



In the Matter of:

GEORGE B. BLACKIE, JR.,

ARB CASE NO. 13-065

COMPLAINANT,

ALJ CASE NO. 2011-STA-055

v.

DATE: June 17, 2014

D. PIERCE TRANSPORTATION, INC.;
DAVE PIERCE, SR.; DAVE PIERCE, JR.;
SHAWN PIERCE; ERIC WEYANDT; et al.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

George B. Blackie, Jr., *pro se*, Claysburg, Pennsylvania

For the Respondents:

Timothy Grant Wojton, Esq.; *Wojton & Wojton*, Pittsburgh, Pennsylvania

BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case is before the Administrative Review Board (ARB) on appeal from a U. S. Department of Labor Administrative Law Judge's (ALJ) Decision and Order (D. & O.) issued May 31, 2013, ruling in favor of Complainant George B. Blackie, Jr., on his whistleblower complaint filed pursuant to the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended.¹ The ALJ held that Blackie's employer,

¹ 49 U.S.C.A. § 31105(a) (Thomson Reuters 2013). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2013).

Respondent D. Pierce Transportation, Inc. (DPT), violated the STAA when it terminated his employment because Blackie engaged in whistleblower-protected activity. We affirm the ALJ's decision on modified grounds.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions under the STAA, and implementing regulations.² The Board reviews the ALJ's factual findings to determine whether they are supported by substantial evidence³ and conclusions of law de novo.⁴

BACKGROUND

The facts in this case are set out in detail the ALJ's decision below. We include here a summary of the testimony and evidence.⁵ Blackie began working as a trucker for DPT on May 13, 2010, driving the truck known as the PG 470.⁶ Because of Blackie's lack of experience hauling steel, Dave Pierce, Sr.,⁷ owner of DPT, initially directed him to follow Erick Weyandt for training purposes. During the course of his initial training period with Weyandt, Blackie reported to DPT managers that Weyandt committed numerous safety violations including speeding, violations of hours of service regulations, failure to perform load checks, and not

² Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. Part 1978.

³ 29 C.F.R. § 1978.110(b).

⁴ *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

⁵ Rather than providing a separate "Findings of Fact" section, it appears that the ALJ included findings of fact in the section headed "Discussion and Conclusions of Law." As support for the findings the ALJ made in his "Discussion and Conclusions of Law," we infer that he credited consistent evidence and rejected inconsistent evidence summarized in the "Factual Background." *See, e.g., Zink v. U.S.*, 929 F.2d 1015, 1020-21 (5th Cir. 1991) (the Fifth Circuit Court of Appeals expressly relied on the reasonable inferences it drew from the district court judge's fact findings (citations omitted)). For example, we infer that the ALJ credited Blackie's testimony summarized on page 15 of the ALJ's D. & O., rather than Pierce Sr.'s conflicting testimony on page 16, regarding the content of their November 10, 2010 termination conversation.

⁶ D. & O. at 3; Respondent's Exhibit (RX) D; Hearing Transcript (HT) at 232-233.

⁷ David Pierce, Sr., the owner of DPT, is referred to as "Pierce, Sr." to distinguish him from his son, David Pierce, Jr.

allowing Blackie sufficient time to complete his driving logs.⁸ Pierce, Sr. raised Blackie's safety concerns with Weyandt and never reduced Blackie's pay or threatened to fire him in response to his complaints.⁹

Although the timing is unclear, it was undisputed that Blackie also complained to Pierce Sr. that another driver, Robert Snare, was not properly securing his load. Both DPT and Snare were fined for this misconduct.¹⁰ According to his complaint, Blackie made multiple safety complaints throughout his employment until DPT laid him off in November 2010.¹¹

In late May 2010, Blackie brought the PG 470 to S. & R. Repair, owned by Sam Ray, the mechanic DPT used for truck repairs. While the PG 470 underwent maintenance and repair, Blackie used the truck known as the PG 482 as his "loaner" truck.¹² The PG 482 was not a new truck and despite reservations about its condition, Blackie drove the truck several times when his assigned truck the PG 470 was in the shop for repair. However, on June 29, 2010, Blackie informed Sam Ray that the PG 482 had an air leak that had worsened to the point that the red air warning light had appeared. Blackie told Ray he would not drive the PG 482 again until he knew it was fixed.¹³ Although Ray testified that the truck was fixed and posed no danger, he conceded that the truck continued to sound as if there were still air leaks.¹⁴ Apart from one time when he would otherwise have been "stranded," Blackie never drove the PG 482 again.¹⁵

On July 6, 2010, Blackie received a log violation letter from DPT's log auditor stating that he was missing logs from May 7 until May 12. Since DPT had not employed Blackie during that time, Pierce, Sr. resolved the mistake. Blackie received another log violation letter dated July 20, 2010, and a third log violation letter dated August 3, 2010. Blackie responded to the third letter by sending a notarized letter to Pierce, Sr. requesting the name of the log auditor. Pierce, Sr. testified that he then told Michael Musiak, DPT's independent contractor safety director, that Blackie wished to speak with him. Blackie claimed he had been trying to get in touch with the safety director since May 2010, but was never allowed to meet with Musiak during his tenure at DPT.¹⁶

⁸ D. & O. at 3.

