



In the Matter of:

RICK JACKSON,

ARB CASE NO. 09-113

COMPLAINANT,

ALJ CASE NO. 2009-STA-022

v.

DATE: May 31, 2011

MAJOR TRANSPORT INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Rick Jackson, *pro se*, Janesville, Wisconsin

For the Respondent:

Steven C. Zach, Esq., *Boardman Suhr, Curry and Field, LLP*, Madison, Wisconsin

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Rick Jackson filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, Major Transport, Inc., violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified, when it refused to hire him on April 8, 2008. 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2010).

The STAA protects employees from discrimination when they report violations of commercial motor vehicle safety rules or when they refuse to operate a vehicle when such

operation would violate those rules or it would be unsafe. A Department of Labor Administrative Law Judge (ALJ) dismissed Jackson's complaint after a hearing because he found that Jackson failed to establish a prima facie case and in the alternative, that if he did establish a prima facie case, he did not establish that Major Transport's legitimate non-discriminatory reason for not hiring him was pretext for discrimination. While we conclude that the ALJ improperly described the law, we conclude that substantial evidence supports the ALJ's findings of fact. Therefore, we affirm his Recommended Decision and Order (R. D. & O.).

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). The Board automatically reviews STAA decisions issued on or before August 31, 2009. 29 C.F.R. § 1978.109(c)(1)(2010). The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c).

DISCUSSION

While we do not adopt the ALJ's decision, we affirm the ALJ because substantial evidence supports the ALJ's finding that Jackson did not engage in protected activity.¹

The ALJ found that Jackson did not engage in protected activity because he merely made an inquiry about Major Transport's policy. R. D. & O. at 5. He found that Jackson did not make a complaint during his driver's test. *Id.* at 5. Substantial evidence supports these findings.

¹ The STAA states at 49 U.S.C.A. § 31105(b)(1) that: "All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121 (b)." The 42121(b) burdens require that to obtain an investigation, a complainant must put forth a prima facie showing that his protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. § 42121(b)(2)(B)(i). To prevail however, a complainant must demonstrate by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. § 42121 (b)(2)(B)(iii). See *Dysert v. Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997). We note that after a hearing on the merits, the analysis is not whether a prima facie case has been established, but whether a complainant has proved by a preponderance of the evidence that his protected activity contributed to the adverse action taken against him. *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, -095; ALJ No. 2002-STA-035, slip op. at 16 (ARB Aug. 6, 2004); *Pike v. Public Storage Cos., Inc.*, ARB No. 99-072, ALJ No. 1998-STA-035 (ARB Aug. 10, 1999); *Ass't Sec'y & Ciotti v. Sysco Foods Co. of Philadelphia*, ARB No. 98-103, ALJ No. 1997-STA-030 (ARB July 8, 1998). We also note that to establish a prima facie case (which was not necessary here), a complainant's burden is not to prove the prima facie elements by a preponderance of the evidence but rather, "to present evidence sufficient to prevail if not contradicted and overcome by other evidence." *Ass't Sec'y & Brown v. Besco Steel Supply*, No. 1993-STA-030, slip op. at 3 (Sec'y Jan. 24, 1995).

Jackson testified that he asked “about the short haul description and other company policies” that were given to him when he applied for a position with Major Transport. Hearing Transcript (Tr.) at 31. (The policies are at Exhibit 4). He testified that he asked Donald Lindser whether the company was authorizing drivers to run illegally and whether drivers were expected to bypass scales if they were overloaded. Tr. at 32. There is no evidence in the record that Jackson made a complaint about having to drive illegally, was told that he would have to drive illegally and made a complaint of it, or refused to drive for any reason. Therefore, the ALJ’s finding that Jackson failed to prove that he engaged in protected activity is supported by substantial evidence in the record.

Because this issue is dispositive of this matter, we do not rule on the rest of the issues raised on appeal. *See Wainscott v. Pavco Trucking, Inc.*, ARB No. 05-089, ALJ No. 2004-STA-054, slip op. at 5 (ARB Oct. 31, 2007) (failure to prove any one of the essential elements of a claim results in dismissal). Therefore, the ALJ properly dismissed Jackson’s petition.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ’s order and **DISMISS** Jackson’s complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge