahn could have done little more to make it known on the record that they felt the truck should not have been released.

The standard the Supreme Court applies in employment discrimination contexts, and the ARB by analogy, is that it is not enough for a complainant to show pretext, but he or she must show pretext for unlawful discrimination under the statute. *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 14-15 (ARB May 24, 2007); *St. Mary's Honor Ctr. at*, 509 U.S. at 513-14; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43, 147 (2000). Supporting his finding that protected activity caused Testa's termination, the ALJ considered O'Keefe's testimony that Testa was always complaining and that O'Keefe was frustrated about the frequent safety complaints. R. D. & O. at 19. We find substantial evidence supports the ALJ's interpretation of O'Keefe's testimony. O'Keefe testified about Testa's frequent safety complaints. Specifically, O'Keefe testified that he was upset about Testa bringing up safety issues at a group safety meeting and about oil spills being reported to the DEC. Tr. at 741-47, 774-77, 783-84.

B. Failed to Perform Proper Second Inspection

The ALJ also took issue with the aspect of the auditor's report (and Adamo's reliance on it) that Testa did not do a proper second inspection. The ALJ found that that Conner was confused or did not appropriately analyze Testa's second inspection in the audit and that Testa in fact did do a sufficient inspection before putting on the state inspection sticker. R. D. & O. at 18.

Substantial evidence in the record supports the ALJ's finding. At the auditor interview, Testa indicated that because the vendor had just replaced the brakes, he did not reinspect them. RX-24. According to Testa, however, Conner did not follow up with Testa to find out what work he did do before replacing the sticker. Tr. at 125. At the hearing, Testa elaborated that he took the front wheels off and inspected the drums as they had not been replaced. Tr. at 105, 107. As Testa recounted, the backing plates were still off, so Testa visually inspected the new items that Spring Tech replaced on the rear wheels. Testa further testified that he pressed the slack adjuster to make sure that it was responsive. Tr. at 108. Thereafter, Testa replaced the expired New York State sticker. Tr. at 126. Testa testified that his inspection complied with New York State guidelines. Tr. at 126, 738-40. Cunningham also testified that an inspection does not require a mechanic to pull the wheel if the backing plates are removed. Tr. at 456.

Con Ed generally argues that Adamo credibly relied upon the auditor's report in making the termination decision. Resp. Br. 2, 17. According to Con Ed, despite any problems with the method or thoroughness of the report, it was the report that formed the basis of Adamo's termination decision and not protected activity. Con Ed argues that the record contains no evidence that Adamo did not believe that Testa had falsified documents, lied to the investigator, and failed to perform a proper inspection when she terminated Testa. Resp. Br. at 17.

We agree that a company does not necessarily violate the STAA simply because its termination decision is harsh or even if the termination is based on erroneous information. *Cf. Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 890 (7th Cir. 1997) ("Plaintiffs lose if the company honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless."). The underlying flaws in an audit or investigation in themselves do not necessarily taint a decisionmaker's decision under the STAA where he or she relied in good faith on a flawed report. In the particulars of this case; however, the supervisors and decisionmakers participated in all aspects of the audit and termination decision. RX-16; Tr. at 740-41. As noted above, the ALJ found that O'Keefe was frustrated with Testa's safety complaints. O'Keefe, Cunningham, and Testa's boss, participated in Adamo's discussion group concerning Testa's termination. O'Keefe testified that the group discussed Testa's conspiracy "to set up a supervisor" as reason for the termination. Tr. at 741. From Conner's notes of Adamo's interview, Adamo contributed to and perhaps shifted the focus of Conner's audit where she offered her belief that Testa was out to get Cunningham. RX-16. We cannot, therefore, divorce the audit interviews and Conner's report from Adamo's termination decision and consider Adamo's termination decision in a vacuum. We find substantial evidence supports the ALJ's finding of pretext and that retaliation in violation of the STAA caused Testa's termination.

For the foregoing reasons, we thus concur in the ALJ's finding that Con Ed violated the STAA when it discharged Testa.

4. Damages

If a violation of the STAA's whistleblower protection provisions is found, the Secretary shall order under 49 U.S.C.A. § 31105(b)(3)(A) affirmative relief abating the violation, reinstatement to the employee's previous position of employment, and the award of compensatory damages including back pay and interest thereon. *Dalton v. Copart, Inc.*, ARB Nos. 04-027, -138, 1999-STA-046 (ARB June 30, 2005).⁴ As previously noted, the ALJ declined to award back pay or other compensatory damages notwithstanding having found that Con Ed violated the STAA's whistleblower protection provisions. The ALJ's rationale in so doing was that Testa had failed to establish at trial the amount of the damages claimed, and failed upon post-hearing motion to show good cause as to why the record should be reopened for the submission of additional evidence. Testa asserts on appeal that the ALJ erred in this regard, and that he is entitled to the award of a fixed ninety-day period of back pay with interest, abatement

⁴ Pursuant to 49 U.S.C.A. § 31105(b)(3)(B) the complainant is also entitled to the award of reasonable attorneys fees and reimbursement of the costs of litigation.

(i.e., expungement of the employer's record of termination), compensatory damages for emotional distress, and punitive damages. Compl. Br. at 25-27.

A. Back Pay and Abatement

A successful STAA complainant is entitled to an award of back pay. 49 U.S.C.A. § 31105(b)(3)(A)(iii); *Carter v. Marten Transport, LTD.*, ARB Nos. 06-101, -159, ALJ No. 2005-STA-063, slip op. at 14 (ARB June 30, 2008). Nevertheless, the ALJ held that Con Ed was not liable for claimed back pay/lost wages resulting from Testa's wrongful termination because Testa had failed to establish at trial the *amount* of the back pay/lost wages claimed, citing in support *Pettit v. American Concrete Prods., Inc.*, ARB No. 00-053, ALJ No. 1999-STA-047 (ARB Aug. 27, 2002), and *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-034 (ARB Dec. 29, 2000). R. D. & O. at 19.

We consider the ALJ's reliance upon *Pettit* and *Murray* misplaced. Both decisions, as well as those Con Ed cited on appeal,⁵ do not stand for the proposition cited. In *Pettit*, the complainant asserted a claim for reimbursement of medical costs for the first time on appeal before the ARB. The Board held that the claim for medical costs was barred because it had not been raised and litigated before the ALJ. *Pettit*, ARB No. 00-053, slip op. at 5. In *Murray*, the respondent sought for the first time on appeal to dispute the amount of the complainant's claimed salary. The Board held the respondent, having failed to object to the amount of the award before the trial judge, was barred from challenging on appeal the amount of salary to which the complainant was entitled. *Murray*, ARB No. 00-045, slip op. at 7. Similarly, the ARB in *Simon*, disallowed an award by an ALJ for which no claim before the ALJ had been made, and in *Cotes*, refused to permit a party to assert on appeal a claim for reinstatement of employment that had been expressly waived at the trial level. In each case cited, it was not the failure to present evidence at the trial level in support of an asserted claim that barred the sought after relief but the failure to assert (or refute) before the ALJ the *claim* itself.

Distinguishable from the foregoing, the claim at issue (i.e., for 90 days of back pay due to Testa's wrongful termination) was clearly asserted on the record at hearing.⁶ Moreover, this was not a matter of whether or not, as Con Ed conceded, the evidentiary record should have been reopened pursuant to 29 C.F.R. § 18.54(c) for the submission of additional evidence after close of the record. We note that before the ALJ, Testa did not couch his request as a motion to reopen

⁵ *Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-040 (ARB Nov. 30, 2007); *Cotes v. Double R Trucking, Inc.*, ARB No. 00-061, ALJ No., ALJ No. 1998-STA-034 (ARB July 16, 1999).

⁶ At the hearing Testa claimed and the ALJ confirmed that Testa was seeking relief for 90 days back pay and abatement. Tr. at 15, 161 (**Judge Romano**: "What relief are you claiming in this case?" **Mr. Schwartz**: "The ninety-day's pay." **Judge Romano**: "And abatement of the ninety-day suspension?" **Mr. Schwartz**: "Yes." **Judge Romano**: "And the pay for the ninety days?" **Mr. Schwartz**: "Yes." **Judge Romano**: "Okay. And I take it attorney's fees?" **Mr. Schwartz**: "Yes.").

the record, but pursuant to his post-hearing submissions, requested that if the ALJ found that Con Ed had violated his rights under STAA, the ALJ retain jurisdiction over the case for purposes of issuing a supplemental ruling should the parties be unable to resolve between themselves the amount of damages for which Con Ed was liable. Complainant's Closing Brief, at 21; Complainant's supplemental submission of November 19, 2007. Moreover, from the record it does not appear that the amount of back pay owed for the 90-day period in question was in dispute. As noted, Con Ed itself did not view Testa's request as necessitating reopening of the evidentiary record, stating in response to Testa's request that, "he only seeks ninety days back pay plus attorney's fees which, if awarded by the Court, would not require re-opening the record. There is no dispute over Complainant's rate of pay during the relevant time frame. . . ." Resp. Opp to Reopen Rec. at 3.⁷

In sum, Testa's claim for the award of 90 days of back pay and interest thereon, as was his claim for abatement (*see* footnote 5, *supra*), was sufficiently before the ALJ, without the need for further evidentiary proceedings, such that the ALJ should have ordered the award thereof.