⁹ D. & O. at 5.

¹⁰ *Id.* at 6.

¹¹ Administrative Law Judge's Exhibit (ALJX) 1 – Blackie's Mar. 4, 2001 Complaint.

¹² D. & O. at 7; HT at 171, 209, 212-213.

¹³ D. & O. at 7; HT at 121-122, 277, 336, 340, 342; ALJX 1 - Complaint at 5.

¹⁴ D. & O. at 7-8; HT at 174-176.

¹⁵ D. & O. at 8; HT at 122, 277.

¹⁶ D. & O. at 8-9.

Sometime between August 20 and 30, 2010, Pierce, Sr. interviewed a job applicant named David Thompson. Pierce, Sr. testified that he told Thompson that he wanted to hire him but there was no position available at the time. Pierce, Sr. advised Thompson to remain at his current job and Pierce, Sr. would call him if a position opened up.¹⁷

In mid-October, Blackie reported to Pierce, Sr. that he believed that Weyandt had tampered with his truck and not for the first time. Weyandt conceded that, because of Blackie's "whining," he had advised Blackie to quit his job if he did not like it. But Weyandt testified he would never tamper with Blackie's truck "because my family runs on these roads, too."¹⁸ According to Blackie, Pierce, Sr. directed Blackie to stay away from Weyandt.

In late October 2010, Pierce, Sr. informed Blackie that he was thinking of selling the PG 470 and on October 27, an agreement was signed to sell the truck.¹⁹ On November 1, 2010, Pierce, Sr. received a notarized, certified letter from Blackie setting out his past and present concerns about safety violations at DPT.²⁰ Blackie claims Pierce, Sr. threatened him over the phone after receiving the certified letter. Pierce, Sr. denies that he threatened Blackie but admits that after he scanned the letter, he contacted his lawyer about it.²¹ That same day, November 1, 2010, Pierce, Sr. hired David Thompson, whose first log in the record is dated November 2, 2010, and indicates that he was assigned to drive the PG 482.²² The next day, November 3, Pierce, Sr. instructed Blackie to drive the PG 470 to Blackie's home, where a driver for DPT would pick it up as it had been recently sold. However, when Blackie arrived at his home, Weyandt, Thompson, and two other men were waiting to pick up the PG 470. Blackie testified that there was no reason to send four men to pick up a single truck and he called Pierce, Sr. to ask him why he had sent Weyandt to pick up the truck. Pierce, Sr. denied sending Weyandt and promised that Blackie would be getting a truck upgrade when he returned to work.²³

On November 10, Pierce, Sr. informed Blackie by telephone that he was laid off, as Pierce, Sr. had no truck other than the PG 482 for Blackie to drive.²⁴ The contents of this

¹⁷ D. & O. at 9-10.

¹⁸ *Id.* at 10.

¹⁹ D. & O. at 12; HT at 332-334; RX L.

²⁰ D. & O. at 12; Complainant's Exhibit (CX) 13.

²¹ D. & O. at 13.

²² *Id.* at 13-14.

²³ *Id.* at 14.

²⁴ D. & O. at 15; HT at 100, 273.

conversation are disputed. Pierce, Sr. testified that he offered the PG 482 to Blackie to drive, but Blackie refused to drive the PG 482.²⁵ According to Pierce, Sr., there was no other truck available, and since Blackie refused to drive it, Pierce, Sr. had no choice but to lay him off for lack of work. Pierce, Sr. testified that if Blackie had agreed to drive the PG 482, he would not have hired Thompson.²⁶ Blackie, on the other hand, testified that Pierce, Sr. did not offer the PG 482 to him to drive that day.²⁷ According to Blackie, Pierce, Sr. told him that the PG 482 would likely be his “upgrade” truck but that it needed repair. Blackie testified that Pierce, Sr. told him that he had not decided whether to sell the PG 482 or not, and because there was no other truck available, Blackie would be laid off. Blackie denied that he was offered the PG 482 to drive that day.²⁸

On Blackie’s subsequent unemployment application, Blackie indicated that he was laid off due to “lack of work,” which the ALJ noted was “motivated by the desire to say whatever was necessary to get benefits, rather than to tell the truth about why he was terminated.”²⁹

DISCUSSION

A. *Statutory Framework and Burden of Proof*

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.³⁰ The STAA protects an employee who makes a complaint “related to a violation of a commercial motor vehicle safety or security regulation, standard, or order.”³¹

To prove a STAA violation, the complainant must show by a preponderance of evidence that his safety complaints to his employer were protected activity, that the company took an adverse employment action against him, and that his protected activity was a contributing factor

²⁵ D. & O. at 15-16; HT at 336.

