U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

PETER KLOSTERMAN,

COMPLAINANT,

v.

E.J. DAVIES, INC.,

RESPONDENT.

ARB CASE NO. 08-035

ALJ CASE NO. 2007-STA-019

DATE: September 30, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Joseph J. Ranni, Esq., ***Jacobowitz and Gubits, LLP,*** **Walden, New York**

For the Respondent:
Richard M. Ziskin, Esq., ***The Ziskin Law Firm,*** **Commack, New York**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; Joanne Royce,** ***Administrative Appeals Judge*****; and Luis A. Corchado,** ***Administrative Appeals Judge*****.**

FINAL DECISION AND ORDER AFFIRMING, IN PART, VACATING, AND REMANDING, IN PART

Peter Klosterman filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, E.J. Davies,

Inc., violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified, and its implementing regulations, when E.J. Davies terminated his employment in retaliation for protected activities. 49 U.S.C.A. § 31105 (Thomson/West 2007); 29 C.F.R. Part 1978 (2009). After finding the complaint timely, a Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Klosterman's complaint after a hearing because she found that Klosterman failed to establish by a preponderance of the evidence that E.J. Davies took any adverse action against him. We affirm only in part. We find that E.J. Davies took adverse action against Klosterman by discharging him. Further, because the ALJ did not make the determinations necessary to reach a conclusion as to whether Klosterman engaged in protected activity or whether E. J. Davies took adverse action against him *because* of protected activity, we remand for further consideration.

BACKGROUND

1. Timeliness

Klosterman alleged that Fred Vordermeier, owner of Respondent company, E.J. Davies, Inc., terminated his employment on December 20, 2005, after he refused to drive an unsafe truck. Recommended Decision & Order (R. D. & O.) at 1. The record shows that he filed his complaint on October 17, 2006. R. D. & O. at 1. He made telephone calls to OSHA and made oral complaints on March 29, 2006; May 9, 2006; and August 30, 2006. R. D. & O. at 21; CX 8. During the March 29, 2006 call, he told an OSHA representative the facts about his safety complaints. R. D. & O. at 21; CX 8. He also sent a letter detailing his complaints after the March 29, 2006 call. R. D. & O. at 21; CX 8. Klosterman set forth in an affidavit that he wrote and sent such a complaint. R. D. & O. at 3. OSHA does not have any written record of a complaint before October 17, 2006. R. D. & O. at 2.

OSHA dismissed the complaint as untimely. The ALJ found that Klosterman made oral complaints to OSHA within the statutory time period and that, therefore, his complaint was timely.

2. Employment

Klosterman worked for E.J. Davies as shop steward under a union contract. R. D. & O. at 8. Under the union contract the shop steward was the first employee to get work, was the last to be laid off, and could not be discharged unless the matter was submitted to an impartial arbitrator who authorized discharge. R. D. & O. at 8.

The ALJ found that all of the witnesses agreed that during his employment, Klosterman made many complaints to his employer, Fred Vordermeier, about the condition of E.J. Davies' vehicles and that the complaints included allegations that the vehicles were unsafe. R. D. & O.

at 23. Vordermeier was unresponsive to Klosterman's complaints at times. R. D. & O. at 25; Tr. 457. The Department of Transportation inspected the E.J. Davies' jobsite and found that the trucks had significant violations. R. D. & O. at 25; RX W; Tr. 162-63, 467. Edward Casale, witness for the Respondent, testified that some of E.J. Davies' trailers had been badly damaged and were unsafe. R. D. & O. at 16. Additionally, Vordermeier admitted that some of Klosterman's complaints regarding safety were valid. R. D. & O. at 18.

The ALJ found that "the Complainant's concerns regarding the condition of the Respondent's vehicles were often justified and were not always addressed satisfactorily." R. D. & O. at 20.

