U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

TIMOTHY J. BISHOP, **ARB CASE NO. 2021-0062**

COMPLAINANT, **ALJ CASE NO. 2020-STA-00018**

v. **DATE: February 8, 2022**

UNITED PARCEL SERVICE, INC. and DARYL BRADSHAW,

RESPONDENT.

Appearances:

For the Complainant:
Paul O. Taylor, Esq. and Peter L. LaVoie, Esq.; *Truckers Justice Center*; Edina, Minnesota

For the Respondent:
Raymond Perez, Esq.; *Jackson Lewis P.C.*; Atlanta, Georgia

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Stephen M. Godek and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. Timothy Bishop (Complainant) filed a complaint under the Surface Transportation Assistance Act of 1982[1] (STAA), as amended, and its implementing regulations,[2] alleging that his former employer, United Parcel Service, Inc. (Respondent), had violated the STAA's whistleblower protection provisions by

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1 49 U.S.C. § 31105 (2007).

2 29 C.F.R. Part 1978 (2021).

terminating his employment. After a hearing, an Administrative Law Judge (ALJ) found that Respondent had not violated the STAA and denied the claim. Complainant appealed the ALJ's decision. We affirm.

BACKGROUND

Complainant worked as a feeder driver for Respondent from May 26, 1992, to June 24, 2011, and from December 1, 2013, to March 21, 2019, at Respondent's Earth City, Missouri facility.[3] Daryl Bradshaw was the business manager at the facility and Complainant's supervisor.[4] Joe Brown was the facility's labor manager.[5]

On June 24, 2011, Respondent fired Complainant for dishonesty because he reported time he had spent waiting to meet another driver to exchange trailers as on-duty time.[6] On July 29, 2011, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent had terminated his position in violation of the STAA.[7] Complainant participated in and testified in OSHA's investigation and in a hearing before an ALJ, Daniel Solomon, on June 5, 2013.[8] On November 15, 2013, the ALJ issued a decision, finding that Respondent unlawfully discharged Complainant because the recording of his waiting time as on-duty time was a protected activity.[9] The ALJ awarded Complainant damages and attorneys' fees and ordered Respondent to reinstate Complainant and expunge references to his firing from their records.[10] The ALJ also required Respondent to post copies of the decision in all places where employee

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3 Decision and Order Denying Claim (D. & O.) at 4.

4 *Id*.

5 *Id*.

6 *Bishop v. United Parcel Serv.*, ALJ No. 2013-STA-00004, slip op. at 4, 12 (ALJ Nov. 15, 2013).

7 *Id.* at 1.

8 D. & O. at 4.

9 *Bishop,* ALJ No. 2013-STA-00004, slip op. at 10, 13. The ALJ held that reporting the waiting time as on-duty time was a protected activity of accurately reporting hours on duty under 49 U.S.C. § 31105(1)(C). *Id.* at 10. The ALJ found that Complainant was not free to pursue activities of his own choosing or relieved of responsibility for his equipment while waiting to meet the driver. *Id.* at 9.

10 *Id.* at 22.

notices are customarily posted, and provide a copy to all employees in Respondent's Central Plains District.[11]

Respondent reinstated Complainant on December 1, 2013.[12] However, multiple witnesses working in the Central Plains District testified that they had not received a copy of the decision or observed copies posted with the other employee notices.[13] Respondent further failed to expunge Complainant's records.[14] A few years ago, Respondent had also failed to follow an ALJ's order to post a decision finding that it had retaliated against another Earth City driver, John Youngermann.[15]

On March 16, 2019, Complainant was in an accident while operating a tractor-trailer.[16] Complainant had fallen asleep and drove into the cable in the road's median.[17] Highway Patrol issued him a citation for crossing a lane boundary unsafely.[18] Respondent classified the incident as a "serious accident" as defined by an agreement with Complainant's union, Teamsters Local 688 (Union).[19] At the time, Complainant was a "Circle of Honor" driver, which is a designation Respondent gives to drivers with outstanding safety records.[20] On March 21, 2019, Respondent took Complainant out of service and notified him that he would be discharged, subject to a grievance process set forth in a collective bargaining agreement between Respondent and the Union.

