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Issue Date: 28 April 2009

CASE NO.: 2008-STA-00052

In the Matter of

LAVAN WILLIAMS
Complainant

v.

DOMINO'S PIZZA
Respondent

Appearances:

Lavan Williams, *pro se*
Enfield, Connecticut

Gary S. Starr and Lesley N. Salafia
(Shipman & Goodwin), Hartford, Connecticut,
for the Respondent

Before: Daniel F. Sutton
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. Statement of the Case

This case arises from the complaint of Lavan Williams ("Williams") that Domino's Pizza ("Domino's") violated the employee protection provisions of Section 405 of the Surface Transportation Assistance Act ("STAA"), as amended, 49 U.S.C.A. § 31105 (West 2008). Williams alleges that Domino's fired him from his position as a truck driver in retaliation for his complaints to the company's compliance hotline about being pressured to drive in violation of U.S. Federal Motor Carrier Safety Administration Regulations ("F.M.C.S.R.") on hours of service. Following an investigation, the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA"), acting for the Secretary of Labor, notified Williams by a letter dated May 1, 2008, of the Secretary's finding that there was no reasonable cause to believe that Domino's had violated the STAA. Williams timely appealed the Secretary's determination and requested a formal hearing before an administrative law judge ("ALJ").

The hearing was initially scheduled to convene on June 26, 2008. However, on June 13, 2008, Domino's moved for summary decision seeking dismissal of Williams' STAA complaint. On June 17, 2008, the ALJ issued an Order Continuing Hearing and Notice to *Pro Se* Complainant which notified Williams of the requirement of Federal Rule of Civil Procedure 56(e) that he respond to Domino's motion with affidavits or other evidence. Additionally, the hearing was continued until further notice to allow time for Williams to respond to the motion for summary decision and to permit a ruling thereon. Thereafter, Williams answered the motion for summary decision which was denied by order issued on August 11, 2008. The hearing was then rescheduled, after a further continuance requested by Domino's attorney due to a prior court commitment, to convene on October 15, 2008.

The hearing was convened as scheduled in New London, Connecticut on October 15, 2008. Williams appeared *pro se*, and Domino's was represented by counsel. Testimony was taken from Williams and Jeff Hargan, Williams' former supervisor. Documentary evidence was admitted as Complainant Exhibits ("CX") 1 and 8-11 and Respondent Exhibits ("RX") 1-12 and 14. Hearing Transcript ("HT") at 14, 18, 20, 164, 170, 351. Domino's objected to the admission of CX 2 (a CD containing an audio recording of witnesses interviews conducted by OSHA during its investigation of the complaint), CX 3 (the transcript of a hearing on Williams' claim against Domino's for unemployment compensation) and CX 12 (a brochure on "PeopleNet" which is a communication system used in Domino's vehicles), and these objections were taken under advisement. HT at 21. On October 17, 2008, the ALJ issued an order which established a time frame for the parties to submit additional argument relevant to the admissibility of CX 2 and CX 3. This order also allowed the parties time to offer stipulations and / or wage records showing Williams' earnings at Domino's and his earnings from subsequent employment. Both parties responded with additional information, and CX 2 and CX 3 were admitted by post-hearing order issued on November 25, 2008.¹ Domino's also submitted wage records which have been admitted without objection as RX 16-18.² The November 25, 2008 order allowed the parties 15 days to notify the ALJ whether they wished to offer any additional evidence in light of the admission of CX 2 and CX 3. Neither party requested leave to offer any additional evidence. The record was closed by order issued on December 12, 2008 which allowed the parties until January 23, 2009 to file briefs.³ Briefs were received from both parties.⁴

¹ CX 12, the PeopleNet brochure, was not addressed in the November 25, 2008 order which admitted CX 2 and CX 3. Williams explained at the hearing that he offered this exhibit to show the capabilities of the PeopleNet system. HT at 171-172. Domino's objected on grounds that the document had not been authenticated, and the objection was taken under advisement pending additional testimony. *Id.* at 172-173. There was no further testimony regarding this exhibit. Accordingly, Domino's objection is sustained, and CX 12 is excluded for lack of proper authentication. 29 C.F.R. §§ 18.901, 18.902 (2008). Moreover, as there is no issue regarding the capability of the PeopleNet system, CX 12 is also properly excluded as irrelevant.

² The wage records admitted are: Domino's pay statement dated 11/9/07 showing Williams' year-to-date earnings (RX 16); Williams' 2007 W-2 statement from Domino's (RX 17); and pay statements from CRST Services (RX 18).

³ Domino's submitted a "Supplemental Response to the Admission of Complainant's Exhibits CX 2 and CX 3" in which it disputes Williams' interpretation of certain statements made during the OSHA investigation and at the unemployment hearing.

⁴ The briefs submitted by the parties failed to comply with the ALJ's briefing order which in pertinent part stated that each brief "shall include . . . A Statement of Facts with specific citations to the hearing transcript and any

After careful consideration of the record and the parties' respective positions, the ALJ concludes that Williams has proved that Domino's terminated his employment in violation of the STAA. Accordingly, he is entitled to relief consisting of reinstatement with back pay plus interest.

II. Findings of Fact

A. Stipulations

The parties entered into the following stipulations at the hearing:

- (1) Lavan Williams was hired on or about January 29, 2007 as a driver-in-training by Domino's.
- (2) Mr. Williams' probationary period ended on or about July 15, 2007 when he was promoted to class A driver after completing all required training and driving time needed for the position.
- (3) Mr. Williams' immediate supervisor was Jeff Lariviere, who at that time was the transportation manager, and Mr. Lariviere reported to Jeff Hargan.
- (4) As a new driver Mr. Williams had to complete the training program that Domino's has for new drivers.
- (5) Domino's procedures require that drivers must, "notify your team leader and contact the Domino's Pizza safety hotline at 800-284-0911 as soon as possible but not later than two hours after the accident."
- (6) Drivers are required to complete an "on-the-spot accident packet."
- (7) Mr. Williams successfully completed the training program.
- (8) On or about March 16th, 2007, during his training period, Mr. Williams was involved in a motor vehicle accident.
- (9) The company's investigation of the accident determined that Mr. Williams was operating a tractor trailer with his trainer as co-driver during a snowstorm in New York State.

relevant Exhibits that were accepted into evidence." See Dec. 12, 2008 Order Closing Record. That order further provided that "[n]on-conforming briefs will not be accepted." *Id.* While both briefs discuss the testimony and other evidence, there is not a single citation to the hearing transcript which is particularly problematic in this case where the transcript runs to 400 pages. Consequently, factual assertions set forth in the briefs have not been considered, and the findings of fact in this decision are based exclusively on the ALJ's review of the hearing transcript and the exhibits entered into the record.

(10) The investigation found that the accident was unavoidable and Mr. Williams did not receive any disciplinary action.

(11) New employees are given a team member handbook, which was provided to Mr. Williams when he was hired.

(12) The Domino's checklist for all accidents states that, after an accident the following steps should be taken: "Turn on the vehicle's emergency flashers, determine injuries, call 9-1-1, render reasonable assistance, secure the scene, set out warning triangles and safety cones. If a fuel spill has occurred, follow procedures found in the containment kit and on reverse side of card. Contact the Domino's Pizza safety hotline at 800-284-0911 as soon as possible, but not later than two hours after the accident. Notify your team leader. Leave a phone number where you can be reached. Complete your on-the-spot accident report on the scene."

(13) On February 12, 2007, Mr. Williams signed a form entitled, "master driver qualification document, driver sign-off acknowledgement" in which he affirms to having reviewed and understood the company's accident reporting guidelines.⁵

(14) Mr. Williams was given a wallet card that contains the accident reporting guidelines.

(15) The company conducts quarterly safety meetings, which Mr. Williams attended.

(16) Domino's provides emergency route drivers in the event that the drivers are approaching the maximum hours they can drive.

(17) If drivers are approaching the maximum hours they can drive, Domino's sends out another crew of drivers to complete the route so that drivers do not exceed the limits set by DOT.

HT at 24-34.

B. Background

Williams is a native of Michigan, and he completed two years of college there. HT at 40-41. Prior to being hired by Domino's in January of 2007, Williams worked as a truck driver delivering steel, a self-employed home builder, a steel mill supervisor and cargo supervisor. *Id.* at 45-46. He possessed a commercial driver's license ("CDL") at the time that he was hired by Domino's. *Id.* at 46-47.

⁵ In entering into this stipulation, the Claimant acknowledged that he had previously admitted during discovery that he also received training on Domino's driving procedures. HT 30-31, 33. However, he stated at the hearing that he did not receive any such training and merely signed the acknowledgement form. HT at 31-32, 59-60, 200-202, 271-273.

Domino's operates nationwide retail food business offering pizza and other food items to the consuming public. HT at 54. It supports its retail outlets through distribution centers including a Connecticut center located in East Granby, Connecticut which covers the New England states, upstate New York, New York City and Northern New Jersey. HT at 54; 280. Truck drivers are employed at the distribution center to deliver loads of supplies to the Domino's stores located within the center's geographic area. *Id.* at 280-281.

