

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 08 February 2012**

*In the Matter of*

**Case No. 2011-STA-00018**

**JAMES E. SEEHUSEN**

*Complainant,*

v.

**MAYO CLINIC**

*Respondent.*

**APPEARANCES:** Paul O. Taylor, Esq.  
For the Complainant

Gregory J. Griffiths, Esq., and Sharon C. Zehe, Esq.  
For the Respondent

**BEFORE:** DANIEL F. SOLOMON  
Administrative Law Judge

**DECISION AND ORDER**

This case came to hearing in St. Paul, Minnesota, on November 17, 2011, pursuant to a claim under the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (“STAA” or “the Act”) (formerly 49 U.S.C. app. § 2305) and under 29 C.F.R. Part 1978, implementing regulations found at 29 C.F.R. Part 24, and the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges found at 29 C.F.R. Part 18.

**PROCEDURAL HISTORY**

On August 6, 2010, Complainant filed a complaint with the Secretary of Labor alleging that Respondent had discriminated and retaliated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105. On November 4, 2010, the Secretary of Labor issued preliminary findings and an order pursuant to 49 U.S.C. § 31105, denying the complaint. Complainant filed timely objections to the Secretary’s findings. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and subject matter of this proceeding.

On November 17, 2011, I conducted a formal hearing on this matter in St. Paul, Minnesota. At the hearing, I entered Administrative Law Judge Exhibit “ALJ” 1, Joint Exhibits “JX” 1-37, and Respondent/Employer’s Exhibits “EX” 2-12, 15, and 17 into the record. *See* Transcript, “Tr.” at 8, 62, 96. Testimony was provided by the Complainant, James Seehusen, Mark Draper, Judith Lee and Adrian Dingley. *See, generally,* Tr.

## ISSUES

1. Whether Complainant has established a causal connection between his alleged protected activity and the alleged adverse actions taken by Respondent.

## STIPULATIONS

The parties have stipulated to, and I accept, the following:

1. The United States Department of Labor, Office of Administrative Law Judges has jurisdiction over this proceeding pursuant to 49 U.S.C. § 31105(b).
2. At all times material James Seehusen was a Minnesota resident.
3. From December 17, 1989, to the present, Mr. Seehusen has been an employee of Mayo Clinic. In 2009 and up to March 5, 2010, Mr. Seehusen was an employee of Mayo Clinic within the meaning of 49 U.S.C. §§ 31101 and 31105 because he operated commercial motor vehicles having a gross vehicle weight rating of 10,001 pounds or more in commerce.
4. Mayo Clinic is a person within the meaning of 49 U.S.C. § 31105.
5. Effective on or about March 5, 2010, Mayo Clinic no longer permitted Mr. Seehusen to operate a commercial motor vehicle having a gross vehicle weight rating of 10,001 pounds or more.
6. On March 5, 2010, Mayo Clinic issued a "Corrective Action Conference Form" (JX 8) to Mr. Seehusen and suspended him from employment for 3 days which he served on March 8, 9, and 10, 2010.
7. On March 19, 2010, Mr. Seehusen sought work with Mayo Clinic for a position operating a mail truck. JX 21; JX 22.
8. Mayo Clinic did not hire Mr. Seehusen for the position which would have allowed him to operate the mail truck.
9. On April 30, 2010, Mayo Clinic placed Mr. Seehusen on a Performance Improvement Plan.
10. Mr. Seehusen's rate of pay from February 17, 2010, to May 24, 2010, for his current job classification as "Courier" is \$17.30 per hour. His rate of pay increased to \$17.65 per hour effective May 25, 2011. Mr. Seehusen's pay increase was delayed from February 16, 2011, to May 25, 2011, due to his previous suspension from work in March 2010.
11. If Mayo Clinic had hired Mr. Seehusen for the job of Truck Driver, his hourly rate of pay would increase to at least \$18.58 effective March 31, 2010, and increase to at least \$19.18 effective May 25, 2011.
12. On August 6, 2010, Mr. Seehusen filed a complaint with the United States Department of Labor, Occupational Safety and Health Administration ("OSHA") alleging that Mayo Clinic had discriminated and retaliated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act. The complaint was timely filed.
13. On November 4, 2010, OSHA by Area Director Mark Hysell issued a preliminary decision and order pursuant to 49 U.S.C. § 31105(b)(2)(A) denying Mr. Seehusen's complaint. Mr. Seehusen timely filed objections to OSHA's preliminary order.
14. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and the subject matter of this proceeding.
15. The parties stipulate to the authenticity and admissibility of all Joint Exhibits. The

parties stipulate to the authenticity of Respondent's exhibits. ALJ 1.

#### APPLICABLE LAW

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

(a) Prohibitions:

(1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because:

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

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

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

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

49 U.S.C. § 31105(a).

Under the Statute:

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

3) "employer" - (A) means a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce; but (B) does not include the Government, a State, or a political subdivision of a State.

49 U.S.C. § 31101(2) and (3).

Additionally, complaints filed under STAA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, ("AIR 21"). 49 U.S.C. § 42121. *See* 49 U.S.C. § 31105(b)(1). Accordingly, to prevail, a Complainant must demonstrate that:

(1) his employer is subject to the Act, and he is a covered employee under the Act;

(2) he engaged in a protected activity, as statutorily defined;

(3) his employer knew that he engaged in the protected activity;

(4) he suffered an unfavorable personnel action; and

(5) the protected activity was a contributing factor in the unfavorable personnel action.

*See* 49 U.S.C. § 42121(b)(2)(B); *Jordan v. IESI*, ARB Case 10-076, ALJ Case 2009 STA 062 (January 17, 2012); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No.

2004-AIR-11, slip op. at 3 (ARB June 29, 2007). The term “demonstrate” as used in AIR 21, and thus STAA, means to “prove by a preponderance of the evidence.” See *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 9 (Jan. 30, 2004). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the STAA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant’s protected behavior. See 42121(b)(2)(B); *Sacco v. Hamden Logistics, Inc.*, ARB No. 09-024, ALJ 2008-STA-00043 and ALJ 2008-STA-00044, slip op. at 4 (Dec. 18, 2009).

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The parties have stipulated that Respondent, Mayo Clinic, is a person subject to the Surface Transportation Assistance Act, 49 U.S.C. § 31105, and that Complainant was an employee of Respondent within the meaning of 49 U.S.C. § 31101 and § 31105. ALJ 1. Upon review of the record and the post-hearing briefs of the parties, I find the following.

### **FACTUAL BACKGROUND**

James Seehusen, Complainant, Mark Draper, Judith Lee, and Adrian Dingley testified at the formal hearing. Complainant works as a courier in the Department of General Services for Respondent, Mayo Clinic. Tr. at 16-17. Complainant has worked for Respondent since December 17, 1989. Tr. at 5-6, 16-17. Complainant held various positions with Respondent. In 1996, Complainant began working as a general service courier, delivering mail and other materials. Tr. at 14. Complainant began to operate a commercial vehicle, the Mayo Clinic box truck, part-time from 2002 to 2004, and then full time from 2004 until March 5, 2010. Tr. 14-20. In 2005, Mark Draper became Complainant’s supervisor. Tr. at 65. During the times relevant to this matter, Complainant was supervised by Mr. Draper, Judith Lee, and Corey Henke. Tr. at 79, 98, 205-206. Adrian Dingley worked in the Human Resources Service Partner for General Services during this time period. Mr. Dingley provided input on Complainant’s corrective actions, issued from 2008 to 2010. Tr. at 107, 164-166; EX 3; EX 4.

Respondent uses a progressive, 4-level process for disciplining its employees for performance, attendance or behavior problems. Tr. at 174; JX 11. The corrective action steps include a supervisor’s conference, a written warning, suspension, and termination. JX 11; Tr. at 106-107, 160-161. If an employee commits a similar infraction within a two year period, the supervisor may issue the next level of action. Tr. at 169. Respondent conducts regular employee performance reviews. Tr. at 162; JX 12. If an employee does not meet expectations, the employee may be placed on a performance improvement plan. *Id.*

On October 15, 2008, Complainant was issued a supervisor’s conference for failing to complete his time card on schedule and for failing to wear his new uniform correctly. Tr. at 105-106, 165, 183-184; EX 3. Mr. Draper repeatedly asked Complainant to complete his time card on time, but Complainant refused. Tr. at 103. Complainant also refused to wear his new uniform and refused to keep his shirt buttoned. Tr. at 103, 184. Mr. Draper took corrective action against other employees for these same infractions. Tr. at 106, 142. A month later, Respondent issued Complainant a written warning for failing to complete his time card in a timely manner. Tr. at 106, 184; EX 4. Complainant received the second level of corrective

action because he had continued his misconduct. Tr. at 166.

On August 3, 2009, Judith Lee, Complainant's assistant supervisor, e-mailed Complainant and other Mayo Clinic employees, asking if they were comfortable driving a Mayo Clinic sprinter van and shuttle bus. On August 6, 2009, Complainant responded to Ms. Lee stating he would not drive either vehicle because neither vehicle was legal. Complainant noted the sprinter van had a broken windshield and because of the shuttle bus's weight, each driver would be required to pass a Department of Transportation (DOT) physical and obtain a DOT medical card. JX 29; Tr. at 21-22, 86, 185-186. Complainant testified that he had personally observed the broken windshield. Tr. at 22, 24.

Mr. Draper also received and reviewed Complainant's e-mail. JX 29; Tr. at 21, 67, 70. He responded to Complainant on August 6, 2009, thanking Complainant for bringing this to his attention and stating the windshield would be repaired. Additionally, Mr. Draper stated he was aware of driver qualifications for each vehicle, and those requiring DOT certification were closely monitored. Mr. Draper asked Complainant to answer Ms. Lee's question and to indicate whether he needed training to drive the sprinter van and shuttle bus. Mr. Draper testified that he then sent the sprinter van to the shop for repair. Tr. at 59, 127-128.

Complainant continued to bring up the DOT requirement for the shuttle bus, until the bus was sold on May 25, 2010. Tr. at 13-136, 148, 199-200, 223. Mr. Draper asked Respondent's fleet manager whether shuttle bus drivers needed a DOT medical card, but the fleet manager said the medical cards were not required. Tr. at 128-130, 135-136. Mr. Draper requested an inspection of the bus by the Minnesota Department of Transportation, which was not conducted until May 2010. Tr. at 131-132. Ms. Lee also inquired whether shuttle bus drivers were required to have DOT medical cards, but she was also informed the medical cards were not required. Tr. at 192-193. Complainant believed that a driver must be issued a DOT medical certification to legally operate the shuttle bus. Complainant testified that he had researched the regulations on the Minnesota Department of Transportation website. Tr. at 23. Complainant also contacted the Minnesota Department of Transportation to find out whether a medical card was required to operate the shuttle bus. Tr. at 40-41.

Ms. Lee, Mr. Draper, and Mr. Henke testified that they continued to have issues with Complainant's behavior in 2009. Mr. Henke spoke to Mr. Draper about Complainant's behavior on several occasions. Tr. at 99-100, 102, 207. In December 2009, Mr. Draper informed Complainant that he was required to follow Mr. Henke's instructions for mail delivery. Tr. at 99; EX 10.

On January 13, 2010, Complainant used a press plate to open an automatic door. Tr. at 43-44; EX 14. The incident was reported to Mr. Draper. Tr. at 104; EX 14. Complainant told Mr. Draper the press plate was not working. Tr. at 104. Mr. Draper reminded Complainant that he was previously told not to strike the press plate and asked him not to do this again. Tr. at 103-105; EX 17. Complainant, however, believes he did not use excessive force to operate the press plate. Tr. at 44.

Ms. Lee asked Complainant to wash the mail truck at Splish Splash Car Wash sometime between February 18 and February 25, 2010. Tr. at 33-34, 81, 187; EX 7. Complainant informed Ms. Lee that he wanted to research how other departments were washing their vehicles. After speaking with other departments, Complainant informed Ms. Lee that no other drivers had to wash their trucks. Tr. at 188; EX 7; EX 8. Complainant washed the truck at the Hilton Building loading dock, an enclosed facility. Complainant testified that he had previously washed the truck at Splish Splash Car Wash, but he had gotten wet and cold and the truck had

mechanical problems because of freezing water. Tr. at 34-35, 81. Complainant informed Ms. Lee he had washed the trucked at the Hilton Building. Tr. at 33, 80; JX 8. Ms. Lee reprimanded him for not following instructions and reported the incident to Mr. Draper. Tr. at 82, 112-113, 188, 190; EX 8. Ms. Lee testified that she felt Complainant was derogatory, belittling, and undermining her authority in front of the staff. Tr. at 188-192. However, Complainant was not issued discipline. Tr. at 113-114.

On February 24, 2010, Complainant raised concerns about pallet jack training. JX 18. He had previously complained about pallet jack training in 2008. JX 17. Complainant then had a pallet jack evaluation on February 26, 2010, with Mr. Draper. Tr. at 58, 127; JX 19.

On February 26, 2010, Complainant sent an e-mail to Mr. Draper, informing him that he planned to conduct pre-trip vehicle inspections for the mail truck, beginning the following Monday. Complainant stated that he recently became aware of federal regulations requiring such daily inspections. Tr. at 26, 28, 70-71, 133; JX 30. Respondent had not trained Complainant to perform pre-trip inspections. Rather, Complainant testified that he determined pre-trips inspections were required through a discussion with another driver within Respondent's Supply Chain Management Department. Tr. at 26-28. Mr. Draper contacted Respondent's fleet manager and Section of Safety. Mr. Draper was informed the inspections were required, so he instituted daily inspections. Tr. at 134. On Monday, March 1, 2010, Mr. Draper accompanied Complainant on his route and observed Complainant's vehicle inspection. Tr. at 28-30, 71, 108. This was the first time Mr. Draper had accompanied Complainant while driving. Tr. at 29. The inspection altered delivery times. Tr. at 146. Additionally, March 1 was the first day of Complainant's new schedule. Respondent had decided to eliminate an early morning mail route, so Complainant's hours were modified. Tr. at 110-112, 194. Mr. Draper was concerned that Complainant was upset with the new schedule, so he wanted to ride with Complainant on this day. Tr. at 108, 112.

On March 3, 2010, the delivery mail procedure to the Mayo Ozmun Building changed. Under the new procedure, the hamper of mail from MSC would go to the Ozmun Building first, rather than to the Mayo Clinic building first. Tr. at 32. On March 4, 2010, Corey Henke, the mail room lead at the Ozmun Building, asked Complainant to offload a hamper of mail into the Ozmun Building. Tr. at 31, 98, 208-210; JX 8; EX 9. Complainant responded that the new procedure did not make sense. Tr. at 210; EX 9. Complainant testified that he did not refuse Mr. Henke's request, though Mr. Henke testified that Complainant did not bring the mail hamper into the building that day and he instructed Complainant to follow instructions in the future. Tr. at 31-32, 209-210; EX 9. Mr. Henke reported the incident to Mr. Draper. Tr. at 210-211.

The next day, Respondent issued Complainant a corrective action conference form. JX 8. Complainant was suspended from work for three days, from March 8-10, 2010. ALJ 1; Tr. at 6, 71, 30, 116-117; EX 8. Complainant's corrective action conference form states that Complainant refused to transport the MSC hamper into the mailroom when asked on March 4, 2010, and that Complainant did not follow instructions to wash his vehicle between February 18 and February 25, 2010. JX 8. As a result, beginning March 5, 2010, Complainant was no longer allowed to operate a commercial motor vehicle, with a gross weight rating of 10,001 pounds or more. Tr. at 6, 83, 117; ALJ 1. Mr. Draper made the decision to suspend Complainant and to remove him from his job as a mail truck driver. Tr. at 71, 116-117. Ken Rinn took over Complainant's job as a full-time mail truck driver on March 5, 2010, while Brad Keith and George Brumm drove the truck on a part-time basis. Tr. at 48. Complainant testified he had an excellent safety record, with no accidents during the time he operated the mail truck. Tr. at 66. Mr. Draper and Ms. Lee

testified that during the two years prior to Complainant's suspension, they had discussed reassigning Complainant to a courier position for closer supervision. Tr. at 195.

Upon Complainant's return to work on March 11, 2010, he began his work as a courier rotator. Tr. at 36. On that same day, Mr. Draper received permission to post a job opening for a mail truck driver position. Tr. 83-84, 121-133; JX 22. The job duties for the position were the same duties previously performed by Complainant and required the employee to operate a commercial mail truck. Tr. at 6, 37, 71-72, 147-148; JX 21; JX 22; JX 27. Complainant had helped create the new position, after informing Mr. Draper that other employees were paid more for similar work to his position sometime in 2007. Tr. at 118. Complainant helped determine the job duties of the position. Tr. at 118-119. The position was approved in October 2008. Tr. at 119; JX 28. However, the position was not posted at that time. In March 2009, Respondent placed a moratorium on hiring for non-essential and new positions because of the market. Mr. Draper did not receive permission until March 2010 to post the position. Tr. at 122; JX 22.

On March 19, 2010, Complainant sent an e-mail to Mr. Draper asking to be considered for the mail truck position; however, Mr. Draper responded that Complainant was ineligible because of his March 5, 2010, corrective action. Tr. at 38-39, 72; JX 21; JX 22. Respondent's policy excludes employees under a corrective action from employment in a new position. Tr. at 172-173. A few days later, Ms. Lee sent out an e-mail to the courier department stating the position had a new classification, with a higher rate of pay, and requiring a DOT medical card. JX 31; JX 22. Mr. Rinn was ultimately hired for the position. Tr. at 122-124.

The Minnesota Department of Transportation investigated Respondent's operations on April 15, 2010. Tr. at 46-47, 132. Complainant filed complaints by e-mail with Jarvis Musolf, an inspector for the Minnesota Department of Transportation, alleging that Respondent had allowed drivers without DOT medical cards to operate commercial motor vehicles. JX 32; JX 35; Tr. at 40, 46-47. Mr. Musolf then met with Complainant on April 19, 2010. Tr. at 46. On May 8, 2010, Complainant filed a complaint with the Minnesota Department of Transportation concerning the DOT medical card requirement. JX 33.

On April 30, 2010, Complainant received a performance evaluation from Mr. Draper and Ms. Lee. JX 4; Tr. at 43, 65-67. At this meeting, Complainant continued to assert that the shuttle bus drivers needed DOT medical cards. Tr. at 43, 67. Complainant's performance evaluation reflected that Complainant could be "defiant and argumentative" when interacting with co-workers and his failure to follow instructions. JX 4. However, it did include positive comments, noting Complainant's excellent attendance record. JX 4; Tr. at 67-69. Complainant was then placed on a performance improvement plan. JX 9; Tr. at 6, 41. The plan listed Complainant's inappropriate behavior as being defiant and argumentative concerning the DOT medical card requirement. JX 9; Tr. at 42. Mr. Draper testified that he was not aware Complainant had contacted the Minnesota Department of Transportation before Complainant was placed on a performance improvement plan.

In May 2010, the Minnesota Department of Transportation informed Mr. Draper that shuttle bus drivers were required to have DOT medical cards. Tr. at 131, 139-140. The shuttle bus was then removed from Respondent's vehicle fleet. Tr. at 200.

From February 17, 2010, until May 24, 2010, Complainant earned \$17.30 an hour, working 8 hours per day. Tr. at 35; ALJ 1. Complainant's pay was increased to \$17.65 per hour on May 25, 2011. ALJ 1. Respondent's employees typically receive wage increases every February, however, Complainant did not receive a pay increase until May 2011 because he was under a corrective active and performance improvement plan. Tr. at 6-7, 75-76, 222; ALJ 1.

## DISCUSSION

The STAA provides that an employer may not “discharge,” “discipline,” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activity. 49 U.S.C. § 31105(a)(1). To prevail on a STAA claim, Complainant must prove, by a preponderance of the evidence that 1) Complainant engaged in protected activity; 2) Respondent took adverse action against Complainant for engaging in protected activity; and 3) the protected activity was a contributing factor in the unfavorable personnel action. *Bailey v. Koch Foods*, ARB No. 10-001, ALJ 2008-STA-061 (Sept. 30, 2011); *Ferguson v. New Prime*, ARB No. 10-075, ALJ 2009-STA-047 (August 31, 2011); *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052 (ARB Jan. 31, 2011); *Riess v. NuCor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010). See also *Clarke v. Navajo Express*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011).

Once Complainant has established that his protected activity was a contributing factor, Respondent must prove, by clear and convincing evidence, that it would have taken the same action absent Complainant’s protected activity. 49 U.S.C. § 42121(b)(2)(B). See e.g., *Sacco v. Hamden Logistics, Inc.*, ARB No. 09-024, ALJ 2008-STA-00043 and ALJ 2008-STA-00044, slip op. at 4 (ARB Dec. 18, 2009); *Bailey v. Koch Foods*, ARB No. 10-001, ALJ 2008-STA-061 (Sept. 30, 2011).

Complainant alleges that he was demoted and not given the new truck driver position because Respondent retaliated against him for filing complaints with management about a broken windshield on the sprinter van, the requirement to perform pre-trip inspections, and the failure of Respondent to require shuttle bus operators to have DOT medical cards. Complainant alleges his complaints were protected activity and this retaliation violated his rights under the STAA. For the alleged violations, Complainant is seeking reinstatement, back pay, compensatory damages, punitive damages, interest, abatement of the violation, and attorney fees and costs.

## PROTECTED ACTIVITY

Under 49 U.S.C. § 31105(a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992); see also *Lajoie v. Environmental Management Systems, Inc.*, 1990-STA-00031 (Sec’y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. *Nix v. Nehi-R.C. Bottling Co.*, 1984-STA-00001, slip op. at 8-9 (Sec’y July 4, 1984). An employee’s threats to notify officials of agencies such as the Department of Transportation or the Federal Motor Carrier Safety Administration may also be protected under the STAA. *William v. Carretta Trucking, Inc.*, 1994-STA-00007 (Sec’y Feb. 15, 1995).

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

Cir. 1998) (holding that the complainant's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

Complainant alleges that his protected activities include filing complaints with Mayo Clinic management about a broken windshield on the sprinter van, the requirement to perform pre-trip inspections, and the failure of Respondent to require shuttle bus operators to have DOT medical cards. *See Compl.'s Proposed Findings of Fact and Legal Argument.* Concerning the DOT medical cards, Complainant cites to Minnesota regulations that require motor carriers to comply with federal regulations, including 49 C.F.R. Parts 392, 393 and 396. Complainant filed multiple internal complaints alleging that Respondent's shuttle bus drivers were required to have DOT medical cards. These complaints included Complainant's August 6, 2009, e-mail to Judith Lee, informing Ms. Lee that he would not drive the sprinter van or shuttle bus because neither vehicle was legal. Complainant stated the sprinter van had a broken windshield and because of the shuttle bus's weight, each driver was required to pass a DOT physical and obtain a DOT medical card. JX 29; Tr. at 21-22, 86, 185-186. In support of this argument, Complainant cites to 49 C.F.R. §§ 391.11, 391.41, and 391.43, stating these regulations require the shuttle bus drivers to undergo a DOT physical and to obtain a DOT medical card. In fact, an investigator for the Minnesota Department of Transportation determined the shuttle bus drivers were subject to these requirements. Tr. at 131-132.

Concerning the broken windshield of the sprinter van, Complainant cites to 49 C.F.R. § 396.3, requiring motor carriers to be in safe operating condition, and 49 C.F.R. § 396.13, stating that drivers of a commercial motor vehicle must be satisfied that the vehicle is in safe operating condition. Complainant believed the sprinter van was not safe to operate, and thus, his complaint about the broken windshield was related to a reasonably perceived violation of a commercial vehicle safety regulation.

Concerning the pre-trip inspections, Complainant, in his February 26, 2010, e-mail to Mr. Draper, stated his belief that he was required to perform pre-trip inspections on the mail truck under 49 C.F.R. §§ 396.11 and 396.13. *See also* Minn. Stat. § 221.0314, Subd 10 (making 49 C.F.R. §§ 396.11 and 396.13 applicable to interstate private carriers by reference). Complainant also points out that he filed complaints with the Minnesota Department of Transportation, and that Respondent was later investigated by the department. Thus, Complainant's complaints to the Minnesota Department of Transportation also commenced a proceeding related to a violation of a commercial motor vehicle safety regulation under 49 U.S.C. § 31105(a)(1)(A).

Upon review, I find Complainant did engage in protected activity. As previously stated, under 49 U.S.C. § 31105(a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. I find that Complainant's complaints about the broken windshield on the sprinter van, the requirement to perform pre-trip inspections, and the failure of Respondent to require shuttle bus operators to have DOT medical cards were related to a reasonably perceived violation of a commercial vehicle safety regulation. I also note that these complaints were later found to be actual safety regulation violations by the Minnesota Department of Transportation. Therefore, Complainant engaged in protected activity under the Act.

#### ***KNOWLEDGE OF PROTECTED ACTIVITY***

In his August 6, 2009, e-mail Complainant informed Ms. Lee that he would not drive the sprinter van or shuttle bus because neither vehicle was legal. Complainant stated the sprinter van

had a broken windshield and because of the shuttle bus's weight, each driver was required to pass a DOT physical and obtain a DOT medical card. JX 29; Tr. at 21-22, 86, 185-186. In an e-mail, dated February 26, 2010, Complainant informed Mr. Draper of his belief that he was required to perform pre-trip inspections on the mail truck.

Upon review, I find Respondent had knowledge of Complainant's protected activity. Complainant's complaints were communicated and submitted to Respondent's supervisors, specifically Mr. Draper and Ms. Lee.

#### ***UNFAVORABLE PERSONNEL ACTION***

Complainant alleges that he suffered unfavorable personnel action as a result of his protected activity. The employee protection provisions of the STAA provide that "[a] person may not discharge an employee" for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). A complainant need not establish termination or discharge, but only an adverse employment action. *See, e.g., Galvin v. Munson Transp., Inc.*, 91-STA-41 (Sec'y Aug. 31, 1992) (finding adverse action despite respondent's characterization of incident, in which complainant was not allowed to complete assignment and then was denied rehire several months later, as a voluntary quit).

Complainant was suspended from work for three days, from March 8-10, 2010. ALJ 1; Tr. at 6, 71, 30, 116-117; EX 8. Beginning March 5, Complainant was no longer allowed to operate a commercial motor vehicle and was removed from his job as a mail truck driver. Tr. at 6, 71, 83, 116-117; ALJ 1. Additionally, because of his March 5, 2010, corrective action, Complainant was not considered for the new mail truck position, which would have been a promotion for Complainant. Tr. at 38-39, 72; JX 21; JX 22. Complainant currently works as a courier and has not returned to his position as a truck driver. Accordingly, I accept that Complainant suffered unfavorable personnel action within the meaning of the Act.

#### ***CONTRIBUTING FACTOR***

Complainant's burden is to prove by a preponderance of the evidence that his protected activity was a contributing factor in Respondent's decision to take unfavorable personnel action. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). *See Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 11 (ARB Nov 30, 2006). Complainant can succeed by "providing either direct or indirect proof of contribution." *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

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

action. *Id.*

Complainant argues there was a causal connection between Complainant's protected activity and Respondent's unfavorable personnel action. I have already determined that Respondent had knowledge of Complainant's protected activity. In support of his argument, Complainant asserts that his performance improvement plan provides direct evidence of discrimination. The plan lists Complainant's inappropriate behaviors as being argumentative, and specifically, argumentative concerning the DOT requirements for the shuttle bus. JX 9.

Complainant also asserts that indirect proof or circumstantial evidence demonstrates Complainant's protected activities were a contributing factor in Respondent's unfavorable personnel action against Complainant. Complainant's April 30, 2010, performance appraisal states that Complainant can be defiant and argumentative when interacting with co-workers. JX 4. Complainant points out that Mr. Draper testified Complainant was defiant and argumentative when informing him about the DOT requirements for shuttle bus drivers. Tr. at 67.

Complainant also cites to temporal proximity as indirect, circumstantial evidence. Complainant filed several complainants and brought up the DOT requirements for the shuttle bus drivers on numerous occasions, from August 2009 until the shuttle was removed from the fleet in May 2010.

While proximity in time may be used to establish the causal inference, it is not necessarily dispositive. However, in this case, I find the temporal proximity to be very close, and give it great weight in my determination. Complainant's suspension, reassignment, performance discipline, and failure to be considered for the truck driver position, which occurred in March and April 2010, occurred close in proximity to his complaints about the DOT requirements for the shuttle bus, as well as his concerns about pre-trip inspections in February and March 2010. I also find that Complainant's performance improvement plan provides direct evidence of discrimination. Therefore, upon review, I find Complainant has demonstrated, by a preponderance of the evidence, that his protected activity was a contributing factor in Respondent's decision to take unfavorable personnel action against Complainant, including Complainant's suspension, performance discipline, reassignment, and removal from consideration for the new truck driver position.

#### ***SHIFTING BURDEN OF PROOF***

Respondent can overcome the above determinations only if it demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545, 53550; 49 U.S.C. § 42121(b)(2)(B)(ii). *See also Ferguson v. New Prime*, ARB No. 10-075, ALJ 2009-STA-047 (August 31, 2011) (citing *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 5, citing 49 U.S.C.A. § 42121(b)(2)(B)(iv) (Thomson/West 2007) and 29 C.F.R. § 1979.109(a)(2010)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Ferguson v. New Prime* ARB No. 10-075, ALJ 2009-STA-047 (August 31, 2011) (citing *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 5, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citing Black's Law Dictionary at 577)).

I note that evidence of pretext will prevent Respondent from meeting its clear and convincing burden of proof. *See, e.g., Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009) (where substantial evidence supported ALJ's finding that respondents' reasons for firing the complainant were pretext, respondents did not

prove by clear and convincing evidence that they would have fired the complainant absent his protected activity); *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009) (where employer's shifting explanations for its adverse action and its disparate treatment of the complainant evidenced pretext, respondent could not prove that it would have terminated the complainant even if complainant had not engaged in protected activity). Respondent's burden is to show that it "would have" terminated Complainant for the conduct of which he was accused, not that it "might have" or "could have." *See, Id.*

Respondent argues that Complainant was suspended, disciplined for poor performance, and as a consequence, was ineligible for the new truck driver position because of Complainant's insubordination and failure to follow directives from supervisors. I have already found that Complainant's protected activity was a contributing factor to Respondent's unfavorable personnel action, including Complainant's suspension, performance discipline, reassignment, and removal from consideration for the new truck driver position.

Respondent asserts that all the employment actions taken against Complainant would have occurred regardless of Complainant's protected activities. Respondent argues it had legitimate, nondiscriminatory reasons for the adverse action taken against Complainant. Complainant was reassigned to his position as a courier because of his history of insubordination. Respondent states it was necessary to place Complainant in a position with more supervision, because he was not following directions or performing his duties as a mail truck driver. Complainant was also placed on a three-day suspension as a result of his ongoing behavior and performance issues. Specifically, Complainant was suspended because he was uncooperative and failed to follow instructions from his supervisors, including Ms. Lee's instructions to wash the mail truck and Mr. Henke's instructions to deliver the mail hamper. Respondent asserts these were "egregious incidences of insubordination." Suspension was the next step of discipline in Respondent's corrective action policy.

Respondent further argues that Claimant was ineligible for the new truck position because of his March 2010 corrective action. Accordingly, Complainant was not considered for the new position. Respondent notes that Mr. Draper refrained from posting the position in October and November 2008, because Complainant was currently under his second corrective action and was ineligible to apply. Mr. Draper felt Complainant deserved a change to apply for the position. Respondent maintains Complainant was not selected for the new truck driver position solely because he was under a corrective action and was thus ineligible to apply.

On April 30, 2010, Complainant received his annual performance evaluation. Complainant did not achieve all of his expectations on his evaluation. As a result, Complainant was placed under a performance improvement plan. Respondent argues the performance evaluation and performance improvement plan focused on Complainant's behavioral issues. Respondent asserts Complainant was not given an unfavorable evaluation or placed on a performance improvement plan in retaliation for Complainant's safety complaints.

After a review of all the evidence, I find Respondent has not demonstrated, by clear and convincing evidence, that it would have taken the unfavorable personnel action against Complainant in the absence of Complainant's protected conduct. Respondent cites to uncooperative behavior and failure to follow instructions as supporting its decision to suspend and discipline Complainant and to remove him from consideration for the new truck driver position. As previously noted, Complainant's suspension, reassignment, performance discipline, and failure to be considered for the truck driver position occurred in March and April 2010.

These unfavorable personnel actions occurred close in proximity to Complainant's complaints about the DOT requirements for the shuttle bus, as well as his concerns about pre-trip inspections in February and March 2010. I find direct evidence that Respondent placed Complainant on a performance improvement plan because of Complainant's protected activities. The plan lists Complainant's inappropriate behaviors as being argumentative, and specifically, argumentative concerning the DOT requirements for the shuttle bus. JX 9. I also note that in October and November 2008 Mr. Draper refrained from posting the new truck driver position because Complainant was currently under his second corrective action and was ineligible to apply. However, in March 2010, after Complainant had raised several safety regulation issues in February and March, Mr. Draper did not refrain from posting the position, though Complainant was under a corrective action. Thus, Complainant was not given an opportunity to apply for and be considered for the position, although Mr. Draper had felt Complainant deserved a chance to apply for the same position in 2008.

Complainant points out that he had worked as a truck driver for 8 years, and for five years under Mr. Draper's supervision. Tr. at 65. Complainant has received corrective actions in the past; however, he was not disciplined for all of his issues. Tr. at 99, 152-153; EX 10. Regardless, Respondent continued to employ Complainant as a truck driver, despite his behavior and performance issues. Respondent then took unfavorable personnel action when Complainant engaged in protected activity. The close temporal proximity of Complainant's protected activity and Respondent's unfavorable personnel action further supports a finding that Respondent's articulated reasons were a pretext for discrimination and that Respondent would not have taken the unfavorable personnel action in the absence of Complainant's protected activities. Therefore, I find Respondent has failed to establish, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the Complainant's protected activity.

### **CONCLUSION**

I find that Complainant has demonstrated that: (1) his employer is subject to the Act, and he is a covered employee under the Act; (2) he engaged in a protected activity, as statutorily defined; (3) his employer knew that he engaged in the protected activity; (4) he suffered an unfavorable personnel action; and (5) the protected activity was a contributing factor in the unfavorable personnel action. I find that Respondent has failed to establish, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the Complainant's protected activity. Accordingly, I find Complainant entitled to relief under the Act.

### **RELIEF**

Under the STAA, a prevailing complainant is entitled to relief including abatement, reinstatement, and compensatory damages, including back pay. 49 U.S.C. § 31105(b)(3)(A)(i)(iii). Complainant is seeking reinstatement, back pay, compensatory damages, punitive damages, interest, abatement of the violation, and attorney fees and costs.

### **REINSTATEMENT**

Under STAA section 405(c), the Secretary must order reinstatement upon finding reasonable cause to believe that a violation occurred. A finding of a violation by an administrative law judge necessarily subsumes a finding of reasonable cause to believe that a violation has occurred. Such preliminary order may issue at any time after the Secretary has investigated a discrimination complaint and before she issues a final order.

Upon review, Complainant is entitled to reinstatement.

### **BACK PAY**

The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Albemarle paper Co. v. Moody*, 422 U.S. 405 418-421 (1975) (under Title VII). Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000 *et seq.* Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. Back pay calculations must be reasonable and supported by evidence; they need not be rendered with “unrealistic exactitude.” *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-05, slip op. at 11 (*citing Beltway v. American Cast Iron Pipe Co., Inc.*, 494 F.2d 211; 260-61 (5th Cir 1974)).

Complainant was suspended for three days in March 2010. ALJ 1. At that time, Complainant earned \$17.30 per hour, working 8 hours each day. Tr. at 35; ALJ 1. Therefore, Complainant’s wage loss for his suspension was \$415.20.

Complainant received a \$0.30 pay increase effective May 25, 2011. However, Complainant states that his pay increase was delayed 3 months, due to his previous suspension from work in March 2010. Tr. at 63; ALJ 1. Additionally, Complainant asserts that if he had been retained in the truck driver position, his wages would have increased to \$19.75 per hour in April 2010. Tr. at 50, 223; JX 22. Furthermore, Complainant would have received the annual wage increase in February 2011, increasing his wages to \$20.38 per hour on February 16, 2011.

Accordingly, Complainant alleges the following damages for lost wages:

A. Three Day Suspension (\$17.30 x 8 hours x 3 days):	\$415.20
B. 3/11/2010 – 3/31/2010 (\$0.35 x 40 hours x 3 weeks):	\$42.00
C. 4/01/2010 – 2/15/2011 (\$2.45 x 40 hours x 45.8 weeks):	\$4,488.40
D. 2/16/2011 – 5/24/2011 (\$3.08 x 40 hours x 14 weeks):	\$1,724.80
E. 5/25/2011 – 1/20/2012 (\$2.73 x 40 hours x 34 weeks):	\$3,712.80
Total:	\$10,383.20

Additionally, Complainant states the next anticipated pay raise will be in February 2012. If wages increase 3.2 percent, then Complainant’s current wages will increase to \$18.21 and the wages Complainant would have earned as a truck driver would increase to \$21.03. Accordingly, Complainant’s damages will accrue at \$109.20 per week from January 21 to February 15, 2012, and \$112.80 per week from February 16, 2012, until reinstatement.

Upon review, I find that Complainant is entitled damages for lost wages in the amount of \$10,383.20. Additionally, I find Complainant entitled to \$109.20 per week from January 21 to February 15, 2012, and \$112.80 per week from February 16, 2012, until reinstatement.

Interest is due on back pay awards from the date of termination to the date of reinstatement. Prejudgment interest is to be paid for the period following Complainant's suspension on March 8, 2010, until the instant order of reinstatement. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made. *Moyer v. Yellow Freight System, Inc.*, [Moyer I], Case No. 89-STA-7 at 9-10 (Sec'y Sept. 27, 1990), rev'd on other grounds. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992). The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621. The interest is to be compounded quarterly. *Ass't Sec'y of Labor for Occupational Safety and Health and Harry D. Cote v. Double R Trucking, Inc.*, Case No. 98-STA-34 at 3 (ARB Jan. 12, 2000).

#### **COMPENSATORY DAMAGES**

Complainant requests \$15,000.00 in compensatory damages for emotional distress, as he served a three-day suspension and continues to suffer because of his demotion.

The Secretary and the Administrative Review Board hold that compensatory damage awards for emotional distress or mental anguish should be similar to awards made in other cases involving comparable degrees of injury. See *Leveille v. New York Air National Guard*, 1994-TSC-3 & 4 (ARB Oct. 25, 1999). A vast array of award amounts has been upheld. See, e.g., *McCustion v. Tennessee Valley Authority*, 1989-ERA-6 (Sec'y Nov. 13, 1991). For example, in *DeFord v. Tennessee Valley Authority*, the complainant received \$10,000 in damages for chest pains, difficulty with swallowing, indigestion, sleeplessness, and general anxiety and depression. *DeFord v. Tennessee Valley Authority*, 1981-ERA-1 (Sec'y Apr. 30, 1984). However, in *Muldrew v. Anheuser-Busch, Inc.*, the Court of Appeals held an award of \$50,000 was reasonable for emotional distress and mental suffering for the complainant's loss of his house and his car, and marital difficulties that resulted. See *Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989, 992 (8th Cir. 1984). Likewise, in *Wulf v. City of Wichita*, the court granted an award of not greater than \$50,000 to a plaintiff who was angry, scared, frustrated, depressed, under emotional strain, and experienced financial difficulties as a result of losing his job. *Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989).

In *Calhoun v. United Parcel Services*, 2002-STA-31 (ALJ June 2, 2004), the ALJ awarded compensatory damages for emotional distress. Based on the ALJ's observations of the complainant at two hearings, the complainant's treatment by a psychologist for emotional distress, and the employer's lack of challenging the complainant's emotional distress claims, the ALJ awarded a modest amount of damages for emotional distress. Similarly, in *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000), the ALJ awarded emotional distress damages where the complainant had put forth evidence demonstrating that he had gained weight from depression and stress, testified that he had trouble sleeping, and that his self-esteem had been damaged.

However, in this case, I find that Complainant has not provided adequate evidence of substantial emotional distress to justify an award of compensatory damages for emotional distress. In comparable cases, a complainant will often offer evidence of adverse effects that psychological trauma has had on his or her life, such as damage to a relationship, an inability to function at work, or other disruption of the normal routines of life.<sup>1</sup> Complainant has not offered, and I do not find, any such evidence to demonstrate Complainant has suffered emotional distress that would warrant the award of compensatory damages.

After a review of the evidence, I decline to award Complainant compensatory damages.

### ***PUNITIVE DAMAGES***

Complainant requests punitive damages in the amount of \$25,000.00. Complainant argues he is entitled to punitive damages because Respondent's actions in retaliating against Complainant reflect a policy of allowing STAA violations to occur. Complainant also notes Respondent is a large employer with approximately 32,000 employees.

The STAA allows for an award of punitive damages in an amount not to exceed \$250,000. 49 U.S.C. § 31105(b)(3)(C). The United States Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law . . . ." *Smith v. Wade*, 461 U.S. 30, 51 (1983). The purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979).

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<sup>1</sup> For examples, see:

- ***Hall v. U.S. Army, Dugway Proving Ground***, 1997-SDW-5 (ALJ Aug. 8, 2002) (awarding \$400,000 in compensatory damages for mental anguish, adverse health consequence, and damage to professional reputation caused by "repeated and continuous discrimination and retaliation" that caused great mental suffering, compromised mental health, and destroyed professional reputation).
- ***Moder v. Village of Jackson, Wisconsin***, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003) (awarding no emotional trauma damages because the plaintiff failed to demonstrate both (1) objective manifestations of distress, e.g., sleeplessness, anxiety, embarrassment, depression, feelings of isolation, and (2) a causal connection between the violation and the distress).
- ***Creekmore v. ABB Power Systems Energy Services, Inc.***, Case No. 93-ERA-24, slip op. at 25 (Dep'y Sec'y Dec., Feb. 14, 1996) (awarding \$40,000 for emotional pain and suffering caused by a discriminatory layoff after the complainant showed that his layoff caused emotional turmoil and disruption of his family because he had to accept temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company).
- ***Michaud v. BSP Transport, Inc.***, ARB Case No. 97-113, ALJ Case No. 95-STA-29, slip op. at 9 (ARB Dec. Oct. 9, 1997) (awarding \$75,000 in compensatory damages where evidence of major depression caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiatrist; evidence also showed foreclosure on Michaud's home and loss of savings).
- ***Blackburn v. Metric Constructors, Inc.***, Case No. 1986-ERA-4, slip op. at 5 (Sec'y Dec. after Remand, Aug. 16, 1993) (awarding \$5,000 for mental pain and suffering caused by discriminatory discharge where complainant became moody and depressed and became short tempered with his wife and children).
- ***Lederhaus v. Paschen***, Case No. 91-ERA-13, slip op. at 10 (Sec'y Dec., Oct. 26, 1992) (awarding \$10,000 for mental distress caused by discriminatory discharge where the complainant showed he was unemployed for five and one half months, foreclosure proceedings were initiated on his house, bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted).

Upon review, I reject Complainant's request for punitive damages claim. Complainant has not established, nor do I find, that Respondent's actions rose to the level of reckless or callous disregard for Complainant's rights. I also find no evidence of a history of repeated, multiple violations by Respondent. Accordingly, I do not find that punitive damages are necessary to deter Respondent from similar conduct in the future. Therefore, I reject Complainant's request for punitive damages.

#### ***ABATEMENT OF THE VIOLATION***

Orders to expunge personnel records and to post decisions adverse to the employer on its premises are authorized as "standard remed[ies] in discrimination cases," *Michaud v. BSP Transport, Inc.*, ARB No. 97-113, ALJ No. 1995-STA-29, slip op. at 9 (ARB Oct. 9, 1997). Here, Complainant requests that I order Respondent to post a copy of any decision favorable to Complainant for 90 consecutive days in places where Respondent normally posts employee notices. Upon review, I find it appropriate to require Respondent to post this decision. *Scott v. Roadway Express, Inc.*, 1998-STA-8 (ARB July 28, 1999) (requiring employer to post the ARB and Secretary of Labor decisions in places accessible to its employees for 180 days). Accordingly, I grant Complainant's request and order Respondent to post this decision for 90 consecutive days in places where Respondent normally posts employee notices.

Complainant also requests that I order Respondent to expunge the following from its personnel records: 1) Complainant's March 5, 2010, corrective action form, JX 8; 2) Complainant's April 30, 2010, performance improvement plan, JX 9; and 3) portions of Complainant's April 30, 2010, performance appraisal that refer to Complainant's protected activity, JX 4. Upon review, I find it appropriate to grant Complainant's request and to require Respondent to expunge these records from its personnel records.

#### ***ATTORNEY'S FEES***

Complainant's counsel is afforded thirty days to submit a petition for attorney's fees. Complainant's counsel shall submit a fully supported and fully itemized fee petition, sending a copy thereof to Respondent's counsel who shall then have fourteen (14) days to comment thereon.

#### **ORDER**

Based on the foregoing findings of fact, conclusions of law, and upon the entire record, I find Complainant is entitled to relief under 49 U.S.C. § 31105(b)(2)(A). I hereby order that Complainant, James Seehusen, be awarded the following remedy:

1. Respondent, Mayo Clinic, shall **REINSTATE** Complainant with the same seniority, status, and benefits he would have had but for Respondent's unlawful discrimination.
2. Respondent shall remit to Complainant:
  - A. \$10,383.20 in damages for lost wages.
  - B. \$109.20 per week from January 21 to February 15, 2012, and \$112.80 per week from February 16, 2012, until reinstatement.
  - C. Interest on the entire back pay award, calculated in accordance with 26 U.S.C. § 6621.
  - D. The Secretary shall designate an official to calculate the amounts set forth by A-C above.

3. Respondent shall post this Decision and Order for ninety (90) consecutive days in places where Respondent normally posts employee notices.
4. Respondent shall expunge from its personnel records Complainant's March 5, 2010, corrective action form, Complainant's April 30, 2010, performance improvement plan, and portions of Complainant's April 30, 2010, performance appraisal that refer to Complainant's protected activity.
5. I retain jurisdiction to entertain a petition for attorney's fees.

**SO ORDERED.**

A

Daniel F. Solomon  
Administrative Law Judge

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

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

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy

only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

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

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

If no Petition is timely filed, the 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).

**The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board.** 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).