



Issue Date: 25 June 2013

JOSEPH DADY,
Complainant

v.

CASE No.: 2012-SPA-0002

HARLEY MARINE SERVICES.
Respondent

Appearances: Stephen Chouest
For the Complainant
Brian Lundgren
For the Respondent

Before: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER
DAMAGE AWARD

This proceeding arises from a claim brought under the employee protection provisions of the Seaman's Protection Act ("SPA"), 46 U.S.C. § 2114, as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281, filed by Joseph Dady ("Complainant") against Harley Marine Services ("Respondent").

Appellate jurisdiction lies with U.S. Court of Appeals in the circuit in which the violation allegedly occurred¹ or the circuit in which Complainant resided² on the date of the violation. *See* 29 C.F.R. § 1986.112.

PROCEDURAL HISTORY

On November 19, 2010 Complainant filed a complaint against Harley Marine. After conducting an investigation of the complaint, on July 13, 2012 the Occupational Safety and Health Administration ("OSHA") found that there is no reasonable cause to believe that

¹ Complainant alleges that he was discharged in violation of the SPA. John Walls, general manager of Harley Marine New York, wrote his termination letter.

² Complainant, in his complaint dated 11/19/2010, listed a Florida address, although it is unclear if that was his address when he was terminated in October 2010. Other documents in the record that predate the termination, however, identify the same Florida address as his address. *See, e.g.*, RX 12.

Respondent violated 46 U.S.C. § 2114. Complainant filed an objection to OSHA's findings on July 23, 2012 and requested a hearing before an Administrative Law Judge.

On August 17, 2012 I issued a notice that the case had been assigned to me and that a hearing was set for December 11, 2012 in Orlando, Florida. Complainant filed a request for a continuance. On October 24, 2012 I held a telephone conference ordering the parties to confer, marshal their evidence and advise me further. Complainant filed a status update and a second Motion to Continue. Respondent filed a status update and a Motion for Summary Decision on November 19, 2012.

On November 21, 2012 I issued an order cancelling the hearing, setting the date for termination of discovery for January 14, 2013, ordering Complainant to respond to the Motion for Summary Decision by January 21, 2012, and indicating that, in the event that Summary Decision is not applicable, the hearing would take place on February 25, 2012 in Washington, D.C.

Complainant filed a response to the Motion for Summary Decision on November 29, 2012, Respondent filed a reply Re Motion for Summary Decision on December 7, 2012, and Claimant filed a Supplemental Opposition to Motion for Summary Decision on January 22, 2013.

On February 13, 2013 I issued an order denying Respondent's motions for summary decision. Complainant filed a motion to continue the hearing and a motion to Compel Production of Documents and Things and to Enforce Related Order of this Court. On February 25, 2013 I issued an Order denying the motion to continue the hearing and held the motion to compel production in abeyance.

A hearing was held in Washington, D.C. from February 25-28, 2013. Complainant's Exhibits ("CX") A through KK were admitted into evidence. Hearing Transcript ("Tr.") at 22, 376, 557. Respondent's Exhibits ("RX") 1-27 were admitted into evidence. *Id.* at 23, 660. ALJ 1 was admitted into evidence. *Id.* at 777. I took administrative notice of the Code of Federal Regulations. *Id.* at 447. At the hearing, the following witnesses provided testimony: Complainant, John Walls, and Richard Graham.

On March 28, 2013 Respondent submitted Respondent's Exhibits 28-48. On April 17, 2013 Complainant submitted CX CC 10. The post-hearing submissions are entered into evidence.

FACTUAL BACKGROUND AND TESTIMONY

Harley Marine Services

Captain Graham testified that Harley Marine Services is a marine transportation company that provides transportation and storage of petroleum products, ship, assist in tank escort services, transportation of general cargo, and rescue and general towing services. Tr. at 295. It is based in Seattle, Washington. *Id.* Harley Franco is the company's founder, chairman, chief

executive officer, and president. *Id.* at 296. Deborah Franco, Harley Franco's sister, is Vice President of Health, Safety, Quality, and Environmental and also Vice President of Administration. *Id.* Both Harley and Deborah Franco's offices are located in Seattle, Washington. *Id.*

Mr. Walls testified that he is the General Manager of Harley marine New York. *Id.* at 61. Scott Manley is the head of the port captains in Seattle for the company. *Id.* at 745.

Complainant testified that Brian Kelly is the Operations Manager at Harley Marine New York. *Id.* at 486.

Complainant's Background and Safety Record

Complainant testified that he is a marine pilot for a living. *Id.* at 432. He attended the Seamen's Institute for his original marine pilot license, Houston Marine for advancement of his license, and Fort Schuyler Marine Academy for safety training, bridge resource management, fire fighting, survival at sea, social responsibilities. *Id.* at 432-433. He holds a Master Coastal License of 1,600 ton and a Pilot's License for a Marine Pilot of ships up to 2,000 gross tons. *Id.* at 433. He received his first license in 1980; he began in the industry in 1976 and advanced from deckhand to mate; and in 1990 he advanced to a captain's position. *Id.* He has worked on vessels for 35 years, and has worked on a variety of vessels; he has worked on salvage vessels, and most of his experience has been on towing vessels similar in makeup to the one he operated for Harley. *Id.* at 435. He has transited all kinds of petroleum products; he has worked on dredging operations, moved aggregate, moved sewage, moved sanitation, worked on the salvage of barges that have been beached on jetties that have received extensive hull damage and worked on the recovery of those barges. *Id.* at 435-436. He received supervisory diversity training from Harley Marine which was on supervisory responsibilities, chain of command, interaction with employees, company they covered discrimination factors, sexual discrimination, things of that nature. *Id.* at 437. He was issued a certification of training. *Id.* at 436.

In the last 35 years, he has not been reprimanded by the Coast Guard. *Id.* at 437. He has never been reprimanded by any board other than his termination at Harley Marine. *Id.* He has never been subject to discipline of any kind. *Id.* He has never been terminated by a tug company before his employment with Harley Marine. *Id.*

He held a chair on the Towing Safety Advisory Committee ("TSAC") from 2006 to 2012. *Id.* at 443. The TSAC is "a congressional committee appointed to the United States Coast Guard to assist the Coast Guard in achieving a safer working environment through regulations and the formation of Subchapter M, and Subchapter M being a new subchapter to vessel inspection in the CFR 46." *Id.* He is currently president of the National Mariner's Association, which is "an association that seeks improvements of safety and quality of life aboard towing vessels for limited tonnage mariners." *Id.* at 490-491.

He started with Harley Marine in the summer of 2007. *Id.* at 440. He was originally hired by Harley Marine as a tugboat captain. *Id.* A few months after his hire, he took on a dual role

steering the tugboat and becoming their port captain. *Id.* The port captain oversees the other captains in the fleet; his

responsibilities are to oversee the captains and the tugs that they operate, and mates really, and make sure that they understand the operations, the operations manual that they follow, proper safety, the requirements by Harley and federal and state regulation, and to make sure that the boats were being operated at the level of expectancy for the company. . . level of expectancy for safety, for efficiency, for compliance with regulation.

Id. at 446. The boats were uninspected but still were regulated by the Code of Federal Regulation, which is enforced by the U.S. Coast Guard. *Id.* He was responsible for issues like ensuring that personnel maintained proper proof of licensing. *Id.* at 447. He was responsible for making sure that personnel on the tugs received and hopefully followed the barge training procedures. *Id.*

One of his duties and responsibilities was to assist the captains and mates in understanding and following the Marine Operations Manual (“MOM”). *Id.* at 448-449. The MOM is an internal operations safety manual created by Harley Marine; it “mirrors the . . . strawman that was put together by TSAC to prepare the industry for the coming of Subchapter M.” *Id.* at 449. He is “quite familiar” with the MOM because he was on the committee and he “worked on the task that had helped write most of that stuff that these companies now use as a guideline.” *Id.* The strawman is a basic standard and was created as a model for what a safety management system should be. *Id.* at 449-450.

Mr. Walls testified that he was Captain Dady’s supervisor during a majority of the time that he worked for Harley marine. *Id.* at 173. Captain Dady held safety meetings with Harley’s crew on a regular basis. *Id.* at 135. Mr. Walls testified that there was no deficiency in Captain Dady’s conducting safety meetings that he knows of. *Id.* at 134. Captain Dady made a PowerPoint presentation related to the proper manner of transferring fuel, which was used by other captains to train their crews. *Id.* at 136-137. He does not dispute that Captain Dady had held emergency safety drills or safety meetings where he had covered the procedures and examples of near-miss incidents with members of his crew within the months prior to the allision. *Id.* at 158. Captain Dady was never written up for any deficiency in his three years of employment and was never given written reprimands for violating Harley Marine’s policies. *Id.* at 135.

Mr. Walls testified that it’s probably accurate that Complainant reported twice as many near-miss incidents than everybody else who worked for Harley combined during the time that Complainant was working for Harley. *Id.* at 157. Mr. Walls knew that Complainant was a proud member of the Coast Guard advisory committee for towing and that he went to meetings in Washington, D.C. to participate in those events because Complainant disclosed this to him. *Id.* at 176. Complainant made written recommendations as to how he thought Harley's Marine Operations Manual could be improved, and he gave lots of recommendations at different times. *Id.* at 176.

Complainant testified that he had an issue in March 2008 with an employee named Jose Panlilio. *Id.* at 579-580. He wanted Mr. Walls to terminate Mr. Panlilio because Mr. Panlilio

attacked him but was stopped by the barge captain and deckhand. *Id.* 580. Mr. Panlilio attacked him not because he was hostile to him but because he “looked at him funny.” *Id.* at 581. Mr. Walls, however, decided not to terminate Mr. Panlilio. *Id.*

Mr. Walls testified that he had concerns “with Captain Dady's listening skills and developing a collaborative environment between the tugboat barges and the tugboat.” *Id.* at 261. These concerns began for him in June of 2008, when Complainant resigned as port captain. *Id.* He put these concerns in his written response to Complainant’s resignation letter. *Id.* He testified that “The question in my mind was if he resigned as port captain, should he be retained as one of the four captains of our two tugboat fleet.” *Id.* at 263-264. Fleet captain is a management position; one of four individuals that operate our two tugboats in New York. *Id.* at 264. At the time Complainant resigned as port captain he considered termination for Complainant but chose not to. *Id.* at 758. He considered termination because “I was concerned that he was creating a hostile work environment between the tug and barge people.” *Id.* at 759. He called a meeting with respect to this issue which included Mr. Walls, Captain Dady, Brian Kelly, Jose Panlilio, and Captain Richard Benoit. *Id.* at 759. Captain Dady wanted him to fire Mr. Panlilio. *Id.* at 760. He decided not to terminate Mr. Panlilio because “of the factor that he was afraid and was making some irrational decisions and that, honestly, that Captain Dady did not manage the situation calmly.” *Id.* Complainant expressed dissatisfaction with his decision not to terminate Mr. Panlilio and said that he felt undermined in his position as port captain. *Id.* at 760-761. Mr. Walls discussed these concerns with Complainant again “At varying times over, since this incident in ’08.” *Id.* at 264.

Complainant testified that he communicated to Mr. Walls that Captain McKay was unlicensed. *Id.* at 583. He did not produce his license, so he did not return to work. *Id.* He guesses that Mr. Walls commenced an investigation into the issue. *Id.* This event caused him to resign as port captain

It's my responsibility to assure, to protect Harley and also myself. I mean, I'm the port captain; I'm the guy who's assigned the responsibility to make sure that the boat's operating within the guidelines of the regulations. And I had a captain that wouldn't produce his license, and I made that aware to Mr. Walls. We talked about it and discussed it. There were other problems with the captain's performance that were relayed to me by his crew, but the key concern was his documentation that he would not produce. And when I went to Mr. Walls with that concern, Mr. Walls dismissed it. He told me that I was singling the captain out. At that time, I realized that I was not getting the support I needed to do my job, and I resigned from it.

Id. at 468. Regarding his letter resigning as port captain, Complainant testified that “I’m -- as a tugboat captain, okay, and my skills at communicating as eloquently as Mr. Walls would have liked -- his background and mine in comparison might not have been up to his standard, and I admitted that in the letter.” *Id.* at 585.

Report Related to Improper Dumping of Raw Sewage

Complainant testified that he reported to the U.S. Coast Guard that Respondent's boats were dumping raw sewage into the water. *See id.* at 483-484. He described the sewage problem as follows:

The sewer system wasn't working, and it would backup and there would -- the biological machinery that was, was not working, and the system would backup with raw sewage and necessitate the need to pump it overboard because the boat would become --

. . .

They would pump raw sewage into the New York Harbor. *Id.* at 489-490. This was "very un-legal, and it was a serious concern for me because I'm the ultimate person responsible." *Id.* at 490. He thinks some members of the crew got sick as a result, so he had had enough and reported it to Harley Marine several times, but it wasn't fixed, so he reported it to the Seattle Coast Guard. *See id.*

He testified that he complained of the sewage issue directly to Mr. Walls, who was port engineer at the time, and Mr. Kelly. *Id.* at 590. He added:

The crew had been complaining to the office about the sewage and the smell on the boat and the spilling of the sewage on the deck onto the -- and the smell permeating through the boat and people getting sick. It was pretty obvious about the sewer problem. I don't think Mr. Walls would deny that there was a sewer problem on the boat and that we were complaining about it.

Id. He never received any statements from anybody at Harley Marine that he perceived to be threatening with respect to the sewage issue. *Id.* at 610.

Mr. Walls testified that he does not remember Complainant addressing with him issues related to improper sewage dumping from Harley vessels. *Id.* at 221. He does not remember if Complainant reported the sewer problem but "it's possible he did." *Id.* at 793.

Report Related to Steering Failure

Complainant testified that he reported a steering failure on a Harley Marine vessel to the U.S. Coast Guard. *Id.* at 488. He reported it by radio and filled out the proper form. *Id.* He described the seriousness of the incident:

The Coast Guard, when you report a steering failure, it's a very serious thing. I imagine, you know, I keep hearing this word "catastrophic event" from other testimony, but it's a catastrophic event when you have an oil barge with forty, a million barrels of fuel, lose steering, and dive across the channel in front of an incoming ship event, so I didn't want to be that person.

Id. at 488-489. He testified that he also reported it to Mr. Walls. *Id.* at 593.

Mr. Walls testified that Complainant reported to him that there was steering failure on the Liberty. *Id.* at 222. "[T]here's no question" that he knew about the steering failure. *Id.* When Complainant experienced steering failure after coming on rotation, they switched to the backup system and when it had problems too "That's when Captain Dady, rightfully, contacted the Coast

Guard and said we have both a primary and backup system that's not operational, and we took the tugboat out of service." *Id.* at 751. He asked Complainant if he called the hotline in addition to the U.S. Coast Guard. *Id.* To resolve the steering system problem, they "had to completely redesign the system, submit the new design system to the Coast Guard, have it fabricated and installed and tested." *Id.* at 752.

Report Related to QMs

Mr. Walls testified that Complainant expressed concerns to him directly about inadequate training of certain personnel, such as qualified mechanics. *Id.* at 220. Complainant never reported to him that he believed that Harley Marine had unqualified mechanics according to the law, but Complainant did raise concerns with him "about the limitations of some of our people to do maintenance and repairs." *Id.* at 223.

Report Related to Improper Manning and 12-hour Work Rule

Complainant testified that he reported many times to the Towing Safety Advisory Committee on "the need for improvements on proper lookout, the need to properly crew their boats to combat fatigue, the need for improvements on recency . . ." *Id.* at 491. He has no doubt in his mind that Harley Marine was aware of his reports to the Transportation Safety Advisory Committee. *Id.* He gave written reports to and had conversations with Mr. Walls about his activities in the Towing Safety Advisory Committee. *Id.* at 491-492.

Complainant testified that he had issues with the MOM and voiced them with Mr. Walls and Mr. Kelly in writing. *Id.* at 457. The MOM lacked some of the resources necessary to do things like maintain a proper lookout and address fatigue and safe manning. *Id.* at 457. He did a Captain's review of the MOM in writing and gave it to Brian Kelly, the operations manager for Harley Marine. *Id.* at 463. In that document he enumerates many of the concerns he testified about, including drills and man overboards, directions and requirements for the engineer, and station drills. *See id.* at 464-465.

Complainant testified that he discussed 12-hour work rule violations with Mr. Walls. *Id.* at 603. Mr. Walls and he had different interpretations of the rule:

I don't know – Mr. Walls didn't disagree with the 12-hour rule. He didn't understand the limits of the 12-hour rule. He didn't demonstrate to me that he understood that the boats could not just simply tie up and have the crew on it. He seemed to feel that, in my view, that if the boat just tied up with the crew on it, it was okay and the 12-hour rule was satisfied, and that's not the case.

Id. at 603-604. He raised this issue with Mr. Walls in "2010, 2009, 2008, 2007, several times." *Id.* at 604. He also raised this issue with Scott Manley. *Id.* at 605.

Complainant testified that he complained about improper lookout on Harley vessels repeatedly because he was concerned about collisions, safety for the public and for Harley's operation and his own liability. *Id.* a 495. He raised his issues with improper lookout and safe manning with Mr. Walls and Mr. Kelly. *Id.* at 457. He also raised concerns about proper lookout to the port captain Scott Manley and

I was actually sort of being threatened by it for bringing up the matter of proper lookout when he told me just read the MOM and the MOM tells you what you have to do, I said, “Yeah, but I don’t have the resources. I have a deck.” And he said, “Just read the MOM on what you have to do.”

Id. at 485, 591. He sent an email to Scott Manley about improper lookout. *Id.* at 590. He testified that the reason he went to Scott Manley is that “he was having trouble communicating to [Mr. Walls] when a lookout is required by law and what a proper lookout was, and I wasn’t really getting the answer that I thought was appropriate for my concerns, so I went beyond my conversation with him and spoke to the port captain.” *Id.* at 591. Complainant testified that Rule 5 in the Coast Guard regulations “was maintain a proper lookout.” *Id.* at 458. He further testified:

The requirements for proper lookout are defined in different areas. It’s not defined in Rule 5, but it’s defined in other areas of the Coast Guard as you go down to policies and things like that of the Coast Guard regulations and policies. And the Coast Guard says whenever you have a reduced visibility, an obstruction of your overall view, whenever you have congestion in the area, whenever you have a sea state that diminishes your radar’s ability to pick up targets and any kind of weather that affects your radar and things of that nature, you have to post a proper lookout.

Id. at 463.

He testified that “we realized early on in Harley’s operation that we had trouble maintaining a proper lookout because the – particularly for the captain’s watch, because the captain and the deckineer were on the same watch. And the deckineer had and the other A/B deckhand also had other duties that took him away from his duty as being a proper lookout.” *Id.* at 458. Captain Dady believes it is “absolutely, absolutely” necessary to have a lookout in New York Harbor:

There are conditions in New York Harbor – there’s periods in the spring and fall where there’s heavy fogs, zero visibility. It’s the most congested navigational traffic probably in the world, and one of the requirements for a lookout beyond the scope of your visibility and the current visibility is traffic congestion. And operating in those waters with ships constantly coming in and out with crosscurrents and barges and launches and all sorts of ferries and all sorts of traffic, it was very important that at times you were able to immediately post a proper lookout.

Id. at 459. On cross-examination, when asked if having a four-man crew for bunker transportation fully complies with the Coast Guard rules and regulations for New York Harbor, he clarified that Coast Guard regulations don’t stipulate crew size but do stipulate when a proper lookout is needed and that a lookout cannot have other duties. *Id.* at 654-655. In his opinion, a deckineer cannot be a proper lookout because he covers two departments, engineering and decking, and “putting these two departments together like that is not a safe practice.” *Id.* at 655.

Mr. Walls testified that he was not aware that Complainant complained of improper manning and violations of the 12-hour rule to the union. *Id.* at 226. Mr. Walls testified that Harley Marine did not have a designated lookout. *Id.* at 286. An assigned lookout can do no other work “so our manning of our boats did not have a designated lookout.” *Id.* at 286. When asked if this is a problem, he responded “Do we need extra people? There’s always -- I shouldn’t

say that. I'm -- it's not necessary . . . In what we do in New York Harbor, it's not been viewed as necessary for either our company or others in the industry." *Id.* at 287. Harley Marine does not have two-man crew boats. *Id.* When asked if he is familiar with the concept of lookout he testified

If there's a situation where there's obstruction view – obstructed view by the bridge people on moving of a tug by itself or tug and barge, then the master of the boat can either secure a lookout or do other actions to put himself in a safer position. We also are compliant with AWO's responsible carrier program that lists both the master and mate as lookout.

Id. at 739. There has never been a problem surrounding any incident where Harley marine New York had noncompliance with lookout issues. *Id.* at 739. Whether lookout requires having five persons placed on a tugboat is "part of the ongoing discussions that we've had in management, both in New York and Seattle and the industry about a fifth man on a harbor tugboat." *Id.* at 739-740. There is no requirement for five men on a harbor tugboat. *Id.* at 740. This is a general discussion in the industry as well. *Id.* The discussion has been going on since 2007. *Id.* He described Harley Marine's current lookout procedures:

On our tugs, we have a four-man crew. The front watch is the captain, and the engineer that also does deck work, and then the mate does the back watches and the A/B deckhand. The lookout is basically the person in the wheelhouse.

Id. When he first came to New York in Fall 2007, Captain Dady was a proponent of a five-man crew and he had ongoing discussions about this. *Id.* at 741. The discussions are still ongoing in the industry and at Harley Marine. *Id.* at 742.

Mr. Walls testified that he remembers having discussions with Captain Dady about the importance of lookouts. *Id.* at 285. He testified that "I'm sure he did" say that if you don't have proper lookout and a man goes overboard, you don't have the manpower to safely rescue him. *Id.* at 285-286. He was asked whether Mr. Dady complained that Harley Marine's lack of lookout constitute violation of Coast Guard regulations:

Q. And he also said that if you had improper lookout posted, you didn't have enough manpower to meet the Coast Guard MOM regulations with respect to engineers or respect to QMs. Is that correct?

A. It was more in the topic when we were looking at day load of a two-man crew rather than a compliment of four persons on a tugboat.

Q. You said it was more of a problem, but, I mean, he addressed these problems with respect to your fleet, right?

A. It wasn't a problem. It was an observation that Captain Dady had.

Id. at 286. He testified that, in what Harley Marine does in New York harbor, it is not necessary to have a designated lookout. *Id.* at 287. In his ongoing discussions with Captain Dady about this issue, he never perceived this as a regulatory noncompliance discussion. *Id.* at 748.

Recency Issue

Complainant testified that he discussed an issue related to recency with the U.S. Coast Guard and the TSAC Committee and had a conversation with the commandant of the U.S. Coast Guard in Washington, D.C. about it. *Id.* at 597. Within Harley Marine, he discussed the issue with Mr. Walls, Mr. Manley, and Mr. Kelly. *Id.*

According to Complainant:

Recency is a Coast Guard requirement that an operator have an amount of practical experience on his route. There's a specific amount of days that you have to have steered on that route in daylight and in darkness under supervision of a licensed operator who has recency on that.

...

[The recency requirement applies to] All licensed operators. And you cannot effectively meet the requirement by steering a group without the -- without oversight from another person as recency. In other words, you can't just take command of the boat and do 12 trips on your own and say, okay, I got recency.

That's not what --

Id. at 596.

Complainant described the recency issue with Harley Marine as follows:

Velez, Marco Velez. I had been training him to take a position in Harley Marine as a mate. He was an apprentice of Harley's. Mr. Walls asked me if I would take him under my wing, more or less, and break him in. It's how people move up. It's how it's done. It's the practical hawse pipe way of moving up. And someone broke me in and I didn't mind breaking somebody else in, so I took on the task and I started to train him and break him in.

Q. Does breaking in include recency?

A. Breaking in includes recency, yes. And one of my concerns was that he was going into a position in the wheelhouse and he still hasn't had any -- established his recency on some of the routes that Harley Marine New York operated on. And I had other concerns about him. He wasn't proficient in his -- he hadn't mastered his skills plotting with a radar and he wasn't really sure of himself with his route, and I didn't think he was ready to move forward and that he needed more training.

Id. at 597-598. He communicated his concern regarding recency training for Marco Velez to Mr. Walls. *Id.* at 598. He told Mr. Walls "Marco did not have enough trips for his route on the North River to passenger terminals. And that he was -- and that he did not have enough trips and he wasn't comfortable on his route in Arthur Kill going down to Port Mobil, Port Socony." *Id.* at 599. Mr. Walls "immediately advanced Mr. Velez to a steering position and put him out on his own." *Id.* at 600. He had recommended that they give Mr. Velez more time, but "they decided that they were going to just put him out there, that he had enough training and they put him out there against my recommendation." *Id.* This occurred in 2009. *Id.* He signed off on Marco Velez's Towing Officers' Assessment Record, but that did not mean Mr. Velez met his recency requirements because "It would only be that I signed off on the routes, but there are different routes." *Id.* at 652-653. He clarified that:

All a TOAR does is that I observe that that person is able to do the functions necessary to navigate a vessel, a towing vessel. Okay, Mr. Velez already had a license, okay? That's all a TOAR does. It's just for a -- it's just a sign-off that he can do the maneuvers of a towing vessel, okay? And it only applies to the route that he had been working on. It doesn't mean that I've signed off that he is -- now has recency for all these routes. That's not what a TOAR is. An apprenticeship is

a different thing. An apprenticeship is what a licensed person would have to go through if they didn't have a certain grade of license in order to get a towing endorsement, and then they would require a TOAR. They would require somebody to check off on them, but it doesn't have to do with recency in area they're working.

Id. at 653-654.

Complainant testified that he never received any statements from anybody at Harley Marine New York that he perceived to be threatening with respect to the recency issue. *Id.* at 610.

Mr. Walls testified that Harley Marine New York has a recency procedure: as far “as I know, since I've been there, it's a part of their employment, in their interview process, if they have recency on particular routes.” *Id.* at 748. Harley Marine New York has not violated any laws with respect to recency. *Id.* Harley Marine has never been investigated or cited over a recency issue. *Id.* at 749. Marco Velez achieved recency prior to undertaking his responsibilities on a tug. *Id.* Complainant complained about improper recency for certain routes of “one person who he was supervising for a TOAR” under his watch. *Id.* at 282. He testified that although Complainant complained about improper recency, “there was never a written nonconformity that there was not recency that was taken up by the company as being valid.” *Id.* at 283-284. He does not recall discussing Marco Velez’s training with Complainant. *Id.* at 750.

Complainant testified that he “never received any statement, any document, letter or anything that Harley would put their name on threatening” him, including his contact with TSAC. *Id.* at 611.

Duck Boat Article

The *Philadelphia Sun* ran an article quoting Captain Dady regarding an incident which has been commonly referred to as the “duck boat incident.” *See Id.* at 227.

John Walls testified that he recalls the article and Complainant’s statement in the article. *Id.* at 227. A couple of people died in the duck boat incident. *Id.* He does not know the specifics of the incident but he did think that the incident occurred “because of [] use of a cell phone.” *Id.* He does not know if the incident involved inadequate lookout. *Id.* at 279. He does know that the article involved issues of visibility and recency:

I knew that the tugboat was on the side of the barge. They did not see the duck boat in the Delaware River, and there was issues of visibility and issues of recency that Joe, that Captain Dady brought up to me. I wasn’t aware of the recency of the captains of that boat, and the cell phone use and the discussion with the, with the master on the boat when his son was – but I’m not a master on that accident.

Id. at 282. He further testified: “They were blind in one spot and that's the reason he hit that vessel, so there's a visibility issue, yes.” *Id.* at 284-285. When asked if it had to do with improper lookout because if you have proper lookout, you don’t have a blind spot, he answered “Okay.” *Id.* at 285. The accident in the article did not involve Harley Marine. *Id.* Complainant’s

contribution to the article is that “he did an analysis of what he felt were the reasons or factors involved in the accident.” *Id.* at 277. Complainant did not mention his affiliation with Harley Marine. *Id.*

Mr. Walls testified that he discussed Complainant’s participation in the article with Deborah Franco, a member of Harley Marine’s executive management team in Seattle:

The article came out and was read by the editing resources, Deborah Franco. Deborah asked me about the article. It was not part of a meeting at Harley Marine. It had to do with HR’s making sure that Captain Dady did not attribute Harley Marine as being an employee of Harley Marine when he made his statements.

. . .

She asked me in a hallway about the article and wanted to make sure that I understood that Joe could not represent the name of Harley Marine in the press. *Id.* at 228. The conversation occurred at Harley Marine’s offices in Seattle and lasted “About maybe 20 seconds.” *Id.* at 278. She was not upset when she expressed her concerns and she never discussed the incident again with him. *Id.* at 279. When asked if he understood that Deborah Franco’s message was to instruct Captain Dady that this was a “no,” he responded “No. It was to say to him if he is to make comments, that he shouldn’t attribute his employment at Harley Marine as a qualification to make these statements.” *Id.* at 229. He never had conversations with any other member of Seattle management about Complainant’s providing expert analysis to media organizations. *Id.* at 278. Harley Franco never said anything to him about the incident. *Id.* at 228. He does not know which duck boat article Deborah Franco read. *Id.* at 765. He did scan one article and then Deborah Franco asked him if he read it. *Id.* at 764.

He relayed Ms. Franco’s message to Complainant. *Id.* at 279. He said to Captain Dady: “Joe, people died here. And you’re making certain statements that K-Sea may come back if they find them to be damaging to them, and you could have some legal ramifications that could be detrimental to you.” So I told him to be very careful because when you make public statements about other companies, their safety record, or their culpability in an accident, you need to be careful about how you approach that otherwise you could expose yourself to risk. This was not a company saying, smacking him down for statements. Clearly, he did not refer to the company’s name. I was speaking to him privately about my concern for his welfare if he were.

Id. at 229. He doesn’t remember if he spoke to Captain Dady with other crewmen around. *Id.* at 229-230. It’s possible that the conversation happened in the galley. *Id.* at 230. He testified that “There was no message from the Franco family about this.” *Id.* at 231. He never said that Harley Marine would sue Captain Dady. *Id.* at 280. Harley Marine executive management did not tell him he should warn Complainant about his potential personal liability for providing expert analysis such as this. *Id.* He was not angry when he relayed his message to Complainant. *Id.* He never discussed the issue again with Complainant. *Id.* He recalled that he “wasn’t quite sure he was listening to me in part of what I was saying and that was frustrating, but I don’t remember the response he gave me.” *Id.* The conversation lasted “A couple minutes.” *Id.* at 280-281.

He thought the conversation occurred less than sixty days before the termination, “Because if I remember that meeting, I was in Seattle the first part of October of 2010, so it was

less than sixty days.” *Id.* at 231. He believes the conversation with Ms. Franco was the first week of October 2010. *Id.* at 291. The discussion with Mr. Dady about it was in October 2010 prior to the allision incident, somewhere between the 3rd and 5th of October. *Id.* Between that conversation and the date of Complainant’s termination, Complainant was not involved in any incident that he can remember with an allision or a collision. *Id.* at 232. He further testified:

Q. So it's a true statement to say that the very first incident following that conversation that you had with him, even though that during that incident he was asleep and off watch, he was terminated. Isn't that correct?

A. I don't know the timing between that, but that was not the only reason why Captain Dady was terminated.

Id.

Complainant testified that there were at least two different articles, in two different papers, that included statements from him about the duck boat incident. *Id.* at 656. He also did an interview on the radio about the incident. *Id.* He’s not sure which article Mr. Walls referred to and what the date of it was. *Id.* at 657. In his testimony Complainant described the Duck Boat incident as follows:

I believe it was September of 2010, a competitive company was moving a barge in the city of Philadelphia along the Delaware River, and the tugboat operator, the person in charge and in command at the time, was in the lower wheelhouse. The boat has two wheelhouses, an upper one and a lower one. And he was towing a barge, a light barge which obstructed his view from the lower wheelhouse, so he was required to be in the upper wheelhouse, but for some reason, he chose not to do that – if the air conditioner was working or what, but I don’t know, he chose to stay in the lower wheelhouse. The later investigation showed that he didn’t post a lookout and that he had an emergency call from home and was distracted by that on his cell phone. And one of these duck boat tourist boats, that amphibious-type thing that people – they drive up on land, you get in, and then they take it for a little tour around the city – had a tour, a full accommodation on the vessel, and they lost power. And they stopped in front of this tow and the operator didn’t see them, and he ran them over and two people lost their lives.

Id. at 493-494. The lookout on the duck boat saw them but there was no lookout posed on the tug. *Id.* at 494. “There’s no doubt” that a lookout would have prevented the incident. *Id.* at 494-495.

Following the publication of the duck boat article in the *Philadelphia Sun*, Mr. Walls returned from a meeting in Seattle, came aboard the boat, in the galley with Mr. Dady’s crew of Richardson, Canterbury, Odegaard and him, and asked him about the tugboat incident. *Id.* Mr. Walls

just said why did your name appear in the – and I explained to him that I was contacted by a reporter that asked me if I could help her to understand. She understood that I was an expert in the CFRs and regulations and those things, and asked me if I could help her understand the regulation and the effect of those types. I told her that I didn’t know anything about the incident firsthand and I couldn’t respond to anything like that, but I would be able to give her – in

answering her questions concerning regulation and, you know, practices in the industry and that kind of thing. And that's what I did.

Id. at 495-496. He allowed the reporter to quote him and his name appeared in the article. *Id.* at 496. He described his conversation with Mr. Walls:

I, you know, vividly remember Mr. Walls telling me that Harley Franco – he used the name Harley Franco – he said that “Harley Franco is not happy with your name appearing in this article.” I said, “Okay.” He said, “Had you mentioned Harley Marine at all in that article, you would have immediately been terminated.” I said, “Okay, but I didn't mention Harley Marine.” He goes, “No, you didn't. And if Harley had any reason to terminate you, you would be terminated right now.” I would be terminated. And then he cautioned me on the legal aspect. He said, “You have to be very careful what you're doing, Joe. If you make any public statements, you could be sued,” and this and that and, “I'd be careful if I were you.

Id. at 497. He took this as a threat. *Id.* The conversation took place at the end of September. *Id.* at 495. The shoreside runner, Ray, approached him on the dock and told him “Hey, you'd better be careful. I overheard them talking that they're not happy with you, and they're going to get rid of you.” *Id.* at 497-498. This reinforced his fear that he'd been threatened. *Id.* at 498. No reportable incident other than the October 12 allision occurred before his termination. *Id.* at 499.

Complainant testified that Harley Marine Management Personnel were aware of his enumerated safety complaints. *Id.* at 486. When people would come to them with a concern or a complaint, Brian Kelly would tell them that “you're getting as bad as Dady.” *Id.* He had a reputation in the company for being concerned with and for voicing concerns about safety:

Well, because everybody knew in the company that I was very concerned with safety, that I wasn't afraid to step up on the issue, and a lot of guys tried to like step between the cracks in the manual and just fill out the documents and put them in and try to fill them out in such a way where there was no backlash to them. I was more open to it. I trusted the system, so I tried to make it work for me. So I was just known to management as sometimes a pain in the ass with all of my complaints about fatigue and improper manning and sewer going into the water and things like that.

Id. His impression was that comments like “you're getting as bad as Dady” were meant to belittle him and quiet others. *Id.* at 487. Ultimately, “A sore festered, and by the time I was terminated, I was pretty much convinced that they were not happy with my active complaints one bit.” *Id.* at 493.

October 2010 Allision

Mr. Walls testified that at the time of the allision, which occurred on October 12, 2010 at 5:40am, Harley Marine was loading oil petroleum products from the ConocoPhillips Refinery at Bayway, New Jersey and bringing them to ConocoPhillips tanks at IMTT for blending and to fuel. *Id.* at 61, 121. The allision occurred when the barge “the Chrestensen Sea,” which was attached to the tugboat “the Liberty,” hit the pier at IMTT, when the fully-loaded barge went to a

terminal to unload the oil.³ *See id.* at 64; 109. Captain Graham testified that the tug and barge were making their arrival and docking at the terminal. *Id.* at 385. Mr. Walls testified that the allision resulted in a hole in the front, in the bow, starboard, right side of the Chrestensen Sea. *Id.* at 94. The hole

was on the starboard side, the center, close to the edge, but I don't know where it was in terms of above or below the waterline, and I don't know how close it was to the edge. There's photographs that can determine that.

Id. at 182.

Mr. Walls testified that at the time of the allision a total of six Harley Marine employees were stationed on the two vessels. *Id.* at 64-65. Each of the employees worked alternating shifts of six hours each, so that each would work twelve hours in a 24-hour period. *Id.* at 65. One shift consisted of a deckineer working under the captain, and the other shift consisted of an able-bodied seaman deckhand working under the mate. *Id.* There were also two tankermen, one during each shift, who worked and slept on the barge. *Id.* at 65-66. The two bargemen assigned to the barge at the time of the allision were the two senior persons that were very skilled. *Id.* at 127. At the time the allision occurred, Lewis Canterbury, the engineer on the Liberty, was asleep and Rex Nunemaker, the barge captain, was awakening in anticipation of his rotation beginning at 6:00am. *Id.* at 66-67. Mr. Walls did not interview Mr. Nunemaker to find out whether he was awake or asleep at the time of the allision, but video from IMTT showed he was on the deck within a few moments after the allision. *Id.* at 67. A tankerman is responsible for the loading of fuel onto a barge and the discharging of fuel off the barge either to another terminal or to a ship. *Id.* at 69. Neither tankerman had a captain's license. *Id.* at 70. Bill Richardson, a deckhand, and Ray Churchill, a tankerman, were on the front of the Chrestensen Sea at the exact moment of the allision. *Id.* at 111. Mr. Churchill was standing near the point of impact and he is shown on the video reacting to the impact of the hard landing. *Id.* at 144. Captain Graham testified that William Odegaard was the mate on watch and was navigating the vessel at the time of the allision. *Id.* at 322. Complainant testified that at the time of the allision he was asleep in his bunk. *Id.* at 493. He does not remember being awakened by an allision or any unusual noises, bangs, bumps. *Id.* at 500.

Mr. Walls testified that Rex Nunemaker got on the wharf because "it hit so hard against it, and they were having a tough time landing the barge onto the terminal pier." *Id.* at 112. When the barge hit against the pier "it bounced away from the terminal" and "[w]hen it came back in, Rex was on the deck and he was boosted over to the terminal to catch a line from the barge to secure a line onto the terminal." *Id.* at 112. When asked if he thinks they inspected the pads, Captain Graham testified that "The video evidence shows that they walked up on the bow of the barge, and they took a look over at the ship's pad." *Id.* at 335. The video also purportedly

³ Mr. Walls testified that the Chrestensen sea is a double-skinned tanker, which means it has void spaces around it on the bottom to prevent it, in case of a puncture, from oil getting into the water and it has a little bit wider than three feet of space between the exterior of the hull where the oil storage begun. *Id.* at 71-72. There were seven safety voids on each side of the tanker, several on the bottom, and one in front and one in back, which are safety features so that if the outer hull gets penetrated it won't leak any oil unless it goes over three feet to get to the inner hull. *Id.* at 72. On the inside of the barge there were ten oil compartments which were separate, sealed, and isolated from each other. *Id.* There's never been any evidence that any of the cargo holds were breached in any way nor was there any oil spill on this allision. *Id.* Of all of the safety voids, only one took on water. *Id.* at 74.

shows that [Mr. Richardson and Mr. Nunemaker] ran from the bow when they hit the ship's resting pad and parts went flying into the air because of the violent severe allision with the bottom pad. And then they returned to the bow, they looked in the direction -- that's all I can say is they looked in the direction of the mooring pad and dock, and they made an incomplete report that there was no damage.

Id. at 336-337. Captain Graham testified that the pad was hanging from the chains. *Id.* at 336.

Mr. Walls testified that after the barge was repositioned and docked at the terminal, the tug left with the tug crew, leaving the two tankermen on the barge at the oil facility. *Id.* at 110. The tugboat left with Mr. Odegaard, the deckhand, the engineer and Captain Dady. *Id.* at 118. The tankermen remained at the facility for at least 8 hours without anyone from the tug around. *Id.* The fully-loaded barge unloaded at the terminal, and this unloading takes "in the neighborhood of ten hours." *Id.* at 109. He does not know if Captain Dady was asleep at the time the Liberty left because "their rotations were 0600 to 1200 for the front watch." *Id.* at 118. Complainant testified that when he woke up, he was on the Liberty, which "was tied up and made fast, tied up with lines to a dock across the river from where the Chrestensen Sea was; a spot where we hang on when the tug is like not working, causing a problem." *Id.* at 505.

Mr. Walls testified that Harley Marine's procedures were not followed after the allision occurred. *Id.* at 107. According to the manual, in the event of an allision, the first call that's supposed to be made is to the company hotline that's posted on all the vessels. *Id.* at 105. The hotline then calls him and he is informed of the incident, and then the hotline calls the Coast Guard. *Id.* at 107. He testified that "at any time, the captain or the mate can call the Coast Guard, depending on the severity of the incident." *Id.* In this case, the mate should have called the hotline when the allision first happened and then he should have notified the HMS scheduler and made a log entry under the procedure. *Id.* at 106. However, nobody called anybody about the allision. *Id.* at 107. The Coast Guard was not notified on October 12, 2010. *Id.* at 108. The crew did not document the damage, including photographs, as required. *Id.* at 108. The crew did not fill out an HMS Marine Accident/Incident Report as required. *Id.* Regarding a rule that prohibits crew members from going ashore, he testified

There's a tankerman on -- there's a, normally, there's an IMTT employee on the dock. Our tankerman can go onto the dock in proximity to the barge, if necessary. But we cannot do crew changes or have people go off the barge, go through the Terminal, go to the store, get grub or whatever, and come back onto the barge. But it's a regular occurrence for the tankermen to go onto the shore either to watch the transfer of fuel or to write the delivery reports of fuel being loaded onto the barge.

Id. at 186.

Mr. Walls testified that there is no reason to inspect the voids on routine voyages but they are to be inspected if "you think that there could be a problem" and "[i]t's not the responsibility of the captain to do it, but to get it done. It's the tankerman's responsibility." *Id.* at 123. He doesn't know if the tankermen here opened up the front void to look inside of it after the hard landing during that time or if they weren't able to for some reason. *Id.* at 119. Captain Dady would not be expected to have somebody inspect the void unless he knew that there was a hard

landing. *Id.* at 123-124. There is no reason the tankermen could not have opened up the front void to look inside of it while it was at the terminal and they were in charge of the barge. *Id.* at 119.

Complainant testified that he returned, on watch, with the Liberty later in the day to retrieve the Chrestensen sea. *Id.* at 505. He did a visual inspection of the barge from the wheelhouse and he described his procedure for inspection of the barge as follows:

And my inspection of the barge, my procedures included the bargemen. You're relying on the bargemen to make sure that the barge was secured. I relied on my own visual inspection, make sure that the draft and things like that were correct and there was no list and stuff, and then I would proceed to make it up to the barge. I would come into the barge and put my deckhand over on the barge. He would go over there with a TSAC radio, one that couldn't create a spark and start a fire, and he would go over there and I would communicate with him and the bargeman and we would make the tug up. I would check in with traffic control and give them my information.

Q. Information you got from the bargeman?

A. Well, the drafts and stuff. When barges are light, I pretty much can see where the drafts are myself, but when the barge is loaded, I will check the drafts with the barge before I can --

Id. at 511-512. From his position in the wheelhouse, facing the Liberty's bow, he could not see the starboard break area of the Chrestensen Sea. *Id.* at 515. The crew left the pier and transported the barge back to Bayway. *Id.* at 516. At Bayway, the barge was loaded, which took 8-9 hours. *Id.* at 518. He dropped off the Chrestensen Sea at Bayway and returned later to pick it up. *Id.* The bargemen conducted a document of inspection with the facility at Con Hook and at Bayway; they are "taking responsibility that the barge is being -- taking product, that it's ready to take product and discharge product safely. It's a declaration of inspection, basically." *Id.* at 518-519.

Complainant testified that on October 13, while they were on the Con Hook Range, when he reached the KBK buoy, he noticed a difference in his trim, that his bow had gone down and water started to break over the bow. *Id.* at 529. He slowed down and the generator stalled. *Id.* Mr. Nunemaker came out, checked the collision void, and told Complainant that it was filled with water. *Id.* at 530. Complainant sounded the alarm and called the hotline. *Id.* at 531. He reported it to the Coast Guard and called Mr. Walls immediately and "asked him if he would take over communication with the Coast Guard at that point, which is normal, it's part of the response. And he said yes, and he did so." *Id.* at 533. He logged the incident. *Id.* He then proceeded to Harley mooring and began to pump the water out of the barge to ascertain where the water was coming from, but they could not pump out enough water to bring the area above the water. *Id.* at 534-535. Mr. Walls and Brian Kelly arrived on the site of the incident on October 13, within an hour of the reporting of the incident. *Id.* at 575. Captain Graham testified that on the 13th "the vessel went down by the head and the fuel was starved of the generator and shut the generator power off to the barge." *Id.* at 362.

Mr. Walls testified that his responsibilities were to contact Complainant and the owner of IMTT, the owner of the oil and the owner of the barge while Brian's responsibility was to contact the Coast Guard and Ken's Marine who was doing the response. *Id.* at 148. During this

process, Mr. Odegaard came up to Mr. Walls and told him about the allision the day before, and this was the first time Mr. Walls heard about the allision. *Id.*

Complainant testified that Mr. Odegaard walked up to Mr. Walls and told him about the hard landing on October 12 and suggested it as a possible explanation. *Id.* at 535. By this time Complainant suspected that there was a hole he hadn't seen based on what Mr. Odegaard was saying in the starboard side of the barge in the void. *Id.* at 536. Once he knew it was the void filling up with water, he knew that the situation had stabilized and that the vessel wouldn't go down anymore. *Id.* Mr. Kelly took over and they transferred the product. *Id.* at 537-538. After removing the product and making the barge lighter they were able to get the water out. *Id.* Then the crew went to Brooklyn Navy Yard to get alcohol and drug testing. *Id.* at 538. Complainant passed the test. *Id.* at 539.

Mr. Walls testified that the incident on October 12-13 was a serious event as "There was a rupture of the hull of a 30,000-barrel oil barge in the New York Harbor. It's, you should not have a hole in a barge, especially at or below the waterline." *Id.* at 272. This could lead to "Fracturing of other chambers within the barge that could lead to further damage or crisis on the part of the structure." *Id.* He does not agree that the barge ceasing to sink makes it a non-serious event because "When you have water in your chamber, it could cause further damage, and that further damage could lead to a catastrophic event." *Id.* at 273. Based on what he knows today, Mr. Walls would say that the risk of the vessel sinking or the oil being released in the New York Harbor was minimal, but it existed. *Id.* at 139. When he terminated Captain Dady, he did not really believe that that vessel almost sank and almost released all of its oil cargo into New York Harbor but at the time of the allision, at the time of the discovery of it, he was concerned that the barge would sink and they would lose the oil. *Id.* at 140.

Complainant testified that he also considers the allision to have been a serious event: But I never said that it wasn't a serious event. What I said was whenever you have a hole in the barge, whenever you have water where you don't know where it's coming from, you expect the worst, you prepare for the worst, and you take it as a serious event until you stabilize the situation. *Id.* at 567. However, he does not believe that, given the design and structure of the barge, the event would not have been catastrophic, meaning the destruction of New York Harbor. *Id.* Prior to the remedy of the situation, he did not believe the situation had the potential to be a catastrophic event. *Id.* at 570.

Captain Graham's Internal Investigation of the Allision

Captain Graham conducted an investigation of the October 12-13 incident. *See id.* at 146. He was the lead investigator. *Id.* at 319. The executive management team chose him as the director of the investigation. *Id.* at 678.

He arrived at Harley Marine in July 2010. *Id.* at 421. A lot of the areas that he is responsible to oversee are linked with federal regulations or the International Safety Management Code, otherwise known as ISO standards and he was performing these services for

Harley related companies. *Id.* at 298-299. Regarding his training in accident investigation he testified:

I've been involved in, I guess the development over all of those years, not actively developing, but I've learned from the development of that through my employers and their individual systems. I'm a student of ABS, accident investigation. I've had training with TapRoot System, which was an older system. All of them are designed to be the same where you develop a timeline of incidents and you compare fact against testimony, and you collect -- basically, you're trying to prove the who, what, when, and how.

Id. at 306. The TapRoot system was "a root-cause system that was developed years ago, and it's still in use by some companies, but it's been modified over the years. You're identifying causal factors, and from that you would find what the actual root-cause of the incident is." *Id.* at 306-307. In conducting his investigation of the October 12-13, 2010 incident he "followed my experience and my training in conducting an investigation, which is made up of some factors within the ABS investigation and root-cause analysis and also the TapRoot." *Id.* at 311. He thinks ABS guidelines are more sophisticated at this point than the TapRoot system, and "because it's ABS, it's geared toward the maritime industry." *Id.* He has done a lot of accident investigations. *Id.* at 320.

At the time he had a direct responsibility for Harley Marine's quality management system, its safety management systems and processes, and its environmental protection requirements Deborah Franco was his direct supervisor. *Id.* at 298. He interacted with Deborah Franco on a frequent, ongoing basis. *Id.* He spoke with her before he came to New York to investigate the incident involving Captain Dady. *Id.* at 299.

His primary purpose was trying to figure out why the accident happened. *Id.* at 358. His purpose also included finding out why the accident wasn't reported. *Id.* at 350. He used skype to do the investigation, and the investigator was at his location while he and his attorney, William Grimm, were in his office in Seattle. *Id.* at 311-312.

He arrived in New York, watched the video and went to the pier on October 14. *See id.* at 347. He conducted his investigation "by looking at video evidence, by taking statements from the personnel made available to me, comparing it to timelines that were established based on the video, by log entries, and then you look for consistent and inconsistent statements based on those timelines and video evidence." *Id.* at 341.

When asked if he took a recorded statement from Mr. Odegaard, he replied that "Mr. Odegaard was not available to me during the investigation. He left town and submitted a typed report later on." *Id.* at 322. He never spoke with Mr. Odegaard. *Id.* He asked Harley Marine Gulf and Harley Marine New York to have access to the crewmembers aboard the vessel but Mr. Odegaard chose to leave. *Id.* at 323. When asked if Mr. Odegaard had a telephone number, he replied "I think we had -- this was two-something years ago, but we had made, I think we had made attempts to talk with him, but we were not successful." *Id.* He does not recall if he tried calling Mr. Odegaard himself. *See id.*

He does not know if Mr. Odegaard was on probation at the time of the incident. *Id.* at 383. When asked if he knows if Mr. Odegaard was expecting to have a review of his previous allision at the time of the subsequent one, he responded that “When I went out there to investigate, I didn't want to be tainted by any knowledge of the thing.” *Id.* at 390. He did not have Mate Odegaard’s personnel file. *Id.* at 422.

All of the handwritten statements were written out before he arrived to conduct his investigation. *Id.* at 352. William Richardson’s statement details his actions at the time of the allision. *See Id.* at 345. He takes issue with Mr. Richardosn’s statement that he looked at the pad and it came back to normal position because “we know that to be false” based on his own inspection of the damage when he went to the pier. *Id.* at 345-347. When asked if he asked Mr. Richardson about his statement regarding the pad when he interviewed him, he testified:

A. At that time, I had not gone under the pier to actually see the damage.

Q. So you talked to him --

A. Wait a minute, I'm sorry. I had seen the damage, I'm sorry. I had seen the damage. The point of taking statements is for me, not to refute that in front of the man, trying to get their independent statement of facts as they saw it, and then I take those statements and those facts and compare it to the best evidence that I have that either collaborates or says that their statements are not totally truthful. Based on that, I make the best determination of the investigation as to what happened. I was more concerned as to why the accident happened in the first place and the fact that damage occurred and it was not recorded.

Id. at 345-346. When asked if he got a recorded statement from Mr. Richardson or if he has noted of his conversation with Mr. Richardson, he replied:

We did not record their statements, or they wouldn't give us the statements. We're employers, and we have the ability to ask an employee for a statement or to describe what happened in an incident. Our purpose is to find out why it happened so we can prevent it from happening again.

Id. at 350. He does not recall if he asked Mr. Richardson why he didn’t report the allision and his statement does not say why. *Id.*

He agrees with Lewis Canterbury’s, the deck engineer’s, statement that he was off watch and in his room at the time of the allision. *Id.* at 351. He does not remember if he ever spoke with Mr. Canterbury. *Id.* at 352. He does not dispute the accuracy of Mr. Canterbury’s statement. *Id.* at 353. He was asked if he just accepted the crew’s written statements without doing more to determine whether they were truthful:

Q. So you accept that their written statements that we're talking about now as fact?

A. Not as truthful facts, just it's a fact they made the statements is what I'm trying to say.

Q. I understand.

A. Here's a man who writes down something and hands it to me. That's his statement to me.

Q. And so somebody writes down a one or two sentence statement like this following a major event, do you do anything to ascertain whether it's an accurate or a truthful statement or not?

- A. He had no further comments to make to me.
Q. How do you know?
A. Read his statement, "I have no information on the subject."

Id. at 352.

He doesn't recall speaking with Rex Nunemaker, who was off watch at the time of the incident. *Id.* at 359-360. He does not believe Rex Nunemaker gave a statement. *Id.* at 360. He knows that Rex Nunemaker knew about the allision because he made a statement to John Walls that he was bounced out of his bunk. *Id.* He was also due to come out on watch and he was observed on the video coming out after the allision. *Id.* He does not know whether Mr. Nunemaker inspected the pad to see if they could see any damage to the pad on the wharf. *Id.* at 362. He testified: "As I recall, there were two personnel that walked up to the bow, but I don't know if it was Mr. Nunemaker or -- ." *Id.*

Raymond Churchill was on the deck of the barge and he was close to where the impact occurred – as close as he could have been "with his back to it as he ran away." *Id.* at 363. Raymond Churchill had a written statement but it disappeared. *Id.* at 363-364. The statement said that "That they struck the pad. As I recall, he just said that they struck the pad and that it came in -- actually, Churchill was very reluctant to say anything." *Id.* at 364. He didn't consider it necessary to reconstruct Mr. Churchill's lost statement "because Mr. Churchill had very little to say." *Id.* at 367-368.

He did not review the tankerman's logs because they were not made available to him. *Id.* at 369.

He can't dispute Captain Dady's statement. *Id.* at 355. He does not dispute that Captain Dady didn't have knowledge of the allision. *Id.* at 394. He did not look to see when the last time Captain Dady met with this crew to inform them of the importance of reporting and even reporting near-misses where there was not even any contact. *Id.* at 394-395. No one told him that "Captain Dady doesn't supervise his crew." *Id.* a 397. He did not receive a document, a write-up, a reprimand, some type of a directive to him, which says Captain Dady doesn't properly supervise his crew. *Id.* He did not have Captain Dady's personnel file at the time he made the determination. *Id.* at 422.

The conclusion that Captain Dady failed to understand his responsibilities and exercise command presence to properly train and evaluate his crew "is based on the performance of the crew associated with this particular incident and their failure to report an incident to the captain." *Id.* at 388. He testified that "A well-trained crew would have informed the captain that they'd had a hard landing or an allision with the pier." *Id.* at 390.

No one on board said during the investigation that they saw the damage. *Id.* at 338. His conclusion was not that they saw the damage on the 12th but that they should have seen it. *Id.* He added:

I conducted my investigation by looking at video evidence, by taking statements from the personnel made available to me, comparing it to timelines that were established based on the video, by log entries, and then you look for consistent

and inconsistent statements based on those timelines and video evidence. My conclusion from that was is that they should have seen damage and reported it to the wheelhouse.

...

I was about to add that this was more than a hard landing. This was an allision with a fixed object that was severe enough for visible parts of the pier, I mean, of the wharf fender or whatever -- well, they call it the trullex (ph.) -- rubber pieces behind the resting pad to disintegrate and to go flying in the air. As a result of that, I would have expected Mate Odegaard to come down and verify that for himself or to show some concern to look and identify that there was damage. I don't know if I'm giving you everything you want, but it's, that's -- I'm telling you the truth --

Id. at 341.

When asked what facts support his conclusion that Captain Dady made blatant disregard of company's policy rules and procedures, he responded:

The owner and operator of a marine business selects and appoints captains, and they have a responsibility to select and appoint captains to a command position. They have ultimate authority and responsibility and accountability for every action and inaction that occurs aboard a vessel. The fact that Captain Dady's crew were involved in an allision with multiple crew members on deck and that was not reported to him demonstrates to me that he lacked command presence aboard his vessel, that his crew were either afraid of him, didn't trust him, he didn't have any rapport with his crew that one single member of his crew would tell him that this occurred. It is required that a hard landing is reported to the captain. Not one single person chose to do so. I find that to be unusual. The only conclusion that I can draw from that is that he lacked the trust and respect of his crew to report to him. A captain is a leader. He is the manager that the company has appointed to make sure that that vessel is operated safely with regard for all rules and regulations, policies, and procedures of the company. That carries a lot of weight, and there's a lot of accountability that goes with that. I've never come across a vessel where something like this would not have been reported.

...

The fact that it was not reported, the fact that his crew did not perform according to the policies and procedures of this company, the policies and procedures that he is directly responsible for training and ensuring that his personnel are aware and that they comply with was not -- I didn't say his training wasn't done. I said they didn't perform to the training that they may have received. They just didn't perform. So why didn't they perform, I asked myself. Why wouldn't they report it? The only, the only -- dealing from my experience, the only reason why that would occur is if there was a disregard and no respect for him or a fear of reporting to him.

...

What type of leader is Captain Dady if he doesn't gain the trust and respect of his crew to report anything aboard that vessel when it occurs? And I must admit that

the two tankermen on there are not captains. They do not bear, they're not masters. They do not have the responsibility that one single sole person has, that is the captain, onboard that vessel. He's the only one in command of that vessel and of that unit and, as such, the employer has to maintain seaworthiness of that vessel. When they prosecute a voyage after a hole's been placed in the bow of this barge, they've had a hard landing, they take no actions to go on the pier or to open a forward rake hatch to see if there was flooding in it. They prosecute a second voyage. They load it with almost 1.2 million gallons of black oil and the forward rake fills with water and it floods, which is discovered by Mr. Nunemaker when the generator stops functioning.

...

This is on the second voyage. They discover it then. It's reported to the captain, it's reported to the company, and the response began. But the fact remains is that I can only conclude that there was no behavior, no training that was effective in meeting the requirements of the company to maintain a seaworthy vessel. A captain has to have a process or procedure in place with his personnel to ensure that his hull is whole and ready and seaworthy for it to leave that dock and go anywhere underway. He had no process to do that and part of his disregard, to me, was he didn't see that that was necessary. He actually said, "I can't open up the hatches and look in the void tanks." And the only void tank I was concerned about was the forward rake. That is standard Policy. Or not policy within the company, but it is standard that when you have a hard landing or you have an allision with something that you check your voids before you begin another voyage.

...

He is to assure himself before they prosecute any voyage whether there's been damage or no damage that his vessel is seaworthy. If he fails to do so and something happens, let's say that barge sank, that would have been a major marine casualty that would have affected not just Harley Marine as a whole, it would have affected every employee that is employed by that company. You're talking about a catastrophic financial burden brought upon a company. So why -- I mean, the company has the right as defined by the International Safety Management Code that says we have to give that captain, that manager, the company manager, have to give him the authority and the responsibility to prosecute those voyages on our behalf. When he fails to do that and the company loses trust in his ability to do so, we were within our grounds to terminate his employment and could no longer trust Captain Dady to have an effective crew to maintain the safety and seaworthiness of that vessel

Id. at 400-403.

He was asked whether he considered other reasons that might have led to the failure to report:

Q. You failed to investigate or consider other reasons that might have resulted in their failure to report.

A. That's not how you do an investigation of an accident.

Q. You don't consider all of the options and all the alternatives?

A. No. I was evaluating the performance of this particular incident.
Id. at 408.

Captain Graham testified that John Walls and Brian Kelly were the two other people that were listed as investigators on the incident report involving the October 12th, 2010 event. *Id.* Their role was to facilitate his “movement throughout the New York Harbor and to gain access to IMTT Terminal and to the video, and provide facilitated arranging for the crew to come in and for me to interview, and so they pretty much opened the doors for me and provided access to the places that I asked to go to.” *Id.* at 319. Mr. Walls was chosen because “Well, the general manager typically is the person that leads investigations of most incidents in his business, and so John was a natural to be there. You know, any decision would involve John.” *Id.* at 678. Mr. Walls testified that his duties in support of Captain Graham’s investigation were: “Arranged for him to meet with all the employees, with the individual employees on the incident, and to provide transportation services for Captain Graham.” *Id.* Other than introductions to the individuals, he did not participate in the interviews and he did not sit there through the questioning. *Id.* at 266. He did not participate in the findings in regard to the investigation, the analysis during the investigation, or in reaching conclusions in Captain Graham’s investigation *Id.*

Captain Graham testified that before making his recommendation about termination, he reviewed the investigation report with executive management. *Id.* at 421. The reviewers of his report included Harley Franco, the founder, owner and CEO and president of the company, and the executive management team because Harley Marine’s investigation procedure (MOM policy) requires that they review the report and also they have to accept or reject the findings of the report. *Id.* at 678. Mr. Franco asked for his recommendation regarding discipline and he recommended that Complainant be terminated. *Id.* at 679. Mr. Franco accepted his recommendation and said “okay, we’ll terminate him” and said nothing else in this regard. *Id.* at 679. No one else was present during this conversation. *Id.* After this conversation with Mr. Franco, it was Captain Graham’s understanding that “it was an absolute order to proceed with termination, and human resources and the general manager are the ones that have to handle that at that point.” *Id.* at 679. At that time he honestly believed Captain Dady’s employment should be terminated and he still believes this. *Id.* at 680.

The executive management team did not influence his investigation or recommendation. *Id.* He determined that he would recommend the termination of captain Dady “When the final report was completed and submitted to their executive management.” *Id.* at 333. He reported his termination recommendation to the owner in Seattle because this was considered a “Class II incident, a serious marine casualty. That’s why I was sent out there to investigate, and it requires me to report directly to the CEO and president of the company.” *Id.* at 679.

Captain Graham testified that the tankermen knew about the allision and should have known they had to report it to the Harley Marine hotline, but they were not fired for failing to report. *Id.* at 403-404. The deckhand, William Richardson, knew about it and should have reported it, but he was not fired for failing to report. *Id.* at 404-405.

Captain Graham testified that he had no knowledge of that Complainant made any safety complaints when he recommended termination to the owner. *Id.* at 680-681.

Termination of Complainant

Mr. Walls testified that Mr. Odegaard was terminated as a result of the allision, and the tankermen were suspended without pay “as part of our Collective Bargaining Agreement with them.” *Id.* at 194. Harley Marine considered terminating the tankermen but decided not to. *Id.* at 130.

Mr. Walls testified that the list of reviewers at the bottom of the investigation report are the executive management team of Harley Marine, in Seattle. *Id.* at 266-267. The lead reviewer is Harley Franco, who is the founder and president of Harley marine. *Id.* at 267. The reviewers on the document participated in making the decision regarding termination of Captain Dady. *Id.* His role with respect to the termination decision was “Essentially, to carry out the instructions of termination of Captain Dady and the implementation of other changes of the recommendations of Captain Graham.” *Id.* He participated or was present in the discussions by the reviewing group regarding Captain Dady's termination. *Id.* He was present for one discussion, to carry out the termination of Captain Dady and other recommendations of the report. *Id.* at 268. The other recommendations were: “Retraining of employees to file incident reports on allisions” and he “did procedural things internally that required an analysis; also the disciplinary actions of the tankermen and Mate Odegaard.” *Id.* In the course of his participation, he decided that Captain Dady should be terminated. *Id.* He decided that termination was appropriate because “There was a breakdown of leadership and communication that led to a lack of information of the incident/allision on the 12th.” *Id.* at 268. In his participation with the discussion over the termination with the Seattle team, nobody in the termination discussion expressed a belief that something less than termination should be appropriate for Captain Dady and the decision to terminate was unanimous. *Id.* at 268-269. The termination was based on the report from Captain Graham and no other information. *Id.* at 269. There were no discussions of any activity by Captain Dady such as raising safety issues or providing expert analysis to media articles. *Id.* He agreed with Captain Graham’s investigation report at the time and still does. *Id.* He did not participate in drafting the report. *Id.* In reviewing the report, he saw no errors in the substance of the report and he still sees no errors in the substance of the report. *Id.* at 270.

Mr. Walls signed the termination letter of Captain Dady, at Exhibit AA. *Id.* at 166-167. He testified “There was an investigation among upper management in Seattle. They work with HR. They disclosed to me what the contents of the letter would be, I agreed with it, and I signed it.” *Id.* at 167. When he terminated Captain Dady for failing to report the incident, he knew that he didn’t know about the incident. *Id.* He knew that the minute Captain Dady found out about the allision, he called the hotline and called him and then did everything that he should have done to respond to the situation at that time. *Id.* at 168. He testified that

“The primary reason [for termination] was the loss of faith in Captain Dady's ability . . . It was a faith in the ability of working with a crew to have them -- because they either didn't or couldn't, wouldn't communicate with him about the allision, that lost trust in his ability or faith in his ability to communicate

effectively and collaboratively with his crew. That was the reason that it was not recorded. That's the reason he was terminated.

Id. at 168-169. This was the first time that he put Captain Dady on notice that he had lost faith in him. *Id.* at 169.

When asked whether Captain Dady failed to properly train his crew, he responded “That was not my concern. He did train his crew. There was formal training, but there was other issues that concerned me . . . There was evidence he did [properly train his crew]; yes, he did. I mean it's posted.” *Id.* He explained that “I believe the import of what [the incident report’s statement that Dady’s lack of supervision placed the vessel and crew at great personal risk by allowing a breach to the hull to go undetected] means is that if there was an atmosphere in the workplace that people were not honest, there was an allision that could have resulted in this type of damage, nobody expressed that to him and that was a tremendous concern since he was the management representative on the vessel.” *Id.* at 174. He can blame Captain Dady “Because there wasn't a collaborative atmosphere between the tug and the barge that they felt comfortable enough to tell him that the occurrence happened.” *Id.* at 174. He testified that

My concern was that without any collaborative relationship with his crew and his fellow workers, they, for whatever reason, did not tell him there was an allision that resulted in that, in that hull breach. And then for that, I lost faith in his communication ability to work collaboratively with his co-workers as a management professional.

...
Captain Dady was not informed by any of the other crew that the allision occurred, and there's no way he could have known that there was damage other than no one told him that there was an allision that could have had that level of damage. That's my answer.

Id. at 177-178. He thinks Captain Dady “should have accepted it was his responsibility to know about it and didn't.” *Id.* at 179. That Captain Dady scheduled and conducted safety training regularly with his crew did not change his decision and opinion that the termination of Captain Dady was appropriate in this case because “I believe that if the training that went on did not germinate into his crew or subordinates, that they would act responsibly at an allision.” *Id.* Whether training had occurred is a “Essentially” a relevant issue for him but “The training is a part of it, but it's the communication of the urgency of it did not germinate with the crew, and that is a leadership management issue. That it's not only the act of the training, it's also the communication of the urgency to report when you have an allision of any type, let alone something this significant.” *Id.* at 275-276.

That Captain Dady said he did not know about the allision did not change his decision about the appropriateness of termination in this case because “He's a management representative and leader of the group. If he doesn't train his people to report to him or report that there's this type of an allision, then he has failed as a leader.” *Id.* at 276-277.

Captain Graham testified that it is his understanding that Harley Marine has a progressive discipline policy, but it is not mandatory and “Based on the severity of the incident, it could result in termination.” *Id.* at 421. When asked whether he considered demoting Complainant

instead of terminating him, Mr. Walls testified that “I no longer trusted Captain Dady, and trust is not a situation where we would consider progressive discipline.” *Id.* at 758.

Mr. Odegaard’s Prior Allision

Mr. Walls testified that he was aware of a previous allision that Mr. Odegaard had on March 24, 2010, when he was the pilot in the same tug but with a different barge and the barge hit the Asphalt Seminole, which was stationary at the time. *Id.* at 148-149. A Coast Guard report was made as a result of that, and property damage was known to have been sustained to the ship at the time. *Id.* at 149. Mr. Walls participated in the investigation performed in connection with the event. *Id.* Mr. Odegaard reported the allision to the hotline. *Id.* at 151. When asked if Mr. Odegaard could have been on probation at the time of the allision of October 12, 2010, Mr. Walls testified:

If there was a probation or a probationary period, yes, he could have been; but, again, that's conjecture on my part. I do not know. It was either a written warning or a written warning with a probationary period, but I don't recall specifically of that other than I know there was an investigation and there was an investigation number for the Asphalt Seminole.

Id. at 160. He does not believe that Mr. Odegaard’s prior allision is the reason the October 12th allision wasn’t reported because “I have other perspectives of what I thought was the dynamics between the tug and crew on the barge. I believe that Mate Odegaard did not reveal it because he was concerned about his status. Why other people didn't communicate with Captain Dady I have no idea, except they didn't communicate with him, and that was extremely disturbing to me.” *Id.* at 160-161.

Incident involving Captain McCauley

Mr. Walls testified that he has terminated a captain before this incident because he lost faith or trust in his ability to command over his vessel. *Id.* at 742. He terminated Captain Charles McCauley in late-summer 2010 because of his involvement in an allision. *Id.* Captain McCauley “approached at a fairly radical angle with fairly high-graded speed, and he bumped against the rake of the passenger vessel.” *Id.* at 743. Although the crew reported the allision, Captain McCauley was terminated because he “made a report of the events of the allision, along with the tankermen and deckhand, and the reports were inaccurate.” *Id.* Captain McCauley was terminated for reporting something inaccurately – “I believe that he didn’t think he lied, but he did.” *Id.* The inaccurate statement is that “Captain McCauley made a declaration of the speed, approach of the combined tug and barge vessel and his angle of approach” and both were inaccurate. *Id.* at 744. The cruise line, Respondent’s client, provided a video of the allision, and the video showed “a dramatic difference between the statements of the captain and crewmen and the event that occurred.” *Id.*

Captain McCauley was not subject to progressive discipline; Respondent went right to termination. *Id.* The crew received suspension without pay for a month. *Id.* at 744-745. He performed the investigation with the assistance of Scott Manley. *Id.* at 745. He made the decision to terminate, and he discussed his termination letter with Deborah Franco and Rob Gullickson, the vice president of operations. *Id.*

Mr. Walls testified that the allision was not serious. *Id.* at 743. The allision involving Complainant was more serious because “first of all, the extent of the damage was relatively minor compared to the breach of the hull of the Chrestensen Sea. The other part of it, the crew made a report that there was an allision. And basically, that's the difference.” *Id.* Failure to report an allision is worse than reporting inaccurately because “it’s not known, and the unknown is the source of greatest concern for any company, especially us, in the oil business.” *Id.* at 744.

Captain Graham testified that he believes the allision incident involving Complainant is “much more serious” than the allision incident involving Captain McCauley. *Id.* at 682. He explained:

Well, the McCauley incident is an approach under the rake of the vessel where he bumps the hull and creates a dent. It didn't cause a penetration. And the allision or whatever at IMTT caused extensive damage and a hole in the barge and potential marine environmental disaster.

Id. In comparing Captain McCauley’s incident with Complainants, he testified:

In Captain McCauley's case, he attempted to downplay the incident itself and to minimize what was there. And in the Chrestensen Sea incident, the crew failed to report it at all. And then the damages are different between the two incidents, as well.

Id. The reporting incident with Captain McCauley was less serious than the reporting incident with Complainant because the company’s policy is to “report everything,” reporting “is an “absolute requirement because we have insurance clauses” that require them to report, and “we can’t respond to [an incident] if we don’t know about it.” *Id.* at 683. The allision with Complainant is also much more serious because “it placed a hole in the hull and those things create an unseaworthy condition aboard the vessel” and that is why the Coast Guard has a requirement for reporting allisions. *Id.*

John Walls testified that to his knowledge, except for Captain Dady, Harley Marine has never terminated anybody who was asleep and off watch at the time of an allision or an accident that they didn't cause. *Id.* at 166.

STIPULATIONS

- I. Respondent stipulated that it will not contest the issue of protected activity. In footnote 7 of my Order on Summary Decision I stated that “Complainant alleges that he complained directly to the United States Coast Guard that Respondent dumped raw sewerage in New York Harbor (January 2009), steering failure (April 2010), report regarding issues with QMs (May 2010), asked local union representative to complain to the Coast Guard regarding staffing shortages and violations of a 12-hour work rule and a report to the Coast Guard in Seattle regarding alleged inadequate crewing of Respondent vessels. ‘Many of these issues were addressed by Captain Dady with the TSAC, an organ of the Commandant of the USCG.’” According to Respondent, Claimant stipulated that footnote 7 includes all the protected activity that will be alleged in this case. Respondent added that “By so stipulating [that Complainant

engaged in protected activity, Respondent] is not affirming that any of the alleged protected activity was correct in any assertions made therein.”

II. The Office of Administrative Law Judges has jurisdiction in this case. *See* Tr. at 18.

After a review of the record, I find that the Office of Administrative Law Judges does have jurisdiction in this case. Protected activity will be discussed below.

DISCUSSION AND ANALYSIS

Section 2114 of the SPA provides, in part:

(a)(1) A person may not discharge or in any manner discriminate against a seaman because—

(A) the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred;

(B) the seaman has refused to perform duties ordered by the seaman's employer because the seaman has a reasonable apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public;

(C) the seaman testified in a proceeding brought to enforce a maritime safety law or regulation prescribed under that law;

(D) the seaman notified, or attempted to notify, the vessel owner or the Secretary of a work-related personal injury or work-related illness of a seaman;

(E) the seaman cooperated with a safety investigation by the Secretary or the National Transportation Safety Board;

(F) the seaman furnished information to the Secretary, the National Transportation Safety Board, or any other public official as to the facts relating to any marine casualty resulting in injury or death to an individual or damage to property occurring in connection with vessel transportation; or

(G) the seaman accurately reported hours of duty under this part.

A complaint under the SPA is “subject to the procedures, requirements, and rights described in” the employee protections provision of the Surface Transportation Assistance Act (“STAA”), 49 U.S.C. 31105. Section (b)(1) of STAA states that STAA whistleblower complaints will be governed by the legal burdens of proof set forth in AIR21, 49 U.S.C. 42121(b). Likewise, whistleblower complaints under the SPA are governed by the legal burdens of proof in AIR21.

Under AIR21, a violation may be found only if the complainant demonstrates that protected activity was a contributing factor in the adverse action described in the complaint. 49 U.S.C. 42121(b)(2)(B)(iii). Relief is unavailable if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 49 U.S.C. 42121(b)(2)(B)(iv); *see Vieques Air Link, Inc. v. Dep’t of Labor*,

437 F.3d 102, 108–09 (1st Cir. 2006) (per curiam)(burdens of proof under AIR21); *see also Formella v. U.S. Dep’t of Labor*, 628 F.3d 381, 389 (7th Cir. 2010) (explaining that because it incorporates the burdens of proof set forth in AIR21, STAA requires only a showing that the protected activity was a contributing factor, not a but-for cause, of the adverse action.).

Protected Activities

Respondent stipulated that it does not contest the issue of protected activity. Respondent listed, at RX 24 (Corrected), the only protected activity it understood Complainant to be alleging: (1) Complainant’s direct complaint in January 2009 to the U.S. Coast Guard that Respondent dumped raw sewerage in New York Harbor; (2) steering failure in April 2010; (3) report regarding issues with QMs in May 2010; (4) and Complainant’s request to a local union representative to complain to the Coast Guard in Seattle about inadequate crewing of Respondent’s vessel. I accept that the four activities above constitute protected activity. Complainant clarified, at the hearing, that the subject matter of the fourth protected activity stipulated to – improper crewing – includes both improper lookout and violations of the 12-hour work rule. *See* Tr. at 215. John Walls testified that it was his understanding that improper lookout is a subset of the manning issue. *Id.* at 746.

In its Post-Trial Brief, Complainant listed the above as the protected activity in this case. Complainant also stated that “in addition to the stipulated protected activity, complainant addressed many of these same issues with the press which appeared in the ‘duck boat’ article” and “[i]t was this article that promoted Mr. Franco to discuss Capt. Dady with Mr. Walls.” Brief at 2. Although Complainant’s participation in the duck boat article does not fall under one of the categories of protected activity listed at § 2114(a)(1), because the subject matter of the article and the stipulated-to protected activity overlap I find that the article is relevant to the discussion of whether the protected activity was a contributing factor in the adverse action. Therefore, the duck boat article will be discussed below.

As stated above, I accept the four activities stipulated to as the protected activities in this case.

Employer Knowledge of Protected Activities

Although Respondent stipulated to the protected activities listed above, Respondent argues that Complainant failed to prove that Respondent had knowledge of the protected activities.⁴ Respondent’s Post-Hearing Reply Brief at 8.

Complainant must establish that the person making the adverse employment decision had knowledge of the protected activity. *See Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). Complainant testified that there is no doubt in his mind that Harley Marine was aware of his reports to TSAC on “the need for improvements on

⁴ In its post-trial briefs, Respondent repeatedly raises the question of whether the protected activities actually took place (e.g., “Captain Dady appeared to testify that he reported [the incident related to sewage] to the Coast Guard at some unknown time, but the record contains no other proof in this regard,” Post-trial Brief at 10-12 (emphasis in original)). However, since Respondent stipulated to the protected activities, they will be presumed to have taken place for the purpose of analyzing employer knowledge.

proper lookout, the need to properly crew their boats to combat fatigue, the need for improvements on recency, potable water.” Tr. at 491.

Respondent makes several arguments as to why Complainant failed to establish employer knowledge. First, Employer argues that Complainant has put forth no specific evidence that Captain Graham was aware of any of Complainant’s protected activities. However, the decision to terminate Complainant was apparently made by executive management at Harley Marine, with participation by John Walls. John Walls testified that executive management were the “Reviewers” of Captain Graham’s Internal Incident Investigation Report at Exhibit 9, and that these Reviewers participated in making the decision to terminate Complainant. Tr. at 266-267. Mr. Walls testified that his role was “to carry out the instructions of termination of Captain Dady and the implementation of other changes of the recommendations of Captain Graham.” *Id.* at 267. He further testified that he participated in the discussion by the reviewing group about Captain Dady’s termination, he agreed that Captain Dady should be terminated, and the decision to terminate was unanimous. *Id.* at 267-269. Captain Graham testified that he did not terminate Complainant, but his job was to investigate the incident and make a recommendation regarding termination. *Id.* at 315. He testified that his investigation report was reviewed by executive management, he was then asked for his recommendation regarding termination, and he gave it. *Id.* at 422. Since the decision to terminate Complainant was made by executive management, with John Walls’ participation, the employer knowledge issue turns on whether they knew of the protected activity.⁵

Respondent also argues that Complainant is unable to prove that Mr. Walls himself knew about his reports to the U.S. Coast Guard. Mr. Walls testified that he does not remember whether Complainant reported the sewage issue to the Coast Guard but that “it’s possible” he did. Mr. Walls did not testify that he knew that Complainant reported to the Coast Guard about inadequately trained QMs, improper lookout, or violations of the 12-hour rule.

However, I find this argument unpersuasive. First, Complainant provided a copy of his report of steering failure to the U.S. Coast Guard, dated 4/24/2010. CX I. Respondent admits that because this document is in evidence “The steering issue is the closest item of protected activity of which a company could have knowledge.” Respondent’s Post-Hearing Reply Brief at 12. Mr. Walls also implied, in his testimony, that he knew Complainant reported the steering failure to the Coast Guard; he testified that Complainant reported to the Coast Guard and there was “nothing improper about that” and at the time he asked Complainant if he “also called the hotline.” *See id.* at 222, 751. Therefore, I find that Respondent knew that Complainant reported to the Coast Guard the steering failure.

⁵ Even if Captain Graham were the ultimate decision-maker, Mr. Walls and other Harley Marine officials who participated in the decision-making process knew of the protected activity. The ARB in *Rudolph v. National Railroad Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-015 (ARB March 29, 2013) explained that “proof that an employee’s protected activity contributed to the adverse action does not necessarily rest on the decision-maker’s knowledge alone. It may be established through a wide range of circumstantial evidence, including the acts or knowledge of a combination of individuals involved in the decision-making process” and “the complainant need not prove that the decision-maker responsible for the adverse action knew of the protected activity if it can be established that those advising the decision-maker knew.”

Respondent's argument that Complainant has failed to establish employer knowledge because the decision makers were only aware of internal complaints is also unpersuasive. In its interim final rule of February 6, 2013 the U.S. Department of Labor explained that the SPA's language is to be given broad instruction "to ensure that internal complaints are protected as fully as possible." 78 Fed. Reg. 8390, 8396 (Feb. 6, 2013). The SPA prohibits retaliation because a seaman in good faith has reported or is about to report to the U.S. Coast or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation described under that law or regulation has occurred. The Department of Labor explained that

One way an employer will know that a seaman is "about to report" the violation is when the seaman has made an internal complaint and there are circumstances from which a reasonable person would understand that the seaman will likely report the violation if the violation is not cured. These circumstances might arise from the internal report itself (e.g., "I will contact the authorities if it is not fixed"), the seaman's history of reporting similar violations to authorities, or other similar considerations.

78 Fed. Reg. 8396. Here, Complainant testified that he actually reported the safety violations (he wasn't merely about to report them), but by analogy, I find that the reasoning above applies to whether the decision-makers knew of Complainant's actual reports. Complainant testified that he made frequent internal complaints to officials at Harley Marine, including Mr. Walls, about the issues involved in the protected activity. Mr. Walls testified that "I'm sure he did" say that if you don't have proper lookout and a man goes overboard, you don't have the manpower to safely rescue him. Tr. at 285-286. Mr. Walls also testified that Complainant expressed concerns to him directly about inadequate training of certain personnel, such as qualified mechanics. *Id.* at 220. In addition, Mr. Walls testified that Complainant complained to him about improper recency for certain routes of "one person who he was supervising for a TOAR" under his watch. *Id.* at 282. I find that Complainant's frequent internal complaints, history of reporting to the U.S. Coast Guard, and belief that the issues were not being sufficiently addressed⁶ are circumstances that would lead a reasonable person to understand that Complainant would likely report his safety concerns.

Respondent also seems to argue that the protected activity involved complaints about Respondent's practices that were not, in fact, violations of the law; and since the Respondent's practices were not violations of the law Respondent did not have reason to know that Complainant reported or would report the practices to the U.S. Coast Guard. The SPA prohibits retaliation against a seaman because "the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman *believes* that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred." § 2114(A)(1)(a) (emphasis added). Complainant testified that he believed Respondent's practices violated safety regulations. I find that he had a subjective belief that these

⁶ For example, Complainant testified that "he was having trouble communicating to [Mr. Walls] when a lookout is required by law and what a proper lookout was, and I wasn't really getting the answer that I thought was appropriate for my concerns" so he went to the Port Captain. Tr. at 591. Respondent argues that "The core facts in the matter as set forth by management witnesses are consistent. The fact some details may be stated with different language at the hearing than in the interview, or that memory may fade over time, does not render the DOL interviews in any way inconsistent." Respondent's Post-Hearing Reply Brief at 40.

violations occurred and, given his articulation of his reasons for believing so (discussed below) and familiarity with maritime and safety laws and regulations, demonstrated, for example, by his membership in TSAC, I find that his belief was objectively reasonable.⁷

Mr. Walls testified that he remembers having discussions with Captain Dady about the importance of lookouts but he never perceived it as a regulatory noncompliance discussion. Tr. at 285, 748. According to Mr. Walls, in what Harley Marine does in New York Harbor it is not necessary to have a designated lookout. *Id.* at 287. I do not find Mr. Walls' testimony that he never perceived the discussions to be about regulatory noncompliance to be credible. Mr. Walls admitted that Complainant questioned the safety of Respondent's practices; he testified that "I'm sure [Complainant] did" say that if you don't have proper lookout and a man goes overboard, you don't have the manpower to safely rescue the person. *Id.* at 285-286. Complainant testified that it is his understanding that Coast Guard regulations don't stipulate crew size but do stipulate when a proper lookout is needed and that a lookout cannot have other duties; in his opinion, a deckineer cannot be a proper lookout because he covers two departments, engineering and decking, and "putting these two departments together like that is not a safe practice." *Id.* at 654-655. Mr. Walls admitted that he discussed the lookout issue with Complainant repeatedly.

Complainant testified that he and Mr. Walls disagreed on how to interpret the 12-hour rule as well:

I don't know – Mr. Walls didn't disagree with the 12-hour rule. He didn't understand the limits of the 12-hour rule. He didn't demonstrate to me that he understood that the boats could not just simply tie up and have the crew on it. He seemed to feel that, in my view, that if the boat just tied up with the crew on it, it was okay and the 12-hour rule was satisfied, and that's not the case.

Id. at 603-604. In addition, although Mr. Walls denied that Complainant reported to him that he believed that Harley Marine had unqualified mechanics according to the law, he also admitted that Complainant expressed concerns to him directly about inadequate training of certain personnel, such as qualified mechanic. *Id.* at 220, 223. Regardless of whether Harley Marine's practices related to these issues actually violated the law, it is hard to believe that throughout all of these discussions Mr. Walls never considered that Complainant was questioning their regulatory compliance.

Furthermore, Complainant's review of the MOM, which Complainant testified he submitted to Mr. Kelly (one of the "reviewers" of Captain Graham's internal investigation report and participant in the discussion that led to Complainant's termination), specifically discussed lookout, and the review begins with "Below find my review of the following sections of MOM with apprehension regarding conformity. These are the areas I believe require change for clarity now that QM's are not a manning requirement on HMS Tugs. As I reviewed the MOM I could not ignore the obvious incursion on HMS standards caused by removing QM manning requirements." *See* CX M. He also explained that the symbol "NI," which he included in his

⁷ *See Blount v. Northwest Airlines, Inc.*, ARB No. 09-120, ALJ No. 2007-AIR-9 (ARB Oct. 24, 2011) (explaining that under AIR 21 a complainant's subjective belief that a violation occurred must be objectively reasonable in order to constitute protected activity). Moreover, I reiterate that Respondent has stipulated that Complainant's complaints constitute protected activity.

notes about several MOM sections, indicates “Negative impact on safety or a digression in environmental protection standards.” *Id.*

For the reasons set forth above, I find that Complainant has established, by a preponderance of the evidence, that those who decided to terminate him had knowledge of his protected activity.

Adverse Employment Action

§ 2114 prohibits discharge of a seaman for engaging in protected activity. Here, the evidence establishes and the parties do not dispute that Complainant was discharged. Therefore, the adverse action element is satisfied.

Contributing Factor

It is Complainant’s burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in his termination. A “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). In proving contributing factor, a complainant can show “either direct or circumstantial evidence” of contribution. *Speegle v. Stone & Webster Construction, Inc.*, ARB No. 11-029-A, ALJ No. 2005-ERA-006 (ARB Jan. 31, 2013).⁸

Complainant argues that the “sheer amount of reports made by Dady and the proximity in time of the threatening message delivered to him by Mr. Walls from Harley headquarters in Seattle, establish by a preponderance of the evidence that Capt. Dady was terminated because of his protected activity. Indeed, no other Harley employee, ever, was terminated for an incident which occurred while he was off watch, asleep and without any knowledge of the incident whatsoever.” Complainant’s Post Trial Brief at 3. Respondent argues that there is nothing to connect the protected activity to the termination decision.

One source of indirect evidence of contribution is “temporal proximity” between the protected activity and the adverse action. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030 (ARB February 29, 2012). While not dispositive, the closer the temporal proximity is, the stronger the inference of a causal connection. *Id.*

Complainant was terminated on October 25, 2010. RX 13. Respondent stipulated that Complainant complained directly to the United States Coast Guard that Respondent dumped raw sewerage in New York Harbor in January 2009, about steering failure in April 2010, and about issues with QMs in May 2010. Complainant, in his testimony, did not specify when he asked a local union representative to complain to the Coast Guard regarding staffing shortages and violations of a 12-hour work rule and a report to the Coast Guard in Seattle regarding alleged

⁸ At this level of inquiry, Complainant needs to show that he had a reasonable belief (objective and subjective) that he had reported a violation of law based on a preponderance of direct or circumstantial evidence. *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011) (an “internal complaint to superiors conveying [an employee’s] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA”)(citation omitted).

inadequate crewing of Respondent vessels. Thus, five months separates the adverse action from the most recent stipulated-to protected activity.

Complainant argues that the temporal proximity between Mr. Walls's conversation with Complainant about the duck boat article, in which Mr. Walls allegedly communicated a threatening message to Complainant from Harley Marine's Seattle headquarters, and the termination is a source of indirect evidence that Complainant's protected activity contributed to his termination. Indeed, Mr. Walls testified that the conversation took place during the first week of October 2010, just weeks before Complainant's termination. Complainant testified that he believes the conversation took place at the end of September 2010. Tr. at 495.

Respondent argues that Complainant's participation in the duck boat article has no relation to any of the alleged protected activities; the article is not itself a report to the U.S. Coast Guard or related agency of a violation and is not even about Harley Marine. Respondent's Post-Hearing Reply Brief at 22. Furthermore, there is "no specific evidence that there was ever 46 U.S.C. § 2114 reporting of a violation at Harley Marine of any of the information provided in this 'duck boat article.'" *Id.*

Although Complainant's participation in the duck boat article itself doesn't fall under one of the §2114 categories of protected activity, the subject matter of the article does overlap with protected activity Respondent stipulated to. Complainant attached to his initial complaint with OSHA several articles about the duck boat incident from July 2010 in which he was quoted. *See CX Y*. In an article dated July 11, 2010 he is quoted as saying that "tugboats have blind spots when they are moving large barges." *Id.* In an article dated July 9, 2010 (and in another, undated, article) he is quoted as saying to the Associated Press that

tugs always have blind spots when they're pushing barges. In this case where the tugs' wheel house was relatively low and the barge was light and floating high in the water, it could have been large he said. He said the Coast Guard requires lookouts on board tugs or barges in situations like that, but that they're often not posted and the rule is not often enforced.

Id. Although it is unclear exactly which article Ms. Franco was referring to in her discussion with Mr. Walls, in each of these articles Complainant is quoted expounding on the issue of visibility problems on tugs and/or the importance of a lookout. In each he is identified as the President of the National Mariners' Association and a tugboat captain himself and Harley Marine's name is not mentioned. *See id.* One of Complainant's stipulated-to protected activities, as discussed above, is his request to a union representative to complain to the U.S. Coast Guard about Harley Marine's improper lookout procedures. He testified that he complained internally about improper lookout on Harley Marine's vessels repeatedly. *See Tr.* at 495.

Mr. Walls testified that he skimmed one of the duck boat articles before discussing it with Ms. Franco and that he did not know if the duck boat incident involved improper lookout. *Id.* at 279, 764. However, he did admit that he knew it involved the issue of visibility and when asked about the concept of lookout at the hearing, he testified that the issue of lookout is related to obstructed visibility. *Id.* at 282-285.

Complainant testified that he viewed the message Mr. Walls relayed as a threat. *Id.* at 497. Mr. Walls, although testifying that he was not angry when he relayed this message, admitted that he did get frustrated when it appeared to him that Complainant was not getting his point. *Id.* at 280.

I find that Complainant's account of the exchange with Mr. Walls about the duck boat article(s) is credible. Harley Marine's executive management appeared to be displeased with his participation in articles in which he expressed his views on visibility problems and lookout. Due to the overlap between the subject matter of the duck boat article and the protected activity, the proximity between the conversation with Mr. Walls and the termination constitutes indirect evidence that the protected activity was a contributing factor in the termination.

Respondent argues that there was an intervening event between the protected activity and the termination that independently caused the termination of Complainant: the October 2010 allision. Indeed, Complainant's termination letter, written by John Walls, dated October 25, 2010, specifies that the termination "is the result of failure to report the incident involving the Christensen Sea on October 12th 2010 which resulted in extensive damage to the vessel and the company's loss of faith in your abilities to perform the job functions of your position." RX 13. An inference of discrimination, i.e., the protected activity contributed to the adverse action, is less likely to arise as the time between the adverse action and the protected activity increases. But, if an intervening event that independently could have caused the adverse action separates the protected activity and the adverse action, the inference of causation arising from temporal proximity is compromised. *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28 (ARB Nov. 30, 2006).

At the hearing, after describing his conversation with Complainant about the duck boat article, Mr. Walls was asked "So it's a true statement to say that the very first incident following that conversation that you had with him, even though that during that incident he was asleep and off watch, he was terminated. Isn't that correct?" and Mr. Walls answered "I don't know the timing between that, but that was not the only reason why Captain Dady was terminated." Tr. at 232. Complainant argues that Mr. Walls' response confirms that the protected activity was a reason for his termination. It is unclear exactly what Mr. Walls was referring to in saying "that was not the only reason Captain Dady was terminated" – the duck boat article conversation or the October 12-13 allision. Nevertheless, his response does suggest that, to him, the October 12-13 allision was not the only reason Complainant was terminated. Yet the allision is the only grounds for termination mentioned in the termination letter he wrote.

Complainant has also provided other indirect evidence that the protected activity was a contributing factor in the decision to terminate him. In addition to temporal proximity, circumstantial evidence includes evidence that discredits the respondent's proffered reasons for the adverse action, demonstrating instead that they were pretext for retaliation. *See Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018 (ARB June 29, 2011); *see also Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011) ("Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, shifting explanations for an employer's actions, and more.").

Complainant argues that Respondent's failure to file a CX-2692 following the allision reveals that Harley Marine used the allision "as a very transparent excuse" to terminate Complainant. Complainant's Post-Trial Brief at 15. Complainant advises me that "46 CFR 4.05-10 mandates that vessel owners, agents, masters, operators, or persons in charge must [in addition to notifying the U.S. Coast Guard when a marine casualty has occurred] file a written report of any marine casualty required to be reported under § 4.05-1" and the written report must be provided on Form CG-2692. *Id.* at 8. One kind of accident that must be reported is "An occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service or route including but not limited to fire, flooding, failure or damage to fixed fire extinguishing systems, life saving equipment or bilge pumping systems." *Id.* at 10. Complainant points out that even though Respondent has repeatedly stressed the seriousness of the allision, Mr. Walls testified that Harley Marine did not file report of it. According to Complainant, "the fact that Harley Marine did not file a CFG-2692 shows that Harley Marine did not believe that the occurrence materially and adversely affected the vessel's seaworthiness or fitness for service or its route. Otherwise Harley Marine would be in serious violation of well established law." *Id.* at 15.

Complainant further argues that the "evidence is overwhelming that Captain Graham was assigned the task of fabricating reasons for Captain Dady's termination by the company's owner, who hand-selected Captain Graham's approach to conducting his investigation of the incident." *Id.* at 18. Complainant highlights several flaws in the way Captain Graham conducted his investigation, including his failure to take Rex Nunemaker's statement, the loss of Mr. Churchill's statement, failure to ask the tankermen why they did not report the allision, failure to request or look at Mate Odegaard's personnel file even though Mr. Odegaard was involved in another allision months earlier or the prior incident report or CG-2692 related to that allision, failure to interview Mate Odegaard, failure to look at Complainant's records of safety meetings and personnel files, and photos and video of the allision that do not show obvious damage to the fender of the terminal wharf, contrary to Captain Graham's testimony that the fender was hanging down 5 or 6 feet chains. Complainant also points to what it alleges are inconsistent statements by Captain Graham to OSHA and before the OALJ.⁹

Complainant also argues that Respondent has provided shifting reasons for terminating Complainant, and this is additional evidence that the October 12-13 allision is pretext. Complainant points out several reasons Respondent has expressed at different times for terminating Complainant, including "failing to report an incident," failing to inspect the barge following the allision, failing to go on the dock to inspect the barge, failing to adequately train his crew, and the Captain is presumed to be responsible even when off-watch and asleep for the actions of the wheelhouse person in charge.¹⁰

⁹ For example, Captain Graham suggested to OSHA that Complainant had a "don't ask, don't tell policy" as captain but at the hearing he testified that he doesn't believe Complainant had such a policy. *See* Tr. at 409-410.

¹⁰ Complainant argues that Respondent's failure to apply progressive discipline to his case is also evidence of pretext. Complainant's Post-Trial Reply Brief at 37-38. However, Captain Graham testified that although Respondent has a progressive discipline policy, it is not mandatory and is dependent on the severity of the incident. Tr. at 421. There is no evidence indicating that Respondent had a mandatory progressive discipline policy.

First, I do not consider Respondent's failure to file a CX-2692 following the allision to be a strong source of indirect evidence of pretext. Complainant seems to be arguing that the failure to file the form reveals that Respondent is being untruthful in describing the event as a serious one. However, Complainant himself admitted at the hearing that the allision was a serious, although not potentially catastrophic, event. He testified that "whenever you have water where you don't know where it's coming from, you expect the worst, you prepare for the worst, and you take it as a serious event until you stabilize the situation." Tr. at 567.

However, after watching the video of the allision, I think that Captain Graham exaggerated the impact of the hard landing. According to Captain Graham, the video shows that [Mr. Richardson and Mr. Nunemaker] ran from the bow when they hit the ship's resting pad and parts went flying into the air because of the violent severe allision with the bottom pad. And then they returned to the bow, they looked in the direction -- that's all I can say is they looked in the direction of the mooring pad and dock, and they made an incomplete report that there was no damage.

Tr. at 336-337. Captain Graham testified that the pad was hanging from the chains. *Id.* at 336. I did not see anything flying in the video, and I am not directed to any actual damage on the video. Dock workers reportedly did not see any.

I also find that Captain Graham overstated the danger of the allision to the OSHA investigator. He told OSHA that Complainant "put us at great risk, both to personnel and to -- to the vessel and to loss of cargo. If that -- if that barge had spilled its 1.2 million gallons of black oil off Liberty Island . . . Harley Marine would not be in business today . . . It would be worse than BP's spill in the Gulf of Mexico." RX 46. Mr. Walls testified that based on what he knows today, he would say that the risk of the vessel sinking or the oil being released in the New York Harbor was minimal. Tr. at 139. Moreover, although he testified that at the time of the discovery of the allision he was concerned that the barge would sink and they would lose the oil, he also testified that by the time he terminated Complainant, he did not really believe that that vessel almost sank and almost released all of its oil cargo into New York Harbor. *Id.* at 140.

I also find the manner in which Captain Graham conducted his investigation to be a strong source of indirect evidence that the allision was used as an excuse to terminate Complainant. Although Captain Graham testified that the purpose of his investigation included finding out why the accident wasn't reported, *see* Tr. at 350, the evidence reveals that this was not much of a concern for him. At the hearing he testified that "the only reason why [the failure to report] would occur is if there was a disregard and no respect for [Complainant] or a fear of reporting to him." When asked whether he considered reasons that might have led to the failure to report other than the reason he ultimately gave he testified

A. That's not how you do an investigation of an accident.

Q. You don't consider all of the options and all the alternatives?

A. No. I was evaluating the performance of this particular incident.

Id. at 408.

He did not explore the possibility that the crew failed to report the allision, not because of inadequate training or communication by Complainant, but because the crew wanted to avoid

discipline for their own actions. For instance, Mr. Walls testified that Mr. Odegaard was involved in an allision earlier in the year and was disciplined as a result with either a written warning or a warning with a probationary period. Tr. at 160. He testified that Mr. Odegaard could have been on probation at the time of the October 12th allision. *Id.* He further testified that he believes Mr. Odegaard did not reveal the allision “because he was concerned about his status.” *Id.* at 160-161. Captain Graham apparently knew, at the time he completed his investigation report, that Mr. Odegaard was involved in the prior allision, as he noted Mr. Odegaard’s involvement in it in the report. *See* RX 9 at 3. Yet Captain Graham, during his investigation, never even spoke to Mr. Odegaard, and at the hearing, when asked why, he could only respond that “Mr. Odegaard was not available to me during the investigation.” Tr. at 322. When asked if Mr. Odegaard had a telephone number, he replied “I think we had -- this was two-something years ago, but we had made, I think we had made attempts to talk with him, but we were not successful.” *Id.* He did not recall if he tried calling Mr. Odegaard himself. *See id.* He testified that he did not know if Mr. Odegaard was on probation at the time of the incident, and when asked if he knew if Mr. Odegaard was expecting to have a review of his previous allision at the time of the subsequent one, he responded that “When I went out there to investigate, I didn't want to be tainted by any knowledge of the thing.” *Id.* at 383, 390. He did not review Mr. Odegaard’s personnel file either before completing his investigation report. *Id.* at 422.

He testified that he does not recall if he asked Mr. Richardson why he didn’t report the allision and his statement does not say why and he didn’t speak to Mr. Nunemaker. *Id.* at 350, 359-360. Raymond Churchill made a statement but it disappeared and Captain Graham did not make any attempt to reconstruct it because “because Mr. Churchill had very little to say.” *Id.* at 367-368.

Captain Graham reached a similarly hasty conclusion that Complainant failed to understand his responsibilities and exercise command presence to properly train and evaluate his crew, which he “based on the performance of the crew associated with this particular incident and their failure to report an incident to the captain.” *Id.* at 388. In his opinion, a “well-trained crew would have informed the captain that they'd had a hard landing or an allision with the pier.” *Id.* at 390. However, he did not look to see when the last time Complainant met with this crew to inform them of the importance of reporting, no one told him that "Captain Dady doesn't supervise his crew," and he did not have Complainant’s personnel file at the time he made his determination. *Id.* a 394-395, 397, 422.

I also agree with Complainant that Respondent’s shifting reasons for terminating Complainant is evidence that his protected activity was a contributing factor in Respondent’s decision to terminate him. In the October 25, 2010 termination letter, Mr. Walls stated that Complainant’s termination is “the result of failure to report the incident involving Chrestensen Sea on October 12th 2010 which resulted in extensive damage to the vessel and the company’s loss of faith your abilities to perform the job functions of your position.” RX 13. Captain Graham, in his internal investigation report, cited the following: Complainant “failed to understand his responsibilities and exercise command presence to properly train and evaluate his crew. His lack of supervision placed his vessel and crew at great personal risk by allowing a breach of the hull to go undetected. He accepts no accountability for his actions;” and “The Mate and Captain exhibited blatant disregard for Company Policy and Procedures in an apparent

attempt to avoid responsibility for their actions or inactions.” RX 9. At the hearing Captain Graham testified that “A captain has to have a process or procedure in place with his personnel to ensure that his hull is whole and ready and seaworthy for it to leave that dock and go anywhere underway” and Complainant

had no process to do that and part of his disregard, to me, was he didn't see that that was necessary. He actually said, “I can't open up the hatches and look in the void tanks.” And the only void tank I was concerned about was the forward rake. That is standard Policy. Or not policy within the company, but it is standard that when you have a hard landing or you have an allision with something that you check your voids before you begin another voyage.

Tr. at 400-401. Mr. Walls, however, testified that there is no reason to inspect the voids on routine voyages but they are to be inspected if “you think that there could be a problem” and “[i]t's not the responsibility of the captain to do it, but to get it done. It's the tankerman's responsibility.” *Id.* at 123. Mr. Walls also testified that, although training played a part, he was not concerned with training, and in his view termination was appropriate because “There was a breakdown of leadership and communication that led to a lack of information of the incident/allision on the 12th.” *Id.* at 173, 268. In sum, Respondent has articulated as reasons for terminating Complainant his failure to properly train his crew, his communication problems and failure to build collaborative relationships with his crew, his lack of command presence, his lack of procedures in place, his refusal to accept accountability for his actions, and the principle that the captain is responsible for the actions of the crew.

Complainant also calls attention to a document, a Request for Separation Information Form from the New Jersey Department of Labor and Workforce Development Division of Unemployment and Disability Insurance, dated 11/1/2010, in which a Human Resources official from Harley Marine listed Complainant's date of discharge as 10/13/2010. *See* CX CC-4. This document raises questions about the actual date of Complainant's termination and supports his contention that the decision to terminate him was made before Captain Graham's Internal Investigation Report was actually completed. This would contradict Captain Graham's testimony that he recommended termination only after the final draft of his internal investigation report was completed and submitted to executive management. *See* Tr. at 333. His internal investigation report in evidence is itself undated. It lays out Captain Graham's findings from the investigation but also states that Complainant “has been terminated for cause,” as if the decision had already been made. *See* RX 9. Mr. Walls told the OSHA investigator that there were multiple drafts of the report and the final draft of the report was about three to four weeks after the incident. RX 48 at 181-183. He stated that he based his decision to terminate largely on what was in the internal investigation report, he saw a draft of the report four or five days before the final draft came out, he had a summary of the report in his possession, and he had had conversations with Captain Graham. *Id.* He told the investigator that Complainant and Mr. Odegaard were terminated about the same time he received the report. *Id.* He believes he called Complainant on 10/25/2010 to notify him he was terminated. *Id.* Although Mr. Walls' letter of termination is dated 10/25/2010, the actual date of termination remains fuzzy,

considering that there were several drafts of the internal investigation report and the document from the Human Resources official shows an even earlier date of termination.

Respondent claims that Captain Graham's internal investigation report underlies its decision to terminate Complainant. However, the evidence shows that lead investigator was not truly concerned with why the crew failed to report or whether Complainant had provided his crew with adequate training or communication. Moreover, Complainant has provided evidence that the decision to terminate Complainant occurred, contrary to Captain Graham's testimony, before he completed his investigation report. This evidence as well as the proximity of the duck boat article discussion to the termination and shifting reasons provided by Respondent lead me to find that Claimant has established, by a preponderance of the evidence, that his protected activity was a contributing factor in his termination.

Same Adverse Action Absent Protected Activities

Clear and convincing evidence that an employer would have fired the employee absent protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability. *Clark v. Airborne, Inc.*, ARB No. 08-133, ALJ No. 2005-AIR-27 (ARB Sept. 30, 2010). Thus, Respondent must establish, by clear and convincing evidence, that it would have terminated Complainant even if he had not engaged in the protected activity. Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain. *DeFrancesco v. Union Railroad Company*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB February 29, 2012). The burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard. Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain. *Id.*

Respondent argues that "the company held Captain Dady and his crew responsible for the failure to report and issued discipline" and this "belief is reasonable given the responsibility of a captain, and it is reasonable given the seriousness of the incident."¹¹ Respondent's Post-Hearing Brief at 42. According to Respondent, it is undisputed that Complainant and his crew did not report the allision until 28 hours later when the fully loaded barge was taking on water in the middle of New York Harbor, the incident caused extensive damage to the vessel and the vessel had to be taken out of service and repaired, and the company lost faith in Captain Dady's abilities to perform." In addition, Respondent terminated Captain McCauley for not reporting correctly in a similar incident that was far less serious than Captain Dady's incident. This evidence, Respondent argues, constitutes clear and convincing proof that regardless of any alleged protected activity, Complainant's employment would have been terminated for the events that occurred on October 12-13, 2010.

¹¹ Respondent discussed, in its post-hearing brief, cases that it alleges establish the principle that the captain is responsible for the actions of the crew. Complainant reviewed the cases in its Post-Trial Reply Brief and argues that "an exhaustive review of the many labor law cases cited by Harley Marine in its post-trial brief fails to disclose even a single decision that would hold a captain who is off watch and unaware of an allision responsible for failing to report something that he did not know about." Complainant's Post-Trial Reply Brief at 3. I note that the Seaman's Protection Act is the law, and these other cases are not persuasive either.

In support of its contention that Complainant, as captain, was accountable for the crew's failure to report the allision even though he was asleep at the time of the allision, Respondent identifies several provisions in its Marine Operations Manual that lay out the responsibilities of the captain regarding safety and training, inspection and maintenance, administration and supervision, vessel operations and what is required in the event of an allision with a structure and a damaged barge.¹² Respondent also points to Complainant's offer of employment letter, dated May 17, 2007, which explains that Complainant's job responsibilities included ensuring compliance with company policies and regulations; ensuring that all crewmen were performing their duties; ensuring compliance with federal, state, and company policies and regulations; and being responsible for the safe transportation of the assigned barge and for the safety of the cargo, vessel, and crew. *See* RX 14.

Respondent also calls attention to Complainant's history of alleged problems communicating with his crew. Respondent points out that Captain Dady stated in his letter resigning as port captain "What I have failed to master is the diplomacy skills to speak my mind and get the men to follow the MOM without pissing them off." RX 11. Respondent advises me that Mr. Walls' letter to Complainant following his resignation states that Mr. Walls had concerns about Complainant's "communication problems with subordinates, sensitivity to perceived criticism, and [a] need to develop better listening skills." RX 12. Mr. Walls' letter further states: "My concern at this time is whether this frustration, and the events of recent history, will prevent you from performing the duties of fleet captain in a safe and efficient manner with Harley Marine NY." RX 12.

Complainant argues that the MOM "very clearly states" that the wheelhouse person in charge is obligated to report the hard landing. At the time of the allision, Complainant was asleep and off watch while Mate Odegaard was the wheelhouse person in charge and Raymond Churchill was the barge person in charge. Complainant cites to several provisions of the MOM which support its argument.

Complainant further argues that the Captain McCauley incident is not similar to the allision involving Complainant. Captain McCauley, Complainant points out, was terminated for lying during an investigation. Captain McCauley described his allision inaccurately "in order to cover up his own navigational error" and video of the incident revealed his statement to be inaccurate. In contrast, in the October 12-13 allision, Mr. Odegaard was truthful during the investigation and Complainant "has always been truthful and has never had any issues or reprimands for navigational errors (or for any reason at all)." According to Complainant, "it is clear that a first offense navigational error is apparently not grounds for immediate termination, while lying, as McCauley did, violates company policy regarding truthfulness and therefore is separate grounds for termination."

Complainant also challenges Respondent's contention that concerns about Complainant's communications problems with his crew support their belief that Complainant should be held

¹² Respondent submitted its Marine Operations Manual as evidence, but indicated that they are protected, confidential and proprietary in nature and filed them under seal. Therefore, the contents of specific MOM provisions will not be revealed in this Decision and Order, although the MOM will be discussed in general.

responsible for his crew's failure to report the allision. Complainant argues that following the events Mr. Walls cites as evidence of communication problems Mr. Walls gave Complainant stellar reviews, Complainant's tugs were very disciplined and well-trained. In addition, the barge crews, which are primarily trained by Brian Kelly, posed problems for tug crews with their lack of discipline and respect for the chain of command; and in the Jose Panlilio incident, Complainant was physically threatened by a bargeman in response to an order from Complainant in an emergency situation, and Mr. Walls failed to back up Complainant while attempting to enforce discipline, "gravely undermining Captain Dady's authority." Thus, Complainant argues, Mr. Walls' concerns "appear to be nothing more than pretext."

First, I note that Respondent does not dispute that Complainant was asleep at the time of the allision and did not have knowledge of it. Mr. Walls testified that he assumes Captain Dady was in fact asleep at the time of the allision and he has not seen evidence to the contrary. Tr. at 117. He further testified that when he terminated Captain Dady for failing to report the incident, he knew that he didn't know about the incident and that the minute Captain Dady found out about the allision, he called the hotline and called him and then did everything that he should have done to respond to the situation at that time. *Id.* at 167-168. Captain Graham testified that he doesn't know if Complainant was asleep or not at the time of the allision but he also can't dispute Complainant's statements that he was off watch and asleep at the time of the allision and didn't know the vessel was hulled until he noticed it had gone down in the bow while pushing it from the Bayway to the mooring. *Id.* at 353, 355-356. Respondent is arguing, basically, that it would have terminated Complainant, who was asleep at the time of the allision and lacked knowledge of it, even if he had not engaged in protected activity.

After a review of the relevant provisions in Respondent's MOM (the provisions relating to the responsibilities of a captain and the responsibilities of the person(s) in charge), I note that the MOM does appear inconsistent at times. Although some provisions suggest that the captain bears ultimate authority, other provisions indicate that the captain's duties are assumed by the person(s) in charge when he is off watch. Because the MOM is ambiguous on this point, I am not persuaded that it shows that Respondent would have terminated Complainant even if he had not engaged in the protected activity.

I also disagree with Respondent that Captain McCauley was similarly situated to Complainant. Respondent is arguing that Captain McCauley and Complainant engaged in similar conduct and received similar treatment (both were terminated). What's more, the incident involving Complainant was more serious than Captain McCauley's. Therefore, this is evidence that Respondent has treated a similarly situated person who did not engage in protected activity no more favorably than Complainant.¹³ However, I find that regardless of the seriousness of the October 12-13 incident compared with Captain McCauley's, the two employees were not similarly situated in all relevant aspects. Captain McCauley, unlike Complainant, was not asleep

¹³ Where the employer's reason for taking adverse action is that the employee violated a work rule, the employee may prove pretext by showing either that he did not violate the rule or that, if he did, other employees who engaged in similar conduct, but who did not engage in protected activity, were not similarly treated. *Speegle v. Stone & Webster Construction, Inc.*, ARB Case No. 06-041, ALJ Case No. 2005-ERA-0006 (Sept. 24, 2009). Here, Complainant argues that no other Harley employee has ever been terminated for an incident which occurred while he was off watch, asleep and without any knowledge of the incident.

at the time of his allision; he was navigating the vessel and, although he made a report, it was inaccurate. Captain Graham testified that Captain McCauley lied in his report. Tr. at 743. In contrast, here, Mr. Odegaard was on watch and navigating the vessel when it made a hard landing and Complainant was off watch and asleep. There were no allegations that the report Complainant ultimately made, upon discovering the problem with the vessel, was inaccurate. The Captain McCauley incident simply does not show that Respondent has treated a similarly situated employee in a similar way. In fact, John Walls testified that to his knowledge, except for Captain Dady, Harley Marine has never terminated anybody who was asleep and off watch at the time of an allision or an accident that they didn't cause. Tr. at 166.

I also do not accept that John Walls' documented concerns about Complainant's communication problems help Respondent meet its burden to prove, by clear and convincing evidence, that Respondent would have terminated Complainant even if he had not engaged in the protected activity. Although Mr. Walls expressed these concerns in his July 1, 2008 letter, two performance evaluations of Complainant from later that year, dated 11/08 and 12/08, show that Harley Marine Officials rated his leadership and other qualities highly. In his 11/08 review, for example, he was rated outstanding in "accepts responsibility," "attitude," "compliance with rules," "effective under stress," "leadership," "planning and organizing" and "safety practices." The reviewer noted "outstanding knowledge of tugboat handling + rules of navigation. His ability to show his knowledge and assist others in obtaining the proper training so they can also learn." CX C. In the 12/09/08 performance evaluation, Brian Kelly rated Complainant's leadership above average and noted "Joe does a good job keeping his crew motivated and continually works at improving the St. Andrew. Joe does a great handling the tug and barges. Joe has put in an extra effort while training his new mate Marco Velez." *Id.* He also noted that "Joe is a seasoned mariner and a valuable asset to HMNY." *Id.* These performance evaluations cast doubt on the assertion that Mr. Walls' concerns about Complainant's communication problems in 2008 relate to the decision to terminate him in 2010.

Finally, if the Respondent has a policy of progressive discipline, as alleged, no evidence was presented that it was administered. When asked whether he considered demoting Complainant instead of terminating him, Mr. Walls testified that "I no longer trusted Captain Dady, and trust is not a situation where we would consider progressive discipline." *Id.* at 758. If progressive discipline did not apply it with respect to Complainant, it is more reasonable that Respondent took advantage of a technical violation in deriving the penalty. It did not provide any schedule for similar employees as to termination. Alternatively, I find to a reasonable degree of probability, that the penalty was arbitrarily adduced.

For the reasons set forth above, I find that Respondent has not met its burden to prove, by clear and convincing evidence, that it would have terminated Complainant even if he had not engaged in the protected activity.

Damages

According to 49 U.S.C.A. § 31105(b)(3)(A), "If the Secretary [of Labor] decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the

person to—(ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and (iii) pay compensatory damages, including back pay.

Reinstatement

Reinstatement is an automatic remedy under the STAA, although when reinstatement is impossible or impractical, alternative remedies such as front pay are available. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-52 (ARB Jan. 31, 2011). In his post-hearing brief, Complainant indicated that he seeks front pay and there is no mention of reinstatement. Complainant did not testify at the hearing that he is seeking reinstatement. However, neither party has presented evidence that reinstatement in this case is impossible or impractical. Therefore, reinstatement is ordered with the same compensation, terms, conditions, and privileges of the Complainant's employment.

Backpay

In *Ass't Sec'y & Bryant v Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005), the ARB summarized the legal framework for back pay awards in STAA whistleblower cases:

A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc.*, 90-STA-44, slip op. at 10 (Sec'y Jan. 6, 1992). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. ...

Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e et seq. (West 1988). ... Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. ... While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." ...

Slip op. at 5-6 (some citations omitted). Complainant has the burden of establishing the amount of back pay that a respondent owes. *Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y 07/19/93). However, uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party. *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB 09/24/97).

Complainant provided a direct deposit earnings statement ending on October 15, 2010 as evidence of gross pay per month at Harley Marine NY in 2010. Complainant claims that this statement shows that his gross pay per month was \$8728.12. According to the statement, Complainant earned \$45.06 per hour and up to that point earned \$87,281.22 in year-to-date gross wages. Complainant states in his brief that from June 6, 2007 to October 13, 2010 he worked 2

weeks on and 2 weeks off, and in 12 hour shifts. \$87,281.22 divided by 10 months equals \$8728.12 per month. I find that this estimate of monthly gross pay is reasonable and is supported by the earnings statement.

Complainant states that he received \$16,200.00 in unemployment compensation from NY State Department of Labor since his termination from Harley Marine and advises me to deduct this amount from the total awarded backpay. However, under the STAA, unemployment compensation is not deductible from the amount due for back pay. *Palmer v. Western Truck Manpower, Inc.*, 85-STA-16 (Sec'y June 26, 1990), *vacated on other grounds sub nom., Western Truck Manpower, Inc. v. United States Dept. of Labor*, 943 F.2d 56 (1991) (table case; unpublished decision available at 1991 U.S. App. LEXIS 21675), *readopted*, (Sec'y Mar. 13, 1992).

Complainant also advises me to deduct from back wages due the amounts Complainant earned from employment he had with other employers after his termination from Harley Marine. Back pay awards are offset by a complainant's interim earnings in positions he or she could not have held had his or her employment with Respondent continued. *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995). Complainant states that he worked for Great Lakes Dock and Dredge from July 15, 2011 to December 18, 2011 and provided an earnings statement dated 12/21/11 which shows that he earned \$52,657 in gross pay from that employer that year. He worked at Greater NY Marine Transportation from January 2, 2012 to January 16, 2012 and earned, according to a W-2 and Earnings Summary, \$3300 in gross pay that year. He worked for Buchanan Marine from April 15, 2012 to September 15, 2012 and a W-2 and earnings summary from 2012 shows that he earned \$50,743.64 in gross pay at Buchanan Marine that year. Respondent argues that Complainant obtained substitute employment on July 15, 2011 at a higher hourly rate than what he was paid at Harley Marine NY; therefore, any claim for lost wages would encompass only the periods of October 13, 2010 to July 15, 2011. However, as discussed above, back pay is owed until Respondent offers reinstatement, and Complainant's earnings in the positions just described constitute interim earnings. Therefore, the amounts earned while working for these employers will be deducted from total back pay owed.

The employee has a duty to exercise reasonable diligence to attempt to mitigate damages; however, the employer bears the burden of proving that the employee failed to mitigate. *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004). Respondent has not presented any evidence that Complainant failed to exercise reasonable diligence in seeking suitable alternative employment. See *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000).

Complainant is entitled to health and retirement benefits as well as fringe benefits, such as vacation pay. See *Dutile v. Tighe Trucking, Inc.*, 93-STA-31 (Sec'y Mar. 16, 1995). Complainant seeks \$17,235.45 in lost benefits (health insurance and 401K), \$5407.20 for lost vacation pay, and \$2883.84 in lost holiday pay. However, Complainant has not provided adequate evidence to determine whether the amounts claimed are appropriate, such as health expenses incurred after his termination, the amount Respondent would have contributed from the date of discharge to the date of tender of the correct amount of plan contributions, or whether it is the practice of the employer to pay an employee for vacation time not taken. See *Dutile*,

supra; **Palmer v. Western Truck Manpower, Inc.**, 85-STA-16 (Sec'y June 26, 1990), *vacated on other grounds sub nom., Western Truck Manpower, Inc. v. United States Dept. of Labor*, 943 F.2d 56 (1991) (table case; unpublished decision available at 1991 U.S. App. LEXIS 21675), *readopted*, (Sec'y Mar. 13, 1992) (finding that the ALJ erred in recommending vacation pay where there was no evidence of complainant's entitlement thereto).

In sum, I find that Complainant is entitled to back pay, with interest,¹⁴ at the rate of \$8728.12 per month from October 13, 2010¹⁵ until the date he is reinstated or receives an offer of reinstatement. \$106,700.64 in interim earnings should be subtracted from the total.

Compensatory Damages

Compensatory damages under the STAA include damages for pain and suffering, mental anguish, embarrassment, and humiliation. **Hobson v. Combined Transport, Inc.**, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008). A key step in determining the amount of compensatory damages is a comparison with awards made in similar cases. **Evans v. Miami Valley Hospital**, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009)

Complainant requests \$100,000 compensation for emotional distress caused by his termination. Respondent argues that Complainant “has shown no legal or factual basis on the record with specificity and by a superior weight of the evidence that he would be entitled to emotional distress damages.”

At the hearing Complainant testified about the consequences of his termination for the economic security of his family:

Q. Okay. I know you testified in the very beginning that, you know, because of your reputation and experience, you always were pretty confident that you could get a job at your level of experience and your age and all that. Is that true?

A. Well, it was until now. I mean, now I'm 61 years old. My -- I worked -- most of my career I, you know, saved money as much as I could and put it away with the hope that one day I'd be able to retire comfortably and maybe help my grandchildren.

Q. Is that different now?

A. Yes.

Q. Tell me how that's different now?

A. Well, I've been living on my 401(k). And --

Q. Take your time.

A. And a home equity loan. And it's hurting pretty bad financially. And there's other things, you know?

¹⁴ Pre- and post-judgment interest must also be paid. **Bryant**, ARB No. 04-014, *supra*; **Ass • ft Sec • fy & Cotes v. Double R. Trucking, Inc.**, ARB No. 99-061, ALJ No. 1998-STA-34 (ARB Jan. 12, 2000); **Doyle v. Hydro Nuclear Services**, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000). The interest rate shall be the rate charged for underpayment of federal taxes, as specified in 26 U.S.C. §6621. **Bryant**, ALJ No. 2003-STA-00036; **Ass • ft Sec • fy & Kerrick v. JLC Industries, Inc.**, 94-STA-00033 (ALJ Oct. 13, 1994).

¹⁵ Respondent, in its post-hearing reply brief, explained that payroll dated Complainant's termination as October 13, 2010, so it is fair to use that date as the beginning of the calculation period. Respondent's Post-Hearing Reply Brief at 48 n.34.

Q. I understand --

A. The women in my wife's family live a long time, some of them to 100 years old. I don't think we're going to make that.

Q. Are you concerned about caring for her and your family?

A. Well, sure. Yeah. When I'm gone, it's a scary thought to think that when you go, you can't provide.

Q. Do you feel like before all of this with Harley, you had put yourself in a, as best you could, in a comfortable position?

A. Yeah. My position was okay. And I thought I'd be retiring from Harley. I thought I would work there until my retirement time.

Tr. at 554-555. Complainant did not provide any medical evidence to support his testimony. In *Hobson, supra*, the ARB affirmed the ALJ's award of \$5,000 in compensatory damages for stress and anxiety which was based solely on the Complainant's testimony and was not supported by medical evidence. The ARB noted that the ALJ had found the testimony credible, that it was unrefuted, and that the ARB has affirmed reasonable emotional distress awards that had been based solely on the employee's testimony. Here, Respondent has not refuted Complainant's testimony. I find that Complainant's testimony is credible.

Complainant argues that similar circumstances and testimony were elicited in *Evans, supra*, in which the ARB did not disturb the ALJ's award of \$100,000 in compensatory damages for emotional distress and loss of reputation. In that case, however, the complainant testified that his firing took his confidence away, he and his wife were in and out of therapy together and individually, they were still in family counseling, a doctor prescribed Paxil for depression and anxiety, and his testimony was corroborated by his wife's testimony. *See id.* In another case, *Carter v. Marten Transport, LTD.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-063 (ARB June 30, 2008), the ARB affirmed an award of \$10,000 where the complainant testified that he felt "very depressed," "worthless," and "real down" when he lost his job, he still felt down because he had been discharged, and there was an episode in court where testified that he was having trouble listening to questions and answering them because he was under stress and that his medication was less effective when he was under stress. I find that the level of harm demonstrated by the testimony here is more similar to the level of harm demonstrated by the testimony in *Barnum v. J.D.C. Logistics, Inc.*, ARB No. 08-030, ALJ No. 2008-STA-006 (ARB February 27, 2009), in which the ARB affirmed an award of \$5000 in compensatory damages where the complainant testified that he suffered from stress and the loss of insurance and other fringe benefits as a result of the wrongful adverse action and *Hobson, supra*, in which the ARB affirmed an award of \$5000 in compensatory damages where the complainant testified that his termination made his anxiety worse. Therefore, I find that \$5000 is an appropriate amount for compensatory damages for emotional distress in this case.

Punitive Damages

Complainant seeks punitive damages in the amount of \$100,000.00. The STAA provides that "Relief in any action under subsection (b) may include punitive damages in an amount not to exceed \$250,000." 41 U.S.C. § 31105(b)(3)(C).

Complainant argues that Respondent's actions were willful and malicious and that Harley Marine has engaged in years of persecution of Complainant, beginning with his termination, continuing with its efforts to deny him unemployment in two state proceedings. Complainant also alleges that Respondent claimed that much of the evidence and records did not exist, yet produced "an ocean of documents and video" after hours on the day pre-trial submissions were due and many documents known to have been maintained by Harley Marine were never produced. Complainant also argues that Harley Marine personnel "engaged in a litany of leis and intentional misstatements in an effort to deny Dady his benefits and to torpedo the OSHA investigation. The egregious conduct of Respondent relative to its efforts to mislead OSHA and its subsequent discovery practices pale in comparison to the callous and reprehensible conduct towards Captain Dady leading up to and following his termination." In sum, Harley Marine "terminated Dady for his protected activity and then engaged in a systematic and untiring effort to deny him unemployment and frustrate his ability to conduct discovery, all the while changing their 'pretextual reason' for his termination," and this "clearly malicious" conduct supports an award of punitive damages.

Respondent argues that punitive damages are not appropriate because "there is no evil motive or intent in this case." Respondent's Post-Hearing Reply Brief at 47.

In *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-47 (ARB Aug. 31, 2011), the ARB wrote:

The United States Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law" *Smith v. Wade*, 461 U.S. 30, 51 (1983). The Court explained the purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979). The focus is on the character of the tortfeasor's conduct – i.e., whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. *Id.* at 54.

... [T]he ALJ did not consider whether Thomas's behavior reflected a corporate policy of STAA violations or whether punitive damages are necessary in this case to deter further violations. *See generally White v. The Osage Tribal Council*, ARB No. 96-137, ALJ No. 1995-SDW-001 (ARB Aug. 8, 1997); *Johnson v. Old Dominion Sec.*, Nos. 1986-CAA-003, -004, -005, slip op. at 29 (Sec'y May 29, 1991). Moreover, the ALJ accepted the Complainant's request for damages in the amount of \$75,000 without discussing the evidentiary basis for this finding. Thus, we vacate the ALJ's punitive damages award and remand the case for further findings on the necessity and amount of such damages under the facts of this case. In his analysis, the ALJ should include consideration of the size of the award that would adequately deter New Prime from future violations and the punitive impact of the damages on the company.

First, I find that Respondent's conduct involves reckless or callous disregard for Complainant's rights, as well as intentional violations of federal law. Respondent hails Harley Marine's culture of safety in its post-hearing brief, advising me that Harley Marine sets the standards for safety in the bunker fuel industry, Harley Marine is a national award winner for both environmental and safety standards, customers ask for safety information and audit safety data of the companies in the industry, and pointing to testimony from Mr. Walls showing that he believes that a safety record gives the company a competitive advantage in the industry and his belief in the importance of reporting incidents. However, the facts belie Respondent's claims about its culture of safety. Complainant testified to the displeasure expressed by Harley Marine's officials toward his safety complaints. He testified that when people would come to a Harley Marine official with a concern or a complaint, Brian Kelly would tell them that "you're getting as bad as Dady" and that he had a reputation in the company for being concerned with and for voicing concerns about safety and "was just known to management as sometimes a pain in the ass with all of my complaints about fatigue and improper manning and sewer going into the water and things like that." *Id.* at 486-487. He testified that his impression was that comments like "you're getting as bad as Dady" were meant to belittle him and quiet others. *Id.* at 487. The duck boat article incident discussed above, involving Harley Marine Vice President Deborah Franco and General Manager John Walls, is also indicative of a corporate policy of SPA violations. Therefore, I find that punitive damages are warranted in this case.

I find that \$20,000 is a sufficient amount in punitive damages to accomplish the aims of punishment and deterrence in this case. *See Youngermann v. United Parcel Service, Inc.*, ARB NO. 11-05, ALJ No. 2010-STA-047 (ARB February 27, 2013). In determining the amount I have considered Respondent's wealth (Respondent submitted a profit and loss statement for Harley Marine NY) and the amount of compensatory damages awarded. I have also considered punitive damage awards in other cases, including *Youngermann, supra*, in which the ARB affirmed a punitive damages award of \$100,000 against UPS (the ARB found that \$100,000 is "sufficient in size to deter a company such as UPS from similar conduct"), and *Ferguson v. New Prime, Inc.*, ARB No. 12-053, ALJ No. 2009-STA-47 (ARB November 30, 2012), in which the ARB affirmed a punitive damages award of \$19,000, where the ALJ found that the respondent terminated the complainant's employment for refusal to drive in hazardous weather in reckless and callous disregard of her rights.

Attorney's Fees

Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 31105(b)(3)(B). Although counsel for Complainant requested attorney's fees in Complainant's post-trial brief,¹⁶ he has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, counsel for Complainant is granted thirty (30) days from the date of the Decision and Order within which to file and serve a fully supported

¹⁶ Counsel requests "40% of total judgment award per contract." However, the ARB in *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004) explained that the lodestar calculation (the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate) is to be used to determine a reasonable attorney's fee.

application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. Respondent shall reinstate Mr. Dady to his former position with the same pay, terms, conditions and privileges of employment that he would have received if he had continued working from October 13, 2010 through the date of the offer of reinstatement.
2. Respondent shall pay Mr. Dady back pay in the amount of \$8728.12 per month, with interest, from October 13, 2010 until such time as Complainant receives a bona fide offer of reinstatement from Respondent. \$106,700.64 in interim earnings shall be subtracted from the total.
3. Respondent shall pay to Mr. Dady the sum of \$5000.00 in compensatory damages.
4. Respondent shall pay to Mr. Dady the sum of \$20,000.00 in punitive damages.
5. Counsel for Complainant shall have 30 days from the date of this Decision and Order to file a fully supported application for fees, costs, and expenses.
6. Respondent shall have twenty days from receipt of the application to file any objections.

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1986.110(a). Your Petition must specifically identify the

findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1986.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1986.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1986.109(e) and 1986.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1986.110(b).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1986.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1986.110(b).

