

U.S. Department of Labor

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Issue Date: 23 September 2009

Case No.: 2009-STA-00049

In the Matter of:

REGINA KENNEDY
Complainant,

v.

**ADVANCED STUDENT
TRANSPORTATION**
Respondent.

Appearances:

Pro Se
For Complainant

Terri Gillespie, Esq.
For Respondent

Before: **RALPH A. ROMANO**
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act (“STAA” or “Act”) of 1982, as amended and re-codified, Title 49 United States Code Section 31105, and the corresponding agency regulations, Title 29, Code of Federal Regulations (“C.F.R.”) Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules or cause serious injury.

This matter is before me on Complainant’s objection to the findings issued by the Secretary of Labor by the Regional Administrator of the Department of Labor’s Occupational Safety and Health Administration (“OSHA”), and her subsequent request for a hearing. (ALJX-1; ALJX-2).¹ A hearing was held before me on July 23, 2009, in Philadelphia, Pennsylvania. (Tr. at 1).² Respondent was represented by counsel, and Complainant, appearing *pro se*, testified

¹ Admitted in evidence are six Administrative Law Judge Exhibits. They are cited herein as “ALJX-1” through “ALJX-6.”

² The Transcript consists of 44 pages and will be cited at “Tr. at --.”

on her own behalf. Further, the parties had a full and fair opportunity to present testimony, offer documentary evidence and submit post-trial briefs.³

THE APPLICABLE LAW

The employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105, states in pertinent part:

(a) Prohibitions:

- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –
 - (A) the employee or another person at the employee’s request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
 - (B) the employee refuses to operate a vehicle because –
 - (i) the operations violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
 - (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.
- (2) Under paragraph (1)(B)(ii) of this subsection, an employee’s apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger or accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

SUMMARY OF THE EVIDENCE

Complainant testified on her own behalf at the formal hearing, and offered one piece of documentary evidence. Respondent offered the testimony of its employee, Kevin Martinez, and offered two pieces of documentary evidence.

FINDINGS OF FACT

Complainant’s Testimony

Complainant worked for Respondent, Advanced Student Transportation Incorporated (“ASTI”), as a school bus driver from June 6, 2008 to September, 12, 2008. (Tr. at 7; RB at 2). The record is devoid of any prior disciplinary conduct, issues or actions concerning Complainant, or any negative performance reviews during her employment at ASTI. (Tr. 1-44).

³ Complainant submitted one exhibit in conjunction with this claim. It will be cited herein as “CX-1.” Respondent submitted two exhibits in conjunction with this claim. They will be cited herein as “RX-1” and “RX-2.” Complainant’s post-hearing brief was received on August 17, 2009 and will be cited herein as “CB at --.” Respondent’s post-hearing brief was received on August 18, 2009 and will be cited herein as “RB at --.”

Complainant drove to Delaware College Prep Academy, bus number two. (Tr. at 21). Her route consisted of fourteen total stops.⁴ (Tr. at 21-22; RX-1).

On the morning of September 12, 2008, Complainant got into her bus and started driving on her route. (Tr. at 9-10). The bus had no problems when Complainant first started driving it. (Tr. at 18-19). After Complainant picked up her first student⁵ at St. John Drive & Evelyn Drive (Citgo Gas Station), she noticed that the bus was driving slower than normal, but still at a speed at which she felt comfortable continuing her route. (Tr. at 9-10, 19; RX-1). Complainant then picked up her second student at Elsmere Public Library (“Elsmere Library”) on Kirkwood Highway. (Tr. at 10; RX-1).

Once the student boarded the bus at the Elsmere Library stop, Complainant started to turn right, but noticed the bus would not go very fast and that “it felt like the transmission was slipping.” (Tr. at 10, 19). She tried pumping the accelerator, but that did not work. (Tr. at 10). So, to try to remedy the problem, Complainant put the bus in neutral⁶ and then back into drive. (Tr. at 10). When she hit the accelerator, the bus would now only drive 5 to 7 miles per hour. (Tr. at 10).

Complainant called Kevin Martinez (“Martinez”), her supervisor, on her cell phone and told him that she picked up the second student on her route and was stopped at the Elsmere Library. (Tr. at 28). Further, she told Martinez that the bus was underperforming, that it would only go 5 to 7 miles per hour and that she thought the transmission was slipping. (Tr. at 10-11, 14, 27-28; CX-1).⁷ Further, Complainant told Martinez that it was not safe for her to drive the bus, because the fastest it could travel was 5 to 7 miles per hour. (Tr. at 10). Martinez then told Complainant that there were no other buses available.⁸ (Tr. at 10, 28). Complainant, again, told Martinez that the bus was unsafe, a hazard and “I can’t drive it,” to which Martinez said “okay” and hung up the phone. (Tr. at 10-11, 28-29).

During that initial conversation, Martinez did not explicitly say that he would send another bus; and Claimant’s testimony lacks any explicit instructions by Martinez to continue her route. (Tr. at 27-29).

Complainant’s route takes place within the confines of city limits, with the speed limit usually 25 miles per hour. (Tr. at 12). Her route does not involve any major highways, just city streets. (Tr. at 13). However, taking into account the condition of the bus, Complainant was afraid to make left-hand turns. (Tr. at 19).

Complainant’s route required her to make a left-hand turn off of Kirkwood Highway – a road with a 35 mile per hour speed limit. (Tr. at 15). Complainant was concerned that when she

⁴ Complainant does not make a stop at 4th and Hawley. It was never taken off her route list, and there are no students at that stop. (Tr. at 22-23; RX-1).

⁵ It should be noted that the students on Complainant’s bus route are of preschool age. (Tr. at 11).

⁶ Complainant said she put the bus in neutral because there was no “park.” (Tr. at 10).

⁷ Complainant also wrote on her time sheet for that day that she believed the transmission was slipping. (CX-1).

⁸ Complainant testified that she told Martinez that she saw four buses “in the back.” (Tr. at 28).

made this left-hand turn at such a slow pace, in which she would have to cross three lanes of traffic with no turning arrow, oncoming traffic may have been obstructed from seeing her turn, resulting in an accident. (Tr. at 16, 19-20).

Complainant testified that she also anticipated trouble when she would have to make a left-hand turn at Washington Street and 11th Street. (Tr. at 17-18). Therefore, based on this anticipated apprehension and distress, Complainant pulled the bus over at Elsmere Library. (Tr. at 18).

Complainant was asked on cross-examination if she attempted to contact Delaware College Prep Academy and report to it that she stopped her route. (Tr. at 23). Complainant responded that she never attempted to contact Delaware College Prep Academy because she did not have their number, and that it was ASTI's responsibility to call Delaware College Prep Academy and relay any relevant news about her bus. (Tr. at 23).

Complainant testified that she did not notify Martinez or anyone else at ASTI's dispatch office that she was pulling her bus over at Elsmere Library and stopping her route. (Tr. at 18, 27). Complainant just told Martinez that her bus was moving very slowly and that it was not safe to drive – that it was a hazard. (Tr. at 18, 23-24).

However, because she told Martinez that the bus was a hazard, Complainant thought Martinez was going to send another bus and bring someone else to help her out; so she sat at Elsmere Library and waited for 40 minutes.⁹ (Tr. at 11, 26, 28-29).

Thereafter, ASTI's secretary, Sweedie,¹⁰ called Complainant asking where she was. (Tr. at 11, 29-30). Complainant told Sweedie that she was still waiting at Elsmere Library for someone to bring her a new bus. (Tr. at 11, 30).

After Complainant's conversation with Sweedie ended, Martinez spoke with her. (Tr. at 11, 30). Complainant testified that Martinez started berating her and yelling obscenities at her. (Tr. at 11, 27, 30). Martinez then asked why Complainant was still at Elsmere Library and did not continue on her route like he told her to do. (Tr. at 11-12, 30). Complainant responded that she already told him that the bus is a hazard, "unsafe to drive," and that she cannot drive the bus on her route. (Tr. at 12, 30). Martinez then hung up the phone. (Tr. at 30).

Ten to 15 minutes later, another bus arrived at Elsmere Library. (Tr. at 12, 30). Complainant got on this new bus to finish her route. (Tr. at 12).

Complainant said that she did not see her original bus leave Elsmere Library. (Tr. at 12). Further, Complainant did not know how her original bus was transported from Elsmere Library or if it was returned back to ASTI's bus terminal. (Tr. at 20-21)

⁹ Until the new bus arrived, the two students sat on the bus the entire time, and the other students, presumably, were waiting at their respective stops. (Tr. at 14, 22).

¹⁰ Sweedie is the nickname for an ASTI employee named Janet. (Tr. at 11, 33). They will be used interchangeably.

As Complainant was leaving Elsmere Library to finish her route, Sweedie called Complainant and told her to report back to ASTI's office when she completed her bus route.¹¹ (Tr. at 12).

Complainant finished her route with the newly provided bus. (Tr. at 13). She then went to ASTI's office and met Martinez.¹² (Tr. at 13). At that point, Martinez handed Complainant a letter telling her that she was fired because she put the children in jeopardy by sitting at their bus stop for an hour.¹³ (Tr. at 13, 24-25). Complainant refused to sign the termination letter Martinez gave her, so Martinez sent a copy of the letter to her by certified mail. (Tr. at 24).

On cross-examination, Complainant agreed that Martinez's letter indicated that she was fired because she disregarded a direct order from a supervisor, and that she put students at risk by pulling over the bus and sitting with the students for one hour without notifying the office. (Tr. at 26). Complainant agreed that Martinez never told her that her firing had to do with the fact that she called ASTI and complained about the bus. (Tr. at 26-27). However, Complainant believes that she was fired for calling ASTI about the condition of the bus. (Tr. at 25).

Complainant is seeking back pay and reinstatement. (Tr. at 14-15).

Kevin Martinez's Testimony

Kevin Martinez has been a senior dispatcher, supervisor at ASTI for approximately five years. (Tr. at 31). As a senior dispatcher, Martinez is required to ensure that all drivers perform their duties – i.e., pick up and drop off the students to and from school. (Tr. at 31).

Martinez testified that Complainant was a bus driver for ASTI. (Tr. at 32). Complainant drove students of pre-kindergarten to kindergarten age to Delaware College Prep Academy, bus route two. (Tr. at 32). Further, Martinez was Complainant's direct supervisor; Complainant reported directly to him. (Tr. at 32).

On September 12, 2008, Complainant started her bus route. (Tr. at 32). Martinez received a call from Complainant when she was at her second stop. (Tr. at 32). After asking Complainant what was exactly wrong with the bus, he was told that the bus "was going slow"¹⁴ that she felt it was "unsafe," and that she wanted him to send another bus. (Tr. at 32-33). Martinez told Complainant that he did not have another bus for her, that all of the other buses were out on their runs. (Tr. at 33). Martinez testified that he then told Complainant to "carry on," and that he would "get to her if at all possible." (Tr. at 32-33).

After instructing Complainant to continue her route, Complainant said "okay." (Tr. at 33). At that point, Martinez thought that Complainant was continuing her route. (Tr. at 33).

¹¹ Complainant testified that after Sweedie told her to report to the office, she knew ASTI was going to fire her. (Tr. at 12).

¹² Complainant said she had to wait for Martinez to finish lunch before meeting with him. (Tr. at 13, 25)

¹³ Complainant continually insists that she only waited for 40 minutes, not one hour. (Tr. at 13).

¹⁴ Martinez said that Complainant only stated that the bus was going slow; she did not indicate an exact speed. (Tr. at 32).

After this initial conversation with Complainant, in which Complainant complained to Martinez about the safety issues with the school bus, Martinez did not believe there were any problems or safety concerns with the bus. (Tr. at 36). His reason for this was that “[t]he bus was driving fine when [Complainant] left the yard, and it was driving fine when [Complainant] got to her stops, and there was nothing wrong with the bus prior or after it got back to the yard.” (Tr. at 36).

Additionally, as senior dispatcher at ASTI, Martinez has received complaints from employees regarding the safety of school buses. (Tr. at 36). Depending on the situation and severity of the issue, ASTI tries to get the bus driver another bus – if possible. (Tr. at 36).

About an hour after Martinez spoke with Complainant, ASTI received a call from Delaware College Prep Academy asking where Complainant’s bus was, because it had not arrived at school yet. (Tr. at 33-34). Janet, another dispatcher,¹⁵ called Complainant to find out where she was located. (Tr. at 33). Complainant told Janet that she was still at the Elsmere Library. (Tr. at 33).

Martinez then got on the phone with Complainant and asked her what was wrong. (Tr. at 34). Complainant explained to Martinez that the bus “wasn’t moving.” (Tr. at 34). Martinez then told Complainant that he previously told her that she should have continued her route; and, based on his previous phone call with her, he was under the impression that she continued her route since her entire route is within city limits, all the roads have a 35 mile per hour speed limit and that she did not have to travel on any highways. (Tr. at 34).

During this second phone call with Complainant, other buses became available. (Tr. at 34). Thus, Martinez told Complainant that he would get her another bus – which was sent to Complainant at Elsmere Library. (Tr. at 34). Further, Martinez called Delaware College Prep Academy and explained what happened. (Tr. at 34).

Martinez testified that Bill Wilson, a mechanic, brought Complainant a new bus and drove Complainant’s original bus back to the bus terminal.¹⁶ (Tr. at 34-35, 37-38). When Complainant’s original bus arrived at the terminal, Martinez took the bus out for a drive. (Tr. at 35). Martinez said he drove the bus out on Route 1, traveling 60 miles per hour.¹⁷ (Tr. at 35). Further, after Martinez drove the bus, he saw another mechanic take the bus out for a drive over 35 miles per hour. (Tr. at 35-36). Based on the above, Martinez concluded that the bus was in good condition, and believed that it was operating safely and functioning properly.¹⁸ (Tr. at 35).

Thereafter, Martinez made the ultimate decision to terminate Complainant. (Tr. at 36-37). His decision was based on Complainant putting the children that she had on the bus at risk –

¹⁵ Martinez said that Janet is a dispatcher for ASTI, whereas Complainant believes that Janet/Sweedie is a secretary. (Tr. at 11, 33).

¹⁶ Complainant asserts that it was not a mechanic, but another bus driver that brought her a new bus. (Tr. at 38).

¹⁷ Martinez said Route 1’s speed limit is 60 miles per hour. (Tr. at 35).

¹⁸ I give no weight to Martinez’ opinion about the bus’s condition based on the mechanic driving the bus, because that mechanic did not testify and the best source of information as to how well the bus was driving and operating when the mechanic drove the bus would be the mechanic himself.

even though they were still on the bus; that a number of other students were waiting at their stops for about one hour; and disregarding one of his orders – i.e., not continuing her route and picking up students. (Tr. at 37).

Finally, Martinez testified that Complainant’s complaint regarding her safety concerns with the bus had no effect on his decision to terminate her employment. (Tr. at 37).

Complainant’s Documentary Evidence

CX-1 is a time sheet that Complainant filled out for the week ending on September 12, 2008. On the day she got fired, September 12, 2008, Complainant’s time sheet states, “I picked up two stops, one at St. John and Elsmere, when the bus transmission started slipping. It was driving real slow. I had to wait for another bus.”¹⁹

Respondent’s Documentary Evidence

RX-1 is a list of all of the places and times of the pickups for Delaware College Prep Academy, bus two – the bus the Complainant drove.

RX-2 is the termination letter Martinez gave Complainant. It is dated September 12, 2008. It reads:

This letter is to inform you that your service at Advanced Student Transportation Inc. is no longer required.
On the morning of September 12, 2008 you disregarded a direct order from you supervisor. Due to your action you put the students at risk by pulling over and sitting with the students for 1 hour without notifying your office that is unacceptable.

ANALYSIS

I. Credibility

Based on my firsthand observation of the behavior, demeanor, candor and consistency of the witnesses, I find Complainant’s testimony to be credible. She told her story multiple times during the trial and her testimony was consistent and unequivocal throughout.

II. Pro Se Status

An Administrative Law Judge (“ALJ”) has some responsibility for helping *pro se* litigants. See e.g., *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52 (ARB Feb. 29, 2000), slip op. at n. 5 (“[p]ro se complainants are by nature inexperienced in legal matters, and we construe their complaints liberally and not over technically”); *Pike v. Public Storage Companies, Inc.*, ARB No. 99-072, ALJ No. 98-STA-35 (ARB Aug. 10, 1999) (*pro se* litigants may be held to a lesser standard than legal counsel in procedural matters); Cf. *Hughes v. Rowe*,

¹⁹ Complainant also read this into the record. (Tr. at 41).

449 U.S. 5, 101 S.Ct. 173 (1980) (papers submitted by *pro se* litigants must be construed liberally in deference to their lack of training in the law).

However, while a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the burden of proving the elements necessary to sustain a claim of discrimination is no less. *Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec’y Oct. 10, 1991); see also *Pike, supra*; *Griffith, supra*; quoting *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983)(“At least where a litigant is seeking a monetary award, we do not believe *pro se* status necessarily justifies special consideration.... While such a *pro se* litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forgo expert assistance.”).

III. Prima Facie Case

Claims under the STAA are adjudicated pursuant to the standard set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, the complainant must initially establish a prima facie case of a retaliatory discharge, which raises an inference that the protected activity was likely the reason for the adverse action. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987); see also *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To establish a prima facie case under the Act, the complainant must prove: (1) that he or she engaged in protected activity under the STAA; (2) that he or she was the subject of an adverse employment action; and (3) that there was a causal link between his or her protected activity and the adverse action of the employer. *Moon*, 836 F.2d at 229.

Complainant bears the initial burden of establishing a prima facie case of retaliatory discharge, which raises an inference that protected activity was the likely reason for the adverse action. Once a prima facie case is successfully established, the burden of production shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its employment decision. If the respondent successfully rebuts the inference of retaliation, the complainant then bears the ultimate burden of demonstrating by a preponderance of the evidence that the legitimate reasons were a pretext for discrimination. *Moon*, 36 F.2d at 229; *Kahn*, 64 F.3d at 278. The ultimate burden of proof remains at all times with the complainant to demonstrate that illegal discrimination actually motivated the employer to take an adverse employment action against the complainant. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993).

1. Protected Activity

The first element that Complainant must prove in her prima facie case is that she engaged in a protected activity under the STAA. *Moon*, 836 F.2d at 229. A complaint is protected even though is it only internal within the company and not to any government agency. See *Kahn*, 64 F.3d at 274. Thus, the STAA protects an employee when he or she makes a safety complaint to a manager. *Yellow Freight Sys. Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993). I find that Complainant engaged in a protected activity when she called her manager, Martinez, and complained to him about the bus’s safety issues and that it was a hazard to drive.

REASONABLE APPREHENSION

Refusal to Drive

A refusal to drive is protected under STAA provisions 49 U.S.C. § 31105(a)(1)(B)(i) and 49 U.S.C. § 31105(a)(1)(B)(ii). To prevail on the merits of her claim, Complainant must prove that she engaged in activity protected by either or both of these provisions, and that she was terminated, at least in part, because of her protected activity. *Byrd v. Consolidated Motor Freight*, 97-STA-09 (ARB May 5, 1998).

Section 31105(a)(1)(B)(i) requires that Complainant show she refused “to operate a vehicle because – the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health...” In this case, Complainant has not presented any evidence that she refused to operate her school bus because it was in violation of a specific regulation, standard or order of the United States related to commercial motor vehicle safety or health. Therefore, Complainant has not met her burden of refusing to drive a vehicle under § 31105(a)(1)(B)(1).

The second refusal to drive provision, § 31105(a)(1)(B)(ii), focuses on whether an employee in the same situation would conclude that there was “a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.” *Cortes v. Lucky Stores, Inc.*, 96-STA-30 (ARB Feb. 27, 1998).

The STAA defines reasonable apprehension as:

An employee’s apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

§ 31105(a)(2).

