

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 December 2008

Case Nos.: 2008-STA-00020
2008-STA-00021

In the Matter of:

LINDELL BEATTY and
APRIL BEATTY,
Complainants,

v.

INMAN TRUCKING MANAGEMENT, INC.,
Respondent.

APPEARANCES:

E. Holt Moore, III, Esq., for Complainants

Andrew J. Hanley, Esq., for Respondent

BEFORE: Daniel A. Sarno, Jr.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982, 49 U.S.C.A. § 31105 (2007), and its implementing regulations, 29 C.F.R. Part 1978 (2008) (“STAA”). On August 9, 2007, Lindell and April Beatty (“Complainants”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that Inman Trucking Management, Inc. (“Respondent” or “Inman”) had violated the employee protection provisions of the STAA, first, when Inman fired Complainants on December 14, 2007, and second, when Inman submitted a negative DAC report for the Complainants. On November 22, 2007, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, Region IV, found that Complainants’ claim had no merit. By facsimile dated December 17, 2007, Complainants filed a request for a hearing before an Administrative Law Judge. On July 15, 2008, a hearing was held in Wilmington, North

Carolina. Complainants submitted exhibits A through K and Respondent submitted exhibits A through F, all of which were admitted into evidence without objection.¹

ISSUES

1. Did the Complainants timely file their complaint on August 9, 2007;
2. Did Respondent discharge, or otherwise discriminate against Complainants, in violation of 49 U.S.C. 31105 (a)(1)(A), by discharging Complainants on December 14, 2005 for making safety complaints;
3. Did Respondent discriminate against Complainants by filing a negative DAC report on December 14, 2005?

STIPULATIONS

1. Respondent is a person within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31101;
2. Respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101;
3. Respondent is engaged in transporting products on the highways via a commercial motor vehicle with a gross weight rating of ten thousand and one pounds or more;
4. Respondent maintains a place of business in Leland, North Carolina;
5. Respondent hired Complainants as team truck drivers, and they drove commercial motor vehicles, to wit, a truck with a gross vehicle weight rating of ten thousand and one pounds or more;
6. Complainants were employed by a commercial motor carrier and drove Respondent's trucks over highways in commerce to haul cargo;
7. In the course of employment Complainants directly affected commercial motor vehicle safety;
8. Complainants were employed by Respondent until being discharged on December 14, 2005, and Complainant filed this discrimination complaint on August 9, 2007.

¹ In this Decision, the following abbreviations will be used: CX – Complainants' Exhibit, EX – Respondent's Exhibit, and TR – Trial Record.

SUMMARY OF THE EVIDENCE

Testimony of April Beatty

Mrs. April Beatty testified that she resides in Wilmington, North Carolina and has been a tractor-trailer driver since 1995. (TR at 27:20-28:1.) Mrs. Beatty testified that between August 2004 and December 2005, she and her husband were employed by Inman Trucking Management ("Inman"). (TR at 28:4-14.) Mrs. Beatty testified that around October 2005, while they were driving to California, she began to smell fumes coming into the bunk while she was trying to sleep. (TR at 48:17-49:11.) Mrs. Beatty further testified that she woke up in Knoxville, Tennessee when Mr. Beatty had pulled over to call the on-call safety person. (TR at 49:5-6.) Mrs. Beatty testified that Mr. Beatty informed the on-call person that the exhaust leak was prohibiting them from sleeping in the bunk, but that they were told to go ahead to California and to stop complaining. (TR at 49:14-50:13.) Mrs. Beatty testified that they pulled over again in Oklahoma City, went under the truck, and took pictures of the muffler. (TR at 50:18-22.) At that time, Mrs. Beatty testified that they again called Inman about the muffler, but were brushed off. (TR at 50:21-22.) Still, Mrs. Beatty testified that they continued to drive until the muffler blew out in Albuquerque and they stopped to have it repaired. (TR at 49:19-20; 50:22-24.)

