

company's vehicles and shop as well as alleged use of alcohol and drugs by other employees while on the job. Respondent argues that Complainant was terminated for failing to report for work on his birthday, as he had been instructed to do, and for failure to report for random drug testing.

On February 21, 2011, Complainant filed an STAA complaint against Respondent with the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA). Following an investigation, the Secretary denied the claim finding that Respondent had not violated the Act. The hearing was set for November 2, 2011, in Denver, Colorado. Complainant did not appear for the hearing due to icy road conditions following a snow that morning. Mr. Kinyon together with his witnesses did appear. The undersigned held a reported telephone call with Complainant on the phone and Mr. Kinyon in person in the courtroom. The undersigned advised both Complainant and Mr. Kinyon of their right to be represented by counsel. The hearing was then continued to January 31, 2012, due to the icy road conditions and to afford both parties the opportunity to seek counsel. Neither party sought legal counsel and both waived such right to legal representation at the January 31, 2012 hearing. A formal hearing with the Office of Administrative Law Judges ("OALJ") was held in Denver, Colorado on January 31, 2012. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Neither party filed a post-hearing brief.² The following exhibits were admitted to record: Administrative Law Judge ("AX") exhibits 1-6, Complainant's exhibits ("CX") A-K and Respondent's exhibits ("RX") 1-2.

ISSUES

- I. Whether Complainant engaged in protected activity under the STAA?
- II. Whether Respondent took an adverse action against Complainant?
- III. Whether there is a causal nexus between the alleged adverse action and the protected activity?
- IV. If so, whether Respondent would have taken the adverse action against Complainant in the absence of the protected activity?

² However, Complainant's mother, Kathryn Fletcher, submitted a letter dated July 3, 2012, in which she complains that Complainant had his Commercial Driver's License revoked by the Department of Transportation based on Mr. Kinyon's report to DOT in April of 2012, following the hearing in this matter, which stated that Complainant had refused to take a drug test. *See* Letter, which I have marked as Administrative Law Judge Exhibit 7. Ms. Fletcher writes that Complainant "had not been afforded an opportunity to present a defense in this matter." *Id.* The undersigned first notes that the Letter comes well after the record was closed following the January 31, 2012 hearing, as well as after the date set for submission of post-hearing briefs. In any event, the matter of Complainant's licensing is not within the province of this Administrative Law Judge or, indeed, the province of the Department of Labor. Complainant must pursue this matter and present any defenses he may have in accordance with the Department of Transportation's rules, regulations and procedures. The undersigned's decision on Complainant's retaliation claim herein obviates the need for evidence on damages and, thus, the information related in the letter that Complainant has lost the employment which he had found is irrelevant.

FINDINGS OF FACT

Complainant began working for Respondent, in April of 2005 or 2006. TR at 27. Complainant initially worked for Respondent as a local tractor trailer driver on local runs between the New Belgium Beer brewery and a cold storage facility in Fort Collins, Colorado. *Id.* at 29. As the business grew, he then became a regional driver delivering beer and grain throughout the state. *Id.* at 28. Complainant testified that he received his termination letter dated February 15, 2011 from Mr. Kinyon in a face to face meeting on February 17, 2011, after he had been unable to contact Kinyon to determine his work status for the preceding three days following his taking his birthday off work. *Id.* at 30-32. Complainant noted that the termination letter only referenced his insubordination with no mention of failing to take a drug screen. *Id.*; CX B at 3. Complainant stated that he had taken Friday, February 11, 2011 as his birthday and had Saturday and Sunday off and then when he reported for work on Monday morning, February 14, 2011, his name had been taken off the schedule so he went home and tried to reach Mr. Kinyon by telephone. TR at 33. He reached Mr. Kinyon on Wednesday, February 16, but was unable to come in that day as he had an appointment to interview for another job so he actually met with Mr. Kinyon on February 17, 2011. *Id.*

