DATE: December 4, 1996

CASE NO. 94-STA-35

In the Matter of

EDWIN I. PLUMLEY

Complainant

v.

TANKNOLOGY CORPORATION INTERNATIONAL

Respondent

Appearances:

Edwin I. Plumley
Marion, Ohio
Pro Se

David A. Kadela, Esq.
Schottenstein, Zox & Dunn
Columbus, Ohio
For the Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises under the Surface Transportation Assistance Act of 1982 (hereinafter "STAA"), 49 U.S.C. Section 2305 and the Regulations found at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules.

Edwin I. Plumley (hereinafter "Plumley") filed a telephone complaint with the Secretary of Labor, Occupational Safety and Health Administration (hereinafter "OSHA") on January 5, 1993, alleging that Respondent, Tanknology Corporation International, (hereinafter "Tanknology") discriminated against him in violation of Section 405(b) of the Act. Plumley contends that he was discharged for complaining to management about working extended hours which was a violation of Department of Transportation regulations. The Secretary of Labor, acting through his duly authorized agent, investigated the complaint and on May 27, 1994,

determined that there was not sufficient evidence to believe that Tanknology had violated § 405 of the Act. (ALJX 5) Plumley filed objections to the Secretary's findings by way of letter received on June 27, 1994, and requested a hearing before an Administrative Law Judge.

A formal hearing commenced on June 21, 1995, in Worthington, Ohio, where the parties were afforded full opportunity to present evidence[1] and argument. The Findings of Fact and Conclusions of Law which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes and case law. Each exhibit received into evidence has been carefully reviewed.

## ISSUES

1. Whether Tanknology Corporation International violated § 405 of the Act by discharging, disciplining or in any manner discriminating against Edwin I. Plumley for engaging in a protected activity;

2. Whether informal complaints addressed to an employee who has no authority to discharge the complainant are protected; and

3. Whether Edwin I. Plumley's claim is barred in whole or in part by evidence of alleged factual misrepresentations which appeared on his employment application but were only discovered subsequent to the time of his discharge.

## STIPULATION OF FACTS

1. The Office of Administrative Law Judges, U.S. Department of Labor has jurisdiction over the parties and the subject.

2. Tanknology Corporation International is engaged in interstate trucking operations and is an employer subject to the Surface Transportation Assistance Act (hereinafter STAA of 1982. (49 U.S.C. § 2305)

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[1]In this decision, "JX" refers to Joint Exhibits, "ALJX" refers to the Administrative Law Judge’s Exhibits, "CX" refers to claimant’s exhibits, "RX" refers to respondent’s exhibits and "Tr." to the Transcript of the hearing.

3. Edwin I. Plumley is now, and at all times material herein, a "person" as defined in § 401(4) of STAA 49 U.S.C.

4. Edwin I. Plumley was an employee of Tanknology Corporation International during the applicable periods in that he was employed as a driver of a commercial motor vehicle having a gross vehicle weight rating of 10,000 or more pounds which was used on the highways in interstate commerce to transport cargo at various times during the course of his employment.

5. Pursuant to § 405 of the STAA, Edwin I. Plumley filed a complaint on January 5, 1993 with the Secretary of Labor alleging that he was fired because he complained to management about working over-hours which is a violation of Department of Transportation regulations.

6. The original complaint filed with the Secretary was timely.

7. Following an investigation, the Regional Administrator, Occupational Safety and Health Administration, issued his findings on the complaint on May 27, 1994.

8. Complainant received those findings by mail on or about two weeks after it was mailed.

9. Complainant mailed an appeal and request for hearing to the Chief Administrative Law Judge. U.S. Department of Labor, Washington, D.C. on June 24, 1994.

10. The appeal of the Complainant satisfied the 30-day time constraints provided by 29 C.F.R. § 1978.105(a).

## FINDINGS OF FACT

Tanknology is an environmental company which tests underground storage tanks and their product lines for leaks in order to guarantee compliance with federal regulations. It does business with both small and large companies who may own underground storage tanks including oil companies such as Shell, British Petroleum, Mobil, Amoco, Chevron, Texaco and all of the large gasoline chains. It is a publicly traded company with headquarters in Houston, Texas. In 1992, Tanknology had a divisional vice president overseeing the East Coast, Midwest and Canada; a regional manager

located in the Midwest Region, together with three operation managers beneath him. The operations managers scheduled the unit managers who are the technicians performing the work in the field. Trainees work under the direct supervision of the unit managers. The unit managers drive a truck which is fully equipped to do all of the tank and line testing. They travel from location-to-location on a day-to-day basis and perform the tests.

On March 26, 1992, Plumley filed an employment application with Tanknology in which he sought a position as a tank and line tester. The application shows that since April of 1991, he had been employed as a line tester for NDE Testing which is a company located in New Jersey. Plumley represented on the application that he was a high school graduate who was earning $26,000.00 per year. In August, 1992, Plumley was interviewed by David Blake who was the manager of Tanknology's Columbus office and Mr. Blake offered Plumley a position as a unit manager trainee. Plumley was advised to report on September 8, 1992 to unit manager, Greg Baker. He was compensated at the rate of $26,000 per year.

Plumley lied on both his employment application (JX 8) and also his resume. (RX 1) He believes that an employer is entitled to an honest answer on an employment application depending upon the nature of the question being asked. (Tr. 102) On both his employment application and his resume, Plumley had represented that he was a high school graduate, when in fact, he had dropped out of high school in the ninth grade. (Tr. 103, 104) Plumley also misrepresented the amount of his salary or compensation paid by NDE Testing in that his employment application showed $26,000.00 when in fact, he was earning $22,000.00. (Tr. 105) The employment application contains the following statement:

> I hereby certify that all statements made by me in connection with my application for employment with Tanknology Corporation International are true and without consequential omissions of any kind. I understand that any falsification may lead to my termination. I agree that the company shall not be liable in any respect if my employment is terminated because of the falsity of statements, answers, or omissions made by me in this questionnaire, or with respect to my physical examination. . . . I further understand that any employment offered to me will not be for any definite period of time and is subject to termination, with or without cause, by the company or by my own election at any time. . . .

(JX 8) Plumley also had misrepresented on employment applications with other employers that he had graduated from high school. (JX 9 and 10)

During the first six weeks of training with Tanknology, Plumley trained with Baker. His routine was to drive from his home

in Marion, Ohio to the Pittsburgh, Pennsylvania area where Baker lived and the two of them then would use a company test van and proceed from site to site conducting the testing. Baker gave Plumley no assignments but simply worked along side him. At the conclusion of the week, Baker and Plumley would drive to Plumley's automobile in the Pittsburgh area where Plumley would then drive home. Plumley began keeping personal work records of hours worked starting on September 14, 1992. (JX 4) The records noted the nature of the work performed and also the total hours worked for the day.

While working as a tank and line tester, the job entailed testing underground storage tank systems including ten to twelve thousand gallon tanks and also the lines from those tanks that run to the dispensing unit. So the testing included both the line and the tank itself. The testing was to determine whether the tank or the line had leaks. Plumley had considerable experience in both tank and line testing prior to his employment with Tanknology. He was employed by three different tank testing companies before he worked for Tanknology. He also was involved in supervisory responsibilities in his earlier jobs. He was aware that a tank testing employee was required to work in travel status away from home five to six days a week. The work was in a several state area and when Plumley accepted the job with Tanknology, he was aware that the hours were long and unusual. When he accepted the job, because of his earlier experience, he realized that a tank and line tester requires an individual to be honest, someone who listens and follows directions, who is a team player, considerate of other people, who is reliable, competent and efficient, who works in a timely manner and who is loyal and committed to the job.

Plumley, together with his wife, prepared the trainee progress reports which were used by the company to evaluate his progress. Progress reports were prepared after weeks one through three, weeks four through six, weeks seven through ten and a final precertification trainee evaluation was prepared on October 29, 1992. (JX 6) Plumley's wife prepared the progress reports, in part, and Plumley reviewed their content. Plumley had represented in an affidavit submitted in an earlier federal district court case that Tanknology or authorized agents or employees of Tanknology had prepared the reports. (Tr. 115, 116)

Plumley was instructed by Baker at the end of the week of October 19, 1992, to pick up his testing truck on October 26, 1992 in New Philadelphia, Ohio from a different unit manager and to meet him later in Cleveland. Plumley was also instructed to pick up supplies in Columbus, Ohio over the weekend. However, Plumley refused that directive because of the total number of hours already worked during the week but opted to pick up the supplies the following Monday morning. Plumley did retrieve Baker's truck in New Philadelphia but he did not load the supplies into the truck from his personal vehicle. Thus, they were left in the vehicle.

The supplies were needed at a job later in the week. Plumley knew that the supplies would have to be retrieved and that would require a return trip. (Tr. 132)

Plumley worked with Baker on Tuesday, October 27 and Wednesday, October 28, 1992. On October 29, 1992, Baker and Plumley, together with Chris Dorazio drove to an auto repair shop near Cleveland to pick up Dorazio's truck. However, the truck was not ready and the three individuals worked together for the rest of that day. The following week, Dorazio was scheduled to be on vacation and Plumley was advised that he was to be working on his own while using Dorazio's truck. Plumley was to retrieve the truck the following Monday morning at the repair shop in Cuyahoga Falls, Ohio. At the conclusion of the week's work, Dorazio drove Baker's truck to a repair shop close to Baker's home and Plumley followed him in his personal vehicle. Plumley was advised by Dorazio that he had removed the nitrogen tank from his own truck and put it on Baker's earlier in the week. Since his truck did not have a tank, Dorazio offered to give Plumley the nitrogen tank from Baker's truck to take home with him so it would be available when he picked up Dorazio's truck the following Monday morning. However, Plumley refused that proposal.

The following Monday morning, November 2, 1992, Blake had telephoned Plumley that an emergency had arisen at a Shell Oil Company Station in downtown Cleveland, Ohio and that three tanks and lines needed to be tested. Plumley was also advised to pick up Dorazio's truck at the repair shop on that same day. Plumley, however, did not leave home until approximately 3:30 p.m. and when he arrived at the auto repair shop, it was closed. Monday was Plumley's day off and Blake had not telephoned him until approximately 10:00 that morning. However, he was advised that an emergency situation existed. Plumley was advised that the tanks should be tested by Monday evening because of the emergency. The drive from Plumley's home to the auto repair dealership to pick up the truck was approximately two and one-half hours. After failing in an attempt to locate someone to open the dealership Plumley telephoned Blake and advised him of the situation. Blake was upset because of the nature of the emergency at Shell. Plumley asked Blake in the same phone conversation whether he could return home to vote in the election the following day. Blake permitted him to do so.

The following day, Tuesday, November 3, 1992, Plumley picked up the truck at the repair shop in Cuyahoga Falls at around 9:30 a.m. and proceeded to the Shell Station in downtown Cleveland where he arrived at approximately 10:00 a.m. Blake had previously faxed to Plumley instructions as to what work was to be done at the Shell Station. (JX 7) Plumley was to test three tanks and three lines. Plumley estimated that it would take approximately six hours to test the tanks only. The line tests would ordinarily be conducted at the same time as the tank tests and therefore, would consume no

additional time. The tank tests are basically computer operated and require only the technician's monitoring. However, circumstances can require additional time.

After Plumley had begun testing the first tank, he realized that the nitrogen tank was not on the truck. He then telephoned Blake and explained the situation to him. Plumley was advised to purchase nitrogen locally. Following some consultation, Plumley determined that it was too late in the day for the store to deliver the nitrogen to him or for him to pick it up. Concerning the nitrogen container, Plumley had submitted an affidavit in a previous case which read, in part, as follows:

> On November 3, 1992, Mr. Blake instructed me to purchase a bottle of nitrogen on my own personal credit card, which I refused to do because the defendant already owed me approximately $900 for expenses incurred. This is the reason the nitrogen tank could not be picked up or delivered by the store.

(Tr. 163) Plumley admitted that the statement was false in that Tanknology owed him substantially less than $900.00 at the time. (JX 13)

Since Plumley needed the nitrogen, Blake was required to drive from Columbus to Cleveland in order to bring the tank to him.

Plumley had not begun testing the first tank until four to five hours after he had arrived on the scene. Blake later arrived at the Shell Station at approximately 8:30 p.m. and found that Plumley was preparing to perform the third tank test. Blake appeared to be upset with Plumley at the time he delivered the nitrogen tank. When Blake arrived, Plumley had been on the job approximately ten and one-half hours and had completed only two tank tests. Tank tests do not require the use of nitrogen but the line tests do. Following the testing of all three lines, Plumley determined that one line had passed, one had failed and the third could not be tested. Plumley left the Shell job site at approximately 3:30 to 4:00 a.m. on November 4, 1992. (JX 5 p. 3)

Plumley understood that an emergency situation existed where there was a concern that a leakage of product was occurring into the ground or into the environment. (Tr. 173, 174) He also understood that the Shell Oil Company as the owner of the station had an obligation to test the site for leakage within at least forty-eight hours from time of discovery. Plumley knew that Shell had an obligation to report the matter to the state fire marshall or his designee which in this case would have been the Cleveland fire marshall. Plumley also understood that the situation existing at Shell could result in the imposition of Environmental Protection Agency fines or fines resulting from the application of state regulations. He acknowledged that he did not take the situation at

the Shell station very seriously because the company continued to pump product. (Tr. 174) Plumley also believed that the fact Shell expected Tanknology to have someone fixing the problem within twenty-four hours was a problem of Tanknology and not his problem. (Tr. 175)

John Ferrara was a district engineer employed by Shell at the time that Plumley tested the tanks in Cleveland. Ferrara had the responsibility of managing the compliance by Shell of the underground storage tanks in the state of Ohio. Part of his responsibilities as a district engineer required him also to oversee all of the company environmental work and station modernizations in his area of jurisdiction around Cleveland. Ferrara testified that it is company policy to have tanks or lines tested in emergency situations within twenty-four hours of the time that the emergency is identified. In fact, state law requires notification within twenty-four hours. Failure to comply with the reporting regulations could result in a fine by either the Ohio Environmental Protection Agency or the state fire marshall or both. The fines could be very substantial ranging from $5,000.00 to $15,000.00 a day. Ferrara viewed tank emergencies as one of the most serious matters for which he was concerned in his job.

Ferrara testified that he was telephoned on Monday, November 2, by John Manion who was a territory sales representative responsible for the Cleveland area. Manion advised Ferrara that there had been an inventory discrepancy in the super unleaded line at the downtown station and that the tanks and lines needed to be tested. Ferrara advised Manion that the tests would be conducted within twenty-four hours. After talking to Manion, Ferrara telephoned David Blake immediately and advised him that the tanks needed to be tested within twenty-four hours because of a potential emergency. Blake assured Ferrara that the tests would be performed within that time frame. Following the conversation with Blake, Ferrara believed that the tests would be performed within the twenty-four hour period. Shell uses Tanknology on a national basis for tank testing and their contract requires testing within twenty-four hours of the notification of an emergency.

The next morning on Tuesday, November 3, Ferrara stopped by the site and spoke with Plumley about the testing. Plumley advised that he was just getting started and Ferrara gave him a business card and told him that if he needed anything, to call him. On his way home from work that evening, at approximately 5:00 to 6:00 p.m., he once again stopped by the station. Plumley stated that the lines had not been tested and that he was working on one of the tanks. Ferrara had suspected that since it takes only approximately six hours to have completed all of the testing, that the tests would have been finished by that time of the day. Plumley told him that he did not have nitrogen on the truck and that is why some of the tests could not be performed. Plumley stated that Tanknology had failed to equip the truck with nitrogen. Plumley

also mentioned that he was thinking about starting his own business and he in effect solicited Shell's testing business for his future company. Following that conversation, Ferrara was disturbed because Plumley had solicited his business and because it had already been thirty-six hours since the time he had contacted Blake concerning the emergency and no tests had yet been concluded.

Plumley denied at the hearing that at the time of his conversations with Ferrara, that he had solicited business for his own venture. In fact, he denied that he was thinking about forming his own business. (Tr. 178) However, the record shows that he had spent time in investigating the formation of his own tank testing company. (RX 2) He had considered an inventory of equipment that he would need if he was to form his own company. He had considered the amount of expenses required in operating that company. He had attempted to determine the amount of gross receipts necessary in order to reach a break-even point for the business. (Tr. 179) He had inquired of the Ohio Bureau of Employment Services concerning unemployment matters relating to a new business. (Tr. 180) He had considered regulations concerning underground storage tanks as promulgated by the Ohio Department of Commerce. (Tr. 282) He had also solicited brochures from suppliers of tank testing equipment. (Tr. 282) Plumley personally prepared the cost estimates which appear in his own handwriting. (Tr. 307) They were written in approximately June or July of 1992. (Tr. 308)

The following morning, Wednesday, November 4, when Ferrara reached his office, Plumley had left a message on his voice mail. Plumley advised that the super unleaded tank had passed the test; that the middle grade unleaded tank was untestable and that the regular unleaded had failed the test. Ferrara was concerned because the company had believed that the problem was in the super unleaded line which had passed the test and that they were unaware of a problem with the regular unleaded tank which had failed the test. He immediately called Blake and asked him for the test results. Blake's response was that the super unleaded line had failed and that the regular line had passed and those results were opposite of what Plumley had advised on the telephone. Ferrara told Blake that he was very concerned about the situation, that it had been forty-eight hours since the emergency began and that he still did not have any answers. Ferrara asked that another tank tester be assigned to the job because, in essence, he had no confidence in Plumley. Ferrara also told Blake that he did not want him on any other Shell sites. Ferrara also reiterated to Blake the conversation that he had with Plumley concerning Plumley forming his own venture and soliciting Shell's business. Blake apologized to him for Plumley's conduct. Tanknology later had the tanks and lines retested and those test results showed that the super unleaded had actually failed and the regular unleaded line was on the verge of failing. Following the second testing, Shell contracted with another company to have new teflon stainless steel flex connectors placed on all three systems.

Following Blake’s conversation with Ferrara, Blake telephoned Todd Ferguson who is the Tanknology Regional Manager over the Columbus office operation. Blake advised Ferguson of his conversation with Ferrara. Ferguson was very concerned because Shell is a "huge customer" of Tanknology and their complaint must be taken very seriously. He instructed Blake to get somebody over to Shell to do the testing once again. Blake also advised Ferguson that Plumley had solicited the testing business from Ferrara. This revelation concerned Ferguson greatly, so he dispatched Ken Slane who was a quality assurance representative to speak with both the Shell representative and also with Plumley about the matter. On the same day, Ferguson received a telephone call from a representative of Clark Oil Company who was concerned about a start-up testing job at a Geneva site for which Plumley was tardy in arriving to conduct the testing. Plumley had been scheduled to conduct tests at a Clark Oil Service Station in North Royalton, Ohio and also one in Geneva, Ohio on November 4, 1992. The tanks and lines at the station in Geneva were new and thus needed to be tested before the station could open for business. That testing activity was given priority over the testing at the North Royalton location. However, Plumley went to the North Royalton station first and later had to be diverted to the Geneva station to conduct the testing so that the filling station could open for business.

While Plumley was still at the North Royalton site, Ken Slane arrived at that location. Slane noticed several safety violations including Plumley not having tied off his ladder, a no smoking sign had not been displayed, the fire extinguisher had been removed from his truck, and no ground wire been hooked up. Slane also concluded that two of the tanks to be tested had too much water in them and could not be tested. Slane then accompanied Plumley to the Geneva site where Slane performed the tests in an effort to demonstrate to Plumley what was expected of him. Slane also asked to see copies of the worksheets which Plumley was to have prepared concerning the job site work at the Shell station in Cleveland. Plumley reported that he had lost the worksheets and that they were unavailable.

On November 7, 1992, Slane returned to the Shell Station in Cleveland to assist in testing the tanks and lines so that the station could reopen. During the latter part of the day, Plumley joined him there, and at some point, a verbal altercation occurred between Slane and Plumley over Plumley’s desire to leave and return home. Ultimately, Slane and Plumley picked up Plumley’s personal vehicle and drove the testing truck to the Cleveland Airport for Dorazio to pick up the following Monday and Slane returned to Chicago. Plumley then returned home.

