

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 November 2011

In the Matter of
JOHN BAUER
Complainant,

v.

Case No.: 2011-STA-00037

J.B. HUNT TRANSPORT
Respondent.

APPEARANCES: Phillip C. West, Esq.
For the Complainant

Robert L. Duty, Esq.
For the Respondent

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER
ORDER OF DISMISSAL

This case came to hearing in Lansing, Michigan, on July 12, 2011, pursuant to a claim under the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (“STAA” or “the Act”) (formerly 49 U.S.C. app. § 2305) and under 29 C.F.R. Part 1978, implementing regulations found at 29 C.F.R. Part 24, and the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges found at 29 C.F.R. Part 18.

PROCEDURAL HISTORY

On February 3, 2011, Complainant filed a complaint with the Secretary of Labor alleging that Respondent had discriminated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105. On May 18, 2011, the Secretary of Labor issued preliminary findings and an order pursuant to 49 U.S.C. § 31105. On May 27, 2011, Complainant, by and through his attorney, filed timely objections to the *Secretary’s Findings and Order*. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and subject matter of this proceeding. On July 12, 2011, I conducted a formal hearing on this matter in Lansing, Michigan.

At the hearing, I entered Complainant’s Exhibits, “CX” 1 to CX 5, and Respondent’s Exhibits, “RX” A to RX E, into the record. *See* Transcript, “Tr.” at 5, 14-15, 17, 25, 128. Testimony was provided by the Complainant, John Bauer, Steven Ross, Nick Thompson, Jaynie

Lynn Wright, and Eric James Konopka. *See, generally*, Tr. Following the hearing, Complainant also submitted exhibits CX 6-9, copies of Complainant's W-2 forms and check stubs. I now accept those exhibits into the record.

EVIDENTIARY OBJECTIONS

On July 12, 2011, Complainant filed objections to three exhibits Respondent proposes to introduce into evidence. These exhibits include: 1) February 3, 2009, Discipline of the Complainant for going through confidential files without permission; 2) March 25, 2009, Discipline of the Complainant for failing to properly communicate with management; and 3) March 26, 2009, Driver Status Change, indicating Complainant voluntarily quit his employment with Respondent. Complainant asserts these documents are inadmissible. In support of this contention, Complainant states that when he asked for a copy of his personnel file from Respondent, these documents were not originally produced.

Complainant cites to the June 16, 2011, *Notice of Hearing and Order* requiring the parties to exchange copies of all evidence on or before June 21, 2011. Respondent's attorney requested an extension until June 29, 2011, and submitted its exhibits to Complainant's attorney on that date. However, the February 3, 2009, Driver Discipline Form was not listed as an exhibit or provided to Complainant at this time. This document was not produced until July 6, 2011. Based on the foregoing, Complainant argues that the February 3, 2009, Driver Discipline Form should be excluded from the record.

Additionally, Complainant argues the February 3, 2009, and March 25, 2009, Driver Discipline Forms should be excluded from the record pursuant to Michigan's Bullard-Plawecki Employee Right to Know Act, § 423.501 *et seq.* The Bullard-Plawecki Employee Right to Know Act provides, in pertinent part:

Personnel record information which was not included in the personnel record but should have been as required by this act shall not be used by an employer in a judicial or quasi-judicial proceeding. However, personnel record information which, in the opinion of the judge in a judicial proceeding or in the opinion of the hearing officer in a quasi-judicial proceeding, was not intentionally excluded in the personnel record, may be used by the employer in the judicial or quasi-judicial proceeding, if the employee agrees or if the employee has been given reasonable time to review the information. Material which should have been included in the personnel record shall be used at the request of the employee.

MICH. COMP. LAWS § 423.502.

After Complainant was removed from the Meijer account in August 2010, he requested a copy of his personnel file from Respondent. Complainant asserts that none of the challenged exhibits were included in Complainant's personnel file. The March 25, 2009, Driver Discipline Form and the March 26, 2009, Driver Status Change were not produced until March 3, 2011. Respondent noted that some of the documents may have been filed digitally in a different file, belonging to either Mr. Konopka or Mr. Thompson, employees of Respondent, which may

explain why they were not produced in response to Complainant's request for his personnel file. Regardless, Complainant argues that because these records were not made a part of his file for more than six months after the incidents, they cannot be made a part of his personnel file. Therefore, they are not personnel files and cannot be used by employer in this matter. MICH. COMP. LAWS §§ 423.501-423.502. In the alternative, if these records are considered personnel files, Complainant asserts they should be excluded because they were not included, or originally produced, in Complainant's personnel file. Additionally, Complainant request the opportunity to submit a written statement concerning the March 25, 2009, Driver Discipline Form and the March 26, 2009, Driver Status Change, if accepted into evidence.