The determination regarding whether or not a complainant was reasonably apprehensive that driving a vehicle could result in possible injury to herself or the public must focus on the information available to the complainant at the time of the work refusal. *Caimano v. Brink’s, Incorporation*, 95-STA-4 (Sec’y Jan. 26, 1996). The information available to Complainant when she pulled her bus over at Elsmere Library and stopped her route was: the bus could only drive 5 to 7 miles per hour; she had to travel on at least one road with a 35 mile per hour speed limit; and the impending danger associated with making a left-hand turn with no turning arrow across three opposing traffic lanes could result in an accident. Based on that information, Complainant believed she was putting herself, the students on the bus and the public who were driving on the roads with her, at danger. I find Complainant was reasonably apprehensive about driving her bus when she discontinued her bus route.

Further, there may be circumstances in which a driver's refusal to drive would compel the conclusion that the driver's perception of an unsafe condition was reasonable, even if a subsequent inspection reveals no defect. *Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76 (2d Cir. 1994). I find that ASTI's subsequent inspection of Complainant's bus – in which it found that the bus traveled 60 miles per hour and had no driving defects – had no bearing on Complainant's apprehension.²⁰

Therefore, I find, under these circumstances, Complainant was reasonably apprehensive about continuing to drive on her route when she refused to drive.

Next, Complainant must prove that she sought from the employer, and been unable to obtain, correction of the unsafe condition. § 31105(a)(2). It has been held that Complainant's request for a new bus is sufficient enough to meet his obligation to seek correction of an unsafe condition. See *Pettit v. American Concrete Products, Inc.*, ARB No. 00053, ALJ No. 99-STA-47 (ARB Aug. 27, 2002).

Complainant's testimony does not explicitly note her telling ASTI that she was refusing to drive. However, Complainant undisputedly called ASTI and informed it that the bus would only travel at 7 miles per hour, was unsafe to drive, a hazard, and that she was stopped at Elsmere Library. I find this equivalent to alerting ASTI that her bus had a problem and that she was refusing to drive the bus.

Additionally, there is conflicting testimony whether or not ASTI directed Complainant to continue her route. Even if ASTI's informed Complainant to continue her route, that would not correct her "unsafe condition." In fact, that would continue the risk and apprehension of which Complainant advised ASTI. Therefore, I find that ASTI did not correct Complainant's unsafe condition complained of.²¹

2. Adverse Employment

An adverse employment action includes discharging an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment. § 31105(a)(1). The facts clearly establish that Complainant suffered an adverse employment action when she was terminated on September 12, 2008. Therefore, Complainant has established this element of her prima facie case.

²⁰ Presuming the truth of Martinez's testimony that his check of the bus revealed no defects, his check occurred at a time other than the time when Complainant experienced the defect. That the bus was without defect when Martinez's checked it, does not mean that the bus was without defect when Complainant earlier experienced the defect.

²¹ I find it inconsequential that ASTI belatedly provided Complainant with a new bus. As stated above, I find that ASTI was aware of Complainant's apprehension and safety regarding the use of the bus. The point of contention in this case is the forty minute time span after Complainant's first phone call with Martinez – during which ASTI should have tried to remedy Complainant's problem – and Complainant's second phone conversation with Martinez – after which he sent a new bus.

3. Causation

The proximity in time between the protected conduct and the adverse action may itself be sufficient to establish causation for purposes of a prima facie case. *Toland v. Werner Enterprises*, 93-STA-22 (Sec’y D&O Nov. 16 1993, slip op at 3); *see also Stiles v. J.B. Hunt Transportation*, 92-STA-34; *Moravec v. HC & M Transportation, Inc.*, 90-STA-44; *Ertel v. Giroux Brothers Transportation, Inc.*, 88-STA-24. Complainant was discharged within hours of when she raised safety complaints about her bus. Thus, based on temporal proximity, I find that Complainant raised the inference of causation.

Based on the above, I find Complainant has established a prima face case of a violation of the STAA.

IV. Legitimate Nondiscriminatory Reason

Once a prima facie case is established, the burden of production shifts to the Respondent to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *McDonnell Douglas*, 411 U.S. at 802.

ASTI’s alleged reason for firing Complainant – that she disobeyed a direct order, and by doing so she put the other students at risk by making them wait at their bus stops – creates an interesting juxtaposition. Complainant told ASTI that the bus she was driving was unsafe and a hazard. Yet, ASTI claims that it fired Complainant for putting children at risk, by not driving a hazardous bus. There has been no demonstration that any children were at risk as a result of Complainant’s refusal to continue to drive the bus.

