



In the Matter of:

ALBERT BRIAN CANTER,

ARB CASE NO. 11-012

COMPLAINANT,

ALJ CASE NO. 2009-STA-054

v.

DATE: June 27, 2012

**MAVERICK TRANSPORTATION,
LLC,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

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

For the Respondent:

Travis Bo Loftis, Esq., *Cross, Gunter, Witherspoon & Galchus, P.C.*, Little Rock, Arkansas

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A.

§ 31105.¹ The Complainant, Albert Canter, a truck driver, alleged that his employer, Maverick Transportation, violated the STAA when it blacklisted him by placing an unfavorable notation on his DAC (Drive-A-Check) Employment Report² stemming from his refusing to drive a truck and filing a complaint about violations of commercial vehicle safety regulations relating to the truck. 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.

Following a hearing, an Administrative Law Judge (ALJ) issued a decision on October 28, 2010, that found, inter alia, that Maverick violated the STAA because it was motivated, at least in part, by discriminatory purpose with regard to Canter's protected activity when it placed a negative notation on his DAC Report. *Canter v. Maverick Transp. LLC*, No. 2009-STA-054, slip op. at 15 (ALJ Oct. 28, 2010). We affirm.

BACKGROUND

Albert Canter worked for Maverick as a truck driver. Decision & Order (D. & O.) at 2. On November 21, 2003, while working for Maverick, Canter was involved in a traffic accident outside of Waynesboro, Pennsylvania, that resulted in a fatality. *Id.* A Pennsylvania state trooper completed an inspection of the truck following the accident and found that two brakes were out of adjustment, the power steering box had a slight fluid leak, a brake hose was chaffing on a wire tie causing visible wear, and the dunnage under the trailer was only secured by a rubber cord. *Id.* The vendor for the trailer adjusted the brakes and then Canter drove the truck to drop off the trailer at an approved truck stop. He then drove the truck without a trailer to his home. *Id.*

Maverick placed Canter on medical leave for about a month because he was experiencing depression due to his involvement in the fatal accident. *Id.* at 5. He was released to return to work on December 29, 2003, but quit his employment a day later. *Id.* at 3. Maverick asked Canter to drive the truck (parked at his home) 200-250 miles to Middletown, Ohio. *Id.* at 5. Canter refused to do so unless the chaffing air line and steering fluid leak were repaired and Maverick arranged for Canter's return bus ticket home. *Id.* Canter told Maverick that the truck had too many "deadline problems" and

¹ 49 U.S.C.A. § 31105 (Thomson/West Supp. 2011) (STAA). The STAA's implementing regulations are found at 29 C.F.R. Part 1978 (2011).

² A DAC report is a consumer report setting forth employment history on truck drivers. D. & O. at 6. It is maintained by HireRight Solutions, Inc. (formerly known as USIS Commercial Services), a consumer reporting agency. *Id.* An abandonment notation on a truck driver's DAC Report will hinder his ability to be hired by an employer. *Id.*

that the defects were in violation of Department of Transportation regulations.³ *Id.* On December 31, 2003, Canter had difficulty starting the truck's engine, but drove the truck 9 miles to a truck stop where he was authorized to leave the truck. *Id.* at 3, 14.

On December 31, 2003, Maverick noted internally that Canter had abandoned the truck and was not eligible for rehire. *Id.* at 3. On a Final Notification of Driver Termination, Maverick noted that Canter called on December 31, 2003, and told them that the truck "had too many deadline problems." CX 12. On January 19, 2004, Maverick noted on Canter's DAC Report "Unauth. Location – W/O Notice," which indicated an abandonment of equipment. *Id.* at 6.

Canter received his DAC report for the first time in July or August 2008. *Id.* On or around September 27, 2008, Canter disputed entries on his DAC report furnished by Maverick. *Id.* On or about October 1, 2008, USIS requested Maverick to investigate Canter's dispute and Maverick reconfirmed the information it had previously submitted to USIS. *Id.* Canter filed a STAA complaint with the Occupational Safety and Health Administration (OSHA) on December 16, 2008.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the 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). In reviewing STAA cases, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Reiss v. Nucor Corp.-Vulcraft-Texas, Inc.*, ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 3 (ARB Nov. 30, 2010). The ARB reviews conclusions of law de novo. *Id.* The Board generally defers to ALJ factual findings that are based on a witness's credibility as demonstrated by the witness's demeanor or conduct at the hearing except "where the recommended decision is marked by error so fundamental that its fact findings are inherently unreliable." *Hall v. U.S. Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005, slip op. at 27 (ARB Dec. 30, 2004), *aff'd sub nom. Hall v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 476 F.3d 847 (10th Cir. 2007). The ARB issues "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).