Vordermeier wanted to appoint someone other than Klosterman as shop steward. R. D. & O. at 25; CX 11. He wrote a letter about Klosterman on December 19, 2005, addressed to Louis Bisignano, the union representative. CX 11. In the letter he refers to a conversation that occurred between Bisignano and himself that day and states that it was time for the union to take a stand on the situation. *Id.* He also stated that it would be in the best interests of both the union and E.J. Davies for Klosterman to be replaced. *Id.* Vordermeier did not send the letter. R. D. & O. at 18-19, 25. He thought that replacing Klosterman would make working with customers easier. R. D. & O. at 25. Also, if Klosterman was no longer shop steward he would no longer be the first man to drive and Vordermeier would not be confronted as often with Klosterman's concerns about the condition of the vehicles and equipment. R. D. & O. at 25.

On December 20, 2005, Klosterman complained to Vordermeier about his assigned truck's condition, and told Vordermeier that it had a flat tire. R. D. & O. at 24; Tr. 84-87. The evidence is in conflict as to whether the truck had a flat tire, and the ALJ did not make a determination regarding it. R. D. & O. at 24. Vordermeier conceded that Klosterman and Vordermeier had an argument on December 20, 2005, regarding E.J. Davies' vehicles. R. D. & O. at 23.

After Klosterman complained about a flat tire on his truck, Vordermeier refused to assign him to a different truck and told Klosterman that if he did not want to drive his assigned vehicle, he should leave. R. D. & O. at 24; Tr. 87. Vordermeier's "drive or go home" statement was made specifically in response to Klosterman's comments about his truck. R. D. & O. at 24. Klosterman walked out and never worked for E.J. Davies again. R. D. & O. at 24-25; Tr. 261, 339.

After Klosterman left E.J. Davies, on the same day, Vordermeier drafted a letter to Bisignano characterizing Klosterman's departure as quitting his employment. RX E. The ALJ was not convinced that Klosterman said he "quit." R. D. & O. at 24.

On December 20, 2005, after being instructed to "drive or go home," Klosterman contacted his union representative Bisignano, regarding his possible remedies. R. D. & O. at 26. Bisignano told Klosterman that Vordermeier told him that Klosterman had quit. R. D. & O. at 14. Klosterman told Bisignano that he had not quit, he had simply refused to drive an unsafe vehicle. R. D. & O. at 14. Bisignano told Klosterman that he was going to look into the matter. R. D. & O. at 12.

Klosterman and his counsel attempted on many occasions to compel the union to intervene on Klosterman's behalf because he refused to drive unsafe equipment at E. J. Davies. R. D. & O. at 9; RX Z. He also attempted to file grievances that the union did not accept. R. D. & O. at 9. At some point after January 31, 2006, Bisignano told Klosterman that he was required to "shape" (present himself at the worksite for work every morning) in order to have the union file a grievance on his behalf. R. D. & O. at 26.

After a hearing, the ALJ found that Klosterman failed to establish by a preponderance of the evidence that Vordermeier discharged Klosterman. Rather, she found that Klosterman voluntarily quit. The ALJ found that Vordermeier's "drive or go home" statement was made as a result of overall impatience and frustration with Klosterman based on the pattern of the relationship between the parties. R. D. & O. at 24.

The ALJ concluded that Klosterman's actions on December 20, 2005, could lead a reasonable person to infer that he had quit, in light of prior statements Klosterman made that he was going to quit or look for work elsewhere. R. D. & O. at 24. The ALJ also concluded that Klosterman's conduct after December 20, 2005, was consistent with voluntary relinquishment of his job because he did not "shape" after that day. R. D. & O. at 25.

The ALJ found that it was unlikely that Klosterman was constructively discharged because Klosterman was aware that Vordermeier did not have the power to unilaterally fire him under the union contract and should have been aware that his job required shaping to preserve his employment and seniority rights. R. D. & O. at 25.

The ALJ found that while Vordermeier wanted Klosterman removed as shop steward, there was no credible evidence that Vordermeier took any deliberate action to remove him. R. D. & O. at 25. She also found that while Vordermeier failed to maintain his trucks, there was no credible evidence that it was deliberate or intended to induce Klosterman to quit his job.

3. Blacklisting/license suspensions

Klosterman's driver's license was suspended twice for failure to pay a fine because Vordermeier failed to pay the fines for two tickets Klosterman received while working. R. D. & O. at 27. The suspensions were cleared in October 2004 and May 2005.