On March 26, 2019, a local-level meeting of the Union and Respondent's management addressed Complainant's grievance with the discharge.[21] Brown, Bradshaw, and division manager Todd Hyden participated in the meeting.[22]

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11 *Id*.

12 D. & O. at 5.

13 *Id.* at 12.

14 *Id.*

15 *Id.* at 14-15.

16 *Id.* at 5.

17 Hearing Transcript (Tr.) at 367.

18 D. & O. at 5.

19 *Id.* at 29.

20 *Id.* at 5. Complainant had been involved in two accidents in 2015 and 2017, but Respondent determined that they were "unavoidable" and did not institute any disciplinary action. *Id.* at 11.

21 *Id.* at 5.

22 *Id.* at 15, 25.

Complainant said in the meeting that he "had caught himself getting sleepy and pulled over to rest" before the accident and that "he ha[d] dozed off before" while driving.[23] Brown testified that Complainant also said he thought that he might have sleep apnea and scheduled sleep test for the day after the meeting.[24] Management gave Complainant the option to resign or have a Joint Area Grievance Committee (Committee) panel hear his grievance.[25] On April 15, Complainant brought his grievance before the Committee, which consisted of three members of the Union and three managers for Respondent.[26] On April 30, the Committee heard the grievance and issued a decision upholding his discharge.[27]

On July 19, 2019, Complainant filed a complaint with OSHA. After an investigation, OSHA denied the complaint. Complainant filed objections to OSHA's finding and requested a hearing with an ALJ. An ALJ held a hearing on December 15 and 16, 2020.

ALJ DECISION

On August 17, 2021, the ALJ issued a Decision and Order Denying Claim. The ALJ first noted the parties had stipulated that Complainant engaged in protected activities when he filed his previous complaint with OSHA in 2011 and participated in the investigation and hearing for that case.[28] The parties had also stipulated that Complainant's firing in 2019 was an adverse action.[29] The ALJ noted that the parties disputed the following issues:

- Whether Complainant's recording of waiting time as on-duty time before his first discharge was a protected activity;
- Whether Respondent's decision not to reinstate Complainant after the grievance process was an adverse action;
- Whether Complainant's protected activities contributed to the adverse actions against him; and

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23 *Id.* at 24-25.

24 *Id.* at 25.

25 *Id.* at 5.

26 *Id*.

27 *Id*.

28 *Id.* at 3.

29 *Id*.

- Whether Complainant would have fired Complainant absent his protected activity.[30]

The ALJ found that Complainant's recording of waiting time as on-duty time was a protected activity because the ALJ in the previous case (ALJ Solomon) had found it was a protected activity.[31] The ALJ also found that Respondent's decision not to bring Complainant back to work after the grievance process was an adverse action.[32]

The ALJ focused on the key remaining disputed issue: whether Complainant's protected activities were contributing factors in Respondent's decision to fire and not rehire him. In addressing this issue, the ALJ discussed several pieces of circumstantial evidence. First, the ALJ found that the five years between the protected activities and the termination did not establish temporal proximity and instead weighed against a finding of contribution.[33]

Second, the ALJ found that there was no evidence of discrimination or harassment against Complainant from the time he had returned to work in December 2013 until his discharge.[34] Complainant did not allege that he was treated differently for the two previous "unavoidable" accidents he had been involved in, and he had also received a "Circle of Honor" award.[35]

Third, the ALJ discussed Respondent's failure to comply with ALJ Solomon's orders to publish the decision and expunge Complainant's record. The ALJ stated that he could infer Respondent's failure to comply with the orders as either evidence of animus or hostility towards Complainant or as indifference towards Complainant, the previous ALJ decision, and the STAA.[36] The ALJ found it more likely than not that Respondent had not complied with ALJ Solomon's orders because of its indifference due to the lack of evidence that it discriminated against Complainant when he returned to work.[37] The ALJ noted Brown testified that he did not consider

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30 *Id*.

31 *Id.* at 6. The ALJ made this finding under the doctrine of collateral estoppel. *Id.*

32 *Id*.