C. Employment and Initial Training at Domino's

Sometime in the fall of 2006, the Claimant was driving through New England while making a steel delivery to Vermont, when he heard a radio advertisement for drivers' positions at Domino's. HT at 47-48. He called Jeff Hargan, the operations manager at the East Granby distribution center, about the job, and he was interviewed and eventually hired as a driver-in-training. *Id.* at 49-50; 283. He received an orientation for new drivers which consisted of reviewing training materials on a computer, and he received some "one-on-one" training from Marlon Leeks, an assistant supervisor. *Id.* at 51-53, 58; 284-285. After a few days, he began helping with loads and going out on routes with other drivers. *Id.* at 53. He testified that the East Granby distribution center was very busy and short-staffed when he was hired and that the most difficult part of his training was learning Domino's inventory control system and the most efficient way of unloading the truck. *Id.* at 54-56.

On February 12, 2007, Williams executed a "Master Driver Qualification Document Driver Sign Off Acknowledgement" in which he agreed that he had received and understood a series of "Driver Qualification" documents required by the Department of Transportation and Domino's Pizza Distribution. RX 4. This acknowledgement form also confirms receipt of "Domino's Pizza Distribution Education and Training Contents" which consisted of a "Smith System CD" and "Compliance and Bonus Training" including "1. Cadec / Hrs. of Service Training, 2. Accident Reporting Guidelines with Fuel Spill Reporting Procedures, 3. Load Securement Procedures, 4. Vehicle Inspection Process with Out of Service Criteria, 5. Receipt of Safety Bonus Program." *Id.* Williams testified that he had completed some of the training, but he was unable to view a video on accident reporting procedures because the video machine was broken. HT at 58-59, 200-202, 271-273. He also denied ever receiving any specific training on accident reporting procedures, though he did acknowledge receiving a checklist card, RX 5, in or around May of 2007. *Id.* at 59-60, 191.⁶ Hargan testified that he provided one-half hour of accident reporting procedure training to Williams on February 2, 2007 during which he emphasized the importance of the driver calling the team leader within two hours of an accident. *Id.* at 289, 291-292; RX 3. While there is some conflict in the testimony furnished by Williams

⁶ As the parties stipulated, the checklist card outlines the following reporting procedures for all accidents:

- Contact the Domino's Pizza Safety Hotline at (800) 294-0911 as soon as possible, but not later than two hours after the accident.
- Notify your team leader. Leave a phone number where you can be reached.
- Complete your On-the-Spot accident report at the scene.

RX 5; HT at 30. The Checklist also outlines emergency procedures to be followed in the event of an accident. *Id.*

and Hargan concerning the extent of the training on accident reporting procedures, Williams by his own account was aware of the required procedures by no later than May when he received the accident checklist card. HT at 197-198, 203-205. *See also* CX 3 at 61 (where Williams admitted at the hearing on his unemployment claim that he “pretty much” knew that drivers were expected to call the “hotline” or a supervisor following an accident).⁷ Williams also testified that he received wallet-sized cards with information on Domino’s compliance and fuel spill hotlines. *Id.* at 67.

After signing the acknowledgement form, RX 4, on February 12, 2007, Williams began going out on routes with more experienced drivers. HT at 60-61. He testified that these routes usually were to Boston or New Jersey and typically took more than 11 hours to complete so that it was necessary to have two drivers split the driving time to comply with the Department of Transportation’s rules on maximum driving hours. *Id.* at 64-66.⁸ He remained in training status until he successfully completed his probationary period on July 15, 2007. *Id.* at 62, 206.

⁷ Williams’ termination notice states that he was trained on proper accident reporting procedures during a class conducted in February by the Director of Operations (Hargan) and “the Transportation Manager (Jeff Lariviere).” RX 1 at 8. Domino’s training record for Williams indicates that he was trained on accident reporting procedures on February 2, 2007. RX 3 at 1. However, these records are inconsistent with Hargan’s testimony that Lariviere’s first week of work at Domino’s was the week of “that huge Valentine’s Day snowstorm in ‘07.” HT at 259-260. *See also* CX 3 at 33-34 (where Lariviere testified at the unemployment hearing that he did not train Williams as he was hired before Lariviere started.). When this discrepancy was pointed out to Hargan at the hearing, he insisted that Lariviere had trained Williams and said that he must have been mistaken with respect to the date that Lariviere started work at Domino’s. HT at 362. The more credible evidence establishes that Lariviere did not train Williams on accident reporting procedures which calls into question the accuracy of Hargan’s testimony that Williams was fully trained on accident reporting procedures by February 2, 2007. Noting that Williams’ testimony that the video training equipment was not operable is not contradicted, the ALJ credits his testimony that he did not complete the accident reporting procedure training in February of 2007.

⁸ The regulations on maximum driving time issued by the Federal Motor Carrier Safety Administration, Department of Transportation are found at 49 C.F.R. Part 395. In pertinent part, the regulation in effect during the period of Williams’ employment at Domino’s provided as follows:

Subject to the exceptions and exemptions in Sec. 395.1:

(a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:

(1) More than 11 cumulative hours following 10 consecutive hours off duty; or

(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of Sec. 395.1(o) or Sec. 395.1(e)(2).

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver’s services, for any period after--

(1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)(1) Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or

(2) Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

D. The March 16, 2007 Accident

During March of 2007, Williams was involved in an accident while driving with his trainer, Mike Puger, during a snowstorm in New York. HT at 27, 192. Puger handled the accident reporting while Williams left the truck to check on the occupants of the other vehicles involved in the accident. *Id.* at 192. When Williams returned to the truck about 30 minutes later, Puger handed him a phone on which he spoke to someone he believed to be “Ted Williams” at the Domino’s accident hotline. *Id.* at 193.⁹ Williams later spoke to Puger to find out what Puger had done to report the accident, and he was told by Puger that “Ted Williams” is the “guy you call when you have an accident.” *Id.* at 195.

E. Complaints about “Pressure” from Other Drivers to Work During Rest Periods

Williams worked long hours and overtime at Domino’s. HT at 70. He often began a “run” at 3:00 a.m., finished around 7:00 p.m. and then accepted a new run at 10:00 p.m. the same day. *Id.* He explained that he was required to have a ten-hour rest or off-duty break before he could drive again under the hours of service rules, so he would begin the second run in the truck’s sleeper berth while another driver began the route. *Id.* This meant that the other driver would have to work by himself, including making deliveries to stores, until Williams completed his ten-hour rest period. *Id.* at 70-71. Some drivers did not like working by themselves and would ask Williams to help with deliveries before his ten-hour rest period had elapsed. *Id.* at 71. Williams refused, stating that he did not want to risk his job as Hargan had made it clear that a driver would be terminated for violating the hours of service rules. *Id.* at 71-72, 218; 314-316. Williams’ refusal caused discord with some of his co-workers. *Id.* at 71-72, 78-79.

In early April of 2007, Williams returned from a run at 8:45 p.m. whereupon he was assigned to go on another run with Puger that commenced that same evening at 10:30 p.m. HT at 73-74. Because he had been on duty until 8:45 p.m., Williams planned to spend the first part of the second run in the sleeping berth for his ten-hour rest period which meant that Puger would have to do any deliveries by himself until 7:00 a.m. the following morning. *Id.* at 73-74, 224. This irritated Puger, and he and Williams became involved in an escalating verbal confrontation while Puger was driving. *Id.* at 72-74. Eventually, both Williams and Puger called Hargan who dispatched Leeks to retrieve Williams from the truck and replace him with another driver. *Id.* at 74-76, 224-225.¹⁰

49 C.F.R. § 395.3 (2006) (as amended at 68 Fed. Reg. 22,516, Apr. 28, 2003).

⁹ “Ted Williams” is also called “Tim Williams” in the hearing transcript. *See* HT at 376. It is clear from context that they are the same person.

¹⁰ It is interesting to note here that Williams later became embroiled in a dispute with another driver, Greg Mitchell, when Mitchell wanted to begin a run in the sleeping berth while Williams started the driving. According to Williams, this incident occurred on or about October 15, 2007 when he was assigned to drive an unfamiliar route with Mitchell. HT 226-227. Before leaving the distribution center, he protested to Lariviere that it was “unprecedented” to expect him to drive a new route and find ten stores without a GPS while Mitchell slept. *Id.* at 227. Lariviere called Hargan who directed Mitchell to drive. *Id.* at 227-228. While one might be tempted to view this incident as revealing a degree of hypocrisy on the part of Williams in not respecting another driver’s rest period, Williams asserted, without contradiction, that this incident involved “a whole different set of circumstances” than the earlier incident with Puger. Moreover, there is no evidence in the record concerning the length of the run in

Williams did not recall having any subsequent discussion of the Puger incident with Leeks or Hargan, HT at 76, but Hargan testified that he had more than one discussion with Williams concerning the latter's claim that "he was being pressured to come out of the bunk and work illegally." *Id.* at 316. Hargan further testified that he spoke to the other drivers involved and was assured by all of them that notwithstanding the amount of time established by Domino's schedule for a particular route, they knew that they could complete the route in less time and without violating hours of service rules if the second driver would agree to return to duty from the sleeping berth and assist with deliveries. *Id.* at 317-318. Nevertheless, Hargan did concede that there could be some merit to the concerns expressed by Williams:

Q. Now, Mr. Williams said that he was being pressured, though, to come out of the berth to help. Now, in doing that, would he have been running counter to the hours of service limitations that the DOT specifies?