Complainant stated that he was told by Mr. Kinyon that he was fired for not showing up to work on his birthday. *Id.* at 34. Complainant testified that he had never worked on any of his previous five birthdays at the company and had asked for the day off several weeks in advance. *Id.* at 34-35. He stated that his name kept appearing on the work schedule for his birthday even though he erased it from the schedule several times. *Id.* at 35. Complainant testified that he decided to call Mr. Kinyon at about 9:30 PM the evening before his birthday to let him know that he was not coming in the next day. *Id.* at 35-36; CX C at 3. He stated that Mr. Kinyon told him in a vulgar manner that he was required to work the next day as Mr. Kinyon was the boss and what he said was "just the way it was going to go." TR at 36. Complainant testified that he had already made plans with his family for his birthday and decided that he could not change them and so he missed work the next day. *Id.* Complainant noted that the personnel file produced to him by Respondent had very little in it. *Id.* at 37-38; CX D and F.

Complainant testified that he believed Respondent didn't comply with many rules from his first employment but needed the job so he kept silent. TR at 39-40. He stated that about a year before his termination, he started to raise more safety concerns about posting notices and other information in the shop but was mostly ignored. *Id.* at 40. He noted that there was never an annual inspection of any of the trucks or trailers. *Id.* at 40-41. Complainant testified that his concerns were expressed to Mr. Kinyon or his son, DJ, who swept them aside. *Id.* He stated that the only written complaint he ever sent was an e-mail time dated at 10:43 PM, about an hour before he spoke on the phone with Mr. Kinyon about taking the next day off for his birthday, although Complainant insisted that he wrote and sent this e-mail before he spoke to Mr. Kinyon that evening. *Id.* at 39-42; CX B at 2. Although Complainant denied that he wrote the e-mail in response to the telephone conversation, he did admit that he wrote it knowing that he was going to have a conflict with Mr. Kinyon regarding working on his birthday the following day. TR at 43-44.

The e-mail set forth a number of safety concerns dealing both with the tractor trailer which Complainant drove, Unit 9, as well as violations around the shop. *Id.* at 45; CX B at 2. The shop violations included not having safety instructions regarding the materials being moved, as well as "proper disposal, eye wash station, improperly marked containers with chemicals, fire extinguishers not serviced, amount of drop cards plugged into a single outlet, not enough proper eye protection, oil and antifreeze spillage both in shop and outside, no posted emergency evacuation plans or protocol, amount of fuel additive upstairs, no emergency call numbers posted". *Id.* Complainant testified that the vehicle violations including repairs that were needed, failure to put on current license plates and some service hours violations as shown on his time records. TR at 46-48; CX D. Complainant stated that he "quit fixing my log books to look legal." TR at 47. He described his e-mail as an attempt to develop a better plan for maintenance and upkeep of his vehicle and denied any intention of refusing to operate the vehicle because of any specific safety concerns. *Id.* at 49-51. He indicated that he had never had to refuse to drive his vehicle since there had always been a backup truck to use. *Id.* at 51. Complainant testified that he had been forced to drive beyond the legal service hours on several occasions due to weather, traffic accidents or problems with the vehicle and noted that Respondent had been written up by DOT after his termination for such on its hours audit as well as being cited for failure to ensure drivers were selected for random drug and alcohol testing. *Id.* at 51-56; CX H at 5, 7-9. Complainant testified that he complained of the service hours violations, failure to inspect the vehicles annually and the shop violations to both Mr. Kinyon and his son, DJ, on multiple occasions. *Id.* However, he could not recall specifically the dates but believed he had made such complaints over the prior several years before his termination. *Id.* at 57-58.

Complainant also stated he complained to both Mr. Kinyon and his son about a co-worker named "Dave" whom Complainant felt was drinking alcohol on duty. *Id.* at 59; CX E. Complainant testified that Dave had an accident and was not sent for a drug and alcohol screening as he should have been. TR at 59-60.

Complainant stated that he found employment as a driver for Norfolk Iron and Metal in April of 2011, and made more money than he did working for Respondent plus better benefits. *Id.* at 61-62; CX I.