33 *Id.* at 10-11.

34 *Id.* at 12.

35 *Id.* at 11-12.

36 *Id.* at 13.

37 *Id.* at 14.

any prior discipline or accidents involving Complainant when deciding to discharge him and that he did not present Complainant's disciplinary record to the Committee, even though it was in his records.[38] The ALJ also found Respondent's failure to abide by an ALJ's order for Youngermann's case to be further evidence of its indifference but it did not persuade him that Respondent had any animus against Complainant.[39]

The ALJ then discussed Respondent's knowledge of Complainant's protected activity when it had discharged him. Bradshaw, Brown, and Hyden were involved in the decision to fire Complainant. Bradshaw and Brown acknowledged that they were aware of Complainant's protected activity at the time they had decided to fire him.[40] However, the ALJ found there was no evidence that any of them had personal interest in Complainant's previous discharge, treated him with any hostility, or had any motivation to retaliate against Complainant.[41] Complainant testified that Bradshaw also discharged him in 2009 for logging waiting time as on-duty time but was rehired, which the ALJ credited.[42] The ALJ acknowledged that Respondent had previously discriminated against Complainant and Youngermann for protected activity but found the lack of further discrimination after those incidents undercut the weight of that evidence.[43] The ALJ therefore found Brown, Bradshaw, and Hyden had no animus or motive to discriminate against Complainant after he returned to work in 2013.[44]

Fourth, the ALJ considered whether Respondent subjected Complainant to disparate treatment. The ALJ analyzed in detail a significant amount of evidence describing how Respondent treated other drivers after being in serious accidents. For example, Bradshaw testified that managers had some discretion in disciplining drivers involved in serious accidents. On the other hand, Brown testified that the policy was to pull from service and then terminate those drivers "to stay in line with the contract that's been negotiated."[45] Brown further testified that there are no set guidelines on whether to rehire an employee but that Respondent considers the

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38 *Id*.

39 *Id.* at 14-15.

40 *Id.* at 15.

41 *Id*.

42 *Id*.

43 *Id.* at 15-16.

44 *Id.* at 16.

45 *Id*.

driver's seniority and safety record.[46] Complainant argued that Respondent treated similarly situated drivers more favorably after being involved in serious accidents.[47] Respondent argued that those drivers were not involved in "serious at-fault accidents" or had crashes that were less problematic, and that other similarly situated drivers were treated similarly.[48] Respondent's agreement with the Union provides that a serious accident occurs when a "citation is issued and one or more motor vehicles incur disabling damage as a result of the accident requiring a vehicle to be transported away from the scene by a tow truck or other vehicle."[49]

After describing the circumstances of several of the alleged similarly situated drivers also involved in serious accidents, the ALJ found that Respondent had treated them more favorably than Complainant.[50] One driver, Sue Steininger, who also had over 20 years of employment with Respondent and had no recent avoidable accidents, received a suspension.[51] Respondent rehired three other drivers, Ronald Robinson, Andre Murphy, and Lorinda Bextermueller, who all had over 26 years of employment, after initially discharging them.[52] Robinson and Bextermueller each had two recent avoidable accidents prior to their discharge.[53] Steininger and Robinson were distracted when their accidents occurred.[54] The ALJ found that four other drivers were similarly situated because Respondent had also terminated and not rehired them for serious accidents.[55] However, those four drivers were involved in accidents that caused an individual to receive medical treatment, so the ALJ found that Steininger, Robinson, Murphy, and Bextermueller were more similarly situated.[56] None of the drivers had engaged in protected activity.[57]

The ALJ then discussed Respondent's rationale for why it treated Complainant differently. Brown testified that Complainant's accident was serious because law

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46 *Id*.
47 *Id.* at 17.
48 *Id*.
49 *Id.* at 21.
50 *Id.* at 22-23.
51 *Id.* at 17-18.
52 *Id.* at 23.
53 *Id.* at 18, 23.
54 *Id.* at 18.
55 *Id.* at 23.
56 *Id*.
57 *Id.* at 24.