²⁶ D. & O. at 16; HT at 340-341.

²⁷ D. & O. at 15; HT 103-104, 109.

²⁸ D. & O. at 15.

²⁹ D. & O. at 17; RX G.

³⁰ 49 U.S.C.A. § 31105(a)(1).

³¹ *Id.*

in the adverse action.³² If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the adverse personnel action, his employer can avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event.³³

B. ALJ's Findings Regarding Protected Activity and Adverse Employment Action

Initially, the ALJ determined that Blackie proved that he engaged in protected activity by a preponderance of the evidence.³⁴ Specifically, the ALJ noted that Blackie had “filed many safety-related complaints, in that he repeatedly reported concerns about Weyandt during training, he confronted Pierce, Sr. about Snare’s cross-chaining violation, he reported to Pierce, Sr. and Pierce, Sr.’s son Shawn his concerns over Weyandt on October 18, and he sent the notarized, certified letter (received at Respondent November 1) enumerating the ‘illegal, unsafe activities’ he believed he had witnessed during his employ with Pierce.”³⁵ We affirm the ALJ’s finding as it is supported by substantial evidence and is not challenged on appeal.

In addition, the ALJ determined that Blackie proved by a preponderance of the evidence that he suffered an adverse employment action under the STAA when Pierce, Sr. laid him off on November 10, 2010.³⁶ As the ALJ’s finding is supported by substantial evidence and is not challenged on appeal, it is affirmed.

C. ALJ's Findings Regarding Contributory Factor and Nondiscriminatory Reason for Termination

The ALJ found that Blackie established a “prima facie case” that his protected activity was a contributing factor in his adverse employment action based on circumstantial evidence.³⁷ First, the ALJ found close temporal proximity between Blackie’s November 1, 2010 letter setting forth his safety concerns and his November 10, 2010 layoff, and that because the letter “served as a reminder of Complainant’s prior protected safety reports,” Blackie’s “layoff was in close temporal proximity with all of [his] earlier [safety complaints] as well.”³⁸

³² *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

³³ *Id.* at 5-6 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv)).

³⁴ D. & O. at 19.

³⁵ *Id.*

³⁶ D. & O. at 20.

³⁷ *See* D. & O. at 20-23.

³⁸ D. & O. at 21.

In addition, the ALJ found the evidence regarding DPT’s attitude towards safety as “mixed,”³⁹ and that, as there is “no evidence of irritation with or hostility against safety rules, the safety director, or employees with safety concerns,” DPT’s attitude towards safety is “only weak evidence of a retaliatory intent.”⁴⁰ Nevertheless, the ALJ listed a number of circumstances that indicated DPT’s disregard for safety including the following:

Pierce himself testified that he has heard other drivers complain to Pierce, Jr. about not getting directions. . . . Pierce also admitted that one of his employees had a violation for cross-chaining during the time of Complainant’s employment, and that he discovered . . . that his safety manuals in the trucks were over four years out of date. In addition, Weyandt testified that he ‘went in light on fuel’ frequently, and Pierce corroborated that this was an acceptable practice, even though it could ostensibly lead to running on the roads overweight. Complainant’s governor in the PG 470 was also set at 75 MPH, 5 MPH above the highest speed limit on roads on which Respondent trucks run. Finally, it seems that Pierce – and other members of Respondent’s management and office staff – were less than assiduous about putting Complainant in contact with Musiak [independent contractor and safety director for Respondent].^[41]

The ALJ concluded that this evidence indicated that DPT had a “lax” or “informal” attitude toward safety.⁴² But, the ALJ found that “[e]ven without this evidence” regarding DPT’s attitude toward safety, “temporal proximity is dispositive on the issue of causation for purposes of a prima facie whistleblower case,” and, therefore, “Complainant has established his prima facie case.”⁴³

The ALJ then stated that “the burden of production now shifts to Respondent to articulate a legitimate, non-discriminatory motive for Complainant’s termination,” noting that it is “a burden of production, not of proof.”⁴⁴ The ALJ determined that Pierce, Sr. “repeatedly articulated” that the legitimate reason he laid off Blackie was due to “lack of work” because

39 *Id.*

40 D. & O. at 22-23.

41 *Id.* at 22.