Mrs. Beatty further testified that they never received any formal disciplinary action while working for Inman. (TR at 47:1-5.) She also testified that she was not present when Inman terminated their employment on December 14, 2005, (TR at 28:20-22), but that she believed they were fired due to a disagreement her husband had in the office. (TR at 47:9-12, 62:22-25.) After leaving Inman, Mrs. Beatty testified that they received unemployment benefits for twenty-six weeks and then applied to work for FedEx in approximately June 2006. (TR at 38:13-21.) Mrs. Beatty testified that they worked for FedEx for three months before they left. (TR at 39:2-3.)

Mrs. Beatty testified that in August 2007, she and Mr. Beatty applied to U.S. Express, Incorporated, but that they were abruptly pulled out of orientation and were told that U.S. Express could not hire them. (TR at 29:9-15.) Mrs. Beatty testified that they had worked for U.S. Express before, and had not foreseen any problem with getting rehired. Thus, Mrs. Beatty testified that when they arrived home she called the main office in Chattanooga to inquire about the problem, and was told by a recruiter that the DAC report directly affected the reason for their dismissal. (TR at 29:23-30:2.) Mrs. Beatty testified that they next tried to seek other employment with Cargill Meats, but were told that they would not be hired due to their DAC report. (TR at 31:4-25.) Then, Mrs. Beatty testified that they tried to seek employment with three other companies, but were not given reasons for their flat denials. (TR at 36:21-24.) Finally, Mrs. Beatty testified that Inman had essentially cleared the DAC report by November 2007, and that they were able to get employment with Covenant Transport for six months. (TR at 39:14-40:1.)

Mrs. Beatty testified that she believed that the negative DAC report was how Inman retaliated against her and her husband for whatever transpired between Mr. Beatty and the office when they were terminated. (TR at 30:17-20.) She further testified that after being fired from Inman she could have checked her DAC report, but that she did not think to check her DAC report, and therefore, did not know that negative comments had been made. (TR at 61:8-14.)

Moreover, Mrs. Beatty testified that in retrospect she believes it would have been a good idea to check her DAC report. (TR at 61:15-17.)

Testimony of Lindell Beatty

Mr. Lindell Beatty testified that he has been a truck driver since 1989 and that he was employed with Inman during the same dates as Mrs. Beatty, between August 2004, and December 2005. (TR at 64:4-15.) Mr. Beatty further testified that he did not disagree with anything in Mrs. Beatty's testimony. (TR at 64:16-21.)

Mr. Beatty testified that as a CDL driver it is his responsibility to check the truck and make sure that it is not operated in a dangerous condition. (TR at 68:21-23.) Mr. Beatty further testified that he did this all the time with Inman, and that as a result Inman labeled him a complainer. (TR at 68:23-24.) Next, Mr. Beatty testified that he was told to call FleetNet America, Inc. ("FleetNet"), an on call repair service, anytime he had to stop for repairs; however, afterwards Inman told him not to call FleetNet anymore, and to call the office instead. (TR at 69:21-24.)

Mr. Beatty testified that an exhaust leak occurred in October while they were driving truck 167 through Knoxville, TN. (TR at 70:8-71:4; 75:4-5; 77:9-25.) He testified that he first called the office, which then told him to call FleetNet. (TR at 69:24-70:3.) After calling FleetNet, Mr. Beatty testified that he called the office again and told them that there was a T/A across the road, and that the office told him to go to the T/A. (TR at 69:3-7.) Mr. Beatty testified that at the T/A they found a hair-thin line on the muffler that was leaking fumes, but that they would have had to wait until the following day to get the part to fix it. (TR at 70:8-13.) Mr. Beatty testified that he called the office again, but that they didn't want him to wait, and told him to drive on. (TR at 70:13-15.) Mr. Beatty testified that they pulled to side of the road in Oklahoma and took pictures of the muffler, which by then had a large hole in it. (TR at 76:10-77:6.) Mr. Beatty testified that by the time they arrived in Albuquerque they could go no further because the muffler needed to be fixed. (TR at 70:14-21.) Clarifying, Mr. Beatty testified that although he reported the muffler from two different cities, Knoxville, TN and Albuquerque, NM, there was only one muffler incident, and it occurred in October. (TR at 71:1-5.) Mr. Beatty testified that they waited in Albuquerque a couple days to have the muffler fixed, and Inman put them in a hotel while they waited. (TR at 71:15-16.)