A. It would depend on the route, okay, and what somebody is asking him to do. In general, especially when he was in the driver development program, his runs were small enough that they were deemed, in most cases, a one-driver run. And then they could turn the run with only using one driver's hours. There were other runs where he may have had to stay in the bunk for, you know, one or two stops so they could legally make the turn. But, in most cases, there is no need for the drivers to go outside of their hours of service.

* * * * *

Q. And what was the determination that you made?

A. Obviously, with more than one situation it was different, but in most cases the facts that the drivers would come to me -- you know, I talked to the drivers, I said this is what the allegation is, are you forcing him out of the bunk, are you trying to make him work illegally, and they said, "No, we can turn the route." And, when you looked at the logs, what they said held up.

Id. at 318-319.

F. Williams' Call to the Domino's Compliance Hotline

In late July or early August of 2007, Williams placed a call to the Domino's "compliance hotline" from his home. HT at 69. He testified that his call was motivated, in part, by an incident in June where he and another driver had been accused of returning a truck without reporting damage that appeared to have been caused while they were out on a route. *Id.* at 80-81. Williams and the other driver both denied responsibility for the damage, and both were eventually assessed three violation points under the Domino's Commercial Driver Accident and Moving Violation Standards policy. RX 1 at 2-5; HT at 80-85. This incident prompted Williams

October, when Mitchell was last on duty prior to departure, or Mitchell's cumulative total of driving hours at that point.

to write a protest to Domino's in July of 2007 that his right to "due process" had been violated by the manner in which he was charged with a driving violation and assessed the three points. HT at 85, 222.¹¹ He also spoke to a supervisor, Desiree Upton, about the incident and, based on her advice, he decided to call "Ted Williams" at Domino's compliance hotline about the three points as well as the hours of service issues. *Id.* at 88-90.¹²

Williams called the compliance hotline in late July or early August of 2007 and left a message for "Ted Williams" that he was being "pressured" to work outside the hours of service rules and that he had been assessed three violation points related to an accident for which he was not responsible. HT at 90-92. Williams did not hear any response until the end of September when Mr. Williams at the compliance hotline called him at home. *Id.* at 92. Williams related his concerns that Domino's was fostering an atmosphere where drivers were pressured to work outside of the hours of service rules and that he was "catching flak" from other drivers because he refused to work outside the hours of service. *Id.* at 93. Mr. Williams responded that he was going to conduct an investigation, and Williams asked if his complaints would be kept confidential. *Id.* at 94. Mr. Williams stated that hotline calls were confidential. *Id.* Williams testified that he did not have any further communications with Mr. Williams at the compliance hotline. *Id.* at 94-95.

G. Williams' Complaint about Mitchell's Vision Problems

On or about October 15, 2007, Williams called Hargan to express a concern that another driver that he had worked with, Greg Mitchell, had difficulty with his vision when he forgot to take his blood pressure medication. HT at 218-219, 228-229; 321, 328. Hargan agreed to look into the situation and spoke to Mitchell. *Id.* at 229; 328. Hargan testified that Mitchell told him that he got a "blue tint" which caused his vision to blur "like headlights coming at you through a dirty windshield" when he forgot to take his blood pressure medication. *Id.* at 330-331. Mitchell assured Hargan that he had no vision impairment as long as he took his medication, and Hargan responded to Williams that the condition was controllable and that Mitchell had agreed to take his medication. *Id.* at 330.

H. The October Meeting in East Granby on Williams' Complaints

About two weeks after Williams spoke to Mr. Williams at the compliance hotline, he was called into a meeting by Greg Higgins, manager of the East Granby distribution center. HT at 96. The meeting took place in Hargan's office with Williams, Higgins and Hargan in attendance. *Id.* at 96-97, 322. Hargan testified that he had been informed by Higgins a few days earlier that Williams had called the compliance hotline contending that "he was being asked to work illegally, that he was being asked to work with an unsafe driver, and then also about that I was

¹¹ There was considerable testimony at the hearing concerning the incident which led to the assessment of the three violation points. HT at 80-87, 209-213, 221-222. However, Williams has not alleged that Domino's decision to assess the three points violated the STAA, and Domino's agrees that this incident played no role in the decision to terminate Williams' employment. HT at 374; CX 3 at 43. Under Domino's policy, an employee's driving privileges are not affected until the employee accumulates 11 violation points. RX 1 at 5, ¶ J; HT at 85.

¹² It appears that Mr. Williams at the Domino's compliance hotline is the same person that Williams spoke to in March of 2007 following the accident during the snowstorm in New York.

giving him three points for an accident he claims he was not involved in.” *Id.* at 321, 366. There are two accounts of this meeting, one from Williams and the other from Hargan, which vary to some extent.

Williams testified that Higgins began the meeting by stating, “We got a complaint from the compliance hotline and, well, we know it was you.” *Id.* at 97. Williams testified that, “I knew I was in trouble,” and he did not respond. *Id.* at 97-98. He said that Hargan then asked him whether anyone in management had asked him to work outside of the hours of service, to which he responded,

I said . . . “no . . . management didn’t do it, but you left – it’s a[n] atmosphere of ‘don’t ask / don’t tell’, you know what’s going on.” And he wanted me – well, “Give me some names and numbers.” And I was like, “Jeff, you know, I’m not going to give you no one[’s] names and numbers”

Id. at 98. Williams testified that Hargan did most of the talking, but he could not remember what Hargan said aside other than asking for the names of the drivers who pressured Williams and getting Williams to agree that no one from management had asked him to work outside the hours or service. *Id.* at 99-101. However, Williams did state that he told Hargan “straight up” that,

You had an atmosphere, you know, it’s a[n] atmosphere, you know, that you don’t -- they don’t want to tell, you know, you don’t want nobody to know about – I mean, you don’t want nobody to tell. You know what’s going on, but you ain’t saying nothing to stop these guys from doing it.

Id. at 101-102. Williams testified that Hargan did not respond to this statement, and the meeting ended after no more than 15 minutes. *Id.* at 102.

Hargan confirmed that Higgins began the meeting by stating that they had received a complaint from the compliance hotline and that he and Hargan were there to investigate the complaint. HT at 322. He also agreed the meeting began with a discussion of Williams’ complaint that he was being pressured to work outside of the hours of service rules. *Id.* at 323. However, his account of Williams’ complaint is markedly different. According to Hargan, Williams conceded that no one had ever asked him to work in violation of the regulation and explained that his complaint was simply that other drivers were asking him to leave the sleeping berth before he was ready to wake up:

Q. When you told him that you had heard that there was this issue about him coming out of the berth early, what did Mr. Williams say to you?

A. You know, once we started the conversation, you know, and I told him what I was being told, he said, I never said that anybody was forcing me to work illegally, what they’re doing is telling me to come out of the bunk before I think it’s time –

Q. All right.

A. -- I am ready to come out.

Id. at 324. This version is obviously inconsistent with Williams' testimony, and it is also somewhat inconsistent with Hargan's testimony regarding his response to Williams:

I told him, you know, Lavan, we have had this discussion before. I said, you know, you were going on runs with people who know the run better than you do, they know where it's time for you to get up, and they are looking to get back as fast as they can, so getting up at the point that they tell you isn't necessarily them forcing you to do anything illegally, but they are trying to get you up and get you moving, you know, timely -- the most effective time, at the most effectively place.

Id. at 325. That there was more to William's complaint than mere sleep deprivation or personal inconvenience is also revealed in Hargan's account of the denouement of the discussion of the hours of service issue:

Q. Now, was there anything else said during this meeting with regard to the issue of driving, that you recall?

A. Not that I recall. I mean, we pretty much -- we ended there, and we were - - you know, I mean, it was pretty evident, to me anyway, that this was something that we were going to disagree on, but I do not believe that there was any wrongdoing on anybody's part.

Q. And not only was there no wrongdoing on anyone's part but did Mr. Williams ever indicate that he had done anything that violated either company rules or DOT requirements?

A. No. As a matter of fact, he was very careful about saying that he wouldn't do that because I told him that he would be fired if I caught him falsifying his logs.

Id. at 327. Hargan's characterization of Williams' complaint as amounting to no more than a gripe that other drivers were waking him up too early frankly makes no sense. Simply put, Williams would have to be a fool to call the compliance hotline if his only complaint was a subjective belief that his rest time was being encroached upon with no hours of service ramifications. Williams is not a fool, and this ALJ finds his description of the nature of his hours of service complaint more credible than Hargan's based on observations of witness demeanor and consideration of the conflicting testimony in light of the record as a whole.

