



In the Matter of:

WILLIAM PETERS,

ARB CASE NO. 08-117

COMPLAINANT,

ALJ CASE NO. 2008-STA-030

v.

DATE: December 18, 2009

RENNER TRUCKING AND EXCAVATING,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

William Peters, *pro se*, Cornelius, Oregon

For the Respondent:

Norman Cole, Esq., *Sather, Byerly & Holloway, LLP*, Portland, Oregon

FINAL DECISION AND ORDER

William Peters filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on May 11, 2007. He alleged that his employer, Renner Trucking and Excavating (Renner), violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified,¹ and its implementing regulations,² when Renner terminated his employment in retaliation for protected activities. The STAA protects from discrimination employees who

¹ 49 U.S.C.A. § 31105 (Thomson/West 2007). The STAA has been amended since Peters filed his complaint. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide whether the amendments apply to this case because even if they did apply, they would not affect our decision.

² 29 C.F.R. Part 1978 (2009).

report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Peters's complaint. We affirm.

BACKGROUND

Peters worked for Renner, a commercial motor carrier engaged in transporting products on the highways, beginning in August 2006.³ He testified that he complained to Renner on his first day on the job, August 7, 2006, about an unsafe groove on the inside of the brake drum of his truck.⁴ He also testified that he complained about a change in Renner's Post Trip Vehicle Inspection Report (VIR) forms, which he believed violated the United States Department of Transportation's (DOT) specifications, and about a vehicle that he refused to drive on November 29, 2006, because of safety concerns.⁵

On December 26, 2006, Peters was warned that further unexcused absences or tardiness could result in dismissal.⁶ During the six months of Peters's employment with Renner, he was late 11 times and absent 9 times.⁷ Peters was absent from work on two occasions and late once after he was warned about his tardiness and absences.⁸ Additionally, on January 29, 2007, Peters ran a personal errand on company time and filled out his daily report as if he were working.⁹ Three days later, Renner's owner, Roy Renner, discharged Peters.¹⁰ Renner testified that he told Peters that he fired him for tardiness while Peters maintains that Renner told him that he was fired for running the personal errand on company time.¹¹

Following his termination, Peters filed for unemployment compensation with the Oregon Employment Department. His claim was denied.¹² After the Employment Appeals Board

³ Secretary's Findings at 2 (Jan. 15, 2008).

⁴ Tr. at 44.

⁵ Tr. at 32-33, 103, 106-07.

⁶ RX 16-260; ALJX 6 at 8.

⁷ RX 5; RX 6; RX 7; RX 8; RX 15; Tr. at 167, 180-82, 207-08.

⁸ RX 7-142, RX 7-146, RX 16; ALJX 6 at 8.

⁹ RX 15; Tr. at 167.

¹⁰ Tr. at 69, 165-66.

¹¹ Tr. at 69, 166-67.

¹² RX 19-263; RX 20-265 to 20-271; RX 21-272; Tr. at 74-75, 206-07.

affirmed the denial, Peters filed his OSHA complaint, alleging that Renner discharged him because of his safety complaints.¹³ Peters submitted to OSHA a partially filled out VIR form that he never submitted to Renner. This form contained information similar to that in the last VIR that Peters submitted.¹⁴ While he stated that he submitted the VIR as a sample of the new VIR form, he did not explain why he partially filled out the form as if he had used it to report a safety issue.¹⁵

Following an investigation, OSHA dismissed the complaint because the preponderance of the evidence showed that Peters's claim lacked merit¹⁶ Peters requested a hearing before an ALJ.¹⁷

After a hearing on March 20, 2008, the ALJ issued a Recommended Decision and Order Dismissing the case (R. D. & O.) because he found that Peters had failed to prove by a preponderance of the evidence that his protected activities were a motivating factor in his termination.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or the Board) her authority to issue final agency decisions under the STAA.¹⁸ The Board automatically reviews an ALJ's recommended STAA decision.¹⁹ The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."²⁰

Under the STAA, we are bound by the ALJ's fact findings if substantial evidence on the record considered as a whole supports those findings.²¹ In reviewing the ALJ's conclusions of

¹³ Secretary's Findings at 1; RX 21-272.

¹⁴ RX 18; Tr. at 196-98.

¹⁵ Tr. at 55-58.

¹⁶ Secretary's Findings at 4.

¹⁷ See 29 C.F.R. Part 1978.105(a).

¹⁸ Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

¹⁹ 29 C.F.R. § 1978.109(c)(1).

²⁰ 29 C.F.R. § 1978.109(c).

²¹ 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. U.S. 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 that which is "more than a mere scintilla" and is such relevant evidence as a reasonable mind

law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision" ²² Therefore, the Board reviews the ALJ's conclusions of law de novo. ²³

Although the Board issued a Notice of Review and Briefing Schedule permitting both parties to submit briefs in support of or in opposition to the ALJ's order, neither party has done so.

THE LEGAL STANDARDS

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 activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "refuses 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;" or who "refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." ²⁴

To prevail on his STAA claim, Peters must prove by a preponderance of the evidence that he engaged in protected activity, that Renner was aware of the protected activity and took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action. ²⁵ If Peters does not prove one of these requisite elements, the entire claim fails. ²⁶

If the employer presents evidence of a nondiscriminatory reason for discharging him, the employee can prevail if he proves, by a preponderance of the evidence, that the reason the

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)).

²² 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

²³ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

²⁴ 49 U.S.C.A. § 31105(a)(1).

²⁵ *Formella v. Schmidt Cartage, Inc.*, ARB No. 08-050, ALJ No. 2006-STA-035, slip op. at 4 (ARB Mar. 19, 2009) (citing *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004)).

