

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 September 2009

Case No.: **2008-STA-00061**

In the matter of:

**ASSISTANT SECRETARY OF LABOR FOR
OCCUPATIONAL SAFETY AND HEALTH,**
Prosecuting Party,

and

TIMOTHY BAILEY,
Complainant

v.

KOCH FOODS, LLC,
Respondent

Appearances: Tremelle Howard-Fishburne, Esquire
For the complainant and OSHA

J. Larry Stine, Esquire
For the respondent

Before: Richard K. Malamphy
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises from a claim under the Surface Transportation Assistance Act (STAA or the Act), 49 U.S.C. § 31105 (2007), and the implementing regulations found at 29 C.F.R. Part 1978 (2008). Section 405 of the Act provides protection to covered employees who report violations of commercial motor vehicle safety rules or refuse to operate vehicles in violation of those rules from retaliatory acts of discharge, discipline, or discrimination.

On August 31, 2007, Timothy Bailey (“Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that Koch Foods, LLC (“Respondent” or “Koch Foods”) terminated his employment on August 3, 2007 in retaliation for refusing to haul a trailer he believed violated state and federal statutes regarding the weight of

tractor-trailers, in violation of the employee protection provisions of the STAA. On July 25, 2008, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, found that Complainant's claim had merit. By facsimile dated August 22, 2008, the Respondent filed objections to the Administrator's findings and requested a formal hearing before an Administrative Law Judge.

A formal hearing was held in Birmingham, Alabama on May 27, 2009, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. At the hearing, the following exhibits were admitted without objection: Government's exhibits ("GX") GX 1 through GX 11 and Respondent's exhibits ("RX") RX 1 through RX 2. Transcript ("TR") at 7; 132. The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent. It is noted that in the Respondent's post-hearing brief, counsel refers to a deposition of the Complainant. However, no deposition has been submitted into the record and, therefore, it will not be considered.

STIPULATIONS

1. Respondent is a person within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31101.
2. Respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101.
3. Complainant is a commercial motor vehicle driver within the meaning of 49 U.S.C. § 31101.

ISSUE

1. Whether Complainant engaged in activity protected under the Act, and if so,
2. Whether the protected activity was a substantial factor in the adverse employment action against Complainant, and if so,
3. Whether the Respondent's reason for suspending and then terminating the Complainant was a pretext for discrimination, and if so,
4. Whether the Complainant is entitled to damages.

SUMMARY OF THE EVIDENCE

A. Testimony of Timothy Bailey

The Complainant began working for Tyson Foods in 2003 and continued to work at the plant when Koch Foods purchased it in May 2007. TR at 17. Koch Foods is a chicken processing plant in Gadsden, Alabama. TR at 178. The Complainant's job was to bring an empty trailer to a farm and exchange it for a trailer that was loaded with chickens ready to be

taken to the plant. TR at 15. Once he returned to the plant with the full trailer, it was taken to the scale house to be weighed. TR at 16.

When Koch Foods took over the plant, they added three new trailers to the company's fleet. TR at 61. The Complainant testified that when he saw one of the new trailers on the scales in the scale house it weighed approximately 92,000 pounds. TR at 18. According to the Complainant, the statutory limit in the state of Alabama is 80,000 pounds and there is a 10% margin so that a trailer over 88,000 pounds can be ticketed. TR at 21. The weight limit on the interstate is 80,000 pounds. TR at 65. He also noted that other drivers told him that they had seen that the new trailers were overweight. TR at 20. He explained that the new trailers were longer and had a thicker frame than other trailers and could hold an additional two bird cages, so he could also tell that they weighed more than other trailers. TR at 18-19. He did not tell his supervisors that the new trailers were overweight because the farmers were paid by the weight on the trailers, so he knew that his managers would get notice of the problem when they received the weight tickets. TR at 20-21.

The Complainant made a few runs with the new larger trailers after discovering that they were overweight. TR at 68. On July 27, 2007, the Complainant started his shift at 6:00 p.m. and arrived at a farm to pick up a trailer that was loaded with chickens. TR at 18, 21. When he saw that it was one of the larger trailers, he decided not to haul the trailer back to the plant because he felt that it was not safe. TR at 21. "And the way it looked to me, you know, it was just going to keep going. They wasn't planning on stopping it ... as long as we kept pulling the trailers..." *Id.* He was worried that the weight might prevent him from being able to stop fast enough to prevent an accident if someone pulled in front of him. *Id.* He also did not want to be pulled over or ticketed for driving an overweight trailer. TR at 21, 36.

The Complainant called Brian Valentine, another Koch Foods trucker, to tell him that he did not intend to haul the trailer back to the plant. TR at 22. He denied telling Mr. Valentine not to haul the trailer and Mr. Valentine did come get the trailer. TR at 22, 196. He then waited approximately half an hour at the farm for the chicken catchers to fill the trailer that he had brought with him and then hauled it back to the plant. TR at 23.

Because the Complainant had the night shift, his shift ended late at night and his supervisor would not be in until the next morning. TR at 23. He also waited because Mr. Valentine had pulled the potentially overweight trailer, so no live-haul was impacted. TR at 196. So, at 6:00 a.m., the Complainant called his supervisor Tim Graul. TR at 23-24. He told Mr. Graul that he would not haul the heavy-duty trailers because they were overweight. TR at 24-25. The Complainant testified that Mr. Graul said "the best thing you can do is find you something else to do." TR at 25. That evening, when the Complainant woke up for his next shift, he received an answering machine message from Mr. Graul informing him not to come in that evening and to be in his office on Monday morning. TR at 25-26.

On Monday July 30, 2007, the Complainant went to Mr. Graul's office and was informed that he was suspended for three days. TR at 27; GX 5. The Complainant stated that Mr. Graul told him that the trailer was not overweight, but he told Mr. Graul that the trailer was probably only weighed when attached to an air-bag truck which does not weigh as much as the trucks the

drivers use to haul cargo from the farms to the plant. TR at 28. He also explained that he had seen the trailer in the scale house previously and it had been overweight. TR at 30. The Disciplinary Action Notification Request Form stated:

On the morning of Friday, July 27, 2007, Tim got back to Doris Copeland Farm, and a loaded trailer was there for him to pick up. Tim did not pick up the trailer and said he was not hauling that trailer any more because he felt it was overweight.

All drivers are expected to perform their job duties and perform these duties with the equipment supplied to them. Any problems that occur beyond the driver's control will be handled in the company.

Tim is receiving a 3 day suspension pending investigation at this time for his actions. Tim is to report back to the live haul office Friday morning Aug. 3, 07 at 9:00 AM.

GX 5. Prior to the suspension, the Complainant had never refused to haul a load before or been disciplined. TR at 23, 170, 198.

On August 3, 2007, the Complainant returned to work and was informed that his employment was terminated. TR at 31. He testified that he was told he was being fired for trying to hold up production. TR at 32. He denied attempting to slow down production or attempting to coerce other employees to not perform their duties. *Id.* His termination notice stated:

On the date of July 27, 2007 Tim got back to Doris Copeland Farm, and did not pull back the trailer he was suppose to. He has intentionally slowed down work production and not performing his job. This is against company policies.

All team members are expected to perform their job duties and not entice or intentionally slow down work production.

Tim's employment with Koch Foods is being terminated at this time for his actions.

GX 6. He testified that he was surprised when the company decided to terminate his employment:

I wasn't expecting to getting [sic] terminated, you know, what came about it. It was -- I figured what they would do, they would cut the number of birds back on them trailers and keep using them, you know. That would have been the logical, easiest thing to do

because they -- the trailer, you can look at it and tell if the trailer is a lot bigger, heavier trailer, plus it holds two more cages.

And when they take the -- and you try to put the same amount of birds on trailers that we've been pulling, it would have been running right at the state limits, you know, 80,000 pounds and stuff. And then you take a bigger trailer that weights that much more and try to run the same amount of birds that you've been running in a trailer that weights less, it's not as far as that's concerned, it's not too hard to figure out them two don't work together. It will be -- you're going to be going overweight, you know.

TR at 41-42.

After the Complainant was terminated, he immediately began seeking new employment. TR at 37. He spoke to the live-haul manager at the Tyson Foods plant in Blountsville, Alabama and was told that there was not a position at that time, but he would be contacted when a position opened. TR at 27-28. He contacted a few other trucking companies and attempted to find employment through a job-search website. TR at 38. He admitted that, while positions may have been available, he did not seek a position as an over-the-road driver. TR at 56-57. However, he was never certain that any positions were available. TR at 57. He was able to receive approximately \$205 a week in unemployment until he began working for Tyson Foods. TR at 39. During the time that he was unemployed, he had to cut back his spending on any extraneous expenses such as cable and hobbies, and he depleted his \$8,000 in savings to pay bills. TR at 39-43.

The Complainant testified that he has been working for Tyson Foods in Blountsville, Alabama since December 23, 2007. TR at 13. For the first few months he worked as a dispatcher, but in September 2008 he was given a full-time driver position. TR at 14. His duties include inspecting the truck, hooking on the trailers, and taking the cargo from the farm to the plant. TR at 13-15. He noted that the position is similar to the one that he held with Koch Foods. TR at 16. He testified that Tyson also ran the larger trailers, but they loaded it with fewer chicken cages so that the trailers were not overweight. TR at 71-72.

On August 25, 2008, Koch Foods offered temporarily reinstate the Complainant, but he rejected the offer. TR at 93. He testified that other drivers were encouraging him not to return because "they [will] find something -- little something to fire you for, and if they don't fire you, they going to give you -- probably give you a hard time from now on." TR at 94. He also spoke with the DOL investigator to find out what "temporary reinstatement" meant. TR at 94-95. He was informed that it meant that if his claim failed, he could lose his job again. TR at 95. Since his manager at Tyson told him that a truck driver position would be opening soon, he decided to stay with Tyson. *Id.*

The Complainant reviewed his pay stubs from Koch Foods and his stubs from Tyson Foods. TR at 45-48; GX 8; GX 9. While working for Koch Foods from May 27, 2007 to July 6,

2007, the Complainant earned approximately \$944.68 per week in gross income.¹ GX 8. While working for Tyson Foods from December 23, 2007 until August 25, 2008 (the date that the Complainant rejected Koch Foods' reinstatement offer), he earned approximately \$605.44 per week in gross income.² GX 9.

B. Testimony of Jon Burdick

Jon Burdick has been the safety manager for Koch Foods for two years. TR at 103. Before working for Koch Foods, he was the safety manager for Tyson Foods. *Id.* His job includes making sure there are safety policy procedures in place, providing the necessary tools to conduct safety training, performing DOT responsibilities, and investigating safety complaints. TR at 104. He testified that he informs the drivers that he is available 24-7, 365 days a year to hear any problems or concerns that they might have. *Id.* He testified that he receives calls from drivers at all hours of the day, and they have access to his home number. TR at 106. Mr. Burdick never received a complaint from the Complainant before or after the incident on July 27, 2007. TR at 106, 109. He also never received notice of the complaint from Koch Foods management. TR at 111.

Mr. Burdick explained that the company determines the safety ratings for the tractors and trailers by looking at the Gross Vehicle Weight Rating or GVWR, which are set by the truck manufacturers. TR at 107. He stated that the rating for the tractors is 50,000 pounds and for the trailers it is 80,000. *Id.* He noted that if the combined weight of the tractor and the trailer exceeds 130,000 pounds, it is considered unsafe to operate. TR at 107-108. So, the company does not consider it unsafe to operate a tractor-trailer combo that is 96,000 pounds. TR at 108. He noted that Alabama has a bridge and overpass law which limits the weight of a tractor-trailer to 88,000 pounds, but you can pay for a permit to operate overweight vehicles. TR at 108-109. He is unaware whether Koch Foods has requested overweight permits. TR at 112.

Complainant's counsel showed Mr. Burdick three weight tickets dated July 16, 2007. TR at 115. One showed a tractor-trailer weighing in at 91,160 pounds. GX 1. The second ticket recorded an 89,000 pound tractor-trailer. GX 2. The final record indicated that the tractor-trailer weighed 90,800 pounds. GX 3. Mr. Burdick testified: "I do recall hearing that we had a couple of trailers that did come in overweight, and they did get with the -- they did get with the contract catchers, and they did address it with them, and the issue was taken care of." TR at 114.

Q: But it's your testimony that drivers can safely drive a trailer even if it's over 88,000 so long it's not over -- did you say a 130?

A: Yes, Ma'am.

Q: Is that information that the drivers are told?

¹ The calculation is based on an average of the gross income the Complainant earned from May 27, 2007 until July 30, 2007. GX 8.

² The calculation is based on an average of the gross income the Complainant earned from December 22, 2007 until August 25, 2008. GX 9.

A: I couldn't say yes to that; I couldn't say no to that. That's what manufacturers have. That's what that's -- that's what the GVWR is.

...

Q: Okay. So you don't know if Koch Foods informs its employees that they can drive up -- they can drive a trailer up to 130,000 pounds?

A: No ma'am.

Q: Is it Koch Foods' policy to drive trailers up to 130,000 pounds?

A: No, ma'am.

TR at 116.

C. Testimony of Tim Graul

Tim Graul has been the live-haul/trip-shop manager for Koch Foods since May 27, 2007 and was previously the assistant live-haul manager for Tyson Foods. TR at 117-118. He supervised the Complainant when he worked at Tyson Foods and Koch Foods. TR at 118.

Mr. Graul testified that Koch Foods used 45-foot trailers that contained 20 cages and 48-foot trailers that contained 22 cages. TR at 121. The tractors used to pull the trailers are 50,000 pounds. TR at 122. The trailers range from 80,000 to 150,000 pounds. TR at 123. The tractor-trailer combo can operate safely as long as it is below 130,000 pounds. *Id.*

Mr. Graul explained the process a live-haul driver goes through to weigh a trailer:

The driver brings it in. He drops it on the yard, and then they use their yard truck [which weighs approximately 1,300 to 1,400 pounds less than the truck they use to pull the trailer]. You come hook up to that trailer and pull it up on the scales, and then they stamp the scale ticket.

TR at 120. The weight tickets are then copied and sent to the live-haul office to be placed in the driver's record. TR at 125. Mr. Graul sees the tickets when they are sent to the live-haul office. *Id.* When Mr. Graul saw the tickets from July 16, 2007 that showed three trailers over the road limits of 80,000 for interstate and 88,000 for state roads, he contacted the farms to explain that the trailers were overweight because too many chickens were being packed into the trailers. *Id.* Mr. Graul was informed two days later that the same supervisor was in charge of filling each of the trailers that came in overweight and that he was no longer a supervisor. TR at 127.

Q: Now, Mr. Graul, when you see the Trucks that come over 88,000 pounds, you're aware of the road-limit rules; correct?

A: Yes, sir.

Q: You will address that issue, will you not?

A: Yes, sir.

Q: But that is not the same issue as a safety issue; is that correct?

A: No, sir.

TR at 152. When a truck is overweight, the company is concerned about the road limits and the effect on the chickens if they are too closely packed. TR at 152-153.

Mr. Graul discussed weight tickets that indicated that the Complainant drove the 22-cage trailers on at least two occasions between July 16 and July 27, 2007. TR at 130-132; RX 1; RX 2. The first ticket dated July 23, 2007 indicated that the Complainant's tractor-trailer weighed 56,140 pounds with 6,760 pounds representing the weight of the chickens. RX 1. On July 25, 2007, the Complainant drove a tractor-trailer weight 84,020 pounds with 33,380 pounds of chicken. RX 2. Mr. Graul indicated that neither trailer was overweight and the Complainant did not mention a problem on either day. TR at 131-132.

The Complainant called Mr. Graul on the morning of July 27, 2007 to inform him that he had refused to haul a trailer. TR at 132. Mr. Graul testified that if the Complainant had called him at the time he was concerned about the trailer's weight, he would have told him about the actions that they took following July 16, 2007 to reduce the weight of the trailers. TR at 133. Mr. Graul considered the Complainant's decision not to pull the trailer because he thought it was overweight to be insubordination. TR at 134.

Following the Complainant's suspension, the company conducted an investigation. TR at 137. In a conversation with Brian Valentine, the driver informed Mr. Graul that the Complainant had tried to get him to also refuse to pull the trailer. TR at 135. Mr. Graul also saw the weight ticket from the trailer that the Complainant refused to pull and it was not overweight; however, the ticket is not in the record. TR at 137. Based on the investigation, Harold Hunt, the complex manager, made the decision to terminate the Complainant's employment. *Id.* According to Mr. Graul, the Complainant responded that he did not want to pull the load because he thought it was overweight and did not want to get a ticket or be sued, but he never specifically mentioned a safety concern. TR at 138-139. During Mr. Graul's conversations with the Complainant, he never informed him that the company had fixed the issue with the catchers overloading the trucks. TR at 145.

He testified that it is very important for the drivers to deliver the trailers to the plant in a timely manner because there are 160 to 170 workers waiting to process the chickens, so without the trailer they have to wait. TR at 118-119.

D. Testimony of Lisa Burdick

Lisa Burdick is currently the Complex Human Resource Manager for Koch Foods, and previously held the same position for fourteen years under Tyson Foods. TR at 155-156. Her job includes handling staffing and turn over, dealing with conflict resolution, assisting in complying with regulations, investing employee conduct, and assisting in employee discipline. TR at 156.

Ms. Burdick explained that Koch Food uses a progressive discipline policy that varies based on the severity of the employee's action. TR at 157; GX 4. Under the Rules of Conduct,

there are two types of conduct. *Id.* Under Type I, violation of the listed rules can be grounds for immediate termination upon the first offense. *Id.* Under Type II, violation of the listed rules leads to a progressive disciplinary procedure that includes the following steps (1) first offense – verbal warning; (2) second offense – written warning; (3) third offense – final warning; and (4) fourth offense – termination. *Id.*

Ms. Burdick was informed that the Complainant had refused to take the load on the larger trailer back the morning after his shift. TR at 158. She agreed that he should be suspended-pending investigation. *Id.* Following the incident, she got a written statement from Mr. Valentine stating that the Complainant had asked him not to haul the load back to the plant. TR at 159.

During the Complainant's suspension, Ms. Burdick, Harald Hunt, and Clint Lauderdale, the live-production manager, discussed what actions should be taken:

[We] discussed what the facts were, the information that Tim had given us for Mr. Bailey, that he had not hauled the load, that he had not communicated with anyone, did not haul the load, waited for another -- for his trailer to be loaded and then brought them back to the plant, as well as coercing another driver, as well as the ticket -- the weight ticket was under weight. And we discussed all those facts and decided that separation was the appropriate action to take.

TR at 160. The group never discussed the Complainant's refusal as a safety concern:

The concerns that were expressed to us was just Mr. Bailey was concerned about getting a ticket, not that he had any safety concern, or any safety indication and at no point do we ever consider that or think of that as a safety concern.

TR at 160-161. She explained that it was company policy to pay the fine if a ticket is issued to a driver for an overweight vehicle. TR at 161.

It was determined that the Complainant had willfully refused to follow reasonable instructions of a supervisor, which is considered to be a Type 1 behavior and grounds for immediate termination. TR at 161; GX 4.

Q: And you've mentioned that it was a Type I violation, and that Type I Violation that you're referring to is a refusal. Can you explain that?

A: It's a refusal to follow reasonable instructions.

Q: And you're considering that – you're considering Mr. Bailey's refusal to haul the load because he believed it to be overweight a refusal to follow reasonable directions?

A: I do believe that, yes, ma'am.

TR at 172. Ms. Burdick also stated that he “coerced another driver into slowing down work production.” TR at 161. When the Complainant was informed that his employment was being terminated:

He said he was afraid he was going to get a ticket and wanted to know if we were – we were done. ...

We asked him if [he] had anything to add, he just said that he was afraid that he might get in trouble if there was an accident, and he might be sued.

TR at 162. According to Ms. Burdick, he did not express a concern about the safety of the tractor-trailer or discuss having seen overweight trailers in the scale house. TR at 162-163. She testified that the Complainant making a complaint about the trailer being overweight played no part in the decision to terminate his employment. TR at 169.

Ms. Burdick noted that if the Complainant had a safety concern, he could have reported it to his direct supervisor, the safety director, or any of the other drivers. TR at 163-164. The company posts a procedure for making safety complaints. TR at 165. There is no record that the Complainant ever voiced concerns about the trailers being overweight. TR at 164. Ms. Burdick testified that the company would not take disciplinary action against an employee for voicing a safety concern. *Id.*

Ms. Burdick testified that from August 2007 to August 2008, live-haul drivers grossed approximately \$832 per week. TR at 166.

E. Testimony of Harold Hunt

As Complex Manager at Koch Foods, Harold Hunt is responsible for the “product flow of birds from live production into the processing plant and out the back door to the customer. I am responsible, basically, for live-production processing, quality control, safety and all the efficiencies of the plant and the whole complex.” TR at 178.

Mr. Hunt stated that it is critical for each truck load of chickens to arrive when it should. TR at 181. If one load is delayed the plant can run out of chickens to process and the company loses approximately \$126 per minute that chickens are not being processed. *Id.* He explained that it is important to avoid overloading the trucks with birds because it is more likely that more birds will die before reaching the plant. TR at 182. As long as the correct number of birds are put into the truck, it will not be overweight. TR at 183. One of Mr. Graul’s functions is to ensure that the trucks are not over packed. *Id.* The company discovered that the trailers from July 16, 2007 were overweight when the number of dead-on-arrival chickens rose. *Id.* It was determined that the problem was caused by the supervisor at the farm failing to make sure the bird catchers were not overloading the trailers. TR at 195. Mr. Hunt is unaware of any problems with the trailers since that supervisor was terminated. TR at 184.

Mr. Hunt first learned of the Complainant's refusal to haul the load on the morning of July 27, 2007. TR at 185. He learned that there had never been a disciplinary action against the Complainant before and he had never attempted to slow down production before. TR at 185, 198. He also discovered that the Complainant had refused to haul the load because he thought it was overweight. TR at 185. He noted that there were no scales so on the farms, so it was not possible to weigh the trailer until it was returned to the plant. *Id.* Mr. Hunt was particularly concerned by how long the Complainant waited to notify management:

[O]ur process is set up to where, you know, minutes are critical, you know. You're running -- you're running 420 birds a minute through that plant all day long. And if you -- if you, you know, slow down, if you run that -- those birds -- each trailer has approximately 8,000 birds on it. You run about 25,200 birds an hour. So if you have a -- if you have a live-haul trailer that doesn't make it to the plant, you've got approximately 21 minutes worth of down time, because the birds didn't arrive.

TR at 186. His concerns were not alleviated by the Complainant waiting 30 minutes for the farm to fill his trailer because it still could have caused 30 minutes down time for the plant. *Id.*

After the decision had been made to suspend the Complainant, Mr. Hunt learned that Mr. Valentine had alleged that the Complainant had attempted to coerce him into not hauling the load. TR at 186-187. Mr. Hunt testified that Mr. Valentine's statement impacted his decision to terminate the Complainant's employment: "[b]ecause not only did he try to slow the production process down, he tried to also coerce a fellow employee to slow it down." TR at 187. He stated that if the Complainant had not attempted to coerce Mr. Valentine, he would have given him a final written warning and not terminated his employment. *Id.*

Mr. Hunt explained that if an employee has a safety concern, they can talk to their supervisor, the safety manager, the HR manager, or any other lead person, supervisor or other employee. TR at 188. Once a complaint is made, it is investigated. *Id.* Mr. Hunt testified that the company does not take disciplinary action against employees for reporting safety complaints. *Id.* However, Mr. Hunt did not consider the Complainant's issues with the weight of the trailer to be a safety complaint:

Q: And why not?

A: One, is you cannot -- you can't determine if that trailer is overweight just by looking at it on the farm.

Q: Okay.

A: And, you know, if there is a trailer that, you know, when it gets to the plant, if you have a trailer that is overweight, then, you know, we need to address it with the catching crew, because that's hopefully how you resolve that.

Q: So the reason why these trailers would be overweight doesn't have anything to do with the weight of the tractor or the trailer, does it?

A: No, sir.

TR at 189-190. He stated that the company did not take into account the fact that the Complainant was mistaken about the weight of the truck in deciding to terminate his employment. TR At 197. He also noted that the Complainant could have looked at other weight tickets in the scale house to determine if other trucks were coming in overweight. TR at 191.

Mr. Hunt acknowledged that an overweight truck could be a safety issue:

Q: Driving a truck -- driving an overweight truck is a safety issue; isn't that true?

A: Depends on the amount that it's overweight.

Q: Would you agree that they [sic] are risks associated with driving an overweight truck?

A: Yes.

Q: And one of those risks is that when a driver is driving an overweight truck, it takes them longer to stop; isn't that true?

A: That is correct, yes, ma'am.

Q: And if it takes the driver longer to stop, that could cause -- that could cause an accident?

A: Potentially.

TR at 197-198. He testified that the Complainant was never told about the Gross Vehicle Weight Rating set by the truck manufacturers which allow a truck to operate at a higher weight than the Alabama and interstate road limits. TR at 198.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The STAA employee protection provision prohibits disciplining or discriminating against an employee who has made protected safety complaints or refused to drive in certain circumstances:

(1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because—

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because—

(i) the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of

accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49. U.S.C. § 31105(a). Subsections (A) and (B) of the quoted provision are referred to as the “complaint” clause and the “refusal to drive” clause, respectively. *LaRosa v. Barcelo Plant Growers, Inc.*, ALJ Case No. 96-STA-10, slip op. at 1-3 (ARB Aug. 6, 1996).

In order to prevail on an STAA complaint, a complaint must make a *prima facie* case of discrimination by showing that: (1) he engaged in protected activity, (2) the employer was aware of his activity, (3) he was subject to adverse employment action, and (4) there was a causal link between his protected activity and the adverse action of his employer. *See Clean Harbors Env'tl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Moon v. Transp. Drivers*, 836 F.2d 226, 229 (6th Cir. 1987); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987). Under the STAA, the ultimate burden of proof usually remains on the complainant throughout the proceeding. *Byrd v. Consol. Motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, slip op. at 5 n.2 (May 5, 1998).

The employer may rebut the *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The employer must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse action. The explanation provided must be legally sufficient to justify a judgment for the employer. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995). Once the employer produces evidence sufficient to rebut the “presumed” retaliation raised by the *prima facie* case, the inference simply “drops out of the picture,” and the trier of fact proceeds to decide the ultimate question. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-11 (1993).

The complainant then has the opportunity to prove, by a preponderance of the evidence, that the employer's reason for the adverse action was mere pretext for discrimination. *Burdine*, 450 U.S. at 253. Specifically, complainant must establish that the proffered reason for the adverse action is false and that her protected activity was the true reason for the adverse employment action. *St. Mary's Honor Center*, 509 U.S. at 507-508; *see also Bechtel Constr.*, 50 F.3d at 934 (holding that the complainant must “establish that the employer's proffered reason is pretextual by establishing either that the unlawful reason, the protected activity, more likely motivated the [employer] or that the employer's proffered reason is not credible and that the employer discriminated against him.”). Although the burden of production shifts, the ultimate burden of persuasion remains with the complainant to show that the employer intentionally discriminated against her. *St. Mary's Honor Center*, 509 U.S. at 507-508. If the proof establishes that the adverse action was undertaken for both discriminatory and nondiscriminatory reasons, i.e. “mixed motives,” the employer must show by a preponderance of the evidence that it would have taken the same adverse action absent the complainant's protected activity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

A. Protected Activity

On July 27, 2007, the Complainant refused to haul a trailer that he believed to be overweight. TR at 18. The Complainant believed that the trailer was overweight because it was longer and had a thicker frame than the company's older trailers and could hold more chickens. TR at 18-19. Furthermore, a few days before the incident, he had seen one of the new trailers in the scale house weighing in at approximately 92,000 pounds. TR at 18. The trailer in the scale house was attached to an "air-bag" or yard truck which weighs approximately 1,300 to 1,400 pounds less than the tractors used to haul the trailers to and from the factory. TR at 28, 120. He testified that he did not want to pull a trailer that was over the statutory limit of 88,000 pounds for Alabama roads and 80,000 pounds for interstate roads because he did not want to get a ticket or be liable for causing an accident. TR at 21, 36.

Under 49 U.S.C. § 31105, a complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. *Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992); *see also Lajoie v. Environmental Management Systems, Inc.*, ALJ Case No. 90-STA-31, slip op. at 3 (Sec'y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. *Nix v. Nehi-R.C. Bottling Co.*, ALJ Case No. 84-STA-1, slip op. at 4 (Sec'y July 13, 1984) (rejecting the respondent's "argument that a complaint must explicitly mention a commercial motor vehicle safety standard to be protected" because "the layman who usually will be filing [a safety concern] cannot be expected to cite standards or rules like a trained lawyer"). Refusal to drive an overweight truck has been considered protected activity if the driver has a reasonable apprehension of serious injury to himself or the public. *See Galvin v. Munson Transportation, Inc.*, 91-STA-41 (Sec'y Aug. 31, 1992).

While the Complainant did not cite the specific statute at the time of the adverse employment action, he noted that he was worried about violating Alabama and interstate restrictions on the weight of the tractor-trailer. Section 32-9-20 of the Alabama Code regulates the width, height, length and weight of commercial vehicles operated on state roads. § 32-9-20, Ala. Code (1975). The Code states:

The gross weight imposed on the highway by the wheels of any one axle of a vehicle shall not exceed 20,000 pounds, or such other weight, if any, as may be permitted by federal law to keep the state from losing federal funds; provided, that inadequate bridges shall be posted to define load limits.

§ 32-9-20(4)(a). Five axle trucks of 44 feet or more are not to exceed 80,000 pounds. § 32-9-20(4)(c). The statute allows for a 10% leeway, which would allow the tractor-trailer to weigh up to 88,000 pounds. § 32-9-20(4)(d). The Employer argued that the statute's purpose is purely to keep the roadway in good condition. However, in discussing the weight limits set by the Alabama legislature, an Alabama Appeals Court noted:

The obvious purposes for enacting truck weight laws is for the safety of the public, and keeping highways in good condition for

the traveling public. Travel upon highways must be as safe as it can reasonably be made consistent with their efficient use. Any overloaded truck creates a safety hazard upon the public highway as well as contributing to a bad state of repair.

Heathcock v. State, 415 S.2d 1198, 1203 (Ala. Crim. App. 1982) (quoting *State Dep't of Public Safety v. Scotch Lumber Co.*, 302 So.2d 844, 846 (1974)); see also *Leonard v. State*, 79 So.2d 803, 807 (1955) (holding that the purpose of § 32-9-20 is “to prevent injury to the public property in the form of damage to roads, bridges ... and further to insure the safety of persons traveling such highways.”). Under the US Code, the gross weight of any vehicle traveling on the interstate must not exceed 80,000 pounds. 23 U.S.C. § 127(a) (2008).

Under the STAA, a complainant's safety concerns can be oral rather than written. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that the driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors); See *Clean Harbors Env'tl. Serv. Inc. v. Herman*, 146 F.3d 12, 20-22 (1st Cir. 1998). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed. See *Clean Harbors Env'tl. Serv.*, 146 F.3d at 20-22 (1st Cir. 1998) (holding that the complaint's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

Given the facts available to the Complainant at the time he refused to drive the trailer, I find that his refusal was reasonable and constituted protected activity. Complainant testified that a few days prior to July 27, 2007, he had seen one of the new trailers weighing in at 92,000 pounds. TR at 18. The Employer produced weight tickets that supported the Complainant's testimony. GX1; GX2; GX 3. On July 16, 2007, on three occasions a trailer weighed in at 91,160, 89,000, and 90,800 pounds. *Id.* On July 25, 2007, the Complainant pulled one of the new trailers that weighed in at 84,020 pounds, which is still over 4,000 pounds over the interstate limit. RX 2. Since it was impossible for the Complainant to weigh the trailer without hauling it to the plant and he had not been informed that the company had spoken to the chicken catchers about lightening the loads, his belief that the tractor-trailer was overweight was reasonable.

The Complainant also indicated that his refusal was based on a concern that he would be violating both state and federal law and that he could cause an accident which would lead to liability and potential injury. As discussed above, the Complainant need not have cited to a specific federal regulation at the time he explained his refusal to drive in order to qualify for protection. See *Nix*, ALJ Case No. 84-STA-1, slip op. at 4. The Respondent argues that the Complainant's concerns about personal liability do not equate to safety concerns. However, it is clear that the Complainant was concerned about liability from causing an accident due to an overweight tractor-trailer. An accident caused by an overweight tractor-trailer would clearly have the potential to cause injury to the driver and/or the public. Therefore, the concerns he expressed to the Respondent satisfy § 31105(a)(1)(B).

Furthermore, it is inconsequential that the trailer the Complainant refused to haul may have actually weighed less than the statutory limitation. See TR at 137. Under the STAA, an employee need not prove the existence of an actual safety defect for his refusal to drive to

constitute protected activity. *Jackson v. Protein Express*, ARB Case No. 96-194, ALJ Case No. 95-STA-38, slip op. at 2 (ARB Jan. 9, 1997) “[T]here may exist circumstances in which an analysis of the situation encountered by a driver at the time of [the] refusal to drive would compel the conclusion that the driver’s perception of an unsafe condition was reasonable...despite the fact that a subsequent mechanical inspection revealed no actual safety defect.” *Id.* (quoting *Yellow Freight Sys. v. Reich*, 38 F.3d 76, 83 (2d Cir. 1994)). Again, the Complainant’s concern that the vehicle was overweight was reasonable based on his knowledge of the new trailers.

The Respondent argues that the Complainant’s claim must fail based on the holding in *Bates v. West Bank Containers*, ARB Case No. 99-055, ALJ Case No. 98-STA-30 (ARB April 28, 2000). In *Bates*, a Louisiana driver refused to haul tractor-trailers over 80,000 pounds because he did not want to jeopardize his commercial driver’s license, which restricted him to hauling loads up to 80,000 pounds. Slip. op. at 2. The ARB determined that the Complainant had not engaged in protected activity because there was no support in the record that operating an overweight vehicle was a safety concern: “Assuming for a moment that the load the Complainant hauled was overweight, to haul an overweight container is neither unsafe nor a violation of any state or federal law. The overweight cargo may be transported provided the carrier obtains a permit to do so.” Slip op. at 10. However, the Alabama Appeals Court has made it clear that the state statutory limits are in place to keep the highways in good condition and to ensure the safety of motorists. See *Heathcock*, 415 S.2d at 1203; *Leonard*, 79 So.2d at 807. Furthermore, the Alabama Code states:

The operation of any truck, semitrailer truck or trailer in violation of any section of this chapter or of the terms of any permit issued under this chapter, shall constitute a misdemeanor, and the owner thereof, if such violation was with his knowledge or consent, and the operator thereof shall, on conviction, be fined not less than \$100.00 nor more than \$500.00 and may also be imprisoned or sentenced to hard labor for the county for not less than 30 days nor more than 60 days.

§ 32-9-5, Ala. Code 1975. Therefore, operating an overweight vehicle without a permit is a clear violation of a state law. While the Alabama statute does allow companies to purchase permits to operate overweight vehicles, there must be good cause shown and “the load transported by such vehicle or vehicles is of such nature that it is a unit which cannot be readily dismantled or separated.” §32-9-29, Code of Alabama (1975). The statute states that examples of such cargo include mobile homes and farm equipment. *Id.* The live-haul carried by the Respondent is not of a kind that cannot be easily separated. There is also no indication that the company sought the permits.

B. Subject to Adverse Employment Action

The employee protection provisions of the STAA provide that “[a] person may not discharge an employee” for engaging in protected activity under the Act. 49 U.S.C. § 31105(a).

The Complainant was suspended and later terminated, and I hereby find that he was subject to adverse employment action within the meaning of the Act.

C. Causal Link Between the Protected Activity and the Adverse Action

On the morning after the Complainant's July 27, 2007 shift, he called his supervisor Mr. Graul to inform him that he had refused to pull a trailer because it was overweight. TR at 25. On the Disciplinary Action Notification Request Form that informed the Complainant that he was suspended for three days, it was written that "Tim did not pick up the trailer and said he was not hauling that trailer any more [sic] because he felt it was overweight." GX 5. During a conversation with Mr. Graul, the Complainant explained that he did not want to pull the potentially overweight load because he did not want to get a ticket or be sued for causing an accident. TR at 138-139. Mr. Graul did not consider his concerns to be safety related. *Id.* Ms. Burdick testified that the Complainant "was afraid that he might get in trouble if there was an accident, and he might be sued." TR at 162. On August 3, 2007, the Complainant's employment was terminated. TR at 31.

A complainant can establish a causal link between the protected activity and the adverse employment action by showing that the employer was aware of the protected activity and that the adverse action followed closely thereafter. *Kovas v. Morin Transport, Inc.*, ALJ Case No. 92-STA-41, slip op. at 4 (Sec'y Oct. 1, 1993) (citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

The Respondent likens the Complainant's situation to *Davis v. Rock Hard Aggregate, LLC*, ARB Case No. 07-041, ALJ Case No. 06-STA-49 (ARB March 27, 2009). In *Davis*, the ARB affirmed the ALJ's dismissal of a complaint where the evidence showed that the driver had only expressed safety concerns after being disciplined. This case is distinguishable because the Complainant called Mr. Graul the morning after the incident to inform Mr. Graul that he had refused to haul the trailer because he believed it to be overweight, which, as discussed above, this court has determined to be an expression of a safety concern and potential violation of state and federal laws. The Complainant was disciplined after he voiced his concerns.

On the morning of July 27, 2007, the Complainant informed his supervisor that he had refused to pull an overweight load the night before and that afternoon Mr. Graul told him not to come into work. TR at 24-26. On July 30, 2007, he received a three day suspension and on August 3, 2007 his employment was terminated. TR at 27, 31; GX 5; GX6. The Employer agreed that the Complainant had never been disciplined before. TR at 170. I find that the close proximity in time establishes a causal connection between the protected activity and the adverse employment action. Additionally, the Complainant's suspension notice also states that he is being suspended for refusing to haul a trailer he believed to be overweight and that the drivers are expected to perform their duties with the equipment supplied to them. GX 5.

D. Respondent's Rebuttal

In order to rebut a *prima facie* case of discrimination, the respondent must articulate a legitimate, non-discriminatory reason for taking the adverse employment action, and is not

required to “persuade the court that it was actually motivated by the proffered reason...” *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The evidence must be sufficient to raise a genuine issue of fact as to whether the respondent discriminated against the complainant. “The explanation provided must be legally sufficient to justify a judgment for the [employer].” *Id.* at 255.

Under the “dual motive” analysis, where the trier of fact finds that there are legitimate reasons for the employer’s adverse action in addition to the unlawful reasons, the burden of proof shifts to the respondent to show, by a preponderance of the evidence, that it would have taken the same adverse action even if the complainant had not engaged in any protected activity. *Clean Harbors Env’tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21-22 (1st Cir. 1998).

Respondent alleges that there were two non-discriminatory reasons for terminating the Complainant’s employment. First, Koch Foods employees testified that the Complainant was terminated for refusing a reasonable assignment and attempting to slow down production. Second, management stated that the Complainant’s employment was terminated because he attempted to coerce another employee into refusing to carry the new trailer.

Mr. Graul stated that he considered the Complainant’s decision not to pull the trailer because he believed it to be overweight to be insubordination. TR at 134. He also testified that after the Complainant was suspended he spoke to Mr. Valentine, who claimed that the Complainant tried to get him to refuse to pull the trailer. TR at 135.

Ms. Burdick testified that in deciding whether to terminate the Complainant’s employment, Ms. Burdick, Mr. Hunt, and Mr. Lauderdale discussed the Complainant not communicating with anyone at the time of the incident, his decision not to pull the new trailer but wait for his to be filled instead, and his attempts to coerce another driver. TR at 160. She stated that they knew the Complainant was concerned about getting a ticket, but that the company would pay for any fines for driving an overweight vehicle. TR at 160-161. It was determined that the Complainant’s decision not to pull the load because he thought it was overweight was equivalent to willfully refusing to follow reasonable instructions from a supervisor, such that termination was appropriate. TR at 161, 172. The Complainant’s termination notice stated that “[h]e has intentionally slowed down work production and not performed his job. This is against company policies.” GX 6.

Mr. Hunt testified that he was concerned by the fact that the Complainant waited to notify management of his refusal to pull the load and that the Complainant’s actions could have potentially stopped production at the plant. TR at 186. Mr. Hunt also learned that Mr. Valentine had alleged that the Complainant had told him not to haul the load. TR at 186-187. Mr. Hunt testified that if the Complainant had not attempted to coerce another employee, he would have only given him a written warning. TR at 187.

When the Complainant arrived on the farm and decided not to haul the new trailer, he called Mr. Valentine and informed him that he would not bring the trailer back to the plant. TR at 22. When Mr. Valentine stated that he would come get the trailer, the Complainant decided that since no live-haul would be affected he would wait until the next morning to inform his

supervisor that he had a problem pulling the heavier trailers. TR at 22, 196. He then waited for another trailer to be filled and brought it back to the plant and finished his shift. TR at 23. He also testified that his intent was not to slow down production. TR at 32. The Complainant's decision not to pull the trailer was incidental to the protected activity, and he had never refused to drive a trailer before or been disciplined for any other reason. TR at 23, 170, 185, 198. The refusal was limited to a one-time refusal to drive that appeared to be calculated to draw attention to the problem of overweight trailers and not to slow production or act against his supervisor's instructions. Furthermore, his decision to wait until morning to contact his supervisor should not be held against the Complainant since he called the plant and the load was pulled by another driver such that there was not an immediate need to contact another person at Koch Foods.

While the Respondent claims that the Complainant attempted to coerce Mr. Valentine into not coming to get the load, neither Mr. Valentine's testimony nor the supposed written statement (*see* TR at 159) were produced. Additionally, Mr. Valentine did come get the load and the Complainant pulled back another truck so that production was not slowed. There is no indication that the Complainant would have benefited in any way from slowing down production by his refusal or gaining the refusal of another employee. I find that there is no credible evidence for the allegation that the Complainant attempted to coerce Mr. Valentine.

Even if Respondent's action is deemed to be subject to the "dual motive" analysis (presence of legitimate as well as unlawful reasons for the employer's adverse action), the burden of proof shifts to the respondent to show, by a preponderance of the evidence, that it would have taken the same adverse action even if the complainant had not engaged in any protected activity. *See Clean Harbors Env'tl. Servs., Inc.*, 146 F.3d at 21-22. Here, Complainant's "insubordination" took place only because he was engaging in protected activity, i.e., refusing to pull a load he reasonably believed to be overweight. The Respondent fails to show that it would have taken the same adverse action absent that protected activity, because the refusal to drive arose from the protected activity. Therefore, the Complainant's insubordinate conduct is permissible since it is directly incidental to the protected activity.

The Respondent argues that *Bates v. West Bank Containers*, ARB Case No. 99-055, ALJ Case No. 98-STA-30 (ARB April 28, 2000) is analogous to the situation in this case. In *Bates*, the ARB found that since the complainant had threatened to "drop the load" on the side of the road rather than haul it the employer had a reasonable non-retaliation purpose for terminating the complainant's employment. Slip op. at 8. In this case, the Complainant called another employee who brought the trailer back to the plant such that his actions did not affect production or put the cargo at risk. The ARB also determined that the complainant in *Bates* did not engage in protected activity, and, as discussed above, the Board's reasoning is distinguishable from this case.

E. Relief

Under the STAA, a prevailing complainant is entitled to relief including abatement, reinstatement, and compensatory damages, including back pay. 49 U.S.C. § 31105(b)(3)(A)(i)(iii).

1. Reinstatement

If the ALJ determines that a violation of the STAA has occurred, the judge may order reinstatement. 49 U.S.C. § 31105(b)(3)(A)(ii). I would recommend reinstatement if the Complainant desired reinstatement. However, at the hearing, the Complainant indicated that he might prefer to remain employed at the Tyson Foods plant instead of returning to Koch Foods. TR at 100.

2. Back Pay

In addition to reinstatement, Complainant is also entitled to back pay. 49 U.S.C. § 31105(b)(3)(A)(iii). “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.” *Assistance Sec’y & Moravec v. HC & M Transp., Inc.*, ALJ Case No. 90-STA-44 (Sec’y Jan. 6, 1992) (citing *Hufstetler v. Roadway Express, Inc.*, ALJ Case No. 85-STA-8, slip op. at 50 (Sec’y Aug. 21, 1986)). Back pay is awarded to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Shalworth v. Justin Davis Enterprises, Inc.*, ALJ Case No. 09-STA-1, slip op. at 7 (ALJ Dec. 19, 2008) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-421 (1975)). To make a person “whole for injuries suffered for past discrimination,” the Act mandates an award of back pay as compensatory damages to run from the date of discrimination until either the complainant receives a bona fide offer of reinstatement, is reinstated, or obtains comparable employment. *Cook v. Guardian Lubricants, Inc.*, ARB Case No. 97-05, ALJ Case No. 95-STA-43, slip op. at 11 (ARB May 30, 1997) (citing *Beltway v. American Cast Iron Pipe Co., Inc.*, 494 F.2d 211, 260-261 (5th Cir. 1974)). Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co., Inc.*, ALJ Case No. 90-STA-37 (Sec’y June 3, 1994).

The employer, and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings. Therefore, the burden of showing that a complainant failed to make reasonable efforts to mitigate his damages is on the employer. *Polwesky v. B & L Lines, Inc.*, ALJ Case No. 90-STA-21, slip op. at 2 (Sec’y May 29, 1991) (citing *Carrero v. N.Y. Hous. Auth.*, 890 F.2d 569, 580 (2nd Cir. 1989); *Rasimas v. Michigan Dep’t of Mental Health*, 714 F.2d 614, 624-26 (6th Cir. 1983)). While the complainant need only make reasonable efforts to mitigate his damages and is not held to the highest standards of diligence, the employer may carry the evidentiary burden by showing that jobs for the complainant were available during the back pay period. *Id.* In this case, complainant testified as to his unsuccessful attempts to locate employment prior to December 23, 2007 when he began working for Tyson Foods. The Respondent has not affirmatively shown other jobs were availability during the Complainant’s period of unemployment. Accordingly, complainant has met his burden of proof and is entitled to back pay.

While employed by Koch Foods, the Complainant earned approximately \$944.68 per week. GX 8. The date of discrimination in this case was July 27, 2007, the date that the Complainant was suspended. On December 23, 2007, the Complainant returned to work for Tyson Foods as a dispatcher earning an average of \$605.44 per week. GX 9. Back pay should end on August 25, 2008, the date that the Respondent offered to reinstate the Complainant.

Therefore, the Complainant is entitled \$944.68 for the 21 weeks between July 27, 2007 and December 22, 2007 and \$339.24 for the 36 weeks from December 23, 2007 to August 25, 2008.

As part of an award of back pay, a complainant is entitled to prejudgment interest to compensate for the loss of use of his wages. *Hufstetler v. Roadway Express, Inc.*, ALJ Case No. 85-STA-8 (Sec'y Aug. 21 1986), *rev'd on other grounds*; *Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987). Similarly, a complainant may receive post-judgment interest on back pay. *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ALJ Case No. 03-STA-36, slip op. at 10 (ARB June 30, 2005). In calculating the interest on STAA back pay awards, the rate used is that charged for underpayment of federal taxes. *See Bryant*, slip op. at 10; 26 U.S.C. § 6621(a)(2). The interest is compounded quarterly, until the damage award is paid. *Bryant*, slip op. at 10; *Doyle v. Hydro Nuclear Servs.*, ALJ Case No. 89-ERA-22, slip op. at 18-19 (ARB May 17, 2000), *rev'd on other grounds*. In light of the above principles, Complainant is entitled to prejudgment and postjudgment interest on his back pay award. The interest will be calculated in accordance with 26 U.S.C. § 6621(a)(2) and compounded quarterly.

It is noted that the Complainant earned unemployment from the time his employment was terminated at Koch Foods in August 2007 until he began working for Tyson Foods in December 2007. However, under the STAA, 49 U.S.C. app. § 2305(c), unemployment compensation is not deductible from the amount due for back pay. *Phillips v. MJB Contractors*, ALJ Case No. 92-STA-22, slip op. at 3 (Sec'y Oct. 6, 1992); *Hadley v. Southeast Coop. Serv. Co.*, ALJ Case No. 86-STA-24, slip op. at 2 (Sec'y June 28, 1991).

3. Compensatory Damages

The Secretary of Labor and the ARB have held that compensatory damages may be awarded for emotional distress or mental anguish caused by the discriminatory conduct. *See Levile v. New York Air National Guard*, ALJ Case No. 94-TSC-3 & 4 (ARB Oct. 25, 1999). A vast array of award amounts have been upheld in whistleblower cases. *See, e.g., McCuiston v. Tennessee Valley Authoirty*, ALJ Case No. 89-ERA-6 (Sec'y Nov. 13, 1991). For example, the claimant received \$10,000 in damages for chest pains, difficulty with swallowing, indigestion, sleeplessness, and general anxiety and depression in *DeFord v. Tennessee Valley Authority*, ALJ Case No. 81-ERA-1 (Sec'y Apr. 30, 1984). In *Muidrew v. Anheuser Busch, Inc.*, the court held an award of \$50,000 was reasonable for emotional distress and mental suffering for the complainant's loss of his house and his car, and marital difficulties that resulted. *Muidrew*, 728 F.2d 989, 992 (8th Cir. 1984). Likewise, in *Wulf v. City of Wichita*, the court granted an award of not greater than \$50,000 to a plaintiff who was angry, scared, frustrated, depressed, under emotional strain, and experienced financial difficulties as a result of losing his job. *Wulf*, 883 F.2d 842, 875 (10th Cir. 1989). The ARB has also considered a loss of savings as a factor in awarding compensatory damages. *See Michaurd v. BSP Transport, Inc.*, ARB Case No. 97-113, ALJ Case No. 95-STA-29, slip op. at 9 (ARB Oct. 9, 1997).

The Complainant testified that during his period of unemployment, he was unable to afford to go hunting and had to cut back on other extraneous expenses such as cable. TR at 39-43. He also depleted his \$8,000 in savings to pay his bills. *Id.* I find that \$8,000 provides adequate compensation for the Complainant's pain and suffering.

RECOMMENDED ORDER

For the foregoing reasons, I hereby RECOMMEND that the Complainant be awarded the following remedies:

1. Reinstatement to his former position at Koch Foods without loss of benefits or other privileges, should he so choose;
2. Back pay of \$944.68 for the 21 weeks between July 27, 2007 and December 22, 2007, totaling \$19,564.32;
3. Back pay of \$339.24 for the 36 weeks from December 23, 2007 to August 25, 2008, totaling \$12,066.77;
4. Interest on the entire back pay award, calculated in accordance with 26 U.S.C. § 6621; and
5. Compensatory damages of \$8,000.00 for pain and suffering.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ahk
Newport News, Virginia

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

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

The order directing reinstatement of the complainant is effective immediately upon receipt of the decision by the respondent. All other relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).