After showing Mr. Beatty EX B and EX F, which depict two exhaust leaks on two separate trucks, the first occurring in October and being reported in Knoxville, and the second occurring in December and being reported in Albuquerque, Mr. Beatty testified that he believed the dates on the invoices and receipts were wrong, or mixed up. (TR at 101:15-20, TR at 102:18-19.) Then, later Mr. Beatty testified that there may have been more than one muffler incidents, and he may have gotten one of the invoice dates wrong. (TR at 104:18-21, TR at 105:14-19.)

Next, Mr. Beatty testified that many times the trucks that they were asked to drive were filthy and that when they reported the dirty conditions of the trucks, they were told that they were

always complaining. (TR at 72:14-20.) Mr. Beatty testified that they had to clean the truck before every trip to California because the previous truck drivers had not cleaned out their truck. (TR at 88:6-19.) Specifically, Mr. Beatty testified that on a previous occasion he and his wife were asked to drive a truck to California, but when they arrived at Inman to pick up the truck, the truck was filthy with trash and moldy food. (TR at 73:6-21; 88:6-15.) Mr. Beatty testified that he requested to have an hour to clean out the truck, but that he was told he had to leave immediately, or not go at all. (TR at 73:15-25.) Mr. Beatty testified that they refused to take the truck that day, but returned to take pictures of the truck. (TR at 74:1-3.) The following day, Mr. Beatty testified that he showed the pictures to Darryl, a supervisor at Inman, and that Darryl understood the situation and did not fire them. (TR at 74:5-8; 87:5-7.) Still, Mr. Beatty testified that he and his wife were labeled as complainers. (TR at 89:3.)

Mr. Beatty testified that on December 14, 2005, he and his wife had just returned from a run and he went into the office to turn in some paperwork. (TR at 67:13-16.) Next, Mr. Beatty testified that Al Grover, Darryl and Trent were in the office, and that he began speaking with Mr. Grover. (TR at 66:16-18.) Mr. Beatty testified that the conversation occurred as follows:

[Mr. Grover] mentioned something that was very derogatory and negative to being a truck driver. . . . I blurted out, "Oh, well, so that's how it is here?" And he said, "Yes." And I said, "Well that's why I got this tape recorder." And that's when I was fired right there.

(TR at 67:21-68:3.) Mr. Beatty also testified that although he had a tape recorder with him, it did not pick up the derogatory comment, and that he does not remember what the comment was that Mr. Grover said. (TR at 92:8-25.) Mr. Beatty further testified that he did not think that he was fired for complaining, but instead, thought he was fired for having the tape recorder with him. (TR at 95:2-3.) Later, Mr. Beatty testified that he believed he was fired for complaining about safety issues. (TR at 111:3-8.)

Mr. Beatty testified that, after their termination with Inman, they didn't have a reason to check their DAC report, because to their knowledge their license was perfectly clean. (TR at 65:3-6.) Mr. Beatty also testified that after leaving Inman he filed for unemployment, and when his unemployment ended he was hired by a couple of companies driving trucks. (TR at 79:2-4.) Mr. Beatty testified that at first he had no problem getting employment, until he applied at U.S. Express. (TR at 79:4; 80:12-25.)

Testimony of Anthony Hall

Mr. Anthony Hall is an owner of a small trucking company, where he leases trucks to Cargill, located out of Milwaukee, Wisconsin. (TR at 116:14-23.) Mr. Hall testified that he had put an ad in the paper stating that he needed a truck driver to run from Milwaukee back to the Carolinas every week, and that Mr. and Mrs. Beatty responded to the ad. (TR at 117:21-25.) Mr. Hall further testified that in early August 2007, they filled out an application, but that Cargill denied it. (TR at 118:1-8; 119:6-10.) He also testified that he did not have any personal knowledge that would have kept him from letting them drive his truck. (TR at 118:9-12.) Next,

Mr. Hall testified that Tom, the safety director at Cargill, called and told him that he could not hire them because of their DAC report. (TR at 128:1-7.) However, Mr. Hall also testified that the safety inspector would not tell him what the issue with the DAC report was, and did not identify the Inman DAC report as the problem. (TR at 128:4-15.) He next testified that the Beattys tried to straighten out their DAC report three times, and that Cargill ran the DAC report three times, but that Cargill would still not accept the application. (TR at 128:16-25.) Still, Mr. Hall testified that he believed the Beattys would have been hired if they had had a clean DAC report. (TR at 129:8-9.)

Testimony of Alan Grover

Mr. Alan Grover is a safety director for Inman. (TR at 130:24-131:1.) Mr. Grover testified that he had personal knowledge of the repairs made to Truck Nos. 172 and 167. (TR at 131:8-10.) Mr. Grover testified that, according to an invoice from FleetNet, on October 29, 2005, after smelling exhaust in the cab, Mr. Beatty called FleetNet and reported an exhaust leak in Truck No. 172. (TR at 131:23-132:3; EX D.) Mr. Grover testified that FleetNet sent a man to the truck, but before he arrived, Mr. Beatty called FleetNet, cancelled the complaint and said they were going on. (TR at 132:7-10; EX D.) Mr. Grover testified that Inman was charged \$165.00 for the call to FleetNet. (TR at 132:22-25.) Mr. Grover further testified that the maintenance records show that no exhaust repairs were made to Truck No. 172 in October, or in December 2005. (TR at 132:18-20.)

Next, Mr. Grover testified that in December 2005, there was a second exhaust leak on a different truck, Truck No. 167. (TR at 133:3-20.) Mr. Grover testified that according to his records Truck 167 was repaired in Albuquerque, New Mexico on December 6, 2005. (TR at 133:17-21.) Mr. Grover testified that at that time the Beattys were put up in a hotel, were paid for their meals and received layover pay. (TR at 133:23-25.)

Mr. Grover testified that company policy requires that drivers make three trips per month in order to be considered fulltime. (TR at 134:3-4.) Mr. Grover further testified that the Beattys only made two trips per month between June 15, 2005, and December 14, 2005, which is a violation of company policy. (TR at 134:8-12.) Mr. Grover testified that the Beattys were constantly being reprimanded over the fact that they weren't living up to the responsibilities that they were hired for. (TR at 134:15-18.) In fact, Mr. Grover testified that at one point Inman brought them down to part-time pay. (TR at 134:15-16.) Furthermore, Mr. Grover testified that most drivers are assigned a specific truck, but Inman was not able to assign the Beattys to a specific truck because they were too unreliable. (TR at 134:19-25.) Mr. Grover also testified that when the Beattys would come to work they would then refuse to drive the truck because it was too dirty, or didn't have enough room for them. (TR at 135:4-14.) Mr. Grover testified that nine out of ten times the Beattys complained about the cleanliness of the trucks and not about safety issues. (TR at 136:8-14.)

Mr. Grover testified that the Beattys were fired because of their excessive complaining. (TR at 137:24-25.) He further testified that Inman had conditioned the Beattys' termination, on whether they refused their December 14th trip for any reason. (TR at 138:4-6.) Mr. Grover

stated, “We were so tired of excuses and reasons why they couldn’t go, that the plan was already made ahead of time that they were going to be fired.” (TR at 138:6-9.) Mr. Grover also testified that they did not fire the Beattys for carrying a tape recorder or for making a safety complaint. (TR at 138:1-12).

Mr. Grover testified that he filled out the Beattys’ DAC reports within a day of their termination date, (158:7-11), that the reports were originally received by DAC on December 14, 2005, (TR at 141:21-23), and that the reports were not filled out at some later date in order to blackball the Beattys. (TR at 158:5-9.) Regarding the Beattys’ work record, Mr. Grover testified that the DAC report stated, “Excessive complaints, company policy violation, personal contact requested and other.” (TR at 142:2-5.) First, Mr. Grover testified that the “excessive complaints” comment signified having excessive complaints from the Beattys about dirty trucks, and the size of the trucks. (TR at 142:7-12.) Second, Mr. Grover testified that “company policy violation” referred to running two trips a month instead of three, and also calling FleetNet personally instead of contacting the office first. (TR at 142:13-20.) Third, Grover testified that “personal contact requested” indicated that future employers should contact him, so that he could explain what he meant on the DAC report. (TR at 142:23-143:6.) Mr. Grover testified that he wanted to clarify to other employers that the excessive complaints were from the drivers and not from the customers. (TR at 143:1-6.) Finally, regarding “other,” Mr. Grover testified that it was basically a catchall phrase. (TR at 143:7-9.) Mr. Grover testified that the reasons for the Beattys’ termination, which he stated in the original DAC report, were accurate. (TR at 144:4-8.) Mr. Grover further testified that he would not have changed the DAC report if OSHA had not offered to settle the case by changing the report. (TR at 144:25-145:6.)

Next, Mr. Grover testified that he changed the DAC report several times in order to settle with the Beattys. (TR at 146:8-147:10.) Mr. Grover testified that he first removed “personal contact requested,” and then, three days later on August 27, 2007, removed “excessive complaints,” and changed “eligible for rehire: no” to “review required before rehiring.” (TR at 146:10-21.) Mr. Grover testified that on September 13, 2007 he submitted the specific DAC codes to make the final changes. (TR at 147:1-8.)

DAC Reports

The following information shows the progressive changes on the Beattys’ DAC report from the approximate time that they first noticed the negative information on the report, until the approximate time that the report was cleared.

Report One - viewed on August 20, 2007

Original data received by DAC on 12/14/2005

Period of Service:	From 06/2004 To 12/2005
Eligible for Rehire:	No
Reason for Leaving:	Discharged (or Company Terminated Lease)
Status:	Company Driver

Work Record: Excessive Complaints, Company Policy Violation,
Personal Contact Requested, Other

Report Two - viewed on September 4, 2007

Original data received by DAC on 12/14/2005

Period of Service: From 06/2004 To 12/2005
Eligible for Rehire: Review required before rehiring.
Reason for Leaving: Discharged (or Company Terminated Lease)
Status: Company Driver
Work Record: Company Policy Violation, Other

Report Three - viewed on September 17, 2007

Original data received by DAC on 12/14/2005

Period of Service: From 06/2004 To 12/2005
Eligible for Rehire: Review required before rehiring.
Reason for Leaving: Discharged (or Company Terminated Lease)
Status: Company Driver
Work Record: Satisfactory

DAC Revision Form

Mr. Grover submitted three forms on separate dates in order to amend the Beattys' DAC report. The forms contained the following information:

1. Date: 8/24/2007
Period of Service: Hire Date: 06/2004 Termination Date: 12/2005
Driver: Beatty A.
Deletions: Personal Contact Requested.
Authorized by: Al Grover [signed]
2. Date: 8/27/2007
Period of Service: Hire Date: 06/2004 Termination Date: 12/2005
Driver: Beatty A.
Change From: Eligible for Rehire: NO
Change To: Review required before rehiring
Deletions: Excessive Complaints, Personal Contact Requested.
Authorized by: Al Grover [signed]
3. Date: 9/13/2007
Period of Service: Hire Date: 06/2004 Termination Date: 12/2005
Driver: Beatty A.

Change From: Code 101, Code 935
Change To: Code 133, Code 901
Deletions: Code 999
Authorized by: Al Grover [signed]

Invoice from FleetNet America, Inc. (EX D)

The Beattys called FleetNet America in order to receive maintenance on their truck for an exhaust leak. This invoice indicates the date of the call, the maintenance issue, the truck number, and what repairs were performed. The pertinent information is reflected below.

Invoice Date: 12/13/2005

Called In: 10/29/2005

Driver: Lindell

Location: Exit 369T/A **City:** Knoxville **St.** TN

Tractor: 172

Nature of Failure: Exhaust Leak when he stops truck smells exhaust in cab.

Repairs: This call was cancelled by the driver. He decided to take the truck on. Called and cancelled call. Vendor and FNA charges.

Albuquerque Invoices (EX F)

The information found in the following invoices indicate the dates that the Beattys' truck was repaired in Albuquerque, NM, the Beattys' layover time, and what maintenance was performed on the truck during their stay.

Invoice from Rush Truck Center

Rush Truck Center, Albuquerque
6521 Hanover Dr. NW
Albuquerque NM 87121

Inman Trucking
1251 Gregory Rd.
Leland NC 28451

COMPLETION DATE: 12/06/2005

Complaint – Exhaust leak – Check and Advise.

Cause – Exhaust elbow at rear of cab below muffler leaking due to rubbed hole.

Correction – Verify, diagnose, R&R elbow and retest for leaks.

Invoice from Super 8 Motel

Super 8 Motel – Midtown
2500 University Blvd NE
Albuquerque, NM 87107

Lindell Beatty		Room: 263
Inman		Arrive: 12/04/05
2423 White Rd.		Depart: 12/05/05
Wilmington, NC 28411		# Guests: 2
Room #:	Date:	Amount:
263	12/04/05	\$51.73

Signature Lindell Beatty [signed]

Invoice from Quality Inn and Suites

Quality Inn & Suites	Date: 12/05/05
411 McKnight Ave. NW	Arrival Date: 12/05/05
Albuquerque, NM 87102	Room: 113

April Beatty
Wilmington, NC 28404

x April Beatty [signed]

DISCUSSION

The Beattys argue that two adverse employment actions were taken against them in retaliation for complaining about safety violations. First, the Beattys argue that they were unjustly terminated from their job on December 14, 2005, and second, they argue that by listing the cause of their termination on their DAC report, Inman essentially blacklisted them. Under the STAA a complainant may file a complaint within 180 days after the alleged discriminatory violation occurs. 29 C.F.R. 1978.102(d). In general, in whistle blower cases the claim accrual or statute of limitation runs from the date an employee receives definitive notice of an adverse employment decision, and not from the date at which the consequences of the act become painful. *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988) (citing *College v. Ricks*, 449 U.S. 250 (1980)); *Sneed v. Radio One, Inc.*, ARB No. 07-072, ALJ No. 2007-SOX-18, slip op. at 2 (ARB Aug. 28, 2008); *Rollins, v. American Airlines*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 2 (ARB Apr. 3, 2007 (re-issued)); *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005); *Jenkins v. U.S. Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 13 (ARB Feb. 28, 2003). In other words, the date that an employer communicates the decision to implement such an action, rather than the date the consequences of the action are felt, marks the occurrence of a violation. *Chardon v. Fernandez*, 454 U.S. 6, 8 (1980) (citing *College v. Ricks*, 449 U.S. 250, 258 (1980)); *English*, 858 F.2d at 961.

Thus, if the Beattys had sufficient notice on December 14, 2005, of the adverse employment actions, then their complaints are time barred, regardless of when they finally felt the effect of the negative DAC report. It is not disputed that Inman gave definitive notice to the Beattys on December 14, 2005, that their employment with Inman was terminated. Furthermore, Mr. Grover testified that on the same day of their termination, he reported the reasons for their termination on the Beattys' DAC. Still, the Beattys argue that their complaint was timely filed on August 9, 2007 because they did not discover that Inman had submitted a negative DAC report until they were unable to obtain employment in August 2007.

Regarding discovery, the ARB has stated that the statute begins to run when "the facts which would support a cause of action are apparent or should be apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights." *Pruett Production Company v. Ayles*, 784 F.2d 1275, 1279-80 (5th Cir. 1986); *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ No. 00-CAA-9, slip op. at 8 (ARB Apr. 23, 2003); *Ross v. Florida Power & Light Co.*, ARB No. 98-044, ALJ No. 96-ERA-36, slip op. at 4 (ARB Mar. 31, 1999). Furthermore, the ARB has also applied the requirement of diligent inquiry, which "imposes an affirmative duty on a complainant to proceed with a reasonable investigation in response to an adverse event." *Hadden v. Georgia Power*, 1989-ERA-21, slip op. at 3 (Sec'y Feb 9, 1994) (quoting *Pacheco v. Rice*, 996 F.2d 904, 907 (5th Cir. 1992)); *Johnsen v. Houston Nana, Inc.*, ARB No. 00-064, ALJ No. 1999-TSC-4, slip op. at 5 (ARB Jan. 27 1999). See also *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 203 (4th Cir. 1990).

In *Olson*, the employee, Phillip Olson, argued that the 180-day statute of limitations should be tolled where the employer concealed the fact that his job was not abolished during a corporate reorganization, but instead, was filled by a younger man. *Olson*, 904 F.2d at 199. Olson claimed that he could not have filed a notice of intent to sue with the Equal Employment Opportunity Commission for constructive discharge until he discovered this fact in August 1987, nine months after his termination. *Id.* The Fourth Circuit first noted that "the 180-day limitations period for an ADEA action arising out of a job termination commences when the employee is informed of his termination . . . even if he is not then aware of its discriminatory nature." *Id.* at 200. Then, the Court observed that Olson was aware of several pertinent facts that should have put him on notice of his claim. Finally, in concluding that Olson's claim was time-barred, the Court stated:

[I]t is not necessary for a claimant to know all of the evidence upon which he will ultimately rely at trial in order to file a charge with the EEOC. . . . It is sufficient that Olson was on notice at the moment of his alleged constructive termination to inquire whether there was a discriminatory motive for the discharge.

Id. at 201, 203.

Similar to Olson's discovery argument, the Beattys argue that the statute of limitations did not accrue until they had discovered the negative DAC reports. See *id.* at 199. However, also like Olson, the Beattys were aware of several pertinent facts that should have put them on notice of their claim. See *id.* at 201. First and most notable, the Beattys were aware of their definitive termination on December 14, 2005. Furthermore, they were aware of their protected activity,

complaining about an exhaust leak, which they believed was one cause of their termination. (TR at 49-50, 67, 69-70, 111.) These facts gave the Beattys ample notice of their cause of action in December 2005. Also similar to *Olson*, even if the Beattys believed they were terminated for non-discriminatory reasons, it is sufficient that the Beattys were on notice at the moment of the termination to inquire whether there was a discriminatory motive for the discharge. *See Olson*, 904 F.2d at 203.

Moreover, the Beattys were aware of even more pertinent information that would have given them notice of their claim. The Beattys were aware that Inman had labeled them as complainers, and that they had violated company policy by calling FleetNet about an exhaust leak, which is exactly what Inman inferred on the DAC report. (TR at 50, 62, 68, 72.) Finally, the Beattys were aware that they had left Inman on bad terms; they were aware that in general, employers may list the reasons for a termination on a DAC report; and they were aware that they had access to the DAC report. (TR at 61, 67-68.) With the knowledge of these facts, a cause of action should have been apparent to a person similarly situated with a reasonably prudent regard for his rights. Thus, also like in *Olson*, in this case, the Beatty's had an affirmative duty to proceed with a reasonable investigation in response to their termination. *See Olson*, 904 F.2d at 203. Had the Beattys put forth a diligent inquiry in order to clarify the terms of their termination, they would have discovered the specific reasons for their termination, and their DAC report, listing those reasons, would not have been a surprise to them two years later.