In response, Respondent asserts that it complied with its obligations to produce Complainant's personnel file. Though Respondent cannot disprove Complainant's allegations, Respondent believes it did produce all the required documents. Regardless, Respondent maintains that it did not intentionally exclude the challenged documents from Complainant's personnel file. Furthermore, Respondent argues that Complainant was given a reasonable time to review the documents once produced. Respondent points out that the February 3, 2009, and March 25, 2009, Driver Discipline Forms are favorable to Respondent's position. Therefore, Respondent had no motive not to produce the documents. Nonetheless, the documents were produced to Complainant, Complainant had ample time to review the documents, and there has been no prejudicial impact upon either party. Based on the foregoing, Respondent requests that these three documents be admitted into evidence.

Hearings before the Office of Administrative Law Judges are conducted pursuant to 29 C.F.R. Part 18, unless otherwise provided. Additionally, the Federal Rules of Civil Procedure apply in any situation not controlled by these rules or rules of special application. *See* 29 C.F.R. § 18.1(a). Pursuant to 29 C.F.R. § 18.29, I have all powers necessary to conduct a fair and impartial hearing, and I must afford the parties a reasonable opportunity for a fair hearing.

Upon review, I find the three challenged documents to be admissible. Regardless of whether the documents constitute personnel files under Michigan's Bullard-Plawecki Employee Right to Know Act, § 423.501 *et seq.*, I find this evidence to be relevant. I do not find that Respondent intentionally excluded the challenged documents from Complainant's personnel file. Furthermore, I note that these documents were in fact produced to Complainant for his counsel's review. Additionally, I find Complainant was provided a reasonable amount of time to review these documents. I note the parties have had the opportunity to present arguments concerning the admission of these exhibits, through pre- and post-hearing briefs and during the formal hearing. Therefore, I do not find that the acceptance of this evidence would be prejudicial to either party. Accordingly, the three documents are admitted into the record, and I will include the documents in my consideration of this claim.

ISSUES

1. Whether Complainant was disciplined for refusing to drive in excess of his legal hours of service on March 24, 2009, in violation of the STAA.
2. Whether Complainant was denied reassignment to the Meijer account in 2010, because of

his alleged earlier, 2009, protected activity, in violation of the STAA.

APPLICABLE LAW

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant 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 vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

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

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

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

49 U.S.C. § 31105(a).

Under the Statute:

2) "employee" means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who - (A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and (B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

3) "employer" - (A) means a person 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; but (B) does not include the Government, a State, or a political subdivision of a State.

49 U.S.C. § 31101(2) and (3).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon review of the record and the post-hearing briefs of the parties, I find: Respondent, J.B. Hunt Transport, is engaged in interstate trucking operations and is an employer subject to the Surface Transportation Assistance Act, 49 U.S.C. § 31105. Complainant was an employee of Respondent within the meaning of 49 U.S.C. § 31101 and § 31105 from March 26, 2007, until

March 25, 2009, and then from August 9, 2010, until August 12, 2010. Respondent stipulated that when Complainant was rehired in August 2010, he was initially assigned to the Meijer account. However, Complainant was terminable at-will and could be reassigned at any time. Tr. at 103-104.

FACTUAL BACKGROUND
Complainant's Testimony

John T. Bauer, Complainant, testified at the formal hearing. Complainant is a truck driver and currently works for Martin Transportation. Tr. at 15. Complainant was hired as a tractor-trailer driver for J.B. Hunt Transportation, Respondent, from March 26, 2007, until March 25, 2009, and then from August 9, 2010, until August 12, 2010. Complainant worked on the Meijer account in Lansing, Michigan. This account allowed Complainant to be in Lansing every day. Tr. at 38. Complainant drove a perishable food route, beginning at 5:00 p.m. and lasted through the night. Tr. at 106.

On March 23, 2009, Complainant began his normal route. Complainant was given his load assignment around his normal time of 5:00 p.m. Tr. at 19. However, Complainant's load was not ready at 5:00 p.m. Tr. at 19. Complainant began his work at 6:15 p.m. with a safety check. Tr. at 48. At or around 10:00 p.m., Complainant knew he would not be able to make the 7:00 a.m. delivery in Grand Rapids, Michigan. Tr. at 20, 106. Complainant testified that he experienced several delays that night, for example the refrigerator trailer was unavailable to start, Complainant had to be live unloaded, and Complainant had to backtrack to fuel up the refrigerator trailer for the back haul. Tr. at 20-21, 64-66. Complainant testified that he was familiar with the route and its time requirements, and therefore, because he was behind schedule, Complainant knew he would not reach his destination within his 14 hours of legal service hours. Tr. at 64-66.

Complainant called Respondent's night dispatcher, Steve Rosso, to inform him that he would not be able to deliver the load. Tr. at 20, 22, 59-60. Complainant asked if he could switch his load with another driver, but Mr. Rosso informed him there were no other drivers available. Tr. at 22, 101. Mr. Rosso told Complainant to complete his assignment as best as he could and to keep him informed of his progress. Tr. at 22, 60-61. Complainant proceeded to drive the load as far as he could within company protocol. Tr. at 64. Following company protocol, Complainant entered his load drop and pickup information on his on-board computer. Tr. at 98, 112. At 7:41 a.m., Complainant stopped and entered "At Tulip City truck stop" on his on-board computer. RX E. At 9:00 a.m., Complainant was informed there was another driver available to relay the load. Complainant did not engage in any other communication with a dispatcher between 10:00 p.m., on March 23, 2009, and 7:40 a.m. the next morning. Tr. at 131-133; RX E. The morning dispatcher, Nick Thompson, had contacted Complainant through the on-board computer and asked Complainant if he would be able to make it to Grand Rapids. RX E. However, Complainant did not respond.

Respondent's company protocol is for drivers to stop at a safe haven, and not to pull off the road when they have reached the maximum legal hours of service. Tr. at 24, 64-65. Complainant stopped driving when he was about 35 miles from his destination, with 30 minutes

of legal service hours remaining. Tr. at 28, 64, 99. However, because of traffic, Complainant testified that it would have taken him 45-60 minutes to reach his destination, causing him to exceed his legal hours of service. Tr. at 64-66, 100. Complainant decided to stop at the Tulip City truck stop, the closest safe haven to his destination, and entered his location on the truck's on-board computer at 7:41 a.m. Tr. at 25, 28, 30, 52, 65; RX E. At 8:00 a.m., Mr. Thompson responded, informing Complainant another driver would meet him shortly. Tr. at 29-30. Complainant received another message from dispatch asking him to call the office. However, Complainant testified that he did not call the office because he did not want to be pressured to deliver the load on time. Tr. at 30, 71. However, Complainant admitted that he was never asked, and thus never refused, to drive more than his legal service hours by Respondent or any of Respondent's representatives, as he did not return the messages from dispatch. Tr. at 72-74. Complainant testified that he had not been previously pressured to exceed his legal driving hours; however, he had never been late with a delivery before this incident. Tr. at 71-72.

At the truck stop, Complainant's load was picked up by a relay driver. Tr. at 31. When the relay driver arrived, Complainant had to unhook and move his tractor, requiring Complainant to go back on duty. Tr. at 118. The delivery was delayed for two to three hours. However, Complainant admitted this delay may have been shorter if he had maintained communications with the dispatcher. Tr. at 67-69. Despite receiving several messages in the morning hours, Complainant did not contact dispatch after 10:00 p.m. and until he stopped at the truck stop at 7:41 a.m. Complainant admitted that nothing had prevented him from making such contact. Tr. at 69-71. He also did not respond to several messages dispatch sent to Complainant after he stopped driving. Tr. at 70-72. After Complainant's break on March 24, 2009, Complainant took the trailer back to Lansing, picked up and dropped off some other trailers in Illinois, and eventually came back to Lansing to drop off a trailer. Tr. at 33. Complainant was then off duty for ten hours. Tr. at 33.

On March 25, 2009, Complainant was called into Respondent's office concerning the late delivery. Tr. at 33-34, 126. Respondent's employees, Nick Thompson, Jaynie Lynn Wright, and Mr. Rosso, disciplined Complainant for the March 24, 2009, incident. Tr. at 86-89. Complainant testified that Nick Thompson informed Complainant he would not be allowed to drive without accepting a discipline for the late delivery. Tr. at 34. Complainant testified that he believed he was being disciplined for not delivering his load assignment on time. Tr. at 76-77. However, there is conflicting testimony as to whether a written disciplinary statement was prepared before this meeting for Complainant to sign. Complainant testified the discipline was not prepared when he arrived and that Mr. Thompson said he would write the discipline at that moment for Complainant to sign. Tr. at 35, 47, 86. Mr. Thompson and Ms. Wright both testified the discipline was prepared prior to the meeting, but Complainant refused to sign. They signed the discipline and made a notation that Complainant refused to sign the discipline. Tr. at 126, 148; RX B. Regardless, Complainant did not sign the discipline. Complainant believed that if he refused to sign the discipline he was terminated from his employment. Tr. at 36, 47, 88-89. Complainant turned over his keys, returned his load assignment to Ms. Wright, and left. Tr. at 36, 88-89. Complainant then called Mr. Konopka. Tr. at 36. Mr. Konopka was already aware of the situation and informed Complainant that Mr. Thompson had already accepted Complainant's resignation. Tr. at 36. Respondent asserts Complainant quit his employment. *Empl.'s Brief* at 4. Complainant returned the next day to clean out his truck. Tr. at 36.

Complainant was unemployed for about a month and then obtained employment elsewhere. Tr. at 36, 79. He worked for K&B Transportation and voluntarily quit to go back to school for a couple of months, and then returned to work for Ryder Logistics until he left to work for Respondent again. Tr. at 79-81. Complainant was recruited by Respondent on several occasions, but declined the positions. Tr. at 36-38. Before Complainant was contacted by the recruiter, he had contacted Mr. Konopka to discuss his return to work with Respondent. Mr. Konopka expressed no concerns with Complainant returning, but stated that Complainant must wait a year to return to the same account. Tr. at 37. Complainant only wanted to work for the Meijer account so he could be home each day. Tr. at 37-38. Then, in August of 2010, Complainant was recruited for the Meijer account. Complainant applied and was rehired by Respondent on August 6, 2010. Tr. at 38-39, 104. Complainant began orientation on August 9, 2010, and at the end of orientation, Complainant was given the contact information for Eric Konopka, the Transportation General Manager on the Meijer account. Tr. at 39-40, 102; CX 4. Complainant attempted to contact Mr. Konopka, but was unsuccessful. Tr. 40, 153. Complainant was then put in contact with Monica Kate, a hiring representative in Respondent's headquarters. Tr. at 40. Ms. Kato informed Complainant that he would not be reassigned to the Meijer account. Initially, she did not provide an explanation, but Ms. Kato later informed Complainant that Mr. Konopka did not want to take Complainant back on the account because of late loads and write-ups. Tr. at 40-41. Mr. Konopka cited Complainant's unacceptable attitude and poor performance for not wanting Complainant to work the Meijer account; however, Mr. Konopka admitted Complainant had never been disciplined for his attitude. Tr. at 158, 164. *See also* RX D. Complainant only had one late delivery in his record, the incident on March 24, 2009. Tr. at 67, 158, 164. However, Complainant testified that he did have some other disciplinary "write-ups" while working for Respondent, including a speeding ticket. Tr. at 93-96; CX 1; RX A. Complainant was removed from the Meijer account. Tr. at 158, 164. Complainant declined to accept another position with Respondent. Tr. at 42, 90-92.

Complainant was unemployed from August 2010 to March 2011, until he began his employment with Martin Transportation. Tr. at 43. Complainant applied for unemployment, but it took six months before Complainant received any unemployment benefits. Tr. at 102-103. Complainant was not aware of Respondent challenging Complainant's eligibility for unemployment benefits. Tr. at 103. Complainant earned \$1,150.00 working for Respondent. Tr. at 43; CX 1. For his employment with Martin Transportation, Complainant earns \$860.00 to \$960.00 a week. Tr. at 43-44; CX 9.

Mr. Rosso's Testimony

Steven Rosso testified at the hearing. Mr. Rosso works as an operations supervisor for Respondent. Tr. at 105. Mr. Rosso testified that around 10:00 p.m. on March 23, 2009, Complainant informed him that he would not be able to complete his back haul following the store delivery. Tr. at 106. In response, Mr. Rosso told Complainant to try his best. Tr. at 106-107. In his testimony, Mr. Rosso explained that when a driver is unable to complete his assignment, the company protocol is to arrange for a relay driver to pick up the delivery load. Tr. at 107. Mr. Rosso has never asked anyone to drive more than the legal service hours. Tr. at 108. He asked Complainant to keep him informed of his progress, but he never heard from Complainant again. Tr. at 109-110. Mr. Rosso testified that if a driver is out of hours with a

truck, the driver can park at a rest stop, and do things such as eat, shower and sleep. However, any type of truck maintenance would require legal service hours. Tr. at 116-117. If it is necessary for a driver to unhook a trailer from his tractor, Mr. Rosso testified that this would not be a violation as it is not a driving activity. Tr. at 118-120.

Mr. Thompson's Testimony

Nick Thompson testified at the hearing. Mr. Thompson is an account manager for Respondent. Tr. at 122. Mr. Thompson testified that on the morning of March 24, 2009, he did not hear from Complainant until 7:41 a.m. He then responded, asking why Complainant had not been communicating with dispatch and also informing Complainant that he was sending a relay driver. Tr. at 122-123. Mr. Thompson testified that he never asked Complainant to drive more than his legal service hours, nor has he ever asked a driver to drive more than the allotted hours. Tr. at 124. If dispatch had known sooner Complainant would not be able to complete his load, Mr. Thompson could have sent a relay driver earlier, and the load could have been delivered sooner. Tr. at 124. Mr. Thompson testified that he presented a disciplinary document to Complainant on March 25, 2009, when Complainant was called to the office to discuss the late delivery. Tr. at 125-126. Mr. Thompson asserted the disciplinary document was prepared before Complainant came into the office. Tr. at 137. He admonished Complainant for not effectively communicating with dispatch about his delivery. Complainant was asked to sign the disciplinary acknowledgment and to communicate better in the future. Complainant refused to sign and turned over his keys. Tr. at 126, 137-138. After Complainant left, Mr. Thompson and Jaynie Lynn Wright signed the disciplinary document, noting that Complainant had refused to sign it. Tr. at 126-127. Mr. Thompson testified that Complainant was being disciplined for failing to maintain constant communication with dispatch and not for the late delivery. Tr. at 127. When the relay driver arrived, Complainant was required to unhook a trailer from his tractor. Mr. Thompson testified that he did not believe it was a violation for Complainant to go back on duty to unhook the trailer. Tr. at 129-130. Mr. Thompson testified that he would not have rehired Complainant in August 2010, citing Complainant's past attitude issues. Tr. at 145-146.

Ms. Wright's Testimony

Jaynie Lynn Wright testified at the hearing. Ms. Wright works as an operations supervisor for Respondent. Tr. at 147. Ms. Wright was present when Complainant was asked to sign a disciplinary document for the incident of March 23-24, 2009. Tr. at 148. Ms. Wright testified that she physically presented the prepared disciplinary document to Complainant during their meeting on March 25, 2009. Tr. at 148.

Mr. Konopka's Testimony

Eric James Konopka testified at the hearing. Mr. Konopka was previously employed by Respondent from 2004 to January 2011. Tr. at 151. He was assigned to the Meijer account from 2005 until he left the company. Tr. at 151-152. After Complainant stopped working for Respondent in 2009, he contacted Mr. Konopka about returning to work. Mr. Konopka told Complainant that he did not want to bring Complainant back to work. Tr. at 152. Mr. Konopka testified that Complainant was unhappy during his employment with Respondent, complaining about the company, and discussing his desire to leave and find another job. Tr. at 152-153. Ms. Wright informed Mr. Konopka that Complainant had been rehired in August 2010. Tr. at 153. Mr. Konopka e-mailed Monica Kato, the hiring representative, and informed her that he would

not accept Complainant on the Meijer account because of his poor performance. Tr. at 153-155. Mr. Konopka testified that Complainant had “extremely poor behavior” and was openly, verbally abusive, discrediting the company, even to customers. Tr. at 154-155, 157. Complainant had not yet “crossed the line,” but Mr. Konopka testified that if Complainant had crossed any further lines, he would have been terminated. Tr. at 155. Mr. Konopka asked Ms. Kato to find another position for Complainant within the company. Tr. at 155-156. Complainant would have been suitable to work on other accounts that would not have required him to work directly with customers. Tr. at 157. Mr. Konopka testified that he had discussions with Complainant about his attitude, but nothing was put into writing. Tr. at 157-158. However, in his testimony, Mr. Konopka stated that Complainant’s record of requiring a relay driver only once was impressive. He also recalled Complainant winning a driver of the month award. Tr. at 164.

DISCUSSION

PRIMA FACIE CASE

Claims under the STAA are adjudicated pursuant to the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, Complainant can prove discrimination with either direct or indirect evidence. To prove a claim using direct evidence, Complaint must prove, by a preponderance of evidence, that Respondent took adverse action against him for engaging in protected activity. Evidence may constitute direct evidence if I am persuaded that it proves a particular fact in question without any inference or presumption. *Randle v. LaSalle*, 876 F.2d 563, 569 (7th Cir. 1989). If Complainant presents direct evidence of discrimination, the burden will shift to Respondent to demonstrate that Complainant would have been disciplined regardless of his protected activity. *Pogue v. U.S. Dept. of Labor*, 940 F.2d 1297, 1298-90 (9th Cir. 1991).

Under the inferential method, Complainant must establish a *prima facie* case of retaliatory discharge, which raises an inference that the protected activity was the likely 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, the Complainant must prove: 1) that Complainant engaged in protected activity under the STAA; 2) that Respondent was aware of the protected activity; 3) that Complainant was the subject of an adverse employment action; and 4) that there was a causal link between Complainant’s protected activity and the adverse action of the Respondent. *Moon, supra*; *Peters v. Renner Trucking & Excavating*, ARB No. 08-117 (Dec. 18, 2009). *See also Byrd v. Consol. Motor Freight*, 97-STA-9, at 4-5 (ARB May 5, 1998) (citing *Shannon v. Consol. Freightways*, 96-STA-15, slip op. at 5-6 (Apr. 15, 1998); *Kahn v. United States Sec’y of Labor*, 64 F.3d 261, 277 (7th Cir. 1995)).

Complainant alleges that he was not assigned to the Meijer account because Respondent retaliated against him for engaging in protected activity, concerning the events of March 23-24, 2009. Furthermore, Complainant alleges this retaliation violated his rights under the STAA. For the alleged violations, Complainant is seeking reinstatement, back pay, and attorney fees from Respondent. Tr. at 45.

PROTECTED ACTIVITY

Under 49 U.S.C. § 31105 (a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. *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). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. *Nix v. Nehi-R.C. Bottling Co.*, 1984-STA-00001, slip op. at 8-9 (Sec’y July 4, 1984). An employee’s threats to notify officials of agencies such as the Department of Transportation or the Federal Motor Carrier Safety Administration may also be protected under the STAA. *William v. Carretta Trucking, Inc.*, 1994-STA-00007 (Sec’y Feb. 15, 1995).