The following Monday morning which was November 9, 1992, Slane met with Ferguson to discuss events in Cleveland, and also to evaluate Plumley’s performance. Slane recommended that Plumley be terminated. His memorandum as to why Plumley should be terminated was written by him on November 9, 1992 but typed by his secretary

on November 10, 1992 and the document contains the latter date. (Tr. 342, JX 2) It was Slane's conclusion that Plumley was basically incompetent, had a poor attitude, failed to follow protocol, was not professional in his demeanor and fails to follow instructions. Following the conversation with Slane, Ferguson telephoned Blake who reiterated the same conclusion in that it also was his recommendation that Plumley be terminated. Following the conversation with Blake, Slane and Ferguson went to the office of Kevin Keegan who was the Tanknology Regional Vice-President. Ferguson explained to Keegan that both Slane and Blake had recommended that Plumley be terminated and reiterated to him the nature of the complaints received from both Shell and Clark Oil Companies and Ferguson voiced his own recommendation that Plumley be terminated. Keegan agreed with that recommendation and immediately thereafter Ferguson telephoned Blake and directed him to convey that decision to Plumley. Blake advised Plumley during the afternoon of November 9, 1992 that he was being terminated. Plumley had started employment with Tanknology on September 8, 1992. Thus, he was an employee for about two months.

At the time Ferguson made the decision to terminate Plumley, he had no knowledge that Plumley had complained about the number of hours that he was working or that Plumley had complained about not being paid overtime compensation. Ferguson was also unaware that Plumley had complained about the number of hours worked being beyond those permitted under the Department of Transportation's hours of service regulations. He also was unaware that Plumley had turned in unaltered time logs evidencing his work hours. He knew nothing about Plumley's logs as of the time the directive was given to Blake to fire Plumley. Prior to the firing decision, he had not had any discussions with any individual within the company concerning Plumley's logs. Plumley's logs were brought to the attention of Ferguson the day after the firing had taken place.

Plumley had the responsibility for preparing daily work logs. (JX 5) The record shows that some of the logs which Plumley had intended to produce were incomplete and were not filled out correctly. (Tr. 344) Plumley testified at an earlier federal court trial involving the same subject and also in this proceeding that his weeks' work logs for the period extending from November 2 through November 7 were placed in the mail to Tanknology on Sunday, November 8, 1992. (Tr. 225, 317)

Deborah J. Hinkle worked for Tanknology from April 9, 1991 until December 14, 1992. She was the receptionist and secretary who worked with the office managers David Blake and Bob Graham. (Tr. 185) She did not tell the men in the field what to do. Her job in that regard was basically clerical. She also supervised no people in the office. She was the only secretary. She had observed Blake assisting another unit manager in preparing log records. She also heard customers complain about line testers in phone conversations. On November 9, 1992, Ms. Hinkle was working and recalled receiving, by way of Federal Express, unit managers'

work logs which she would give to David Blake. (Tr. 217) It was her recollection that Mr. Blake was upset with the packet of logs received on Monday, November 9 and telephoned Chicago. Following the phone conversation, she testified that she gave the logs to David Blake who in term uttered some obscenities about Mr. Plumley and directed her to telephone Ferguson in Chicago. Ms. Hinkle was adamant about her belief that she had received Plumley's work logs on Monday, November 9, 1992. However, the record shows that the logs were Federal Expressed by Plumley on Sunday, November 8, 1992 in which case they would not have been received until Tuesday, November 10, 1992. (Tr. 225)

## CONCLUSIONS OF LAW

The relevant portions of § 405 of the STAA provides as follows:

> (a) Prohibitions. (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because-
>
> (A) the employee, or another person at the employee's request has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (B) the employee refuses to operate a vehicle because-
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
>
> (ii) 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). Ordinarily, under the burdens of persuasion and production in whistleblower cases, the complainant must first present a prima facie case. In order to prove a prima facie case, the complainant must establish that:

1. He engaged in protected activity;

2. The employer was aware of that conduct; and

3. The employer took some adverse action against him.

Dean Darty v. Zack Company of Chicago, Case No. 82-ERA-2, Sec. Dec., April 25, 1983, slip op. at 7-8. Also incumbent upon the complainant is a need to present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. McCuistion v. TVA, Case No. 89-ERA-6, Sec. Dec., Nov. 13, 1991, slip op. at 5-6; Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (6th Cir. 1983). The employer may then rebut the complainant's prima facie showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Complainant, on the other hand, may counter the respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. Regardless, the complainant bears the ultimate burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law, St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Darty v. Zack Company of Chicago, supra.

