

U.S. Department of Labor

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Issue Date: 03 August 2011

CASE NO.: 2010-STA-00010

In the Matter of:

PHILIP MILLER,
Complainant,

v.

SINCLAIR TRUCKING,
Respondent.

Before: RICHARD M. CLARK
Administrative Law Judge

DECISION AND ORDER DENYING WHISTLEBLOWER COMPLAINT

This action involves a complaint under the employee protection provision of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105, and its implementing regulations found at 29 C.F.R. Parts 18 at 1978.¹

On April 20, 2011, a hearing was conducted in Denver, Colorado, in this matter involving Philip Miller ("Complainant"), who was represented by Thomas Muther, Attorney at Law, and Sinclair Trucking ("Respondent"), which was represented by Carrie Brantley and L. Anthony George, Attorneys at Law. During the hearing, the following exhibits were admitted into evidence: Complainant's exhibits ("CX") 1 through 9 and Respondent's exhibits ("RX") A through O. Hearing Transcript ("TR") at 6-7. Although not admitted at the hearing, Complainant's and Respondent's pre-hearing statements were marked as Administrative Law Judge's exhibits ("ALJX") 1 and 2, respectively. On July 18, 2011, Complainant and Respondent submitted post-hearing briefs, which are marked as ALJX 3 and 4, respectively, thereby closing the record.

¹ On August 31, 2010, the Secretary issued "interim final" regulations governing STAA claims pursuant to the 9/11 Commission Act of 2007. Although labeled "interim," these regulations went into effect immediately upon issuance and are treated as final within this decision and order. See Supplementary Information for Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982, 75 Fed. Reg. 53,552 (Aug. 31, 2010).

I. Issues in Dispute

This matter presents the following disputed issues:

1. Whether Complainant engaged in protected activity under the STAA.
2. If so, whether Respondent violated 49 U.S.C. § 31105 of the STAA when it terminated Complainant on November 16, 2009.
3. If Respondent violated 49 U.S.C. § 31105, whether Complainant is entitled to damages under 49 U.S.C. § 31105(b)(3).

II. Stipulations

Prior to hearing, the parties agreed to a number of stipulated facts:

1. Complainant applied for a position as a fuel deliver driver with Respondent on October 21, 2008. On this date, Complainant signed and dated a position description for "transport driver."
2. Respondent hired Complainant on October 26, 2008.
3. Complainant's effective start date as a fuel delivery driver for Respondent was on or about November 1, 2008.
4. At all times during his employment with Respondent, Complainant possessed a commercial driver's license issued from the state of Colorado with a hazardous materials and tank endorsement (an "X" endorsement).
5. Complainant's primary job responsibility was to load gasoline and ethanol from specified loading stations and to deliver the gasoline and ethanol to gas stations around the Denver metropolitan area.
6. Both gasoline and ethanol are hazardous materials as identified by Department of Labor regulations, and the truck Complainant was driving on November 14, 2009, was placarded pursuant to 5 U.S.C. § 5103.
7. Stephanie Keil was a dispatcher working for Respondent during Complainant's tenure there.
8. Ron Bowman was a part-time dispatcher working for Respondent during Complainant's tenure there.
9. Darin Rowberry was Respondent's terminal manager during Complainant's tenure there. Mr. Rowberry would cover dispatching duties if Ms. Keil or Mr. Bowman was unavailable.
10. On November 14, 2009, Complainant drove an eighteen-wheel, semi tractor-trailer. This vehicle weighed over ten-thousand pounds when empty and over eighty-thousand pounds when full.
11. On November 14, 2009, Complainant was assigned to transport loads of fuel to various locations around Denver, Colorado, and one load of ethanol from Windsor, Colorado. He left Respondent's truck yard to begin this work at approximately 3:45 PM.
12. On November 14, 2009, Complainant called Ms. Keil at 10:03 PM and 10:56 PM. Ms. Keil returned Complainant's second call at 11:01 PM. Complainant then

- called Ms. Keil back at 11:16 PM and informed her he had parked the truck he was driving due to inclement weather.
13. Complainant did not work on November 15, 2009.
 14. On November 16, 2009, Respondent terminated Complainant's employment. Mr. Rowberry informed Complainant he was not being terminated for refusing to drive in the snow.
 15. Complainant is currently attending Metro State College in Denver, Colorado.
 16. After his termination, Complainant worked at Griffin Trucking for approximately twenty-two days.
 17. On March 12, 2010, Complainant filed a complaint under the STAA, alleging he was terminated after he refused to drive a truck during a snowstorm due to hazardous conditions.
 18. On September 30, 2010, the Regional Administrator for OSHA, Region III, found there was no reasonable cause to believe Respondent violated the STAA.²
 19. On October 5, 2010, Complainant received the finding dismissing his formal complaint of retaliation under the STAA.
 20. On November 3, 2010, Complainant filed his objections to OSHA's findings and requested a hearing before an administrative law judge.

See ALJX 1 at 2-4; ALJX 2 at 1-3. The above stipulations are accepted as undisputed facts binding the parties and are relied upon below in the analysis of Complainant's claim. 29 C.F.R. § 18.51; *see Seater v. S. Cal. Edison Co.*, No. 90-013, slip op. at 14-15 n.25 (ARB Sept. 27, 1996).

III. Disputed Facts

The parties also listed a number of facts as disputed. These are summarized below as follows:

1. The contents of and circumstances surrounding the alleged written warning given to Complainant on August 3, 2009.
2. Complainant's attitude and behavior toward Respondent's customers and corrective actions that may have been taken by Respondent with respect to such behavior in October and November of 2009.
3. Whether or not Complainant, on November 13, 2009, was warned by Mr. Rowberry against calling Ms. Keil for noncritical issues while she was off duty as a dispatcher and accused by Mr. Rowberry of doing so because "she was a single female."
4. Whether Complainant left a message for Ms. Keil on November 14, 2009, telling her "the roads were dangerous and he was going home."
5. The contents of the discussion between Complainant and Mr. Rowberry on November 16, 2009, during which Complainant was informed he was being terminated.

² Although the parties stipulated to this fact, it has no bearing on the analysis below as STAA claims are subject to *de novo* review. *See* 29 C.F.R. § 1978.107(b).

6. The circumstances surrounding any policy Respondent may have had regarding when a driver-employee of Respondent may choose not to drive, specifically how widely and with what frequency such a policy was disseminated.
7. Whether or not Respondent has taken adverse action against any other driver aside from Complainant for refusing to drive due to safety concerns.
8. The extent of Complainant's employment search since his tenure ended with Griffin Trucking.

ALJX 1 at 4-5; ALJX 2 at 3-5.

IV. Factual Findings

As the parties were able to agree on a number of factual issues, the findings below address only disputed issues – so far as they are relevant – and other facts that are relevant to the resolution of the complaint.

1. According to Complainant, prior to his employment with Respondent, he worked for a number of other trucking companies for short periods of time. These included a one-month tenure with Solar Transportation that Complainant voluntarily ended; a nine-month tenure as a fuel driver with Map Transportation that Complainant voluntarily ended; a one-month tenure with Cast Transportation that Complainant voluntarily ended; a four-month tenure with TSL Transportation that Complainant voluntarily ended; and a four-month tenure as a driver for Okami Foods that ended due to a change in policy about team driving. TR at 74-77.

2. Complainant received a written warning from Respondent on August 3, 2009. RX E at 1; *see* TR at 113-14. This warning admonished Complainant generally for “substandard work,” specifically directing him to discontinue arriving at work early as this was a distraction for Respondent's other employees with whom Complainant sought to converse prior to the beginning of his shifts. RX E at 1. The warning noted a specific instance in which Complainant had argued with one of Respondent's employees and caused a distraction. *Id.* It also chastised him for his “poor pre and post trip inspections” and an instance when he ran his truck out of fuel during one of his work shifts. *Id.*; *see* TR at 120-21. Mr. Rowberry assisted Complainant when this latter mishap occurred. TR at 121. The warning alerted Complainant that further written warnings may result in a suspension and then termination. RX E at 1. Mr. Rowberry and Ms. Keil signed the warning, although Complainant refused to do so. *Id.*; *see* TR at 122. According to Mr. Rowberry and as indicated by the form itself, Ms. Keil's signature demonstrated Complainant was shown the warning. RX E at 1; TR at 121-22.

3. One of Complainant's “essential functions” as a driver for Respondent required he “[m]aintain proper amounts of fuel, oil, water, air and other elements to insure the proper operation of the truck.” RX M at 29.

4. Respondent received negative reports and complaints regarding Complainant's interactions with its customers on numerous occasions. A number of these complaints originated from employees of a company called Bradley that operated convenience stores in the Denver

area. *See* TR at 105, 108. Deliveries to the Bradley stores comprised approximately sixty percent of Respondent’s total business. *Id.* at 105.

5. Mr. Rowberry received two of these complaints personally. *Id.* at 103-07. Bradley employees complained Complainant had been rude, upset, used profanity, and become generally impatient in requesting these employees accompany him in measuring the amount of fuel in tanks prior to his delivering fuel to these locations. *Id.* at 103, 106. Bradley had a policy in place requiring its store managers to verify visually the amount of fuel in the tanks at its convenience stores prior to any delivery. *Id.* at 104. Mr. Rowberry discussed these incidents with Complainant, explaining it was important Respondent’s employees follow this procedure and be courteous to Bradley’s employees given the large percentage of Respondent’s total business attributable to Bradley. *Id.* at 105-07. In response, Complainant asserted there was no problem with his behavior and, instead, the problem was with the persons who had made these complaints. *Id.* at 106-07. Complainant denied being rude to or using profanity while interacting with Bradley Employees. *Id.* at 79-80. Mr. Rowberry was also aware of three additional service-related complaints attributable to Complainant’s behavior – two from Bradley employees and one originating from an employee of Respondent’s own gas stations – that were received by Ms. Keil. *Id.* at 107.

6. Other drivers for Respondent also generated complaints from their interactions with Bradley employees, which on several occasions resulted in written warnings. *See* CX 6 at a-d.³ For example, on November 8, 2010, David Ottensman, a driver for Respondent, was reprimanded via written warning for his “behavior and attitude” toward a Bradley employee. *Id.* at a. This warning noted “other occasions when your temper, and [sic] lack of patience with Bradley personnel and their customers, as well as motorists, have caused problems,” and threatened suspension without pay and possible termination for any future negative interactions of this same sort. *Id.*

7. On January 16, 2008, Mr. Rowberry issued a written warning to another of Respondent’s drivers, Mark Allen. *See generally id.* at d. This warning chastised Mr. Allen for “unacceptable behavior,” including “acting crazy and rude” to customers at a Bradley store while making a delivery. *Id.* It was also labeled as a “final warning” and stated “[a]ny further infractions relating to profanity, attitude or general misconduct towards customers or co-workers will result in termination.” *Id.* On December 15, 2010, Michael Richard, a dispatcher for Respondent, emailed Mr. Rowberry to inform him Mr. Allen had been “belligerent and rude” to a customer the day before. *Id.* at b. Mr. Allen nevertheless remained employed with Respondent at the time of hearing. *See* TR at 173-74. Mr. Rowberry explained this was so because of the length of the interval between the January 16, 2008, written warning and the December 2010 complaint. *Id.* at 175.

8. On November 24, 2010, Mr. Richard emailed Mr. Rowberry to complain about the conduct of another of Respondent’s drivers, Enrique Martinez. *See generally* CX 6 at c. According to Mr. Richard, Mr. Martinez had called him the prior day refusing to perform the work Mr. Richard had scheduled for him. *Id.* Mr. Richard noted, as with Mr. Allen, that Mr. Martinez’s behavior had been “belligerent and rude,” stating Mr. Martinez’s “attitude [was]

³ Complainant used letters to mark the pages of his various exhibits.

becoming intolerable.” *Id.* The email also stated this constituted the fourth time Mr. Martinez had been written up, *id.*, a characterization with which Mr. Rowberry disagreed. TR at 171.

9. According to Mr. Rowberry, despite the warnings issued to Mr. Ottensman, Mr. Allen, and Mr. Martinez, none of them had received the same number of customer complaints in as short a period of time as Complainant. *Id.* at 175.

10. Another of the “essential functions” of Complainant’s job as a driver for Respondent was to “[i]nteract with customers, co-workers, managers, and the general public in a professional manner as an [sic] uniformed representative of [Respondent]’s Trucking Division.” RX M at 29.

11. Mr. Rowberry received complaints from other drivers employed by Respondent regarding Complainant’s interactions with them and his failure to clean out the cab of his truck properly prior to its use during a subsequent shift. Mr. Rowberry recalled receiving two complaints from “previous employees” who had alleged Complainant had threatened to “kick their teeth in.” *Id.* at 111. Mr. Rowberry discussed these complaints with Complainant, who denied having made such statements. *Id.* at 79, 111. Other drivers for Respondent had also complained about the state in which Complainant left the cab of his truck after completing a shift. *Id.* at 111-12. Mr. Rowberry characterized it as “messy” and a “pig pen,” which “was full of fast food wrappers, . . . coffee cups, [and] drink cups.” *Id.* Mr. Rowberry twice observed the unkempt state of the cabs of the trucks Complainant had driven, and he discussed this issue with Complainant. *Id.* at 112.

12. Another of the “essential functions” of Complainant’s job as a driver for Respondent required he “[m]aintain [the] cleanliness of self and uniform as well as vehicle and its components.” RX M at 29.

13. Prior to his termination, Complainant had been told at least four times by Mr. Rowberry to stop calling Ms. Keil on her home phone. TR at 125. The last of these warnings had occurred approximately one week prior to Complainant’s termination, when Mr. Rowberry had given Complainant a “directive” to stop calling Ms. Keil outside of work. *Id.* at 127-28. This occurred in Mr. Rowberry’s office and was overheard by Sharon Lund, Respondent’s payroll clerk. *Id.* at 127, 183-84. Mr. Rowberry told Complainant these calls created the impression Complainant was “stalking” Ms. Keil “because she’s a single female.” *Id.* at 127. Ms. Keil had complained to Mr. Rowberry about being called by Complainant during her off-work hours. *Id.* at 125. On August 12, 2009, Complainant had requested Ms. Keil’s personal email address so he could “tell you some things when you’re off the clock” and because “communication on the company server is public.” RX D at 14. Ms. Keil provided this email address. *Id.*

14. On the evening of November 14, 2009, a snowstorm occurred during Complainant’s work shift for Respondent. TR at 42-56. Mr. Bowman was the dispatcher when this shift began. *Id.* at 58. Complainant began this shift by traveling from Denver to Windsor and back, picking up and dropping off a load of ethanol. *Id.* at 41-42. Following this, he loaded his truck with gasoline in Denver and began a delivery route that was to take him to several gas

stations throughout the Denver metropolitan area. The truck Complainant drove for Respondent was equipped with snow chains. *Id.* at 45. At the first two gas stations Complainant stopped to deliver fuel, Complainant said he had problems getting his truck to move and that his “tires were spinning” in the snow; nevertheless, Complainant did not attempt to utilize the snow chains he had been given in these situations, asserting “you don’t need chains on city roads.” *Id.* at 45-46, 49. Complainant attended training provided by Respondent on “chaining a truck” on October 8, 2009. RX O at 156.

15. Before leaving the second station on November 14, 2009, Complainant called another driver then working for Respondent, Jeff Ansel, who informed Complainant he had put chains on his truck in order to move out of a gas station parking lot. *Id.* at 56. Complainant also called Ms. Keil, who was off duty and not working, so he could, in his words, “open[] the lines of communication” with respect to the weather. *Id.* at 56-57. After leaving the second station, Complainant decided to return to Respondent’s terminal due to the weather conditions. *Id.* at 53. Thereafter, he witnessed the trailer of his truck “start to jackknife out and slide.” *Id.* at 54. It was by this point – according to Complainant – too dangerous to stop and put chains on his truck as he was then out on public streets and risked being struck by another motorist. *Id.* When asked if he would have, at this point, put chains on his truck had he been able to find a safe location to do so, Complainant responded, “I mean I could have had triple chains on every single tire of the truck. I mean there’s still people driving around, that [sic] they don’t have chains on their cars and they’re sliding, you know, doing 360s or whatever.” *Id.* at 55.

16. Upon returning to the terminal, Complainant called Ms. Keil a second time, leaving her a message stating conditions were too dangerous for him to continue his shift. *Id.* at 60. Ms. Keil thereafter called back, Complainant ended this call, and then Complainant called Ms. Keil back to discuss the weather and his situation. *Id.* According to Complainant, he spoke with Ms. Keil for approximately forty-five minutes, during which time she became angry and told him to continue his shift because the weather “wasn’t bad” and the other drivers continued to work. *Id.* at 62; *see* CX 2, 5. Complainant stated this conversation ended by Ms. Keil telling him not to come into work the following day, which he interpreted as her suspending him from work. TR at 64. Complainant did not call his supervisor or the on-duty dispatcher.

17. During the times Complainant called Ms. Keil on the evening of November 14, 2009, he believed she was the dispatcher on duty. *Id.* at 58. Complainant stated he believed this was because she would be the dispatcher working the following morning and would have to “come in early . . . look at the whole board in front of her, all the stations, where they were at, and . . . was going to have to start making decisions.” *Id.* at 58. Complainant offered no explanation as to why Mr. Bowman could not have communicated the situation to Ms. Keil, and he did not explain why he never told Mr. Bowman about the situation. According to Ms. Lund, Ms. Keil would not have been the dispatcher to call in this situation. *Id.* at 185-86. According to Mr. Rowberry, Mr. Bowman should have been called by Complainant – instead of Ms. Keil – for two reasons. First, he had dispatched Respondent’s trucks the night before and “knew what stores would be dispatched for Sunday morning, where [Ms. Keil] did not.” Second, Mr. Bowman was a former trucker and was consequently better able to assess the effect of inclement weather than Ms. Keil. *Id.* at 129-30. Ms. Keil herself asserted in an email that Complainant’s

calls on the evening of November 14, 2009, “had woken [her] up on a night when [she] wasn’t even dispatching.” CX 5 at 12.

18. Mr. Rowberry terminated Complainant’s employment with Respondent during a phone call on Monday, November 16, 2009. TR at 130-31. During this conversation, Mr. Rowberry informed Complainant his termination was due to his continued problems interacting with customers and coworkers as well as his failure to heed the “directive” not to call Ms. Keil when she was not working. *Id.* at 66, 131. According to Mr. Rowberry, Complainant during this conversation stated his belief he was being terminated for refusing to drive in the snow, something Mr. Rowberry explicitly told Complainant was not the case. *Id.* at 131-32. According to Complainant, Mr. Rowberry never mentioned Complainant’s calls to Ms. Keil during this conversation. *Id.* at 67.

19. Respondent annually informed its drivers how to handle inclement weather. *Id.* at 138, 190, 199, 215. Mr. Rowberry explained to Respondent’s drivers each year how they should handle inclement weather while driving a truck for Respondent. *Id.* In Mr. Rowberry’s words, this training amounted to the following maxim: “[I]f they feel uncomfortable, they’re not required to drive the vehicle.” *Id.* at 138. Several drivers testified to the existence of this policy. *See id.* at 190, 199, 215. One of Respondent’s drivers, Christian Aldrich, testified to informing Ms. Keil of his experiencing inclement weather during a trip to Wyoming, and being subsequently told by her to return to Denver “[b]ecause of the weather.” *Id.* at 212.

20. Of the drivers who testified at the hearing regarding their experiences encountering inclement weather while driving for Respondent, none – aside from Complainant – told of repercussions for choosing not to drive. Steven Moss, a driver who had worked for Respondent for four years at the time of the hearing, was not aware of any driver of Respondent’s who had ever been disciplined for a refusal to drive, noting he had informed Respondent of his own refusal to drive because he felt unsafe “a number of times.” *Id.* at 191. Notably, Mr. Moss had never informed Mr. Keil of an instance where he was ceasing his driving work because such decisions, in his opinion, were usually made after 5:00 PM when she was off of work. *Id.* at 195. Mark Schnose, a driver who had worked for Respondent for fifteen years at the time of the hearing, and Frank Harry Pearson, a driver who had worked for Respondent for three years at the time of the hearing, were also not aware of any driver who had been disciplined for refusing to drive. *Id.* at 199, 206-07. Mr. Pearson had on one occasion informed Ms. Keil of his refusal to drive and had consequently received no “push-back” from her. *Id.* at 206. Scott Dean Perry, a driver who had worked for Respondent for four years at the time of the hearing, stated Mr. Rowberry “made it clear to me that if I didn’t feel safe, I didn’t have to drive.” *Id.* at 214-15. He, too, could not recall any employee of Respondent’s being disciplined for refusing to drive due to inclement weather. *Id.* at 216.

V. Analysis and Conclusions

As set forth below, the following conclusions of law are based on analysis of the entire record; arguments of the parties; and applicable regulations, statutes, and case law. 29 C.F.R. §§ 18.57, 1978.107. In deciding this matter, the administrative law judge is entitled to weigh the

evidence, draw inferences from it, and assess the credibility of witnesses. *See Germann v. Calmat Co.*, No. 99-114, slip op. at 8 (ARB Aug. 1, 2002); 29 C.F.R. § 18.29.

A. Credibility Determinations

Although several witnesses appeared at the hearing, only two provided substantial testimony: Complainant and Mr. Rowberry. Their credibility is consequently discussed below.

Complainant's Credibility

1. Complainant's credibility is a serious detriment to his believability as a witness. His version of events was often unsupported by evidence in the record, and his own explanations for certain events were often paradoxical. For instance, he offered no support – beyond his own bare assertion – to explain why he was never presented with the August 3, 2009, warning addressing issues with his performance. *See* Factual Findings (“F.F.”) ¶ 0. Indeed, Ms. Keil's signature – as indicated by the printing below it – was only necessary if Complainant had “refuse[d] to sign.” *Id.* The record indicates this was much more likely to have occurred given Mr. Rowberry's version of the events surrounding the warning, *see id.*; RX E at 1, and Complainant's own failure to produce any evidence supporting his version of the events whereby the August 3, 2009, warning was created and signed by Mr. Rowberry and Ms. Keil and never passed along to him.

2. Complainant's explanation as to why he failed to use snow chains on November 14, 2009, is also contradictory and nonsensical. By his own account, he opted not to fit snow chains to his truck at two gas stations where he encountered problems gaining traction because such chains were not needed on city streets. These locations were safe and not exposed to traffic. Shortly thereafter, once driving on these same city streets, he noted it was too dangerous to apply chains to stop his truck from jackknifing. F.F. ¶¶ 0, 0. Conversely, Mr. Ansel by Complainant's account chose to apply snow chains to his own truck while he too was having trouble gaining traction while stopped at a gas station. F.F. ¶ 0. Complainant's actions, when compared to those of Mr. Ansel, appear irrational and not credible given his own characterization of the severity of the storm on November 14, 2009, and Mr. Ansel's decision to utilize snow chains on his own truck.

3. Also unbelievable is Complainant's alleged impression that he was to call Ms. Keil – and not Mr. Rowberry or Mr. Bowman – when he decided to discontinue his shift on November 14, 2009. No other witness at the hearing offered testimony to support this decision; several witnesses, however, offered testimony as to why Complainant should *not* have called Mr. Keil under these circumstances. These included Mr. Rowberry (who had explicitly directed Complainant not to call Ms. Keil in the evenings), Ms. Lund (who testified Mr. Bowman, the daytime dispatcher for the prior shift, should have been called and overheard the conversation whereby Mr. Rowberry directed Complainant not to call Ms. Keil during nonwork hours), and Mr. Moss (who stated he would not call Mr. Keil after 5:00 PM). F.F. ¶¶ 0, 0. Ms. Keil herself, although not a witness, stated she was upset because she had been called on November 14, 2009, by Complainant when she “wasn't even dispatching.” F.F. ¶ 0.

4. In sum, Complainant's recollection of the events giving rise to his whistleblower complaint is supported in many instances solely by his own account of events, which in turn stands in contrast to the bulk of the record in this case. Therefore little if any weight is given to his testimony, especially in instances where his recollection conflicts with other evidence in the record.

Mr. Rowberry's Credibility

5. In contrast to Complainant, Mr. Rowberry presented himself as a much more believable witness, although his credibility was undermined somewhat by the dates associated with his recordkeeping. He is a competent manager with years of experience in the trucking industry. *See* TR at 90-97. Much of his testimony – notably where it conflicted with Complainant's – was supported by that of other witnesses and evidence submitted at the hearing. For instance, while Complainant denied having been told not to call Ms. Keil outside of her normal working hours, Ms. Lund supported Mr. Rowberry's versions of events whereby he had issued a directive to Complainant not to make such calls. *See* F.F. ¶ 0. Likewise, despite Complainant's testimony that Respondent fostered a culture in which drivers were expected to perform their delivery work regardless of the severity of weather conditions, *see* TR at 57, the other drivers recounted a uniform and different policy under which Mr. Rowberry informed them at annual safety meetings of how to handle inclement weather by using their own judgment and not taking risks on unsafe roads if the weather became too dangerous. *See* F.F. ¶ 0.

6. Nevertheless, Mr. Rowberry's testimony and recordkeeping evidenced uncertainty with respect to the dates he believed certain events may have occurred, for instance his directive to Complainant not to call Ms. Keil during her off hours. *See* TR at 156-63; RX J, K, N. While such inattention to detail undermines his recollection of events somewhat, Mr. Rowberry offered a credible explanation as to why the dates on these memoranda may have been incorrect based on the extensive duties involved in serving as terminal manager. Consequently, he may have recorded the events giving rise to Complainant's termination over the course of several days. *See* TR at 160. Furthermore, the events outlined in the memoranda – such as his directive to Complainant not to call Ms. Keil – were supported by the testimony of other witnesses at the hearing. Therefore, much greater weight is given to Mr. Rowberry's recollection of events as compared to Complainant's. Where there are conflicts in their testimony and other evidence, Mr. Rowberry is more credible and his account is accepted.

B. Complainant's Prima Facie Case

7. Under the STAA, a complainant must prove four elements in order to establish a prima facie case: (1) that he or she engaged in protected activity under the STAA; (2) that the employer was aware of the protected activity; (3) that he or she experienced some form of adverse action; and (4) that the protected activity was "contributing factor" to the adverse action that was suffered. 29 C.F.R. § 1978.109(a);⁴ *see Halgrimson v. Contract Transp. Servs.*, No. 09-

⁴ These elements may be discerned from the August 31, 2010, amendments updating 29 C.F.R. §1978.109(a). While this language was added by the Secretary after the events giving rise to Complainant's whistleblower complaint under STAA, this standard with respect to Complainant's prima facie case has been in effect since Congress's amending of the STAA in 2007. *See Villa v. D.M. Bowman Inc.*, No. 08-123, slip op. at 3-4 (ARB Aug.

103, slip op. at 3 (ARB Mar. 24, 2011); *Fleeman v. Neb. Pork Partners*, No. 09-059, slip op. at 3-4 (ARB May 28, 2010).⁵ For an employer to be found to have violated the STAA, all of these elements must be proven by the complainant by a preponderance of the evidence. 29 C.F.R. § 1978.109(a); see *Allen v. ARB*, 514 F.3d 468, 475 n.1 (5th Cir. 2008); 75 Fed. Reg. 53,550.

8. In Complainant's case, there is little question his termination by Respondent constituted adverse action under the STAA. See Stipulations ¶ 14; 49 U.S.C. § 31105(a)(1) (prohibiting "discharge" of an employee). Furthermore, although Respondent challenges Complainant's having engaged in protected activity, there is also no dispute Respondent was aware of Complainant's refusal to drive on November 14, 2009. See Stipulations ¶ 12. Consequently, the remaining issues to be addressed with respect to his prima facie case are whether his refusal to drive constituted protected activity under the STAA and, if so, whether this refusal was a contributing factor in his termination.

Protected Activity

9. A refusal to drive is protected activity, if at all, under 49 U.S.C. § 31105(a)(1)(B). This section contains both an "actual violation prong" and a "reasonable apprehension prong," either of which may constitute protected activity. See *Roadway Express, Inc. v. ARB*, 116 Fed. App'x 674, 676 (6th Cir. 2004). Under the first of these prongs, known as the "when" clause, a refusal to drive must be rooted in an actual violation of "a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." 49 U.S.C. § 31105(a)(1)(B)(i). Under the second prong, known as the "because" clause, there must be "a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." *Id.* § 31105(a)(1)(B)(ii); see *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 77 n.1 (2d Cir. 1994). The "because" clause, however, has an additional requirement whereby "the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." 49 U.S.C. § 31105(a)(2). This same subsection further defines "reasonable apprehension" as existing "only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety condition establishes a real danger or accident, injury, or serious impairment to health." *Id.*

Actual Violation

10. The applicable regulation addressing inclement weather is contained in 49 C.F.R. § 392.14, which, after citing such hazards as "snow, ice, sleet, fog, mist, rain, dust, or smoke," states as follows: "If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated." *Id.* In proving protected activity under this prong, a complainant "must

31, 2010); *Fleeman v. Neb. Pork Partners*, No. 09-059, slip op. at 2 n.1 (ARB May 28, 2010). Respondent erroneously relies on case law prior to the 2007 amendments in setting forth an incorrect legal standard for the analysis of STAA claims. See ALJX 4 at 2 & n.2.

⁵ *Fleeman* relies on the term "motivating factor" in determining whether a claimant's engaging in protected activity caused him or her to suffer adverse action. This language was replaced in the new regulations with the phrase "contributing factor." 29 C.F.R. § 1978.109(a).

allege and ultimately prove that an actual violation would have occurred . . . [A] reasonable and good faith belief by the driver alone that it is unsafe to drive is not enough.” *Cummings v. USA Truck, Inc.*, No. 04-043, slip op. at 5 (ARB Apr. 26, 2005).

11. Complainant does not attempt to and is unable to demonstrate an actual violation of 49 C.F.R. § 392.14 would have occurred had he continued to operate his vehicle on November 14, 2009. He has offered no evidence of road closures or the specifics of the weather that forced him to abandon his shift on this date aside from his own testimony, which is not credible.⁶ No evidence was submitted of any other driver who worked on November 14, 2009, and in doing so violated 49 C.F.R. § 392.14’s prohibition against driving in inclement weather. To the contrary, the record in this instance is ambiguous on the matter, indicating if anything that none of the other drivers working on this date discontinued their shifts. Complainant offered no evidence that Mr. Ansel, with whom he spoke and who placed chains on the tires of his truck, discontinued his shift after their conversation. *See* F.F. ¶ 0. Ms. Keil’s emails and communications with Complainant indicated the other drivers working on this date worked through the storm. *See* F.F. ¶ 12. Complainant offers no evidence to undermine this version of events. In sum, he is unable to demonstrate by a preponderance of the evidence his refusal to drive on November 14, 2009, constituted an actual violation of 49 C.F.R. § 392.14. *See Yellow Freight Sys.*, 38 F.3d at 82 & n.7; *Cummings*, No 04-043, slip op. at 5-6.

Reasonable Apprehension

12. Under the reasonable apprehension or “because” prong of the STAA, Complainant is required to prove two elements: first, that his refusal to drive on November 14, 2009, was the result of reasonable apprehension of a hazard or security condition and, second, that he informed Respondent of this condition, which in turn was unable to provide corrective action. 42 U.S.C. § 31105(a)(1)(B)(ii), (2); *see Dalton v. U.S. Dep’t of Labor*, 58 Fed. App’x 442, 445 (10th Cir. 2003); *Yellow Freight Sys.*, 38 F.3d at 82-83. This clause of the STAA generally provides broader protection to an employee as it does not require the occurrence of an actual violation. *Yellow Freight Sys.*, 38 F.3d at 82-83. Nevertheless, a court must be mindful of instances whereby an employee attempts to utilize this provision as a means to justify bad-faith refusals to drive. *See LeBlanc v. Fogleman Truck Lines*, No. 89-STA-8, slip op. at 3-6 (Sec’y Dec. 20, 1989), *aff’d sub nom. Fogleman Truck Lines v. Dole*, 931 F.2d 890 (5th Cir. 1991).

13. As with his attempt to make out protected activity under the “when” clause of the STAA, Complainant is likewise unable to do so under the “because” clause by demonstrating reasonable apprehension of an unsafe condition led to his work stoppage on November 14, 2009. This is so for three reasons.

14. First, Complainant’s contradictory characterization of the weather conditions on this date undercuts his assertion that he harbored reasonable apprehension of “serious injury to [himself] or the public.” *See* 49 U.S.C. § 31105(a)(1)(B)(ii). By his own account, Complainant experienced wheel slippage due to accumulated snow at the first two gas stations at which he stopped to make fuel deliveries on November 14, 2009. F.F. ¶¶ 0, 0. Nevertheless, despite these

⁶ At the hearing, Complainant was unclear as to the amount of snow that had actually fallen, making a gesture at one point that appeared to indicate a foot while simultaneously stating there had been “six, eight inches.” TR at 51.

circumstances, Complainant made no effort to fasten snow chains to his vehicle while at these stations and out of the way of traffic on city streets. *Id.* However, after leaving the second gas station, Complainant allegedly witnessed his trailer jackknife⁷ – an event that could have likely been prevented by the application of snow chains – and consequently decided this event along with his alleged witnessing of other vehicles sliding in the snow merited a work stoppage on the basis of safety concerns. F.F. ¶ 11. Such events and reasoning do not constitute reasonable apprehension. Instead, they evidence an unexplained and unreasonable failure by Complainant to utilize a mechanism by Respondent to allay the safety concern he cites as his reason for discontinuing his shift. Although Complainant stated it became too dangerous to apply snow chains once he had driven his vehicle out onto city streets after visiting the second gas station, he offered insufficient explanation as to why he could not have found a location to apply snow chains at this point. Although he cited the fact that chains on his vehicle would not have curbed the danger of a collision with another out-of-control motorist, such chains would have clearly diminished the danger of further jackknifing. Complainant’s failure to apply chains – and thereby eliminate the possibility of losing control of his vehicle – contradicts an argument that he harbored reasonable apprehension of the weather conditions on this date posing a risk to his own or the public’s safety. *See Byrd v. Consol. Motor Freight*, No. 98-064, slip op. at 7 (ARB May 5, 1998) (finding employee’s failure to take steps to minimize or attempt to eliminate perceived safety risk supported finding of no reasonable apprehension under 49 U.S.C. § 31105(a)(1)(B)(ii)).

15. Second, Complainant’s description of the weather conditions constituting the alleged safety risk is not supported by other evidence in the record. Complainant testified to initiating a phone conversation with Mr. Ansel, another driver who was delivering fuel in the storm on the night of November 14, 2009. F.F. ¶ 0. Mr. Ansel indicated he had fitted chains to his truck, *id.*, and Complainant offered no evidence or testimony indicating Mr. Ansel thereafter discontinued his shift.⁸ As noted, Ms. Keil’s email to Mr. Rowberry on Sunday, November 15, 2009, indicated “[t]he three other drivers that were out Saturday night finished their work.” CX 2 at 5. Aside from his own description of weather conditions, however, Complainant offered no evidence of the severity of the weather on November 14, 2009, and its effect on the other drivers then working for Respondent. These circumstances undercut Complainant’s own characterization of the severity of the weather he encountered on this date. While complainant attempts to give credit to his description of the severity of weather conditions on November 14, 2009, through the submission of accident reports issued by the Colorado Highway Patrol on this date, *see generally* CX 9; ALJX 3 at 6, this evidence is insufficient for two reasons. First, Complainant’s work on this evening entailed deliveries throughout Denver on city streets, but many of these accident reports detail accidents on state or interstate highways. *See* CX 9 at b, d, f, h, k, q, s, u, cc, ee, ff. Second, while a number of accidents occurred, many of which were weather-related, no additional data is provided so that a comparison can be made between the number reported on November 14, 2009, and those of a day on which snowy or icy conditions

⁷ Aside from his own testimony, Claimant produced no further evidence this event actually occurred.

⁸ According to Complainant’s recollection of this conversation, Mr. Ansel referenced a culture within Respondent’s organization whereby drivers never abandoned their shifts due to inclement weather. *See* TR at 56-57. However, Complainant failed to call Mr. Ansel as a witness to bolster his version of this conversation. Furthermore, such a statement is wholly unsupported by the testimony of Respondent’s other drivers who appeared at trial and testified uniformly to Respondent’s practice of supporting drivers’ decisions not to drive due to inclement weather. *See* F.F. ¶ 0.

did not exist. Given Complainant's aforementioned credibility problems, *see supra* Part 0, such an account when combined only with these accident reports is insufficient to demonstrate Complainant harbored reasonable apprehension of a safety risk on this date. *See Wrobel v. Roadway Express, Inc.*, No. 01-091, slip op. at 5-6 n.4 (ARB July 31, 2003) (finding no protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii) when reasonable apprehension was based on complainant's characterization of events, which were not credible).

16. Finally, there is insufficient evidence in the record to indicate Complainant gave an adequate description of his own actions to Ms. Keil on the evening of November 14, 2009, to satisfy 49 U.S.C. § 31105(a)(2)'s "communication" requirement. Complainant's characterization of his conversation with Ms. Keil, although allegedly lasting approximately forty-five minutes, focused on her reaction to his refusal to drive, veiled threats, and her order to him not to come into work the following day. TR at 61-64. Prior to this conversation, Complainant did leave a message from Ms. Keil, but this focused only on the road conditions and his belief that Respondent should begin calling in drivers due to the weather. *Id.* at 57-58. While Complainant argues this is sufficient to satisfy the communication requirement, *see ALJX 3* at 7, nowhere did he mention to Ms. Keil his own failure to apply snow chains to his vehicle. He never called the manager or on-duty dispatcher. This omission is crucial in light of § 31105(a)(2)'s purpose, which is to provide the employer with an opportunity to correct the circumstances giving rise to the perceived safety hazard. *See id.; LeBlanc*, No. 89-STA-9, slip op. at 3-6. Consequently, Complainant has also failed to meet the communication requirement necessary for protected activity to arise out of a reasonable apprehension of a perceived safety risk. *See Wrobel*, No. 01-091, slip op. at 5-6 n.4 (finding 49 U.S.C. § 31105(a)(2)'s communication requirement includes provision of "adequate information" to employer from which attempt to correct perceived safety risk may be made).

17. In sum, Complainant has failed to demonstrate by a preponderance of the evidence he engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii). This is due both to the unreasonableness of the safety risk he perceived on November 14, 2009, and his not disclosing the crucial circumstance of his failure to use snow chains to Ms. Keil. This constitutes sufficient grounds for denial of his STAA whistleblower claim. 49 C.F.R. §§ 1978.109(a), (d)(2).

Contributing Factor

18. Although Complainant has failed to demonstrate he engaged in protected activity, the relationship between his refusal to work on November 14, 2009, is nevertheless examined as the fourth necessary element of his prima facie case. *See Halgrimson*, No. 09-103, slip op. at 3; *Fleeman*, No. 09-059, slip op. at 3-4. This assumes, *arguendo*, that Complainant has made out a case for protected activity.

19. In order for Complainant to satisfy this element, he is required to demonstrate his refusal to drive on November 14, 2009, was a "contributing factor" to his termination two days later. *See* 49 C.F.R. § 1978.109(a). A complainant may demonstrate via temporal proximity that alleged protected activity was a contributing factor in subsequently suffered adverse action. Although not entirely dispositive, "the closer the temporal proximity is, the stronger the

inference of a causal connection” between adverse action and the alleged protected activity. *Riess v. Nucor Corp.-Vulcraft-Tex., Inc.*, No. 08-137, slip op. at 5 (ARB Nov. 30, 2010). In Complainant’s case, this inference is very strong given his termination a mere two days after the date he alleges he engaged in protected activity due to his refusal to drive. See Stipulations ¶¶ 12, 14. These circumstances weigh in favor of finding Complainant’s refusal to drive, were it protected activity, was a contributing factor in his termination. See *Negron v. Vieques Air Link, Inc.*, No. 04-021, slip op. at 8 (ARB Dec. 30, 2004) (finding two-day window was sufficient to demonstrate protected activity was contributing factor to subsequent suspension), *aff’d Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102 (1st Cir. 2006). Such temporal proximity as is present here serves to demonstrate a causal connection between Complainant’s refusal to drive and his termination the following Monday. However, as Complainant has failed to prove this refusal constituted protected activity, his claim must nevertheless fail.

C. Respondent’s Presentation of Clear and Convincing Evidence That It Would Have Terminated Complainant Absent His Refusal to Drive

20. If an employee meets the burden of demonstrating protected activity was a contributing factor in his or her suffering adverse action, an employer may nevertheless relieve itself of liability by demonstrating “by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity or the perception thereof.” 29 C.F.R. § 1978.109(b). Although Complainant failed to make out his prima facie case, this analysis is nevertheless performed – again assuming, arguendo, Complainant had met his evidentiary burden – in light of the evidentiary record and arguments made by Complainant and Respondent in their posthearing briefs. The clear and convincing standard requires Respondent make a case that is “highly probable or reasonably certain” that Complainant’s termination would have occurred had he never engaged in protected activity. See *Barker v. Ameristar Airways, Inc.*, No. 05-058, slip op. at 5 n.2 (ARB Dec. 31, 2007) (quoting *Black’s Law Dictionary* 577 (7th ed. 1999)).

21. Respondent in this instance points to several instances in Complainant’s employment history aside from his refusal to drive on November 14, 2009, supporting its assertion that Complainant’s employment was terminated for nonretaliatory reasons. This includes Complainant’s prior history of adverse interactions with Respondent’s customers and coworkers; his being reprimanded for poor work performance, including failure to adequately clean out his truck, his running out of fuel on at least one occasion, and his receipt of a written warning for arriving at work too early and arguing with a dispatcher; and his being warned on several occasions by Mr. Rowberry to refrain from calling Ms. Keil during nonwork hours. Respondent additionally argues its actions toward other drivers who had previously discontinued their work shifts during inclement weather demonstrates Complainant’s prior work history – and not his work stoppage on November 14, 2009 – brought about his termination. These assertions are examined below.

22. With respect to Complainant’s interactions with Respondent’s customers and his own coworkers, these create some inference of a legitimate reason for Respondent’s termination of his employment, although not clear and convincing evidence standing alone. Mr. Rowberry testified to his awareness of five separate complaints arising from Complainant’s interactions

with employees at various gas stations and convenience stores to which Respondent delivered fuel. *See* F.F. ¶¶ 0, 0. While these complaints clearly violated one of the essential functions applicable to Complainant's position as a fuel delivery driver, *see* F.F. ¶ 0, Complainant was not the sole driver who received such criticism. Indeed, several drivers employed by Respondent received complaints from Respondent's customers, some on several occasions. *See* F.F. ¶¶ 0-0; TR at 167-74. This included at least one occasion where a driver was given a written warning threatening termination of an additional violation, committed an additional violation, and nevertheless continued to be employed by Respondent. *See* F.F. ¶ 0. Mr. Rowberry testified to a general aversion to firing drivers, however, given the difficulty in hiring additional employees should such action be taken. *See* TR at 124. Also according to Mr. Rowberry, no driver had received so many complaints from different customers in the same period of time as Complainant had in his year of employment with Respondent. TR at 175. These circumstances indicate Respondent was somewhat tolerant of the behavior exhibited by Complainant giving rise to these complaints generally, although Complainant further exhibited a tendency to generate these complaints more frequently than any other driver employed by Respondent. While Mr. Rowberry's explanation as to the treatment of drivers and Complainant's receipt of more customer complaints than other drivers in such a short interval are persuasive, such evidence alone is not clear and convincing proof that Respondent would have terminated Complainant absent his refusal to drive on November 14, 2009.

23. Complainant's other work-related issues, however, are another matter. Aside from the complaints received from Respondent's customers – which appeared commonplace among drivers – the record demonstrates Complainant's work behavior caused problems extending far beyond these interactions. Complainant was reprimanded for failing to clean out his truck, running out of fuel, and arguing with another employee. *See* F.F. ¶ 0. He also threatened two of Respondent's employees, stating he would “kick their teeth in.” F.F. ¶ 0. Complainant was additionally given a directive by Mr. Rowberry not to call Mr. Keil during nonwork hours, something Complainant testified never happened but the record demonstrates did in fact occur. *See* F.F. ¶ 0. Aside from disputing being admonished against calling Ms. Keil, Complainant nevertheless asserted a belief she was the proper person to call on the evening of November 14, 2009. *See* F.F. ¶ 0. The record demonstrates such an assertion is unfounded. Mr. Rowberry, Ms. Lund, and Mr. Moss all stated Ms. Keil would not have been the person to call in this situation for various reasons, including, respectively, Mr. Bowman's greater familiarity with operating trucks in inclement weather, the fact that Mr. Bowman was working the following shift, and the fact that Ms. Keil did not work after 5:00 PM. *See* F.F. ¶¶ 0, 0. Mr. Rowberry further warned Complainant his after-hours calls to Ms. Keil were being interpreted as “stalking,” a perception not wholly unsupported by the record given Complainant's prior request for Ms. Keil's personal email so he could “tell you some things when you're off the clock.” *See* TR at 127. Apart from Mr. Martinez's reprimand for complaining about a work assignment, these non-customer-related transgressions were not exhibited by Respondent's other drivers. Consequently, these acts themselves demonstrate his termination was highly probable or reasonably certain following the call to Ms. Keil, regardless of its subject matter.

24. In addition to the aforementioned performance-related issues, the testimony of the other drivers at the hearing demonstrates Complainant's termination was not due to his refusal to

drive. The drivers called by Respondent to testify uniformly agreed to the existence of a policy whereby they could refuse to drive due to inclement weather. *See* F.F. ¶ 0. Several drivers testified to their own work stoppages under this policy, none of which resulted in retaliatory action by Respondent toward them. *Id.* Collectively, this testimony is much more credible than the version offered by Complainant, based on his own assertions and characterization of his conversation with Mr. Ansel, whereby Respondent discouraged drivers from stopping their work in inclement weather. Although Complainant places some emphasis on the comments made by Ms. Keil in emails that she told Complainant to continue driving on the evening of November 14, 2009, he fails to demonstrate what role her input played in his termination. Indeed, Mr. Rowberry stated emphatically that Complainant was not terminated for his refusal to drive, something he told Complainant repeatedly on November 16, 2009. *See* TR at 131-32. Furthermore, Complainant minimizes other comments in Ms. Keil's emails, specifically her frustration with being woken up while she was off duty. *See* F.F. ¶ 0. Such evidence demonstrates convincingly that Respondent terminated Complainant for reasons independent from his refusal to drive.

25. Although Respondent is under no burden to do so, the record demonstrates to a reasonable certainty that it would have terminated Complainant following his call to Ms. Keil on November 14, 2009, for reasons unrelated to his refusal to drive. Complainant's year-long tenure with Respondent had been plagued by complaints from customers and coworkers alike that far exceeded those directed at any other of Respondent's drivers. Apart from these complaints, Complainant had threatened others, failed to maintain the cleanliness of his truck and ran it out of fuel, been admonished for showing up at work early and distracting others, and been warned multiple times to stop calling Ms. Keil during nonwork hours. Despite this latter warning, Complainant nevertheless called Ms. Keil on the evening of November 14, 2009, a call the record demonstrates should have been placed to Mr. Bowman. Respondent has therefore demonstrated by clear and convincing evidence that it would have terminated Complainant's employment following his call to Ms. Keil, regardless of the content of their discussion.

26. Complainant makes several arguments as to why Respondent's evidence is not clear and convincing in this instance. First, Complainant argues the written warning he received on August 3, 2009, mandated a five-day suspension for any further transgressions on his part before termination could occur. *See* ALJX 3 at 10; RX E at 1. While the warning does state as much, there is no evidence in the record that this was *necessary* for Respondent to take such action before terminating Complainant. Second, Complainant argues Mr. Rowberry's memoranda and Ms. Keil's emails are insufficient to demonstrate he was warned not to call Ms. Keil on the night of November 14, 2009. ALJX 3 at 11-12. While there are inconsistencies in Mr. Rowberry's memoranda regarding certain dates and the record, *compare* RX I at 6 *with* TR at 30, and while Ms. Keil later added details to her account of the phone conversations she had with Complainant on November 14, 2009, *compare* RX H at 5 *with* RX L at 12, these alleged inconsistencies do not demonstrate Complainant was not told to call Ms. Keil at home or that Ms. Keil was not working on the evening of November 14, 2009. As noted, other witnesses bolstered the assertion that Ms. Keil was not working and should not have been called by Complainant on November 14, 2009. *See* F.F. ¶¶ 0, 0, 0. Further, Mr. Rowberry testified credibly to telling Complainant at least four times not to call Ms. Keil at home. *See* F.F. ¶ 0. Finally, Complainant asserts other employees had received multiple disciplinary warnings, some

labeled as “final,” yet continued to be employed by Respondent. As discussed, though, none of these employees were cited for as many infractions or transgressions as Complainant in a similarly short amount of time. Consequently, Complainant’s arguments are insufficient to undercut Respondent’s presentation of clear and convincing evidence that it would have nevertheless terminated Complainant’s employment had he not engaged in any protected activity.

27. Assuming, arguendo, that Complainant had met his burden regarding a protected activity, the evidence submitted by Respondent would have rebutted that finding and demonstrates Claimant was terminated for a reason unrelated to any protected activity.

D. Damages

28. The third issue set forth by the parties is that of damages. As Complainant has both failed to make out his prima facie case, and as Respondent has demonstrated by clear and convincing evidence it would have terminated Complainant’s employment absent his refusal to drive on November 14, 2009, Complainant is not entitled to any relief. Consequently, the issue of damages is not addressed.

VI. Order

For the reasons stated above, Complainant’s claim is DENIED.

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RICHARD M. CLARK
Administrative Law Judge

San Francisco, California

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).