Complainant denied that Mr. Kinyon asked him to report for drug testing at 4:00 PM on the day prior to his birthday. TR at 65-66; EX 1. Complainant stated that Mr. Kinyon never asked him to get that drug test and that is why the termination letter did not mention the drug test. *Id.* He also noted that Mr. Kinyon's lack of credibility could be seen in his failure to produce various records during the investigation. TR at 67-68; CX F and G. Complainant surmised that his termination was also motivated by Respondent's wish to avoid a severance package since Respondent obviously knew its contract with New Belgium was about to lapse requiring the layoff of its drivers. TR at 69. Complainant noted that his driving record with the DOT was fairly clean with only an accident while employed by Respondent, a minor weight violation and no mention of failing any drug screens. *Id.* at 70-71; CX K. Complainant testified that given his good work record, he believes that at least part of the reason behind his termination was due to his safety complaints. TR at 72-76.

Robert Kinyon is the president of Kinyon Transport which has been in business for about six years distributing beer primarily in northern Colorado. TR at 79-80. His son, DJ, was assistant manager of the company until he left in May of 2011 over some disagreements and the slowdown in business. *Id.* at 80-81.

Mr. Kinyon testified that he maintained an erasable chalkboard on the wall to write the week's work schedule. *Id.* at 81. He stated that he had a policy of requiring written requests to take time off, which he would grant if he had other drivers to do the work. *Id.* He testified that he had noticed that Complainant's name kept being erased off the work schedule for February 11, 2011, and had been told that Complainant was the one who had erased it. *Id.* at 82. Mr. Kinyon stated that he could not let Complainant take that day off as he did not have enough drivers to fill in the schedule for that day without him. *Id.* Mr. Kinyon testified that he was at a friend's house when Complainant called him to say he was not coming in the next day. *Id.* He told Complainant "You'll suffer the consequences if you do not come to work." *Id.* Mr. Kinyon stated that he took a few days to "cool off a little bit" and then met with Complainant on February 17, 2011, when he gave him the termination letter. *Id.* at 82-83. He testified that he asked Complainant for the copy of his random drug test but was told that Complainant hadn't taken it because "he didn't feel like it." *Id.* at 83.

Mr. Kinyon testified that he never saw Complainant's e-mail until he got home from playing cards and checked his e-mail that evening at about 10:30PM. *Id.* He agreed that he had prepared the termination letter on February 15, 2011, but could not get together with Complainant until February 17, 2011. *Id.* at 83-84. Mr. Kinyon stated that the reasons for termination were failure to report to work on Complainant's birthday and insubordination for doing so after Mr. Kinyon explicitly told him to come in to work on the phone the night before. *Id.* at 84. Although he originally testified that Complainant's refusal to take the drug test was a reason for his termination, he subsequently agreed that he did not know of the drug test failure until he met with Complainant and gave him his termination letter. *Id.* at 84-85. He did state that he probably would have fired Complainant for missing the drug test unless there had been some conciliatory approach by Complainant. *Id.* at 85. Mr. Kinyon stated he had not reported the failure to take the drug test to DOT since Complainant was no longer employed by his company. *Id.*³

Mr. Kinyon stated that he has had other employees call in sick or otherwise needed a day off. TR at 86-87. He noted that Complainant did not call in nor request time off in writing so that he could have tried to find another driver willing to give up his day off. *Id.* at 87. Mr. Kinyon testified that he had to call in two other drivers and drive himself on the day Complainant took off due to the heavy work load. *Id.* at 88. With respect to Complainant's e-mail regarding safety complaints, Mr. Fletcher testified that whenever Complainant wrote up any safety issues with any of the trucks, he took care of it as quickly as possible. *Id.* at 89. He noted that his son was in charge of maintenance and that there was a maintenance plan. *Id.* Mr. Kinyon admitted that he had been lax on the annual DOT inspection requirement. *Id.* at 89-90. He denied ever being advised of any complaints about hazardous chemical storage or protocols for handling such by

³ Although given Complainant's mother's letter, apparently Mr. Kinyon decided after the hearing that he should make such a report to DOT. *See* AX 7. As noted previously, I do not consider this report to the DOT as relevant to this case, as the matter of whether the report should be made or was valid is for determination by the DOT.

Complainant. *Id.* at 90. Mr. Fletcher denied that Complainant's February 10, 2011 e-mail played any role in his termination and stated that the e-mail was the first indication that complainant ever gave of making a safety complaint to any outside agency. *Id.* at 90-91. He pointed out that the company had a good safety record as evidenced by its approval for pre-pass. *Id.* at 91.

