

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 November 2006

In the Matter of:

TIMOTHY J. ELBERT,
Complainant

Case No.: 2005-STA-00036

v.

TRUE VALUE COMPANY, and
JOHN DOE and MARY ROE,
Respondents

Appearances:

Paul O. Taylor, Esq.
Truckers Justice Center
Burnsville, Minnesota
For the Claimant

Brian S. Arbetter, Esq.
Thomas Hurka, Esq.
Baker & McKenzie LLP
Chicago, Illinois
For the Employer

Before: Alice M. Craft
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This proceeding arises from a claim of whistleblower protection under Section 405 of the Surface Transportation Assistance Act, as amended (“STAA”), 49 U.S.C. § 31105. This statute, and implementing regulations at 29 CFR Part 1978, protect employees from discrimination in retaliation for engaging in protected activity such as filing a complaint about commercial motor vehicle safety violations, or refusing to operate a vehicle because of its unsafe condition. In this case, the Complainant, Timothy J. Elbert, alleged that he was terminated from his position as a truck driver for True Value Company because he reported the brakes on the trailer he was assigned would not release, and refused to use it until the brakes were repaired.

STATEMENT OF THE CASE

Mr. Elbert filed a complaint with the Occupational Safety and Health Administration of the Department of Labor ("OSHA") dated March 2, 2005, received by OSHA on March 7, 2005. He alleged he had been terminated on January 13, 2005, in violation of the STAA. Complainant's Exhibit 21.

On April 29, 2005, the Area Director for OSHA issued findings on the complaint on behalf of the Secretary of Labor. The Area Director stated that after investigation, the Secretary found no merit to the allegation that True Value violated the STAA.

On May 9, 2005, Mr. Elbert appealed the OSHA finding by filing Complainant's Objection to Secretary's Findings & Order transmitted to the Office of Administrative Law Judges ("OALJ") by facsimile.

I conducted a hearing on this claim on June 7-10 and 14-15, 2005, in St. Paul, Minnesota. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18. Complainant's Exhibits ("CX") 1-7, 12-21, 23-32, and 35-36, Respondent's Exhibits ("RX") 6-8 and 12-13, and Administrative Law Judge Exhibit ("ALJX") 1 were admitted into evidence. Claimant's Exhibits 33 and 34 were excluded from evidence. Other numbered exhibits either were not offered, or were withdrawn. Tr. 1249-1252. The witnesses were separated during the hearing and, therefore, did not hear each others' testimony. The record was held open after the hearing to allow the parties to submit closing and reply briefs. Both parties submitted briefs, and the record is now closed.

After the hearing, counsel for the Complainant apparently filed complaints of perjury against two of the Respondents' witnesses with local authorities. Counsel for the Respondent wrote a letter protesting that action, a copy of which he submitted to me. Thereafter, the Complainant filed a motion to strike and for a protective order, seeking to prevent the Respondent from filing such letters in the administrative record. The Complainant also filed a motion for sanctions against the Respondent for late filing of its brief. The Respondent responded to both motions. Having considered the submissions by the parties, I find that the motions should be denied.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at the hearing and the arguments of the parties on the merits of the claim.

ISSUES

The issues in this case are whether True Value Company violated the STAA when it terminated Mr. Elbert's employment and, if so, who may be held liable, and what remedies should be awarded.

APPLICABLE STANDARDS

The employee protection section of the STAA provides:

(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.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 31105(a). This employee protection provision was enacted “to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations.” *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

In order to prevail on his claim, the Complainant must establish by a preponderance of the evidence that the Respondent took adverse employment action against him because he engaged in protected activity. *Shannon v. Consolidated Freightways*, USDOL/OALJ Reporter (HTML), ARB No. 98-051, ALJ No. 96-STA-15 (ARB Apr. 15, 1998), *aff'd* 181 F.3d 103 (6th Cir. 1999). In that case, the ARB stated,

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because she engaged in protected activity. A complainant initially may show, for example under a “pretext” analysis, that a protected activity likely motivated the adverse action.

Guttman v. Passaic Valley Sewerage Comm'rs, Case No. 85-WPC-2, Sec. Dec. Mar. 13, 1992, slip op. at 9, aff'd sub nom. *Passaic Valley Sewerage v. Department of Labor*, 992 F.2d 474 (3d Cir.), cert. denied, 114 S.Ct. 439 (1993). A complainant meets this burden by proving (1) that she engaged in protected activity, (2) that the respondent was aware of the activity, (3) that she suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Kahn v. United States Sec'y of Labor*, 64 F.3d 271, 277 (7th Cir. 1995); *Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989). A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant then must prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

Alternatively, under a 'dual motive' analysis, a complainant may prove, by a preponderance of the evidence, that a respondent took adverse action in part because she engaged in protected activity. For example, a respondent may admit, or direct evidence may establish, that protected activity provided part of the motive for the adverse action. In this event, the burden of persuasion shifts to the respondent to demonstrate that the complainant would have been disciplined even if she had not engaged in the protected activity. *Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287, 1289-1290 (9th Cir. 1991) (dual motive test set forth in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), applies where it was 'undisputed' that complainant engaged in protected activity and 'that this was a motive for disciplinary action'); *Passaic Valley Sewerage v. United States Dep't of Labor*, 992 F.2d at 481; *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163-1164 (9th Cir. 1984). The burden of persuasion shifts under the 'dual motive' model because the complainant has proved retaliation, i.e., that the respondent took adverse action 'because' the complainant engaged in protected activity. 49 U.S.C. § 31105(a)(1)(A) and (B). A violator then must establish a form of affirmative defense in order to avoid liability. 'The employer's burden in ... a dual motive case 'resembles an affirmative defense: the plaintiff must persuade the fact finder on one point, and then the employer, if it wishes to prevail, must persuade it on another.'" *Ass't Sec'y on behalf of Lansdale v. Intermodal Cartage Co., Ltd.*, No. 94-STA-22, 1995 WL 848152, at *3 n.1 (DOL Off. Adm. App. Jul. 26, 1995), quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246 (1989).

ARB No. 98-051at 5-6 (footnotes omitted).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. SUMMARY OF THE EVIDENCE

At the hearing, the parties stipulated that the complaint was timely filed; that the objections to the Secretary's preliminary findings were timely filed; that OALJ has subject matter jurisdiction and jurisdiction over the parties; that Mr. Elbert was an employee within the meaning of the STAA; that he began employment with True Value on July 24, 1989; and, that he was discharged on January 13, 2005. Transcript ("Tr.") at 11-12. These stipulations are consistent with the evidence in the record, and I adopt them as part of my findings of fact and conclusions of law.

True Value Company is a cooperative whose members operate hardware stores. Tr. 378. The headquarters is in Chicago, Illinois. Mr. Elbert was a truck driver for True Value. He began working there in 1989.¹ He worked out of the Mankato, Minnesota, regional distribution center. During the time he worked for True Value, Mr. Elbert received his 11-year safe driver award, and would have been eligible for his 12-year award had he remained with the company; he also received several trophies for participating in the national truck driver rodeo sponsored by the company, including first place in 1995. Tr. 491-492; CX 1; CX 2; CX 24. When he was discharged on January 13, 2005, his immediate supervisor was Gene Struck, the Regional Transportation Manager. Tr. 18; CX 7. Mr. Struck reported to Gerald Gainer, the Manager of the Mankato office. Tr. 991-992. Mr. Gainer had been working in the Mankato office about four years. Tr. 994. Mr. Gainer made the decision to discharge Mr. Elbert. Tr. 13, 482. Before he did so, he contacted corporate counsel and the human resources office in Chicago to "get his ducks in a row." Tr. 111, 1017, 1018-1019. *See also*, Tr. 1218, 1228-1229, 1234, 1271-1272. Mr. Gainer has only discharged four other employees, one for drunkenness on the job, and the other three for production and quality. Tr. 1066-1067.

True Value has a progressive discipline system. Tr. 163-164; CX 18. Mr. Gainer said that discipline does not have to follow an exact procedure from verbal warning, to written warning, to suspension, to discharge. Tr. 17, 1060-1061, 1066. The Area Human Resource Manager with jurisdiction over the Mankato office testified similarly, agreeing, however, that sometimes an associate is given several chances. Tr. 1241. A form entitled "Notice of Disciplinary Action Due to Employee Work Rule Violation," used to record disciplinary actions during Mr. Elbert's employment, Tr. 132-133, was introduced as CX 18A. Listed on the back of the form are two categories of work rules. The first group, of less serious offenses, could result in "disciplinary action including warnings, suspension, or discharge depending, in management's discretion, upon the circumstances surrounding the incident, the severity of the misconduct, and the offending employee's past record. This group of offenses includes "Interfering with the work of others." The second group of offenses could result in immediate dismissal. This group includes the offense of "Insubordination." Mr. Gainer said managers also had leeway whether to dismiss an employee for one of the second group of violations. Tr. 135, 161-162. Ordinarily, disciplinary write-ups would be kept indefinitely in personnel files. Tr. 1242-1243. Removal of

¹ The Company was known as Cotter and Company when Mr. Elbert first began working there. Later, the name changed to TruServ Logistics, and eventually, to True Value Company. Tr. 490, 503. All three names appear on documents admitted as exhibits. *See, e.g.*, the Driver's Manual, which carries the name Cotter and Company, CX 19; Tr. 31, 148, 170, 382-384.

a disciplinary record from an employee's file did not necessarily mean he was starting with a clean slate. Tr. 164-165, 173.

On May 18, 2004, Mr. Elbert was involved in an argument with another driver and Lisa Floer, a traffic clerk, while he was speaking to Mr. Struck about route assignments. The following day, Mr. Elbert received a verbal warning about this incident. A written record of the warning was placed in his personnel file. CX 29. The "Notice of Disciplinary Action Due to Employee Work Rule Violation" stated he had violated work rules 28, 29 and 32 by "use of foul language and intimidating other drivers, swearing, insubordination, creating a hostile work environment." The notice said that "to avoid future corrective and/or progressive disciplinary action," he should perform his duties as assigned, adhere to company policy regarding his conduct to management and peers, and that "any future violations could result in suspension or discharge." Mr. Elbert wrote a three-page response, RX 6, suggesting that [t]he entire conversation ... was simply an alternative view being expressed by myself, but was misconstrued by co-workers that were not invited into the conversation." RX 6 at 1. He then responded to each allegation of misconduct, denying that he was at fault, or at least, the only one at fault, and justifying his actions. He blamed the other driver and Ms. Floer for creating a hostile environment by interjecting loud, unrequested, and derogatory comments into his private conversation with Mr. Struck. He thought it discriminatory that he was written up for the incident, while the others involved were not. His response singled out Ms. Floer as having made unfounded accusations about his conduct. RX 6 at 2-3. Mr. Elbert did not believe that he had engaged in inappropriate conduct on that occasion, but others, including Ms. Floer, did. Tr. 871, 872. Mr. Elbert wrote an additional three-page response, entitled "Recap of events for May 19, 2004," in which he recited the chronology of events. RX 7. In that statement, Mr. Elbert recounted two calls he made from his truck to Ms. Floer, and two to Mr. Struck, during which he questioned the way his route was scheduled. He then described the confrontation which occurred when he got back to the traffic office about Noon. He said when he offered his views on the route to Mr. Struck, Ms. Floer joined the discussion with "a nasty way" making "snide remarks," and that another driver raised his voice when he, too, interjected himself into the discussion by yelling. RX 7 at 2. Next, Mr. Elbert said, Mr. Struck told him to:

'calm down Tim' in a louder than usual voice as he took a step toward me with both arms and hands extending toward me in a high position. I took one step back, not knowing why his arms were extending up and outward toward me. I also felt the Gene's telling me to calm down was misdirected completely. After all, Al was the one yelling at me and Lisa with the snide comments.

RX 7 at 3. Thereafter, Mr. Elbert wrote, he and Mr. Struck sat down with an atlas to discuss the route further.

At the hearing, Mr. Elbert testified that he wrote two documents responding to the incident because Mr. Gainer asked him to write up his version of what happened. Tr. 872. He also said that he wrote them because he wanted his side of the story to be heard, and he did not believe that Mr. Struck's write-up was an accurate account of what had taken place. Tr. 905. He said he did not think he had done anything wrong that day. Tr. 877.

Mr. Gainer said Mr. Elbert's voice was so loud it was reported that he, and only he, could be heard in the next room. Tr. 997. It was his understanding that Mr. Elbert was loud and

insubordinate on that occasion. Tr. 998. As to the response written by Mr. Elbert, Mr. Gainer said it was not unusual for Mr. Elbert to have a different view of what happened than everybody else did. Tr. 1000.

The record of the verbal warning was removed from Mr. Elbert's file after six months, pursuant to an agreement reached after Mr. Elbert, Mr. Gainer, and Mr. Struck met about the write-up in June 2004.² Tr. 16, 141-142, 404-409, 608-611. During that meeting, Mr. Elbert suggested that a human resources person from Chicago might be called in to act as a neutral party. Tr. 900, 1062. According to Mr. Elbert, Mr. Gainer became angry and belligerent at the suggestion. Tr. 901.

Asked at the hearing whether the May 2004 incident motivated his decision to terminate Mr. Elbert, Mr. Gainer said it did not motivate him, but was one of a series of things that led up to his decision. Tr. 14-15, 146-147, 148. He said it showed "a past history of the ways Mr. Elbert acted." Tr. 19. He was also aware of an incident from March 2002 in which Mr. Elbert was accused of falsifying his log. *See* RX 5. He said Mr. Elbert became loud and argumentative on that occasion, too. Tr. 147. He also described an incident in December 2004 when Mr. Elbert wanted new uniforms. Company policy at that time was to replace uniforms only when they were worn out, instead of every year, as used to be the case. Mr. Elbert had already spoken to Mr. Struck, who denied the request. He then went to Mr. Gainer, who said Mr. Elbert went "on and on," and "wouldn't let it alone." According to Mr. Gainer, "... it lasted a lot longer than I thought it should have because it's basically an issue between Gene and him, not Gene and me. ... it was just another deal where, you know, Tim had a hold of it and wasn't letting go of it." He agreed that Mr. Elbert was being like "a dog with a bone," a phrase he had heard Mr. Goebel use in connection with Mr. Elbert. Tr. 1001-1003. Mr. Gainer told Mr. Elbert at that time that he was "walking on thin ice ... it was starting to get old, you know, running to my office, you don't get the answer you want, you know, come and let's see if we can bounce it off of somebody else and get the answer I want." Tr. 1005. He said that "the total accumulation of Tim's past history had played into" his decision to fire him. Tr. 21. He said "there was always a 10-page response to every issue that was brought to Tim's attention." He was familiar with the write-ups, and Mr. Elbert's responses, from seeing them at the time; he did not review them in making his decision to fire Mr. Elbert. Tr. 996, 999. He agreed that it was typical of Mr. Elbert that he never accepted any responsibility for any wrong doing. Tr. 1001, 1030-1031.

The event that precipitated Mr. Elbert's discharge was a confrontation he had with Ms. Floer on the evening of January 11, 2005, at about 5:30 p.m. At the time of the hearing, she had been working at True Value about two years. Tr. 176. Gene Struck is her immediate supervisor, as well as Mr. Elbert's. When Mr. Struck is not available, Ms. Floer is in charge of dispatching drivers. Tr. 35, 177. Mr. Struck was out of town from January 9-12, 2005, at a business meeting. Tr. 178, 393, 400.

² Mr. Elbert argued that he should have had a "clean slate" after this warning was removed from the file. Complainant's Opening Brief at 39. Based on the testimony of Mr. Gainer, Mr. Struck, and Ms. McCulloch, however, I find that the disciplinary system, although nominally progressive, did not operate in such a formal fashion. Rather, the policy was applied in a flexible manner, in that True Value tried to take into account the circumstances of the particular incident, and the employee's overall history, in reaching a decision as to the appropriate discipline to apply in any situation.

The incident began when Ms. Floer asked Mr. Elbert to initial a reminder notice from Mr. Struck, CX 3. Mr. Elbert said he refused to sign the notice because he did not understand the paragraph about the procedure for tracking fuel and miles. He said at the hearing that he had asked Ms. Floer to explain it when he first saw the notice on January 6, but she would not explain it to him. Tr. 515-516. He said he was unable to ask Mr. Struck about it before he left on his business trip. Tr. 516-517. When he again refused to sign it on January 11, Ms. Floer threatened to withhold Mr. Elbert's paycheck. Tr. 176.

According to Mr. Elbert, when Ms. Floer told him he would not be paid if he did not initial the notice, he remained calm. He testified that Ms. Floer also told him that if he did not sign, he would be "talking to" Mr. Gainer, and "they're just waiting for you." Tr. 535. He said her voice was escalating, and she was trying to needle him into signing something he did not understand, but he remained calm. Next, he said, she yelled at him, "I can't stand you – every time you open your mouth, I can't stand you." Tr. 536. He told her he thought what she was asking him to do was "illegal." He said she was upset, and he asked her, "[w]hy are you letting this bother you so much?" Tr. 537. Ms. Floer left the room, saying she was going to go get security. Mr. Elbert approached the other drivers in the room, and said, "[d]id you guys see what she did, how she blew up at me?" Mr. Elbert said he wanted the other drivers to be his witnesses, because she had blown up at him several times before. Tr. 538. He estimated that the entire encounter lasted "somewhere between four to six minutes." Tr. 539.

Ms. Floer's account of the argument jibes with Mr. Elbert's in terms of the chronology of events, but varies primarily in how she described Mr. Elbert's demeanor. She said Mr. Elbert was usually the last one to sign the notices. Tr. 1131-1132. She said she asked him two or three times to sign it, but he started getting angry, and refused. Tr. 1131, 1132. She said he just picked it up and threw it down, but as far as she knew, he never even read it. She denied that he told her that he did not understand anything on the notice. Tr. 1132. She said he just kept yelling back and forth, and when one of the other drivers tried to coax him into signing it, he still refused. She admitted she threatened to withhold his paycheck, saying, "[i]t was the only thing I could think of saying, you know, just blurted it out. I was upset." Tr. 1133. She said she did not, in fact, have any authority to withhold employees' paychecks, which was confirmed by Mr. Gainer. Tr. 136. She said that she tried to talk to Mr. Elbert, but she could not get any words in, and he just continued yelling. Tr. 1133. She went on to say, "I was trying to calm him down, telling him to sign it and he refused to sign it. And I just got to the point where I couldn't take it any more and I walked out." Tr. 1134. Asked to describe what he looked like, she said, "[l]ike he usually does when he's yelling, his face turns beet red and the little veins in your neck start popping up and you get really angry and start yelling at the top [of] your lungs." Tr. 1134. She said she, too, had to yell, in order to be heard.

When she left the traffic office, Ms. Floer walked up to the front office to see if anybody was still in the building, where she found the receptionist and Mr. Leroy Gappa. Tr. 1134-1135. Mr. Gappa is the shipping supervisor for the Mankato office. Tr. 308. He was the only person in management on duty on the evening of January 11. Tr. 314. The testimony is somewhat inconsistent as to whether Ms. Floer was crying at that point. Ms. Floer testified that she told the receptionist she did not want to be in the traffic office any more, and that Mr. Elbert would not leave, whereupon the receptionist took her into a conference room. Ms. Floer said she was crying at that point because she finds Mr. Elbert to be very intimidating. Tr. 1135. The receptionist was not called as a witness by either party. The record indicates that while

Ms. Floer was speaking to the receptionist, Mr. Gappa became involved. Tr. 186. Ms. Floer told Mr. Gappa that she would not go back in the traffic office until Mr. Ebert left, because she could not do her job with him there. Tr. 310, 321. He said he thought she was “near tears.” Tr. 321. He called Mr. Gainer to report what had happened. Tr. 319. He told Mr. Gainer that Mr. Elbert had been hindering Ms. Floer’s productivity. Tr. 322. Mr. Gainer said if Mr. Elbert did not leave, then he should be suspended. Tr. 319-320. After Mr. Gappa spoke to Mr. Gainer on the phone, he went to the traffic office. Ms. Floer followed him into the room.

Mr. Gappa then spoke to Mr. Elbert, who said he would not initial the notice, and asked Mr. Gappa to confirm that Ms. Floer could not withhold his paycheck as she had threatened to do. Tr. 310-311. Mr. Gappa told Mr. Elbert his job was done and instructed him to leave. Tr. 215, 310, 315. He said he had to ask Mr. Elbert to leave at least three or four times, as Mr. Elbert kept bringing up the subject of signing the notice. Tr. 323-324.

Mr. Elbert’s account of the encounter with Mr. Gappa was essentially the same. He said to Mr. Gappa that he had read but did not understand the notice, had tried unsuccessfully to get clarification, and he thought it would be illegal for Ms. Floer to withhold his paycheck. Tr. 540. He said that Ms. Floer was only a co-worker, at which Ms. Floer said, “I’m your supervisor today because Gene is gone. And then Leroy followed up with, ‘Gene’s gone, she is your supervisor today.’” Tr. 541-542. He told Mr. Gappa he could check his story with the other drivers. Then there was a pause, and Mr. Gappa said that if he was finished with his paperwork, he should leave so that Ms. Floer could finish her work. He said Mr. Gappa told him to leave twice. Tr. 542. He did not leave the first time because he “felt that it was my duty to report what Lisa had done to a supervisor ...” Tr. 542-543. He believed that Ms. Floer had violated the company code of conduct. He thought “her actions were unbecoming of an associate.³ And then beyond that, after Leroy and her notified me that she was my supervisor that day, I felt that it was that much worse, that now my supervisor had threatened to withhold my paycheck. ...” Tr. 543.

Ms. Floer said Mr. Gappa had to tell Mr. Elbert to leave “eight to ten times at least.” Tr. 1136. *See also*, Tr. 1155-1156.

Mr. Elbert left the office, and went out to inspect the trailer he was to haul the next day; he had begun the pre-trip inspection on his tractor before he went to the office. Tr. 508-509, 519-523, 545-554. Drivers for True Value are required to perform a daily vehicle inspection to make sure their trucks are operational; pre- and post-trip inspections are required by Department of Transportation regulations and state regulations. Tr. 24-25, 335, 354; CX 17, 20. Some drivers, including Mr. Elbert, like to perform the pre-trip inspection the night before a run. Tr. 637-638. To perform the inspection, the driver hooks up the tractor and trailer, including the “glad hands” connecting the color coded air lines between the tractor and the trailer (including the lines to the emergency (parking) brakes, and to the service brakes); starts the engine; turns on the lights; checks the oil, water, and windshield wipers; and, watches the gauges. The driver walks around the tractor and the trailer to check on the general condition, and looks at the tires, air lines, lights, signals, reflectors or reflective tape, license plate, and placards. As part of the inspection, the driver puts the truck in gear and pulls the trailer forward. A hand valve in the truck releases air to charge and release the parking brakes in the trailer. The driver charges the

³ True Value refers to employees as associates. Tr. 378.

trailer and tractor, makes sure the air comes up, and releases the brakes. A gauge in the truck has two needles to show that the brakes in the tractor and the trailer are taking on air. The brakes can be tested by pulling down a "Johnson arm," which allows the tractor to roll, and locks up the trailer to the hitch. Tr. 273-276, 336-340, 355-360, 545, 846-847. If the parking brakes on the trailer do not release, the truck cannot pull forward. Tr. 337, 1102. If the trailer will not roll, a second person needs to listen to see if air is going back to the trailer. Tr. 338. Once the tractor and trailer pull forward, a second inspection is performed of the trailer, including opening the back door to make sure the load is properly secured. The trailer cannot be completely inspected when it is parked up against the dock after hours, because the building is locked at 4:30 p.m. Tr. 274, 338-339, 347, 359-360, 551-553, 588-589. If brakes do not release, the usual procedure is to tap on the brake shoe. If they still do not release, then the driver can call a mechanic. Tr. 24-25; 1089-1090. After the inspection, the driver fills out an inspection report, noting any needed maintenance or repairs. Tr. 345. No driver has ever been discouraged from or disciplined for reporting problems. *See* Tr. 150-151, 228-229, 345, 375-377, 1098-1099; CX 17. Mr. Elbert testified that before he was fired, he had never been disciplined for reporting or complaining about a repair or maintenance on a vehicle inspection report or anywhere; whenever he requested a repair, "it was always done according to the pre-trip inspection report in triplicate." Tr. 879. Nor had he ever been informed he had been mistaken when he reported a defect or problem. Tr. at 903-904. A mechanic from another facility, Brian Rohrer, testified that he had never heard of any driver being terminated because a mechanic found nothing wrong. Tr. 1098-1099.

Mr. Elbert said he spent about eight minutes connecting and inspecting the tractor and trailer; he then re-entered the cab and checked his air pressure gauge, which read at normal operating air pressure. When he tried to pull away from the dock, however, he could not pull away from the dock because the trailer brakes were not releasing. Tr. 554. He then disconnected and reconnected the air hoses, which appeared to have normal airflow. Tr. 555. He double-checked the gauge and the valves. Tr. 556. He tapped on the brake shoes with a hammer. Tr. 557. The gauge still read as normal, and he tried to pull forward again, without success. He tapped on the brake shoes a second time. Tr. 559. He opened the valve on the reservoir tank; no air was coming out, which meant no air was reaching it. Tr. 560. Then he got back in the truck and tried again to pull forward, revving his engine. Tr. 561.

While Mr. Elbert was in the yard inspecting his truck and trailer, another driver, Jerry Waisanen, was also in the yard for his own inspection. He heard Mr. Elbert revving up the engine, and suspected that he was having a problem with frozen brakes. Tr. 362. The trailer assigned to Mr. Elbert was one of the 900 series trailers, meaning it had been purchased in 1989. Tr. 240, 596. The brakes on the 900 series charge up more slowly than other trailers. Tr. 241, 363, 596. Mr. Waisanen mentioned this fact to Mr. Elbert, who said he had been there long enough that the brakes should have released. Mr. Waisanen helped Mr. Elbert disconnect the air lines, and Mr. Elbert tested the brakes to see whether air was coming out of the lines to service the trailer. Tr. 363, 562-563. Because air was coming out of the tractor, they hooked the lines back up, but no air could be heard going into the tank as it should, indicating a slow valve, or a blocked line. Tr. 364, 366, 563-564. Mr. Elbert decided to get a mechanic, so Mr. Waisanen helped him unhook from the trailer, after which he went home, while Mr. Elbert went back to the office. Tr. 364, 564-566. Mr. Elbert said he and Mr. Waisanen worked together to try to find the problem for about another eight minutes. Tr. 565.

According to Mr. Elbert, when he first went back to the office, only Mr. Ward and Mr. Goebel were there. He told them he was having a problem with the brakes. Tr. 567. Ms. Floer came back into the room, and he told her about the problem with the brakes and asked her to call a mechanic. Tr. 568. He said he did not make the call himself, because when he has done so, he often could not get an answer. Tr. 568-569. He said she walked right out of the room. Mr. Elbert was not sure whether she heard him ask her to call a mechanic. Tr. 569, 785-786. He said he grabbed a piece of paper and a black magic marker to leave a note. See CX 4; RX 12. He wrote the note because he wanted to be sure that Ms. Floer knew he had a problem (a “defect”) with the trailer. Tr. 787. He wrote “original” on the note, and made two copies, one for himself, and one for Ms. Floer, so he would have proof that he had notified the company he had a problem. Tr. 570-571. Mr. Gappa returned to the office while he was writing the note, saying that he heard Mr. Elbert was having a problem with the brakes. Tr. 572. Mr. Elbert said he was respectful when he was talking to Mr. Gappa. He said he asked Mr. Gappa to call a mechanic, and explained that he was writing the note because he had tried to explain the situation to Ms. Floer, but she “came in the office, turned around, and went right back out.” Tr. 573. Mr. Gappa then left the room for about 10 minutes. While he was gone, Mr. Elbert said, he finished the note and the vehicle inspection report (CX 5; RX 13). Tr. 576. When Mr. Gappa returned, he called for a mechanic, which took two calls. Tr. 574. Once the mechanic was on the way, Mr. Elbert said he put the note and the inspection report on Ms. Floer’s desk before he left for the night.⁴ Tr. 576-577, 584, 788. He said he left because he had his dogs with him in his own truck, and he felt there was nothing left for him to do. Tr. 584-585. He also needed to be off for 10 hours before driving to comply with Department of Transportation regulations. Tr. 381, 633.

Ms. Floer said when Mr. Elbert came back to the room, he said that his brakes were “froze ... and that I had to do something about it.” Tr. 1136. She repeatedly said that Mr. Elbert wanted her to fix the brakes herself, not just call a mechanic. Tr. 1137, 1138, 1142, 1155. She said she was not surprised that he was back in the room later, because “he just can’t leave anything alone.” Tr. 1137. She said there was more back and forth about who should take care of fixing the brakes, and finally she got up and left, going back to the receptionist’s area. She and the receptionist stayed in the bathroom until it was quiet. When she went back to the room, Mr. Elbert was gone. Tr. 1138. Ms. Floer left work about 7:00 p.m. on the night of January 11th. Jerry Ibberson had arrived shortly before, but he had not worked on the trailer yet. Tr. 194-195.

⁴ True Value took the position that Mr. Elbert knew he was going to be fired over this incident, and prepared these documents later to bolster his claim. Post-Hearing Brief at 16-18. Mr. Ibberson testified that he never saw the pre-trip inspection report until weeks later, and that it was unusual for a pre-trip inspection report to be turned in before a trip. Tr. 1195-1196. He thought it was a fraudulent document, because it never made its way to him in the usual course of business. Tr. 1197. I do not credit this theory of the case, as it is not supported by the sequence of events. Mr. Elbert left Mankato at 5:00 a.m. on January 12, and was fired almost immediately upon his return to Mankato on January 13. There are many possible explanations why the inspection report did not make its way to Mr. Ibberson in a timely manner, including the fact that Mr. Gainer was investigating the incident, so it may not have been put into the regular flow of paperwork. The pre-trip report was written in the present tense, reporting a problem with the brakes, and requesting a mechanic to look at the trailer brakes before the trip could begin. There is no evidence that Mr. Elbert had the opportunity to fabricate such a report at a later time and submit it, since he was fired as soon as he returned from Lacrosse. Moreover, contemporaneous creation of such a report, as well as the note, is consistent with his history of documenting his point of view with written reports. In addition, I find credible Mr. Elbert’s testimony, recounted below, that when he returned to Mankato, he thought he was in trouble, not for the incident in the office on January 11, but rather, for going over Mr. Gainer’s head on January 13 by calling the corporate office. When he was confronted by Mr. Gainer upon his return to Mankato, however, Mr. Gainer’s comments soon made it clear that the focus was on the events of January 11, and not January 13.

She said she was very upset, and did not want to go back to work the next day. Tr. 1139. She said she was and is scared of Mr. Elbert. Tr. 1140, 1154. She said she spoke to Mr. Gainer the next day about what had happened, and was asked to write up a summary. Tr. 197-199, 1143. Her written summary is not in evidence.

Mr. Gappa's version of the second encounter was only slightly different from Mr. Elbert's, and does not support Ms. Floer's allegation that Mr. Elbert said she should fix the brakes herself. When Mr. Elbert came back into the office, about 15 minutes after he left the first time, Ms. Floer went to see Mr. Gappa to tell him. Tr. 316, 324. This time, Ms. Floer was in tears. Tr. 328. Mr. Gappa said he was bothered by Mr. Elbert's return because he was hindering Ms. Floer's productivity. Tr. 316. When he went to speak to Mr. Elbert, he learned that there was a problem with the brakes on the trailer. Tr. 316, 325. Mr. Elbert said he wanted Ms. Floer to call a mechanic; he refused to make the call himself because, he said, he was tired of having the mechanics try to push the job off onto someone else. Tr. 317, 325. Mr. Gappa made the call because Mr. Elbert refused to. Tr. 317, 325. The first mechanic Mr. Gappa called, the most senior, declined to come in, and suggested that he call another mechanic, Jerry Ibberson. Tr. 318, 325, 575-576. According to Mr. Gappa, one of the other drivers said he had some gas line antifreeze in his vehicle, which he offered to retrieve to help Mr. Elbert solve the problem.⁵ Tr. 325. Mr. Elbert declined the help, and then went home, which Mr. Gappa thought was unreasonable; he thought Mr. Elbert should have stayed to try, with other available drivers, to pressurize the brakes. Tr. 318-319, 325. Mr. Gappa then checked to make sure that Ms. Floer was all right, finished his own work, and went home between 6:30 and 7:00 p.m. Tr. 309, 326-327. At some point, Mr. Gappa called Mr. Gainer a second time to report that Mr. Elbert had returned to the office because the brakes locked up. Tr. 327. Mr. Gainer asked Mr. Gappa to make notes so he could remember what happened. Tr. 327.

Two other truck drivers, Ray Ward and Gordy Goebel, were both present in the office when the confrontation between Mr. Elbert and Ms. Floer over signing the notice took place, and when Mr. Elbert returned to the office. Tr. 186, 213.

Mr. Ward was doing paperwork after a run. He said that Ms. Floer was insistent that Mr. Elbert should sign the notice. Mr. Elbert said that he would not sign it without an explanation. After going back and forth, Ms. Floer picked up a clipboard containing the notice, and brought it to Mr. Elbert to sign, but he continued to refuse to sign it. Tr. 341. Ms. Floer said if he did not sign it, he would not get his check on Friday. Tr. 342. According to Mr. Ward, the argument kept escalating until Mr. Elbert was getting ready to leave, and Ms. Floer said she was going to get security. Tr. 342. Mr. Ward said Mr. Elbert did not raise his voice, but Ms. Floer did. Tr. 342. Mr. Ward testified that he and other drivers have had arguments with Ms. Floer, and that he saw her cry on one of those other occasions.⁶ Tr. 350. After she left the room, Mr. Elbert told the others that she had jumped on him before. Tr. 342. Ms. Floer returned with

⁵ I conclude that Mr. Gappa was referring to the isopropyl alcohol which Mr. Goebel obtained.

⁶ Mr. Ward said that three drivers were talking "and she had to inject her two cents into the argument, and we kind of told her it wasn't her business and she got a little upset and charged out of the room, crying." Tr. 350. He identified one of the other drivers present as Chuck Hoffman. Mr. Hoffman testified that Ms. Floer said she hated Mr. Elbert and wanted to see him fired. Tr. 1286-1287. Ms. Floer admitted saying she hated Mr. Elbert, but denied saying that she wanted to see him fired. Tr. 1182. Mr. Hoffman made a complaint about Ms. Floer to Human Resources a week before the hearing. Tr. 1239.

Mr. Gappa, who told Mr. Elbert that he had to leave so Ms. Floer could get her work done. Tr. 342. Mr. Gappa told Mr. Elbert to leave two or three times. Tr. 348. Mr. Elbert left the room, and when he returned, he said his trailer brakes would not release. Tr. 343. Mr. Ward recalled that Mr. Elbert said he was going home, and that someone needed to fix the problem with his trailer. Tr. 343. Mr. Ward said he was not asked to tell Mr. Gainer what had happened on January 11 until after Mr. Elbert was fired. Tr. 343-344, 348.

Mr. Goebel also said he was doing paperwork when Mr. Elbert walked in. Ms. Floer asked Mr. Elbert to sign the reminder notice, CX 3. Mr. Goebel had just initialed the notice, which was meant to show that he had read it and would try to adhere to it. He said most of the other drivers had already initialed it. He handed it to Mr. Elbert, who declined to initial it. When asked about the incident, he told Mr. Gainer he thought Mr. Elbert had been “unreasonable” or “stubborn” about it. He reported that Ms. Floer had said something to the effect that “maybe you don’t want to get paid ... because it’s something that the drivers need to do. And so then I just remember bantering back and forth, and Lisa ended up getting upset and leaving the room.” Tr. 214. Asked whether Mr. Elbert raised his voice, he said it was somewhat elevated, but not a yell. Tr. 216. He said the confrontation went on from five to ten minutes. Lisa was “visibly upset, her voice was shaking, and she got up and walked out of the room.” He was not certain whether she was crying. Tr. 217. In his opinion, Ms. Floer was just trying to do her job. Tr. 218-219. She did not do anything inappropriate or anything that would have warranted Mr. Elbert’s response. Tr. 227. A few minutes later, Mr. Gappa came into the room with Ms. Floer and asked Mr. Elbert to leave because Ms. Floer had some work to do, and “she couldn’t do it when Tim was in the room [be]cause it was upsetting to her.” He was uncertain about the sequence of events after the initial confrontation. Tr. 219. He recalled that when Mr. Gappa came into the room with Ms. Floer, he asked Mr. Elbert to leave a couple of times. Mr. Goebel said Mr. Elbert left within a few minutes. Tr. 220, 224-225.

When asked what caused Ms. Floer to become upset, he said:

Well, I think it was just the verbal conversation that her and Tim were having. And from my observation from working with Tim over 15 years, when he gets at a point, he doesn’t like to back down or listen to anybody else. It’s kind of like this is my point, I’m trying to get it across. And so I think Lisa got frustrated with that

Tr. 215. In his opinion, Mr. Elbert is “a confrontational person. I mean, if he feels like he’s got a point about something, he’s not going to rest until it’s heard to his satisfaction. ...” Tr. 229. He thought Mr. Elbert’s reaction to being asked to sign a reminder was “excessive” for what was involved. Tr. 230. He thought that Mr. Elbert, like some other drivers, was “trying to push Lisa’s buttons.” Tr. 249.

Mr. Goebel said that when Mr. Elbert came back a few minutes later, he said he couldn’t get his trailer to move, and “Lisa needs to call a mechanic, she’s in charge.” Mr. Goebel went across the street, bought a bottle of isopropyl alcohol to pour in the air lines, and brought it back. Tr. 222-223. As he was coming back to the office, he ran into Randy Keim, to whom he made some sort of comment about the confrontation going on in the office among Mr. Elbert, Ms. Floer, and Mr. Gappa. Tr. 223-224. He recalled that Mr. Keim suggested that the particular trailer type required a longer time to charge the brakes. As to his offer of alcohol to pour in the

lines, Mr. Goebel said that that is a standard procedure for ice in the lines, along with tapping on the brake shoes. He testified that alcohol could be used to dry out any moisture which might freeze in the valve system for the air brakes. Tr. 226. He agreed that air dryers should remove most of the moisture from a brake system, and that excessive moisture in the system could signify a bad air dryer. Tr. 237-238. After Mr. Goebel offered a couple of times to help, Mr. Elbert asked him not to interfere. He said Mr. Elbert was not cooperative. In Mr. Goebel's view, "it was kind of like, no, he wanted a mechanic and he didn't want to try to do the basic things that a truck driver should do...." Tr. 221. He later admitted he assumed, but did not know, that Mr. Elbert had not tried tapping on the brake shoes. Tr. 235. He said he recommended using alcohol at least three times, but Mr. Elbert asked him, in effect, to "butt out," so he did. Tr. 221-222, 234. He said there were people coming and going, and he did not keep track of who was in the room at which points, but he did recall that Mr. Gappa came in at some point saying a mechanic was on the way. Tr. 222. He said he told Mr. Gainer essentially the same story the next day. Tr. 225, 233. He agreed that the 900 series trailers, like the one which had the problem, are old trailers and it takes a while for the brakes to charge. Tr. 241. He told Mr. Gainer he thought Mr. Elbert just did not wait long enough for the brakes to charge. Tr. 244, 254, 256. Asked about his own experience with filling out vehicle inspection reports and requesting repairs by a mechanic, he said he had never received any adverse reaction or discipline for requesting a repair. Tr. 228-229.

Mr. Keim came into office on January 11 after Ms. Floer and Mr. Goebel had already left the room after the first encounter. Tr. 279. He said he saw a frustrated Mr. Elbert asking questions about why he had to sign the notice. Tr. 268. He knew Mr. Elbert was frustrated because he had passed Mr. Goebel on his way in; Mr. Goebel told him that there was a commotion going on upstairs. Tr. 285-286. Mr. Keim told Mr. Elbert that the purpose for signing was to let Mr. Struck know that he had seen the notice.⁷ Tr. 269. There were probably three, four or five such notices each year. Tr. 279, 286. Mr. Keim did not recall the details of what Mr. Elbert said about his truck. Tr. 281-282. While Mr. Keim was still in the office, Mr. Goebel came in from the street with the alcohol he had purchased, and Mr. Gappa came in from the other offices. Tr. 283. Mr. Keim did not observe Mr. Elbert being uncivil to Mr. Gappa. Tr. 279. He did not think Mr. Elbert was out of line with Mr. Gappa. Tr. 289. Mr. Gainer did not interview Mr. Keim about what had happened. Tr. 269. Mr. Keim confirmed, however, that at some point he told Mr. Gainer that Mr. Elbert was being a "dink" that night, and that "Tim was just being Tim." Tr. 285. Asked to explain, he said, "... Tim is always kind of, in my words, a push-the envelope, Tim does things Tim's way." Tr. 290. His behavior that night was no different than any other times during the 14 years they worked together. Tr. 291. Mr. Keim said he and others have had similar disputes with Ms. Floer. Tr. 288-289. Mr. Keim also offered to help Mr. Elbert with his truck. Tr. 287.

Mr. Ibberson, the mechanic who was called to fix the trailer, said that when he arrived, Mr. Keim accompanied him to the trailer. Mr. Ibberson found nothing wrong with the trailer. Tr. 1191-1192, 1193, 1203. He said Mr. Keim told him that "Timmy is just being Timmy." Mr. Ibberson's understanding was that Mr. Elbert "was just being difficult. He was making a mountain out of a molehill which he sometimes had a tendency to do." Tr. 1192. He said Mr. Gainer contacted him the following day and asked what was wrong with the trailer. He told

⁷ Mr. Elbert remembered asking Mr. Keim if he understood the paragraph about tracking fuel and miles. Tr. 580, 582. He thought Mr. Keim might understand it because he was a member of the drivers' committee. However, the drivers' committee had not met for several years. Tr. 267.

Mr. Gainer that he “went out, hooked up to it, aired it up and basically drove it away.” Tr. 1193, 1203, 1204. Mr. Ibberson pulled the trailer around to the front of the building next to the traffic office door so that Mr. Elbert would see that the brakes had released. Tr. 1193-1194.

Mr. Elbert said he declined Mr. Goebel’s suggestion to put alcohol in the air lines because he had never done it before, and would not know where to put it, or how much to use. He was not sure if it was the right type of alcohol. Tr. 578, 759-761. Nor had he ever seen anyone else do it before. Tr. 579, 754, 757, 758, 916.⁸ He left True Value about 6:25 p.m. and drove home. Tr. 585. After he got home, Mr. Keim called him to tell him that the mechanic had been able to release the brakes and the trailer would be sitting in front of the building in the morning. Tr. 586. At that point, Mr. Elbert said he was satisfied that the trailer was in working order. Tr. 587. He reported to work at 5:00 a.m. the next morning to begin a two-day run to LaCrosse, Wisconsin, and back. His logs for January 11-13, 2005, appear in the record at CX 6. On his way back to Mankato, late in the afternoon on January 13, Mr. Elbert called the corporate compliance number he found in the Code of Conduct and Business Ethics, CX 25, and reached the True Value legal department, to seek assistance because he was concerned about whether he would receive his paycheck on January 14. The person he spoke to said he would contact Mr. Gainer. Mr. Elbert was to call again to find out what happened the next day. Tr. 598-605, 789-791. When he got back to Mankato, he saw that Mr. Gainer and Mr. Struck were still in the office, although it was late, and he was concerned about whether there would be repercussions from his call to the legal department. Tr. 607. He thought Mr. Gainer was upset or uptight when Mr. Elbert had suggested involving someone from human resources when he protested his May 2004 write-up, which Mr. Gainer took as a threat. Tr. 609-610. As a result, he got his micro-cassette tape recorder from his personal truck and put it in his pocket. Tr. 607, 780. The meeting about the warning he received in May 2004 had been unpleasant, he expected any meeting to be “Gene and Gerry against me,” and he wanted to have the tape recorder as a witness of his own. Tr. 615. After he got the tape recorder, he went into the office to finish his paperwork from his trip to LaCrosse. Tr. 616. When he had finished his paperwork and was ready to leave, Mr. Gainer and Mr. Struck came out of Mr. Gainer’s office to speak to him. Tr. 616.

Mr. Gainer testified that he first learned of the January 11 incident when he was called at home. Tr. 58, 1012. The receptionist called and told him that Ms. Floer was upset and would not go back to the traffic office until Mr. Elbert left. He asked her if there was a supervisor available, and then Mr. Gappa was put on the phone. Tr. 1012. Mr. Gainer told Mr. Gappa that

⁸ Mr. Elbert called an expert witness to testify about air brake systems. The expert said that applying alcohol into the air brake system is a “last resort” which would lead him to question the reason and whether the cause of the problem is known. Tr. 945. He would not use isopropyl alcohol, because it would remove a needed silicone lubricant that the valves are assembled with. He would use an alcohol made for air brake systems, which contain a lubricant to protect the valve. Tr. 951, 976-977. Asked what a driver, as opposed to a mechanic, should do if the brake will not release, the expert described essentially the procedure that Mr. Elbert and Mr. Waisanen followed. Tr. 950, 970. He said he knows that some drivers do pour alcohol into the system, but said they should be trained to do so, as it can hurt the system badly if put in the wrong place. Tr. 952, 954-955, 977. He said it should only be done in an emergency situation, such as an out-on-the-road attempt to get the vehicle going. Tr. 976. He said it is possible to have a “sticky valve” that will not accept air at one point, but come “unstuck” a half hour or 45 minutes later. Tr. 953. True Value called a mechanic who is a certified brake inspector as a witness. He admitted that a driver who does not know what to do should not apply alcohol to the brake system. Tr. 1104. He agreed that methyl alcohol is recommended for use as a de-icer, but not isopropyl alcohol or ethylene glycol type antifreeze. Tr. 1107.

Ms. Floer had to get the paperwork done to finish the routes. He instructed Mr. Gappa to get Mr. Elbert to leave the traffic office so Ms. Floer could finish her work. He said Mr. Gappa expressed doubt about getting Mr. Elbert to leave, so Mr. Gainer said, "Just get him out of there, if he refuses to leave, just suspend him." Tr. 1013. Asked how he felt after receiving the call, Mr. Gainer said,

A[nswer] I was, in my mind, Tim was gone, he was fired.

Q [uestion] Why?

A Because this is just an ongoing, just ongoing with Tim, and enough was enough, and that was it.

Q Were you upset?

A Yes, I was.

Q Are you in the habit of receiving telephone calls at home?

A No.

Q How many times have employees called you at home in [the] last four years?

A Three or four times.

Q Has anyone ever called home with a complaint about another employee?

A No.

Q What were the other telephone calls to your house?

A They were all drivers that were broke down on the road, something major had happened, and they weren't ... able to contact Gene. ...

Tr. 1014.

Twenty to thirty minutes later, Mr. Gappa called again to tell him the result. Mr. Gappa said he had gotten Mr. Elbert out of there after telling him to leave two or three times, but he had come back in "complaining about his brakes wouldn't release and he told the mechanic and ... after requesting Tim to leave again, Tim left." Tr. 1015. He said the fact that Mr. Gappa had to ask Mr. Elbert to leave a number of times "reaffirmed my belief that it was time for Tim to go." Tr. 1015-1016.

The next day, Mr. Gainer interviewed the receptionist, everyone who was in the drivers' room, the mechanic, and anyone else whose name came up. Tr. 58, 1017-1018, 1027. Mr. Keim and Mr. Ibberson (who was interviewed later, Tr. 1037, 1054, 1058) said the brakes were

working, *i.e.*, that there was nothing wrong with them. Tr. 1019, 1054, 1068. Because of that, Mr. Gainer thought that the complaint about the brakes was “probably ... just a way for Tim to get back up into the dispatch office and ... start up with Lisa again.” Tr. 1020. Mr. Keim also said Mr. Elbert was being a “dink.” Tr. 59. Mr. Ward gave him little information; he did not want to get in the middle. Tr. 60. He said Tim was just being Tim, and that Ms. Floer said she was not going to give him his check if he did not sign the notice. Tr. 1067-1068. Mr. Goebel gave him a more detailed account of what had happened. Tr. 1069. He did not interview Mr. Elbert or Mr. Waisanen. Tr. 61. He did not interview Mr. Elbert, he said, because “I had the information consistently from everybody that was there and I had talked about stuff before then. And Tim Elbert’s always right and everybody else is always wrong.” Tr. 1028; *see also*, Tr. 1059-1060. He did not discipline Ms. Floer for her actions during that evening. Tr. 137, 1055. He did tell her she did not have the authority to withhold a paycheck. Tr. 1055.

Mr. Gainer and Mr. Struck met to discuss the incident on January 13, 2005, after Mr. Struck returned from his out-of-town meeting. According to Mr. Struck, Mr. Gainer brought up the subject of terminating Mr. Elbert over his behavior. Tr. 414. Mr. Struck admitted that during the discussion, Mr. Gainer mentioned that Mr. Elbert had complained about the brakes on a trailer, that a mechanic had to called, and that there was nothing wrong with the brakes. Tr. 412-415. Mr. Struck confirmed that he was not present on January 11, and had no involvement in the decision to fire Mr. Elbert. Tr. 482.

Mr. Gainer and Mr. Struck were the only persons present when they met with Mr. Elbert on January 13. Tr. 40-41. Mr. Gainer and Mr. Struck were not aware that the meeting was being recorded. Tr. 41, 617. The material parts of the discussion regarding the reason for his termination went as follows:⁹

Voice No. 1 [Mr. Gainer]: True Value has decided to terminate your employment, ah. Enough is enough. Okay?

Voice No. 2 [Mr. Elbert]: Can I ask who you talked to?

[Mr. Gainer]: I talked to everybody that was here.

[Mr. Elbert]: Who was –

[Mr. Gainer]: That’s it. Okay. I’m not going to drag this on all night. Okay?

[Mr. Elbert]: No, I don’t –

⁹ True Value objected to admission of the tape into evidence on multiple grounds. I overruled the objections, and admitted a copy of the portion of the tape relating to the meeting of January 13, CX 26, and a transcript of the conversation made from the tape, CX 27. *See* Tr. 6, 41-56, 76-77, 646-654. The original microcassette, which contained additional recording on the reverse side which the Respondents did not hear in advance of the hearing, was marked for identification as ALJ Exhibit 1 and retained for the record, but was not admitted into evidence. Tr. 655-656, 659-664. At a later point in the hearing, however, the Respondents were allowed to use the reverse side of the tape to refresh Mr. Elbert’s recollection of a meeting with Mr. Struck in February 2005, during which Mr. Elbert reviewed his personnel file. Tr. 723-724, 804-819.

[Mr. Gainer]: I interviewed ... everybody that was here and, ... we just decided it's best that ... we terminate the employment. Okay? And it's not a decision that was come to easily. ... I don't like to do this kind of stuff but ... it gets to the point where enough is enough. ...

[Mr. Elbert]: Okay. Did you talk to Ray and Gordy ... ?

[Mr. Gainer]: I said I talked to everybody. ...

[Mr. Elbert]: Okay.

[Mr. Gainer]: And ... the decision's been made, Tim. Okay.

[Mr. Elbert]: Okay.

...

[Mr. Elbert]: Okay. I will ask you one more time if you could tell me if you had talked to Ray and Gordon because they were present here.

[Mr. Gainer]: They were present. That's right.

[Mr. Elbert]: Did you talk to them?

[Mr. Gainer]: Yes, I did.

[Mr. Elbert]: Can I ask what they said or would it be better for me to talk to them?

[Mr. Gainer]: You can do whatever you want to, Tim. Okay?

[Mr. Elbert]: Okay. That's fine.

[Mr. Gainer]: Like I say, isn't something I enjoy doing, but it's just time. It's just time. Enough is enough. Okay? You know, I'm not going to ramble on.

...

[Mr. Elbert]: ... One other thing that I – since you don't want me coming back and forth, that last piece of paper that you wanted everything initialed, can I get a photocopy of that. Because that's where everything started. And I had talked to her last week about that.

[Mr. Gainer]: I have that.

[Mr. Elbert]: Okay.

[Mr. Gainer]: And you know, I have that. If you get – I have that and I'm supposed to get that kind of stuff together and get it to someone. Okay. And, you know, you're going to have to go through the proper channels. It's not been altered. It's not been changed. Nothing – I – I'm not a lawyer, Tim. I don't know.

[Mr. Elbert]: Neither am I.

[Mr. Gainer]: I'm sure there probably won't be a problem with that.

[Mr. Elbert]: Okay.

[Mr. Gainer]: Is that okay? Is that a good enough answer?

[Mr. Elbert]: Well, actually, for myself, I would like to have it because then I can go see somebody tomorrow. I feel that if that's how your decision was made just on that basis –

[Mr. Gainer]: No, no. Actually, that really didn't have a lot to do with it. You know just the, ah, ah – Well, the trailer brake deal, there wasn't nothing wrong with the trailer brakes. All you had to do was wait for the tank to charge up.

[Mr. Elbert]: I did, and there was no air going in the tank. Jerry Waisanen was there at the time.

[Mr. Gainer]: Okay.

[Mr. Elbert]: An, you know, we both looked at it. And he said, I hear no air going in the tank.

[Mr. Gainer]: Well, Jerry [Ibberson] came in a half hour later and the trailer brakes released.

[Mr. Elbert]: Yeah, and I had put the Glad hands to it and put air to it and maybe in the meantime something broke loose. I don't know. But Jerry Waisanen was standing there and he watched me – he, actually, helped me. He took the Glad hands off.

[Mr. Gainer]: Okay. Let's get this done.

[Mr. Elbert]: I mean, that got back to the point where you asked me if that was good enough. And I said I would actually like that piece of paper. Actually, I guess, what I'm looking for is what the reason – I think sooner or later you're gonna have to tell, um, somebody what the reason for the termination was. And I think that's my right, I believe. And would it be better to tell me now or I mean sooner or later, I believe that's how it goes.

[Mr. Gainer]: The insubordination of Leroy, it would be – ah. Just a failure to operate in a team environment, Tim. My point of view with the information I have gathered about the trailer brake deal was just another opportunity to get back up here. And, you know, there was a mechanic called and there – so, you know, that’s failure to operate equipment right.

[Mr. Elbert]: Well, I understand what you’re saying. I hear what you’re saying. I explained my point of view on that and what I did when I was out there. And I have a witness, Jerry Waisanen. I take it that you didn’t talk to him because nobody knew I’m sure.

[Mr. Gainer]: Nobody knew, yeah.

[Mr. Elbert]: So that if that is part of your reasoning for letting me go –

[Mr. Gainer]: Then you can take that out and use the other two, Tim.

[Mr. Elbert]: Okay. What was the insubordination from Leroy is what I ask next.

[Mr. Gainer]. I interviewed everybody and I sent everything to the company lawyer. You know, I can’t make a decision like this, Tim. Okay? That’s were it’s at. It’s in peoples’ hands that – are –

[Mr. Elbert]: Well, they had to get it from somebody, I guess. And, like I said, I believe, you know, that I am entitled to the reasons for the termination.

[Mr. Gainer]: Okay.

...

CX 27; Tr. 77-121. Mr. Elbert went on to explain his view of what had happened on the 11th. Mr. Gainer did not say anything further about his reasons for terminating Mr. Elbert before the tape ran out. All of the conversation on the tape took place in the traffic office. Tr. 666. After the meeting, they went to clean Mr. Elbert’s personal belongings out of his truck. Tr. 75, 123, 433, 645, 665.

At his deposition, Mr. Struck said that the meeting lasted only two to three minutes, referring to the time they were in the office, as opposed to the shop, and he denied that Mr. Gainer brought up the fact that there was nothing wrong with the brakes. Tr. 436, 440, 467, 468-469. Mr. Struck said that some of the discussion on the tape may have occurred in the shop, while cleaning out Mr. Elbert’s truck. Tr. 442, 447-452, 454-455. He insisted that he did not remember anything about the brakes being mentioned in the office, but they might have come up in the shop. Tr. 442, 443, 456-459. He said he testified at his deposition truthfully according to his recollection, but conceded that the tape contradicted his memory. Tr. 460-461, 463, 468-469, 480, 1036. Asked whether he knew that the issue of whether or not Mr. Gainer mentioned the brakes when he discharged Mr. Elbert is an important issue in this case, Mr. Struck said, “I

didn't feel that that was a major factor. I didn't think it was even a small factor. It was the consistent behavior of Tim Elbert that brought to this point." Tr. 463. *See also*, Tr. 466.

Similarly, Mr. Gainer testified at his deposition that the January 13 meeting lasted only one to two minutes, and that the "trailer [brake] deal" was not mentioned. Asked about the discrepancy between his deposition testimony and the tape recording, Mr. Gainer said he told everything as he remembered it. He said that when he said he did not bring up the "trailer [brake] deal," he "meant the trailer brake situation didn't have anything to do with the discharge." Tr. 57-58. He said he did not recall having told Mr. Elbert that he had not operated the equipment properly. Tr. 70-71. In his mind, he had not made false statements at his deposition; they were accurate to the best of his knowledge before he heard the tape. Tr. 73, 115. He insisted that "the brake deal had nothing to do with the termination." Tr. 72, 109. After listening to the tape, he said he was "trying to summarize everything. I thought that the trailer brake situation probably got Tim back up into the office a second time." Tr. 98. He still thought that in hindsight by the time of the hearing. Tr. 1069. He said he was "lured" into saying that the trailer brake deal was a reason for firing Mr. Elbert; he could not point to any particular language from Mr. Elbert luring him, however. Tr. 99, 124. Even after hearing the tape, he did not remember some of the conversation. Tr. 123, 125. Neither he nor Mr. Struck remembered that the trailer came up during the meeting with Mr. Elbert. Mr. Gainer and Mr. Struck had discussed it ahead of time while they were waiting for Mr. Elbert to return from the trip to Lacrosse, Wisconsin, and afterwards, when the complaint came, and on other occasions. Tr. 124-125, 127-128. He denied that they met to get their testimony consistent. Tr. 128.

Asked what he meant by the phrase, "enough is enough," Mr. Gainer said he was referring to "all the confrontations ... we were always being inferred to that we were ... messing with Tim ... and it was jut on and on with this all the time. And that's what I meant by, okay, enough is enough." *See also*, Tr. 1070. Asked how Mr. Elbert responded to discipline, he said, "There was probably a three or four-page letter every time something like this would come up ..." Tr. 155. He said he was not prepared for Mr. Elbert's questions at the termination meeting. It was the end of a 13-hour day, and he just wanted to leave. Tr. 158. He had written the grounds for the termination on a note he could hold in his hand, that Mr. Elbert was being terminated for insubordination and failure to operate in a team environment. He did not want to say anything that would hurt himself or the company. Tr. 159. Before the termination meeting, he had not heard anything about Ms. Floer tearing down Mr. Elbert in front of the other drivers. Tr. 160.

Later in the hearing, Mr. Gainer was asked to explain why he decided to terminate Mr. Elbert. In response, Mr. Gainer said:

Well, the evening of the 11th ... there was an incident that started there in the drivers' room that ... escalated to the point where ... we had somebody just leaving because they couldn't do their job. They claimed they couldn't do their job anymore. ...

...

... And ... then ... there was a call made to me, and at that point, it needed to be defused. You know, that's when it could have stopped right there. But, this

supervisor had a hard time getting Tim to leave. Like Gordy said, he was like a dog with a bone ... he was pushing buttons.

And then ... he came back, and when he came back, ... there was an issue there where he could have called the mechanic himself, where he could have come back and not pushed the issue about Lisa being a supervisor ... [I]t was just an ongoing effort to keep this going, and ... the fact that the supervisor had asked him once, and had to ask him again to get out of there. It could have stopped.

Tr. 1021-1022. He went on to say that Mr. Elbert could have called a mechanic himself, or accepted help from the other drivers. Tr. 1022-1023.

On January 31, 2005, Mr. Elbert wrote to Mr. Gainer, asking him to write a letter stating why he had been fired, and requesting a copy of his personnel file. CX 12. In response, Mr. Gainer signed a letter dated February 10, 2005, in which he said the following regarding the reasons for the termination:

On January 13, 2005, you were released from employment with True Value Company. The reason for termination is insubordination and failure to contribute to a team work environment.

On January 12, 2005 you were asked to initial a weekly reminder sheet. You refused to initial and talked on and on to the traffic clerk about why you didn't have to sign. She asked you to leave and you did not. She retrieved a supervisor to assist her to have you leave, so her work could be completed. The supervisor asked you to leave. After a third request to leave, you went outside. You returned to the traffic office again for assistance with your breaks [sic]. You refused the offer of help from other drivers on your team and insisted the traffic clerk call a mechanic. A mechanic came to the warehouse and determined there was nothing wrong with the brakes.

As recently as May 2004, you have been previously counseled for similar problems with unacceptable communication within the department. Previous warnings regarding similar conduct have not resulted in lasting improvement. As a result, you were terminated.

...

CX 13; Tr. 37-40.

II. DISCUSSION

For the following reasons, I find that Mr. Elbert has failed to bear his ultimate burden of persuasion, that True Value fired him because he engaged in protected activity.

In reaching my decision, I must evaluate the credibility and demeanor of the witnesses. I find that Mr. Elbert was generally truthful, although he was sometimes argumentative and hyper-technical in his answers to questions by counsel for True Value. For example, at the hearing, he

denied that Mr. Struck talked to him about taking too much time to load pallets, Tr. 885-886, later conceding that such an incident occurred, but related to loading lumber for pallets, rather than pallets, Tr. 903. Testimony of all the witnesses present on January 11, including Mr. Elbert's testimony, supports the conclusion that he behaved in a similar way during the incident on January 11, 2005.

As to Ms. Floer, she is the only witness who described Mr. Elbert as yelling and red-faced on January 11. She is also the only witness who said that Mr. Gappa had to tell Mr. Elbert to leave eight to ten times. She is also the only witness who testified that Mr. Elbert asked her to fix the truck herself, rather than to call a mechanic. I find that she exaggerated her testimony for effect, including her testimony that she was fearful of or intimidated by Mr. Elbert. Nonetheless, I also conclude that Mr. Gappa believed that it was Mr. Elbert, and not Ms. Floer, who was responsible for the conflict on January 11, and that he communicated that opinion to Mr. Gainer.

Other witnesses who were present during the evening of January 11, including Mr. Gappa, Mr. Ward, Mr. Goebel, Mr. Keim, and Mr. Waisanen, appeared candid and truthful about the events that took place that evening from their point of view.

I also find Mr. Struck to be a credible witness. Mr. Elbert maintained that the tape recording proved Mr. Struck was lying at his deposition when he said the "trailer brake deal" did not come up during the meeting on January 13. Mr. Struck explained that he said he did not recall that the trailer brakes came up during the termination meeting, *i.e.*, in the office, but he did remember the subject coming up in the shop when they were cleaning Mr. Elbert's belongings out of the tractor. I find his explanation of the apparent inconsistency to be credible. He held up well under intensive questioning by counsel. He steadfastly maintained that it was Mr. Elbert's consistent conduct that led to his termination.

As a practical matter, it is Mr. Gainer's credibility that is most important, as the evidence is strong that he, and he alone, made the decision to fire Mr. Elbert. I find that Mr. Gainer's testimony was generally truthful as well, although colored by hindsight, and a desire to protect the company's position. For this reason, I do not credit his testimony that he decided to fire Mr. Elbert when he was first called on January 11. Had he done so, of course, then Mr. Elbert's complaint about the brakes could not have entered into the decision, as Mr. Elbert had not yet gone outside for his pre-trip inspection of the trailer. It is unlikely, however, that Mr. Gainer would have allowed Mr. Elbert to go out on a two-day trip if he had made up his mind at that point. Instead, he allowed Mr. Elbert to go out on his run, while he investigated what had happened, and "got his ducks in a row" with the corporate office. Nonetheless, it is clear that Mr. Gainer was angry with Mr. Elbert when Mr. Gappa called him the first time, and that Mr. Gainer anticipated that Mr. Elbert might not leave when asked to do so; otherwise, he would not have instructed Mr. Gappa to suspend Mr. Elbert if he would not leave. On the other hand, I do credit Mr. Gainer's testimony that he did not recall having brought up the "trailer brake deal" in the meeting with Mr. Elbert on January 13, because his testimony that he did not *intend* to bring it up is credible under the circumstances, *i.e.*, his testimony that he had prepared notes for himself as to what he intended to say; that he did not intend to enter into a discussion, he just wanted to get the termination done; that he was not prepared for Mr. Elbert's questions; and, that he is uncomfortable at termination meetings. Tr. 65-70, 73, 75, 109, 153, 1071-1072. In any event, his position that he did not fire Mr. Elbert *because* he complained about the brakes, is consistent with the overwhelming weight of the evidence that when he made the decision to

terminate Mr. Elbert, he did not know that there was anything wrong with the brakes. Tr. 1072. There is no evidence that Mr. Elbert told anyone on January 11 that Mr. Waisanen had helped him, or that anyone saw them together while he was outside. There was no opportunity for Mr. Elbert to tell anyone on January 12 or 13, because he was away from the office on his run to Wisconsin. Mr. Gainer did not talk to Mr. Elbert until the termination meeting. Because Mr. Gainer had not talked to Mr. Elbert, neither he, nor any of the other persons he talked to, were aware that Mr. Waisanen had been in the yard when Mr. Elbert discovered the problem with the brakes and could corroborate that there really was a problem. On the other hand, the mechanic, who was called to fix the trailer, was interviewed, and he confirmed that he found no problem with the brakes.