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

An employee can also engage in protected activity by refusing 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” or because “the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.” 49 U.S.C.A. §§ 31105(a)(1)(B)(i)-(ii). These two types of refusal to drive are commonly known as the “actual violation” and “reasonable apprehension” subsections. *Eash v. Roadway Express, Inc.*, ARB No. 04-036, slip op. at 6 (Sept. 30, 2005) (*citing Leach v. Basin Western, Inc.*, ARB No. 02-089, slip op. at 3 (July 31, 2003)). In such a case, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he actually operated the vehicle. *Brunner v. Dunn’s Tree Service*, 1994-STA-55 (Sec’y Aug. 4, 1995). However, protection is not dependent upon actually proving a violation. *Yellow Freight System v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992).

Complainant alleges that his protected activities include: 1) stopping at a safe haven after operating his vehicle for 13.5 hours, when driving to the freight destination would have required him to drive beyond his legal hours of service on March 24, 2009; and 2) opposing a discipline for the March 24, 2009, late load when the stated reason for the discipline was a pretext and the true motivation for the discipline was to pressure Complainant to exceed his legal hours of service in similar circumstances. *See Compl.’s Closing Brief*.

Respondent states Complainant was never asked to drive more than his allotted hours by Respondent or any of Respondent’s representatives, and thus, Complainant never refused to drive more than his allotted hours. Therefore, Complainant never engaged in protected activity. Tr. at 72-74. Complainant did not communicate with dispatch after 10:00 p.m. and until 7:41 a.m., when he sent a message through the on-board computer that he was at a safe haven. Tr. 55-

57. Additionally, Mr. Thompson never tried to persuade Complainant to drive more than his legal service hours. Respondent points out that at 9:00 a.m., Mr. Thompson sent a message through the on-board computer asking Complainant why he was not communicating and stating that he would be sending someone else shortly to take Complainant's load. RX E. Rather, Complainant merely speculated that if he had called into dispatch, he would have been asked to continue driving. Tr. at 72. Accordingly, Respondent asserts, as a matter of law, this does not constitute protected activity.

Upon review, I find Complainant did engage in protected activity. As previously stated, an employee can engage in protected activity by refusing 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" or because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. §§ 31105(a)(1)(B)(i)-(ii). Complainant declined to drive more than his legal service hours, and I find this action constitutes a refusal 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." I note that protection is not dependent upon actually proving a violation. *Yellow Freight System v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992). Based upon the foregoing evidence, Complainant has established that a genuine violation of a safety regulation would have occurred had Complainant driven in violation of the Department of Transportation's legal service hours regulation.

Additionally, I find that Complainant's opposition to and refusal to sign a discipline for the March 24, 2009, late load also constitutes protected activity. An employee may not be disciplined for refusing to operate a vehicle "when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health..." *Mace v. Ona Delivery Sys., Inc.*, 91-STA-10 (Sec'y Jan. 27, 1992). Accordingly, I find that Complainant has established that he did engage in protected activity.

KNOWLEDGE OF PROTECTED ACTIVITY

Complainant alleges that Respondent had knowledge of Complainant's protected activity. Complainant informed Respondent that he would not be able to deliver his load on time because of previous delays. Complainant then later informed Respondent using the on-board computer that he had stopped at the Tulip City truck stop and was out of service hours. At a meeting the following day, Complainant refused to sign a discipline for the late delivery, as Complainant believed he had followed instructions, company protocol and Department of Transportation guidelines.

Respondent argues that because Complainant never engaged in protected activity, Respondent was never put on notice or otherwise. Additionally, Respondent points out that there is no evidence that Mr. Rosso or Mr. Thompson had ever asked a driver to exceed the legal service hours.

Upon review, I find Respondent had knowledge of Complainant's protected activity. I find no evidence in the record, nor has Respondent provided any such evidence or arguments, to dispute this finding.

ADVERSE EMPLOYMENT ACTION

Complainant alleges that he suffered adverse employment action as a result of his protected activity. In August 2010, Complainant was rehired by Respondent to work on the Meijer account. On August 12, 2010, Complainant was removed from the Meijer account. Complainant states that he was removed from the account because of "late loads," though Complainant had only one late delivery, the March 23-24, 2009, incident. Complainant acknowledges he did have another disciplinary write-up, concerning an incident in which Complainant may have looked at confidential materials on Mr. Konopka's desk. *See Compl.'s Closing Brief*; RX A.

The employee protection provisions of the STAA provide that "[a] person may not discharge an employee" for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). A complainant need not establish termination or discharge, but only an adverse employment action. *See, e.g., Galvin v. Munson Transp., Inc.*, 91-STA-41 (Sec'y Aug. 31, 1992) (finding adverse action despite respondent's characterization of incident, in which complainant was not allowed to complete assignment and then was denied rehire several months later, as a voluntary quit). Respondent disciplined Complainant on March 25, 2009, and asked Complainant to sign a disciplinary document, which Complainant refused to sign. Additionally, Respondent removed Complainant from the Meijer account on August 12, 2010. Complainant has not been returned to status, and I accept that he suffered adverse employment action within the meaning of the Act in this case.