42 *Id.*

43 *Id.* at 23.

44 *Id.*

“there was no truck for Complainant to drive.”⁴⁵ The ALJ then stated that “since it is not Respondent’s burden to produce evidence in support of its alleged rationale, the articulation of this motive shifts the burden back to Complainant to establish that this asserted rationale is pretext.”⁴⁶

Finally, the ALJ concluded that the “only logical conclusion” from the “objective evidence of record” regarding the timing of Thompson’s hiring was that Pierce, Sr. never offered Blackie the PG 482 to drive and, therefore, that Pierce, Sr.’s reason for laying Blackie off because of his refusal to drive was a pretext.⁴⁷ When “[c]ombined with the striking temporal proximity of the adverse employment action” to Blackie’s November 1 letter or protected activity, the ALJ concluded that “this show of pretext constitutes a preponderance of evidence that the layoff was a retaliation against Complainant for his safety complaints.”⁴⁸ Thus, the ALJ found that Blackie “has shown by a preponderance of the evidence that his protected activity was a contributing factor in [Pierce, Sr.’s] decision to take an adverse employment action against him.”⁴⁹

The ARB has discouraged application of the prima facie analytical framework after a case has been tried.⁵⁰ Further, as we explain below, we no longer countenance use of this outmoded framework in the context of the post 2007 amendments to STAA. Nevertheless, the ALJ ultimately applied the correct causation standard and substantial evidence supports the ALJ’s causation finding.

D. ALJ Applied Incorrect Burdens of Proof Standards

The ALJ initially articulated the correct burden of proof standards arising under the STAA.⁵¹ However, he erroneously analyzed the facts under the analytical framework of case

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ D. & O. at 24-25.

⁴⁸ *Id.* at 25.

⁴⁹ *Id.*

⁵⁰ See, e.g., *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 6 (ARB Sept. 30, 2003)(However, we continue to discourage the unnecessary discussion of whether or not a whistleblower has established a prima facie case when a case has been fully tried. See, e.g., *Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 2000-CAA-015, slip op. at 3 n.7 (ARB May 30, 2003).”).

⁵¹ See D. & O. at 18.

authority derived from Title VII of the Civil Rights Act of 1964.⁵² This case law was appropriately applied to STAA cases prior to the 2007 amendments, but those amendments dramatically altered the burden of proof framework applicable to STAA cases. In particular, the ALJ failed to explicitly address the Respondent's affirmative defense, that is, whether Respondent showed by clear and convincing evidence that it would have fired Blackie in the absence of his protected activity.

In making his causation determination, the ALJ relied upon case law adopting the Title VII burden shifting paradigm, as first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). This Title VII body of law was incorporated into STAA as early as 1984.⁵³

Prior to the 2007 amendments to STAA,⁵⁴ the Title VII burden of proof framework the ALJ relied upon was controlling. However, as the Board pointed out in *Salata v. City Concrete*,⁵⁵ the 2007 STAA amendments replaced the *McDonnell Douglas* Title VII burden of proof standards and burden-shifting analytical framework in STAA cases by incorporating the legal burdens of proof and framework imposed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21),⁵⁶ which provides whistleblower protection for employees in the aviation industry. The 2007 amendments revised paragraph (b)(1) of 49 U.S.C.A. § 31105 to expressly provide that STAA whistleblower complaints are governed by the legal burdens of proof set forth in AIR 21 at 49 U.S.C.A. § 42121(b).

Under the AIR 21 standard, a new burden of proof framework is established in which the complainant is initially required to show by a preponderance of the evidence that protected

⁵² 42 U.S.C.A. § 2000e *et seq.* (Thomson Reuters 2012). The ALJ specifically cited to *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-612 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Clean Harbors Envtl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995); *Moon v. Transp. Drivers*, 836 F.2d 226, 229 (6th Cir. 1987); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987); *Simpkins v. Rondy Co., Inc.*, ARB No. 02-097, ALJ No. 2001-STA-059 (ARB Sept. 24, 2003); *Somerson v. Yellow Freight Sys.*, ARB No. 99-004, ALJ No. 1998-STA-009 (ARB Feb. 18, 1999); *Byrd v. Consol. Motor Freight*, ARB No. 98-064, ALJ No. 1997-STA-009 (ARB May 5, 1998); *Stiles v. J.B. Hunt Transp., Inc.*, No. 1992-STA-034 (Sec'y 1993); *Ertel v. Giroux Bros. Transp., Inc.*, 1988-STA-024 (Sec'y Feb. 16, 1989).