However, because "this case was fully tried on the merits," it is not necessary to engage in an analysis of the elements of a prima facie case. USPS Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Carroll v. Bechtal Power Corp., Case No. 91-ERA-46, Sec. Dec., Feb. 15, 1995; slip op. at 11, n. 9, petition for review docketed, No. 95-17229 (8th Cir., Mar. 27, 1995). Once the employer produces evidence that Plumley was subjected to an adverse employment action for a legitimate, nondiscriminatory reason, the answer to the question whether a prima facie case was presented is no longer useful. In the event Plumley has not prevailed by a preponderance of the evidence on the ultimate question of liability, it does not matter whether he presented a prima facie case. Williams v. CMS Transportation, Inc., 94-STA-5, Sec. Dec., Oct. 25, 1995; White v. Maverick Transportation, Inc., 94-STA-11, Sec. Dec., Feb. 21, 1996.

I observed each of the witnesses who testified in this proceeding very carefully at the time of the hearing. I find all of them to have been credible with the exception of Edwin I. Plumley for reasons stated later in this opinion. I find specifically that the testimony of Deborah J. Hinkle was credible. I believe, however, that she was mistaken concerning the date of receipt of the contested logs of Plumley. Plumley testified in both the federal court proceeding and in this proceeding that his logs were mailed on Sunday, November 8, 1992, in which case they would not have been received until November 10, 1992. Although Ms. Hinkle testified that Blake was upset when she presented the logs to him on November 9, 1992, and uttered obscenities about Mr. Plumley, the record is not clear that the obscenities were related to the logs or to some other activity of Plumley which may have aggravated Blake. Nonetheless, I do not believe that Ms. Hinkle had the logs on November 9, 1992, since she would not have received them until the following day.

Plumley contends on brief that Tanknology was subject to federal law relating to the transportation of hazardous materials and also safety regulations relating to the operation of motor carriers. No specific contentions are made with respect to the hazardous materials excepting as vague comments concerning a nitrogen container which was included as a part of the equipment transported on the Tanknology service trucks. The record shows that a confrontation did occur between complainant and management of Tanknology concerning Plumley's willingness to drive on certain occasions. Internal complaints to management as alleged by Plumley here are protected under the STAA. Reed v. National Minerals, Corp., Case No. 91-STA-34, Sec. Dec., slip op. July 24, 1992.

Plumley must prove by a preponderance of the evidence that he actually made internal safety complaints. The matter regarding the nitrogen container seems to have been a casual conversation between Plumley and his supervisor which did not raise itself to the dignity of a complaint. The matter relating to the daily logs pertaining to his work hours and driving time also requires scrutiny. There is no evidence in the record that Plumley was pressured in any way to alter his logs. Any casual conversation which may have taken place, once again, does not rise to the dignity of a complaint. The record is clear that neither Keegan nor Ferguson who made the final decision to terminate him were even aware of either the nitrogen tank conversation or any alleged conversations that related to driving time or driver logs. Therefore, I conclude that the complainant has not established by a preponderance of the evidence that he engaged in activity protected by the complaint provisions of the STAA.

The discussion of this case should not end here, however. Since there is no documentary evidence of activities protected under the Act, whether or not I find Plumley to have engaged in protected activities rests solely on his testimony. Plumley's credibility is clearly at issue by the facts of this case. The record shows that he had been involved in similar type cases with previous employers. The fact that he began keeping a separate calendar of events including driving logs one week following the commencement of work leads me to believe that there may have been some subterfuge in this employment experience. I note that Plumley worked for Tanknology only for a period of two months. I suspect that he may have known at the beginning that his tenure would be short. I carefully observed Plumley at the time of the hearing of this case. There were portions of his testimony that I simply did not believe. He was less than convincing when he testified that Ferrara had lied about any conversation concerning Plumley's solicitation of business from Shell once Plumley's own testing business commences operation. Ferrara was not employed by Tanknology and, in fact, was one of their primary customers. He would have no reason to lie about that conversation. Plumley had misrepresented in his application and on his resume that he was a high school graduate and that his earnings were greater than what

he was actually making. The record shows that he misrepresented in a prior federal proceeding that other Tanknology personnel had prepared his progress reports. His contention in that regard was false and he admitted as much at this hearing. He also submitted a false affidavit in the other case concerning the reasons for refusing to purchase a nitrogen tank. He contended that he had already charged $900.00 worth of goods or equipment and that he did not want to make any further charges. The $900.00 figure was shown to be patently false. In evaluating his testimony concerning these and other matters, I find it to have been untrustworthy, and therefore, I choose to disregard it completely.