Klosterman believed that Vordermeier and the union retaliated against him after his last day of employment with E.J. Davies and that as a result, he could not find work. R. D. & O. at 12. The ALJ found that Klosterman failed to establish by a preponderance of the evidence that Vordermeier blacklisted him in retaliation for protected activity. She found that the events of December 20, 2005, did not play a role in Vordermeier's failure to pay the fines for the two tickets because they were each cleared prior to December 20, 2005.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority and assigned responsibility to the Administrative Review Board (ARB or the Board) to act for the Secretary of Labor, in review or on appeal, including, but not limited to, the issuance of final agency decisions. 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 an ALJ's recommended STAA decision. 29 C.F.R. § 1978.109(c)(1). 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).

THE LEGAL STANDARDS

The STAA provides that an employer may not "discharge an employee, or discipline or discriminate against" an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" or who "refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;" or who "refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. § 31105(a)(1).[1]

To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity and took an adverse employment action against him, and that the adverse action taken against him was *because* of his protected activity. *Formella v. Schnidt Cartage, Inc.*, ARB No.

[1] Although STAA has been amended, we are applying the pre-amendment version of law because the claim arose prior to the amendments. *See* 49 U.S.C.A. § 31105 (Thomson/West Supp. 2010); 29 C.F.R. Part 1978 (2009).

08-050, ALJ No. 2006-STA-035, slip op. at 4 (ARB Mar. 19, 2009) (citing *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004)); 49 U.S.C.A. § 31105(b)(1). If the employee does not prove one of these requisite elements, the entire claim fails. *See West v. Kasbar, Inc. /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

Under the STAA, any discharge by an employer constitutes an adverse action. *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 15 (citations omitted) (Oct. 31, 2007). A discharge is any termination of employment by an employer. *Minne*, ARB No. 05-005, slip op. at 13. Under Board precedent, "except where an employee actually has resigned, an employer who decides to interpret an employee's actions as a quit [sic] or resignation has in fact decided to discharge that employee." *Minne*, ARB No. 05-005, slip op. at 14 (citations omitted).

If the respondent presents evidence of a nondiscriminatory reason for discharging him, the complainant can prevail if he proves, by a preponderance of the evidence, that the reason the respondent proffered is a pretext for discrimination. *See Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 5 (ARB Nov. 27, 2002) (citing *Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). In proving that an employer's asserted reason for adverse action is a pretext, the complainant must prove not only that the respondent's asserted reason is false, but also that discrimination was the true reason for the adverse action. Klosterman bears the ultimate burden of persuading the ALJ that E.J. Davies discriminated against him. *Calhoun*, ARB No. 00-026, slip op. at 5, citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

If, however, the ALJ concludes that the employer was motivated by both a prohibited and a legitimate reason (has mixed or dual motives), the employer may escape liability by demonstrating by a preponderance of the evidence that the employer would have taken the same unfavorable personnel action in the absence of the protected activity. *Muzyk v. Carlsward Transp.*, ARB No. 06-149, ALJ No. 2005-STA-060, slip op. at 5 (ARB Sept. 28, 2007).

DISCUSSION

The ALJ appropriately found that, beginning in March 2006, Klosterman contacted OSHA and made allegations regarding retaliation. The ALJ also recognized that the exact nature of these allegations was unclear but, at a minimum, they included references to the incidents on December 20, 2005, and thereafter. As discussed further below, it is possible to resolve the timeliness issue despite the ambiguity regarding Klosterman's complaints to OSHA.

However, to properly analyze the merits of this case, it is necessary for the ALJ to crystallize further the elements of Klosterman's complaints. In other words, did Vordermeier

discriminate against Klosterman on December 20, 2005, because Klosterman engaged in protected activity? If so, did the protected activity occur before and/or on that day? What was the nature of any protected activity that occurred? What were the effects of the adverse action on Klosterman and how long did they last? Was there any adverse action taken against Klosterman other than his discharge?