enforcement issued him a citation and his truck had to be towed.[58] Brown recalled that Complainant had said at the local level hearing that he "caught himself getting sleepy and pulled over to rest."[59] Brown had also asked him if he had ever fallen asleep while driving before, to which Complainant answered that he had "dozed off before" and would pull over and take a nap when he did.[60] Brown also testified that Complainant had said he may have sleep apnea and scheduled to get tested for it the following day.[61]

Complainant denied saying that he had sleep apnea or had previously fallen asleep while driving and did not recall stating that he had an ongoing issue with tiredness.[62] Complainant admitted he had said that he previously became sleepy while driving and pulled off the road to rest.[63] Brown testified that he had decided to terminate Complainant because he "admitted he ha[d] dozed off before . . . and still continues to drive and fall[] asleep" and that Respondent "can't tolerate that kind of behavior" because it is "too dangerous."[64] Ultimately, they "didn't feel comfortable putting [Complainant] back on the road" because Complainant "hadn't taken any steps to try to rectify [his sleep issue] until he got terminated."[65]

Bradshaw testified about Complainant's issue with dozing off while driving that he had decided to terminate rather than suspend Complainant because he "would not feel comfortable putting somebody with that unaddressed condition behind the wheel of a 70,000 pounds of equipment traveling down the highway."[66] Bradshaw also explained the difference between Complainant's accident and the accidents involving Robinson and Steininger, who were distracted but awake when they crashed. Bradshaw testified that Complainant, unlike the distracted drivers, was not cognizant at all prior to the accident, and that Complainant's condition is much more difficult to address than distracted driving.[67] Bradshaw and Brown both

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58 *Id*.

59 *Id*.

60 *Id.* Brown testified that Complainant had said he took a nap on the day of the accident. *Id.*

61 *Id.* at 25.

62 *Id.* at 27.

63 *Id*.

64 *Id.* at 25.

65 *Id*.

66 *Id.* at 26.

67 *Id.* at 27.

testified that they did not discuss or consider Complainant's prior STAA claim when deciding to discharge and not rehire him.[68]

The ALJ found that Complainant had not said he previously fell asleep behind the wheel before the accident, but he did not discredit Brown's testimony that he had understood that Complainant said he fell asleep while driving before.[69] The ALJ stated that he would not upset Respondent's decision not to rehire Complainant solely because Brown misunderstood Complainant.[70] The ALJ found that Complainant, Brown, and Bradshaw were all credible witnesses.[71]

The ALJ found that Respondent's explanation for firing and not rehiring Complainant itself to be reasonable.[72] The ALJ noted the explanation made less sense when considering the similarly situated employees that Respondent had treated more favorably, including those who were also incognizant and lost control of their vehicles.[73] However, the ALJ found Respondent could reasonably conclude that a sleeping driver is far less cognizant than a distracted driver.[74] The ALJ determined that the distinction was weak, but not weak enough to be pretextual, especially considering Respondent's concern that Complainant had an unaddressed sleeping problem.[75]

Summarizing his analysis of the evidence concerning the contributing factor element, the ALJ found that 1) the lack of temporal proximity, 2) lack of discrimination after Complainant's return to work, 3) lack of retaliatory motive from the decisionmakers, and 4) the creditable explanation for terminating Complainant all weighed against a finding of contribution.[76] Although the ALJ found that Respondent treated Complainant differently than similarly situated drivers, the ALJ ultimately found that any disparate treatment was not the result

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68 *Id*.

69 *Id*.

70 *Id.*

71 *Id.* at 29.

72 *Id.* at 28.

73 *Id.* The ALJ described Steininger, Robinson, and Murphy as "incognizant" when they had their accidents. *Id.*

74 *Id*.

75 *Id*.