⁵³ See *Nix v. Nehi-RE Bottling Co.*, No. 1984-STA-001 (Sec'y 1984); *Byrd*, ARB No. 98-064; see also *Moon v. Transp. Drivers*, 836 F.2d 226 (6th Cir. 1987).

⁵⁴ Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act) (Aug. 7, 2007).

⁵⁵ ARB No. 08-101, ALJ No. 2008-STA-012 (ARB Sept. 15, 2011).

⁵⁶ Pub. L. No. 106-181, 114 Stat. 61 (Apr. 5, 2000).

activity was a “contributing factor” in the alleged adverse personnel action.⁵⁷ Should the complainant meet the “contributing factor” burden of proof, the burden shifts to the employer, who is required, in order to overcome the complainant’s showing, to prove by “clear and convincing evidence” that it would have taken the same adverse action in the absence of the protected conduct.⁵⁸

The AIR 21 burden of proof framework is much more protective of complainant-employees and much easier for a complainant to satisfy than the *McDonnell Douglas* standard.⁵⁹ The AIR 21 complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent’s reason for the unfavorable personnel action was pretext, or that the complainant’s activity was the sole or even predominant cause.⁶⁰

If the complainant proves that his/her protected activity was a contributing factor in the unfavorable personnel action, the burden shifts to the respondent, in order to avoid liability for damages, to prove “by clear and convincing evidence” that it would have taken the same adverse action in any event.⁶¹ This is a high burden of proof which we examined recently in detail.⁶² To meet the burden, the employer must show that ‘the truth of its factual contentions is highly probable.’”⁶³ “In addition to the high burden of proof, the express language of the statute requires that the ‘clear and convincing’ evidence prove what the employer ‘would have done’ not simply what it ‘could have’ done.”⁶⁴

⁵⁷ 49 U.S.C.A. § 42121(b)(2)(B)(i); *see also* 75 Fed. Reg. 53,545; 53,550 (Aug. 31, 2010).

⁵⁸ 49 U.S.C.A. § 42121(b)(2)(B)(ii); 75 Fed. Reg. 53,545; 53,550.

⁵⁹ *See e.g., Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013).

⁶⁰ *See, e.g., Araujo*, 708 F.3d at 158; *Marano v. Dept. of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 10 (ARB June 29, 2006).

⁶¹ *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

⁶² *Speegle v. Stone & Webster Constr. Co.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 10-12 (ARB Apr. 25, 2014).

⁶³ *Araujo*, 708 F.3d at 159 (citations omitted).

⁶⁴ *Speegle*, ARB No. 13-074, slip op. at 11.

We recognize that the Board has sanctioned use of the Title VII analytical framework in past opinions.⁶⁵ In retrospect, however, it is clear that maintaining the Title VII analytical methodology has given rise to confusion regarding the burdens of proof required of the parties.⁶⁶ It is also clear, as we explained in detail in *Beatty v. Inman Trucking Mgmt.*,⁶⁷ that leaving the Title VII analytical methodology in place was legal error on the ARB's part. Several federal appellate courts have recognized the critical distinctions between the Title VII framework and the new AIR 21 analytical framework.⁶⁸ As the Second Circuit recently observed in a comparable case governed by the AIR 21 burdens of proof framework: "The ALJ's alternative [Title VII] burden-shifting scheme has no basis in any relevant law or regulation, and is simply incorrect."⁶⁹

⁶⁵ See, e.g., *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) ("This is not to say, however, that the ALJ (or the ARB) should not employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in AIR 21 cases."); *Kester*, ARB No.02-007, slip op. at 6 ("Nor do the 1992 amendments [to the ERA] dictate or suggest that an ALJ, or this Board, not rely, when appropriate, upon the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof.").

⁶⁶ Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 381 (1997) (But there is mounting evidence that preoccupation with *McDonnell Douglas* and its periodic reiteration and reformulation in subsequent Supreme Court cases is generating unproductive, conflicting, and often quite dubious legal doctrines.); Mark R. Bandsuch, *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965, 967 (2009)("The three-prong approach to Title VII originally provided a helpful framework for addressing discrimination cases. Unfortunately, the attempts by the courts and Congress to adapt Title VII to the more recent and changing faces of discrimination have turned the once-helpful tripartite framework into a three-headed analytical monster with each prong presenting its own set of problems.")(footnote omitted).

⁶⁷ ARB No. 13-039, ALJ No. 2008-STA-020 (ARB May 12, 2014); see also *White v. Action Expediting, Inc.*, ARB No. 13-015, ALJ No. 2011-STA-011 (ARB June 5, 2014).