Clear findings are necessary regarding these issues. In analyzing these questions, we believe that the facts and discussion in the *Minne* opinion are strikingly similar and instructive. Below, we affirm the ALJ's finding on timeliness and blacklisting; however, like the panel in *Minne*, we remand the case for further determinations pertaining to alleged protected activity, and discriminatory treatment on and after December 20, 2005, caused by protected activity.

1. Timeliness

December 20, 2005, appears to be the focal point of Klosterman's whistleblower claims to OSHA. R. D. & O. at 1. Consequently, Klosterman was required to file a sufficiently clear complaint within 180 days of December 20, 2005, to obtain redress for the illegal treatment he allegedly suffered on that day and thereafter. The record shows that he filed his written complaint on October 17, 2006. R. D. & O. at 1. The ALJ found that Klosterman called OSHA several times, beginning on March 20, 2006, and that he testified credibly that he had several phone conversations with OSHA representatives, including complaints that he suffered retaliation and was denied assignments beginning on December 20, 2005. R. D. & O. at 21-22. The ALJ noted that under the Act and the regulations, a written complaint is not required, the complaint procedure is informal, and oral complaints have been determined to be sufficient. R. D. & O. at 21-22.

E. J. Davies asserts that Klosterman's April 2006 letter to the DOT did not allege that he had been subject to discrimination. The Respondent argues that Klosterman's claim is time barred because he has not complained of any circumstances that would justify equitable tolling, he voluntarily quit his employment on December 20, 2005, he does not have any written accounts of his alleged complaints made by phone, and he was represented by private counsel as of January 31, 2006, as evidenced by letters between his counsel and the union, the DOT, and OSHA between January 2006 and September 2006.

The ALJ stated that under the STAA and the regulations, a written complaint is not required. Based upon Klosterman's testimony and the phone records he presented, she found he called OSHA several times, that the phone calls that Klosterman made were valid complaints, and that Klosterman's complaint was timely. R. D. & O. at 22.

The regulations at 29 C.F.R. § 1978.102(b) state that "[n]o particular form of complaint is required." Klosterman made two oral complaints that were timely. Thus, we affirm the ALJ's

finding that Klosterman's complaint about discriminatory treatment occurring on December 20, 2005, and thereafter, was timely.

2. Discriminatory Treatment

A. *Protected activity*

It is undisputed that Klosterman engaged in protected activity before December 20, 2005. R. D. & O. at 23. The parties dispute the nature of Klosterman's activities of December 20, 2005. Klosterman argued that he engaged in protected activity when he made complaints about E.J. Davies' vehicles and when he refused to drive on December 20, 2005, because of a flat tire. The ALJ did not make a specific determination as to whether any of Klosterman's complaints or his refusal to drive constituted protected activity. Because we find that there was testimony about safety complaints and an adverse action in this case, we remand for findings of fact regarding whether Klosterman in fact also engaged in protected activity on December 20, 2005.

B. *Adverse action*

Before analyzing whether there was any adverse action, we again note the significance of Vordermeier's written desires on December 19, 2005, the day before the focal point of this case. Vordermeier clearly wrote that he thought "that replacing Peter Klosterman will be in the best interest of both [E.J. Davies] and the union." There is no dispute that Vordermeier wrote this document. The dispute centers on whether Vordermeier took any action to fulfill his goal to get rid of Klosterman.

Turning to the critical last day of work, the ALJ found that Klosterman complained to Vordermeier on December 20, 2005, about the condition of the truck he was to drive. R. D. & O. at 24. She also found that Voldermeier told Klosterman to drive it or go home. R. D. & O. at 24. The ALJ found that Klosterman walked out when Vordermeier refused to assign him to a different truck. R. D. & O. at 24. After Klosterman left, Vordermeier sent a letter to Bisignano stating that Klosterman had quit and was no longer employed with E.J. Davies. R. D. & O. at 18; RX E. Implicit in the ALJ's findings is the reasonable inference that Vordermeier affirmatively took steps to perfect the end of Klosterman's employment by exploiting Klosterman's ambiguous departure on December 20, 2005.

The ALJ concluded "that Vordermeier's actions did not constitute an actual discharge of the Complainant." R. D. & O. at 24. She instead concluded that Klosterman voluntarily abandoned his job. R. D. & O. at 26. Thus, the ALJ concluded that Klosterman had not been subject to adverse action.