76 *Id.* at 29.

of his protected activities.[77] The ALJ found that Respondent's failure to abide by ALJ Solomon's orders was due to indifference and the record did not demonstrate Respondent had any animosity toward Complainant as a result of his protected activities.[78] The ALJ noted that he made his decision based on the entirety of evidence discussed, and not solely on any absence of retaliatory intent, and that the most persuasive factors were the lack of temporal proximity and lack of discrimination against Complainant after his return to work.[79]

The ALJ thus concluded that Complainant failed prove that his protected activities were contributing factors to the adverse actions and denied his complaint.[80]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated his authority to the Administrative Review Board (Board) to issue final agency decisions in STAA cases.[81] The Board will affirm an ALJ's factual findings if substantial evidence supports them.[82] The Board reviews the ALJ's legal conclusions de novo.[83]

DISCUSSION

The STAA whistleblower statute provides that an employer may not retaliate against an employee for making a complaint about the existence of a commercial motor vehicle safety violation.[84] To prevail on a STAA complaint, the complainant

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77 *Id.* at 29-30.

78 *Id.* at 30.

79 *Id*.

80 *Id.* The ALJ did not discuss whether Respondent had proved it affirmative defense.

81 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

82 29 C.F.R. § 1978.110(b); *Balazs v. Dimare Fresh, Inc.*, ARB No. 2006-0095, ALJ No. 2006-STA-00002, slip op. at 2 (ARB Sept. 28, 2007). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Menter v. N. Cty. Transp.*, ARB No. 2005-0104, ALJ No. 2004-STA-00061, slip op. at 1-2 (ARB Oct. 24, 2007) (quotation omitted).

83 *Olson v. Hi-Valley Constr. Co.*, ARB No. 2003-0049, ALJ No. 2002-STA-00012, slip op. at 2 (ARB May 28, 2004).

84 49 U.S.C. § 31105(a)(1)(A).

must prove by a preponderance of the evidence that: 1) they engaged in a protected activity, 2) that the employer took an adverse employment action against them, and 3) that the protected activity was a contributing factor to the adverse employment action.[85] If the complainant successfully meets their burden, the employer may avoid liability by proving by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.[86]

Complainant challenges several aspects of the ALJ's decision that, cumulatively, support the finding that Complainant failed to prove his protected activities were contributing factors to the adverse actions. Complainant first contests the finding that Respondent's failure to comply with ALJ Solomon's orders to distribute his decision and expunge Complainant's disciplinary record was due to indifference rather than hostility or animus toward Complainant. In support of reversing the finding, Complainant cites Brown's possession of Complainant's unexpunged record at the local level hearing and Respondent's previous retaliatory conduct towards Youngermann and him. Respondent notes the ALJ found Brown credibly testified that he did not rely on the record in deciding to discharge Complainant.

The circumstantial evidence of Respondent's previous retaliatory conduct may support Complainant's argument. However, the record does not demonstrate that any of Respondent's decisionmakers involved showed animus or hostility toward Complainant or others engaging in protected activity in the several years since his reinstatement. Complainant also does not present any direct evidence that contradicts the ALJ's finding. The ALJ's finding is supported by substantial evidence. We thus decline to reverse the ALJ's finding.

Complainant next contends that the ALJ committed legal error by failing to address why Brown had Complainant's unexpunged disciplinary record at the local level hearing and why it was not sufficient evidence to establish retaliatory intent. Respondent notes the ALJ found that Brown and Bradshaw did not discuss or consider Complainant's prior discipline, which Complainant does not dispute. The ALJ mentioned in the decision that the disciplinary record was in Brown's

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[85] 29 C.F.R. § 1978.109(a); *Estate of Ayres v. Weatherford, U.S., L.P.*, ARB Nos. 2018-0006, -0074, ALJ No. 2015-STA-00022, slip op. at 6 (ARB Nov. 18, 2020) (citing 49 U.S.C. § 42121(b)(2)(B)(iii)).

[86] 29 C.F.R. § 1978.109(b); *Blackie v. Smith Transp., Inc.*, ARB No. 2011-0054, ALJ No. 2009-STA-00043, slip op. at 8 (ARB Nov. 29, 2012).

possession at the grievance hearing.[87] Though Complainant criticizes the ALJ's lack of discussion regarding why Brown possessed the record at the hearing, an ALJ is not required to discuss every piece of evidence to develop the record fully and fairly. Rather, an ALJ only must explain the reasons for rejecting significant probative evidence.[88] Considering Brown's testimony that the managers did not refer to Complainant's previous discharge in the grievance process, his possession of the record is not particularly probative. We therefore discern no legal error in the ALJ's analysis of this issue.