Hargan further testified that he responded to Williams' complaints by pointing out that Domino's paperwork on routes contained only general estimates of route times and that he should be willing to accept the judgment of an experienced driver that the route could be completed without any violation of the hours of service rules if Williams were to curtail his rest period and help with the deliveries. HT at 325. Hargan explained that this could be

accomplished as long as the other driver did not exceed 11 hours of driving time because the hours of service regulation does not limit the number of hours that Williams could perform non-driving duties. *Id.* at 326-327. In the event that the driver exceeded the 11 cumulative hours of driving time allowed under the hours of service rules, Hargan said that “in most cases, not every one, but in most cases we will find a rescue driver, we call them, and we will send them down either by courier or by one of us driving them down there to rescue the truck.” *Id.* at 325-326. This testimony is uncontradicted, and it is credited.

Williams testified that he was assigned to a different route the week after his meeting with Higgins and Hargan. HT at 102-103. Williams said that he had been regularly driving a route to Rhode Island before the meeting and that the schedule was thereafter changed so that he was assigned to the New York / New Jersey route on which he was later involved in an accident. *Id.* at 103-104. While he testified that he lost overtime opportunities because of this route reassignment, he did not register any complaint, and he has not alleged that this reassignment violated the STAA. *Id.* at 105-107.

I. The October 26, 2007 Accident

Prior to October 26, 2007, Williams had been learning the New York / New Jersey route with another driver who did the first part of the driving duties. HT at 107-108. On October 26, 2007, a Friday, Williams was behind the wheel for the first time when he and the other driver, Greg Mitchell who was in the sleeping berth, left the East Granby distribution center at 4:19 a.m. *Id.* at 108, 111-112; RX 10. While entering a highway in New York, Williams attempted to maneuver the truck into the left lane to clear a low overhead bridge, but he was forced into the right lane by another vehicle which cut him off. *Id.* at 109-110. As a result of entering a lane with reduced overhead clearance, the top right side of the trailer scraped the underside of the bridge. *Id.* 110-112. After clearing the bridge, Williams briefly pulled to the side of the road where he was able to see what appeared to be minor damage on the roof of the trailer. *Id.* at 112. However, because there was no breakdown lane where he could get out of the truck for a closer inspection, Williams decided to continue on to his first scheduled stop which was only a short distance away. *Id.* at 113-114. The accident occurred at approximately 8:00 a.m. *Id.* at 231. Domino’s later repaired the damage at a cost of approximately \$4,800.00. *Id.* at 353.

J. Williams’ Attempts to Report the October 26, 2007 Accident

When he arrived at the first stop, a Domino’s Pizza store, Williams parked the truck and did a full inspection which revealed that the damage involved a seam strip that had become dislodged along the top edge of the trailer. HT at 114-115. He then attempted to use the mobile phone assigned to the truck to call the distribution center but found no signal. *Id.* at 115-116, 233. Williams next completed a written accident report and diagram, and he typed a report of the accident into the PeopleNet system. *Id.* at 116-118, 234, 243; CX 3 at 59, 73; RX 10 at 2.¹³

¹³ Domino’s introduced a partial copy of Williams’ PeopleTime driver’s log for October 26, 2007 which shows that Williams made an “Inter-trip Inspection” entry at 8:34 a.m. in which he described the accident where the trailer scraped while passing under the bridge. RX 10 at 2. However, it is undisputed that the full text of the accident

The PeopleTime report was not sent to anyone at Domino's in particular, and it was not available for review until 12:00 p.m. Eastern Time on October 26, 2007 when the PeopleTime system made its next periodic "download" of entries. HT at 382-383. No one at Domino's saw Williams' PeopleTime entry until Monday, October 29, 2007 when Lariviere checked the driver's logs after discovering the damage to the top of the trailer. CX 3 at 17.

Following his unsuccessful attempt to call Domino's on the mobile phone and the completion of the accident report forms and the PeopleTime entry, Williams unloaded the truck and then went to get breakfast at a local restaurant, leaving Mitchell asleep in the truck. HT at 118-119.¹⁴ On the way to breakfast, he placed two calls to the distribution center from a pay phone, first to Upson and then to Lariviere, but he did not reach either supervisor and made no attempt to leave a voicemail message. *Id.* at 119-121; 236-242; CX 3 at 62-63. He said that he did not leave a message because he did not have a cell phone and had no number to leave for a return call. *Id.* at 247-248. After failing to reach either Upson or Lariviere, he did not attempt to call Hargan or anyone else from the pay phone. HT at 239-242. He also did not call the Domino's accident hotline, explaining that he did not have the wallet card showing the accident checklist and hotline number with him that day. HT at 237; CX 3 at 56-57. Williams then continued on the route and made no further attempt to contact anyone at Domino's about the accident. *Id.* at 121-122, 242-243.

Williams testified that after he made the entry reporting the accident in PeopleNet, he felt that he had done all that was required. HT at 122; CX 3 at 80. He also asserted that all of the accident reporting procedures outlined on the wallet card are routinely not followed in the case of minor accidents when no emergency or "911" call is made, and that he believed it was sufficient to file an accident report with Domino's when he returned to the terminal because there was only minor damage to the trailer. *Id.* at 267-261; CX 3 at 84. Nevertheless, Williams acknowledged that the hearing on his unemployment claim that he "pretty much" knew that he was supposed to call the Domino's accident hotline. CX 3 at 61. Lariviere disputed Williams' claim that calling the accident hotline is not required in the case of a minor accident, though he did concede that the accident reporting procedure allows the driver to use "good judgment" and that there is "some leeway" in the reporting requirements "if the driver is somewhere where there is absolutely no phones." *Id.* at 48.

Williams and Mitchell returned to the East Granby terminal at approximately 4:30 a.m. on Saturday, October 27, 2007. HT at 123. Mitchell was driving, and Williams gave him the written accident report and diagram that he had completed to leave, along with the other paperwork for the route, in a designated area adjacent to Hargan's office. *Id.* at 124-125, 244. There was no one else at the terminal when Mitchell and Williams returned from the New York / New Jersey route, and Williams went home. *Id.* at 124.

report entered into the PeopleTime system by Williams was not printed on RX 10. HT at 234. *See* n.26, *infra*, for further discussion of RX 10.

¹⁴ Williams testified that Mitchell had to remain in an off-duty status for approximately the first ten stops on the New York / New Jersey route in order to comply with the hours of service rules. HT at 123-124.

K. The October 30, 2007 Meeting

On the afternoon of Tuesday, October 30, 2007, Williams called Lariviere, knowing that he was going to have to speak to someone about the accident before going out on his next scheduled route. HT at 125-127. He suggested to Lariviere that he come in a little before the start of his next route to discuss the accident, but Lariviere directed him to come to the terminal immediately, stating that he could not work again until he came in to discuss the accident. *Id.* at 127-129. Williams then went to the terminal where he met with Lariviere and Hargan in the late afternoon. *Id.* at 129-131; 340-341. Hargan began the meeting by stating that he knew that Williams had been involved in an accident and had not reported it. *Id.* at 131. Williams countered that he had reported the accident in PeopleTime and in the written accident report and diagram. *Id.* at 131; 341, 345. Hargan agreed that Williams had made a report of the accident on PeopleTime but said that he had not seen the report until Monday. *Id.* at 131.¹⁵ Hargan then sent Lariviere out to look for the written report and diagram. *Id.* at 131-132. Hargan and Williams continued to discuss the accident and Williams's actions, and Hargan asked why Williams had not tried to call him after he unsuccessfully tried to call Lariviere. *Id.* at 132; 343. Williams responded that he did not want to bother him, to which Hargan retorted that he could not understand Williams' failure to call since he called Hargan for everything else. *Id.* at 344. Hargan also commented that if Williams had been able to call the compliance hotline, he should have been able to call the accident hotline. *Id.* at 132. Williams did not respond, and Hargan then informed him that he was suspended without pay pending further investigation. *Id.* at 132-133; 344. Lariviere eventually returned to the office and advised that he had been unable to find any paperwork on the accident. *Id.* at 133.¹⁶ At that point, Hargan reiterated to Williams that he would be conducting an investigation and that Williams would hear from him. *Id.* at 133-134;

¹⁵ Hargan testified that he did not find the PeopleTime report until sometime later when he looked for it. *Id.* at 341-342. However, this testimony is directly contradicted by Lariviere's statement at the unemployment hearing that the PeopleTime log entry was discovered before the October 30, 2007 meeting:

We became aware of the damage to the trailer on Sunday . . . [w]e had a yard inspection . . . and our lot man noticed the damage [and] called me at home. I looked up to see who had the trailer last, which was Mr. Williams, and then we checked his logs and found that he had made a note on the logs that he had damaged the trailer and when we spoke to him afterwards, I believe it was that Monday, he also told us about that -- yes, he had hit -- I believe it was a low bridge.

CX 3 at 17. Accordingly, the ALJ finds that Hargan and Lariviere knew that Williams had reported the October 26, 2007 accident in the PeopleTime log prior to their October 30, 2007 meeting with Williams.

¹⁶ Hargan testified that Domino's never found the written accident report that Williams claimed to have turned in during the early morning hours on November 27, 2007 when he and Mitchell returned to the East Granby terminal. HT at 351, 375. This testimony is contradicted by statements that Lariviere made at the December 13, 2007 hearing on Williams' unemployment claim. Specifically, Lariviere, on questioning by the hearing referee, admitted that Williams had turned in a written accident report, though he also pointed out that the report was not discovered by a clerk until sometime on Monday, October 29, 2007. CX 3 at 93-95. Noting Lariviere's admission, Williams's testimony that he filed a written accident report and diagram is credited.

344.¹⁷ Williams then left. *Id.* The next day, Williams filed the claim for unemployment compensation. *Id.* at 134-135, 178-179.

L. Hargan's Decision to Terminate Williams for Failure to Follow Accident Reporting Procedures

After his October 30, 2007 meeting with Williams, Hargan completed his investigation which confirmed that Williams had not called anyone at Domino's to report the October 26, 2007 accident, and he decided to terminate Williams' employment for failure to follow proper accident reporting procedures. HT at 344-347. Hargan testified that he mailed a termination notice to Williams, but it was returned with a notation that the address was no longer valid. *Id.* at 347. He further testified that he had previously terminated two other drivers for failure to report accidents but he agreed that neither of these employees had done anything to report the accidents and that there is a difference between failure to report an accident and not properly reporting an accident. *Id.* at 347-348, 378-379, 360; RX 6. He also testified that he was unsure whether it would have made a difference had Lariviere been able to locate the written accident report that Williams claimed to have turned in when he returned to the East Granby distribution center on October 27, 2007. *Id.* at 375.

M. Domino's Changes the Reason for Termination to Job Abandonment

Hargan testified that he completed his investigation on Wednesday, October 31, 2007, and he instructed Lariviere to call Williams. HT at 353. When Lariviere reported that he was unable to contact Williams, Hargan instructed Lariviere on Friday, November 2, 2007 to leave a message on Williams' phone that the investigation had been completed and that he would be terminated on grounds that he had abandoned his job if they did not hear from him by Monday. *Id.* at 353-354. Williams testified that he heard nothing further from Domino's before Friday morning when he left Connecticut to travel to Boston for the weekend. *Id.* at 135.

Williams returned to Connecticut at approximately 12:30 a.m. on Monday, November 5, 2007. HT at 136. Upon arriving at his home, he discovered two telephone messages – one from a cousin informing him that his grandmother was dying in Michigan and the second from Lariviere instructing him to call Hargan at a telephone number. *Id.* at 136-138. Williams then called Hargan at home at approximately 4:00 a.m. and said that he had received Lariviere's message and would be in "Domino's office at 2:00 p.m. tomorrow." *Id.* at 138-140; 354-355. Williams explained that he had decided at this point to drive to Michigan to see his grandmother and to go to Domino's headquarters in Ann Arbor on Tuesday, November 6, 2007 for the purpose of pursuing a complaint that he has been punished for calling the compliance hotline. *Id.* at 139-140. However, Williams did not tell Hargan that he planned to go to Domino's headquarters in Michigan, and Hargan mistakenly believed that Williams would be at the East Granby distribution center at 2:00 p.m. on Monday, November 5, 2007. *Id.* at 364-366.

¹⁷ Hargan's testimony that he specifically told Williams that he expected to complete his investigation and get back to him by Wednesday, October 31, 2007, HT at 344, is not credited as it is inconsistent with the more contemporaneous termination notice which states that Williams was "clearly told" at the October 30, 2007 meeting "that we would be in touch within the next couple of days to resolve the issues." RX 8 at 1.

Williams drove to Michigan on Monday, and he went to the Domino's headquarters facility in Ann Arbor at approximately 9:00 a.m. on Tuesday, November 6, 2007. HT at 140-141. At Domino's headquarters, Williams asked to see the head of personnel, and he was referred to Eric Parsons who identified himself as a human resources supervisor. *Id.* at 141-142. Williams told Parsons that he believed that he has been suspended without pay in retaliation for calling Domino's compliance hotline, and Parsons said that he would have to talk to Karen Blemic, head of human resources for Domino's eastern seaboard division. *Id.* at 142-143.

At approximately 11:00 a.m. on Tuesday, November 6, 2007, Hargan was in a staff meeting with Higgins in East Granby when Higgins received a call from a Tim Barr at Domino's headquarters who advised that Williams was in Ann Arbor and asked whether Higgins knew why he was there. HT at 356-357, 369-370. Higgins responded that Williams had been terminated for failure to report an accident. *Id.* at 357. Hargan testified that as of November 6, 2007, the decision had already been made to terminate Williams for failure to report the accident although Williams had not been officially notified of the decision. *Id.* at 369-370. Hargan added that at this point, "it was HR's decision to change [the reason for termination] to job abandonment" because Williams was not returning his telephone calls. *Id.* at 371. In response to Williams' questions at the hearing, Hargan explained that the termination was made effective on November 8, 2007 because he was waiting for three days to pass without hearing from Williams:

Q. So my question is, why didn't you terminate me on 11/5? You don't know?

A. Well, I do know.

Q. Why?

A. Because the last contact with you was on 11/5, and company policy says I have to wait three days after my last contact of not hearing from you before I can terminate you.

Q. Uh-huh. But you heard from me on 11/6. Did you hear –

A. Whenever Monday morning was.

Q. You heard from me Monday morning, but you also heard that I was in Domino's office on 11/6.

A. Right.

Q. Why didn't you terminate me that day? You were still waiting for three days?

A. You had not contacted me directly or anybody at the facility, so we were waiting our three days for your no-call / no-show, and when that happened we terminated you on that date, per policy.

Id. at 368-369. Domino's introduced a copy of the termination notice that was prepared for Williams with an effective date of November 8, 2007. RX 8. Under a heading entitled "Describe the Situation," the document states,

Lavan had an accident on 10/26/07. He hit a fixed object (bridge). He failed to follow proper reporting procedures after the accident. Lavan was provided with training on proper accident reporting procedures during a class given in February. The training was conducted by the Director of Operations along with the Transportation Manager (Jeff Lariviere). Lavan also had further accident reporting counseling after an accident situation in June of 2007. Lavan made no contact with anyone in the team leader group and he failed to call the accident into the safety hotline. The requirements for reporting an accident are on the wallet card that Lavan was given and required to keep on his person when operating Domino's equipment. He failed to follow the procedures.

Id. at 1. The notice then outlines an "Action Plan" which reads as follows:

Lavan was suspended without pay on 10/30/07 pending the outcome of the investigation. He was clearly told that we would be in touch within the next couple days to resolve the issues. On 10/31/07 and again on 11/2/07 Jeff Lariviere attempted to contact Lavan to discuss his employment and was unable to do anything but leave a message on Lavan's phone and received no return call. On the morning of 11/5/07 @ 4:25 AM Lavan called the Director of Operations and informed him he would be in the office at 2:00 PM, he never showed and we have not heard from him here at the facility since. Lavan also applied for unemployment on 10/31/07.

Id. The notice concludes with section entitled "Next Step" which states,

Lavan's employment will be terminated. Lavan violated the safety/security policy and then failed to respond to management's request to return to the DC to discuss disciplinary procedures.

Id. The copy of the termination notice, which appears to have been completed by Lariviere as Williams' team leader, in evidence is unsigned. *Id.*

N. Williams Learns of his Termination

After his meeting with Parsons at the Domino's headquarters facility on November 6, 2007, Williams testified that he received a call from Blemic at approximately 12:00 p.m. HT at 143. Williams said that they spoke briefly as he was upset, having just learned that his grandmother had died, but he did give Blemic a quick explanation that he had been suspended

without pay for failure to report an accident even though he had reported it on PeopleNet and filed a written report and damage diagram and that he had been told by his supervisor that he was being suspended because he had called the compliance hotline. *Id.* at 143-146. According to Williams, Blemic told him that this was not what she had heard and that she was going to check into his allegations. *Id.* He further testified that Blemic called him back at approximately 2:00 p.m. on the afternoon of November 6, 2007 and told him that he should attend to the matter of his grandmother's funeral and that she and Don Fontana, a Domino's manager, would discuss the employment situation with him further the following week. *Id.* at 147-149.

Blemic stated during her OSHA interview that she spoke with Williams' sister on November 6, but she did not speak with Williams until November 7, 2007. CX 2 at 4:52-6:20. However, Fontana stated that he spoke to Williams by telephone on November 6, 2007 after he had received a call from Blemic. *Id.* at 11:20-11:42. Fontana testified that Williams raised some questions during this conversation concerning the October 26, 2007 accident and that while he did not discuss "bereavement leave" with Williams, he did say that he would have to pursue these questions with personnel at the distribution center, and he agreed with Williams' request to have a follow-up discussion sometime after the funeral for Williams' grandmother during the week of November 12, 2007. *Id.* at 11:30-12:13, 15:50-16:10. Fontana denied ever scheduling a conference call for November 13, 2007 for the purpose of discussing the matter further with Williams and distribution center management. *Id.* at 16:15-16:20.

In light of the fact that Williams was admittedly upset on November 6, 2007 over the loss of his grandmother, and considering his confusion regarding the nature and sequence of his conversations with Blemic and Fontana, *see* HT at 144-149, the ALJ finds that Williams more likely than not spoke to Fontana, rather than Blemic on November 6, 2007. The ALJ further finds that while Fontana may not have actually scheduled a meeting or conference call for November 13, 2007, Williams reasonably understood from Fontana's agreement to a follow-up discussion after his grandmother's funeral that he would have some type of continuing dialogue with Fontana on November 13, 2007. HT at 157.¹⁸ He also testified that he confirmed the Tuesday meeting with Blemic when she called him back later during the week of November 5, 2007. *Id.* at 160-161.

On Tuesday, November 13, 2007, Williams returned to Domino's headquarters in Ann Arbor at about 9:00 a.m. HT at 161. He was met by Parsons who explained that Fontana was not available. *Id.* at 162. Williams left and called Blemic who was in Orlando, Florida. *Id.* at 162-163. Blemic told him that Fontana was out of the country and that everything had changed. *Id.* at 163-164; CX 2 at 15:20-15:30.

Williams then returned to Connecticut where he received a call from Fontana about a week and one half later. HT at 164-165. Fontana apologized for not being available to meet with Williams on the 13th when Williams was in Ann Arbor. *Id.* at 166. Williams asked what would happen at this point, and Fontana made a reference to Williams' failure to follow proper accident reporting procedures and concluded, that "it's [*i.e.*, the termination] done now." *Id.* at 167. The conversation ended. *Id.*

¹⁸ The funeral for Williams' grandmother took place on Monday, November 12, 2007. HT at 157; CX 11.

O. Williams' Attempt to Secure Alternate Employment

After the December 13, 2007 hearing in Connecticut on his unemployment claim, Williams returned to Michigan to assist his mother who was incapacitated while awaiting surgery for cancer. HT at 44-45, 262. He was awarded unemployment compensation which he collected for six months. *Id.* at 187. He testified that he spent about two to three months after Christmas of 2007 caring for his mother in Michigan while he was also looking for work. *Id.* at 262. He contacted a former employer, Falcon Transport, about returning to work, and he applied to several other trucking companies, all without success. *Id.* at 179-182. He was offered one driving job in Michigan during January of 2008, but he had to decline the offer because the position involved operation of a tandem trailer unit for which he lacked the necessary training. *Id.* at 185-186. He also applied for a job at an automotive engine plant in February of 2008 but was informed that the job required an associate degree which he does not possess. *Id.* at 263-264. Williams testified that he was cited for speeding in his own car during April of 2007, resulting in the assessment of two violation points on his record, and this disqualified him from at least one driving job that he applied for in May of 2008 as the employer required applicants to have no infractions within two years. *Id.* at 182-184. He also testified that he had reported the speeding citation to Domino's, and confirmed that he still has his CDL license which has never been suspended. *Id.* at 183-184, 187. Around the end of August of 2008, Williams was hired by CRST as a delivery truck driver, and he was working at this job, earning \$17.50 per hour over a 35-hour workweek, at the time of the hearing. *Id.* at 41-43.

III. Conclusions of Law

A. Analytical Framework

Burdens of proof under the STAA, as amended effective August 3, 2007,¹⁹ are set forth at 49 U.S.C. § 42121(b). *See* 49 U.S.C.A § 31105(b)(1) (West 2008). Under Section 42121(b), a complainant must demonstrate that: (1) he engaged in protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered an adverse personnel action; and (4) the protected activity was a contributing factor in the adverse personnel action. *Clemmons v. Ameristar Airways, Inc. (Clemmons)*, USDOL/OALJ Reporter (PDF), ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11, slip op. at 7, 2007 WL 1935557*4 (DOL Adm.Rev.Bd. June 29, 2007). If a complainant proves that the employer committed a violation, he is entitled to relief unless the employer demonstrates by "clear and convincing evidence" that it would have taken the same unfavorable action in the absence of the protected activity. *Id.*

B. Williams' Protected Activity and Domino's Knowledge

Section 405 of the STAA was enacted in 1983 to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. *Brock v. Roadway Express, Inc. (Roadway Express)*, 481 U.S. 252, 258 (1987). To promote this important public safety objective, Section 405 provides that an employer may not discharge, discipline or

¹⁹ *See* Pub.L. 110-53, Title XV, § 1536, 121 Stat. 464 (Aug. 3, 2007). This case was litigated after the enactment of the 2007 amendments.

discriminate against an employee-operator of a commercial motor vehicle because the employee-operator either made a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order” or refused to operate a vehicle because operation would violate a regulation, standard, or order related to commercial motor vehicle safety or health or because of a “reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.” 49 U.S.C.A. §§ 31105(a)(1)(A) and 31105(a)(1)(B).²⁰

Williams claims that he engaged in activity protected by the STAA when he complained to the Domino’s compliance hotline that conditions in the East Granby distribution center pressured drivers to violate the hours of service rules. He has not alleged that he refused to operate a vehicle. In essence, his complaint to the compliance hotline was that he was being assigned to go out on routes when he had completed less than a ten-hour off-duty break and that he was being pressured by the other drivers to help with deliveries before he had completed ten hours off-duty which would preclude him from legally being available to take over driving responsibilities toward the end of the route when the other driver reached his maximum driving time. Domino’s, through its witness Hargan, insists that although Williams might have anticipated a potential violation based on the route schedule and estimated delivery times, these times are inflated, and he should have accepted the judgment of his more experienced co-driver that the route could be legally completed in less time if he was willing to interrupt his rest break prior to ten consecutive hours in order to assist the other driver with deliveries. Hargan also testified that Williams should have been aware of Domino’s policy to send out a “rescue” driver to relieve drivers should they reach the driving time limits before returning to the distribution center. Domino’s asserts that Williams complaints were thus based on a misunderstanding which is insufficient to draw the STAA’s protection. Domino’s Br. at 3. Domino’s also contends that Williams’ complaints to Hargan that other drivers violated the hours of service rules are undeserving of statutory protection because Williams refused to provide Hargan with names so that his allegations could not be substantiated. *Id.* Therefore, the initial issue to be resolved is whether he made a protected complaint under Section 405(a).

The Secretary of Labor has interpreted the protection afforded by Section 405(a) broadly and not dependent on proof of an actual violation of a commercial motor vehicle safety

²⁰ The STAA, as amended in 2007, added three additional categories of protected activity which are not implicated in this matter. The additional categories are:

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

Pub.L. 110-53, Title XV, § 1536, 121 Stat. 464 (Aug. 3, 2007).

regulation. See *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992) (affirming the Secretary’s interpretation as “reasonable, consistent with the statutory mandate, and persuasive”). Noting that “the purpose of preserving unobstructed channels of information is served if individuals are protected for providing testimony concerning possible violations,” the Secretary concluded that “protection extends to employees who have filed any complaint or instituted or testified in any proceedings relating to a violation of a spectrum of safety criteria.” *Id.* Protection is not limited to formal complaints addressed to regulatory or law enforcement agencies. “Internal complaints about violations of commercial motor vehicle regulations may be oral, informal or unofficial,” provided that that such informal complaints are “communicated to a manager or supervisor.” *Calhoun v. United Parcel Service (Calhoun)*, USDOL/OALJ Reporter (PDF) ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 14, 2007 WL 2718653*8 (DOL Adm.Rev.Bd. Sept. 14, 2007), *appeal docketed sub nom. Calhoun v. Administrative Review Board*, No. 07-2157 (4th Cir. Dec. 12, 2007). See also *Jackson v. CPC Logistics*, USDOL/OALJ Reporter (PDF) ARB No. 07-006, ALJ No. 2006-STA-004, slip op. at 3, 2008 WL 4820117*3 (DOL Adm.Rev.Bd. Oct. 31, 2008).²¹

Contrary to Domino’s arguments, the record in this case does not support a finding that Williams’ complaints about possible hours of service violations were so baseless or frivolous as to be undeserving of statutory protection. Williams credibly testified that his refusal to gamble that he and his co-driver could complete a route legally if he ended his rest period prematurely to help with deliveries precipitated confrontations with the other drivers. Indeed, the fact that Williams and Mitchell were on the road for approximately 24 hours on the New York / New Jersey route from October 26 to October 27, 2007 with Mitchell beginning the trip in the sleeping berth corroborates Williams’ claim that leaving the sleeping berth prior to logging ten hours in an off-duty status on some routes could very likely place the driving team in a position where neither driver could complete the route without violating the maximum driving limit imposed by the hours of service rule. Moreover, the reasonableness of Williams’ concerns is confirmed by Hargan’s tacit agreement that not all of Williams’ hours of service concerns were unfounded and by Hargan’s equivocation on Domino’s willingness to dispatch a “rescue” whenever a driver is confronted with reaching the maximum allowable driving time.²² For these reasons, the ALJ concludes that Williams has proved by a preponderance of the evidence that he engaged in activity protected by Section 405(a) when he complained to Domino’s compliance hotline about possible violations of the hours of service rules.