We accept the relevant factual findings of the ALJ as being supported by substantial evidence. 29 C.F.R. § 1978.109(c)(3). A determination as to whether there has been adverse action is a legal conclusion, which we review de novo. *Minne*, ARB No. 05-005, slip op. at 12 n.14. Based on the ALJ's findings and the exercise of our de novo review of the legal issues, we conclude, unlike the ALJ, that Klosterman was in fact discharged. Discharge constitutes an adverse action under the STAA. 49 U.S.C.A. § 31105(a)(1).

As explained above, under Board precedent, "an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee." *Minne*, ARB No. 05-005, slip op. at 14. *See also Ass't Sec'y & Vilanj v. Lee & Eastes Tank Lines, Inc.*, 1995-STA-036, slip op. at 4-6 (Sec'y Apr. 11, 1996) (employer violated the STAA when it reacted to complainant's refusal to drive by "consider[ing] [complainant] to have voluntarily quit" rather than by addressing condition complainant had raised, thus by implication employer engaged in adverse action by deciding that complainant had "quit"); *Ass't Sec'y & Lajoie v. Envtl. Mgmt. Sys., Inc.*, 1990-STA-031, slip op. at 5-6 (Sec'y Oct. 27, 1992) (overturning ALJ's determination that employee had "voluntarily quit," the Secretary held that employer had "engaged in adverse action" by "discharg[ing]" employee when employer "was not willing to address [employee's] complaint and considered [complainant] discharged if he failed to capitulate" by driving even though employer had not addressed complainant's concern); *Fronczak v. N.Y. State Dep't of Corr. Servs.*, 2 Fed. Appx. 213, 215-17 (2d Cir. 2001) (unpublished).

In *Minne*, the complainants James Minne and Robert Privott drove to and from gun shows and sold guns for Star Air, Inc. *Minne*, ARB No. 05-005, slip op. at 2 (citing R. D. & O. at 4). On his way to one of the gun shows, Privott received a warning citation for driving a load in excess of 10,000 pounds without a Class A Commercial Driver's License, for not displaying the name of the company, its home base, or its Department of Transportation number, and for not carrying a log book. *Id.* at 2. Because his supervisor did not address issues with his truck, Privott became concerned that the truck did not comply with all applicable regulations, including hazardous materials regulations. *Id.* at 3. Privott told his supervisor that he was not willing to drive the truck if it was not in compliance. *Id.* a 4. Privott did not make a scheduled trip to Indianapolis because the truck was not in compliance. *Id.* at 4. The next day, Star Air placed a hold on Privott's credit card and did not assign Privott any more work. *Id.* at 4.

Privott called Minne while Minne was on the way to a gun show and told him that he received a citation. *Id.* at 5. Minne called his supervisor and told him that he was returning to the worksite rather than continuing to the gunshow and risking a citation. *Id.* at 5. He told his supervisor that he would drive for Star Air, but that he would not drive illegally. *Id.* at 5. Star Air assigned other drivers to drive to the remainder of Minne's scheduled shows and deactivated his company credit card. *Id.* at 6. Minne called his supervisor and asked if the vehicles were compliant and during this conversation it became apparent to him that Star Air had no interest in

making them compliant. *Id.* at 6. Minne was thereafter removed from Star Air's payroll. *Id.* at 6. He did not return to work because vehicles were still operating illegally. *Id.* at 6.

The ARB overturned the ALJ's determination that Privott and Minne had "decided not to return to their jobs," when Star Air chose to react to their refusals to drive "by considering them to have resigned, rather than by addressing all the issues they had raised." *Id.* at 14. Citing Board precedent, the ARB held that "except where an employee has actually resigned, an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee." *Id*. at 14 (citations omitted). Thus, the Board held that Star Air's decision to remove Privott and Minne from the payroll rather than address the issues they had raised constituted a decision to terminate their employments for what Star Air presumed was job abandonment. *Id*. at 15. Therefore, the Board found adverse action. *Id*. at 15-16.

