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Office of Administrative Law Judges
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Issue Date: 07 May 2015

ARB No.: 12-058

Case No.: 2011-STA-00032

In the Matter of:

FERNANDO D. WHITE,

Complainant,

v.

AMERICAN MOBILE PETROLEUM, INC.,

Respondent.

DECISION AND ORDER

The above matter is a complaint of employment discrimination under Section 31105 of the Surface Transportation Assistance Act of 1982, as amended (STAA). The case has been referred to the Office of Administrative Law Judges for formal hearing on Appeal by Complainant of the Occupational Safety and Health Administration January 18, 2011, determination which dismissed the Complainant's case. A hearing was held on May 6, 2014, in Atlanta, Georgia. at which time the parties were afforded a full opportunity to present evidence and argument as provided in the Act and applicable regulations. Both parties were represented by counsel.

Joint stipulations were accepted and read into the record. (JX 1) At the hearing, ALJ Exhibits 1 through 3 were admitted into the record. (TR 9) Complainant offered Complainant's Exhibits 1 through 33. (TR 10) Respondent objected to Exhibits 31 through 33 on the grounds of foundation, and not being contained in the prior prehearing statement. Complainant explained that the wage statements went to mitigating damages and the other evidence was a foreclosure notice. The undersigned overruled the objection, admitted the exhibits and the weight will be given to which they are entitled. Complainant's Exhibits 1 through 33 were admitted into evidence. (TR 12) Complainant did not submit exhibits 29 and 30 at the hearing inasmuch as they were audio recordings. The audio recordings were transcribed at a later date by a transcriptionist and were subsequently admitted into evidence. (TR 14) Respondent's Exhibits 1 through 29 were admitted into evidence without objection. (TR 16) Both Complainant and Respondent submitted post-hearing briefs for consideration.

PROCEDURAL HISTORY

On February 16, 2012, Judge Sarno issued a Decision and Order Granting Respondent's Motion for Summary Judgment and Dismissing the Complaint. White v. American Mobile Petroleum, Inc., 2011-STA-00032, slip op. at 1 (ALJ Feb. 16, 2012). Judge Sarno determined that Complainant "failed to establish he engaged in protected activity, that was known to Respondent, and that his employment was terminated at least in part due to his protected activity." *Id.* Judge Sarno noted that Mr. Carroll and Mr. Glover were trainers who exercised no decision making authority over Complainant's employment status. Furthermore, Judge Sarno noted that there was nothing in the record to demonstrate that Complainant informed his supervisor that Mr. Carroll ordered him to drive in excess of the speed limit. *Id.* at 3. In addition, Judge Sarno noted that Complainant stated that he only informed his supervisor that Mr. Glover asked him to speed after his termination. *Id.* at 3. In his conclusion, Judge Sarno determined that Complainant failed to show that he engaged in a protected activity of which his supervisor was aware prior to the termination. *Id.* Judge Sarno granted the Motion for Summary Decision and dismissed the claim with prejudice.

By Decision and Order dated May 31, 2013, the Administrative Review Board ("Board") reversed Judge Sarno's Order and remanded the case. White v. American Mobile Petroleum, ARB Case No. 12-058, ALJ Case No. 2011-STA-032, slip op. at 2 (ARB May 31, 2013). The Board emphasized that an administrative law judge (ALJ) may grant summary decision "where the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." *Id.* at 3, citing Elias v. Celadon Trucking Svcs, Inc., ARB No. 2011-STA-028, slip op. at 3 (ARB Nov. 21, 2012). The Board noted that Judge Sarno's Decision turned principally on the determination that Complainant's supervisor, Mr. Parchman, was not aware of Complainant's safety complaints prior to the termination. The Board, however, noted that during Mr. Parchman's deposition, he indicated that Complainant on the last day may have complained that he was being asked to drive over the speed limit. *Id.* at 4. Therefore, weighing the evidence in the light most favorable to the Complainant, the Board determined that there was a genuine issue of material fact for hearing. The Board reversed the Decision and remanded for further proceedings.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

The parties have stipulated to, and this Administrative Law Judge finds the following, as fact:

1. American Mobile Petroleum, AMP, is a corporation with a principal place of business located at 4159 Winters Chapel Road, Suite B, Doraville, Georgia, 30360. Respondent is engaged in interstate trucking operations and operates commercial motor vehicles having a gross weight rating of 10,001 pounds or more, transporting properties on the highways and interstate commerce. Respondent is a person within the meaning of 1 USC, Section 1, and

49 USC, Section 31105. It is also a commercial carrier within the meaning of 49 USC, 631101. Respondent is engaged in transporting products on the highway via commercial motor vehicles, that is, a vehicle with a gross ton vehicle weight rating 10,001 pounds or more.

2. Respondent maintains a place of business in Doraville, Georgia.
3. Complainant was employed by American Mobile Petroleum approximately from August 8 through August 13, 2010. During that time, Complainant worked as a commercial truck driver operating tractor-trailer vehicle combinations, having a gross vehicle weight rating of 10,001 pounds or more on the highways transporting property in interstate commerce.
4. During Complainant's employment with Respondent, he drove a commercial truck with Arrie Glover and Robert Carroll on consecutive days in August of 2010.
5. While driving a truck with Mr. Glover and Mr. Carroll, Complainant audiotaped his conversations.
6. On August 13, 2010, Respondent's president, James E. Parchman, Jr., called Complainant and informed him that he could not use him anymore.
7. On or about August 13, 2010, Respondent terminated Complainant's employment.
8. On January 18, 2011, Complainant filed an OSHA complaint against Respondent with the U.S. Department of Labor, alleging that American Mobile Petroleum had discharged and retaliated against him for refusing to drive over the posted speed limits, in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 USC, Section 31105.
9. On or about April 15, 2011, OSHA issued preliminary findings and an order pursuant to 49 USC, Section 31105.
10. On May 21, 2011, Respondent filed objections to the Secretary's findings and order.
11. The U.S. Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and subject matter of the proceeding.
(TR 5-8; JX 1).

ISSUES

1. Whether the Complainant engaged in protected activity under the Act.
2. Whether the protected activity was a substantial factor in the adverse employment action taken against Complainant.
3. Whether Complainant is entitled to damages.

4. Whether the Respondent is entitled to recover attorney's fees and costs from the Complainant for defending the claim.

PARTY POSITIONS

Complainant's Positions

The Complainant submits that he engaged in protected activity when he refused to follow the alleged direction of trainer Arrie Glover to drive over the posted speed limit on August 12, 2010. Complainant submits that he was terminated for following Federal Highway Safety Regulations. These include allegedly refusing to speed, refusing to not wear a seatbelt, and refusing to drive in unsafe and dangerous manners. (TR 20) He submits that he was discharged by James Parchman on August 13, 2010, due to his protected activity. He argues that his refusal to drive/speed was a motive for retaliation by Respondent and was the motive for his termination from employment. Complainant seeks damages under the Act including back wages, emotional distress damages, punitive damages, attorneys fees and costs, and abatement of the violation. (TR 21)

Respondent's Position

Respondent submits that Complainant did not engage in protected activity or protected speech to a representative of AMP management which contributed to his termination. Respondent submits that Complainant did not suffer any adverse action after his August 11, 2010, training session with Robert Carroll or his discussion with Mr. Parchman. Mr. Parchman viewed it as a personality conflict, paid the Complainant for the rest of the day and had Complainant assigned to another AMP trainer for the next day. Respondent submits that Complainant did not engage in protected activity the next day on August 12, 2010, when he was allegedly told to violate federal safety regulations by the next trainer, Arrie Glover. Respondent submits that he did not suffer any adverse action after his August 12, 2010, training. Respondent submits that there is no evidence in the record that Complainant informed Mr. Parchman or any member of American Mobile Petroleum management that he refused to violate safety rules before being terminated by Mr. Parchman on August 13, 2010. Respondent submits that AMP and Mr. Parchman had no knowledge that Complainant had engaged in alleged protected activity or that the alleged protected activity was a contributing factor in his termination. Respondent submits that Complainant was not terminated due to protected speech or activity. He was terminated because he was considered untrainable by two AMP trainers, who both informed Mr. Parchman on August 12, 2010, and August 13, 2010, and who both refused to continue to train the Complainant. Respondent submits that AMP had a legitimate, non-retaliatory reason for terminating the Complainant's employment and Complainant has failed to prove there was any pretext for his termination. Respondent further submits that Complainant has not provided evidence of damages.

DECISIONAL FRAMEWORK

This Complaint was referred for formal hearing under the STAA. The evidence of record establishes that the above captioned matter arose from the Parties' actions in Georgia, which is

within the jurisdictional area of the U.S. Court of Appeals for the Eleventh Circuit. Accordingly, the judicial precedents of the U.S. Court of Appeals for the Eleventh Circuit apply.

The “whistle-blower” provisions under the STAA are designed to protect “employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance.” Brock v. Roadway Express, Inc., 481 US 252 (1987).

The STAA, at 42 USC §31105, provides in pertinent part:

(a) Prohibitions.

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

(A)(i) the employee ... has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such 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 vehicle safety, health, or security; or,

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition;

(C) the employee accurately reports hours on duty pursuant to Chapter 315;

(D) the employee cooperates ... with a safety security investigation ... or;

(E) the employee furnishes ... information to ... any Federal, State or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee’s apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

Implementing federal regulations applicable to the STAA at 29 CFR Part 1978 were last revised effective July 27, 2012. The revised regulations are used herein and provide, in pertinent part:

§1978.102 Obligations and prohibited acts.

(a) No person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in any of the activities specified in paragraphs (b) or (c) of this section. ...

(b) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee ... has:

(1) Filed ... a complaint with an employer, government agency, or others or begun a proceeding relating to a violation of a commercial motor vehicle safety or security regulation, standard or order; or

(2) Testified or will testify at any proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order.

(3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or any other action to carry out the purposes of such statutes. ...

(c) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee:

(1) Refuses to operate a vehicle because:

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

(ii) He or she has a reasonable apprehension of serious injury to himself or herself or the public because of the vehicle's hazardous safety or security condition;

(2) Accurately reports hours on duty pursuant to Chapter 315 of Title 49 of the United States Code;

(3) Cooperates with a safety or security investigation ...; or,

(4) Furnishes information to ... any Federal, State or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(d)

(e) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employer perceives that:

(1) Filed ... or is about to file ... a complaint with an employer, government agency, or others or begun a proceeding relating to a violation of a commercial motor vehicle safety or security regulation, standard or order;

(2) The employee is about to cooperate with a safety or security investigation ...; or,

(3) The employee has furnished information or is about to furnish information to ... any Federal, State or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(f) For purposes of this section, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

Federal motor carrier regulations from 2009 relevant to this case include:

49 CFR§396.7 Unsafe operations forbidden.

(a) General. A motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle.

(b) Exemption. Any motor vehicle discovered to be in an unsafe condition while being operated on the highway may be continued in operation only to the nearest place where repairs can safely be effected. Such operation shall be conducted only if it is less hazardous to the public than to permit the vehicle to remain on the highway.

In order to establish a prima facie case for whistleblower protection under the STAA, an employee must establish (1) that the Complainant was an employee; (2) that the employee engaged in protected activity; (3) the employer had actual or constructive knowledge of the protected activity; (4) the alleged hostile act occurred; and (5) a causal connection existed making it likely that the protected activity resulted in the alleged discrimination. Luckie v. Administrative Review Board, 321 Fed. Appx. 889 (11th Cir. 2009) unpub.; Self v. Carolina Freight Carriers Corp., ARB No. 89-STA-9 (Jan. 12, 1990); Moon v. Transport Drivers, Inc., 836 F.2d 226 (6th Cir. 1987); Wrenn v. Gould, 808 F.2d 493 (6th Cir. 1987); Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co., 783 F.2d 50 (6th Cir.), cert. denied, 478 US 1006 (1986); and cases cited in Roadway Express, Inc. v. Brock, 830 F.2d 179, FN6 (11th Cir. 1987)

If the Complainant establishes a prima facie case under the Act, the respondent will not be held to have violated the Act if it establishes that that adverse employment action was the result of events and/or decisions for a legitimate, nondiscriminatory reason independent of protected activity; that is, the evidence raises a genuine issue of fact as to whether the respondent discriminated against the employee. If the respondent successfully raises the issue, the Complainant must show by a preponderance of the evidence that legitimate reasons offered by the employer were actually a pretext for discrimination. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Texas Department of Community Affairs v. Burdine, 450 US 248, 253; 101 S.Ct. 1089, 1093 (1981); Williams v. U.S. Department of Labor, *supra*, at 569; Reeves v. Sanderson Plumbing Prods., Inc., 530 US 133; 120 S.Ct. 2097 (2000).

The Administrative Procedure Act (APA) provides that “except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. §556(d) The STAA, at 49 U.S.C. §31105(a)(2), provides that the legal burdens of the Parties in a STAA complaint are governed by the provisions of 49 U.S.C. §42121(b), set forth in §512 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21). Accordingly, the Complainant has the burden to establish a prima facie case that protected activity occurred and such activity was a contributing cause to the alleged unfavorable personnel action. If the prima facie case is established, the employer is not liable if it establishes by clear and convincing evidence that it would have taken the same alleged unfavorable personnel action in the absence of the alleged protected activity. Where the credible evidence of record is in “equipoise”, that is evenly balanced, the party proponent with the burden of proof (persuasion) must lose. Director, OWCP v. Greenwich Colliers, 512 US 267, 281 (1994); Schaffer v. Weast, 546 US 49 (2005)

SUMMARY OF EVIDENCE

Testimony of Fernando White

Complainant testified that at the time of the hearing, he was fifty years old, (TR 26) has been a commercial truck driver for twenty-three years, (TR 27) and holds a CDL, Class A, all endorsements except for the P, passenger endorsements, hazmat, border crossing, Canada border crossing, and tractor-trailer certification. (TR 27) Complainant testified that he learned about the position with American Mobile Petroleum through Craig’s List. (TR 28) Regarding wages, he testified that he was going to receive thirteen dollars per hour. (TR 29) He testified that he only worked for Respondent for four to five days until he was terminated by the owner of the company, James Parchman. (TR 28)

Complainant testified about the application process. He testified that Mr. Parchman went over Complainant’s application with him and “asked me questions about my different employers” and “asked questions on why did I write that and why did I write this, and what happened there. . .” (TR 30). Complainant testified that he informed Mr. Parchman that sometimes he would draw unemployment and he was told by the adjudicator that he could not receive unemployment if he had been fired. (TR 30) Complainant testified that Mr. Parchman informed him that the only thing that would disqualify him would be theft, embezzlement, accidents, and things of that nature. (TR 31) Complainant testified that he assured Mr. Parchman that “it was nothing like that in my background.” (TR 31)

Complainant testified that on August 9, 2010, he drove with JC and an unknown driver. Complainant testified that Robert Carroll and Arrie Glover “were my trainers.” (TR 40) On August 10, 2010, his second day, he drove with Robert Carroll. He had no problems with Mr. Carroll on August 10, 2010. (Transcript 36-37) On August 11, 2010, he was driving with Mr. Carroll. (TR 38) On August 12 – August 13, 2010, he was driving with Mr. Glover.

Complainant testified regarding an alleged incident that occurred while he was in the truck with Robert Carroll. (TR 32, 89-93) Complainant testified that he was driving a loop around Atlanta when Mr. Carroll asked him to get off on an exit quickly because he had forgotten something at the office. (TR 32) Complainant testified that he did not get off on the exit because it would have

been unsafe. (TR 32) Complainant testified that his refusal to get off on the exit upset Mr. Carroll. (TR 32) Complainant testified that as he was fueling the truck, Mr. Carroll “begin [sic.] to fuss at me about not getting off when he wanted me to get off, and things of that nature.” (TR 34) Complainant testified that he told Mr. Carroll that it would have been unsafe. (TR 34) Complainant testified that Mr. Carroll decided to take him back to the office. (TR 34)

He testified that Mr. Carroll wanted him not to follow the posted 55 mile per hour speed limit. (TR 33) (See RX 9 – where Complainant made a different complaint to OSHA and did not mention a 55 mile per hour speed limit issue. His only complaint to OSHA was regarding exiting the highway.)

Specifically, Complainant testified that allegedly Mr. Carroll told him to maintain the posted speed limit. Complainant testified it could not be maintained. (Transcript 88) Complainant testified that Mr. Carroll did not ask him to speed in excess of the speed limit and stated “not the posted speed limit but DOT speed limit.” (Transcript 33, 89) Complainant testified in his opinion, it was too dangerous to go the posted speed limit. (TR 89) Complainant testified that Mr. Carroll returned with him to the AMP yard because Mr. Carroll would not work with Complainant anymore. “Yes.” (TR 90)

Complainant testified that he told Mr. Parchman and Mr. Lomax (Wallace) that same day that “he was trying to get me to violate DOT regulations by going around traffic, driving erratic speeds, and told me that I had to maintain the posted speed limit, when the posted speed limit couldn’t be achieved. . . .” (TR 34)

Complainant testified that he told Mr. Parchman and Mr. Wallace about the conflicts with Mr. Carroll. Complainant specifically testified he had a conversation with Mr. Parchman, AMP’s president as well as Mr. Lomax Wallace about what happened with Mr. Carroll during the route that morning. (TR 38, 39, 91) Complainant testified that “I can’t recall at this point” what he told Mr. Parchman and Mr. Wallace about what Mr. Carroll told him to do regarding driving. (Transcript 92) Complainant disagreed that he told Mr. Parchman and Mr. Wallace that Mr. Carroll allegedly wanted Complainant to turn around one exit and that Complainant instead went to the next exit. (This is in direct contrast to what U.S. Department of Labor OSHA investigator memorandum states. RX 19)

Q. In fact, Mr. White, you only complained to Mr. Parchman and Mr. Wallace about Mr. Carroll allegedly wanting you to turn around one exit, and that you proceeded instead to the following exit, before turning the vehicle around the, isn’t that correct?

A. I just said turn the truck over.

Q. So you never complained to Mr. Parchman on August 11 or Mr. Wallace that he was directing you to drive faster than the traffic conditions allowed?

A. Yes, I did. I just didn’t go into detail then.

Q. Do you remember what you told the DOL investigator you told Mr. Parchman when you returned to the office in August 11 about what had happened?

A. I’m unsure.

Q. Do you remember whether or not you told the Department of Labor OSHA investigator what you had shared with Mr. Parchman upon your return to the yard on August 11?

A. I'm unsure. I was focusing on the smoking gun, the speed, what I was terminated for. (Transcript 92-93)

Complainant testified that Mr. Parchman told him "don't worry about it, it could be a personality conflict, I don't know, he said, but I'm going to let you go home. I'm going to let you go home and I'm going to let you go home with pay. I'm going to pay you for a full shift, and let me emphasize that I was—I only did one stop." (TR 38-39)

Complainant testified that he was not terminated and that Mr. Parchman paid him money that Complainant felt he did not deserve. (TR 97)

Q. So he didn't terminate you on August 11?

A. No, he didn't.

Q. After you had allegedly shared with him all the bad things that Mr. Carroll allegedly directed you to do?

A. No, he didn't terminate me. In fact, he gave me money that I don't feel like I deserved.

Q. And that's because, as you testified earlier, he sent you home with pay.

A. Right.

Q. And told you to come back for your next shift, correct?

A. Right. That's why I didn't elaborate on it.

Q. Did he also tell you that he was going to assign you to another trainer?

A. He sure did, yes, he did. (Transcript 97)

Complainant's testimony at the hearing was different from what he reported to the OSHA investigator. Complainant reviewed the U.S. Department of Labor OSHA memo written by the investigator. (RX 19) (TR 93) The investigator stated that Complainant reported that he did not want to turn around at a specific location so he continued driving up the road to the next exit. The investigator further stated that the employee was upset with the Complainant because Complainant did not turn around. Investigator stated that Complainant reported that upon arriving at the office, the owner of the company Mr. Parchman, asked what happened and the Complainant told him about the turnaround at a specific location. The OSHA investigator made no mention of exceeding the 55 mph speed limit. (TR 94) Complainant testified at the hearing that the investigator omitted mentioning the speed limit issue because she "misconstrued a lot of stuff in a report." (TR 93-95)

Q. There is no mention in there of driving too fast for the conditions or driving in excess of the speed limit, is there?

A. That's her, yeah, her, but I—she misconstrued a lot of stuff in a report.

Q. I see. So it's your testimony that the OSHA investigator either misremembered or didn't capture what you were telling her?

A. That's correct. She did the same for his—Mr. Parchman. (Transcript 95-96)

When asked whether Complainant knew if Mr. Carroll could terminate people, Complainant testified that Mr. Carroll bragged that he could fire people. (TR 86) Complainant testified that he did not yell or argue with Mr. Carroll. (TR 89) He also testified that he did not wave his arms or behave in a threatening manner. (TR 89)

On August 12, 2010, Complainant was assigned to train with Arrie Glover. (TR 39) Complainant testified at his deposition, page 79, line 14 that Mr. Glover did not have the authority to terminate. At the hearing, Complainant changed his testimony and testified that Mr. Glover “bragged that he could get rid of the drivers.” (Depo page 99) Complainant testified that Arrie Glover started training him in August 12, 2010, and they went past midnight into August 13, 2010. (Transcript 46)

Complainant testified at the hearing that Mr. Glover trained him in August 12, 2010 and things were “uneventful.” Complainant specifically stated “I was doing real well at doing lots of stuff on my own, and he didn’t have to give me as many pointers, and he was going into a lot of detail and I was just, you know, taking in everything, absorbing what he was instructing me to do. And from what I remember is the night went uneventful from that time till we got into the next day, till we went past midnight, we got into the next day.... August 13, 2010.” (Transcript 46)

Complainant testified regarding the events of August 12, 2010. (TR 39) He testified that Arrie Glover “had been told to train me or something to that effect. . .” (TR 39) Complainant testified that he went over the truck with Mr. Glover and noticed a flat tire. (TR 42) In addition, Complainant testified that Mr. Glover allegedly told him that he needed to stop wearing his seatbelt because he would be getting in and out of the truck frequently. (TR 42) Complainant testified that Mr. Glover allegedly told him that he needed to speed and drive at 65 miles per hour, even though the speed limit was 55. (TR 43) Complainant testified that he did not speed and that he never knowingly and continuously speeds. (TR 45, 48)

Complainant testified there was then a confrontation with Mr. Glover while they were stopped for fueling. Complainant testified Mr. Glover allegedly wanted him to speed. (TR 48)

Complainant secretly tape-recorded Mr. Glover though he was aware that per the rule book, it was illegal for a driver to use an electronic device at a fueling station. (TR 101) He stated that he has an electronic device at the fueling station because he was “gathering the facts of an STA situation.” (TR 101) He testified he used a recording device.

A. Yes, I did.

Q. Now, a recording device is an electronic instrument, correct?

A. Yes.

Q. Electronic device?

A. Yes.

Q. So is it fair to say that by recording Mr. Glover at a fueling station with an electronic device, you violated federal motor carrier safety regulations, in support of this claim?

A. No, I don’t think so.

Q. Why is that?

A. Because I was gathering the facts.

Q. I see. So it’s not a violation of Federal Motor Carrier Safety Regulations for you to use an electronic device at a fueling station so you can support your claim, but otherwise it’s illegal?

A. Well, there is a doctrine of necessity that would have took place there.

Q. What was the doctrine of what? What was necessary about you using an electronic device in a fueling station?

A. Because they were trying to get me to run over and kill people, and I was gathering the facts of all of that, sir. (Transcript 102-103)

Complainant testified that Mr. Glover allegedly “came up with this wrench- he was coming at me to hit me in the head with this wrench up over my head. At that point I was maybe- I was maybe 10, 12 feet from him, so he had to run to come up to me, and I got down in my stance. I flexed my muscles, I got in my stance, I prepared for the lick and then I prepared to defend myself, whatever I had to do. And I was fear come over his face when I got in my stance to defend myself. . . He put- he brought the wrench down from the assault mode. . . . (TR 50-51)

Complainant and Respondent’s counsel had this exchange about the incident:

Q. And you believe that Mr. Glover intended to kill you, if I’m not mistaken, because you refused his direction to drive in excess of the speed limit?

A. Yes.
(TR 103)

Complainant testified this was not the first time he alleged that a coworker with a trucking company threatened to kill him on the job. Complainant admitted that he has alleged that another coworker at another company had him worried for his life. (TR 104)

Complainant testified that after fueling “it was pretty much uneventful” with Mr. Glover. Complainant testified that he did not have a discussion about the alleged incident with Mr. Parchman or Mr. Wallace that night. (TR 52, 56)

Complainant testified regarding his termination from AMP. Complainant testified that Mr. Parchman terminated his employment on the telephone in August 13, 2010, before the beginning of his next shift later that day. “Yes, he did.” (Transcript 104) Complainant testified that Mr. Parchman called him at home stating that he heard from Mr. Glover and that Mr. Parchman could not use him anymore. “Yes, that’s right.” (TR 104-105, TR 58) According to Complainant, Mr. Parchman stated that he did not drive the truck in the manner directed by Mr. Glover. (TR 58)

Q. So before you told him anything on the phone, he told you that you were being terminated because he couldn’t use you?

A. And he elaborated on it, sir. (TR 105)

Complainant testified that after he was terminated, then he played portions of the secret audiotape to Mr. Parchman. (TR 105-106) “Yeah, it did happen afterwards, yes, . . .” (TR 106, 58) Complainant testified that Mr. Parchman told him that he did not have permission to record his staff. (TR 59) In addition, Complainant testified that he did not ask permission to record Mr. Glover. (TR 108) Complainant testified he was not present for any conversations between Mr. Parchman and Mr. Carroll or Mr. Glover regarding his termination. Complainant testified he had no firsthand knowledge of what was discussed because he did not hear it himself. (TR 107-108)

There are differences between Complainant's testimony and the U.S. Department of Labor OSHA investigator's report. Complainant testified his belief that when he was interviewed by the Department of Labor investigator, he told investigator that he secretly audiotaped Mr. Glover. Complainant testified that he told the DOL investigator that he played part of the request secret recording to Mr. Parchman. (TR 106) However, there is no mention by the Department of Labor OSHA investigator regarding any secret audiotape. (RX 19) Complainant stated that the investigator misconstrued everything and was not a good investigator.

Q. Any explanation as to why that's not in her report?

A. Probably same reason she misconstrued Mr. Parchman's report, she just is not real good—

Q. So again, a sloppy investigator?

A. She's just not real good with the facts. (TR 106-107)

Complainant addressed OSHA's finding that he did not engage in protected activity. (TR 145) Complainant testified that the U.S. Department of Labor is very biased against him. (TR 145) He testified that someone would have to die before the Department of Labor would seriously consider his claim. (TR 145).

Complainant testified regarding applying for work with AMP. He submitted an employment application in August 2010. (Transcript page 117-118, 119-121, RX 1) Complainant confirmed it was his signature on the employment forms. (Transcript page 75, 76, 80, 81, 82, 118, 121). Complainant testified that the information on his job application was accurate. He was asked if there was anything on the job application that was not accurate. Complainant testified "not that I know of." (Transcript page 121) Complainant received a copy of the Federal Motor Carrier Safety Regulations which he certified and signed on the form as receiving. However, Complainant testified he was not given a copy of the safety regulations. (TR 76, Transcript 164-165, RX 9) Complainant testified that he was given "a lot of literature and papers to sign. That's what I did sign." (Transcript 80) Complainant testified that per the training manual, it was company policy that all protective equipment he was required to wear and failure to wear the protective equipment could result in dismissal. (Transcript 84) Complainant testified that he had read section C of the training manual which stated that "in the process of performing your job as a driver for AMP, you are to use all safety guidelines, information presented to you, following all posted speed limit signs and obeying all traffic laws his company policy." (transcript pages 83-84, RX 11, page 19-30) Complainant testified he could not recall which documents he received. (Transcript page 80)

Complainant testified that he signed the job application employment with American Mobile Petroleum, Complainant completed the document, it is in his handwriting, and is his signature on the last page. (Transcript 118) Complainant testified that "it's pretty much accurate." (Transcript 120) He testified regarding the truthfulness of the job application, "Yes, I responded as truthful as the industry allow you to be, sir." (Transcript 120) Complainant was asked whether there was anything on his job application that was not accurate, and he responded "not that I know of." (Transcript 121)

Complainant testified regarding his past work and why those jobs ended. Complainant testified at the hearing that regarding Action Expediting Inc., he wrote on his job application that his reason

for leaving was “placed on unemployment wage after no more assignment available.” (RX 1, page 3) Complainant testified at the hearing “that’s correct.” (TR 122) At the hearing, Complainant denied that he told the Georgia Department of Labor when he applied for unemployment insurance benefits that the reason for leaving was because he was terminated for alleged retaliation for refusing to drive hours exceeding the Department of Transportation regulations. Complainant stated “I’m unsure.” (Transcript 123) Conversely, per the Respondent Exhibit 30, complaint, it stated he was “terminated due to a late delivery.”

Complainant testified regarding his job application with AMP and what he wrote down as his reason for leaving Gemini Traffic Sales. (Transcript 134, RX 1, page 8-9) Complainant testified that he wrote on his AMP application that he was “laid off no work available.” “Yes, that’s correct.” (Transcript 134) However, Complainant testified that on his U.S. Department of Labor STAA retaliation form, he stated he was terminated for refusing to drive while ill. “Yes, I went into detail, yes.”

Q. Okay. So, in fact, you were not laid off for lack of work?

A. That’s what it settled there, that case settled.

Q. But, sir, the application didn’t ask you what the case settled for. It asked you why you were separated.

A. That’s what they changed it to so that’s what I had to go with.

Q. That’s what who changed it to?

A. The respondent. Gemini. (Transcript 135)

Complainant testified at the hearing about his job application with AMP and the reasons he listed for leaving Gresh Transport also known as Federal Freight Systems. (Transcript 135-136) Complainant testified that his reason for leaving was “company going out of business.” Conversely, Complainant testified that on his complaint to the U.S. Department of Labor he stated that he was discharged for refusing to drive an unsafe truck. He testified that this was “not what I told [AMP].” (Transcript 137, RX 1 page 8-9)

Complainant testified at the hearing that he put on his AMP job application his reason for leaving Expert Moving and Delivery. He stated it was because “encounted [sic] financial hardship-no work available.” (Transcript 138, RX 1, page 8 – 9) Complainant was asked whether that was what he represented to AMP on his job application for his reason for leaving Expert Moving and he testified “right here typed on this paper, yes.” (Transcript 138) At this point, Complainant testified that “everything is truthful the best of my knowledge.” (Transcript 138-139) Complainant testified there was a difference between what he told AMP verbally as his reason for leaving work and what he put down on his job application. “Yeah, we can’t put all that on these little lines but verbally you can tell them everything. You can be upfront and candid with somebody.” (Transcript 139) Complainant testified he gave a different reason for leaving Expert Moving and Delivery to the U.S. Department of Labor. Conversely, Complainant testified that he filed a complaint with U.S. Department of Labor against Expert Moving and Delivery stating that his termination was for allegedly refusing to operate a vehicle with malfunctioning signaling system. Complainant testified “yes, they want detail.” Complainant admitted that was not what he told AMP on his job application. (Transcript 139)

Complainant testified at the hearing that he put on his AMP job application his reason for leaving Land Air Transport. He testified that he put down his reason for leaving as part-time job. However, Complainant testified that he stated to the U.S. Department of Labor when he brought his later STAA retaliation complaint, that calling it a part-time job was to resolve the claim against Land Air Transport. Complainant testified:

A. "Yeah, settled at that, yes. Sir.

Q. But you complained to the Department of Labor in 2007?

A. Yes.

Q. That Land Air discharged you in reprisal for being involved in prior whistleblower activities and in violation of gross weight regulations; correct?

A. Yes, that was in detail.

Q. So can we agree, sir, just so the record is clear, that your employment application that you submitted and hand wrote to AMP contained several material misstatements?

A. Misstatements?

Q. Misstatements of fact about the circumstances—

A. No, I disagree.

Q. Surrounding your separation from prior employers?

A. No, I disagree. (Transcript 140-141)

When Respondent's counsel asked Complainant whether he received the AMP driver policy, Complainant responded that he was given a variety of documents. (TR 74)

Complainant testified that he did read the training manual. (TR 82) Complainant testified that he read the section of the policy that directed the drivers to drive the posted speed limit and obey all traffic laws. (TR 83) Complainant testified that he was not given a road test before he was hired. (TR 84) Complainant testified that the handwriting on Respondent Exhibit 13 was his handwriting. (TR 84)

Complainant testified regarding his secret recording of Mr. Glover and secret recordings of other employees at former employers. Complainant initially testified that he made the recording to "gather the facts in case something happens" because he "was the new person coming in." (TR 109) Complainant testified that this was not the first time that he has secretly recorded coworkers. (TR 109)

Q. Now, this is not the first time you've audio recorded your coworkers, is it, meaning—

A. Yes, I don't—

Q. Coworkers at AMP, these are not the first coworkers you've ever audio recorded, are they?

A. No, it's not the first time.

Q. In fact, you've previously secretly audio recorded coworkers while employed by other employers; right?

A. Yes, I have. (TR Page 109)

In his testimony, Complainant later changed his testimony. He stated that he audiotapes conversations as note taking because he has dyslexia. Complainant testified it was his choice whether or not to inform when he secretly records people.

Q. Not in this case you didn't.

A. I didn't do it then. I didn't have to. It's my choice when I want to do it and when I don't want to do it." (Transcript 111)

* * *

Q. Well, then if your testimony is that you tape-record people because of your medical condition, then why do you do it secretly as opposed to out in the open?

A. Because that would not be—that would not make good sense. (TR 110)

When asked why he did not inform Mr. Glover of the recording if his purpose was note taking, Complainant responded that he has the choice to inform or not. (TR 111)

Complainant testified that he was terminated from AMP on August 13, 2010. In September 2011 he started working for Perry Enterprises, a trucking company in Georgia. (TR 111-112) Complainant testified he no longer works for Perry. He testified he also filed a whistleblower STAA complaint against Perry Enterprises trucking company as well. (TR 112) Complainant testified that he has filed other retaliation complaints against other truck companies under the Surface Transportation Act (STA). (TR 112-115, 146-147)

Complainant testified that he has filed STAA whistleblower retaliation complaints against the following companies: Action Expediting, Gresh Transport, Carl Petty Enterprises, J.B. Hunt Transport, Expert Moving and Delivery, Naturally Fresh, Gemini Traffic Sales, and Salson Logistics. (TR 112-115, 146-147, 63).

Complainant testified he filed multiple whistleblower complaints against JB Hunt transport. (TR 145) Complainant testified that while he was terminated because of customer complaints, he testified:

A. That's not what it settled as.

Q. But that's what they originally stated was the reason for your termination until you sued them?

A. They took it back.

Q. That's because you settled your case against JB Hunt, is that right?

A. That's correct. (TR 147)

Rather than advising AMP on his written job application that he had been terminated from JB Hunt Transport, Complainant testified that he left JB Hunt Transport because he was laid off. (TR 147)

Complainant testified that he did not suffer physical harm as a result of his termination from AMP. (TR 116) Complainant testified that he believes he suffers from "situational disorder" as a result of the termination though he has not seen a doctor nor has any doctor diagnosed this since he was terminated. (TR 116) Complainant testified he was diagnosed with situational disorder at least 4 to 5 years before going to work for AMP. (TR 116)

Complainant testified that he has worked since his termination from Respondent. (TR 59) Complainant testified that he worked for the following companies: Schneider, National, Carl Perry Enterprises, Cardinal Transport, International Transport, Isaac Brothers Transportation, and Picasso Logistics. (TR 61) Complainant testified that at the time of the hearing, he was working for Picasso Logistics. (TR 62) Complainant testified that he is seeking the following: back wages, interest, damages for emotional distress, punitive damages, attorney's fees, and abatement of violations. (TR 63)

Secret Tape-recording of Training Session with Mr. Glover (CX 29, CX 30)

A transcript of a secret audiotape recording made by Complainant when he was being trained by Mr. Glover, was submitted post hearing. Complainant testified that he had a handheld tape recorder with a wire. Complainant testified he did not tell Glover that he was recording him. (CX 29 Page 108) It was an exchange between Mr. Glover, Mr. White, and an unknown dispatcher on August 12, 2010. It was transcribed by David Jonas, and was received post hearing by the undersigned on June 13, 2014. Mr. Jonas wrote on the front of the typed transcript "the transcript has inaudible parts due to the extremely poor nature of the audio files provided." The transcriptionist at times was also unable to determine who was speaking or identify who was the speaker. The transcriptionist wrote "male speaker 1" and "male speaker 2" instead of providing names.

Complainant testified that he was aware that the driving rules banned the use of electronic devices at fueling stations. Complainant testified that he secretly audiotaped Mr. Glover during the training, including when they were fueling.

The secret recording begins with a statement by Complainant that the date is August 12, 2010. (CX 29 at 3) Complainant stated that he was about to begin another day of training with Respondent. (CX 29 at 3) Mr. Glover began the training session by describing the radio system and the routes. (CX 29 at 10) In addition, Mr. Glover explained the dispatch system. (CX 29 at 15) Mr. Glover explained that certain customers set window times for when they needed to provide the fuel. (CX 29 at 21) He explained fuel accounts, route sheets, and barcode sheets. (CX 29 at 25) Mr. Glover instructed Complainant to bring rain gear. (CX 29 at 31) As Complainant and Mr. Glover were looking over the truck, Complainant stated that the tire had a flat. (CX 29 at 33) Mr. Glover instructed Complainant on how to pump the fuel and the corresponding color system. (CX 29 at 51)

The secret audiotape recording covers discussions regarding the speed limit, disagreements between Complainant and Mr. Glover, and seatbelts. Per the secret tape recording, Complainant and Mr. Glover discussed wearing seatbelts. Mr. Glover advised the Complainant that he was "going to find yourself in this business not wearing that seatbelt eventually. You are in and out the truck too much." (CX 29 page 63) Per the recording, Mr. Glover never advised Complainant not to wear the seatbelt.

Per the secret tape recording, Complainant and Mr. Glover discussed the 55 mph speed limit. Mr. Glover told Complainant that in his opinion, he needed to go 60 to 65 mph but Complainant would not be fired if he drove 55 mph. "Nah, you're not supposed to. I'm just telling you." Mr.

Glover said that if Complainant wanted to finish the night, he would not get it finished if he was driving 55 mph. Mr. Glover said “I’m just telling you. Now, I ain’t saying don’t do 55. I ain’t saying do 80. I’m just telling you.” Complainant stated he was concerned he would be fired if he did that and Mr. Glover told Complainant he would not be fired. “They not gonna fire you for not driving fast. They don’t want you to speed but I’m just telling you, you gonna have to speed.” (CX 29 page 107-111, 115-116)

Testimony of Ms. Angela White

Angela White testified at the hearing and stated that she is separated from the Complainant. She stated they are not divorced due to financial reasons. (Transcript 153, 158)

Ms. White testified that she could not remember because she has forgotten a lot. (TR 153)

Ms. White was asked whether she was present on August 13, 2010, when Complainant was on the telephone with Mr. Parchman. She testified that she heard the conversation. She testified that Mr. Parchman told the Complainant that “he heard from Arrie and that he was—he can no longer use them.” (Transcript 153) Ms. White testified and stated to Complainant’s counsel that she could not remember because she has forgotten a lot.

A. Mr. Parchman said it was—you know, I’m just filibustering because I forgot a lot of it.” (Transcript 153)

Q. Well, if you don’t remember, say I do not remember.

A. Okay, I do not remember what happened between then—after then, straight after then, after he said why. Oh, Mr. White said that he was going to play him the tape recorder of him, of Arrie, you know, of Arrie trying to make him drive like Arrie wanted him to drive. (Transcript 154)

Ms. White testified “I don’t recall” to Complainant’s counsel as to whether the Complainant said anything else to Mr. Parchman. (Transcript 154) Ms. White testified that Complainant got emotional, was concerned about his finances, and the house. Upon cross-examination, Ms. White changed her testimony from “I don’t recall” and stated “I do have a recollection of the call when I think back.” (Transcript 157)

Ms. White testified that while she is separated from the Complainant, they were still married and she agreed that she would benefit or have financial gain in the outcome of Complainant’s case.

Q. “If your husband receives money in this case, you’re going to share in that money, correct? You are still husband-and-wife, right?

A. Yeah, we are.” (Transcript 158)

Testimony of James Parchman, Jr.

Mr. Parchman, president of American Mobile Petroleum, testified at the hearing. (TR 159) He testified that the only persons with the authority to hire and fire are Mr. Parchman, Mr. Lomax Wallace and Ms. Mary Parchman. In summary, he testified he did not tell Complainant what to write on his job application. Complainant was given a copy of the Federal Carrier Motor Safety

Regulations in book form since it is mandatory by DOT. (TR 163-164, 176) Complainant was assigned to train with Mr. Carroll on August 11, 2010. Mr. Carroll reported to Mr. Parchman that Complainant was “combative,” acting like a supervisor and Mr. Carroll could not train him. Mr. Parchman figured it was a personality conflict. Mr. Parchman paid Complainant for the day and assigned him to train with Mr. Glover. Complainant trained with Mr. Glover on August 12, 2010 and August 13, 2010. Complainant secretly audiotaped Mr. Glover, particularly while refueling at the fuel pump which was “forbidden” since it could cause an explosion. On August 13, 2010, Mr. Glover called Mr. Parchman, refused to continue to train the Complainant and told Mr. Parchman that Complainant was untrainable. On August 13, 2010, Mr. Parchman called the Complainant to terminate his employment, advising the Complainant that no one would work with him. After terminating the employment, Complainant advised Mr. Parchman that he had an audiotape of his training, played it for Mr. Parchman, and Mr. Parchman said it was mostly inaudible.

Mr. Parchman stated that American Mobile Petroleum does petroleum delivery, employs 11 drivers, and he has been in the business of delivering fuel for 26 years. (TR 173) Mr. Parchman testified that his job duties include reviewing financial statements, payroll, employee timecards, files, and OSHA requirements. (TR 160) In addition, Mr. Parchman testified that he makes sure that everyone follows proper procedures for bringing on new employees. (TR 161) Regarding terminations, Mr. Parchman testified that he shares the authority to hire and fire with Mr. Lomax Wallace and Ms. Mary Parchman. (TR 161) He testified that either he performs the training or Mr. Wallace performs the training for new employees. (TR 161) He testified that all employees undergo training and orientation. (TR 162) Mr. Wallace does the scheduling and matches a new employee with a trainer 99 percent of the time. (TR 162) He stated Mr. Wallace assigned Complainant to train with Mr. Carroll and Mr. Glover. (TR 163)

Mr. Parchman testified regarding the hiring process by American Mobile Petroleum for Mr. White and prospective employees. He testified that Complainant responded to a Craigslist ad. AMP had the Complainant come in and fill out the application package and fill it out on site. (TR 174) When the prospective employee has completed filling out the paperwork, they are brought back in, AMP goes over the paperwork to make sure everything is signed. Mr. Parchman stated that if the prospective employee has any questions or has left anything blank, they have the employee fill it in for DOT. “... Because when we get audited, when our employee files get audited, they make sure that every single thing is filled out, so we go through that with the employee. So we go through every single page with the employee to make sure that everything is still down and everything is answered.” (TR 174-175, 177-178) Mr. Parchman testified that he did not tell the Complainant what to write on any of the application forms. “No.” He testified those were the Complainant’s words on the job and orientation forms. (TR 178)

Mr. Parchman stated that when the application is filled out, the prospective employee is sent off for a drug test. They obtain a motor vehicle report and then the individual is brought in for orientation. He testified that the person is escorted around the building, the truck, shown how it operates, “just because there’s so much to learn, so we just kind of get them to familiarize themselves with the truck. Then we put them with a trainer, and the trainer starts going back over, you might say the orientation, because he has to know all about the valves working on the truck, how all the pumps work on the truck, which compartments have what products on it, so

there is a lot to learn.” (TR 175) Mr. Parchman testified that the new employee is provided a co-driving trainer for “about 2 weeks.” (TR 178)

Mr. Parchman stated that Complainant was provided documents as part of the application and orientation process. He stated that the Federal Motor Carrier Registration is one document that comes in book form. He testified it is not a copy but is the original. He testified they do not keep extra receipts for the motor carrier registration regulations because “that would be illegal.” (TR 176) He testified the entire original is provided to the new employee “so he had to have received the book.” (TR 176)

Mr. Parchman testified that Complainant was provided with a training manual and a copy of the Federal Carrier Motor Safety Regulations in book form. (TR 163-164, 176) Mr. Parchman stated “it’s mandatory by DOT” to provide before an employee drives a vehicle. (TR 165)

Mr. Parchman testified that other training materials were provided to the Complainant. These included loading procedures, company policy, phone procedures, and safety equipment procedures. (TR 177)

Mr. Parchman testified regarding the forbidden use of electronic devices at fueling stations. (TR 180) He testified that it is extremely dangerous and forbidden by company policy, “forbidden by local city municipalities, and fire marshals.” (TR 180) Mr. Parchman explained that using electronic devices “could have a massive explosion.” (TR 181) He testified that “before you pull in you have to turn off all your headlights, your cell phones, and you can only use diesel powered trucks. You can’t use a gasoline powered vehicle, because that creates an ignition source. So you can’t have anything on. You can’t have any flashlights, anything like that, while you’re on the loading rack, because if there is a release, you can have a massive explosion.” (TR 181)

Mr. Parchman testified that when listening to Complainant’s secret audiotape, he could tell from listening to the audiotape that Complainant was recording at the fueling station. (TR 181)

Yes, and 4 seconds into the tape, he starts out at the BP facility in Atlanta, and they are going through the entire loading procedure, up to 12 to 13 minutes, and was explaining to him the ground plug, the red light, the green light, which tells you that the truck is properly grounded, that you have your loading arms properly hooked up, that you have your vapor recovery properly hooked up, because you cannot get a green light to load the truck until everything is hooked up properly. (TR 181-182)

Mr. Parchman testified about a conversation he had with Mr. Carroll on August 11, 2010. Mr. Parchman testified that Mr. Carroll described Complainant as “combative” and “untrainable.” (TR 165). He testified that Mr. Carroll described Complainant “as acting like a supervisor” and “not listening to him.” (TR 166)

Q. Okay, on the 11th. And then what were those conversations [with Mr. Carroll]?

A. He said Fernando was untrainable. He was basically combative. He was acting like a supervisor and we are hauling hazardous material and we have to make sure that the drivers are trained in a specific manner, and he would go over it and basically they were being—they were arguing between each other and he just said he couldn't train him, he just wouldn't listen.

Q. Okay. And when you said Mr. White was acting as a supervisor, what was he doing exactly that was acting in a supervisory type position or role?

A. I don't know, I wasn't there.

Q. Okay. So Mr. Carroll did not explain further?

A. No, what Mr. Carroll told me was is that when he was out training Fernando, he wasn't listening to him, and we have to make sure that our drivers follow very strict procedures to avoid spills and accidents, things of that nature, and he took the attitude that—Mr. White took the attitude that he was a supervisor and he was telling Robert what to do, and it just went downhill from there. (TR 165-166)

Mr. Parchman testified regarding his conversation with Complainant after Complainant's training with Mr. Carroll.

On the day he [Complainant] came back, when Robert [Carroll] brought [Complainant] back, I had brought [Complainant] into my office. I said, you know what's going on, and he said there's a conflict that we were just taking back and forth. It wasn't anything combative or anything. It was a very cordial conversation, and he said yeah, he said he wants me to drive too fast and I'm not going to do that, and I said fine, you're not supposed to, it's against the law, and follow DOT procedures, and that's all we really said about it because I didn't give it a second thought, and he didn't make a big issue of it.

(TR 170).

Mr. Parchman testified that Complainant did not mention taking an exit after the one that Mr. Carroll told him to take. (TR 170)

Mr. Parchman stated that he reassigned a new trainer to Complainant. Mr. Parchman thought it was a personality conflict.

I just thought it was a personality conflict when Mr. White came into my office. Again, he was very cordial, very polite. I didn't see an issue. I thought it was just a couple guys that didn't get along, and made the decision to put him out with Arrie. (TR 179)

Mr. Parchman testified that Complainant was then assigned to train with Mr. Arrie Glover on August 12 and August 13, 2010. (TR 166) He testified that Mr. Glover also informed him that he would not work with Complainant. (TR 167)

Q. Okay. And did Arrie Glover, after training with Mr. White, come to you and discuss the events that took place during that timeframe of August 12 through the 13th of 2010?

A. Yes, he called me up and said he refused to work with Mr. White.

Q. And why was that?

A. Because he was being combative. He was untrainable. He just wouldn't take any direction. He was laying out instructions and Mr. White was doing the same thing to him that he was to Mr. Carroll. He was telling them what to do, what the rules and regulations were, and it was just he refused to work with him. (TR 167)

Mr. Parchman testified that Mr. Carroll never told him that there was an alleged confrontation regarding speed limits. (TR 179) Mr. Parchman testified that Mr. Arrie Glover did not mention anything about driving speed, the speed limit, or seatbelt use. (TR 167) Mr. Parchman testified that Complainant never told him about Mr. Glover allegedly approaching him in a menacing way with a wrench. (TR 180) Mr. Parchman testified that Complainant never told him that Mr. Glover or Mr. Carroll were allegedly upset with him for wearing a seatbelt or driving in any other manner. (TR 180)

Mr. Parchman testified that he terminated Complainant's employment over the telephone on August 13, 2010. (TR 167) He testified that he informed Complainant that he was terminating him because no one could work with him to train him. (TR 168)

Q. And what was the reason that you told Mr. White that you were terminating him?

A. I didn't have anybody that could train him to work with him, and there was—there was no way he could be trained to do the job. Everybody refused to work with him. (TR 168)

Mr. Parchman testified that after he terminated the Complainant's employment, Complainant informed him that he had an audiotape and that Mr. Glover told him to go fast. (TR 168). Mr. Parchman testified that was the first he heard of it.

Well, on the day that I terminated him, he called me— when I was talking to him, he then said he had a tape and I'm not—I really don't remember him playing the tape. He may have, but it's mostly inaudible anyway, but he said something that Ari was telling him to go fast and I said I didn't know anything about it, you know, that we have—we talk about going fast, it's in between the yards, that we have to work at a certain pace in order to get our routes complete, because you can only drive so fast on the streets, especially in Atlanta traffic. There's only so much distance you can cover in a night, so the only place that you make up your time is actually in the yard delivering product. And so that's one of the things that we stress as we have a routine that the drivers have to follow as far as pumping fuel, getting your meter readings, so it's very repetitious. That's the main thing as far as training our drivers, is that they follow a certain protocol, you might say, and it's consistent. It's the same way every single time. (TR 169)

Mr. Parchman testified that the first time he heard about the seatbelt and alleged weaving in and out of traffic, was during Complainant's hearing testimony. (TR 169) "I had never heard that before." (TR 169)

Mr. Parchman responded to questions about his interaction with Complainant.

Q. What was your, if you can recall, what was your demeanor or attitude towards [Complainant] during his orientation and training process?

A. He was very cordial, very polite. We got along fine.

Q. Did you ever threaten him, express any anger, or force him to sign any documents before he was assigned a work route?

A. Absolutely not.

Q. Did you ever observe Mr. Wallace do so?

A. No.

(TR 179).

Deposition of Robert Carroll (RX 29)

Robert Carroll was deposed on December 6, 2011. Mr. Carroll worked for American Mobile Petroleum (AMP) and had worked as a driver for approximately 3 years. He delivered petroleum fuel to customers. Mr. Carroll testified that he also trained new employees "showing them the routes, showing them the proper way to distribute the fuel.... I am just basically showing them where the stops are, showing them which compartment to pull fuel out of and showing them the proper way to fill a tank." (RX 29, pages 6-7) He testified he normally trained new employees "a week to 2 weeks, depending on the employee.... There is no set time." (RX 29 page 7)

Mr. Carroll testified that he was assigned to train Complainant who "was assigned to ride with me on my route" in approximately August 2010. Mr. Carroll testified that he trained the Complainant "one full night and the beginning of a second night." (RX 29, page 8) On August 10 and August 11, Mr. Carroll's training covered "paperwork, fueling procedures... Route sheets, inventory sheets." (Rx 29, Page 9) Mr. Carroll testified a route or delivery schedule generally takes 8 to 10 hours. Drivers take a 30 minute break. (Rx 29, Page 10)

Mr. Carroll testified that on August 10, 2010 he did not have any altercation with the Complainant. He told Complainant to drive the posted speed limit which was 55 mph.

Q. On August 10, did you and Mr. White have any altercations?

A. No.

Q. And during August 10, did you inform Mr. White to drive the posted speed limit?

A. Yes.

Q. Do you remember what the posted speed limit was?

A. 55. (Rx 29, Page 11)

Mr. Carroll testified that delivery routes do not need to be completed during a set amount of time.

Q. When drivers are assigned delivery routes or schedules, are they to complete those within a certain amount of time?

A. No.

Q. They meaning drivers?

A. No

Q. So is there any standard process as far as when you start and finish a delivery route?

A. No. (Rx 29, pages 11-12)

On the second day of training the Complainant, August 11, 2010, Mr. Carroll testified that Complainant was very aggressive.

Q. Let's go to August 11, 2010. This was, I believe, the second day that you were assigned to Mr. White for a follow-up training session. Does that sound correct?

A. Yes.

Q. And did Mr. White act differently-

A. Yes.

Q. Towards you? How did he act differently?

A. He acted very aggressively.

Q. Can you explain that?

A. Loud voices, waving hands.

Q. When did he act that way?

A. On the way to our first stop.

Q. Was that after you told him or instructed him to do a certain task or drive a certain way in the truck?

A. No....

Q. Did Mr. White suddenly act aggressively?

A. Yes.

Q. And to your knowledge, there was no reason for him to act aggressively?

A. None. (Pages 12-13)

Mr. Carroll testified that he has trained other newly hired employees for American Mobile Petroleum. He estimated he does this once every 6 months. He testified that AMP has training manuals that are given to newly hired AMP employees. (Pages 15-16) Mr. Carroll testified that he has seen training manuals and they are given out by Mr. Lomax Wallace. (Page 16)

Mr. Carroll was questioned regarding page 30 of the training manual which addresses posted speed limits. Mr. Carroll testified that he has never told a driver that he was training, to drive faster than the speed limit. (Page 18) Mr. Carroll testified that he has never told a driver in training to drive 55 miles an hour if that is the posted speed limit when it is not safe to drive 55 mph. "No, not when it's not safe." (Page 20)

Mr. Carroll was asked regarding the American Mobile Petroleum driver policy, page 1, number 11, with regards to always wearing a seatbelt when in a company vehicle. Mr. Carroll testified he has never told a newly hired driver to not wear a seatbelt. (Pages 20-21)

Q. Are you aware of drivers not wearing seatbelts while driving a truck?

A. Employee's or truck drivers?

Q. Both. I mean, technically, employees. I mean, I'd like to know both.

A. No.

Q. So in follow-up, you are not aware of any truck drivers that don't wear seatbelts due to frequently getting in and out of a truck?

A. No. (Page 21)

Complainant's Job Application

Complainant submitted an application for employment for a position with Respondent. (RX.1)

Complainant signed the "Employee Probation" form on August 6, 2010, acknowledging that he understood that he was on a ninety day probationary period. The signed form stated "I am on a 90 days probationary period and my employment can be terminated for any reason during that period. I also understand that any derogatory information on my MVR or Background check that is not discussed prior to my employment will be grounds for termination." (RX 8) Conversely, Complainant testified at the hearing that he was not a probationary employee.

Complainant testified regarding his AMP job application and his reasons for leaving past employment on the job application. Complainant testified that he signed the job application for employment with American Mobile Petroleum, completed the document, it was his handwriting, and his signature on the last page. (Transcript 118) Complainant testified that "it's pretty much accurate." (Transcript 120) He testified regarding the truthfulness of the job application, "Yes, I responded as truthful as the industry allow you to be, sir." (Transcript 120) Complainant was asked whether there was anything on his job application that was not accurate, and he responded "not that I know of." (Transcript 121)

Regarding Action Expediting, Complainant wrote on his application that he was "[p]laced on unemployment wage after no more assignment avail." (RX 1 at 3) Complainant testified at the hearing "that's correct." (Tr 122) At the hearing, Complainant denied that he told the Georgia Department of Labor when he applied for unemployment insurance benefits that the reason for leaving was because he was terminated for alleged retaliation for refusing to drive hours exceeding the Department of Transportation regulations. Complainant stated "I'm unsure." (Transcript 123) Conversely, per the Respondent Exhibit 30, complaint it stated he was "terminated due to a late delivery."

Regarding Gemini Traffic Sales, Complainant wrote on his application that he was "laid off no work available." Complainant testified at the hearing, "Yes, that's correct." (Transcript 134, RX 1, p 8-9) However, at the hearing, Complainant testified that on his U.S. Department of Labor STAA retaliation form, he stated he was terminated for refusing to drive while ill. "Yes, I went into detail, yes."