²⁶ *See West v. Kasbar, Inc. /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

employer proffered is a pretext for discrimination.²⁷ In proving that an employer'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. Peters bears the ultimate burden of persuading the ALJ that Renner discriminated against him.²⁸

If, however, the ALJ concludes that the employer was motivated by both a prohibited and a legitimate reason (has mixed or dual motives), the employer may escape liability by demonstrating by a preponderance of the evidence that the employer would have taken the same unfavorable personnel action in the absence of the protected activity.²⁹

DISCUSSION

After a careful review of the entire record we conclude that substantial evidence supports the ALJ's findings of fact.³⁰

The ALJ found that a form that Peters falsified, his contradictory testimony about using the new form, his false assertions about unsafe brake drums, his failure to mention the alleged retaliation at an earlier unemployment hearing, and his "occasionally obvious disregard for the truth of his own testimony" devalued the credibility of his testimony in its entirety.³¹ The ALJ also found that the testimony of Renner's witnesses was generally credible and consistent internally and with the objective evidence of record.³² We generally defer to an ALJ's credibility determinations, and Peters has offered no evidence that detracts from the ALJ's finding.³³

The ALJ found that Peters engaged in protected activities and that he was terminated, which constituted an adverse action under the STAA. The ALJ assumed without deciding that

²⁷ See *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 5 (ARB Nov. 27, 2002) citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

²⁸ *Calhoun*, slip op. at 5, citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

²⁹ *Muzyk v. Carlsward Transp.*, ARB No. 06-149, ALJ No. 2005-STA-060, slip op. at 5 (ARB Sept. 28, 2007).

³⁰ See R. D. & O. at 10-17 (and transcript pages cited therein).

³¹ R. D. & O. at 13.

³² *Id.*

³³ See *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 12-14 (ARB June 29, 2006) (wherein we explained that we give great deference to an ALJ's credibility determinations that rely on the evaluation of the demeanor of witnesses, but do not accord ALJ determinations such great deference when the ALJ does not explicitly state that his credibility determination was based on witness demeanor (citations omitted)).

Peters engaged in protected activity when he reported a safety problem with the brakes of Truck No. 2 on August 7, 2006. The record shows that the brakes were replaced on August 16, 2006, which provides support that Peters reported a safety issue concerning the brakes on his vehicle. Peters's complaints about the brakes after September 2006 were not protected because, as the ALJ found, the repairs were made and the brakes passed an Oregon DOT inspection.

The ALJ also assumed without deciding that since the VIR form concerned post-trip inspections and safety issues, Peters engaged in protected activity when he continuously complained about the new VIR form from the first time it was used throughout his employment.

The ALJ also found that Peters engaged in protected activity on November 29, 2006, when he refused to operate a truck because he had problems stopping due to brake problems. Substantial evidence supports this finding because a daily haul report for the day prior indicates that Peters drove Truck No. 4 on that day and had a notation for "adjusted brakes."

Finally, the ALJ found that Peters did not engage in protected activity by filing a verbal report with the DOT because Peters offered no evidence to support that allegation.

Though the ALJ assumed and found that he engaged in protected activity, Peters cannot prevail because he failed to prove by a preponderance of the evidence that his protected activity was the reason for his discharge. The ALJ found that Renner articulated two legitimate, nondiscriminatory reasons for firing Peters, i.e., "attendance problems and a falsified haul report after an unauthorized detour to the post office." The record supports the ALJ's finding "that [the] Complainant was late 11 times and absent 9 times in his six months of employment with [the] Respondent" and was given "a 'final warning notice' on December 26, 2006," after which he was again late once and absent twice.³⁴ His employment was terminated accordingly. It is also notable that during his employment compensation hearing, Peters did not mention that he thought that he was discharged for his alleged protected activity rather than for absences and tardiness. For these reasons, substantial evidence supports the ALJ's finding that Renner discharged Peters for legitimate, non-discriminatory reasons.

As we noted earlier, Peters filed an unemployment compensation claim with the Oregon Employment Department (OED) after his termination.³⁵ The claim was denied because the OED found that Peters was terminated for misconduct, i.e., unexcused absences and tardiness.³⁶ Peters appealed, a hearing was held, and the OED judge found that Renner proved that Peters was terminated for misconduct.³⁷ The Oregon Employment Appeals Board affirmed on appeal.³⁸

³⁴ R. D. & O. at 17.

³⁵ *Id.* at 10.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

Renner argued that issue preclusion prevented Peters from asserting that he was terminated for complaints about brakes because he did not make that argument during the unemployment compensation proceedings.

The ALJ found that he could not defer to the OED and Appeals Boards decisions in Peters's unemployment proceedings because Oregon law bars using "decisions, findings, conclusions, final orders, and judgments" of its unemployment hearings and appeals "for the purpose of claim preclusion or issue preclusion in any other action or proceeding" except under the state unemployment insurance statute.³⁹ The ALJ also found that he could not defer to those proceedings under 29 C.F.R. § 1978.112(c) because the record did not contain evidence that those proceedings addressed whether Renner discharged Peters because of his complaints about the brakes and VIRs.⁴⁰

CONCLUSION

Substantial evidence supports the ALJ's findings that Renner did not discharge Peters because of his protected activity. Therefore, we **DENY** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

³⁹ O.R.S. § 657.273. R. D. O. at 14.

⁴⁰ 29 C.F.R. § 1978.112(c) provides that under the STAA, deferral to the results of other proceedings requires that it be clear that all factual issues were adequately dealt with in the proceedings, the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the STAA.