⁶⁸ See *Araujo*, 708 F.3d at 157-158; *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008)(the "'independent burden-shifting framework' [of SOX/AIR-21] is distinct from the *McDonnell Douglas* burden-shifting framework applicable to Title VII claims."); see also *Trimmer v. U.S. Dept. of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999)("In 1992 Congress amended § 5851 of the ERA to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05 (1973)."); *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997)("Section 5851 [of the amended ERA] is clear and supplies its own free-standing evidentiary framework.");

⁶⁹ *Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 448 (2d Cir. 2013).

E. Substantial evidence supports the ALJ's finding of causation.

The ALJ found that Blackie engaged in STAA-protected whistleblower activity, which determination is not challenged on appeal. It is also uncontroverted that Blackie suffered an adverse action when Pierce, Sr. laid him off on November 10, 2010. The remaining issues in this case are whether the evidence of record supports a finding that Blackie proved by a preponderance of the evidence that his protected activity was a contributing factor in DPT's decision to lay him off and, if so, whether DPT can demonstrate by clear and convincing evidence that it would have laid Blackie off in the absence of his STAA-protected activity.

The ALJ improperly applied the *McDonnell Douglas* "pretext" methodology to his causation analysis. Nevertheless, the ALJ ultimately concluded that Blackie demonstrated by a preponderance of the evidence that his protected activity contributed to his layoff. Substantial evidence of record amply supports this finding. There is, initially, the temporal proximity of Blackie's protected activities to his layoff. On November 1, 2010, Blackie sent Pierce, Sr. a notarized, certified letter setting out his past and present concerns about safety violations at DPT. As the ALJ observed, "this letter was not only its own, independent protected activity, but also served as a reminder of Complainant's prior protected safety reports."⁷⁰ Nine days later, Pierce, Sr. laid Blackie off. While correctly noting that temporal proximity alone may be sufficient to establish causation,⁷¹ the ALJ relied on additional evidence to support his conclusion. For example, as noted previously,⁷² the ALJ listed a number of circumstances demonstrating DPT's "lax" attitude toward safety, which he found to be evidence, albeit "weak," of retaliatory intent.

The ALJ also took credibility into account. He observed that Pierce, Sr.'s memory of events was "very shaky" as opposed to Blackie's story, which was "very consistent and precise" albeit at times "outlandish" and "unsubstantiated."⁷³

Finally, the ALJ correctly noted that "one type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation."⁷⁴ The ALJ made detailed findings of fact in support of his pretext determination. He pointed out that Pierce, Sr. sold the PG 470 in late October and promised Blackie an upgraded truck. The ALJ observed that by Pierce, Sr.'s own testimony, he would have hired Thompson in August but "*for the sole reason that Pierce had no truck available for*

⁷⁰ D. & O. at 21.

⁷¹ D. & O. at 23.

⁷² *Supra* at p. 7 (quoting from D. & O. at 22).

⁷³ *Id.* at 24.

⁷⁴ *Id.* at 23 (citing *Salata*, ARB Nos. 08-101, 09-104; slip op. at 9 (citing *Riess v. Nucor Corp.-Vulcraft-Texas, Inc.*, ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 6 (ARB Nov. 30, 2010)).

*him to drive.*⁷⁵ On November 1, 2010, Pierce, Sr. received Blackie’s ten-page, certified complaint letter memorializing his prior complaints and raising some new ones. Thompson began work the same day.⁷⁶ Thompson’s logs for November 2nd and 3rd show that he was assigned to drive the PG 482.⁷⁷ Pierce, Sr. confirmed that Thompson had been assigned the PG 482 and that there was no other truck to drive.⁷⁸ The ALJ reasoned that the only explanation consistent with this documentary evidence was that Pierce, Sr. had never intended to give Blackie the PG 482. As the ALJ explained, the only reason the PG 482 was more “available” to Thompson on November 1, 2010, than it had been in August (when Pierce, Sr. told Thompson he had no truck available) was because Pierce, Sr. had no intention of giving it to Blackie as his “upgrade” truck.⁷⁹

Pierce, Sr.’s testimony that he offered the PG 482 to Blackie on November 10 lacks credibility for another reason.⁸⁰ As the ALJ noted, Pierce, Sr. was emphatic that he only offered Thompson the PG 482 *after* Blackie refused to drive it.⁸¹ But undisputed documentary evidence shows that Thompson was assigned the PG 482 over a week before Pierce, Sr. claims Blackie refused to drive the PG 482. The ALJ concluded that because Pierce, Sr. never offered Blackie the PG 482, Pierce, Sr.’s claim that Blackie’s refusal led to a “lack of work” was pretextual.

The ALJ was persuaded that this showing of pretext, when combined with the “striking temporal proximity” of the adverse action, “constitutes a preponderance of evidence that his protected activity was a contributing factor in Respondent’s decision to take an adverse employment action against him.”⁸² Substantial evidence supports the ALJ’s conclusion.