CAUSAL CONNECTION

A causal connection between the protected activity and the adverse employment action may be circumstantially established by showing that the Respondent was aware of the protected activity and that adverse action followed closely thereafter. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Thus, close proximity in time can be considered evidence of causation. *White v. The Osage Tribal Council*, ARB No. 99- 120, slip op. at 4 (Aug. 8, 1997). While temporal proximity may be used to establish the causal inference, it is not necessarily dispositive. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6 (Apr. 28, 2006). When other, contradictory evidence is present, inferring a causal relationship solely from temporal proximity may be illogical. *Id.* Such contradictory evidence could include evidence of intervening events or of legitimate, nondiscriminatory reasons for the adverse action. *Id.*

Complainant argues that there was a causal connection between Complainant's protected activity and the adverse employment action, namely, Complainant's removal from the Meijer account in August 2010. I have already determined that Respondent had knowledge of Complainant's protected activity. While proximity in time may be used to establish the causal inference, it is not necessarily dispositive. In support of his argument, Complainant states that Respondent removed him from the Meijer account, to which Complainant had been rehired and assigned, because of "late loads." Tr. at 40-41. However, Complainant points out that the incident of March 24, 2009, was Complainant's only late delivery. Tr. at 67, 158, 164.

Complainant admits he did have some other disciplinary write-ups; however, these write-ups were not for late deliveries. Tr. at 93-96; CX 1; RX A. Upon review, I find Complainant has demonstrated a causal connection between his protected activity and the adverse employment action of Complainant's removal from the Meijer account. Thus, Complainant has established a *prima facie* case.

REBUTTING THE COMPLAINANT'S PRIMA FACIE CASE

If the Complainant can carry his burden of establishing a *prima facie* case, the burden shifts to the Respondent to rebut that *prima facie* case by articulating a legitimate, nondiscriminatory reason for its employment decision. The Respondent "need not persuade that it was actually motivated by the proffered reasons," but the evidence must be sufficient to raise a genuine issue of fact as to whether the Respondent discriminated against the employee. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). "The explanation provided must be legally sufficient to justify a judgment for the [Respondent]." *Id.* If the Respondent is successful, the *prima facie* case is rebutted, and the Complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the Respondent is a mere pretext for discrimination. *Id.* at 255-256.

Respondent argues that Complainant was disciplined for failing to communicate with management concerning the events of March 23-24, 2009. This is supported by Mr. Thompson's testimony, stating that Complainant was disciplined for failing to maintain constant communication with dispatch and not for the late delivery. Tr. at 127.

Respondent also argues it had a legitimate, nondiscriminatory reason for not reassigning Complainant to the Meijer account in August 2010. Mr. Konopka did not want Complainant back on the Meijer account in August 2010 because of his past performance. In an e-mail to Monica Kato, the hiring representative, Mr. Konopka wrote:

Currently you have a driver named John Bauer in orientation for our account. We will not be accepting him. This driver has a list of poor performance, and we gladly took his resignation when he submitted it. Had you called us to let us know that driver was schedule [sic] for orientation, we could have eliminated this problem....

Please find a different position for John Bauer. We will not be taking him on the Meijer account.

RX D. Furthermore, Mr. Konopka testified that Complainant had "extremely poor behavior" and was openly, verbally abusive, discrediting the company, even to customers. Tr. at 154-155, 157. Complainant had not yet "crossed the line," but Mr. Konopka testified that if Complainant had crossed any further lines, he would have been terminated. Tr. at 155. Mr. Konopka stated that Complainant would have been suitable to work on other accounts that do not require him to work directly with customers. Tr. at 157. Mr. Konopka testified that he had discussions with Complainant about his attitude, but nothing was put into writing. Tr. at 157-158. Mr. Thompson also testified that he would not have rehired Complainant in August 2010, citing Complainant's past attitude issues. Tr. at 145-146. In sum, Respondent argues that this evidence demonstrates

Respondent had legitimate, nondiscriminatory reasons for deciding not to reassign Complainant to the Meijer account.

After a review of all of the evidence, I find, by a preponderance of the evidence, that Respondent has articulated legitimate, nondiscriminatory reasons for both disciplining Complainant for the events of March 23-24, 2009, and for refusing to re-assign Complainant to the Meijer account in August 2010.

PRETEXT

Because Respondent successfully rebutted the inference of retaliation that arises from the Complainant's *prima facie* case by showing a legitimate motive for the adverse action, the burden shifts to the employee to rebut the employer's showing by proving that the employer's articulated reason was not the true reason for the adverse action, by preponderance of the evidence. *See Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987); *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). An employee can prevail by proving that the reason given by employer is "unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, *supra*. I can, where appropriate, infer pretext from the facts. A complainant need not proffer indirect evidence that unlawful discrimination was the real motivation. Instead, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 146 (2000).

Respondent argues that Complainant was disciplined for failing to adequately communicate with management. In response, Complainant argues that he did maintain communication with management. Complainant called the dispatcher to report that he would not be able to finish the back haul within his legal hours of service. Tr. at 21, 49, 107. Complainant points out that Respondent was familiar with Complainant's delivery route. When Complainant contacted dispatch around 10:00 p.m. on March 23, 2009, he was told that no relay driver was available. Tr. at 22. Complainant continued his route for as long as he could until stopping at the safe haven. Respondent never contacted Complainant about arranging a relay until the next morning. Tr. at 131-133.

Complainant asserts he was disciplined, and a year later removed from the Meijer account for which he was rehired, because he did not complete his load assignment on March 23-24, 2009. He states that his past complaints about the company, as described by Mr. Konopka's testimony, are unrelated to Complainant's performance. In fact, Mr. Konopka stated that Complainant's record was "impressive." Tr. at 164.

Complainant argues that he did communicate with dispatch about his status on March 23-24, 2009. Respondent was aware that Complainant's load was delayed because of circumstances out of Complainant's control. Additionally, at the meeting on March 25, 2009, Complainant was told he must sign the discipline report or he would not be able to drive. Complainant believed signing the report was a pre-condition for receiving his next assignment. Refusing to sign, Complainant concluded he was terminated. Complainant believed he had followed instructions, company protocol and Department of Transportation guidelines, and thus had done nothing

wrong. Complainant opposed the discipline and asserts that this is also protected activity. Furthermore, Complainant asserts he was removed from the Meijer account because Mr. Konopka refused to accept Complainant on the account, in large part, due to the circumstances of Complainant's separation in March 2009. Therefore, there is a direct nexus between Complainant's protected activity and the adverse employment action he suffered as a result.

Complainant must establish that the adverse action was linked to his protected activity. Complainant may rely on either direct evidence of Respondent's discriminatory motive or inferential evidence, the *McDonald Douglas* method of proof, which undermines the credibility of Respondent's articulated reasons. The complainant must prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but were a pretext for discrimination. *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002); *Ridgley v. C.J. Dannemiller Co.*, ARB No. 05-063, ALJ No. 2004-STA-53 (ARB, May 24, 2007).

Upon review, I find Complainant did not present sufficient evidence to establish that his removal from the Meijer account in August 2010 was based on a pretext. I find it reasonable that Respondent removed Complainant from the account because of his past, poor performance and attitude, including Complainant's failure to communicate during the events of March 23-24, 2009, and as described by the testimony of Mr. Konopka, Complainant's "extremely poor behavior" and his being openly, verbally abusive, discrediting the company, even to customers. I find that these are serious infractions of existing company policy. Therefore, Complainant has not met his burden to establish pretext and to rebut Respondent's articulated reasons for disciplining Complainant in March 2009 and then later removing Complainant from the Meijer account in August 2010.

However, even if there was a discriminatory reason for the Complainant's discipline and removal from the Meijer account, I find that Respondent would have taken the same action absent any protected activity. Respondent has articulated legitimate, nondiscriminatory reasons for both disciplining Complainant for the events of March 23-24, 2009, and for refusing to reassign Complainant to the Meijer account in August 2010. I accept that Respondent's reasons for the adverse employment action are both legitimate and credible.

Complainant also did not present evidence to show that this fact pattern falls within "mixed-motive" analysis. If an employer retaliates for both legitimate and illegitimate reasons, courts apply the 'dual motive' test, under which the employer must show that it would have retaliated even if the protected activity had not occurred. *Am. Nuclear Res., Inc. v. U.S. Dept. of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). "The employer bears the risk if the two motives prove inseparable." *Id.* However, because Complainant failed to prove that retaliation is not even a partial motivating factor, "mixed motive" analysis is inapplicable. *Ridgley v. C.J. Dannemiller Co.,supra*; *Ridgley v. USDOL*, No. 07-3917 (6th Cir. Oct. 21, 2008) (unpublished)

CONCLUSION

I find no evidence to indicate that any alleged adverse employment action taken by Respondent was motivated by Complainant having engaged in protected activity. As

Complainant has failed to establish that the action against him was motivated by any prohibited reasons, his claim must be denied.

ORDER

Based on the foregoing findings of fact, conclusions of law, and upon the entire record, I enter the following:

1. The parties' underlying dispute falls under the provisions of the STAA as Respondent is a commercial motor carrier and Complainant operated commercial motor vehicles.
2. Complainant established a prima facie case: 1) that Complainant engaged in protected activity under the STAA; 2) that Respondent was aware of the protected activity; 3) that Complainant was the subject of an adverse employment action; and 4) that there was a causal link between Complainant's protected activity and the adverse employment action of Respondent.
3. Respondent articulated legitimate, nondiscriminatory business reasons for taking adverse action against Complainant.
4. Complainant failed to rebut and prove that Respondent's articulated reasons were not the true reason for the adverse action.
5. Complainant is not entitled to relief under 49 U.S.C. § 31105(b)(2)(A), and Complainant's requests for reinstatement, back pay, and attorney fees are hereby denied.

Accordingly, it is hereby **ORDERED** that this claim is **DISMISSED**.

A

Daniel F. Solomon
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).