B. Compensatory and Punitive Damages

Under the STAA, a successful complainant is entitled to compensatory damages in addition to back pay. 49 U.S.C.A. § 31105 (b)(3)(A)(iii). Compensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Cf. Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 10 (ARB June 29, 2006). To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Id.* As noted above, on appeal Testa asserts that he is also entitled to compensatory damages for emotional distress, citing evidence of record that he argues establishes his entitlement thereto. However, unlike the claim for back pay, Testa failed to assert his claim for compensatory damages based on emotional distress before the ALJ. Thus, consistent with our previous rulings in *Pettit* and *Murray*, we deem this claim to have been waived.

⁷ Con Ed cites to, *Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-040 (ARB Nov. 30, 2007) in support of its argument that the Board should not speculate as to the amount of damages. In *Simon*, the complainant argued to the Board that in light of factual uncertainties as to the amount of back pay damages, he was entitled to the benefit of the doubt and thus to higher damages than the ALJ awarded. The Board refused to speculate on the damages owed, notwithstanding the alleged uncertainty. Here, as Con Ed concedes, there is no uncertainty as to the duration and rate of back pay owed, unlike the situation in *Simon*. Thus here, not only does the Board not indulge in speculation, there is no need for it to do so.

On appeal for the first time Testa also asserts entitlement to punitive damages. The claim having not been asserted at the trial level, it is rejected for the same reasons we reject on appeal Testa's claim for compensatory damages.⁸

C. Mitigation

Additionally, Con Ed argues on appeal that Testa is not entitled to back pay because he failed to exercise reasonable diligence to mitigate back pay damages. While it is true that the STAA imposes a duty to mitigate; nevertheless, the burden of proving that a complainant failed to mitigate is on the employer. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 6-7 (ARB Mar. 31, 2005). The employer must establish that substantially equivalent positions were available to the complainant and that the complainant failed to use reasonable diligence in attempting to secure such position(s). *Id.* at 6-7.

Con Ed argues on appeal that it has satisfied its burden of proof because it demonstrated that Testa did not look for a temporary job. Resp. Br. at 29-30 & n.42. We disagree. The only evidence Con Ed cites is Testa's testimony that he failed to seek a temporary job during his unemployment following his termination.⁹ However, to prevail Con Ed was required to show more, specifically that substantially equivalent positions were available to Testa and that Testa failed to use reasonable diligence in attempting to secure such position(s). *Dale*, ARB No. 04-003, slip op. at 6-7. An employee wrongfully terminated from his employment does not have a duty to secure any available alternative employment without consideration of his qualifications and experience. Rather, it must be shown that the alternative employment constituted a "substantially equivalent position" providing the same promotional opportunities, compensation, job duties, working conditions, and status. *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, slip op. at 20 (ARB Feb. 9, 2001), citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982). The limited evidence Con Ed cited and relied upon, *i.e.*, Testa's testimony (*see* footnote 9, *supra*), simply fails to meet the burden of proof imposed upon Con Ed to sustain its argument of failure to mitigate.

CONCLUSION AND ORDER

For the foregoing reasons, we **AFFIRM** the Recommended Decision and Order **IN PART**, and **REVERSE IN PART**. The ALJ's finding that Con Ed violated STAA's whistleblower protection provisions in terminating Testa's employment is **AFFIRMED**. The

⁸ Moreover, the STAA in effect in 2006 when Testa filed his claim, did not authorize punitive damages. 49 U.S.C.A. § 31105(b)(3)(A) and (B); *Nolan v. AC Express*, 1992-STA-037 (Sec'y Jan. 17, 1995).

⁹ Resp. Br. At 30 n.42 ("Testa admitted [at hearing] that he failed to mitigate his damages by making no effort to obtain temporary employment during his 7-month period of unemployment before reinstatement, and by boastfully telling potential employers that his discharge from Con Edison was 'bullshit' and that he fully expected to win his job back (Tr. at 291-93).").

ALJ's denial of Testa's claim for the award of damages is **REVERSED** to the extent that we hold that Testa is entitled to the award of back pay for the fixed period of 90 days herein at issue at his former rate of pay, plus pre- and post-judgment interest on the back pay according to the rate used for underpayment of federal taxes,¹⁰ and expungement of his personnel record insofar as the termination of Testa's employment is concerned. Testa's claims for compensatory damages based upon mental and emotional distress and for punitive damages are denied.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

¹⁰ 26 U.S.C.A. § 6621(a)(2) (West 2002); *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989-ERA-022, slip op. at 17-21 (ARB May 17, 2000) (outlining the procedures to be followed in computing the interest due on back pay awards) *rev'd on other grounds sub nom. Doyle v. United States Sec'y of Labor*, 285 F.3d 243 (3d Cir. 2002).