Under the AIR 21 framework, after complainant has demonstrated that protected activity was a contributing factor in his adverse action, the burden of proof switches to the employer to show by clear and convincing evidence that it would have acted adversely in the absence of the protected activity. Because the ALJ did not explicitly address this issue, we ordinarily would remand to the ALJ to determine in the first instance whether DPT showed by clear and convincing evidence that it would have laid Blackie off in the absence of his protected activity. However, DPT failed to argue its affirmative defense. But even had DPT argued its defense, we

⁷⁵ D. & O. at 24 (ALJ’s emphasis).

⁷⁶ *Id.* at 13.

⁷⁷ D. & O. at 25 n.7; HT at 411; (*see also* CX 37 – Thompson logs).

⁷⁸ D. & O. at 16, 24; HT at 337, 344.

⁷⁹ D. & O. at 25.

⁸⁰ *Id.* at 25.

⁸¹ D. & O. at 16; HT at 335, 337, 430.

⁸² D. & O. at 25.

would find DPT unable to meet its high statutory burden. As mentioned above, despite using the outdated *McDonnell Douglas* language to articulate his findings, the ALJ traversed the correct AIR 21 burdens of proof. Because the employer’s “clear and convincing” burden of proof standard required under STAA is a *higher* burden of proof than the corresponding Title VII standard, the ALJ’s failure to explicitly apply the correct standard is ultimately harmless error since the ALJ found the employer unable to meet even the lower Title VII standard. Furthermore, we believe that there is only one possible outcome under the particular facts of this case, so we see no reason to remand.⁸³

As we explained, substantial evidence supports the ALJ’s determination that Blackie’s protected activity was a contributing factor to his layoff. And as the ALJ noted, Pierce, Sr. repeatedly testified that the *only* reason he laid Blackie off was because of “lack of work” due to Blackie’s refusal to drive the PG 482, the only truck available.⁸⁴ We affirmed as supported by substantial evidence the ALJ’s conclusion that DPT’s only proffered reason was pretextual and unworthy of credence. Under these circumstances, Blackie is entitled to prevail as a matter of law. If the only legitimate reason DPT proffers is found to be untrue, he cannot as a matter of law prove that Blackie was laid off for any reason besides the illegal one. This is not a “mixed-motive” case where both legal and illegal motives contributed to the discrimination. In this case, because of Pierce, Sr.’s insistence that there was one cause alone for the layoff, the issue is whether either legal or illegal reasons, but not both, were the real reason behind the layoff. There is simply insufficient evidence in the record to sustain a finding that DPT would have laid off Blackie in the absence of his safety complaints. Because DPT as a matter of law is unable to prove its affirmative defense, we affirm the ALJ’s finding that the layoff constituted retaliation against Blackie because of his safety complaints, entitling Blackie to compensation under the STAA.

E. Damages Issues

Finally, DPT also argues that the ALJ erred in determining the damages to which Blackie is entitled. Under the STAA, a successful complainant is entitled to “compensatory damages, including back pay.”⁸⁵ A wrongfully discharged complainant is required, however, to mitigate his damages through the exercise of reasonable diligence in seeking alternative employment.⁸⁶

⁸³ See *Hussain v. Gonzales*, 477 F.3d 153 (4th Cir. 2007) (when the result of a remand is a foregone conclusion amounting to a mere formality, the “rare circumstances” exception to the remand rule is met and remand is unwarranted); *Zhong v. U.S. Dep’t of Justice*, 461 F.3d 101, 113 (2d Cir. 2006) (stating that an agency error does not warrant remand when it is clear from the record “that the same decision is inevitable on remand, or, in short, whenever the reviewing panel is confident that the agency would reach the same result upon a reconsideration cleansed of errors”) (citation omitted).

⁸⁴ D. & O. at 23; HT at 335, 337, 338, 344.

⁸⁵ 49 U.S.C.A. § 31105 (b)(3)(A)(iii).

⁸⁶ *Pollack v. Continental Express*, ARB Nos. 07-073, 08-081; ALJ No. 2006-STA-001, slip op. at 12 (ARB Apr. 7, 2010).