Although I have accepted Mr. Struck's and Mr. Gainer's explanations of the reasons for the apparent inconsistency between their deposition testimony and the tape, the evidence is unequivocal that Mr. Gainer mentioned the "trailer brake deal" and a "failure to operate equipment properly" during his meeting with Mr. Elbert on January 13. I must, therefore, first consider whether his comments constitute direct evidence of discrimination.

I find that Mr. Gainer did not bring up the "trailer brake deal" because Mr. Elbert reported a safety hazard. Rather, he brought it up because he did not believe that Mr. Elbert had found a safety hazard; he thought Mr. Elbert made it up as an excuse to continue the confrontation with Ms. Floer. In other words, Mr. Gainer concluded that Mr. Elbert had made a false report. I credit Mr. Elbert and Mr. Waisanen's testimony that they were unable to get the emergency brakes on the trailer to release and, therefore, that Mr. Elbert's report of a problem was legitimate. However, the mechanic who was called did not find anything wrong with the brakes, and that is what he told Mr. Keim, and later, Mr. Gainer. Mr. Gainer did not talk to Mr. Elbert or Mr. Waisanen before making the decision to fire Mr. Elbert. Thus, the information before him supported his conclusion that Mr. Elbert had made a false report. I find that Mr. Gainer was mistaken but sincere in his initial belief that the problem with the brakes was a fabrication by Mr. Elbert. I further find that once Mr. Gainer knew that another driver could corroborate the problem with the brakes, he still felt that Mr. Elbert should have handled the problem differently. There is merit in Mr. Gainer's position that Mr. Elbert could have defused the situation when he returned to the office had he acted differently, for example, by calling a mechanic himself, in stead of insisting that Ms. Floer make the call because she was his "supervisor" that night and, therefore, "in charge."

Mr. Elbert maintained that "the only explanation of Elbert's alleged 'failure to operate in a team environment' was 'the trailer brake deal' ..." Complainant's Opening Brief at 28. However, this interpretation takes out of context the references to the "trailer brake deal" on the tape recording of the January 13 termination meeting, and in the February 10 letter explaining the reasons for the termination. I find that the "failure to operate in a team environment" was a reference to Mr. Elbert's interactions with Ms. Floer, interfering with her work, along with his refusal to sign the notice, to accept help from other drivers in solving the problem with the brakes, or to call a mechanic himself.

For these reasons, I find that the references to the trailer brakes when Mr. Elbert was terminated do not constitute direct evidence of discrimination. As I do not find that there is direct evidence of discrimination, I must look to the circumstantial evidence in determining whether Mr. Elbert has borne his burden of proof.

Mr. Elbert engaged in protected activity on January 11, 2005, when he reported that the brakes for his assigned trailer were not working, and requested a mechanic be called. True Value took adverse action against Mr. Elbert when it terminated his employment on January 13, 2005. The entire sequence of events took place over a three-day period. “Proximity in time is sufficient to raise an inference of causation.” *Bechtel Construction Co. v. Sec’y of Labor*, 50 F.3d 926, 934 (11th Cir. 1995), citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Under the circumstances of this case, I find that Mr. Elbert has established sufficient nexus between his protected activity and the adverse action, based on proximity in time of the discharge to his complaint about the brakes on the trailer, and explicit references to the “trailer brake deal” in the termination meeting, and the follow-up letter, to establish a *prima facie* case of discrimination. True Value has articulated a legitimate, nondiscriminatory reason for terminating Mr. Elbert’s employment; namely, that Mr. Elbert’s confrontational communications and failure to be a team player made his behavior unacceptable for continued employment. The remaining issues, then, are whether Mr. Elbert has established that True Value’s articulated reason was a pretext for discrimination, or, if there were both legitimate and prohibited reasons for the discharge, whether True Value has established that it would have fired him anyway.

As noted above, until Mr. Gainer talked to Mr. Elbert on January 13, Mr. Gainer believed that Mr. Elbert made up the problem with the brakes as an excuse to return to the office. Testimony and the tape recording establish that Mr. Elbert told Mr. Gainer on January 13 that Mr. Waisanen could corroborate his story that there was a problem with the brakes. However, Mr. Gainer did not learn of Mr. Waisanen’s presence on January 11 until after the decision to fire Mr. Elbert had already been made. The fact that Mr. Gainer was mistaken in his conclusion that Mr. Elbert made up the problem with the brakes, does not undermine the conclusion that he fired Mr. Elbert, at least in part, because he thought Mr. Elbert made it up as an excuse to continue the confrontation with Ms. Floer, and because of the way Mr. Elbert handled calling the mechanic (*i.e.*, refusing assistance from other drivers and insisting that Ms. Floer should make the call). The central reason for the decision to fire him, however, was that Mr. Gainer viewed the confrontation between Mr. Elbert and Ms. Floer—which led to Mr. Gainer being called at home to intervene, along with Mr. Elbert’s failure to leave the office when first asked to do so, and the continued conflict with Ms. Floer when he returned to the office—as part of a continuing course of conduct by Mr. Elbert. Mr. Gainer had warned Mr. Elbert the month before that he was “walking on thin ice.” When Mr. Elbert pointed out during the meeting on January 13 that no one had spoken to Mr. Waisanen to confirm that there was a problem with the brakes, Mr. Gainer responded, “Then you can take that out and use the other two [the insubordination of Mr. Gappa, and a failure to operate in a team environment], Tim.” CX 27 at 9-10. This statement supports the conclusion that reporting the problem with the brakes was not the reason for the termination. The February 10 letter also supports the interpretation that what caused Mr. Elbert to be fired was his behavior both before and after he discovered that the brakes would not release, and not the fact that he reported the problem with the brakes.

Mr. Gainer testified that he considered Mr. Elbert to be a safe and skilled driver. Tr. 393. Mr. Struck also said that Mr. Elbert was a skilled driver. Tr. 994-995. The evidence as a whole, including the testimony of the other drivers who were present on January 11, supports Mr. Gainer’s testimony that he fired Mr. Elbert because Mr. Elbert was insubordinate and did not operate in a team environment, and he had a history of conduct similar to his conduct on the evening of January 11. Furthermore, as Mr. Elbert himself acknowledged, and other drivers

confirmed, all drivers had reported safety problems and requested assistance from mechanics many times before, with no adverse consequences.

True Value introduced evidence intended to establish that Mr. Elbert had engaged in other misconduct with respect to Ms. Floer, as a reason for the animosity between them. *See* True Value's Post-Hearing Brief at 12-14. True Value also attempted to establish that it had a policy against surreptitious taping, so that Mr. Elbert's taping of his meetings with his supervisors would have been independent grounds for discharging him. *See* Post-Hearing Brief at 31-32. Much of that evidence lacked credibility (regarding the reason for the animosity between Mr. Elbert and Ms. Floer), or was insufficient to lead to the desired conclusion (regarding the alleged policy), but in any event, neither theory is material to the outcome of this case. The issue before me is whether Mr. Elbert was fired because he complained about a safety problem. I cannot substitute my judgment for Mr. Gainer's whether Mr. Elbert should have been fired. I can only decide whether he was fired for a prohibited reason. I conclude that Mr. Elbert was not fired because he reported that he had a problem with the brakes on his trailer. Rather, I conclude that he was fired because in Mr. Gainer's view, Mr. Elbert was stubborn and confrontational, and Mr. Gainer had had enough. Mr. Gainer viewed Mr. Elbert's failure to leave the office the first time he was asked by Mr. Gappa, before Mr. Elbert knew of the problem with the brakes, to be insubordination. To the extent that it can be said that Mr. Elbert's manner in reporting the problem with the brakes contributed to his discharge, making this a mixed motive case, I also find that True Value established by clear and convincing evidence that Mr. Elbert would have been fired even if he had not returned to the office to report a problem with the brakes.

RECOMMENDED ORDER

Because Mr. Elbert has failed to establish that True Value discharged him because he engaged in protected activity, I recommend that his complaint filed with the Occupational Safety and Health Administration on March 7, 2005, be dismissed.

A

ALICE M. CRAFT
Administrative Law Judge

NOTICE OF REVIEW: The Administrative Law Judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, D.C., 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the Administrative Law Judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the Administrative Law Judge's recommended decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.