In *Hadden*, the Secretary of Labor applied this principal to whistleblower cases. In that case, the complainant, Hadden, was terminated from a nuclear power plant job with a Termination Notice that stated he was not eligible for rehire. *Hadden*, 1989-ERA-21 at 1-2. It was not disputed that the complainant received a termination notification, or that the notice stated that he was not eligible for rehire. *Id.* at 3. Instead, the complainant argued that it was not clear to him how long he was ineligible for rehire, or for whom he was barred from working, until he applied for a job with another employer two years later. *Id.* at 2. After realizing that other employers would not hire him, the complainant claimed that by putting him on a permanent bar list the nuclear power plant had blacklisted him. *Id.* at 3-4. The Secretary of Labor stated that the complainant had an affirmative duty to question any ambiguities regarding an adverse employment action. *Id.* at 3. The Secretary noted that the complainant had not inquired into the duration of his ineligibility for rehire, but instead had simply based an assumption on his knowledge of other employees who had been disciplined. *Id.* Specifically, the Secretary stated that the “[c]omplainant made no effort to learn the length of the employment bar until, over two years later, he sought employment with another employer in the nuclear industry.” *Id.* Thus, the Secretary held that the complainant had sufficient notice to trigger the 30 day time limit for filing an ERA complaint from his Notice of Termination. *Id.* at 3.

Analogous to *Hadden*, in this case, it is not disputed that the Beattys received notice of their termination on December 14, 2005, or that the Beattys knew, in general, that employers will write the reasons for a termination on a DAC report. *See id.* at 1-2. Still, like the assumption in *Hadden*, the Beattys did not seek clarification on why they were terminated, but instead, made assumptions on the cause of their termination. *See id.* at 3. Mr. Beatty assumed he was terminated for carrying a tape recorder, and Mrs. Beatty assumed they were terminated over an argument with Mr. Beatty. (TR at 63, 95.) Likewise, although the Beattys left Inman on bad

terms, they assumed that Inman would not write anything negative on their DAC report. (TR at 61.) In fact, like in *Hadden*, although the Beattys had an affirmative duty to inquire into the cause of the negative employment actions, the Beattys made no effort to learn why they were fired, or to check their DAC report until, about two years later, when they were denied employment with another employer. *See Hadden*, 1989-ERA-21 at 3. Thus, following the conclusion in *Hadden*, the Beattys were aware of sufficient facts to give them notice of their claim and to trigger the 180 day time limit for filing an STAA complaint on December 14, 2005. *See id.* Therefore, their complaint is now time-barred.

Accordingly, the Presiding Judge finds that the Beatty had knowledge of sufficient facts on December 14, 2005, to give notice to a reasonably prudent person that a cause of action had accrued. The Presiding Judge notes that after their termination, the Beattys had an affirmative duty to inquire into any ambiguities regarding their termination and that the Beattys made no effort to clarify the terms of their termination from Inman, or to inquire into the negative employment action. Therefore, the Beattys' cause of action began to accrue at the time they ought to have made such an inquiry, on December 14, 2005, and not when they finally felt the consequences of the negative employment action two years later. Thus, their complaint is now time-barred.

ORDER

Accordingly, for the reasons set forth above, it is **ORDERED** that the claim of Complainants Lindell Beatty and April Beatty be, and hereby is, **DISMISSED** as untimely.

SO ORDERED.

A

Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/bdb
Newport News, Virginia

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, Suite S-5220, 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, 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 correspondence in this matter should be directed to the Board.