³ Robert Roberson, who worked for Maverick as a fleet manager from December 2002 to July 2004, explained in his deposition that "deadline problems" indicates Department of Transportation violations, and that if a truck has "deadline problems" that means that the truck does not comply with those regulations. Roberson Depo. at 21 (Aug. 7, 2009).

DISCUSSION

To prevail on a whistleblower claim under the STAA, a complainant must prove by a preponderance of the evidence that: (1) he engaged in activity or conduct the statute protects; (2) the respondent took an unfavorable action against him; and (3) the protected activity was a contributing factor in the adverse personnel action. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011). Failure to prove any one of these essential elements means that a complainant cannot prevail on his retaliation claim. If, however, the complainant meets his or her burden of proof, the employer may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event. *Id.*⁴

First, the ALJ found that the claim was timely since Canter received the DAC report around July or August 2008 and filed his claim on December 16, 2008, within the 180-day statutory period. The ALJ held that Canter's receipt of the DAC report was his first actual knowledge of the negative report and thus constituted the "final, definitive, and unequivocal notice" of an adverse employment action by Maverick from which the statute of limitations period began to run. D. & O. at 9-10 (citing *Eubanks v. A.M. Express, Inc.*, ARB No. 08-138, ALJ No. 2008-STA-040, slip op. at 6 (ARB Sept. 24, 2009), *Beatty v. Inman Trucking Mgmt.*, ARB No. 09-032, ALJ No. 2008-STA-020 (ARB June 30, 2010)).

Next, the ALJ found that Canter's refusal to drive was protected under 49 U.S.C.A. § 31105(a)(1)(B)(i) because there was compelling testimony in the record that driving the truck would have violated DOT regulations. D. & O. at 12. The ALJ also found that Canter's refusal to drive was protected under 49 U.S.C.A. § 31105(a)(1)(B)(ii) because Canter had a reasonable apprehension that driving 200-250 miles to the

⁴ Congress amended the STAA's burden of proof standard, on August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). The Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to state that STAA whistleblower complaints will be governed by the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b) (Thomson/West 2007)(AIR 21), which contains whistleblower protections for employees in the aviation industry. Under the AIR 21 standard, complainants must show by a "preponderance of evidence" that a protected activity was a "contributing factor" to the adverse action described in the complaint. 49 U.S.C.A. § 42121(b)(2)(B)(i); *see also* Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Act of 1982, 75 Fed. Reg. 53544, 53545, 53550 (Aug. 31, 2010). The employer can overcome that showing only if it demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545; *see also id.* at 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii).

Middletown, Ohio terminal could result in serious injury to himself and others in part because he knew that there was a chaffing brake hose and a steering fluid leak. *Id.* at 13.

The ALJ further found that Maverick had discriminatory purpose when it took adverse action against Canter. The ALJ found that Canter put forth a prima facie case and that Maverick proffered the explanation that it placed the abandonment notation on Canter's DAC report merely as a piece of relevant information about Canter's employment history and that it did not know that Canter had safety concerns related to the abandonment. *Id.* at 14.

Finally, the ALJ held that Canter met his burden of proving that his protected activity motivated the Respondent's actions in placing the abandonment notation in the DAC report. The ALJ discounted Maverick's proffered explanation that it placed the abandonment notation on Canter's DAC report merely as a piece of relevant information about his employment history and his assertion that the Respondent did not know that Canter had safety concerns related to the abandonment, citing the fact that although Maverick requested Canter to return the truck to Middletown, Ohio, after he quit, Maverick was aware of the extenuating circumstances that led to Canter's refusal to drive, including Canter's concerns that the truck had "too many deadline problems" and was thus unsafe to drive. *Id.* at 14-15. Given the seriousness of the matter and that the truck had recently been involved in a fatal crash, the ALJ found that Canter was justified in refusing to drive the truck 200-250 miles rather than the 9 miles to another authorized location. *Id.* at 15. Consequently, the ALJ concluded that Maverick's decision to place an abandonment notation on Canter's DAC report was motivated, at least in part, by discriminatory purpose, rather than the proffered explanation that the notation was simply an effort to accurately record Canter's employment history. *Id.*