²¹ The Second Circuit, in which this case arises, has noted in *dicta* that although it has never directly addressed the question of whether the “filed complaint” language covers internal complaints to company management, the Department of Labor and other circuits have determined that internal complaints are protected by the STAA. *Harrison v. Administrative Review Board, US Department of Labor*, 390 F.3d 752, 757 n.2 (2004).

²² As discussed in the findings, *supra*, Hargan testified that in situations where a driver exceeded 11 cumulative hours of driving time, “in most cases, not every one, but in most cases we will find a rescue driver, we call them, and we will send them down either by courier or by one of us driving them down there to rescue the truck.” HT at 325-326. In this ALJ’s view, this is not comparable to the type of clear layover policy that has been found to preclude a reasonable belief that a route assignment amounted to pressure to violate the hours of service rules. *Cf. Bethea v. Wallace Trucking Co.*, USDOL/OALJ Reporter (PDF) ARB No. 07-057, ALJ No. 2006-STA-023, slip op. at 10, 2007 WL 4623502*5 (DOL Adm.Rev.Bd. Dec. 31, 2007).

In addition to establishing that he engaged in activity protected by the STAA, Williams has met his burden of proving that Domino's had knowledge of his protected activity since the evidence established that Hargan, who was responsible for making the termination decision, knew that Williams had complained to the compliance hotline. *See Peck v. Safe Air International, Inc.*, USDOL/OALJ Reporter (HTML) ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 11, 2004 WL 230770*13 (DOL Adm.Rev.Bd. Jan. 30, 2004).

C. Adverse Action

The Administrative Review Board ("ARB") applies the "materially adverse" standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) to determine whether an employer took an adverse action against an employee within the meaning of the STAA as well as the other federal whistleblower anti-discrimination statutes enforced by the Secretary of Labor. *Melton v. Yellow Transportation, Inc.*, USDOL/OALJ Reporter (PDF) ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 19, 2008 WL 4462979*8-10 (DOL Adm.Rev.Bd. Sept. 20, 2008).²³ In *Melton*, the ARB held that "[f]or purposes of the retaliation statutes that the Labor Department adjudicates, the test is whether the employer action could dissuade a reasonable worker from engaging in protected activity." *Id.* at 19-20 (quoting *Burlington Northern*, 548 U.S. at 57). While this inquiry can sometimes be controversial, it is not in this case because there is no doubt that "[t]ermination is an adverse action." *Bethea v. Wallace Trucking Co.*, USDOL/OALJ Reporter (PDF) ARB No. 07-057, ALJ No. 2006-STA-023, slip op. at 12, 2007 WL 4623502*7 (DOL Adm.Rev.Bd. Dec. 31, 2007). Therefore, the ALJ concludes that Williams has established that Domino's took an adverse action against him.

D. Protected Activity as a Contributing Factor in Williams' Termination

Williams must next prove by a preponderance of evidence that his protected activity was a contributing factor in Domino's decision to terminate his employment. *Clemmons* at 9. A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Seivers v. Alaska Airlines, Inc.*, USDOL/OALJ Reporter (PDF) ARB No. 05-109, ALJ No. 2004-AIR-024, slip op. at 4, 2008 WL 316012*3 (DOL Adm.Rev.Bd. Jan. 30, 2008) (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)), *appeal filed*, No. 08-71101 (9th Cir.). Williams can meet his burden of proof with either direct or so-called "smoking gun" evidence that conclusively links his protected activity and the adverse action and does not rely upon inference or with indirect, inferential or circumstantial evidence proving, by a preponderance of the evidence, that the reasons Domino's offered for his termination are not the true reasons but rather a pretext for retaliation. *Id.* at 4-5. If Williams proves that Domino's proffered reasons for his termination are pretextual, it is permissible, though not required, for the ALJ to infer that his protected activity contributed to the termination. *Id.* at 5 (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993)).

²³ *Melton* was a 2-1 decision in which the dissenting member of the ARB argued in favor of a "tangible employment consequence" test under which a complainant must show that the employer took an action which had a substantive impact on the employee's compensation, terms, conditions, or privileges of employment. *Melton* at 9-12. There is no dispute in this case that a termination of employment qualifies as an adverse action under either the "materially adverse" or the "tangible employment consequence" test.

There is no direct or “smoking gun” evidence that Domino’s terminated Williams for his protected activity. However, there is substantial circumstantial evidence in the record which seriously undermines the credibility of Domino’s asserted legitimate reasons for terminating Williams. Initially, it is noted that Domino’s has provided multiple and shifting reasons for the termination decision -- failure to report the October 26, 2007 accident, failure to properly follow accident reporting procedures, and job abandonment -- which can support an inference that the asserted reasons for a challenged action are pretexts. *Schmitz v. St. Regis Paper Co.*, 811 F.2d 131, 132-133 (2d Cir.1987), *Vieques Air Link, Inc. v. United States Department of Labor*, 437 F.3d 102, 110 (1st Cir. 2006). Second, and more importantly, there is Hargan’s false testimony that Domino’s never found any written accident report completed by Williams, a claim that is contradicted by Lariviere’s admission at the unemployment hearing.²⁴ “The creation of a calculated subterfuge to support an adverse employment action supports an inference that the employer knew or recklessly ignored the fact that their real reason . . . was unlawful.” *Cross v. New York City Transit Authority*, 417 F.3d 241, 253 (2d Cir. 2005). Third, Domino’s has not shown that it has terminated other drivers for failure to completely follow all of the accident reporting requirements. That is, the comparator cases introduced by Domino’s are clearly distinguishable from Williams’ situation, as Hargan himself conceded, because those drivers made no effort whatsoever to report the accident and could fairly have been regarded as attempting concealment. In contrast, Williams reported his accident, albeit not in accordance with the manner specified in Domino’s accident reporting policy. And finally there is Hargan’s reference during the October 30, 2007 meeting to Williams’ call to the compliance hotline. While Hargan’s jibe that Williams should have been able to call the accident hotline since he knew to call the compliance hotline falls short of “smoking gun” evidence of retaliatory motivation, it is indicative of an element of hostility on Hargan’s part to Williams’ protected activity. The inference of hostility toward Williams’ protected activity is strengthened by the patently coercive manner in which Domino’s responded to his complaint to the compliance hotline. Instead of protecting Williams with confidentiality and an impartial inquiry into his complaint, Domino’s informed the local managers at the distribution center, who were clearly implicated by Williams’ complaint, and left any “investigation” to the accused -- a classic example of assigning the fox to solve a case of missing chickens. For all of these reasons, the ALJ concludes that Domino’s explanation that Williams was terminated for failure to report or properly report an accident is unworthy of credence. Since the record does not contain uncontroverted independent evidence that conclusively establishes the absence of any unlawful discrimination,²⁵ the ALJ infers from the falsity of these proffered reasons that Domino’s is “dissembling to cover up a discriminatory purpose . . . consistent with the general principle of evidence law that the factfinder is entitled to consider a party’s dishonesty about a material fact as “affirmative evidence of guilt.”” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) (quoting *Wright v. West*, 505 U.S. 277, 296 (1992)).²⁶ Accordingly, the ALJ

²⁴ Domino’s declined the ALJ’s offer of leave to reopen the record for submission of additional evidence in light of the decision to admit the transcript of the unemployment compensation hearing which contained Lariviere’s testimony.

²⁵ See discussion, *infra* at Section E, of Domino’s “job abandonment” justification.

²⁶ Although a relatively minor consideration, it is worthy of mention that the rather curious presentation of Williams’ accident report in the copy of the PeopleTime log entered into evidence, *see* RX 10 at 2 (where the

concludes that Williams has met his burden of proving by a preponderance of the evidence that his protected activity was a contributing factor in Domino's decision to terminate his employment.