I find Complainant’s refusal to obey an order to continue her route – despite her bus being a hazard – does not make for a legitimate reason to discharge her. As a result, ASTI has failed to rebut the prima facie case. Respondent has failed to articulate a legitimate nondiscriminatory reason for firing Complainant.

V. Relief

1. Reinstatement

A successful Complainant is entitled to an order requiring restatement “to [her] former position with the same pay and terms and privileges of employment.” 49 U.S.C.A § 31105(b)(3)(A)(ii). *See Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 02-STA-30, slip op. at 4-5 (Mar. 31, 2005) (reinstatement under the STAA is an automatic remedy designed to re-establish the employment relationship, unless it is impossible or impractical). *See Palmer v. Western Truck Manpower*, ALJ No. 85-STA-6, slip op. at 19 (Sec’y Jan.16, 1987) (an order of reinstatement is not discretionary).

Further, an “administrative law judge’s decision and order concerning whether the reinstatement of a discharged employee is appropriate shall be effective immediately upon receipt of the decision by the [respondent].” 29 C.F.R. § 1978.109(b).

In *Dutile v. Tighe Trucking, Inc.*, 93-STA-31 (Sec’y Oct. 31, 1994), the Secretary held that “when a complainant states . . . that he does not desire reinstatement, the parties or the ALJ should inquire as to why. If there is such hostility between the parties that reinstatement would not be wise because of irreparable damage to the employment relationship, the ALJ may decide not to order it. If, however, the complainant gives no strong reason for not returning to his former position, reinstatement should be ordered.” Slip op at 4-5.

Complainant has requested reinstatement. My review of the record indicates neither irreconcilable animosity nor irreparable harm between the parties. Therefore, I find Complainant is entitled to reinstatement to her previous position of employment with ASTI under the same terms regarding rate of pay, conditions, and privileges, with no loss of seniority or benefits, as if she had remained a driver with ASTI since September 12, 2008.

2. Back Pay

In addition to reinstatement, Complainant is also entitled to back pay. 49 U.S.C. § 31105(b)(3)(A)(iii). “An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA.” **Assistant Sec’y & Moravec v. HC & M Transp., Inc.**, 90-STA-44 (Sec’y Jan. 6, 1992).

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. *Polewsky v. B&L Lines, Inc.*, 90-STA-21, slip op. at 5 (Sec’y May 29, 1991). Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require “unrealistic exactitude.” *Cook v. Guardian Lubricants, Inc.*, 95-STA-43 (ARB May 30, 1997), slip op. at 11-12, n.12; citing *Pettway v. Am. Cast Iron Pipe Co., Inc.*, 494 F.2d 211, 260-61 (5th Cir. 1974). Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co., Inc.*, 90-STA-37 (Sec’y June 3, 1994); *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec’y Oct. 1, 1993).

As noted above, a *pro se* litigant must be given fair and equal treatment; she cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forgo expert assistance. *Dozier*, 702 F.2d at 1194.

In this instance, I cannot grant Complainant any award of back pay. Back pay must be based on the evidence at hand. *Cook*, 95-STA-43. Complainant, who choose not to hire a lawyer to help litigate her case, has not provided any evidence – i.e., prior paychecks, multiple timesheets for her usual hours worked, her contract with ASTI that states her annual rate of pay, etc... – to help me establish a calculation of back pay. Without any evidence at hand, I cannot make a calculation of Complainant’s back pay. Although back wages do not require “unrealistic exactitude,” I will not speculate what Complainant’s award of back pay should be, and therefore decline to grant Complainant any back pay.

VI. Conclusion

Complainant has proven the merits of her case and is entitled to reinstatement.

ORDER

Pursuant to 49 U.S.C. § 31105 (b)(3) it is hereby **ORDERED** that Respondent:

Forthwith reinstate Complainant to her former position, at the same rate of pay, without loss of benefits or other privileges.

A

Ralph A. Romano
Administrative Law Judge

Cherry Hill, New Jersey

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).