Mr. Kinyon stated that his company lost its contract with New Belgium Brewing company leading to the layoff of 12 of his 15 drivers. *Id.* at 92. He testified that he did not know of the loss of the contract until several days following Complainant's termination and thus maintained that the layoff played no role in his termination. *Id.* at 93. In fact, Mr. Kinyon testified that had Complainant showed up for work on his birthday, he would still be working for the company as Mr. Kinyon would have kept him on as one of his few remaining drivers following the loss of the contract with New Belgium Brewing. *Id.* Mr. Kinyon did not recall a handwritten letter from Complainant requesting his birthday off dated about three weeks ahead of his birthday, but indicated it may have been submitted and gotten lost with so much going on at the time. *Id.* at 93-94; CX C at 1. Mr. Kinyon maintained that although he was aggravated by Complainant erasing his name from the work schedule, he probably would not have terminated him had Complainant either showed up for work or called him to talk about it earlier than the evening before. TR at 95.

Mr. Kinyon admitted that when he first read Complainant's e-mail, he was angry. *Id.* at 96. He denied that he ruled with an "iron fist" pointing out that he asked people to do things rather than told them. *Id.* at 96-97. Mr. Kinyon testified that he did not call Complainant the week following his failure to appear for work as he felt it was up to Complainant to check on his job if he was worried. *Id.* at 98-99. Under Complainant's cross examination, Mr. Kinyon admitted that he may have held a meeting with his drivers prior to Complainant's termination where he warned that the company might be losing the New Belgium contract and that he would be preparing severance packages. *Id.* at 100-101.

Timothy W. Schmuck was one of the company drivers at the time Complainant was terminated although he knew nothing about his termination until several days later. TR at 102-103. Schmuck was aware that Complainant planned to take his birthday off as Complainant told him that on two occasions when he saw Complainant erasing his scheduled runs for that day off the scheduling board. *Id.* at 103-105. Schmuck testified that he was not aware of any complaints made by Complainant to Mr. Kinyon but did recall various times when Complainant would complaint to the other drivers about problems not being taken care of quickly enough. *Id.* at 106-107. He did not recall any complaints about annual inspections, hazardous materials or data safety sheets or any specific complaints within a week or two of his termination. *Id.*

Under cross examination, Schmuck admitted being late to work a number of occasions perhaps as many as seven or eight times in a month but received only verbal warnings. *Id.* at 108-110. He indicated that he called in if he was to be more than five or ten minutes late. *Id.* at 113-114. He stated that he never heard any reasons for Complainant's termination from either Mr. Kinyon or his son, but did hear a rumor around the shop that it was due to a drug screen. *Id.* at 109-110. Schmuck stated that he has driven beyond his service hours on a few occasions but that he did not feel pressured to do so by Mr. Kinyon. *Id.* at 110-111. He noted that he had no particular problems with repairs being done to his truck in a timely manner. *Id.* at 111-112.

Schmuck testified that even when he was late for work he showed up and made his delivery and so he did not view the lateness as being insubordination. *Id.* at 115-116.

Donald J. Kinyon stated that he had worked for his father's company for about seven years until April of 2011 as a manager and mechanic. TR at 117-118. He testified that he and his father would have supervised Complainant but that he had nothing to do with Complainant's termination which he understood to be because Complainant "no-called, no-showed for work." *Id.* at 118-120. Kinyon did not recall seeing Complainant's e-mail of February 10, 2011. *Id.* at 121. He testified that he could not recall any conversations with Complainant about vehicle maintenance plans but noted that there was a vehicle maintenance plan calling for routine maintenance service every 10,000 miles. *Id.* at 121-122. Kinyon admitted that he had discussions with Complainant about the lack of material safety data sheets for the chemicals kept around the shop and admitted that some of the chemicals were probably improperly kept at the shop. *Id.* at 123-124, 128. He testified that Complainant had never threatened to make any report to outside authorities and had not refused to drive any of the vehicles due to safety concerns. *Id.* at 124-125. He noted that if there were problems with a truck, that truck would be switched out with another vehicle until it was repaired. *Id.* Kinyon stated that he knew someone had erased Complainant's schedule for his birthday several times following which his father would write it back on the board, but denied knowing who had erased it. *Id.* at 126. However, on cross examination, Kinyon admitted speaking with Complainant about wanting his birthday off and telling Complainant to put it in writing and speak with his father about it. *Id.* at 128.

Kinyon testified that he was present on the afternoon of February 10, 2011, when his father handed Complainant the paperwork for a drug screening and was also present the following week when Complainant stated that he had not taken the drug screen. *Id.* at 127; CX B at 4; RX 1. Kinyon agreed that his father could be "grouchy" on some days and that paperwork could occasionally get lost. TR at 128-129. Although Kinyon agreed that Complainant had not worked on his previous five birthdays at the company, he stated that the company was really busy that week and needed him to drive that day. *Id.* at 129-130. Kinyon agreed that Complainant had better attendance at the job than most of the drivers and was pretty good with the customers. *Id.* at 130-131.

Kinyon testified that due to personal disagreements with his father, he decided to quit working with the company but noted that when he did not come in to work without calling, his father terminated him before he could tell him he was quitting. *Id.* at 132-133. He indicated that his termination occurred about the same time that the DOT did an onsite investigation in April of 2011. *Id.* at 134-135. Kinyon testified that he was late for work a number of times in the seven years that he worked for the company and was written up for it several times. *Id.* at 134.

In addition to this proceeding, Complainant filed a complaint with the Colorado Department of Labor and Employment regarding payment for his hours worked while employed by Respondent. CX F. Complainant also filed a complaint with OSHA which resulted in citations and fines relating to failures to maintain and test fire extinguishers; failure to instruct employees on fire extinguishers; and various failures relating to the storage, labeling and instructions to employees regarding hazardous chemicals kept in the shop. CX G. Complainant filed a complaint against Respondent with DOT leading to an inspection of the facility and records

which resulted in a number of violations relating to driver's records, maintenance records and procedures, alcohol and drug testing and hours of service violations. CX H. Respondent received a Conditional safety rating from DOT requiring that corrections be made. *Id.* at 15. All of these complaints were filed by Complainant after his termination from employment by Respondent.

DISCUSSION

A. Surface Transportation Assistance Act

The STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee because the employee has engaged in certain protected activities. Complainant may recover under the STAA if he satisfies the criteria under §31105(a)(1)(A), commonly known as the “Complaint Clause,” or under §31105(a)(1)(B), the “Refusal to Drive Clause.” In relevant part, the Complaint Clause states that it is impermissible to retaliate against an employee because:

“The employee...filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order...”

The Refusal to Drive Clause states that it is impermissible to take an adverse action against an employee for refusing to operate a vehicle because:

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

Under either clause, Complainant must establish a prima facie case of retaliation by proving that: 1) he engaged in protected activity under the Act; 2) he was subject to an adverse employment action; and 3) there was a causal link between his protected activity and the adverse action of his employer. *Moon v. Transp. Drives, Inc.*, 836 F.2d 226 (6th Cir. 1987); *see also Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Osborn v. Cavalier Homes of Alabama, Inc. and Morgan Drive Away, Inc.*, 89-STA-10 (Sec’y July 17, 1991). After a prima facie case is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision. *Moon*, 836 F.2d at 229. If the employer articulates a non-discriminatory reason for the adverse employment action, the complainant bears the burden of showing that the employer’s reason is pretextual and the real reason for the adverse action was retaliation. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). However, once the case is tried on its merits, the ultimate inquiry becomes whether complainant has proved by a preponderance of the evidence that the respondent discriminated against him because of his protected activity. *U.S. Postal Serv. Bd. of Governors v. Aiken*, 460 U.S. 711, 713-14 (1983);

Calhoun v. United Parcel Service, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB Sept. 14, 2007). The one exception to the claimant's burden of proof arises under the "dual motive" analysis: once the evidence shows that the proffered reason is not legitimate, and that the discharge was motivated at least in part by retaliation for protected activity, then the employer must establish by a preponderance of the evidence that it would have discharged the complainant independently of his protected activity. *Faust v. Chemical Leaman Tank Lines, Inc.*, 93-STA-15 (Sec'y April 2, 1996); *Moravec v. HC &M Transp.*, 90-STA-44, slip op. at 12, N.7 (Sec'y, Jan. 6, 1992).

II) Complainant Engaged in Protected Activity Under the STAA

The Complainant in an STAA proceeding bears the burden of proving that he engaged in protected activity. The "Complaint Clause" of the STAA protects an employee who has "filed a complaint or begun a proceeding related to a violation of a regulation, standard, or order, or has testified or will testify in such a proceeding." 31105(a)(A)(i). The statute covers internal complaints to supervisors as well as external complaints to government officials. *See Nix v. Nehi-RC Bottling Co., Inc.*, 84 STA-1 (Sec'y July 13, 1984); *Davis v. H.R. Hill, Inc.*, 86-STA-18 (Sec'y Mar. 19, 1987); *Harrison v. Roadway Express, Inc.*, 1999 STA 37 (ARB Dec. 31, 2002). Employee's complaints cannot be too generalized or informal. *Calhoun v. U.S. DOL*, 576 F.3d 201, 213-14 (4th Cir. 2009). If the "internal communications are oral, they must be sufficient to give notice that a complaint is being filed." *Jackson v. CPC Logistics*, ARB No.07-006, ALJ No. No 2006-STA-4 (ARB Oct. 31, 2008); *see Clean Harbor Env't Servs., Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (finding that a driver "filed a complaint" when he sent letters to his superiors explaining various safety precautions he had been taking in an attempt to explain his slow pick-up times). All complaints, whether internal or external, must "relate to" safety violations. Courts have construed "relate to" broadly to encompass violations of both federal and state laws. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992). However, in order to qualify for protection, the complaint must be based on a "reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation." *Calhoun*, 576 F.3d at 213.

Complainant may also prevail under the "Refusal to Drive" clause of the STAA. A refusal to operate a commercial motor vehicle is protected under two provisions. The first provision, 49 U.S.C. §3115(a)(1)(B)(i), deals with "actual violations" of the law and requires Complainant to "show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive." *Yellow Freight Sys. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993). "DOT regulations extend beyond federal motor vehicle safety regulations to include any relevant motor vehicle regulation, standard, or order." *Canter v. Maverick Transp., LLC*, 2009-STA-00054, slip. op. at 11 (ALJ Oct. 28, 2010); *see also Chapman v. Heartland Express of Iowa*, ARB No. 02-030, ALJ No. 2001-STA-35 (ARB Aug. 28, 2003). Accordingly, refusing to drive when the contemplated run would cause the driver to violate the Federal hours of service regulations is also protected activity under the STAA. *See Ass't Sec'y & Brown v. Besco Steel Supply*, 93-STA-30 (Sec'y Jan. 24, 1995); *see also Hamilton v. Sharp Air Freight Serv., Inc.*, 91-STA-49, slip op. at 1-2 (Sec'y July 24, 1992); *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Aug. 31, 1992); *BSP Trans, Inc., v. United States*

Dep't of Labor, No. 97-2282 (1st Cir. 1998), *aff'g Michaud v. BSP Transp., Inc.*, 95-STA-29 (ALJ Sept. 6, 1996).

Under the second “Refusal to Drive” provision, 49 U.S.C. §31105(a)(1)(B)(ii), Complainant must demonstrate that he had a reasonable apprehension of serious injury to himself or the public because of the vehicle’s unsafe condition. *Eash v. Roadway Express, Inc.*, ARB No. 04-036, ALJ No. 1998-STA-28 (ARB Sept. 30, 2005). “This clause of the STAA covers more than just mechanical defects of a vehicle - it is also designed to ensure ‘that employees are not forced to commit...unsafe acts.’” *Canter*, 2009-STA-00054, slip op. at 11 (citing *Garcia v. AAA Cooper Transp.*, ARB No. 98 -162, ALJ No. 1998-STA-023, slip op. at 4 (ARB Dec. 3, 1998)). The “apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous danger of accident, injury, or serious impairment to health.” 49 C.F.R. § 31105(a)(2). In determining whether a “refusal to drive” merits STAA protection, the Court must consider the totality of the circumstances surrounding the refusal. *Johnson v. Roadway Express Inc.*, ARB No. 99-011, ALJ No. 1999-STA-005, slip op. at 7-8 (ARB Mar. 29, 2000).

Here, Complainant alleges that he engaged in protected activity by complaining internally about Respondent’s lack of maintenance upon and lack of maintenance plan for the trucks; failure to post notices and take proper safeguards with respect to hazardous chemicals kept in the shop; allowing hours of service violations by Complainant and other drivers; and laxity in enforcing drug and alcohol regulations. TR at 40-41, 46-48, 51-56, 59; CX E. Complainant testified that he did not refuse to operate any vehicles as he was allowed to operate other trucks if a maintenance problem needed repair on his truck. TR at 51, 124-125. There is some disagreement as to whether Complainant made all of these complaints known to Respondent but there is agreement that he did register at least some dissatisfaction in several of these areas. TR at 89-90, 106-107, 123-124, 128. There is no dispute that Complainant expressed these same safety concerns in his e-mail sent on the evening prior to his birthday which was the first time that Complainant had ever suggested he might report any concerns to any outside agency. CX B at 2; TR at 45-51, 90-91, 124-125. Thus, it appears to be undisputed that Complainant did express safety concerns to Mr. Fletcher which constitute protected activity for purposes of the Act.⁴

III) Complainant Was Subject To An Adverse Employment Action

In order to prevail on his STAA claim, Complainant must establish that he was subject to an adverse employment action. 49 U.S.C.A. § 31105(a)(1). In *Melton v. Yellow Transportation, Inc.*, the two member majority of the Board adopted the Title VII “materially adverse” standard which the Supreme Court applies to the anti-retaliation provisions under 42 U.S.C.A. § 2000e-3(a). *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008); *see Burlington Northern and Santa Fe Railway Co. v. Sheila White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). In adopting the “materially adverse” standard, the ARB noted that the “purpose of the employee protections that the Labor Department administers is to

⁴ While Complainant also filed complaints with OSHA, DOT and the Colorado Department of Labor and Employment, these complaints were all filed following his termination of employment with Respondent. *See* CX F, G and H.

encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. Therefore, we think that testing the employer's action by whether it would deter a similarly situated person from reporting a safety or environmental or security concern effectively promotes the purpose of the anti-retaliation statutes." *Melton*, ARB No. 06-052, slip. op. at 20.

In this case, there is no question that Complainant suffered an adverse employment action when he was terminated from Employment on February 17, 2011.

IV) There Is No Causal Link Between Complainant's Protected Activity And The Adverse Action.

To establish the prima facie case, Complainant must present evidence sufficient to raise the inference that his protected activity was the likely reason for the adverse action. *See Carroll v. J.B. Hunt Transp.*, 91-STA-17, slip op. at 2 (Sec'y June 23, 1992). However, since direct evidence of any connection between the employees protected activity and the adverse action are rare, Complainant may prove that such a connection exists with circumstantial evidence. *Clay v. Castle Coal & Oil Co.*, 90-STA-37, slip op. at 6 n.5 (Sec'y Nov. 12, 1991). *Germann v. CalMat Co.*, 1999-STA-15 (ALJ Aug. 6, 1999); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir. 1864). An inference of causation may be raised if the adverse action is close in time to the protected activity. *See e.g., Bergeron v. Aulenback Transp., Inc.*, 91-STA-38, slip op. at 3 (Sec'y June 4, 1992) (concluding that an inference was raised when the discharge immediately followed the protected activity); *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991) (finding a causal connection where the employee was fired immediately after bringing the lawsuit). To succeed on his claim, Complainant must also prove by a preponderance of the evidence that Respondent's managers who decided to terminate his employment knew of the protected activity. *Baughman v. J.P. Donmoyer, Inc.*, ARB No. 05-105, ALJ No. 2005-STA-5 (ARB Sept. 28, 2007); *Osborn v. Cavalier Homes*, 89-STA-10, slip op. at 2 (Sec'y July 17, 1991).

In this case, Complainant argues that he was terminated in retaliation for his complaints about the alleged safety violations, particularly in his e-mail of February 10, 2011. As discussed above, Complainant engaged in protected activity when he complained to Mr. Fletcher about these violations. Nevertheless, after examining the totality of the evidence, the undersigned finds that Respondent's actions were not motivated by animus towards Complainant's protected activity.

Mr. Kinyon testified that he terminated Complainant's employment because Complainant failed to show up for work as assigned on his birthday and for insubordination. TR at 84. Mr. Kinyon deemed the Complainant to be insubordinate in refusing to show up for work despite personally speaking with Mr. Kinyon the prior evening and being specifically told that Complainant was needed at work the next day and could not have the day off despite his request. *Id.* Accordingly, Complainant's absence was viewed not only as an unexcused absence but also a direct refusal of a direction by the owner of the company to show up for work due to the heavy work load for that day. While Complainant's written e-mail voicing safety concerns was in temporal proximity to his termination, his failure to appear for work on the day following the e-mail is even more temporally proximate and appears to be the immediate cause of his termination. The undersigned finds that such an absence from work following Mr. Kinyon's

explicit warning the prior evening that Complainant did so at his own peril was the direct, primary and sole cause of Complainant's termination. While Complainant did express written safety concerns to Mr. Kinyon that same evening, I find this e-mail to have been a pre-emptive effort by Complainant to avoid discipline for his planned intention to disobey Mr. Kinyon's instruction to work on his birthday. Complainant had never before made any written complaints relating to safety, refused to drive any vehicle due to safety concerns, expressed an intention to make any report to any outside agencies about safety concerns, or made any reports to outside agencies until he had been terminated by Respondent. TR at 39-42, 49-51, 124-125; CX B at 2; CX F, G and H. Indeed, Complainant admitted that he knew there was going to be a problem with Respondent over his desire to take his birthday off when he wrote the e-mail. TR at 43-44. Thus, I do not find it coincidental that Complainant sent the e-mail the evening before he planned to take an unauthorized absence from work, termed himself a "whistleblower," and warned that he could not be "disciplined or terminated for coming forth with my concerns. CX B at 2. Further, Mr. Kinyon testified that he had already warned Complainant that he "would suffer the consequences" if he failed to show for work the next day before Mr. Kinyon ever saw that evening's e-mail from Complainant. *Id.* at 82-83.⁵

As for the alleged failure to take the drug screen, I find that this did not contribute to the termination as Mr. Kinyon did not even know that Complainant had failed to take the drug screen until he had apparently already given him the termination letter dated several days earlier, which of course made no mention of the drug screen. CX B at 3; TR at 84-85. In any event, failure to take a drug screen is not a protected activity nor is it necessary to make a determination as to whether that failure was an independent cause sufficient for Respondent to terminate Complainant's employment as I have found that Complainant's protected activity had no causal nexus to his termination. Finally, the issue of whether Mr. Kinyon may have been motivated in some part by the desire to avoid severance payments in light of the looming potential layoff due to the loss of the New Belgium Brewing contract is likewise irrelevant as this issue has no relationship to any protected activity. Thus, even if this played a role in the termination, that gives no right of recovery herein as that would not constitute retaliation for any safety complaints.

Based on the evidence presented above, the undersigned finds that Complainant failed to establish a nexus between his protected activity and the adverse employment action.

Conclusion

Complainant engaged in protected activity when he complained to Respondent about various safety concerns, particularly in his e-mail to Mr. Fletcher dated February 10, 2011. However, Complainant has failed to establish that he was terminated because of these complaints. The evidence on the record demonstrated that Respondent terminated Complainant because he failed to show up for work as scheduled on February 11, 2011, and due to his insubordination in failing to appear for work on that day in direct contravention of Mr. Kinyon's instructions by telephone the evening before.

⁵ Indeed, Mr. Kinyon's own son suffered the same fate of termination two months later at least in part due to his failure to appear for work without calling in.

ORDER

For the reasons described above, Complainant's actions do not qualify for protection under §31105(a)(1)(A) of the STAA. Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find that Respondent did not unlawfully discriminate against Complainant because of any protected activity and, accordingly, his complaint is hereby **DISMISSED**.

Russell D. Pulver
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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 may be found to have waived 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(b). 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(b).