The burden is on an employer to establish any failure by a wrongfully discharged complainant to properly mitigate damages through the pursuit of alternative employment.⁸⁷

The mitigation of damages doctrine requires that a wrongfully discharged employee not only diligently seek substantially equivalent employment during the interim period but also that the employee acts reasonably to maintain such employment.⁸⁸ A failure to mitigate damages through the retention of employment will reduce the employer's back pay liability in that the back pay award will be reduced by no less an amount than that which the complainant would have made had he remained in the interim employment throughout the remainder of the back pay period.⁸⁹

In determining that Blackie was entitled to back pay, the ALJ found that "although Complainant's employment with [his subsequent employer after his layoff from DPT] ended prematurely after damage to [the subsequent employer's] property due to Complainant's negligence, the Pennsylvania Unemployment Compensation Board of Review held that Complainant's negligence did not constitute willful misconduct, and I therefore find that the record does not 'clearly indicate' that the complainant failed to exercise reasonable diligence to retain his position."⁹⁰ DPT contends that because Blackie's subsequent employment was terminated due to his negligence, the ALJ erred in determining that Blackie failed to exercise reasonable diligence to retain his position and, therefore, DPT should not be liable for back pay for the period following Blackie's termination from his subsequent employer. However, "only if the employee's misconduct is gross or egregious, or if it constitutes a willful violation of company rules, will termination resulting from such conduct serve to toll the discriminating employer's back pay liability."⁹¹ Thus, we reject DPT's contention.

Finally, DPT argues that the ALJ erred in admitting Complainant's Exhibit (CX) 40 into the record at the hearing. The Board reviews an ALJ's determinations on procedural issues and evidentiary rulings under an abuse of discretion standard.⁹² The evidence contained at CX 40 addresses when Blackie's unemployment benefits ended and his financial difficulties after his

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ D. & O. at 28.

⁹¹ *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-005, slip op. at 10-11 (ARB Dec. 30, 2002).

⁹² *Butler v. Anadarko Petroleum Corp.*, ARB No. 12-041, ALJ No. 2009-SOX-001, slip op. at 2 (ARB June 15, 2012).

layoff from DPT.⁹³ Because this evidence could be relevant to the ALJ’s consideration of damages, but was not listed in the pre-trial exhibits or submitted during Blackie’s case-in-chief at the hearing, thereby preventing DPT from cross-examining Blackie on the evidence it contained, DPT argues that the ALJ erred in admitting CX 40 to the extent that he relied on it in assessing damages and, therefore, prejudiced DPT.

But we note that the ALJ only addressed CX 40 in stating, “While there is ample evidence of his financial difficulties (CX 40), I cannot presume emotional stress or mental anguish from this documentation alone.”⁹⁴ Thus, because the ALJ apparently did not rely on CX 40 in assessing any damages, we reject DPT’s contention and affirm the ALJ’s admittance of this evidence as within his discretion.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ’s finding that DPT laid off Blackie in violation of the STAA, and we **AFFIRM** the ALJ’s order of damages and remedies.

As the prevailing party, Blackie is entitled to costs incurred for litigation before the ARB. Complainant shall have thirty (30) days from receipt of this Final Decision and Order in which to file a fully supported statement of costs with the ARB, with simultaneous service on opposing counsel. Thereafter, DPT shall have thirty (30) days from its receipt of the costs statement to file a response.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Judge Corchado, concurring:

I concur that, despite the ALJ’s discussion of the *McDonnell Douglas* burden-shifting framework, he ultimately concluded that Blackie’s protected activity contributed to his layoff and ultimate loss of his job with DPT. As the majority explains, the ALJ relied on substantial evidence to find causation. I agree that it is legal error *to require* an employee to prove pretext where the causation standard is a “contributory factor” standard, but pretext can be used as

⁹³ See CX 40.

⁹⁴ D. & O. at 29.

circumstantial evidence of discrimination against whistleblowers. Most importantly, aside from the incompatibility with the contributory factor standard, I agree that the *McDonnell Douglas* analytical framework overcomplicates and muddies the ultimate causation question presented by cases involving the contributory factor causation standard: did the complainant prove that protected activity contributed to an unfavorable employment action. This requires weighing all of the complainant's circumstantial evidence together against all of the opposing evidence. Of course, the ALJ needs to provide sufficient reasons and basis for his or her material findings, and resolve material conflicts in the evidence, but the ALJ need not go through the confusing mental ping pong analysis required by the *McDonnell Douglas* framework.

As for the question of whether an employer could show, by clear and convincing evidence, that it would have taken the same action in the absence of protected activity, my position differs from the majority in that I find this question to be relevant only if the employer sufficiently briefed it before us. I do not find that DPT adequately briefed this issue, but I agree with the majority that it could not meet this high burden of proof, given the ALJ's findings. DPT utters the phrase "clear and convincing" in its brief but it did not argue that clear and convincing evidence shows that it would have taken the same action in the absence of protected activity. *See* "Brief for Appellant, D. Pierce Transportation, et al.," at 16-21.

LUIS A. CORCHADO
Administrative Appeals Judge