Having found that the Respondent retaliated against Canter in violation of STAA's whistleblower protection provisions, the ALJ awarded Canter back pay, interest on the damage award, attorney's fees and costs, and ordered abatement of the violation. *Id.* at 15-19. The ALJ ordered Maverick to pay Canter \$55,136.49 for back pay through August 21, 2010, and \$585.70 per week from August 21, 2010, until the DAC report is corrected or Canter receives comparable employment, whichever occurs first. The ALJ found that Canter failed to provide sufficient data to calculate a front pay award and denied the claim for front pay. The ALJ awarded \$75,000.00 in compensation for Canter's emotional distress but denied Canter's request for punitive damages. The ALJ awarded interest on his recovery and directed Canter to file a petition for attorney's fees and costs. Finally, the ALJ directed Maverick to post notice of the ALJ's decision in all places where employee notices are customarily posted and to take such measures as were necessary to delete the abandonment notation from Canter's DAC report.

On appeal, Maverick made essentially the same arguments that it did before the ALJ. After careful review of these arguments and the record on appeal, we nevertheless find that the ALJ's determinations that Canter's claim was timely filed, that Canter engaged in STAA-protected activity, and that Canter's protected activity was a

contributing factor in the adverse action Maverick took against Canter are supported by the substantial evidence of record and in accordance with applicable law.⁵ Further, because Canter demonstrated pretext by substantial evidence, Maverick did not, and could not, prove by clear and convincing evidence that it would have placed the adverse report in DAC absent protected activity.⁶ See *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074; ALJ No. 2006-AIR-014, slip op. at 18 (ARB Sept. 30, 2009).

We also affirm the ALJ's order of relief as supported by substantial evidence and prevailing law.

CONCLUSION

The ALJ's determination that Maverick retaliated against Canter in violation of STAA is supported by the substantial evidence of record and in accord with applicable

⁵ The ALJ failed to apply the burdens of proof standards required pursuant to the 2007 STAA amendments. See footnote 4, *supra*. In analyzing causation, the ALJ required Canter to prove that Maverick acted with a "discriminatory purpose" in deciding to place the abandonment notation on his DAC Report, see D. & O. at 13-14, rather than prove that Canter's protected activity contributed to the adverse action, *supra* n.4. The ALJ's error, however, is harmless. The "contributing factor" standard that Canter is required to meet under the 2007 STAA amendment is a lesser burden of proof than the "discriminatory purpose" or "motivating factor" standard the ALJ applied, and the "clear and convincing evidence standard [required of Maverick] is a higher burden of proof than the preponderance of evidence standard." 75 Fed. Reg. 53550. "In the review of judicial proceedings, the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowan*, 302 U.S. 238, 245 (1937). Since in this case the ALJ's findings of fact are supported by substantial evidence, and the 2007 STAA amendment employs a lesser burden of proof for complainants and a higher burden of proof for employers, the result would be no different even had the ALJ employed the correct legal standard. See *Knight v. Mills*, 836 F.2d 659, 661 n.3 (1st Cir. 1987) ("It is proper for an appellate court to affirm a *correct* decision of a lower court even when that decision is based on an inappropriate ground."); *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986) (agency may rely on harmless error rule when its mistake does not affect the result).

⁶ The ALJ concluded that "Respondent's decision to place an abandonment notation on Complainant's DAC Report was motivated, at least in part, by discriminatory purpose, rather than the proffered explanation that the notation was simply intended to record a stage in Complainant's employment history." D. & O. at 15. As explained *supra* n.4, while a lesser burden of proof for Canter than that the ALJ used applies here, substantial evidence in the record nonetheless supports the ALJ's conclusion. See D. & O. at 5-6, 14-15; see also CX-12 (final notification stating that Smith is not eligible for rehire "ever! ever!").

law. The ALJ's decision is thus **AFFIRMED**.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge