

U.S. Department of Labor

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Issue Date: 08 December 2009

Case No: 2009-STA-00061

In the Matter of:

CURTIS C. DICK,
Complainant

v.

J.B. HUNT TRANSPORT, INC.,
Respondent

APPEARANCES:
CURTIS C. DICK
Pro Se

KEVIN MULLEN, ESQ.
On behalf of Respondent

BEFORE: LARRY W. PRICE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (the STAA or the Act), 49 U.S.C. § 31105, and the implementing regulations at 29 C.F.R. Part 1978, brought by Curtis C. Dick (Complainant) against J.B. Hunt Transport, Inc., (Respondent). The STAA prohibits covered employers from discharging or otherwise discriminating against employees who engage in certain protected activities related to their terms or conditions of employment.

Complainant was employed as a truck driver by Respondent from October 2008 until he was terminated on March 31, 2009. On April 20, 2009, Complainant filed a complaint with the Department of Labor Occupational Health and Safety Administration (OSHA) alleging Respondent retaliated against him on March 31, 2009. Following an investigation by OSHA, Complainant's complaint was dismissed on June 16, 2009. On July 16, 2009, Complainant filed a notice of objection and a request for a formal hearing.

A formal hearing was held in Dallas, Texas, on September 23 and 24, 2009, where the Parties were afforded a full opportunity to present testimony and submit documentary evidence. Complainant's Exhibits (CX) 1-9, 11, 13-26, 28-31¹ and Respondent's Exhibits (RX) 2-38 were received into evidence.

ISSUE

Whether Respondent's suspension and termination of Complainant's employment violated 49 U.S.C. § 31105?

FINDINGS OF FACT

Based upon the hearing testimony and supporting evidence, I make the following findings of fact:

1. Respondent is a commercial motor carrier within the meaning of the Act. Complainant was employed by Respondent as a covered employee under the Act. [Tr. p. 30-31].
2. Complainant, Richard Doarn (Operations Manager), Mark Hanback (Regional Area Risk Manager/Safety Manager), and Todd Davis (HR Compliance Manager), testified at the formal hearing. Kevin Hartgrave (a Safety Representative in the Safety Casualty Claims Department), Terry Smith (a Claim's Specialist), and Regan Guest (a Claims Examiner), testified by deposition.
3. Complainant has been a professional truck driver since 1992. [Tr. p. 123]. Complainant began working for Respondent as a truck driver in October 2008. [Tr. p. 32, 122-23].
4. On October 16, 2008, Complainant received a verbal warning after cutting off another vehicle while changing lanes. [Tr. p. 176-77; RX 23].
5. In November 2008, Complainant verbally informed Janice Hamm, the Fleet Manager, and Doarn about a dark pick-up location in Brownwood, Texas. The pick-up location is on the lot of a private company that is one of Respondent's customers. [Tr. p. 33-34, 37]. As such, Doarn has no control over the dark pick-up location. [Tr. p. 187]. Both Doarn and Hanback testified that drivers are trained for dark situations, such as the one mentioned by Complainant. [Tr. p. 186, 411]. Respondent has a program called "GOL, Get Out And Look," and expects drivers to get out of the truck in dark situations and use flashlights or flashers to identify any sort of safety hazard. [Tr. p. 186]. Doarn testified that to his knowledge, Complainant never refused to deliver loads to this customer. [Tr. p. 187]. The dark pick-up location is one of the two allegedly safety-related complaints Complainant argues led to his suspension and termination. [Tr. p. 52-53].
6. On November 14, 2008, Hamm and Doarn suspended Complainant for violations occurring on November 10, 2008, which included a service failure, violation of hours of service (HOS), incorrectly parking a load, and choosing to ignore warnings on electronic logs. [Tr. p. 128, 178; CX 5; RX 24]. As a result, Complainant was suspended for three days for violating company policy. [CX 5; RX 24]. Complainant agreed that he did cause a service failure and that he did miscalculate his HOS. [Tr. p. 129-30]. Complainant also admitted to incorrectly doing his logs which in turn caused him to be unable to take some loads. [Tr. p. 48-51]. Although Complainant admitted to the service

¹ CX 1, 18, 19, and 25 were admitted into evidence for limited purposes. [Tr. p. 357-61].

failure and miscalculation of his hours, he did not agree that he should have been suspended. [Tr. p. 130]. However, Complainant later testified that his suspension was justified. [Tr. p. 593]. Doarn testified that the decision to suspend Complainant was appropriate due to the number of issues/violations on the form. [Tr. p. 182].

7. By letter dated November 16, 2008, Complainant responded to his suspension with a letter to Michael Brothers, a vice president within the company. [Tr. p. 140; CX 5; RX 8]. Complainant acknowledged that he did cause a service failure and that until that point he was unaware that he was not following the 70 hour rule correctly. [CX 5; RX 8]. This letter is the first time Complainant notes the dark pick-up location in Brownwood, Texas, in writing. [Tr. p. 137-38; CX 5; RX 8]. Complainant had previously complained verbally to Hamm and Doarn about the dark location. [Tr. p. 34-35, 137-38].
8. In an electronic message dated November 18, 2008, Complainant asked Hamm whether to stay on line three (the driving line) while loading in the rail yard, to which Hamm responded "all time spent in the rail yard is driving time." [Tr. p. 139-41; 539-40; CX 22; CX 31]. Complainant was in training at the time of this message and was learning how to use the electronic log. According to Doarn, Complainant was instructed that all time in the rail yard was to be on the drive line, unless dropping and hooking a load, which is why Complainant was confused by Hamm's message. [Tr. p. 242-43, 383-84].
9. Complainant testified that he also complained verbally to Hamm and Doarn about the way he was being told to fill out his log books. [Tr. p. 40-42, 47]. This complaint appears in written form for the first time in a letter to Brothers dated February 8, 2009. [CX 22]. When picking up and dropping off a load inside the yard, that time is supposed to be shown on line four, the "on duty not driving line," in accordance with DOT and Respondent's policy. [Tr. p. 41]. Complainant acknowledged that Respondent's policy was to "log it as you do it." [Tr. p. 541-42, 544, 550, 557; RX 29]. However, Complainant testified that he was told by Hamm and Doarn to log all the time spent inside the rail yard as driving time. [Tr. p. 42-45, 146-47, 541-42]. Complainant testified that the first time Doarn instructed him to "log it as you do it" was when he was suspended on February 3, 2009. [Tr. p. 541-42, 544, 550, 557; RX 29]. Doarn denied ever telling Complainant something other than "log it as you do it." [Tr. p. 554-55]. By completing the logs as Complainant alleges he was being told to do, he would have been permitted less driving time. [Tr. p. 43-44, 147-48, 211]. The log book issue is the second allegedly safety-related complaint Complainant argues led to his suspension and termination.
10. The electronic logs work to place drivers on the drive line when the driver goes over seven-tenths of a mile or twenty miles an hour. When a driver stops to do a "drop and hook," either the driver is automatically placed or the driver edits the log to place him on line four, the on-duty not driving line. [Tr. p. 231, 236]. For the paper logs, a driver is supposed to log a fifteen minute pre-trip drop and hook on line four. All other time inside the rail yard is drive time. [Tr. p. 239, 245]. Doarn testified that all drivers are trained to record all the time in the rail yard on the driving line, except when dropping and hooking a load, conducting a pre and post trip inspection of containers and trailers, and waiting in line to get in and out of the rail yard, which would be noted on line four. [Tr. p. 242-43, 245, 384-85]. The electronic logs are more accurate and help to prevent driver mistakes and/or falsifications. [Tr. p. 236, 243, 385]. Doarn testified that he never

- instructed Complainant to falsify his logs and to his knowledge, no other managers, including Hamm, instructed Complainant to falsify his logs. [Tr. p. 385].
11. On December 23, 2008, Complainant received a verbal warning for being idle. [Tr. p. 187; RX 25].
 12. On January 26, 2009, Complainant received a written warning after receiving another lane change complaint. [Tr. p. 189; RX 26; RX 27].
 13. On February 2, 2009, Complainant received a verbal warning after failing to timely deliver a load on January 30, 2009. [Tr. p. 192; RX 28].
 14. On February 3, 2009, Hamm and Doarn suspended Complainant for three days for violation of company policy, service failure, and log falsification. [Tr. p. 130, 194; CX 6; RX 29]. The incidents listed in the Driver Discipline Form included (1) arriving late for a pick-up and delivery resulting in a service failure charged against Respondent; (2) washing his truck in the wash bay in violation of company policy and failing to log such activity; (3) bringing a load to the wrong yard; and (4) failing to maintain proper estimated time of availability (ETA's). [Tr. p. 131; CX 6; RX 29]. Complainant testified that he did not believe he should have been suspended. [Tr. p. 130]. Doarn testified that Complainant's suspension was appropriate. [Tr. p. 196].
 15. Complainant testified that he called and spoke with Brothers on February 3, 2009, and wrote Brothers a letter in response to his suspension on February 6, 2009. [Tr. p. 535-37; CX 6].
 16. By letter dated February 8, 2009, Complainant wrote a letter to Brothers about the logging practice. [Tr. p. 46-47; CX 22]. This letter is the first time Complainant mentions the log book issue in writing. [Tr. p. 40-41, 139-42; CX 22] Specifically, Complainant wrote, "Just last week I was told by you that, that [sic] they were not clear of correct company [p]olicy on fueling procedures. Now it appears as if they are not clear of proper DOT Logging procedures . . ." [CX 22]. Complainant stated that he was told by Hamm that all time spent in the rail yard loading and unloading was to be logged as driving time. Complainant indicated he was not clear on this practice and asked Brothers to clarify the issue for him. [CX 22]. The company, however, had told Complainant previously to "log it as you do it," and Doarn instructed him to "log it as you do it" in writing on February 3, 2009. [Tr. p. 541-42, 544, 550, 557; RX 29]. The February 3, 2009, form signed by Hamm and Doarn stated: "Upon a review of the driver's logs on 1/30/2009 shows no 'on duty not driving' time during the time the driver was cleaning the truck in the wash bay. Drivers are instructed to log all activity as they do it. 'Log it as you do it.' [Complainant] has an electronic log in his truck which would allow him to log every minute of every day. [Complainant] elected not to log this per policy and DOT regulations . . ." [RX 29].
 17. On February 17, 2009, Complainant called the Safety Casualty Claims Department (Corporate Safety) located in Lowell, Arkansas, and spoke with Neil Hartgrave, one of the Safety Representatives. [Tr. p. 82-83, 148-49, 583; RX 9; RX 36, p. 4]. Safety maintenance records are kept of conversations with drivers. [RX 36, p. 6]. The information contained in the safety maintenance record between Hartgrave and Complainant was the information relayed by Complainant during the phone conversation. [RX 36, p. 10-12]. According to the safety maintenance record, Complainant complained of being treated unfairly by people within the company which in turn caused him mental unrest and distress. It was noted that Complainant was very upset and stated he did not

feel his psychological state was healthy, which was a direct result of the “treatment he has been receiving from his operations people for months now.” It was also noted that Complainant stated he wanted to seek treatment. Hartgrave informed Complainant he was not clear to drive at that time since he had stated he needed medical treatment, and Complainant informed him that his wife would pick him up instead. [RX 9]. Company policy is to immediately not clear a driver to be in the truck when the driver makes a statement that he/she wants to receive treatment until they are cleared by a doctor. [RX 36, p. 13-14]. It was Hartgrave’s decision alone, based on company policy, to not clear Complainant to drive. [RX 36, p. 19]. Hartgrave did not know Complainant previously and knew nothing of his alleged safety-related complaints. [RX 36, p. 19-21].

18. Complainant testified that he made the call to complain about how he was being treated. [Tr. p. 82-83, 148-49, 583]. According to Complainant, at some point in the conversation he informed the person on the phone, identified as Hartgrave, that he was going to have to use his day off and own money to go “talk to someone” and seek professional help, but that he never used the word “doctor,” “medical,” or “mental illness.” [Tr. p. 83, 149-51, 585-87]. Complainant also denied stating he was suffering from mental stress and stating that he needed someone to talk to and help him with his anger or stress. [Tr. p. 149-50, 585]. However, Complainant testified that he did state he needed to talk to someone other than his wife and other drivers. [Tr. p. 585]. Complainant’s intention was to try and make the company feel bad for not compensating him for having to talk to someone. [Tr. p. 84]. Complainant denied being told that he was not cleared to drive, but acknowledged that he was asked to have his wife pick him up. [Tr. p. 84-85, 151-52, 584]. Complainant testified that that night Brothers phoned him, but said nothing about trying to satisfy any of his complaints. [Tr. p. 85, 88, 90].
19. Terry Smith, a Claims Specialist in Respondent’s Lowell, Texas office testified to a safety maintenance record he completed during a phone conversation with Complainant on February 17, 2009. [RX 37, p. 6-9]. The information entered was based on the information given by Complainant. [RX 37, p. 10]. The record notes that Complainant called about his problems with his Fleet Manager and Operations Manager and wanted to know if his mental stress would be covered under Texas workers compensation. [RX 37, p. 11; Exhibit A]. Complainant also informed Smith that he had a doctor’s appointment the following day and Smith informed Complainant that “if he does see a doctor for any reason that his fleet manager and safety manager will require something from a doctor showing [Complainant] is able to drive.” [RX 37, p. 12; Exhibit A].
20. Doarn received the safety maintenance record thereafter and agreed with Hartgrave’s decision to “free” Complainant from the truck and placed him on personal medical leave. [Tr. p. 199]. He informed Complainant of the decision to place him on personal medical leave as of February 17, 2009, by letter that same date. The letter informed Complainant that he was being placed on personal medical leave for his statement to safety that he was suffering mental instability and was unable to complete his job functions. Complainant’s leave was for six weeks and a release from his attending physician was necessary to return to work. [Tr. p. 201-02; CX 14; RX 10].
21. Complainant met with Michael J. Stedham, LPC LMFT, on February 18, 2009. By letter the following day, Stedham informed Brothers of an initial evaluation attended by Complainant “regarding the high level of stress in . . . [Complainant’s] life due to several job related issues.” Stedham’s initial assessment was that Complainant was currently fit

- for duty, however, he also recommended that Complainant return for further sessions for a more in depth evaluation and therapeutic help on handling stress. [CX 15].
22. Regan Guest, a Claims Examiner in Respondent's Lowell, Arkansas office testified to a safety maintenance record she completed during a phone conversation with Complainant on February 18, 2009. [RX 38, p. 4, 7]. During the call, Complainant stated that he sought professional help regarding his stress and called to inform Respondent that he was working on getting it all figured out. Complainant asked about returning to work, and was told to follow up with his operations manager or safety manager. [RX 38, p. 11; Exhibit A]. Guest also informed Complainant that she did not have the ability to clear him to return to work. [RX 38, p. 12; Exhibit A]. Complainant denied making a call to anyone in the safety department on February 18, 2009, and testified that he called the switchboard and asked to speak with someone in Human Resources. [Tr. p. 579-80, 587-88]. Specifically, Complainant testified that he called someone in Human Resources on February 18, 2009, to complain about the phone call he received from Brothers the night before. [Tr. p. 91-92].
 23. Complainant testified that he received a phone call from Brothers on February 19, 2009, with Doarn, Hanback, and a woman from Human Resources on the line. [Tr. p. 94-95]. Complainant was informed that he needed a DOT physical and something from Stedham before he could return to work, and that as soon as he got the DOT physical done, he could drive again. [Tr. p. 95-96]. Complainant testified that he did not know that he was placed on leave until he received Doarn's letter on February 20, 2009. [Tr. p. 87, 103, 154, 581-82].
 24. To return to work following medical leave, Respondent's policy and DOT regulation require a release to be given "from a DOT qualifying physician, and must address the employee's ability to qualify as a driver per DOT regulation, 49 CFR Section 391.41 et. al, prior to returning to work as a driver." [Tr. p. 202; RX 6].
 25. By letter dated February 19, 2009, Complainant wrote Respondent's Human Resources Department about Doarn. [CX 29].
 26. Complainant stated that he picked up a letter from Stedham the following day, February 20, 2009, and brought it to Hamm. According to Complainant, Hamm refused to accept it and informed him that all she needed him to do was go get the physical done. [Tr. p. 97-98].
 27. Complainant then went to get his physical from the DOT qualified physician. Once he arrived to the physician's office, Complainant noticed a sticky note on the papers asking the office to call someone at the company first. [Tr. p. 98-99, 463-64]. Complainant assumed the physician was a company physician and that he and Respondent had come together to conspire against him, although Complainant admitted that "[a] DOT physical is a DOT physical, and it doesn't matter where you work." [Tr. p. 99-100]. Complainant left without seeing the DOT qualified physician or receiving his physical and therefore did not get his certification to go back to work. [Tr. p. 101]. Complainant then filed for unemployment benefits. [Tr. p. 102].
 28. After refusing the physical by a DOT qualified physician, Complainant never returned to undergo the physical in order to return to work before his employment was terminated. [Tr. p. 164].
 29. Complainant testified that he called Corporate Safety again on February 21, 2009. [Tr. p. 153, 589-90]. According to Complainant, this was the second time he called Corporate

- Safety, the first being on February 17, 2009. [Tr. p. 153, 589-90]. Complainant testified that the Corporate Safety representative at that time informed him that he would have to be cleared by one of his managers to return to work. [Tr. p. 153-54].
30. Complainant testified that he talked to Todd Davis on Monday, February 23, 2009, and informed him that he would not have problem going to a psychologist or psychiatrist. [Tr. p. 104, 109].
 31. By letter dated February 24, 2009, Kayla Elzey, Respondent's Benefits Service Representative, informed Complainant that although he did not qualify for the leave he requested, he did qualify for six weeks of unpaid personal medical leave. The letter informed Complainant that he needed medical certification to grant such time away from work and enclosed an "Attending Physician's Certification of Health Condition" form to be completed by Complainant's physician and returned to Respondent by March 10, 2009, in order for the leave to be approved. The letter made clear that failure to return the form by that date would result in denial of his leave and subject him to Respondent's time and attendance policy which could lead to termination of his employment. [Tr. p. 159; CX 24; RX 11; RX 35].
 32. By letter dated March 6, 2009, Dr. Andrew Minigutti, M.D., a board certified family doctor, stated that Complainant was seen by him on that date and that he was cleared to continue full work duty without restrictions. [CX 16].
 33. By letter dated March 7, 2009, Complainant informed Respondent's Group Benefits Department that he never requested any type of leave and that his Operations Manager placed him in this status under false and misleading statements. Complainant also informed that he has not had any condition or been under any treatment for any condition that would keep him from working, and enclosed Doarn's letter dated February 17, 2009, Stedham's letter dated February 19, 2009, and Dr. Minigutti's clearance letter dated March 6, 2009. [RX 12].
 34. By letter dated March 9, 2009, Complainant forwarded to Doarn the letters from Stedham and Dr. Minigutti, dated February 19, 2009 and March 6, 2009, respectively. [Tr. p. 66; CX 13; RX 13]. Doarn testified that the physicians Complainant had seen were not DOT certified and could not have put Complainant through the DOT qualifying certification process and thereby clear Complainant to return to work. [Tr. p. 204-05].
 35. Doarn sent an email to Davis on March 13, 2009, in order to make sure he was following company policy and procedure with regard to getting Complainant recertified back to work. [Tr. p. 205-06; RX 14]. Complainant had to either qualify his need for family medical leave or get his recertification physical and return to work. [Tr. p. 466-67; RX 14].
 36. By letter dated March 13, 2009, Elzey informed Complainant that Respondent had not received Complainant's "Preliminary Leave Designation Packet," provided by Complainant's supervisor, or the "Attending Physician's Certification of Health Condition," provided in the February 24, 2009 letter. The current letter enclosed another copy of the form to be completed by Complainant's physician and informed Complainant that it must be returned before March 28, 2009, in order for Complainant to remain off from work. Complainant was also informed that if the documentation was not received by that date, his leave would be denied and his employment with Respondent would be terminated. [CX 24; RX 15].

37. By letter dated March 13, 2009, Complainant wrote Kirk Thompson, Respondent's President-CEO. [Tr. p. 55-56; CX 9].
38. By letter dated March 18, 2009, Elzey enclosed another "Attending Physician's Certification of Health Condition" form to be completed by Complainant's physician in order to have his leave approved. Complainant was informed that if the form was not received his leave would be denied and a request would be made for his termination of employment as of February 17, 2009, the date he was placed on medical leave. [Tr. p. 159; CX 24; RX 16; RX 35].
39. On March 27, 2009, Complainant faxed Doarn a form completed by Dr. Minigutti indicating that Complainant did not have any serious medical condition and was able to perform work of any kind without limitations. [Tr. p. 207; CX 17; RX 17].
40. By letter dated March 31, 2009, Elzey informed Complainant that if he is unable to return to work his employment would be terminated. [CX 24; RX 18].
41. By email dated March 31, 2009, Elzey informed Billy Holcomb, the current Fleet Manager, that Complainant's maximum leave time had expired and asked him to enter a termination of Complainant's employment. [Tr. p. 209; RX 19]. Neither Doarn nor the Fleet Manager had the authority to determine whether a driver could return to work after being placed on medical leave or the authority to overrule the decision in the email, as Respondent's leave policies are universally applied to every employee to ensure fairness. [Tr. p. 210, 469]. Doarn testified that he has no doubts that Complainant's termination was justified due to his failure to follow company policy by not getting a DOT physical recertification. [Tr. p. 210]. Doarn and Davis testified that Complainant was not terminated because of any safety-related complaints. [Tr. p. 172-73, 453-54, 460-61].
42. Hanback corroborated Doarn's testimony that a driver is required to be recertified by a DOT qualifying physician in order to return to work after being on leave for any period of time. [Tr. p. 406-07; RX 6]. Specifically, Complainant needed to (1) provide Respondent with a release from a treating physician that says he can drive, load, and unload without restrictions, and (2) go to the clinic and be recertified by a DOT qualified physician. [Tr. p. 414]. Whether a driver could return to work or not would be based on the releases from both these physicians. [Tr. p. 416]. Hanback also testified that Complainant's two complaints were not safety-related issues. [Tr. p. 410-12].
43. Davis corroborated the testimony of Doarn and Hanback regarding the necessity of a release from a DOT qualifying physician prior to a driver returning to work following medical leave. [Tr. p. 458; RX 6]. Davis discussed Complainant's options with him multiple times and asked Complainant to return and get the DOT physical, but Complainant refused and at one point stated he was "pleading the fifth." [Tr. p. 463-65, 470, 508-09]. Davis also had a call with Complainant and an EOC representative, who asked Davis if it was possible for Respondent to make an exception to its policies and procedures and allow Complainant to return to work without having to take the DOT recertification physical, to which Davis informed her that he could not allow an exception as he was bound by DOT regulations. [Tr. p. 465-66].
44. Complainant's last day of work was March 31, 2009. [Tr. p. 115-16]. Complainant argues that if he had not made the two alleged safety-related complaints he would not have been suspended or terminated by Respondent. [Tr. p. 121, 133, 135, 165]. Complainant admits that his first suspension in November 2008 was justified, but argues that the second one in February 2009 was in retaliation. [Tr. p. 593].

45. On June 5, 2009, Dr. Chris Chumley, M.D., completed a Medical Examination Report for Commercial Driver Fitness Determination. Dr. Chumley found that Complainant met the standards in 49 C.F.R. Section 391.41 and qualified for a two year certificate. [CX 25]. Complainant testified that he began working for a new employer on June 14, 2009. [Tr. p. 116]. There is no evidence of if or when Respondent was made aware of Dr. Chumley's report.
46. I find Doarn, Hanback, and Davis to be credible in their explanation of events that led to Complainant's suspension and termination.

LAW AND CONTENTIONS

The STAA was established "to 'promote the safe operation of commercial motor vehicles,' 'to minimize dangers to the health of operators of commercial motor vehicles,' and 'to ensure increased compliance with traffic laws and with . . . commercial motor vehicle safety and health regulations and standards.'"² To achieve its stated purpose, the STAA protects all employees of commercial motor vehicle carriers from discharge, discipline, or discrimination for (A) filing a complaint about commercial motor vehicle safety or testifying in a proceeding on safety (the "Complaint Clause") or (B) refusing to operate a commercial motor vehicle when operation would violate a Federal safety rule or when the employee reasonably believes it would result in serious injury to himself or others (the "Refusal to Drive Clause").³

To prevail on a claim under Section 31105(a)(1), a complainant must establish a *prima facie* case that (1) he engaged in protected activity under the STAA; (2) he was subject to an adverse employment action; and (3) there was a causal link between his protected activity and the adverse action of his employer.⁴ The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action.⁵ Once the employer rebuts the presumption of discrimination, it "drops from the case . . ."⁶ The burden then shifts back to the complainant to prove by a preponderance of the evidence that the proffered reason is a pretext and that the real reason for the adverse action was retaliation for his protected activity.⁷ While a *pro se* complainant may be held to a lesser standard than legal counsel in procedural matters, the burden of proving the elements necessary to sustain a claim of discrimination is no less.⁸

In cases fully tried on the merits, consideration of whether a complainant met the preliminary requirements of establishing a *prima facie* case is unnecessary.⁹ "Rather, the

² Calhoun v. U.S. Dep't of Labor, 576 F.3d 201, 208 (4th Cir. 2009) (quoting 49 U.S.C. § 31131(a) (2006)).

³ See 49 U.S.C. § 31105(a). Section 31105(a)(1)(A) is commonly referred to as the "Complaint Clause" and Section 31105(a)(1)(B) is commonly referred to as the "Refusal to Drive Clause." See Calhoun, 576 F.3d at 208.

⁴ Moon v. Transp. Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987); see also Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); Wrighten v. Metro. Hosps., Inc., 726 F.2d 1346, 1354 (9th Cir. 1984).

⁵ Burdine, 450 U.S. at 254; Calhoun, 576 F.3d at 209.

⁶ Burdine, 450 U.S. at 255 n.10.

⁷ See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Calhoun v. Dep't of Labor, 576 F.3d 201, 209 (4th Cir. 2009); Nolan v. AC Express, 92-STA-37 (Sec'y Jan. 17, 1995).

⁸ See Flener v. H.K. Cupp, Inc., 90-STA-42 (Sec'y Oct. 10, 1991).

⁹ See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-14 (1983); Johnson v. Roadway Express, Inc., ARB No. 99-011, ALJ No. 1999-STA-5, slip op. at 7 n.11 (ARB Mar. 29, 2000); Frechin v. Yellow Freight Sys., Inc., ARB No. 97-147, ALJ No. 1996-STA-34, slip op. at 2 (ARB Jan. 13, 1998); Pike v. Pub. Storage Companies, Inc., ARB No. 99-072, ALJ No. 1998-STA-35, slip op. at 2 (ARB Aug. 10, 1999).

relevant inquiry is whether [the complainant] established, by a preponderance of the evidence, that the reason for his discharge was his protected safety complaints.”¹⁰

As discussed below, the Court finds that Complainant has failed to establish that he engaged in protected activity and/or that Respondent terminated his employment in violation of the employee protection provisions of the STAA.

Complaint Clause

As Complainant did not refuse to operate his vehicle, his claim falls under the “Complaint Clause” of Section 31105(a)(1). The “Complaint Clause” protects from retaliation an employee who “has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order”¹¹ Internal safety complaints to managers, whether written or oral, satisfy the complaint requirement and constitute protected activity under the STAA.¹² To qualify for protection, however, “a complaint must be based on a ‘reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation.’”¹³ For reasons discussed below, I find that both of Complainant’s “complaints” did not relate to an actual violation of a Federal Motor Carrier Safety Regulation (FMCSR).

Complaint argues that he made a protected complaint in November 2008 when he verbally told Hamm and Doarn about the dark pick-up location. However, I do not find that this was a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order. At the formal hearing, Complainant could not point to a commercial motor vehicle safety regulation that Respondent was violating. [Tr. p. 143-45]. Furthermore, Complainant was adequately trained to handle dark locations like the one in Brownwood, Texas. Given the training and “Get Out And Look” program provided for drivers, I do not find that Complainant can demonstrate a “reasonable belief” that Respondent was engaging in a violation of a motor vehicle safety regulation. Thus, Complainant’s complaint to Hamm and Doarn did not involve a concern about a violation of a specific safety regulation, nor did it concern conduct that was reasonably necessary to satisfy Complainant about the safe operating condition of his truck. Therefore, Complainant’s complaints about the dark pick-up location do not amount to protected activity.

Complainant also argues that he made a protected complaint when he verbally told Hamm and Doarn that he was being instructed to inaccurately fill out his log books. Although Complainant’s refusal to falsify his log books would be a protected activity,¹⁴ I find that a preponderance of the evidence establishes that this is not a case where Complainant was being

¹⁰ Pike v. Pub. Storage Companies, Inc., ARB No. 99-072, ALJ No. 1998-STA-35, slip op. at 2 (ARB Aug. 10, 1999).

¹¹ 49 U.S.C. § 31105(a)(1)(A).

¹² See Calhoun v. U.S. Dep’t of Labor, 576 F.3d 201, 212 (4th Cir. 2009); Nolan v. AC Express, 92-STA-37 (Sec’y Jan. 17, 1995).

¹³ Calhoun, 576 F.3d at 212 (quoting Dutkiewicz v. Clean Harbors Env’tl. Servs., Inc., ARB No. 97-090, ALJ No. 1995-STA-34 (ARB Aug. 8, 1997), *aff’d sub nom.* Clean Harbors Env’tl. Servs., Inc. v. Herman, 146 F.3d 12 (1st Cir. 1998)).

¹⁴ See 49 C.F.R. Part 395.3; 49 C.F.R. Part 395.8.

told to falsify his log books. Rather, Complainant was instructed numerous times to “log it as you do it,” per Respondent’s policy. Complainant acknowledged that he knew this was Respondent’s policy. As Doarn testified, Respondent was trying to have Complainant complete his log books to match the new, more accurate, computerized logging system. Therefore, I do not find that Complainant engaged in any protected activity because he has failed to show that he was refusing to falsify his log books. The credible testimony of Doarn and evidence establish that Complainant was instead refusing to complete them correctly.

Causation

Even if Complainant could have shown that he engaged in protected activity, he would not have been able to show that his alleged safety complaints motivated Respondent to take any adverse action against him.

Complainant alleges two adverse actions were taken against him – his suspension on February 3, 2009 and his termination on March 31, 2009.¹⁵ A causal connection between the protected activity and the adverse employment action may be circumstantially established by showing that the employer was aware of the protected activity and that adverse action followed closely thereafter.¹⁶ However, when other, contradictory evidence is present, inferring a causal relationship solely from temporal proximity may be illogical.¹⁷ Such contradictory evidence could include evidence of intervening events or of legitimate, nondiscriminatory reasons for the adverse actions.¹⁸

In the present case, Complainant first made his allegedly safety-related complaints in November 2008, and was suspended February 3, 2009. While this timeframe is short, Complainant had received some sort of discipline from Respondent, either in the form of a verbal or written warning or a suspension, five times between October 2008 and February 3, 2009. After his suspension in November, Complainant was twice warned that future violations would result in suspension. [RX 24; RX 28]. Doarn also testified that Complainant’s suspension was appropriate given the number of previous violations. I agree that Respondent was justified in its suspension of Complainant in light of the numerous infractions noted against him and therefore find that the record overwhelmingly establishes that Complainant was suspended for his recorded insubordination and not for his allegedly protected complaints.

The second adverse action, Complainant’s termination, was also justified for his failure to see a DOT qualified physician in accord with Respondent’s leave policy and DOT regulation. Specifically, I find that Complainant was terminated not in retaliation, but because he was medically disqualified from driving and knowingly refused Respondent’s attempt to have him recertified. The overwhelming weight of the evidence supports this conclusion.

¹⁵ Claimant was also suspended on November 14, 2009, but admitted that the suspension was justified. [Tr. p. 317, 593].

¹⁶ See *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

¹⁷ *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR- 19, slip op. at 6 (ARB Apr. 28, 2006).

¹⁸ *Id.*

First, the event that led to Complainant's termination was not put into motion by Hamm, Doarn, or Brothers, those who knew of Complainant's complaints. Rather, Hartgrave, a corporate safety representative in Arkansas, removed Complainant from his truck after Complainant called obviously upset and stating he needed to seek professional help. Hartgrave did not know Complainant previously and knew nothing of his alleged safety-related complaints. [RX 36, p. 19-21].

Second, removing Complainant from his truck and requiring a release from his physician and a DOT qualified physician in order to drive again was in accord with Respondent's policy and the implementing regulations, which provide that a person can only operate a commercial motor vehicle if "medically certified as physically qualified to do so . . ." ¹⁹ "A person is physically qualified to drive a commercial motor vehicle if that person . . . [h]as no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his/her ability to drive a commercial motor vehicle safely . . ." ²⁰ Complainant complained of mental unrest and distress and stated he did not feel his psychological state was healthy, and attributed these issues with the treatment he was receiving from "operations people." [Tr. p. 82-83, 148-51, 583-87; RX 36; RX 9]. After hearing the statements made by Complainant, Respondent had good reason to believe that Complainant had a mental disease or psychiatric disorder which could interfere with his ability to drive a commercial motor vehicle.

Moreover, Complainant was informed by Respondent on numerous occasions that he could return to work as soon as he had a physical from a DOT qualified physician. [Tr. p. 96]. Despite this knowledge, Complainant refused to see the DOT qualified physician and was ultimately terminated by Respondent following the expiration of his leave time. Doarn had no say in whether or not Complainant could return to work after being placed on leave, and the decision to terminate Complainant after his leave expired was company policy universally applied to all employees. [Tr. p. 210, 469]. Based on the foregoing, the evidence before the Court overwhelmingly supports Respondent's argument that Complainant's termination was justified due to his failure to see a DOT qualified physician for recertification, per company policy and DOT regulation. Complainant has failed to show that Respondent's proffered legitimate, nondiscriminatory reason for his termination was pretext for discrimination.

I find that the preponderance of the evidence establishes that Respondent had a legitimate nondiscriminatory reason for suspending and terminating Complainant. I find that Complainant has not established by a preponderance of the evidence that he was suspended and terminated as retribution for his raising concerns about alleged safety-related issues. Accordingly, I recommend that the Secretary enter the following order pursuant to 29 C.F.R. § 1978.109(c)(4).

¹⁹ 49 C.F.R. Part 391.41(a)(1)(i).

²⁰ 49 C.F.R. Part 391.41(b)(9).

ORDER

Based on the foregoing findings of fact, conclusions of law, and upon the entire record, the complaint of Curtis C. Dick is **DENIED**.

So ORDERED.

A

**LARRY W. PRICE
ADMINISTRATIVE LAW JUDGE**