Complainant next contests the ALJ's finding that Respondent's reasoning for the disparate treatment of Complainant compared to other drivers was not pretextual. Respondent explained that it did not rehire Complainant because he was incognizant, lost complete control of his vehicle during the March 16, 2019 accident, and had a preexisting problem with becoming drowsy while driving.[89] Complainant argues that the only meaningful difference between him and the drivers who were not permanently discharged was they had not engaged in a protected activity.

Respondent, however, presents details of the accidents of the drivers that were not permanently discharged to show there were meaningful differences between their accidents and Complainant's. In Steininger's case, she looked down at her phone for only a moment before rear-ending a truck and was not texting or speeding.[90] In Robinson's case, he rear-ended a truck in front of him at a stop sign when he looked left for oncoming traffic.[91] Finally, Murphy hit ice before crashing into an illegally

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87 *See* D. & O. at 14 ("Brown further testified that although [the disciplinary record] was in his records, he did not present it to the [Committee] Panel.").

88 *Bankr. Est. of Donald M. Graff v. BNSF Ry. Co.*, ARB No. 2021-0002, ALJ No. 2018-FRS-00018, slip op. at 14 n.116 (ARB Sept. 30, 2021); *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998).

89 D. & O. at 28.

90 Tr. at 153-54.

91 Complainant's Exhibit (CX) 10 at 18.

parked vehicle and was not accused of being distracted.[92] All drivers received some form of suspension, though Respondent did not discharge any of them.[93]

Complainant's disparate treatment compared to the similarly situated drivers reasonably warrants scrutiny of Respondent's decision to permanently discharge Complainant. However, the details surrounding each employees' accident makes Respondent's decision more understandable. None of the drivers that Respondent suspended or rehired were totally unconscious when they crashed, while, in contrast, Complainant was asleep at the wheel.

Respondent's managers therefore had a right to be concerned with Complainant's conduct that led to the accident. Though the ALJ found Brown had misunderstood Complainant when he thought Complainant said he fell asleep at the wheel before, the misunderstanding would not make Complainant's firing unlawful.[94] The ALJ's finding is supported by substantial evidence. We therefore affirm the ALJ's finding that Respondent's reasoning for Complainant's disparate treatment was not pretextual.

Last, Complainant contests the ALJ's ultimate finding that he failed to prove his protected activities had contributed to Respondent's decision to discharge and not rehire him. Complainant cites several pieces of evidence that he claims supports finding contribution, including the previous retaliatory conduct at the Earth City facility, Respondent's failure to comply with multiple ALJ orders, Brown's possession of the disciplinary record at the hearing, and the disparate treatment of Complainant.

We agree with the ALJ's conclusion that the protected activities were not contributing factors in the adverse actions based his findings on the lack of 1) temporal proximity, 2) retaliatory animus or motivation by Respondent's managers, and 3) discriminatory conduct after Complainant's return to work. We defer to the

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92 Tr. at 69-72; D. & O. at 19 ("He was cognizant of what was taking place.").

93 D. & O. at 17-19. The ALJ did not describe the circumstances of Bextermueller's accident besides that it was serious and that her discharge was reduced to a suspension. *Id.* at 19. The record only provides that she was distracted and looking down before the crash. CX 7 at 2-3, 21.

94 *See Muzyk v. Carlsward Transp.*, ARB No. 2006-0149, ALJ No. 2005-STA-00060, slip op. at 7 n.31 (ARB Sept. 28, 2007) (quoting *Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1507-08 (5th Cir. 1988)) ("[S]tatute cannot protect employees 'from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated.'").

ALJ's credibility determinations. Though possibly probative, the evidence cited by Complainant is not direct or significant enough to compel us to reverse the ALJ's finding. Therefore, we conclude the ALJ's finding is free from legal error and is supported by substantial evidence.

Accordingly, we **AFFIRM** the ALJ's Decision and Order Denying Claim.[95]

SO ORDERED.

[95] In any appeal of this Decision and Order that may be filed with the Courts of Appeals, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).