E. Avoidance of Liability

Notwithstanding Williams' successful proof that his protected activity was a contributing cause of his termination, Domino's can avoid liability if it demonstrates by "clear and convincing" evidence that it would have terminated his employment in the absence of any protected activity. While there is no precise definition of what constitutes "clear and convincing evidence," the Secretary of Labor and Supreme Court have recognized that it is "a higher burden than 'preponderance of the evidence' but less than 'beyond a reasonable doubt.'" *Yule v. Burns International Security Service*, USDOL/OALJ Reporter (HTML) ALJ No. 93-ERA-12, slip op. at 4 (Sec'y May 24, 1995) (citing *Grogan v. Garner*, 498 U.S. 279, 282 (1991) and *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 n.11 (1991)).²⁷ Since two of Domino's justifications for the termination, failure to report an accident and failure to properly follow accident reporting procedures, have been rejected as unworthy of credence, Williams must prevail unless it is determined that the evidence clearly and convincingly demonstrates that he would have been terminated for job abandonment. Domino's has not made this demonstration. First of all, it is clear from Hargan's testimony that the decision had already been made to terminate Williams for failure to report an accident and / or failure to follow accident reporting procedures, and that job abandonment was an *ex post facto* gloss added by human resources. Further, there was no evidence introduced that other drivers have been terminated in circumstances comparable to this case, and the claim of job abandonment does not stand up in the face of the facts. Williams was told at the October 30, 2007 meeting that he was being suspended without pay pending completion of Hargan's investigation in the next few days and that Hargan would call him. It appears that Lariviere attempted to call Williams on October 31, 2007, but there is no evidence that he left a message. Lariviere did leave a message on November 2, 2007 which Williams promptly returned as soon as he arrived at his home in the early hours on November 5, 2007. While Williams can certainly be faulted for being less than clear to Hargan about his intentions when he said that he would be in Domino's offices at 2:00 p.m. the following day, his misfeasance in this regard is minor in comparison to Domino's bizarre claim that he abandoned his job. It is undisputed that Williams went to Domino's headquarters in Ann Arbor on November 6, 2006, that he informed at least two Domino's managers that he was there because he believed that he had been unlawfully disciplined in

accident report has been compressed into a barely legible half inch column with significant text clearly omitted), is consistent with a less than forthright effort to portray Williams in a negative light. That is, one might mistakenly conclude from looking at RX 10 that Williams really did try to conceal the accident by making a barely legible entry in the PeopleTime log. By making this observation, the ALJ is not faulting Domino's attorneys who appear to have conducted themselves in an entirely professional manner through this proceeding. Responsibility very likely lies with the client who prepared the misleading exhibit.

²⁷ Prior to the 2007 amendments to the STAA, an employer's burden to avoid liability in a "dual motive" case (*i.e.*, where a complainant proved that protected activity was a contributing factor, along with asserted legitimate reasons, in a challenged adverse action), was "to prove by a preponderance of the evidence" that it would have taken the challenged action in the absence of the protected activity. *See e.g.*, *Carter v. Marten Transport, Ltd.*, USDOL/OALJ Reporter (PDF) ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-63, slip op. at 13, 2008 WL 2624769*10 (ARB June 30, 2008).

retaliation for calling the compliance hotline, and that Domino's management at the East Granby distribution center was specifically informed on November 6, 2007 that Williams was at headquarters in Ann Arbor. Despite this knowledge of Williams' whereabouts, no one at Domino's ever instructed Williams to call the distribution center or otherwise indicated to him that his absence from the distribution center would be considered job abandonment. Instead, as Hargan testified, Williams had "not contacted me directly or anybody at the facility, so we were waiting our three days for [his] no-call / no-show, and when that happened we terminated [him] on that date, per policy." HT at 369. The ALJ finds that this testimony reveals that Domino's had no legitimate basis to believe that Williams had abandoned his job and that it decided to let Williams unwittingly stumble into an abandonment scenario that would provide cover for an unlawful termination action. Therefore, the ALJ concludes that Domino's has not demonstrated by clear and convincing evidence that it would have terminated Williams in the absence of his protected activity.

IV. Relief

A. Reinstatement

As a successful complainant under the STAA, Williams is entitled to an order requiring Domino's to reinstate him to his former position with the same pay, terms, and privileges of employment as there has been no showing that reinstatement would be impossible, impracticable, or cause irreparable animosity. 49 U.S.C.A. § 31105(b)(3)(A)(ii); *Carter v. Marten Transport, Ltd. (Carter)*, USDOL/OALJ Reporter ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-63, Slip op. at 14, (DOL Adm.Rev.Bd. June 30, 2008).

B. Back Pay and Interest

A successful STAA complainant is also entitled to an award of back pay, 49 U.S.C.A. § 31105(b)(3)(A)(iii), with pre-judgment and post-judgment interest. *Carter* at 14. Domino's opposes any award of back pay on the ground that Williams has not shown that he made a diligent effort to find work and mitigate his wage loss. Domino's Br. at 10-11. An STAA complainant has a duty to exercise reasonable diligence to attempt to mitigate back pay damages, but the employer bears the burden to prove that the complainant failed to mitigate. *Carter* at 14. Domino's can meet this burden by establishing that substantially equivalent positions were available to Williams and he failed to use reasonable diligence in attempting to secure such a position. *Id.* A "substantially equivalent position" provides the same promotional opportunities, compensation, job duties, working conditions, and status. *Dale v. Step 1 Stairworks (Dale)*, USDOL/OALJ Reporter (PDF) ARB No. 04-003, ALJ No. 02-STA-30, slip op. at 7, 2005 WL (DOL Adm.Rev.Bd. Mar. 31, 2005).

Arguably, Domino's has shown that Williams did not exercise consistent diligence in attempting to secure employment during the nine months that he was out of work following his unlawful termination. Although Williams testified that he unsuccessfully applied for several jobs, the record shows that he was not qualified for some of these jobs and that his availability for employment after December of 2007 was compromised by his mother's illness and his transiency between Michigan and Connecticut. In addition, there is no evidence that Williams

applied for any jobs in industries for which he is qualified by virtue of his past employment. When Williams did eventually apply for a job for which he was qualified at his present employer, he had no difficulty getting hired. However, Domino's has introduced no evidence that substantially equivalent employment was available to Williams. Therefore the record cannot support a finding that Domino's has met its burden with respect to establishing a failure to mitigate. *Johnson v. Roadway Express, Inc.*, USDOL/OALJ Reporter (HTML) ARB No. 99-111, ALJ No. 1999-STA-5, slip. op. at 13-15, 2000 WL 35593006*11-12 (DOL Adm.Rev.Bd. Mar. 29, 2000),

“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.” *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, USDOL/OALJ Reporter (PDF) ARB No. 04-014, ALJ No. 2003-STA-36, slip op. at 5, 2005 WL 1542547*4 (DOL Adm.Rev.Bd. June 30, 2005). Calculations of the amount due must be reasonable and supported by evidence, but they need not be rendered with “unrealistic exactitude.” *Cook v. Guardian Lubricants, Inc.*, USDOL/OALJ Reporter (HTML) ARB No. 97-005, ALJ No. 95-STA-43, slip op. at 14 n.12, 1997 WL 303980*8 (DOL Adm.Rev.Bd. May 30, 1997) (quoting *Pettway v. Am. Cast Iron Pipe Co., Inc.*, 494 F.2d 211, 260 (5th Cir. 1974)). Domino's introduced Williams' wage records which show gross earnings of \$52,120.47 for the period of January 29, 2007 to November 4, 2007. RX 16. Williams last day of work was October 27, 2007, so his earnings at Domino's covered 39 weeks which produces an average weekly wage of \$1,336.42. The wage records from Williams' current employment at CRST are incomplete, and they do not show his date of hire. RX 18. They are also somewhat cryptic and defy ready translation into an average wage. Consequently, the ALJ will rely on Williams' testimony that he has earned \$17.50 per hour since late August of 2008, working 35 hour weeks. This produces an average weekly wage of \$612.50 which will offset Domino's back pay liability after August 25, 2008. Therefore, Domino's is liable for back pay at the rate of \$1,336.42 per week for the period of October 31, 2007 to August 24, 2008, and at the rate of \$723.93 from August 25, 2008 through the date of a *bona fide* offer of reinstatement. Domino's will also be ordered to pay Williams interest on the back pay award which shall be calculated pursuant to 26 U.S.C.A. § 6621(a)(2) (West 2008). *Dale* at 8. The interest shall accrue, compounded quarterly, until Domino's pays the damages award. *Id.*

V. Recommended Order

Based on the foregoing findings of fact and conclusions of law, **IT IS RECOMMENDED** that the following order be issued:

1. Domino's Pizza shall reinstate Lavan Williams with the same seniority, status, and benefits he would have had but for his unlawful discrimination;
2. Domino's Pizza shall remit to Lavan Williams back pay at the rate of \$1,336.42 per week for the period of October 31, 2007 to August 24, 2008, and at the rate of \$723.93 from August 25, 2008 through the date of a *bona fide* offer of reinstatement;

3. Domino's Pizza shall pay Lavan Williams interest, calculated pursuant to 26 U.S.C.A. § 6621(a)(2) (West 2008), on the back pay awarded herein, and such interest shall continue to accrue with quarterly compounding until paid; and

4. Lavan Williams shall have 15 days from the date of this recommended decision and order to file an itemized application for litigation costs, and Domino's Pizza shall have ten days from service of the application to file any objection.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

NOTICE OF REVIEW

The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 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).