Q. Okay. So, in fact, you were not laid off for lack of work?

A. That's what it settled there, that case settled.

Q. But, sir, the application didn't ask you what the case settled for. It asked you why you were separated.

A. That's what they changed it to so that's what I had to go with.

Q. That's what who changed it to?

A. The respondent. Gemini. (Transcript 135)

Regarding Gresh Transport, also known as Federal Freight Systems, Complainant wrote on his application "company going out of business." (Rx 1, p 8-9, TR 135-136) He testified that his reason for leaving was "company going out of business." Conversely, Complainant testified at the hearing that on his whistleblower complaint to the U.S. Department of Labor he stated that he was discharged for refusing to drive an unsafe truck. He testified that this was "not what I told [AMP]." (Transcript 137, RX 1 page 8-9)

Regarding Expert Moving and Delivery, Complainant wrote on his application "encounted [sic] financial hardship-no work available." (Transcript 138, RX 1, page 8 – 9) Complainant testified that he represented to AMP on his job application his reason for leaving expert moving and he testified "right here typed on this paper, yes." (Transcript 138) At this point, Complainant testified that "everything is truthful the best of my knowledge." (Transcript 138-139) Complainant testified there was a difference between what he told AMP verbally as his reason for leaving work and what he put down on his job application. (Transcript 139) Complainant testified he gave a different reason for leaving Expert Moving and Delivery to the U.S. Department of Labor. Complainant testified that he filed a whistleblower complaint with U.S. Department of Labor against Expert Moving and Delivery stating that his termination was for allegedly refusing to operate a vehicle with malfunctioning signaling system. Complainant testified "yes, they want detail." Complainant admitted that was not what he told AMP on his job application. (Transcript 139)

Regarding Land Air Transport, Complainant wrote on his application reason for leaving was "part time job." He testified at the hearing that he put on his AMP job application that his reason for leaving was part-time job. (RX.1 p 4) However, Complainant testified that he stated to the U.S. Department of Labor when he brought his whistleblower complaint, that calling it a part-time job was to resolve the claim against Land Air Transport. Complainant testified:

A. "Yeah, settled at that, yes. Sir.

Q. But you did complain to the Department of Labor in 2007?

A. Yes.

Q. That Land Air discharged you in reprisal for being involved in prior whistleblower activities and in violation of gross weight regulations; correct?

A. Yes, that was in detail.

Q. So can we agree, sir, just so the record is clear, that your employment application that you submitted and hand wrote to AMP contained several material misstatements?

A. Misstatements?

Q. Misstatements of fact about the circumstances—

A. No, I disagree.

Q. Surrounding your separation from prior employers?

A. No, I disagree. (Transcript 140-141)

On his AMP job application regarding his position with Ameristar Services, Complainant wrote that he left because he was waiting for an assignment. (RX 1 at 3) Regarding the BAH Express position, Complainant wrote that he was wrongly asked to run equipment. (RX 1 at 3) For the Naturally Fresh position, Complainant wrote that he was laid off when there was not enough work. (RX 1 at 4) On his job application, Complainant wrote that he had been involved in two sideswipes and a hit and run. (RX 1 at 6)

Complainant signed AMP's driver policy on August 6, 2010. (RX 4 at 1) When Respondent's counsel asked Complainant whether he received the AMP driver policy, Complainant responded that he was given a variety of documents. (TR 74) On the signed Certifications of Violations, Complainant attested that he had not been convicted of any traffic violations in the past twelve months. (RX 5) On August 6, 2010, Complainant signed a receipt acknowledging that he received a copy of the Federal Motor Carrier Safety Regulations. (RX 9) Conversely, Complainant testified at the hearing that he did not receive a copy. (TR 76-77) On August 6, 2010, Complainant signed the weekly checklist for drivers from the AMP Training Manual. (RX 11 at 2) On August 6, 2010, Complainant certified that he watched the Hazmat Transportation Security Awareness Training Module. (RX 12) Complainant completed a Driver's Road Test Examination administered by Robert Carroll on August 10, 2010. (RX 13) Complainant testified that he was not given a road test before he was hired. (TR 84) Complainant testified that the handwriting on Respondent Exhibit 13 was his handwriting. (TR 84)

Complainant testified that he did read the training manual. (TR 82) Complainant testified that he read the section of the policy that directed the drivers to drive the posted speed limit and obey all traffic laws. (TR 83) Complainant testified that allegedly Mr. Carroll told him to maintain the posted speed limit.

Complainant's Exhibits

Complainant submitted exhibits 1 through 16. These include his signed job application, signed AMP driver policies (CX 4), signed motor vehicle drivers certification of violations (CX 5), and signed employee probation form. (CX 8) The exhibits include Complainant's signed receipt for having received the Federal Motor Carrier Safety Regulations from the Department of Transportation signed August 6, 2010 (CX 9), the letter to all AMP drivers regarding loading and safety procedures, and Complainant's signed receipt for AMP training manual. (CX 10-11) Complainant signed the hazmat transportation security awareness training module form (CX 12) certifying that he watched the hazmat training module. Complainant also submitted his driver's road test examination which was signed by Mr. Carroll. (CX 13)

Complainant submitted his whistleblower application into evidence. The allegation summary was "Complainant was hired on 8-8-2010 as a commercial truck driver delivering fuel throughout the local Atlanta area. On 8-13-2010 he was terminated. Complainant alleges he was terminated because he would not drive over the speed limit when told to do so by another driver, who the Complainant alleges was his supervisor" (CX 17)

Investigator Christine Schulz, with U.S. Department of Labor, Occupational Safety and Health Administration, performed an investigation of the complaint. Her report is dated January 18,

2011. (CX 19) Complainant advised Ms. Schulz, the investigator, that on August 11, 2010, he was driving the truck. The trainer needed to return to the office, the trainer “wanted him to turn around at a specific location [but] he drove up the road a little way and then turned around and drove back to the office. The [trainer] was a little upset that the Complainant had not turned the truck around as asked.” She noted that Complainant stated that the next day on August 12, 2010, he was entering Interstate 285 West, the speed limit was 55, the trainer told him to drive faster to go 65 mph but he refused and was terminated. Investigator Schultz wrote that per Complainant, “on or about August 13, 2010, Parchman called the Complainant and told him that he had spoken with. . . and had decided ‘I can’t use you, I don’t want to argue. There was no further conversation.” (Cx 19, p.2) In the report, she noted Complainant also stated that the trainer came after him with a wrench. (CX 19)

Ms. Schulz, wrote a second draft the second report dated January 19, 2011. (CX 20) She noted that on that date, Complainant “provided further information on his complaint.” Ms. Schultz wrote:

“Specifically, the Complainant now states that was his supervisor and that he had directing the Complainant to drive over the posted speed limit. He also stated that he believes his termination was retaliatory because he had been told that he was doing a good job and he had not experienced any problems on the job.” (CX 20)

Complainant submitted the Department of Labor, OSHA Final Investigative Report dated April 15, 2011 from Investigator Christine Schultz to the Area Director William Fulcher. (CX 26) The investigator analyzed the facts, the complaints, and the investigative statements and concluded that Complainant did not engage in protected activity. “Complaints of safety must be made to someone in management who has the authority to take corrective action. In this case, the Complainant did not report his concerns of safety to the respondent. Hence, a mere disagreement between two employees does not rise to level being protected activity. When there is no protected activity you cannot establish the elements of knowledge or nexus.” (CX 26 page 5)

Complainant submitted the U.S. Department of Labor, Occupational Safety and Health Administration, Regional Administrator, Secretary’s Findings dated April 15, 2011, signed by William Fulcher, Area Director into evidence. (CX 27) OSHA determined that “Complainant was not involved in protected activity thus it could not be a contributing factor in the termination.” The Area Director determined that the Respondent decided to terminate Complainant’s employment based on the fact that within the first four days of employment, two drivers refused to work with him. Those two drivers were not supervisors but worked with the Complainant to teach him paperwork and how to fuel. (CX 27, page 3) The case was dismissed. (As trier of fact, the undersigned is not bound by previous decisions of OSHA. The Undersigned reviews the facts, the testimony, the evidence in the record, and applies the law to make a determination.)

DISCUSSION

I. The Complainant Did Not Engage in any Protected Activity Under the STAA which Contributed to His Termination

The Complainant's cause of action is under 42 USC Section 31105 of the Surface Transportation Assistance Act of 1982, as amended (STAA). "Protected activity" under the Act includes reporting violations of Federal Motor Carrier regulations. In this case, the complaints of allegedly being told to maintain posted speed, drive over the posted speed limit, exit, not wear seatbelts, and other unsafe driving directives on August 11, 12, and 13, 2010, had the potential to violate Federal Motor Carrier Regulations then in effect. However, there is no credible evidence in the record that Complainant was directed to actually violate the safety regulations by a person who supervised or had the authority to hire and fire him.

Complainant suffered no adverse employment action after training with Mr. Carroll, the first trainer, on August 11, 2010. Mr. Carroll testified he did not tell Complainant to speed. Mr. Parchman attributed their alleged dispute to being a "personality conflict." He paid Complainant the full day, sent him home and had him assigned to another trainer for the following day on August 12, 2010. This is supported Mr. Parchman's testimony, Complainant's testimony, Complainant's statements to the OSHA investigator, and Mr. Carroll's testimony.

Complainant was assigned to a second AMP trainer, Mr. Glover, on August 12, 2010. Mr. Carroll testified he did not tell Complainant to speed. Complainant testified that Mr. Glover directed him to allegedly violate additional safety regulations. Of note, Complainant violated federal safety regulations when he used an electronic device, his secret audio recorder, when fueling. Mr. Parchman testified that was a serious violation, forbidden by numerous municipal, state and federal laws. He stated it could cause a "massive explosion." (TR 181) Complainant also testified that he was aware of the law forbidding electronic devices at fueling stations but chose to secretly record nonetheless. (TR 102-103)

There is no credible evidence in the record that Complainant reported to Mr. Parchman, or any member of AMP's management, that he refused to violate safety rules before he was terminated by Mr. Parchman on August 13, 2010. Neither Mr. Carroll nor Mr. Glover were supervisors. Neither Mr. Carroll nor Mr. Glover had authority to hire or fire. Complainant never told Mr. Parchman that he allegedly refused to speed or follow any other driving directives as allegedly directed to by Mr. Carroll or Mr. Glover BEFORE he was terminated.

Little weight is given to the transcribed secret audiotape recorded by Complainant. Most importantly, Mr. Glover is not a supervisor, he does not hire and fire. Mr. Glover told Complainant his opinion regarding the speed limit in order to finish the work but Mr. Glover specifically stated that "you're not supposed to" and "they not going to fire you for not driving fast. They don't want you to speed but I'm just telling you, you gonna have to speed." (emphasis added) Mr. Glover discussed wearing seatbelts but did not tell Complainant not to wear a seatbelt. Equally important is the fact that the transcript was inaudible according to the typist who said that was due to "extremely poor nature of the audio files provided." Transcriptionist was unable to identify who was speaking, frequently stating male speaker 1 and male speaker 2.

No foundation has been laid as to the authenticity of the tape, whether any portions were changed, deleted, or altered. Complainant testified that he had previously secretly audio recorded coworkers while employed with other employers. (TR 109) Accordingly, little weight is given to this out-of-court secretly tape-recorded audiotape made by Complainant.

Little weight is given to Complainant's testimony regarding his job application. His hearing testimony is not consistent with what he wrote and signed as true on his job application. His hearing testimony is not consistent with what he wrote and signed as true regarding receiving training manuals and federal regulation books. His hearing testimony is not consistent with Mr. Parchman who testified that the Complainant completed the job application in his own words and that the federal regulations book was provided to the Complainant. Significant weight is given to the hearing testimony of Mr. Parchman because his testimony is persuasive and is consistent with the evidence in the record.

Little weight is given to Complainant's testimony regarding his opinion that Mr. Carroll and Mr. Glover were supervisors and had the authority to fire him. That is Complainant's opinion and not based on fact. Significant weight is given to the testimony of Mr. Parchman, who is the President of AMP. Mr. Parchman testified that only he, Mr. Wallace and Ms. Parchman have authority to hire and fire. Since Complainant did not report the alleged protected activity to Mr. Parchman before his termination, Mr. Parchman had no actual knowledge of the alleged protected activity. Accordingly, Complainant's testimony that the trainers could fire him for allegedly urging him to violate safety rules but his refusing to do same, is given no weight.

Little weight is given to Complainant's testimony regarding his opinion that he feared for his life when training with Mr. Glover. Complainant testified that he had that same concern with other former coworkers in other claims. (TR 104) The Investigator for OSHA considered the statements of Mr. Glover who denied that he came after the Complainant with a wrench or told him he had to speed to keep his job. According to the investigator and the Secretary's findings, Mr. Glover (called driver B) noticed that Complainant was hooking a hose to the wrong compartment so he approached the Complainant to tell him about it. Per the investigation, Mr. Glover advised Mr. Parchman that he would quit rather than work with and train the Complainant. (RX 26) Significant weight is given to Mr. Glover's statements to the investigator that he did not tell the Complainant to speed or that he allegedly came after the Complainant with a wrench. An alleged disagreement between two employees does not meet the requirements of protected activity.

Little weight is given to Complainant's testimony regarding interaction with Mr. Carroll on August 10, 2010 – August 11, 2010, and allegations regarding driving violations with Mr. Carroll (the speed limit). Significant weight is given to the testimony of Mr. Carroll (RX 29) since it is consistent with the evidence in the record, is consistent with the testimony of Mr. Parchman, and is consistent with the reported difficulty training the Complainant also made by the next trainer, Mr. Glover.

Little weight is given to Mrs. White's hearing testimony. She stated under oath that she did not remember "a lot" of the incident and was "filibustering." She specifically testified "you know, I'm filibustering because I forgot a lot of it." (Emphasis added, TR 153) After admitting she

remembered very little of the event, and testifying “I don’t recall,” she changed her mind. Then she testified to alleged events. Moreover, Ms. and Mr. White were separated. She stated she had a financial interest in the outcome of the Complainant’s claim since they were unable to divorce due to financial reasons. (TR 153, 158)

After deliberation of the credible evidence of record, this Administrative Law Judge finds that the Complainant has not established by a preponderance of the evidence that he made a safety complaint to American Mobile Petroleum management or engaged in protected activity under the STAA prior to his being terminated on August 13, 2010.

II. Respondent Did Not Have Actual Knowledge of Complainant’s Alleged Protected Activity Before August 13, 2010 Termination

As discussed above, Mr. Parchman, President of AMP, had authority to hire and fire along with Mr. Lomax Wallace and Ms. Parchman. Neither Mr. Carroll nor Mr. Glover had that authority. They were fellow truck drivers and served as trainers for the Complainant. There is no credible evidence in the record that Mr. Parchman had actual knowledge of alleged protected activity prior to the August 13, 2010, termination. Both Complainant and Mr. Parchman testified that Complainant played his secret audio recording AFTER the termination.

After deliberation of the evidence of record, this Administrative Law Judge finds that the Respondent did not have actual knowledge of the Complainant’s alleged protected activity.

III. Adverse Action

Complainant was terminated from employment on August 13, 2010. Complainant has established that he has experienced an adverse action.

IV. The Respondent Terminated the Complainant’s Employment on August 13, 2010 for a Legitimate, Nondiscriminatory, Non-retaliatory Reason

Mr. Parchman, President of AMP, testified that Complainant’s employment was terminated because neither of the two trainers could work with the Complainant. They both told Mr. Parchman that he was “combative” and “untrainable.” These are legitimate, non-retaliatory reasons for terminating an employee. Complainant has submitted no credible evidence that the reasons for terminating his employment was a pretext. Based on the evidence in the record, neither Mr. Carroll nor Mr. Glover told Mr. Parchman that Complainant refused to drive over the speed limit, or that Complainant allegedly refused to violate safety regulations.

Weighing the evidence in the record, Complainant’s version of events are not credible. His testimony is inconsistent with the consistent statements of trainers Mr. Carroll and Mr. Glover as well as Mr. Parchman. His testimony regarding his job application, his past jobs and reasons for termination, is not consistent with what he wrote and signed as true on his job application. His testimony regarding receipt of the driving manuals and federal safety regulation documents provided to him is not consistent with what he wrote and signed as true on his job application or

the testimony of Mr. Parchman. Complainant's testimony regarding his interaction with Mr. Carroll and Mr. Glover is not consistent with the overwhelming evidence in the record.

After deliberation of the credible evidence of record, this Administrative Law Judge finds that the Complainant is not credible, that the Respondent has established that no adverse actions were taken against the Complainant, and that the Complainant's employment was terminated on August 13, 2010, for legitimate, nondiscriminatory, non-retaliatory reasons.

V. The Complainant Has Failed to Establish by a Preponderance of the Evidence that the Employer's Stated Reason for the August 13, 2010 Employment Termination was Pretextual for Retaliation for Allegedly Engaging in Protective Activity Under the STAA

The Complainant argued that his alleged refusal to drive over or maintain the posted speed limit, to not wear seatbelts and to exit in an unsafe manner, was a motive for retaliation by American Mobile Petroleum.

After deliberation of the credible evidence of record, this Administrative Law Judge finds that the Complainant's argument is without merit. The Complainant contradicted himself through his own testimony and his written documents. He is contradicted by Mr. Parchman, Mr. Carroll and Mr. Glover's statements to the OSHA investigator. While his wife testified regarding his termination by Mr. Parchman, she testified she was "filibustering because I forgot a lot of it."

This Administrative Law Judge finds that the Complainant has failed to establish by a preponderance of the evidence that the August 13, 2010, employment termination directed by Mr. Parchman, was a pretext for alleged retaliation against the Complainant.

VI. The Complaint Must be Denied

In view of all the foregoing, the Complainant has failed to establish that the Respondent violated the provisions of the STAA. Accordingly, the complaint must be denied.

VII. The Complainant is Not Entitled to Relief for Reinstatement, Back Pay, Compensatory Damages, Punitive Damages, Interest, Costs Incurred, or Other Relief Under the STAA

In order to be entitled to reinstatement, compensatory damages, attorney fees and/or legal costs associated under the STAA, the Complainant must have established that the Respondent had taken adverse employment action against the Complainant in violation of the STAA due to his protected activity of complaints related to alleged violations of safety rules.

After deliberation of the credible evidence of record, this Administrative Law Judge finds that the Complainant has failed to establish that a violation of the STAA occurred in this case. Accordingly, the Complainant is not entitled to reinstatement, compensatory damages, attorney fees and/or legal costs or any other damages allowed under STAA, associated with this complaint.

VIII. Attorney Fees.

Respondent requested an award for reasonable attorney's fees and expenses relative to defending this complaint. After review of the Motion, Respondent's request is denied.

The Secretary of Labor has held that there is no authority to award attorney's fees or costs to a Respondent against a Complainant under the STAA, even if there was a denial of a "specious" Complaint. Somerson v. Mail Contractors of America, ARB No.03 042, ALJ No.2003 STA 11 (ARB Oct. 14, 2003), Abrams v. Roadway Express, 1984 STA 2, Slip op. at 12 (May 23, 1985).

ORDER

It is hereby **ORDERED** that:

1. Complainant's Complaint is **DENIED**.
2. Respondent's request for attorney fees and expenses is **DENIED**.

DANA ROSEN
Administrative Law Judge

DR/ard
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

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

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

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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