



Issue Date: 01 June 2009

CASE NO.: 2009-STA-00024

*In the Matter of:*

DUANE HALGRIMSON,  
Complainant,

vs.

CONTRACT TRANSPORTATION SERVICES,  
Respondent.

**RECOMMENDED DECISION AND ORDER GRANTING SUMMARY DECISION**

**Introduction and Procedural History**

This case arises under the employee protection or “whistleblower” provision of the Surface Transportation Assistance Act (“the Act”), 49 U.S.C. §31105, as amended 2007. Complainant is a former employee of Respondent. On January 23, 2009, he filed a complaint with the Occupational Safety and Health Administration alleging that Respondent wrongfully terminated his employment after he was involved in an accident in which he was not at fault. On February 6, 2009, OSHA dismissed the complaint, finding Complainant did not engage in protected activity. On February 23, 2009, Complainant timely requested a hearing before an administrative law judge. Complainant represents himself; Respondent is represented by counsel of record.

Respondent moves for summary decision on the grounds that: (1) Complainant’s OSHA complaint was untimely; and (2) Complainant did not engage in protected activity.<sup>1</sup> Complainant opposes the motion. He also asserts arguments that bring into question this Office’s jurisdiction.

The parties fully briefed the motion.<sup>2</sup> Having considered the affidavits, exhibits, and arguments of the parties and being fully informed, I will grant the motion.

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<sup>1</sup> OSHA did not address the timeliness of Complainant’s complaint.

<sup>2</sup> As a general matter, replies and surreplies are not allowed without permission from the administrative law judge. Here, Respondent filed a reply and Complainant filed a surreply without leave. Nonetheless, I will consider the arguments and evidence presented in each.

## Parties

Respondent identifies itself alternatively as “Contract Transportation Services” or “Sherwin-Williams Company.” For example, Respondent offers the affidavit of Christy Carter, in which Carter asserts that she is the “Human Resources Manager for Respondent Contract Transportation Services.” She authenticates and identifies a letter she sent to Complainant to terminate his employment. Aff. Carter. ¶8. The letter is written on Sherwin-Williams letterhead. It states that the employment being terminated is “with Sherwin-Williams Company.” Aff. Carter, Exh. B. Carter’s signature block does not identify her as “Human Resources Manager,” her title with Contract Transportation Services; it gives as her title: “Human Resource Generalist, Sierra, NV DSC.” *Id.* Ms. Carter also identifies a portion of the employee manual that she asserts applied to Complainant’s employment. *Id.* ¶6. She refers to it as a section of “the CTS Supplement to the Employees Manual.” *Id.* Apparently the employee manual to which this is a supplement is Sherwin-Williams’ manual – the document attached is entitled: “Sherwin Williams: Covering the West with the Best, CTS Supplement to the Employees Manual.” Aff. Carter, Exh. B. Complainant also refers to Sherwin-Williams as well as CTS as his employer. He states in his affidavit, for example, “While working for Sherwin Williams/CTS I have never been instructed to operate a forklift.” Aff. Comp. ¶3. I will therefore conclude that, for purposes of this Decision only, both entities jointly employed Complainant and terminated him from employment.<sup>3</sup>

## Issues To Be Decided

1. Respondent terminated Claimant’s employment in connection with a motor vehicle accident that occurred on the Walker River Indian Reservation. If this was Indian tribal land, does the Act apply, or does this situs deprive this Office of jurisdiction?
2. Complainant received notice of his termination from employment on June 18, 2008 and filed his OSHA complaint on January 23, 2009, more than a month past the 180-day filing deadline. Is the claim time-barred, or do any circumstances give rise to equitable tolling of the statute of limitations?
3. Complainant offers evidence that Respondent terminated his employment to avoid any penalties that various governmental agencies might impose as well as any other financial exposure. He contends that he was terminated from employment before he knew about Respondent’s purposes and therefore could not complain about the conduct before his termination. Does this satisfy the Act’s requirement that Complainant engage in activity protected under the Act, such as complaining about unsafe conditions or refusing to operate a vehicle for safety reasons?

I will find that:

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<sup>3</sup> It is entirely possible that CTS is a subsidiary of Sherwin-Williams and that CTS was Complainant’s sole employer. But for purposes of this Decision the result is the same regardless of whether the two companies were joint employers or CTS was the sole employer. I see no point to delaying a decision and requiring supplemental briefing.

1. This forum has jurisdiction to hear and decide this claim. Congress authorized the Secretary of Labor to conduct hearings and decide whistleblower cases under the Act. The Act covers both Complainant and Respondent, and the alleged misconduct of which Complainant complains (the retaliatory termination decision) occurred within the United States and not on an Indian reservation.
2. Complainant's OSHA complaint was late-filed. Complainant failed to show an adequate basis for equitable tolling, and his claim is time-barred.
3. Complainant did not engage in protected activity. It is unclear if he made any complaint other than this presently pending whistleblower claim. To the extent he did, it was not until *after* the termination, which means the termination could not have been in retaliation for the complaint. The absence of protected activity forecloses Complainant's claim.

### **Undisputed Facts<sup>4</sup>**

For purposes of this motion, the parties agree to the following basic facts:

- Respondent maintains a place of business in Reno, Nevada.
- Respondent operates vehicles with weight ratings over 10,001 pounds and that affect interstate commerce.
- At the relevant times, Respondent employed Complainant as a truck driver.
- Complainant drove Respondent's vehicles over highways in interstate commerce, which directly affected commercial vehicle safety.
- The motor vehicle accident at issue occurred on the Walker River Indian Reservation on June 13, 2008, when the tractor and trailer that Complainant was operating overturned. *Id.*

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<sup>4</sup> In support of its motion, Respondent provided the affidavit of Christy Carter (Aff. Carter), with a portion of the Company's employee manual attached as Exhibit A and the termination letter sent to Complainant as Exhibit B; the affidavit of David N. Inwood (Aff. Inwood), with Complainant's accident report attached as Exhibit A and a portion of the Driver Accident Review form attached as Exhibit B; and the affidavit of Michael Schreurs (Aff. Schreurs). In his opposition, Complainant provided his own affidavit (Aff. Comp.), as well as a dismissed ticket from the accident as Exhibit 1 and another portion of the employee manual as Exhibit 2.

Claimant objects that a document to which he refers as "Attachment E" includes what purports to be corrections based on statements he made. He asserts that he signed the document before the corrections were written in. Aff. Comp., ¶18. He says that his "answer" is "on top of the line, but not the added on part beneath the line." *Id.*

Complainant apparently refers to Affidavit of Inwood, Exhibit B. That document is entitled, "'Attachment E' DRIVER ACCIDENT REVIEW." By "on top of the line" and "beneath the line," Complainant appears to refer to the answer to Question 1: "What does he feel he did wrong that caused the accident?" I conclude this because no other answer is written both above and below the line. The portion above the line is: "Shouldn't have taken the load." The portion written below the line is: "Unsecured, unable to secure load." Respondent did not address the objection in its reply. To the extent that the language "below the line" purports to be a record of Complainant's oral statement to Inwood, I sustain the objection as double hearsay; otherwise the objection is overruled.

There were no other evidentiary objections, and I admit the remaining exhibits.

- On June 18, 2008, Complainant received a letter from Respondent terminating his employment. Aff. Comp. ¶19. The letter, dated June 17, 2008, states: “This letter will serve as official notice of termination of your employment with Sherwin-Williams Company effective 6/17/2008,” and is signed by Christy Carter, Human Resource Generalist. Aff. of Carter, Exhibit B.
- Complainant filed a complaint under the Act with OSHA on January 23, 2009 by voicemail. On February 3, 2009, OSHA issued findings and concluded that Complainant did not engage in protected activity.
- On February 17, 2009, Complainant filed objections and requested a hearing before an administrative law judge. The Chief Administrative Law Judge received the filing on February 23, 2009. The objections and request for hearing were timely.

The record further demonstrates that the following (seen in the light most favorable to Complainant) is undisputed:

On June 12, 2008, Complainant arrived at Sherwin-Williams’ paint plant in Victorville, California after the plant had shut down for the day. Aff. Comp. ¶1. There were two loaded trailers with shipping documents, both bound for Reno, Nevada. *Id.* ¶2. Complainant selected a trailer with “plastic totes,” which were loaded down the center of the trailer and weighed about 4,000 pounds each. *Id.* ¶3. The trailer appeared to be old and lacked the usual fittings for securing the particular kind of load involved. *Id.* ¶4. Complainant was unsure how to secure the load and did what he had done successfully before with “steel caged totes.” *Id.* ¶5. With no one around, Complainant drove off with the trailer.<sup>5</sup> *Id.* After driving without incident, he stopped for the night. *Id.*

The following morning Complainant checked the load and found nothing had moved. *Id.* He drove off. *Id.* Around noon, when he was making a turn on the Walker River Indian Reservation, the left wheels lifted off the ground. Aff. Comp. *Id.* ¶6. Complainant brought the truck to a stop in or along the road, and the wheels slowly came down. *Id.* He drove to a place where he could stop and inspect the load. *Id.* ¶7. The trailer and truck were leaning “extremely to the right,” with the left tires “barely touching the pavement.” *Id.* Looking into the trailer, he discovered that all the totes had moved to the right. *Id.* Being on the right side of the road with the roadbed tapering to the right, with the freight all having moved onto the right side, and with the onboard fuel transferring to the right (and weighing about 1,000 pounds), Complainant was concerned that the vehicle would overturn even while stopped. *Id.* Moving off onto the shoulder would only worsen the situation because of the increased taper of the roadbed, which would increase the fuel’s shift to the right. *Id.* Poor cell phone reception made it difficult for Complainant to call anyone for advice. Aff. Inwood, Exh. A. It appears that Complainant considered it unsafe to move across the opposing flow of traffic on the left to stop on the left shoulder, where the roadbed would taper in a helpful direction.

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<sup>5</sup> The record is silent as to whether Complainant contacted or attempted to contact anyone by telephone to seek advice.

Instead, Complainant drove slowly until he found a road off the highway with no sign of traffic for miles. He drove onto the road, crossed onto the left side, and stopped the truck. The left-leaning taper of the roadbed helped balance the load, but even so, the truck continued to list to the right. *Aff. Comp. Id.* ¶8.

Complainant hoped that if he drove slowly, the fuel would continue to shift back to the left, and at least one of the paint pallets would shift back to the left, bringing the trailer into balance. *Id.* Traveling at about two or three miles per hour, in two or three seconds there was a “loud bang.” *Id.* The truck had turned over onto its left side. *Id.* As it turned out, all the paint had shifted to the left at once, throwing the trailer completely off balance. *Id.*

It took Complainant ten minutes to extricate himself from the tractor, which also had fallen over onto its left side. Given the poor cell phone reception, he managed only with considerable difficulty to reach two Company managers. *Id.* ¶¶9, 10. Local tribal police and Nevada Highway Patrol officers arrived. *Id.* ¶11. A tribal police officer cited Complainant for driving left of center and failing to maintain lane. *Comp. reply brief/aff., Exh. 1.* The citation was subsequently dismissed. *Id.* ¶1.

When a Sherwin-Williams manager arrived at the accident scene, he and Complainant took photographs. *Aff. Comp.* ¶12. The manager discussed with a tow truck operator uprighting the vehicle and cleaning the area. *Id.* ¶13. The manager then drove Complainant to a Sherwin-Williams facility in Fernley, Nevada for a transfer to Stead, Nevada, where he could get drug tested. *Id.* at 14.

Respondent’s Safety Coordinator David Inwood met Complainant at Stead. *Aff. Inwood* ¶2; *Aff. Comp.* ¶16. Complainant gave Inwood the camera and took the drug test. *Id.* Inwood drove Complainant to his car, which had been parked in Sparks, Nevada. *Id.*

Respondent’s employee manual provides that in the event of an accident, a “progressive system” will be applied. *Comp’s reply brief/aff, Exh. 2.*<sup>6</sup> Central to the system is a determination whether the accident was “chargeable,” apparently meaning it was “preventable” or “caused” by the driver. *Id.*

The process begins with a three-step investigation into “chargeability.” *Id.* The steps are:

1. Initial determination of chargeability to be made immediately between the Traffic Manager and Safety Coordinator.
2. Safety will issue a Notice of Investigation letter immediately to the driver.
3. If chargeability cannot be immediately determined, notification to the driver and CTS management will follow investigation of the accident.

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<sup>6</sup> Respondent submitted page 14 of the employee manual as a one-page excerpt. *Aff. Carter, Exh. A.* Complainant supplemented with page 13 of the manual, which he attached to his verified reply brief as Exhibit 2.

*Id.*<sup>7</sup>

Discipline for chargeable accidents depends on: (1) whether there was a fatality; (2) whether the accident is reportable under Department of Transportation regulations; (3) the driver's accident record over the past twelve months; and (4) the financial extent of property damage. *Id.* "Corrective action" for chargeable accidents not involving a fatality but with property damage exceeding \$4,500 is set at "Probation And/or Termination." *Id.*

As part of his investigation, Safety Coordinator Inwood visited the accident site and obtained photographs. He determined there were no witnesses to interview. On June 16, 2008, he interviewed Complainant. *Id.* ¶18. He told Complainant that he'd failed to secure the load properly. *Id.* Complainant offered an explanation and excuses. *Id.* He filled out a "Driver's Report of Accident Scene," in which he set out the circumstances surrounding the accident. *Aff. Inwood* ¶4, Exh. A. The statement is generally consistent with (although less detailed than) the history recited above. Inwood asked Complainant if he felt he'd done anything wrong; Complainant answered that he'd picked the wrong truck because the other truck hadn't been loaded with plastic totes. *Id.* Inwood completed a "Driver Accident Review" form, which he discussed with Complainant. *Id.* Exh. B. Complainant asked if he were being fired; Inwood told him that he had not been fired and that the Company would notify him. *Id.*

Based on the information he'd gathered, Inwood determined that this was an avoidable accident (and thus chargeable to Complainant). *Aff. Inwood* ¶¶6, 7. Throughout the course of this matter, including the investigation and determination of chargeability, Inwood was unaware of any complaint from Complainant, including any complaint related to safety. *Id.* ¶7.

The record is unclear on who decided to terminate the employment. Operations Manger Mike Schreurs stated in an affidavit that the reason for the termination was that the total amount of property damage exceeded \$50,000, that damages exceeding \$4,500 are cause for probation or termination under Company policy, and that "based on the high dollar amount of the loss and the fact that this was a preventable accident, CTS terminated [Complainant's] employment." *Id.* ¶¶4, 5. As did Inwood, Schreurs stated that he was not aware of any complaint, including safety complaints, which Complainant made before his termination from employment. *Id.* ¶7. He also stated in conclusory form: "[Complainant's] termination was based solely on the June 13, 2008 accident." *Id.* Schreurs later told Complainant that he should not have accepted a load if not properly secured and further that Complainant also was at fault for attempting to redistribute the load. At that time Complainant agreed. *Id.* ¶6.

Although the participants and their process is not revealed on the record, the Company decided to terminate the employment. Human Resources manager Christy Carter sent Complainant notice of the termination in a letter dated June 17, 2008, which Complainant received on June 18, 2008. *Aff. Comp.* ¶19; *Aff. Carter* ¶8, Exh. B. The letter unequivocally states: "This letter will serve as official notice of termination of your employment with Sherwin-Williams Company effective 6/17/2008." As with the other managers, Carter stated in her affidavit that she was unaware of any complaint, including any safety complaint, which Complainant made before the

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<sup>7</sup> For non-probationary employees, an accident "automatically" is chargeable if a ticket or citation is issued. *Aff. Carter*, Exh. A. Although tribal authorities cited Complainant for the accident, Respondent found the accident chargeable to Complainant for other reasons. Perhaps this is because the citation was dismissed.

termination. Aff. Carter ¶9. She also stated that “his termination was based solely on the [accident].” *Id.*

Complainant noted that the termination letter didn’t include an investigative report or list of persons who had participated in an investigation. *Id.* He waited a couple weeks for the report but none arrived. *Id.* ¶20.

Complainant wanted “to figure out what happened” and began researching truck accidents. *Id.* He found a book that discussed who survived accidents and who did not. *Id.* He sent six copies to Schreurs, “hopefully to be better educated on how to understand accidents.” *Id.* Complainant spoke with Schreurs and explained that he hoped the book would “help CTS arrive [at] a better accident investigation [than] it did with me.” *Id.* at 22. Schreurs also told Complainant that the reason for the termination was that the loss from the accident exceeded \$100,000. *Id.*

### **Discussion**

On a motion for summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. § 1905.40(c) (1994); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed. R. Civ. P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson* at 252.

#### **I. Jurisdiction.**

Complainant reports that a Nevada OSHA official told him that his agency lacked jurisdiction to investigate accidents on Indian reservations. Complainant therefore questions whether (federal) OSHA had jurisdiction for the initial decision on this claim. As OSHA’s jurisdiction and that of this Office derive from the same Congressional action, Complainant’s question about OSHA also brings into question this Office’s jurisdiction. I find, however, that Complainant’s concerns are unfounded, and jurisdiction is proper in this forum.

A driver of a commercial vehicle is covered under the Act’s whistleblower provision if he or she:

1. directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier; and
2. is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

49 U.S.C. §31105(j). A “commercial motor vehicle” is any “self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle . . . has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater . . . .” *Id.*, §31101(1)(A). An “Employer” “means a person [other than a government entity] engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce . . . .” *Id.*, §31101(3).

Congress vested jurisdiction in the Secretary of Labor to receive complaints under the Act’s whistleblower provision from alleged aggrieved employees and to investigate, decide, and issue orders for relief, potentially including orders of reinstatement. 49 U.S.C. §31105(b). If a party objects to the Secretary’s findings, the party may request a hearing on the record. *Id.* Congress vested jurisdiction in the Secretary to conduct such hearings and issue final orders following them, including affirmative action to abate violations, reinstatement of employment, compensatory damages (including back pay), and attorney’s fees and costs. *Id.* Finally, Congress provided a right of appeal from the Secretary’s post-hearing decision to the U.S. Courts of Appeals. 49 U.S.C. §31105(c).

There is no dispute that Complainant is an employee within the meaning of the Act and that Respondent is a covered employer. The complaint asserted here, which is grounded on the employee protection provision in the Act, thus comes within the Secretary’s jurisdiction. That is the jurisdiction this forum is exercising on the Secretary’s behalf.<sup>8</sup>

## II. Timeliness.

“An employee alleging discharge, discipline, or discrimination in violation of [the whistleblower provision] . . . may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred.”<sup>9</sup> 49 U.S.C. §31105(b)(1). The time begins to run from the date the employee receives “final, definitive, and unequivocal notice” of an adverse employment decision.<sup>10</sup>

“Complaints not filed within 180 days of an alleged violation will ordinarily be considered to be untimely.” 29 C.F.R. §1978.102(d)(2). Circumstances may “justify the tolling of the 180-day

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<sup>8</sup> Primary jurisdiction over land that is “Indian country” rests with the Federal Government and the Indian tribe inhabiting it, and not with the States. *See e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S.Ct. 789, 798, 139 L.Ed.2d 773 (1998). “Indian country” includes land within the limits of any Indian reservation under the jurisdiction of the United States Government. 18 U.S.C. § 1151. Potentially this could deprive Nevada OSHA, a State agency, of jurisdiction to investigate accidents occurring on an Indian reservation. But it does not limit the federal government’s jurisdiction.

Moreover, the gravamen of Complainant’s action is not negligence or any other theory of recovery said to arise out of the accident; it is that Respondent, with office in Reno, Nevada (not on an Indian reservation), retaliated against Complainant when it terminated him from employment. Neither the alleged safety-related complaint (if any) nor any of Respondent’s allegedly retaliatory conduct is said to have occurred on an Indian reservation.

<sup>9</sup> The Occupational Health & Safety Administration receives the complaints on the Secretary’s behalf. 29 C.F.R. §1978.102(c).

<sup>10</sup> *Thissen v. Tri-Boro Construction Supplies, Inc.*, ARB No. 04-153, ALJ No. 2004-STA-35 slip op. at 5 (December 16, 2005) citing *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 14 (ARB Feb. 28, 2003); *See also Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133 (6<sup>th</sup> Cir. 1994).

period on the basis of recognized equitable principles or because of extenuating circumstances.” *Id.* at §1978.102(d)(3). Examples of circumstances justifying tolling are: “where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation.” *Id.* On the other hand, the employee’s filing with another agency or pursuing a grievance-arbitration procedure “are examples of circumstances which do not justify a tolling of the 180-day period.” *Id.*

Complainant received notice of the termination on June 18, 2008.<sup>11</sup> The language of the notice is final, definitive, and unequivocal. Consequently, the 180-day period filing deadline began to run on that day and ended on December 15, 2008. Complainant filed the complaint on January 23, 2009. The filing therefore was untimely.

There is no basis for equitable tolling. Respondent did not mislead Complainant about the reason for the termination. The termination was in connection with the accident in which the truck Complainant was operating overturned, and Respondent never suggested anything else. Complainant argues that Respondent blamed him for the accident so that it could avoid government-imposed penalties or other liability, but he doesn’t dispute that what occasioned the termination was the accident. This is not a case in which a complainant mistakenly filed the correct, identical complaint in another forum, and under the regulations, it would appear that this would be insufficient anyway.<sup>12</sup>

### **III. Protected Activity.**

The employee protection provision of the Surface Transportation Assistance Act “was enacted to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles.” *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 257 (1987). “Congress

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<sup>11</sup> I base the date of Complainant’s receipt of notice on Complainant’s declaration. Respondent’s papers fail to establish a date of notice. Although (1) Carter stated that she sent the termination letter to Complainant, and (2) the letter is dated June 17, 2008, neither Carter nor any other witness states *when* Carter sent the letter; there is only the fact that she did send it. Nor did the Company offer discovery responses from Complainant in which he admitted to the date of receipt (or even the fact of receipt). But as it happens, Complainant admitted in his opposition that he received the notice on June 18, 2008. That is sufficient to establish June 18, 2008 as the undisputed date when he received the notice of termination.

<sup>12</sup> At some unidentified time Complainant spoke to an unnamed representative of Nevada OSHA. Aff. Comp. ¶24. He stated that he “wanted to work with CTS to find the cause/why [of his accident]” and had not received any accident investigation report. He told the representative that Schreurs told him that it was probably too late to make a complaint. The Nevada OSHA representative responded that “it didn’t matter anyway, as again OSHA had NO Authority on Indian reservations.” *Id.* “Eventually” Complainant called OSHA Region IX and gave an interview. *Id.* ¶25. According to Complainant, the Region IX representative said OSHA would probably dismiss the complaint but asked if he wanted to file. *Id.* Complainant said that he did. *Id.*

These factual assertions, which I accept for purposes of this motion, are too vague to establish entitlement to equitable tolling. They do not suggest that Respondent deceived Complainant; these assertions don’t involve Respondent. As to Nevada OSHA’s actions, it is unclear what Complainant was discussing with the representative: Was he discussing Nevada OSHA’s investigation of the accident, or was he discussing some kind of safety complaint against Respondent? The former seems more likely, but the record is insufficient to be certain. In any event, getting misleading information from Nevada OSHA (if that occurred) did not stop Complainant from contacting OSHA Region IX, which in fact he did. Had OSHA Region IX refused to accept a complaint, that would be an important fact. But even if they discouraged filing, they asked Complainant if he wanted to file, and he did.

recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations.” *Id.*

The provision provides in relevant part that an employer may not discharge an employee because:

- The employee “has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding”; or
- the employee refused to operate a vehicle because
  1. “the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
  2. “the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition.”

49 U.S.C. §31105(a).

A complainant’s “proof of unlawful retaliation is established using the same framework used to prove discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2.” *Calmat Co. v. U.S. Dep’t. of Labor*, 364 F.3d 1117, 1122 (9th Cir. 2004). This requires adapting the test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973),<sup>13</sup> to the STAA. *Id.* It means that a complainant

[H]as the initial burden of establishing a prima facie case by raising an inference that protected activity was likely the reason for the adverse employment action. Once the [complainant] has established a prima facie case, the burden of production shifts to the [respondent] to articulate a legitimate, non-retaliatory reason for the adverse employment decision. If the [respondent] advances reasons to rebut the inference of retaliation, the [complainant] bears the ultimate burden of demonstrating by a preponderance of the evidence that the reasons articulated were pretext for retaliation.

*Calmat, supra*, 364 F.3d at 1122 (citations omitted).

Establishment of a *prima facie* case requires a complainant to show: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of an adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of the

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<sup>13</sup> The Court has further developed the test in *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); and *Raytheon v. Hernandez*, 540 U.S. 44 (2003).

employer. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). Some decisions identify the employer's knowledge of the protected activity as a separate element; others analyze it as necessary to the causal link.<sup>14</sup>

By challenging Complainant's showing that he engaged in protected activity, Respondent here is asserting that Complainant is unable to make out a *prima facie* case. If this is correct, Respondent will prevail without articulating a legitimate reason for the termination or advancing reasons to rebut retaliation. Neither will I reach the issue of pretext.

As to protected activity, Complainant did not allege any refusal to drive. Thus any protected activity would have to be the filing a complaint related to vehicle safety or security or beginning or testifying in a proceeding related to vehicle safety or security.<sup>15</sup>

On claims such as these, a complainant need not name a specific commercial motor vehicle safety standard<sup>16</sup> nor prove an actual violation of a vehicle safety regulation.<sup>17</sup> He need not complain to a government agency; it is enough if he complains to his employer.<sup>18</sup> The complaint may be written or oral but must be sufficient to give notice that a complaint is being filed about regulatory compliance and safety.<sup>19</sup>

Respondent's proof here is substantial but falls short of establishing the absence of protected activity. Respondent offers no witness who will state that the Company received no safety-related complaint from Complainant prior to the termination and is aware of no safety-related complaint Complainant made to a government agency prior to that time. Three Company managers involved in the termination each state that he or she was unaware of any such complaints. But other Company managers might have known of complaints and for that matter might have been involved in the decision to terminate, for Respondent never states who was involved in the termination decision or how it was reached.

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<sup>14</sup> As the Administrative Review Board more recently described the analysis: "A complainant meets this burden by initially showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in protected activity under the statute of which the employer was aware, that the complainant suffered adverse employment action and that a nexus existed between the protected activity and the adverse action. *Jenkins*, slip op. at 16-17. Once a complainant meets his initial burden of establishing a prima facie case, the burden then shifts to the employer to simply produce evidence or articulate that it took adverse action for a legitimate, non-discriminatory reason (a burden of production, as opposed to a burden of proof). When the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, non-discriminatory reason, the rebuttable presumption created by the complainant's prima facie showing "drops from the case." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Schlagel*, slip op. at 5 n.1; *Jenkins*, slip op. at 18. Cf. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)." *Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007).

<sup>15</sup> The complaint must be objectively reasonable, but I do not reach that question here because I find no complaint.

<sup>16</sup> *Nix v. Nehi-R.C. Bottling Co.*, 1984-STA-00001, slip op. at 8-9 (Sec'y July 4, 1984).

<sup>17</sup> *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992); see also *Lajoie v. Environmental Management Systems, Inc.*, 1990-STA-00031 (Sec'y Oct. 27, 1992).

<sup>18</sup> See *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (case below 95-STA-34) (DOL Secretary's policy to protect internal complaints "eminently reasonable") (citing cases).

<sup>19</sup> *Id.*

Yet, the moving party on summary decision is not required to negate the opposition's case by means of the affidavits it submits. Rather, as under the parallel Federal Rule of Civil Procedure (Rule 56),

Regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

*Celotex, supra*, 477 U.S. at 323-24 (1986).

I therefore look to the entire record to determine whether Respondent is entitled to a favorable decision on the undisputed facts. And here, Complainant admits that he made no complaint prior to the Company's decision to terminate. As Complainant stated in his affidavit, "I was terminated before I could whistleblow . . ." Aff. Comp. ¶26.

Complainant's theory, as evidenced in his affidavit and argument, is that Respondent blames drivers for accidents so as to avoid governmental penalties and other exposure. *Id.* ¶23. Complainant links this somewhat obscurely to Respondent's alleged efforts to avoid "losing their ability to participate in OSHA health and safety programs and . . . to avoid inspections due to their higher manipulated ratings for their physical plant and distribution facilities." *Id.* As he wrote: "Driver error is an easy out for any investigator or company, especially if the driver[s] are not around to talk." *Id.* He asserts that he wanted to get to the root cause of the accident, that he initially thought Respondent was investigating with the same purpose, and that he did not complain until after the termination because it was not until then that he discovered Respondent was not really trying to find the "root cause" but was aimed at these other purposes such as avoiding penalties and liability. *Id.* ¶¶ 23, 26.<sup>20</sup>

Complainant's argument is misdirected. The purpose of the statute is to protect employees from discrimination on account of their complaining of unsafe conditions or refusing to operate vehicles under unsafe conditions. For the complaint or refusal to give rise to the retaliatory act, it must precede the retaliatory act in time. There is an exception: the statute protects workers when the employer "*perceives that the employee has filed or is about to file a complaint.*" 49 U.S.C. §31105(a)(1)(A)(ii) (emphasis added). But Complainant does not allege and there is no evidence to support that Respondent thought Complainant had filed a complaint or that it anticipated that he would do so.

Complainant's allegation that Respondent blames drivers for accidents so as to avoid its own responsibility is a serious one. Had Respondent made such an allegation to Company officials or

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<sup>20</sup> Having conducted his own research, Complainant reports that the "root cause" of the accident relates to the flat, smooth, non-porous, hard bottom, and high center of gravity on plastic paint totes as compared with steel-caged totes. He concludes that dirt, clay, or talcum powder would significantly reduce the tendency of the plastic totes to slide. He believes Respondent should have been committed to find this out in the interest of future safety.

government agencies *prior to* the termination, the case might have been different. But making the allegation for the first time after termination cannot be protected because it couldn't have led to a termination which preceded it in time.<sup>21</sup>

### Conclusion and Order

Complainant's complaint was untimely filed. He did not engage in protected activity. Accordingly, I recommend that Respondent's motion for summary decision be GRANTED and that the action be DISMISSED.

**A**

STEVEN B. BERLIN  
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.

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<sup>21</sup> If the analysis reached the question of pretext, the record before me would have resulted in the motion's being denied. The Company did not fully follow the steps in the "progressive system" concerning discipline for driver accidents. (Inwood did not send out a notice of investigation. See Comp. Reply Aff. ¶2.) The Company offered no examples of comparable accidents in which other drivers had their employment terminated rather than the other option under Company policy: probation. It did not address the possibly mitigating fact that Complainant might have had no one to ask about how to proceed, given the late hour and difficulty of cell phone reception. It did not address whether Complainant took reasonable steps to mitigate the problem once it surfaced. The Company gave varying valuations of the damages, either \$50,000 or \$100,000, with no explanation of either. The Company never identified who made the ultimate decision, nor did it give any detail on how the decision was reached.

But given the statutory purpose and the controlling authority, the Surface Transportation Assistance Act is not a general wrongful termination statute for truck drivers. Rather, it is narrowly aimed at employers who retaliate against drivers (and certain other workers) who make objectively reasonable complaints of safety violations or refuse to drive under conditions that would be in violation. Without a complaint or refusal to drive, a complainant cannot show retaliation.

(I do not mean to suggest that Respondent's stated reason for the termination was pretextual. Respondent's motion is based on timeliness and Complainant's failure to make out a *prima facie* case. That means Respondent had no reason to address pretext at this stage. I reach no conclusion on pretext.)