Even assuming that Plumley had engaged in protected activities, Tanknology has produced multiple legitimate nondiscriminatory reasons for his firing. The record demonstrates that the Shell business account was very important to Tanknology. Therefore, problems with that account should have been avoided. Plumley demonstrated an essential incompetence in the manner in which he conducted the tank testing activities in response to the Shell emergency of November 2, 1992. The tests were not conducted in a timely professionally competent manner. The erroneous results obtained by Plumley, speak for themselves. This was but one instance of incompetence demonstrated by Plumley in this record. His work clearly aggravated the Shell authority and resulted in Ferrara demanding that Tanknology remove him from the Shell premises and appoint another unit manager to conduct new tests. Considering the importance of the Shell account to Tanknology, I believe that Plumley’s demonstration of work incompetence with regard to this emergency situation could have justified his termination.

Perhaps even more damning than the work incompetence was Plumley’s arrogance in soliciting the Shell account for his new business venture. Plumley denies the conversation with Ferrara, but I have no doubt but that it took place. He unquestionably considered starting a competing enterprise. A company simply cannot tolerate employees speaking in a demeaning fashion of company management while at the same time soliciting the same business for a new venture. There is no question in my mind but that Plumley’s conduct in this regard clearly justifies his immediate termination.

Regardless of the above, the record demonstrates other reasons for his termination. Plumley needed an attitude adjustment. He was stubborn, slow or tardy in conducting testing activity, he lost paperwork, produced wrong results on tests, apparently wasted time, was involved in verbal confrontations with superiors in front of customers and had log book errors. Plumley testified that in his judgment, the emergency problem at the Shell station was Tanknology’s problem and not his own. I believe that this comment encapsulates his attitude toward his position at Tanknology.

The record shows in addition to the Shell fiasco that over a two-week period, Plumley had:

1. Complained about picking up supplies on a weekend;

2. Failed to follow his trainer's instruction to pick up supplies on a weekend;

3. Forgot to load the supplies onto a truck after once acquiring them which required a return trip;

4. Failed to pick up a testing truck at a repair shop in a timely fashion despite a supervisor's instruction that the truck be obtained before the end of the day;

5. Neglected to obtain a nitrogen tank when he picked up a truck resulting in a supervisor's having to travel in order to obtain one for him;

6. Failing to conduct tests in a timely fashion at a Clark station in Geneva, Ohio;

7. Failing to follow safety procedures in setting up tests at another location; and

8. Failing to identify the problem of water in tanks which would have prevented proper testing.

This record demonstrates that Plumley's overall competence was highly questionable.

The record also shows that the employment application filed by Plumley with Tanknology contained two misrepresentations relating to the level of his education and the amount of his compensation in his prior position. Plumley admitted these misrepresentations. The application included a notation that Plumley understood that if there appeared any falsification, that it may lead to his termination. Therefore, the company had grounds for termination for this reason alone. I recognize that the record does not show that the company considered the application material at the time of Plumley's discharge. However, Plumley's admission of lying on the application and on employment applications submitted with other companies, lends credence to my finding that his testimony was not truthful in this proceeding.

In weighing all of the above, it is clear that Plumley has not prevailed by a preponderance of the evidence on the ultimate

question of liability. Tanknology terminated his services for multiple, legitimate, nondiscriminatory reasons. The decision to terminate Plumley was reached following complaints from Shell concerning the competence he demonstrated on that job and also by Ferrara concerning his solicitation of business. Complaints were also received from Clark Oil concerning the timeliness of his work activity on that job. Multiple internal complaints also existed within a short two-week period. The proximity of the customer complaints in conjunction with the other work related internal complaints about Plumley serves to validate the conclusion of the non-discriminatory nature of the discharge decision. Polchinski v. Atlas Bulk Carriers, 95-STA-35, Sec. Final Dec., March 7, 1996.

Accordingly, I conclude that Edwin I. Plumley was not discriminated against by Tanknology Corporation International.

ORDER

It is recommended that the complaint of Edwin I. Plumley against Tanknology Corporation International under § 405 of the Surface Transportation Assistance Act be dismissed.

Rudolf L. Jansen
Administrative Law Judge

NOTICE: This Recommended Order and the administrative file in this matter will be forwarded for review to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. See 61 Fed. Reg. 19978 and 19982 (1996).