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Issue Date: 25 October 2005

Case Nos. 2005-STA-00033

In the Matter of

ROBERT HOWARD,
Complainant,

v.

COOL EXPRESS, INC.,
Respondent.

APPEARANCES:

Robert Howard,
Pro Se for the Complainant

Darrell Wessels,
Pro Se for the Respondent.

BEFORE: JOSEPH E. KANE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 ("Act" or "STAA"), 49 U.S.C. § 2305, and the regulations promulgated thereunder 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 such operation would be in violation of those rules.

The Complainant, Robert Howard ("Complainant" or "Mr. Howard"), filed a complaint with the Occupational Safety and Health Administration, United States Department of Labor, on January 14, 2005, alleging that the Respondent, Cool Express, Inc., ("Respondent" or "Cool

Express") discriminated against him in violation of 49 U.S.C. § 31105. (ALJX 1).[1] The Secretary of Labor, acting through a duly authorized agent, investigated the complaints and on March 30, 2005, determined that Mr. Howard failed to establish that he was an employee of the Respondent or suffered any damages. Id. Furthermore, the Secretary of Labor found no adverse action was taken against the Complainant in retaliation for his alleged protected activities, and thus no violation of 49 U.S.C. § 31105 occurred. Id.

The Complainant filed objections to the Secretary's findings by way of notice of appeal dated April 28, 2005. (ALJX 2). A formal hearing was held before the undersigned on July 13, 2005, in Madison, Wisconsin. (TR 1). All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder.

The findings of fact and conclusions of law set forth in this Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered.

ISSUES

The issues in this case are:

1. Whether Mr. Howard was an employee of Cool Express, and therefore entitled to protection under STAA; and,

2. If Mr. Howard is covered by STAA, whether Cool Express took an adverse action against him in retaliation for his alleged protected activities.

Based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations and relevant case law, I hereby make the following:

[1] In this Recommended Decision and Order, "ALJX" refers to exhibits 1 through 10 admitted into the record and offered by the Administrative Law Judge, "CX" refers to the Complainant's exhibits 1 through 48, and "TR" refers to the pages in the hearing transcript. The Respondent in his pre-hearing exchange and at the hearing noted that he was submitting a copy of the Occupational Safety and Health Administration's ("OSHA") report on March 30, 2005 and an accompanying letter by George Yoksas, Area Director, as well as log book entries. (ALJX 7). However, the Respondent admitted that the log book entries were included in the Complainant's exhibits. Moreover, the OHSA report and Mr. Yoksas' letter are in evidence marked as ALJX 1. Thus, the Respondent provided no additional evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Testimonial Evidence:

1. Robert Howard

Mr. Howard testified that he was an experienced driver of thirty-six years and responded to an internet ad seeking a truck driver in October 2004. (TR 29, 74). He spoke to Kory Dobson who informed the Complainant that he was seeking a part-time driver so that he could spend more time at home with his family. (TR 29). The Complainant told Mr. Dobson he wanted a similar schedule, and they met at Mr. Dobson's home where they negotiated a wage of twenty-five percent of the load. (TR 29-30, 72). Mr. Dobson requested the Complainant fill out an application from Cool Express. (TR 30). Mr. Dobson told the Complainant that he personally owned the truck but that he was under lease with Cool Express. (TR 30, 76). The Complainant was interviewed by Dan Wessels, an employee of Cool Express, to make sure he was qualified and could drive under Mr. Dobson's lease. (TR 30, 78). Thereafter, the Complainant began driving and continued driving for Mr. Dobson until approximately Christmas 2004. (TR 30).

On December 29, 2004, the Complainant received a phone call from Darrell Wessels, Vice President of Cool Express, asking him to take a truck to Mount Home, Arkansas, reload, and return to Wisconsin. (TR 31). The Complainant testified that he agreed to make the trip if he had a safe truck to drive. Id. The Complainant picked up the truck on December 29, 2004, performed an inspection, and began driving. (TR 79, 82). The Complainant experienced no problems during the first day of driving. (TR 85). On the morning of December 30, 2004, the Complainant performed an inspection of the truck and picked up the trailer in Arkansas. Id. The Complainant testified that he started driving down the road, noticed a "terrible shimmy," and stopped to call Cool Express. (TR 86). The Complainant spoke to Darrell Wessels who informed him to "see how it handles when it's loaded, may have to go to the shop if not better." Id. Mr. Howard made a notation in his log book. Id. The Complainant called Cool Express every half-hour checking for a load and reporting the condition of the truck. (TR 87-88). The Complainant was assigned a load by a Cool Express dispatcher at 2:00 p.m. (TR 33). The Complainant drove that afternoon from 2:00 p.m. to 4:15 p.m. (TR 88). He stated that the truck continued to drive horribly. Id. He reached his destination at Springfield, Missouri and the truck was loaded from 5:30 p.m. to 6:00 p.m. at which point he started driving again. (TR 33, 89). He drove that evening until about 9:15 p.m. (TR 89).

The Complainant stated that he stopped in Kingdom City, Missouri that evening to get fuel. (TR 34). At that time, he noticed that the driver's side steer tire had two steel cords that had worn through the tire. Id. As he was out of driving hours, the Complainant parked the truck in the gas station lot to sleep overnight. Id. Admitting he falsified his log sheet, the next morning on December 31, 2004 at 6:00 am he took the truck across the street to a Petrol Truck Stop to have the tires examined. (TR 34, 38). The employee at the service station informed the Complainant that the tire in question needed to be replaced. (TR 34).

Mr. Howard testified that he called Dan Wessels at Cool Express that morning. (TR 34). Dan authorized the tire in question to be replaced. (TR 34-35). However, the Complainant told Dan Wessels that he would not drive the truck unless two tires were replaced. (TR 35). The employee at the service station informed Dan Wessels that one tire must be replaced, but the tire on the right might make it back to Wisconsin. Id. At some point, the Complainant called the Missouri State Highway Patrol and the Department of Transportation ("DOT") to report the incident. (TR 35). The state patrol refused to investigate the situation due to lack of jurisdiction. Id. Also, DOT would not report to the site because it was on private property. Id. During this time, the Complainant testified that Darrell Wessels called the service station and told the Complainant to immediately start driving the truck. (TR 35-36). Mr. Howard informed Darrell Wessels that he had reported the incident to DOT. (TR 36). The Complainant testified that the two men argued on the phone, and then Darrell Wessels informed the employee at the service station to take the truck keys from Mr. Howard because he was fired. Id. The phone conversation was terminated, but the Complainant called back shortly, and he continued to argue with Darrell Wessels. Id. The two men were fighting over approving replacement of the second tire. (TR 90).

The Complainant called the DOT again who recommended that he work out a way with Darrell Wessels to drive the truck home and then file a federal DOT complaint. (TR 37). As instructed, Mr. Howard phoned Darrell Wessels and with the help of the service station employee the two men agreed to replace one right tire. Id. The Complainant testified that after the tire was removed that he could see where steel cord had worn through the tire. Id. Furthermore, the Complainant stated that Darrell Wessels informed him to start driving as soon as the tires were fixed. (TR 39). Darrell Wessels told the service station employee to call him when the Complainant started driving or to take the keys away from him. (TR 39, 97). Also, the Complainant alleged that Darrell Wessels threatened him on the phone and ordered him to start driving even though he was out of hours. (TR 41, 97, 106). Approximately 7:30 a.m., an hour and a half after arriving at the service station, the Complainant began driving with the two new tires on the truck. (TR 90-93). The Complainant stated he had called Cool Express and informed the company that he was having no trouble with the tires, but he had no further communication with Darrell Wessels that day. (TR 99).

As the Complainant neared the truck terminal in Blue River, Wisconsin, he called the Branch County Sheriff's Office to request an escort. (TR 41). An officer met the Complainant and followed him to the terminal. Id. The officer spoke with Darrell Wessels and stayed at the location while Mr. Howard removed his possessions from the truck. Id. The Complainant gave the officer the paperwork and keys then left in his personal vehicle. (TR 41-42). Darrell Wessels accepted the truck, paperwork, and keys from the officer. (TR 42). The Complainant alleged that he was paid late for the load after he filed a complaint with the state of Wisconsin Department of Workforce Development. (TR 57-58).

The remainder of Mr. Howard's testimony was irrelevant to the issues being decided in this case.

2. April Dobson

April Dobson, the wife of Kory Dobson, testified that the Complainant was a former driver for her husband. (TR 112). She stated that her husband entered into a purchase contract to buy a tractor trailer from Cool Express. (TR 114, 117-118). As he was purchasing the truck from Cool Express, he also contracted to deliver loads for the company. (TR 114). He made payments on the truck through his settlement or pay check. Id.

Mrs. Dobson explained that her husband posted an internet ad seeking a part-time relief driver. (TR 113). The Complainant responded to the ad, and her husband hired him. Id. She stated that Mr. Howard's twenty-five percent payment of a load was taken out of her husband's settlement. (TR 113, 120). However, Mrs. Dobson said that Cool Express actually issued the check. (TR 113). She believed that the Complainant was a contract driver for her husband as no income taxes were taken out of Mr. Howard's payment. (TR 120).

At the hearing, Mrs. Dobson testified that her husband regularly repaired his truck when there were problems. (TR 127). She explained that he would replace old parts. (TR 128). However, after questioning, she admitted that if the replacement parts were not available or if the defective items were not serious, then he would wait to replace those parts. Id. Mrs. Dobson did state that Mr. Howard was never forced by her husband to drive an unsafe truck. (TR 130).

Mrs. Dobson stated that length of employment was not discussed with Mr. Howard. (TR 119). She explained that her husband and brother-in-law began team driving. Id. As soon as her brother-in-law was able to drive full-time, there was no longer a need for the Complainant's services. Id. She said that the Complainant was never terminated but was no longer called for work. Id.

The remainder of Mrs. Dobson's testimony was irrelevant to the issues being decided in this case.

3. Diane Petterson

Diane Petterson stated that she is a Cool Express employee and has worked in safety and human relations for the company for the last two and a half years. (TR 131). Previously from 1978 until 1989, she drove a tractor trailer. (TR 132). She explained that during her career she has become familiar with DOT regulations, and in her latest job with Cool Express, she handled the annual DOT review and the DOT compliance reviews. Id. She also testified that she maintained driver files and contracts. (TR 133, 146). Ms. Petterson stated that Cool Express had a driver file on the Complainant because he drove for Kory Dobson, but there was no driver's contract with him. (TR 133, 146-147, 163).

Ms. Petterson testified that drivers prepared trip and monthly inspections of the trucks, and Cool Express prepared an annual report. (TR 134, 160). She also stated that drivers were responsible for their log books, and the company enforced violations of such. (TR 135). She further testified to the company's safety record and log book formalities that did not relate to the incident in question. (TR 141-143, 149-159).

At the hearing, Ms. Petterson explained that she was familiar with the company's payroll system. (TR 139). A settlement or paycheck was issued to each driver. Id. Out of Mr. Dobson's settlement, he paid the Complainant for his part-time driving. Id. She stated that this system was easier than to have Mr. Dobson pay the Complainant after he received his settlement because often he was away from home driving for long periods of time. (TR 145-146).

Ms. Petterson testified that Cool Express never sent a termination letter to Mr. Howard because he was not a driver for the company. (TR 147). The remainder of Ms. Petterson's testimony was irrelevant to the issues being decided in this case.

4. Darrell Wessels

Darrell Wessels ("Mr. Wessels") testified that he previously owned part of Cool Express which was a closed family company; however, in 1995, the company incorporated and now he owns an interest and is an employee. (TR 167). Mr. Wessels stated that he knew the Complainant through Kory Dobson, one of his contract drivers. (TR 168, 177). An emergency situation arose after a truck broke down in Arkansas, and Mr. Wessels needed a driver to pick up an empty trailer. (TR 168). He phoned Kory Dobson and inquired if he would be using the Complainant that weekend as a driver. Id. Mr. Dobson informed him that he was not using the Complainant that weekend. Id. Thus, Mr. Wessels called the Complainant and asked if he would be interested in driving for a special trip. Id. The Complainant, on December 29, 2004, agreed to come in and drive the truck. Id. Mr. Wessels testified at the hearing that the Complainant was a contract driver for the one trip from December 29, 2004 to December 31, 2004. (TR 181-182).

Mr. Wessels met the Complainant later that day at the truck. (TR 168). He watched Mr. Howard perform an inspection of the truck, and then gave the Complainant directions and information regarding the empty trailer. (TR 168-169). Mr. Wessels watched him leave the location in the truck at the beginning of his trip. Id.

Mr. Wessels stated that he received a call from the Complainant the next afternoon, December 30, 2004. (TR 169). The Complainant informed him that there was something wrong with the truck because it was vibrating. Id. Mr. Wessels informed the Complainant to go get it checked if he thought something was wrong, or if it was a safety issue to get it fixed. Id. After the Complainant stopped in Arkansas to pick up the empty trailer, he called Mr. Wessels again and told him that the vibrations were more noticeable. (TR 170). However, both men decided that they would wait to see how the truck operated once it was loaded because it had not become a critical issue. Id.

On December 31, 2004, the next morning, the Complainant called Cool Express from the service station and explained that the situation had worsened once the load was added to the truck. (TR 170). Mr. Wessels said the Complainant became very irritable during the phone conversation and blamed him for the problems. (TR 171). The Complainant threatened to turn the matter in to the DOT and refused to drive. (TR 171, 183). After further discussion, the issue was narrowed down to the tires which the Complainant thought should be replaced. (TR 172). Mr. Wessels did not believe that all the tires needed to be replaced so he had a discussion with the service station employee, and they agreed to replace one tire. Id. He informed the service station employee to pull the keys out of the truck and fix it while the Complainant "settles down." (TR 172-173, 186). If the Complainant settled down, then the service station employee was instructed to give him the keys. (TR 173). Approximately fifteen or twenty minutes later after examining the remaining tires, the service station employee called Mr. Wessels and recommended that they replace the second steer tire. Id. Mr. Wessels gave approval, and the tire was changed. Id. Either during that phone conversation or in another that shortly followed, Mr. Wessels issued a check for payment and asked the service station employee whether he believed the Complainant was capable of driving the truck. (TR 173-174). The service station employee informed him that he believed the Complainant could drive the truck. (TR 174). At that point, the Complainant returned to the phone and stated that he was comfortable driving the truck home. Id.

A few hours later, the Complainant called Mr. Wessels and stated that the truck was driving well. (TR 174). Mr. Wessels said "good" and to "bring it on in." Id. In all of the conversations throughout the day, Mr. Wessels testified that there was never a threat, whether firing or physical, made to the Complainant. Id.

That afternoon Mr. Wessels was at the terminal doing work on another building, and a sheriff's officer pulled into the lot. (TR 175). He questioned Mr. Wessels regarding a threat made towards the Complainant. Id. Mr. Wessels explained that he did not threaten the Complainant, and he had no idea why the Complainant would think so. Id. Mr. Wessels did not object to the sheriff escort, and he remained at the building where he was working about 200 to 300 feet away. (TR 175-176). He saw the Complainant drive the truck into the terminal, but he did not speak to him and has not talked to him since that time. (TR 176).

Mr. Wessels testified to some issues with the Complainant receiving his final pay check, but the remainder of his testimony was irrelevant to the issues being decided in this case.

Documentary Evidence:

1. Log and Inspection Reports

The Complainant's log and inspection reports that date from October 22, 2004 to December 31, 2004 were offered into evidence. (CX 1A). Because the incident in question was from December 29, 2004 to December 31, 2004, I will only examine the logs that correlate to those dates. On December 29, 2004, the Complainant noted that the condition of the vehicle was satisfactory. Id. On the log for the same day, he left Wisconsin at approximately 7 a.m. and

stopped for one hour in Missouri at 12:30 p.m. Id. His next break was from 6:30 p.m. to 9:30 p.m. in Arkansas with a sleeper berth notation for the remainder of the night. Id.

On December 30, 2004 in the truck inspection, the Complainant noted problems with the headlights and the steering. (CX 1A). He specifically listed "left front headlight shakes very badly." Id. Also, he wrote "steering is very loose – maximum speed 55 mph – uncontrollable above 55 mph." Id. Moreover, he stated "notified Cool 8:30 a.m. will see how it handles with load – may have to go to stop if not better." Id. The edge of the report was cut off; however, it appears to read "per Darrell stopped at Kingdom City steer tires are bad out of service." Id.

The Complainant's log for December 30, 2004 indicated that he was in the sleeper berth until 6:00 a.m. and then was off duty for two hours. (CX 1A). Next he worked on duty for fifteen minutes, and then remained off duty until 2 p.m. Id. He began driving from Arkansas at that time and continued until 4:15 p.m. when he stopped in Springfield, Missouri. Id. The Claimant was off work and again worked on duty not driving for fifteen minutes. Id. At approximately 6 p.m., the Complainant began driving and continued until 9:15 p.m. when he entered Kingdom City, Missouri for fuel and a sleeper berth break. Id.

On the following day, December 31, 2004, the Complainant noted on his inspection report that the steer tires had been replaced at Petrol, but the condition of the vehicle was satisfactory. Id. The Complainant's log showed that he was in sleeper berth for the day until 6:00 a.m. Id. For the next hour and a half, he had the tires repaired. Id. The Complainant drove from 7:30 a.m. to noon but noted that he was out of hours and driving at Darrell's insistence. Id. The Complainant returned to Wisconsin at approximately 4:15 p.m. Id.

2. Complainant's notes

The Complainant offered notes that appear to relate to the trip in question. (CX 10-11). However, they contain no date or signature. Id. Moreover, portions of the notes are illegible. Therefore, I grant these notes little to no weight.

3. Complainant's Settlement

The Complainant received settlements or pay stubs which were titled "Bob Howard Settlement for Cool Express." (CX 12-14, 19). Directly below that title the settlement stated "#32Q189 Kory." Id. The five settlements were in the amounts of $383.64, $459.96, $0, $1,056.81, and $978.18. Id. They were dated November 2, 2004; November 9, 2004; November 16, 2004; December 14, 2004; December 17, 2004; and January 4, 2005. Id.

4. Kory Dobson's Settlement

Mr. Dobson received a settlement on November 23, 2004 from Cool Express in the amount of $484.19. (CX 17). Included on that settlement were "Bob's advances."

5. Letter from DOT

A letter dated March 9, 2005 from William G. Vickery, Division Administrator, from the Wisconsin office of the DOT was submitted into evidence. (CX 28). The letter is addressed to Mr. Howard and stated that an investigation involving the safety compliance of Cool Express had been completed. Id. Cool Express had instances of noncompliance with the Federal Motor Carrier Safety Regulations. Id. The letter stated that enforcement action was underway. Id.

6. Letters from the State of Wisconsin Department of Workforce Development ("DWD") and Cool Express

The first letter, dated March 24, 2005, from DWD was addressed to Cool Express. (CX 29). This letter informed the Respondent that Mr. Howard had filed a complaint with the office and requested a response. Id. A second and final request was dated April 12, 2005 seeking the same information. (CX 30). An April 18, 2005 letter from DWD was addressed to the Complainant which explained that the Respondent had issued a check to him in the amount of $368.53. (CX 31). Cool Express also sent a letter to DWD dated April 15, 2005 stating that a check to the Complainant had been issued and cleared its bank account on April 5, 2005. (CX 32).

7. Truck Photographs

The Complainant offered nine photographs of a truck and tires. (CX 1-9). His testimony supported a finding that these pictures were the truck and tires in question. (TR 53-57). Picture one is the left front tire with steel cords showing, leaning against the truck. (CX 1). Picture two is a closer version of picture one. (CX 2). Picture three is a different angle of picture one. (CX 3). Picture four shows the bumper and headlight section of the truck and includes the Wisconsin license plate number 89754. (CX 4). Picture five is of the tire in picture one; however, the tire appears to be on the truck. (CX 5). Picture six shows the right front tire with steel cords exposed on the truck. (CX 6). Picture seven includes the tire in picture six but it is no longer on the truck. (CX 7). Picture eight is a different angle of picture seven. (CX 8). Picture nine is a closer version of picture seven. (CX 9).

8. Remainder of Complainant's evidence

I have thoroughly examined the remainder of the Complainant's evidence that he offered into the record. However, it appears that the evidence does not relate to the incident in question. The Complainant submitted the driver's log of Charles Spargrove from October 26, 2004 to December 27, 2004. (CX 38-48). Although the Complainant indicated that these records showed driving violations, he failed to indicate specific instances of violations. Also, the Complainant submitted what appear to be various faxes, rate confirmations, invoices, etc. (CX 15-16, 18, 20-23, 25-26). None of these documents include any reference to the Complainant or the incident in question. Furthermore, the Complainant offered an internet printout titled "SafeStat Online." (CX 34-37, 2A – 5A). The document was a carrier report for SafeStat regarding an inquiry about Cool Express. Without other evidence to support internet documents, I do not find the SafeStat

report adequately documented transportation information. Therefore as discussed in this section, I will not rely upon the remainder of the Complainant's evidence in this Decision and Order.

Applicable Law:

Employee Status Under STAA

STAA section 405(a) provides that no person shall discharge any "employee" because such "employee" has filed any complaint relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order.

An "employee" is defined by the STAA as a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual who is not an employer, who directly affects commercial vehicle safety in the course of employment by a commercial motor vehicle carrier. 49 U.S.C. § 31101(2).

The parties contest the issue of whether the Complainant was an employee of the Respondent.[2] However, Darrell Wessels testified that he contracted directly with the Complainant, after receiving permission from Kory Dobson, to drive from December 29, 2005 to December 31, 2005. (TR 181-182). Therefore upon admission by Mr. Wessels, the Complainant qualifies as an independent contractor for the trip in question.

Furthermore, a "commercial motor vehicle" is defined as "any self-propelled ... vehicle used on the highways in commerce principally to transport passengers or cargo" with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. App. § 2301(1). The parties do not contest that vehicle that Mr. Howard drove was a commercial motor vehicle. Moreover, both the Complainant and Mr. Wessels testified that the Complainant personally drove the truck on the trip. (TR 79, 82, 168-169)

The definition of employee, as set forth above in 49 U.S.C. § 31101(2), includes an independent driver when that person operates a commercial motor vehicle. Id. Therefore, from December 29, 2005 to December 31, 2005, the Complainant qualifies as an employee of Cool Express under STAA regulations.

Statement of Law Under STAA

49 U.S.C.A. § 31105(a)(1), provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. Id. The protected activity includes making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order." § 31105(a)(1)(A).

[2] The parties conceded that the Complainant was employed by Kory Dobson, an independent contractor with the Respondent. (TR 30, 168).

The Act further provides protection for employees who have "a reasonable apprehension of serious injury to themselves or the public due to [an] unsafe condition." § 31105(a)(1)(B)(ii). Whether an employee's apprehension of serious injury is reasonable is subject to an inquiry of whether a reasonable individual in the same circumstances would conclude that the condition represents a real danger of accident, injury, or impairment to health. Id. To prevail under the STAA, a complainant must prove (1) that he engaged in protected activity, (2) that the employer was aware of the activity, (3) that the employer took adverse employment action against the complainant, and (4) that there was a causal connection between the protected activity and the adverse employment action. Schwartz v. Young's Commercial Transfer, Inc., ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); Assistant Sac's v. Minnesota Corn Processors, Inc., ABR No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003). By establishing a prima facie case, a complainant creates an inference that the protected activity was the likely reason for the adverse action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Once the inference is established, the respondent has the opportunity to present evidence of a nondiscriminatory justification for the adverse employment action. Carroll v. J.B. Hunt Transportation, 91-STA-17 (Sec'y June 23, 1992). The respondent need only articulate a legitimate reason for its action. St. Mary's Honor Center v. Hicks, 509 I.S. 502 (1993). If such evidence is presented, then the complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is the pretext for discrimination. Texas Department of Community Affairs v. Transport Drivers, Inc., 450 U.S. 248, 253 (1981); Moon v. Transport Drivers, Inc., 836 F.2d 226 (6th Cir. 1987). A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and the employer's explanation is not credible. Hicks supra, at 2752-56. In addition to discounting the employer's explanation, "the fact finder must believe the [complainant's] explanation of intentional discrimination." Id.

When an employer offers a nondiscriminatory justification for the adverse employment action, then it is necessary to decide whether that reason is pretextual. Instead of focusing on whether a prima facie case has been established in this circumstance, "the proper inquiry is whether the complainant has shown that the reason for the adverse action was his protected safety complaints." Pike v. Public Storage Companies Inc., ARB No. 99-071, ALJ No. 1998-STA-34 (ARB Aug. 10, 1999). However, "[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination, and it is unnecessary to rely on a 'dual motive' analysis." Mitchell v. Link Trucking, Inc., ARB 01-059, ALJ. No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

A. Protected Activity

1. § 31105(a)(1)(A)

Mr. Howard alleged that he was fired as a result of his complaint to Darrell Wessels, part owner and employee of Cool Express. Under subsection (a)(1)(A) of Section 31105, protected activity may be the result of complaints or actions with agencies of federal or state governments,

or it may be the result of purely internal activities, such as internal complaints to management. Reed v. National Minerals Corp., 91-STA-34 (Sec'y Decision, July 24, 1992).

Complaints do not have to refer to particular safety standards in order to be protected. See Davis v. H.R. Hill, Inc., 86-STA-18 (Sec'y Mar. 1987) slip op. at 5-6; Nix v. Nehi-R.C. Bottling Complainant, 84-STA-1 (Sec'y July 31, 1984). Further, the alleged safety violations need not be proven in order for the complaints to be considered protected activity. Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356-57 (6th Cir. 1992).

In the instant case, Mr. Howard made a complaint pursuant to § 31105(a)(1)(A) when he informed Mr. Wessels that the truck tires were unsafe for driving. (TR 34-38). Specifically, Mr. Howard asserted that all of the tires needed to be replaced. Id. The regulations, under 49 C.F.R. § 396.7, forbid commercial motor vehicles to operate unsafely. Mr. Howard made the complaint in question to Darrell Wessels on December 31, 2004. Id.

The Respondent does not dispute that Mr. Howard made this safety complaint. (TR 170-172). However, Cool Express contested the extent of Mr. Howard's complaint, and only replaced two tires, maintaining the truck was safe to drive with the two new tires. (TR 171-173). Therefore, although the extent of Mr. Howard's safety complaint is contested, he engaged in protected activity by making the complaint pursuant to § 31105(a)(1)(A).[3]

2. Section 31105 (a)(1)(B)

Section 31105(a)(1)(B) is designed to protect employees who refuse to operate a vehicle because such operation violates law or because the employee has a reasonable apprehension of serious injury to the employee or the public because of the unsafe condition. Mr. Howard stated that he did not want to drive the route because the tires were unsafe. (TR 34-41).

The issue ultimately lies with whether or not Mr. Howard reasonably believed that it was unsafe to drive the truck with the worn tires. An employee's belief must be grounded in conditions constituting reasonably perceived violations of the underlying Act. Johnson v. Old Dominion Security, 86-CAA-3 to 5 (Sec'y May 29, 1991). Under Section 31105(a)(2), "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." Id. Furthermore, the Section reads, "[t]o qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition." Id.

Mr. Howard's complaint, regarding the tires, is a safety concern. I find that his apprehension of serious injury is reasonable. His accusation that the tires should not be driven was supported by the employee at the Petrol Station with respect to the two replaced tires. (TR

[3] During his stop at the Petrol station on December 31, 2005, the Complainant called the DOT to report the incident. (TR 35). However, no formal complaint was filed. As the Complainant has proven that he engaged in protected activity, the issue regarding the phone call to DOT need not be addressed.

36-37, 172-173). Furthermore, Darrell Wessels on behalf of Cool Express authorized and paid for the two replacement tires. (TR 172-173). In addition, the photographic evidence of the two tires clearly indicates that both were worn with metal cords exposed. (CX 1-9). Moreover, Mr. Howard called Cool Express the day prior to replacing the tires complaining of trouble with the truck. (TR 85-88, 169-170). Also, the Complainant noted in his inspection of the truck the prior day that he was experiencing steering trouble. (CX 1A).

For these reasons, I do find that Mr. Howard's belief that the truck was unsafe to drive with the tires is reasonable. Accordingly, I acknowledge he engaged in protected activity by making a complaint under §§ 31105(a)(1)(A) and (B).

B. Knowledge of the Activity

Internal complaints to management are protected under the STAA. Reed v. National Minerals Corp., Case No. 91-STA-34, Sec., Dec. and Order, slip op. at 4, July 24, 1992. As Mr. Howard's complaint to Darrell Wessels was internal, Cool Express had immediate knowledge of the Complainant's protected activity.

C. Adverse Action

1. Termination

A complainant must establish that the respondent took adverse action against him or her. Any employment action by an employer which is unfavorable to the employee's compensation, or terms, conditions, or privileges of employment, can constitute adverse action. Long v. Roadway Express, Inc., 88-STA-31 (Sec'y Mar. 9, 1990). A Complainant's testimony, standing alone, can satisfy the adverse action element of a STAA claim if not contradicted and overcome by other evidence. Ass't Sec'y & Brown v. Besco Steel Supply, 93-STA-30 (Sec'y Jan. 24, 1995).

In this case, Mr. Howard testified that Darrell Wessels terminated him during a phone conversation on December 31, 2004 while at the Petrol truck stop. (TR 36). However, Darrell Wessels stated that he did not fire the Complainant. (TR 174). Accordingly, the Complainant's termination is contested.

Although the Complainant testified that he was terminated, I find other evidence contradicts such a finding. Specifically, Darrell Wessels explained that he did not fire the Complainant. (TR 174). Furthermore, the Complainant completed the assignment by returning the truck to Cool Express's terminal in Wisconsin. (TR 175-176). Not only did the Complainant testify that he was paid for the trip, but documentary evidence from the Wisconsin Department of Workforce Development and Cool Express also supports a finding of payment. (TR 57-58; CX 29-32).

I acknowledge that after the incident in question that Cool Express did not contract with the Complainant for additional driving trips. However, Cool Express was under no obligation to do so. Per the Complainant's and Darrell Wessels' conversation on December 29, 2004, the Complainant agreed to drive for one trip. (TR 31, 168, 181-182). Moreover, Cool Express and

the Complainant had no history of directly contracting with one another. As an employee of Kory Dobson, the Complainant was assigned all of his prior work through Mr. Dobson.[4] (TR 30).

Therefore, I find the Complainant has failed to prove any unfavorable employment action was taken regarding his compensation, or terms, conditions, or privileges of employment with Cool Express. Accordingly, the Complainant has not established that he suffered from an adverse employment action. As such, I find that Mr. Howard did not meet his burden of proof in establishing a prima facie case of discriminatory treatment under STAA.

Conclusion:

In summary, I have found no evidence to indicate that any alleged adverse action was taken against the Complainant for his engagement in the alleged protected activity. Because the Complainant has failed to establish that any adverse actions were taken against him, his claims must be denied.

RECOMMENDED ORDER

IT IS RECOMMENDED that the complaint of ROBERT HOWARD for relief under the Act be DENIED.

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JOSEPH E. KANE
Administrative Law Judge

NOTICE OF REVIEDW: The administrative law judge's Recommended Decision an 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 DC 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,

[4] As Mr. Kory Dobson is not a named respondent in this case, the issue of whether Mr. Dobson terminated the Claimant has not been raised by the Complainant and is irrelevant.

the administrative law judge's 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 corres-