As demonstrated in *Minne*, it is the supervisor's behavior (in this case, Vordermeier's), rather than the employee's, which ultimately ended the employment relationship. After Vordermeier told Klosterman to drive or go home, and Klosterman opted to go home, Vordermeier chose to interpret Klosterman's refusal to drive by considering him to have quit, rather than by addressing the issue that he raised. Under these circumstances, Vordermeier effectively discharged Klosterman. *See Ass't Sec'y & Lajoie*, 1990-STA-031, slip op. at 5-6 (overturning ALJ's determination that employee had "voluntarily quit," the Secretary held that employer had "engaged in adverse action" by "discharg[ing]" employee when employer "was not willing to address [employee's] complaint and considered [complainant] discharged if he failed to capitulate" by driving even though employer had not addressed complainant's concern).

The ALJ's own findings establish that Vordermeier took deliberate actions to perfect the termination of Klosterman's employment.[2] Vordermeier immediately considered the refusal to drive to constitute quitting as evidenced by his letter of the same day to Bisignano stating that Klosterman had quit.[3] Bisignano then told Klosterman that Vordermeier stated that he quit and was no longer employed at E.J. Davies. Since Klosterman was told that Vordermeier did not consider him an employee, it is understandable that he did not continue to consider himself one.

Based on our de novo review of the ALJ's conclusion of law regarding adverse action, we conclude that Vordermeier terminated Klosterman's employment (i.e., "discharged" him)

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[2] We find very significant the letter Vordermeier drafted on December 19, 2005, as evidencing clearly a state of mind predisposed to remove Klosterman as a shop steward and potentially from employment.

[3] Vordermeier's hearing testimony implied that Bisignano had coached him on how to get rid of Klosterman: "[I] put it in writing like [Bisignano] said [I] should put it in writing because [I]know [I] don't have the power to fire a shop steward . . . ." Tr. at 418-419.

when he told him to drive or go home and then immediately considered that Klosterman had voluntarily quit. *Ass't Sec'y & Lajoie*, Sec'y 1990-STA-031, slip op. at 5-6. Thus, Vordermeier committed an adverse action by discharging Klosterman on December 20, 2005.

C. *Causation*

To show that an employer retaliated in violation of the STAA, a complainant must show that the employer took adverse action against that complainant because of protected activity. The ALJ did not make findings regarding causation due to protected activity because she determined that there was no adverse action by too narrowly focusing on the issue of "discharge" and too narrowly defining the term "discharge." Therefore, given our finding of an adverse action through the discharge and the ALJ's findings of protected activity occurring before December 20, 2005, the ALJ on remand should determine: 1) whether Klosterman engaged in protected activity on December 20, 2005, and 2) whether this activity or his previous protected activity caused the discharge or any other adverse action.

We note that the ALJ found that Vordermeier's frustration with Klosterman was the reason for the December 20, 2005 action terminating Klosterman's employment. The ALJ's findings support a reasonable inference that Klosterman's complaints before and on December 20, 2005, were part of the reason for Vordermeier's frustration. These findings, therefore, necessarily make this a mixed motive case given the protected activity occurring before and potentially on December 20, 2005.

3. Blacklisting/license suspensions

The ALJ found that Klosterman failed to establish by a preponderance of the evidence that Vordermeier blacklisted him. She also found that the events of December 20, 2005, did not play a role in Vordermeier's failure to pay the fines for the two tickets because they were each cleared prior to December 20, 2005. As substantial evidence supports these findings, we affirm the ALJ regarding blacklisting and Klosterman's license suspension.

CONCLUSION

Klosterman filed a valid and timely discrimination complaint with OSHA on March 29, 2006, and May 9, 2006. Substantial evidence supports the ALJ's findings that Klosterman failed to establish that Vordermeier or anyone at E.J. Davies blacklisted him, and that there was no retaliation when Vordermeier failed to pay Klosterman's traffic violation fines. We therefore **AFFIRM** the ALJ's R. D. & O. in part.

Whether E.J. Davies violated the STAA when it terminated Klosterman's employment cannot be decided without additional findings by the ALJ as described above. We therefore **VACATE** the dismissal of Klosterman's claims and **REMAND** for further proceedings consistent with this decision.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge