

U.S. Department of Labor

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Issue Date: 08 November 2012

CASE NO. 2012-STA-11

In the Matter of:

RICKIE ANDERSON,
Complainant,

v.

TIMEX LOGISTICS, et al.,
MILDA KRAPUKAITYTE, and
JANIS JUSHKEVICH,
Respondents.

Appearances:

PAUL O. TAYLOR, Esq.
For the Complainant

DANAS LAPKUS, Esq.
For the Respondent

Before: MICHAEL P. LESNIAK
Administrative Law Judge

DECISION AND ORDER GRANTING RELIEF

This case arises under the Surface Transportation Assistance Act of 1982 (“STAA” or “the Act”), which is codified at 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act 2007, Public Law 110-053, Section 1536 (Aug. 3, 2007).¹ The STAA prohibits “a person” from discharging, disciplining or discriminating against “an employee” in pay, terms or privileges of employment when the employee refuses to operate a vehicle in violation of a regulation, standard or order of the United States relating to commercial vehicle safety, health, or security. 49 U.S.C. § 31105(a)(1).

¹ The statute’s implementing regulations are contained at 29 C.F.R. Part 1978. *See also* 77 Fed. Reg. 44,121 (July 27, 2012)(providing “the final text of [the amended] regulations” under the Act).

Stipulations

I held a formal hearing in the above-captioned case on June 5 and 6, 2012 in Orlando, Florida. At that time the parties agreed:

- That Respondent is subject to the STAA and is engaged in Interstate Commerce within the meaning of the Act;
- That Respondent employed Complainant as an over-the-road truck driver assigned to Respondent's Countryside, Illinois facility;
- That Complainant is an employee within the meaning of the Act;
- That Respondent terminated Complainant on or about December 21, 2010;
- That on April 14, 2011, Complainant filed a timely written complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the Act.

(TR 5 and 6).²

Summary of the Evidence

Testimony of Milda Krapukaityte

1. Ms. Krapukaityte testified that she is the owner of Timex Logistics, which she has owned for five years. Darius is her operations manager and dispatcher. Darius also goes by the name of Janis Jushkevich. (TR 15). He's been the dispatcher for five years. Ms. Krapukaityte testified that she made the decision to fire Mr. Anderson after speaking with her safety director, Angela Rogius, and after speaking with Janis (Darius). (TR 16). She identified CX 16 as Mr. Anderson's termination letter, which she authorized to be issued. (TR 17-18). Part of the reason Mr. Anderson was terminated was that he missed a delivery appointment in San Francisco. (TR 18).
2. Ms. Krapukaityte agreed that she and the others decided to fire Mr. Anderson after the San Francisco load was delivered late. (TR 18-19). Having previously been a dispatcher, she knew the distance from Seattle, Washington to San Francisco, California to be about 808 miles. (TR 19). Claimant's Exhibit 16 was admitted into evidence. (TR 20). The letter is signed by Angela Rogius. Ms. Krapukaityte directed Angela Rogius to write the termination letter on December 21, 2010. (TR 19).

² The following abbreviations are used in this Decision and Order: TR = Transcript of the June 5-6, 2012 hearing; CX=Complainant's Exhibit; RX=Respondent's Exhibit. The parties further stipulated that objections to the Secretary's finding were timely filed. (TR 8).

3. Ms. Krapukaityte also identified Claimant's Exhibit 14, which shows that this particular load from Seattle to San Francisco came from a broker, Act International Corporation, located in Utah. The individual at the broker was named John. Page 1 of Claimant's Exhibit 14 is a load confirmation sheet. The witness agreed that the load confirmation sheet says "drivers to drive straight through and deliver." (TR 21). Ms. Krapukaityte explained that this language means exactly what it says, although she wasn't sure if it meant not to take any breaks. She then explained that it meant to deliver as soon as legally possible; it didn't mean without stopping. (TR 22).
4. Ms. Krapukaityte stated that it would not necessarily require a team of drivers make the run from Seattle to San Francisco legally but without stopping. She did agree that under the hours-of-service regulation, a driver would have to take a 10 hour break after driving 11 hours. She also agreed that one driver could not drive 800 miles in 11 hours. Ms. Krapukaityte knew that the speed limit in California and Oregon at the time was 55 mph. (TR 24). She also knew that the truck speed for the State of Washington was 60 mph. (TR 24-25). Finally, if a driver had completed 2/3 of this trip, he would be in California or Oregon, where the speed limit was 55 mph. (TR 25).³
5. Ms. Krapukaityte testified that, as of December of 2010, her trucks were not equipped with a satellite system; therefore, she kept track of her drivers by phone calls. However, Darius kept track by the satellite that was on the trailer. (TR 27).
6. In response to my questions, the witness testified that CX 14 was a document that the broker had provided. It indicated the location and time of the pickup: Menzies Aviation in Seattle, Washington; pickup on December 14, 2010 at 8:00 p.m. (TR 29). It also showed that the load had to be delivered to Air Container Transfer in San Francisco, California between 3:00 and 7:00 p.m. (TR 29-30). The witness affirmed that the distance between Menzies Aviation and San Francisco is about 800 miles. (TR 30-31). She also clarified that it said to deliver on the same date but "it's probably just a mistake [because] nobody delivers on the same date that distance." (TR 31).
7. Ms. Krapukaityte explained that the dispatcher gave instructions to the driver; she did not. (TR 31). She explained that the term "straight through" means as soon as possible. The exhibit indicates "drivers," plural, but the witness testified she was not instructed to provide two drivers. (TR 32). Under the statement "drivers to drive straight through and deliver" is another term, "hot shipment." The witness agreed that the term "hot shipment" is jargon in the industry, which means to do what you have to do to deliver the load as soon as possible. (TR 33). CX 14 was admitted into evidence. (TR 35).
8. The witness testified that Mr. Anderson's wages were not contingent on Timex Logistics getting paid by the customer. Mr. Anderson's truck was leased from Beyond Logistics, which is another company that the witness owns. (TR 36). The witness testified that taxes

³ On cross examination, the witness testified that she believed it was possible for Complainant to legally deliver the load. (TR 103). However, she agreed on redirect that Mr. Anderson would have needed about 16 hours of driving time, a 10-hour break, two pre-trips and time to eat and use the rest facilities. (TR 105-06). Therefore, she agreed a driver could not complete the delivery in 26 hours. (TR 106-07).

were not taken out of Mr. Anderson's wages. She treated him as an independent contractor. His dispatch assignments all came from Timex Logistics, and the trailer was under the control of Timex Logistics. (TR 37). Timex Logistics assumed all the risk of hauling the load and whether it would make a profit. (TR 37-38).

9. The witness testified that CX 2 is an independent contractor's agreement, which Mr. Anderson signed, although she did not believe he was an independent contractor. (TR 40). She signed it for the company so she would not have to take taxes out of his paycheck. She agreed that Mr. Anderson was paid 35 cents per mile. (TR 41). Respondent's counsel noted that it had stipulated that Mr. Anderson was considered to be an employee. (TR 43). CX 2 was admitted into evidence. (TR 45).
10. CX 3 was admitted into evidence. This document was described as a general agreement indicating that Mr. Anderson had to agree to be on time for all loads in order to maintain his employment. (TR 46).
11. The witness testified that CX 5 is a payment statement for Mr. Anderson, which she confirmed. (TR 47). It shows that Mr. Anderson received a cash advance of \$300.00, which he was to use for expenses, and that he spent \$228.40. (TR 48-49). On page 9 of CX 5, there is an indication to hold Mr. Anderson's pay. (TR 50). The witness agreed that they are still holding back his pay check in the amount of \$1844.50 plus \$35.00. (TR 51). They were also withholding a \$1000.00 insurance deductible because Mr. Anderson did not submit any kind of paperwork. (TR 51-52).
12. When she made the decision to fire Mr. Anderson, the witness was aware that he had stopped in Weed, California while in route from Seattle to San Francisco, and that he had stopped there because he couldn't drive straight through 800 miles from Seattle to San Francisco. At the time, she also knew that this was a "hot load" and the broker wanted "drivers," plural, to drive straight through. She was not planning on giving Mr. Anderson his final paycheck. (TR 53).
13. Because Mr. Anderson did not deliver the load, Timex was charged a \$1,550.00 penalty and was not paid. The witness believed this situation could have been avoided had Mr. Anderson driven straight through. (TR 54). When a driver is on a 10 hour break, they do not have to answer phone calls. (TR 54-55).
14. The witness clarified that she decided to fire Mr. Anderson after he came back to Chicago. She didn't fire him only on the basis of the San Francisco trip; rather, she noted that there were "nine or so instances where he [was] late and not answering." (TR 61). However, the San Francisco trip was the straw that broke the camel's back. (TR 61-62). CX 5 was admitted into evidence. (TR 62).
15. Claimant's Exhibit 6, Complainant's 2010 1099 form, was admitted into evidence. (TR 65).⁴

⁴ In reviewing CX 6, I note that the 2010 1099 lists \$7,821.30 in non-employee compensation. The hold back of \$1,900.00 dollars would bring Mr. Anderson's gross compensation for the two months in 2010 to \$9,721.30.

16. The witness was questioned regarding CX 10, which shows that Timex Logistics underwent a compliance review by the U.S. Department of Transportation (USDOT) in the spring of 2011. The auditor interviewed the witness and Angela Rogius. As a result of the audit, the company received a conditional safety rating. (TR 66). The witness agreed that a conditional safety rating could be considered a type of probation, and that the company could have lost its right to operate as a carrier if it didn't "clean up [its] act." The auditor found numerous violations of the hours-of-service regulation and that 80 percent of the company's drivers whose records were checked had falsified their log books. (TR 67). CX 10 was admitted into evidence. (TR 74).
17. The witness testified that she has never fired a driver for falsification of a log book in and of itself. (TR 78). However, she agreed that falsification of the log book is a very serious violation. (TR 84-85). She also agreed that one of her drivers was placed out of service for hour rule violations, but that she did not fire him. (TR 82). She testified that the company issues warnings and fines when drivers break the hours-of-service regulation. (TR 84). CX 11 was admitted into evidence. (TR 85).
18. The witness agreed that, according to USDOT regulations, after a driver has been on duty for 14 hours, he must shut down for 10 hours. (TR 81). Also, "if you've driven 11 hours, you have to commence a 10-hour break," even if it is before the 14-hour period expires. (TR 81-82).
19. The witness identified CX 15 as a company note written by Angela Rogius. (TR 85-86). The note indicates that Mr. Anderson was fired on December 22, 2010. (TR 85). It also explains that the company was billed for the load. The witness admitted that this was a "big thing" because they usually did not get billed for loads they did not deliver. (TR 87).
20. Ms. Krapukaityte reiterated on cross examination that the San Francisco load was the last straw in making her decision to terminate Mr. Anderson; however, she stated that there were several other instances of complaints about his work. She would receive these complaints almost once a week. They involved being late, missing appointments and for not communicating (i.e. not picking up his phone for dispatchers and brokers). (TR 97).
21. Ms. Krapukaityte explained the procedure for distributing loads to drivers:

We call the driver and ask him if he is able to deliver a certain load from point A to point B If he confirms that he is able to do that, he has enough hours, he has rested, we take that load from the broker, book that load, and dispatch the driver. If the driver says that . . . he needs to take a rest now or he won't be able to deliver at that time . . . we try to reschedule with that broker. If we are unable, we just don't book that load and we look for another one.

(TR 98).
22. Ms. Krapukaityte testified that it's up to the driver to determine how many hours he has. (TR 98-99). It takes the company a week or two to check the log books. (TR 99). If the

company finds violations of the log book, they issue verbal warnings, written warnings for repeated violations, and then fines. If a driver does not heed a warning, they give the driver time off, up to a week. (TR 100). She agreed that “it’s not the end of the world” if a driver cannot take a particular load because he does not have the hours. (TR 101-02).

23. Ms. Krapukaityte clarified that when she said that the San Francisco load was not delivered due to lack of communication, she meant that Mr. Anderson just turned off his cell phone; he never informed the dispatcher or broker or anyone at the company that he needed to go off duty for any reason. Since he turned off his cell phone and they were not able to communicate, the company had to track him and call the police, “thinking he might have gotten into some kind of accident.” (TR 102-03). Ms. Krapukaityte agreed that if a driver wanted to get some sleep he’d be expected to turn his cell phone off. (TR 107). She did not know that he was planning on resting in Weed, California. (TR 108). She agreed that the company does not tell drivers where specifically to rest. (TR 109). Ms. Krapukaityte did not know how long Mr. Anderson rested in Weed, California because he never turned his logs in. (TR 110).
24. In response to my questions, the witness testified that Mr. Anderson stopped answering his phone later in the afternoon around 4:00 or 5:00 p.m. on December 15. She agreed that if he drove until 1:00 p.m. on December 15, that would be 12 hours (assuming he had started at 1:00 a.m.) and he could only drive 11 hours legally. (TR 111). She believed that the broker relieved Mr. Anderson around midnight on December 15 because that’s when “we finally tracked him.” (TR 112).

Testimony of Janis Jushkevich

25. Mr. Jushkevich testified that he also known as Darius. He is the operations manager and dispatcher for Timex Logistics, and he had that position in December 2010. (TR 116-17). He directed Mr. Anderson to communicate with the broker as well as himself concerning the San Francisco load. He knew it was a “hot load,” which means it’s a critical shipment, and he knew that it was air freight, which means it was going to be put on an airplane. (TR 118-20). The witness reviewed CX 14 and authenticated his signature on the lower left hand corner. He signed the document on December 14, 2010. He agreed that the document says “drivers [plural] to drive straight through and deliver.” (TR 120). This means to him that the driver has to pick up the load and deliver it as soon as possible within the legal hours of operation. He also knew that a single driver could not drive straight through from Seattle to San Francisco without taking a 10 hour break. (TR 121). He expected Mr. Anderson to drive about 500 miles down the road without taking a 10 hour break. After the 10 hour break he would still have about six more hours of driving. (TR 123). He did not assume that Complainant was taking a break in Weed, California, although it is about 500 miles from Seattle. He stated that drivers usually call and tell the dispatchers what time they will take a break. (TR 124). However, he doesn’t dictate where drivers take their breaks. (TR 125).⁵

⁵ In full, the witness explained that he expects drivers to make check calls, although he agreed they don’t do this on their breaks. (TR 126-27). He stated that drivers have to tell the company when they are starting their 10-hour break, and that his phone is always on, so drivers can text him. (TR 127). He testified that he wants to know when

26. The witness stated that he did not “remember about firing hiring because it [was] not really his position. However, he agreed that he recommended that Milda fire Mr. Anderson. The witness reviewed CX 16, which sets forth all the reasons why Mr. Anderson was fired. (TR 131). He agreed that it does not say he was fired for not calling in. (TR 132).
27. On cross examination, the witness testified that he felt that Mr. Anderson could have legally run the load from Seattle to San Francisco. If he picked up the load on time, which he did, driving legally for 11 hours and then resting for 10 hours, he could have accomplished the mission. (TR 136-37).⁶ He felt this load could have been delivered in 26 to 30 hours. He reiterated that “hot load” means that the load is extremely important, and it was important to him to know where the driver was. (TR 137). The run was submitted to the broker as a solo driver, as they did not have a team of two drivers to provide. He stated that the termination letter does not give all the reasons for terminating Mr. Anderson. (TR 138).
28. On redirect, the witness testified that the San Francisco run was only one of the reasons why Mr. Anderson was terminated. (TR 140). He stated that the broker told him he expected the load to be delivered as soon as possible. (TR 140-41). The broker did not specify that Mr. Anderson should have arrived in San Francisco by 22:00 on December 15. (TR 141-42).
29. In response to my questions, the witness testified that he did not personally dispatch Mr. Anderson for the San Francisco load. (TR 142). Rather, informed Mr. Anderson that the broker would call him, as he “didn’t want to be involve[d].” (TR 142-43).
30. The witness understood that the load was picked up on December 15 at 2:00 a.m. and the broker lost communication with Mr. Anderson at 4:00 or 6:00 p.m. that afternoon. (TR 143). In response, the witness called XTRA lease, the emergency line, which allowed them to locate the trailer in Weed, California, by GPS. He then called a police officer to check to make sure the trailer was okay, which it was. The police officer didn’t tell him anything else. (TR 144-45).
31. The witness believed that the broker came to the trailer after midnight on December 16. (TR 155-56). The company made no transportation arrangements for Mr. Anderson after he was fired. (TR 154). The witness knew that he lived in Florida. His contractor agreement showed that equipment had to be dropped off in Chicago. (TR 154-55). He stated that employees “have the ability to come to work and leave . . . without any arrangements.” The company does not buy them tickets to leave the job. (TR 156-57).
32. On re-cross examination, Mr. Jushkevich testified that the reason he was not happy with Mr. Anderson on this particular load was his lack of communication. (TR 157). Specifically,

the driver is taking a break because brokers check in and want to know where the driver is. They cannot tell a broker that they don’t know where a load is, considering it may be worth millions of dollars. (TR 129).

⁶ Later, Mr. Jushkevich agreed that the earliest that Mr. Anderson could have delivered the load was at 6:00 a.m. on December 16. (TR 153). As such, when the broker called on December 15, he should not have been surprised that the load was not yet in San Francisco. (TR 152).

because the broker did not know the status of the load, he took it away from the company and sent another carrier to pick it up. (TR 157-58). He stated that the company needed check calls every two hours after pickup on a hot load. It wasn't that Mr. Anderson was too slow to deliver. (TR 158).

33. In response to my questions, the witness testified that the broker reached him at home around 9:00 or 10:00 p.m. on December 15. Mr. Jushkevich gave permission to the broker to send another driver to pick up the trailer, which he knew to be in Weed, California. (TR 162). He sent text messages to Mr. Anderson telling him someone else was coming for the load, but he had no confirmation that Mr. Anderson received those messages. (TR 164).
34. On redirect examination, the witness again testified that Mr. Anderson's failure to get the load to San Francisco as quickly as he wanted him to get it there was not a factor in his termination. However, the termination letter, CX 16, indicates that, on December 14, Anderson missed his delivery appointment in San Francisco. The witness stated that the letter was made by the safety department, comprised solely of Angela Rogius. (TR 170). When asked whether he understood Milda to have made the decision to fire Mr. Anderson, he responded: "All dispatchers, safety department me, brought all information to Milda. She made the final decision" (TR 170-71).
35. I asked some additional questions to clarify the timeline. The witness agreed that Mr. Anderson left Seattle at approximately 1:15 a.m. on December 15. (TR 171). Assuming he drove 11 hours, he stopped in Weed, California at 2:15 p.m. that same day. (TR 171-72). Assuming he took a 10 hour break, that would take the timeline to until 12:15 a.m. the next day. (December 16). However, the broker reached him at home in the evening of December 15, apparently because he wasn't sure where the load was. The witness spoke to the police officer before that conversation. He told the broker that he had spoken to the police officer and that Mr. Anderson was in Weed, California. (TR 172). He tried to talk the broker out of changing drivers, not only because of loss of profit, but also because of the penalty. (TR 172-73). The broker's name is John. (TR 173). Mr. Jushkevich has never met him, but he knows him from telephone conversations. (TR 173-74). During the conversation with John, it was Mr. Jushkevich's impression that the broker's frustration had to do with lack of communication. (TR 176). John is the person who sent the witness CX 14, which stated that drivers, plural, were to drive straight through. (TR 178-79).

Testimony of Ken Petti

36. Mr. Petti testified that he's been working for Timex Logistics since February 2010. His rate of pay is 37 cents per mile. When he first started it was 31 cents a mile, which increased incrementally over time. It was his understanding that his pay increased because he delivered loads on time. (TR 181). He testified that he was a truck driver for 19 years and that a "hot load" means get it there as soon as you can. He has to make at least daily calls to Timex. (TR 182). Timex does not tell him when to take his 10 hour break. When he takes his break, he doesn't always tell Timex; it depends on who the dispatcher is. (TR 185). If the dispatcher knows that he does his job, then he doesn't have to stay in such close contact.

On cross examination, Petti testified that if it's a "hot load," then he would keep in more frequent contact. (TR 186).

Testimony of Chris Hodges

37. Mr. Hodges testified that he has been a commercial driver for about 3 ½ years and is employed by Timex Logistics. He has been cited for a log violation, and he was placed out of service as a result. (TR 188). He testified that he made a mistake on the log. (TR 189). There was another time that he was cited for exceeding the 14 hour rule. He understands "hot load" to mean get it there as soon as you can, but "it's not a load that you have to run straight through." (TR 190). He could not say what the broker meant by "drivers to drive straight through and deliver." (TR 191).
38. Mr. Hodges testified that a driver could not legally drive from Seattle, Washington to San Francisco, California without taking a 10 hour break. He reported his citations to Timex, which gave him a warning letter and a notice that \$100.00 would be taken out of his paycheck. He "periodically" makes check calls to Timex, depending on the load type. (TR 192). He uses his discretion regarding whether or not to inform Timex when he takes his 10 hour break. He stated that it was a matter of common courtesy, not company policy. (TR 197).
39. On cross examination, the witness testified that he does not receive threats from Timex that he's resting too much or not planning his stops. (TR 198).
40. In response to my question whether he would get a bonus for getting a load from place A to point B as soon as possible, he stated that the only bonus would be to get to move on to the next load. (TR 199).

Testimony of Rickie Anderson

41. Mr. Anderson testified that he lives in Brooksville, Florida and he holds a commercial driver's license from the state of Florida. He first became employed as a commercial driver in 1969, and he is 59 years of age. (TR 204). He has operated in 48 states and has performed mountain driving. The terrain from Seattle to San Francisco is mountainous and curvy. He would not want to park on interstates between Seattle and San Francisco because California would write a citation, and it is dangerous. (TR 205). The witness identified CX 1 as his employment application with Timex. (TR 208). Throughout his employment with Timex, his rate of pay was 35 cents a mile. (TR 209).
42. Mr. Anderson testified that Isa, his regular dispatcher, would push him to go from point A to point B overnight and would discourage him from stopping to shower or eat. (TR 209). Isa pushed him to break the hours-of-service regulation; for example, right after he started, he picked up a load by himself in Los Angeles, California and Isa told him it had to be in Morton, New Jersey Monday morning at 8:00 a.m., which allowed him two days to get there. He spoke several times with Darius about his unwillingness to break the hours-of-service regulation. (TR 210). During their first conversation, Darius told him that a particular load

had to be in Kent, Washington the next afternoon, and Mr. Anderson told him it wasn't going to happen. (TR 211). He told Darius he didn't run illegally, that this was his driver's license, his life, and all he's ever done. (TR 211-12).

43. Mr. Anderson testified that he wasn't off duty on December 14, contrary to Darius's testimony. He began the day in La Grand, Oregon, and then he went to Fife, Washington after delivering in Auburn, Washington. (TR 213). After he delivered to Auburn, he contacted Timex and told Darius he was empty. Darius told him to call a broker and that person would give him his next load. (TR 214). He did not know where that load was going to be picked up or delivered. He called the number that Darius gave him, and he spoke with somebody from Act International. The person's name was John. John told him that the pick-up was in Seattle and he'd have to go to California. (TR 215). He said it had to be in California the next morning. He told John that couldn't happen; he didn't have the hours to do it. John hung up on him. Darius called him ten minutes later. (TR 216). Darius wanted to know what the problem was, and he told Darius he wasn't going to be running illegally anymore. Darius told Anderson to pick up the load and go. He still did not know he was going to San Francisco. (TR 217).
44. The load was ready to leave for San Francisco on December 15 at 5:15 a.m. (TR 222). After the load was ready, the witness called Darius and left a message on his cell phone that he was loaded and headed to San Francisco, California. (TR 223). He didn't speak to Darius again. (TR 224).
45. The witness agreed to the following timeline: He went on duty at 5:15 a.m. central time on December 15, 2010; he had a 15 minute pre-trip inspection, and then he drove to 9:00 a.m. central time and made a fuel stop in Aurora, Oregon. (TR 226). Then he drove until 11:30 a.m. central time and stopped in Oakland, Oregon for 30 minutes. He resumed driving at noon and drove until 2:30 p.m. to a rest area in Oregon. Then he drove another hour and a half to Weed, California. (TR 227-28).
46. Mr. Anderson did not know it was a "hot load." The broker just told him to be in California the next morning. (TR 228). He agreed that he could have driven another hour and a quarter without violating the hours-of-service regulation; however, he knew there is a McDonalds Truck Stop in Weed and nothing for 250 miles after that. (TR 229). Mr. Anderson woke up with the police knocking on the side of his truck. (TR 235). The police told him that his company wanted him to call in. He checked his phone and noted that no one from the company had called it. (TR 235). As soon as he put the phone back down, a man with a semi-tractor arrived and told him that he was sent by John to pick up the trailer. Mr. Anderson tried calling his dispatcher, but the phone just rang. (TR 236). He surrendered the trailer. He eventually spoke to Isa, his dispatcher, who was unable to explain what was going on, and who said that Darius was not there. (TR 236-37). He did not speak to Darius until he reached the I-80 truck stop in Walcott, Iowa. (TR 238).

47. CX 4, pages 1 through 3, which are Mr. Anderson's log book for December 13, 14, and 15, 2010, was admitted into evidence. (TR 238-39).⁷ Page 4, the log for December 16, 2010, was also admitted into evidence. (TR 245). The witness clarified that the police arrived while he was in the sleeper berth, and that the semi arrived approximately half an hour later. (TR 248). Mr. Anderson said that his 10 hour break would have been up at 3:30 a.m. on December 16. When the police came, he was still on his 10 hour break, but by the time the load was taken away, his 10 hour break was up. (TR 249). After the load was taken away, Mr. Anderson went to San Francisco to retrieve the trailer. (TR 254). He then drove to Corning, California to pick up a new load. (TR 254-255).
48. By the time he talked to Darius, he was in Walcott, Iowa, heading east with the new load. This was within a couple days after he was relieved of the San Francisco load in Weed, California. (TR 250). Darius told him that he had to start doing things differently and eventually told him that he was fired. That was the end of the conversation. (TR 251). Mr. Anderson took his current load to the Timex drop yard, leaving the truck paperwork as well. (TR 251-52). The witness testified that he had never seen CX 12, a warning letter dated November 24, 2010, prior to the lawsuit. (TR 258-59). CX 12 was admitted into evidence. (TR 260). The witness also testified that he had not seen Claimant's Exhibits 14, 15, and 16 prior to the lawsuit. (TR 260-61). The first time he saw CX 16, the termination letter, was after his attorney provided it to him; he did not receive it when he was discharged. (TR 261).
49. After he lost his job, the witness called his son who lives in Seymour, Indiana and asked his son if he would come over and get him. (TR 261). His son came to get him at Love's Truck Stop at Exit 9 on I-80 near Chicago. (TR 262). He was feeling angry because he got fired for something he would not do. (TR 262). From Seymour, Indiana, he hitchhiked to Florida. He didn't get paid; he didn't have any money, and he wanted to get home. He felt disgusted because he had been driving a truck for 40 years and he never had a company treat their drivers like he was treated by Timex Logistics. (TR 263). After he got back to Florida, he made an effort to look for work, applying to some 75 to 80 positions. He did receive some calls, but after he told them that he lived 55 miles south of Ocala they indicated it was out of their range. (TR 264). He had not worked at all since he was fired by Timex Logistics. (TR 264-65). He has signed up for food stamps and goes around various places in Brooksville, Florida where they give him free food and he, "go bum me a bed here and there every other night." He can only stay at his daughter's house one night a week because of his grandkids. His wife left him because he couldn't pay his bills. (TR 265).
50. On cross examination, Mr. Anderson testified that Isa had discouraged him from stopping and putting chains on his truck during a snowstorm, even though the law required using chains and failure to do so would result in a \$500.00 fine. (TR 276). Mr. Anderson testified that whenever he talked to Darius, there was an argument about running illegally. (TR 280). He clarified that he hadn't said he would take the San Francisco load; he told the broker he

⁷ At this point in the testimony I pointed out to the parties that there was a discrepancy between the testimony of Darius and Mr. Anderson regarding when the police officer contacted Anderson in Weed, California. Darius testified that all these conversations took place on the evening of December 15, and Mr. Anderson testified that he was asleep in the early morning hours of the 16th when he was awakened by the police officer. (TR 241-42).

did not have time to get there or the hours, and the broker told him to bend the rules, which he refused to do. (TR 281). After the broker hung up, Darius called and told him: "You will pick that load up, and you will go to San Francisco." (TR 282).

51. CX 1, Anderson's application for employment, was admitted into evidence. I noted on the record that there is no CX 7. (TR 284). CX 17 was admitted. I noted for the record that there is no CX 18. (TR 286). CX 19 and 20 were admitted into evidence. (TR 288-89).

Milda Krapukaityte was recalled as a witness for the defense

52. Ms. Krapukaityte testified that she owns 100% of the stock of Timex Logistics. There are no other co-owners of the company. Ms. Krapukaityte reviewed what was marked as RX 1 and said it was a dispatch note for Mr. Anderson. There is a dispatch note for every driver, and they are made contemporaneously with each date. (TR 299). The dispatcher makes the notes. RX 1 shows all of the loads Mr. Anderson delivered, including pick-up and delivery times. On the right side it shows notations by dispatchers: if delivery was missed, or it was late, or there were any problems with the load. (TR 300). RX 1 was admitted into evidence. (TR 305).
53. The witness confirmed that, according to the notations in RX 1, Mr. Anderson was late or missed deliveries on the following dates: October 29, November 4, November 17, November 18, November 20, November 29, and December 14. He was also out of communication on some of these dates. (TR 305-06). The witness testified that every driver has a record like this, but not in a two month period with so many notations. A missed delivery means that the driver was not there at the scheduled time. (TR 306-07).
54. The witness testified that Mr. Anderson quit on December 9. (TR 309). She met with Mr. Anderson that day and, during the meeting, he changed his mind and said he wanted to work. The meeting was in her office. The witness testified that she told her safety manager to make up a general agreement to include all of the issues that they addressed with Mr. Anderson. These included being late, not answering phones, and not communicating with dispatchers. Ms. Krapukaityte witnessed Mr. Anderson and the safety manager sign in. (TR 309-10). The agreement was admitted as a Complainant's Exhibit 3. (TR 313).
55. Ms. Krapukaityte testified that the main reason for the agreement was that they "had issues before and if [they] continued to work together, [they] needed to eliminate the issues. [She] thought that having Mr. Anderson sign something would make him more serious about the issues." She testified that, when she decided to fire Mr. Anderson, the main reason was that he failed to comply with the agreement: to answer the phone and to make his timely deliveries. He also failed to manage his time and he was undependable. (TR 313).
56. Ms. Krapukaityte testified that she never asked Mr. Anderson to drive from Seattle to California over a one night time period. (TR 314). The witness reviewed Mr. Anderson's "driver's Daily Log" for December 14, 2010, which had previously been admitted. She identified it as a driver's data log for Ricky Anderson. (TR 314-15). Mr. Anderson did not turn the document into the office. There is no record anywhere in the office of this exhibit,

and this was the first time Ms. Krapukaityte had seen the document. Ms. Krapukaityte testified she was familiar with drivers' logs and understood their notations. From the log, she understood that Mr. Anderson:

[W]as sleeping from midnight until 6:15 in the morning. He made a pre-trip inspection. He was driving from 6:30 a.m. to 10:15 a.m. He stopped in the rest area for 15 minutes. He was driving for two hours to North Bend, Washington to fuel. He fueled for 15 minutes. He was driving from North Bend to Auburn, Washington. He was on duty there for two hours. He was driving for half an hour and then went to sleep until 7:45 p.m.

(TR 315).⁸

57. Ms. Krapukaityte testified that the bill for the Auburn delivery was dated 12/12, but the log book said he made the delivery on the 12/14, which didn't make sense. Ms. Krapukaityte could not verify that Mr. Anderson's log was accurate. (TR 316).
58. The witness identified RX 2 as a bill of lading showing that Mr. Anderson delivered the Auburn load on December 12, 2010. (TR 317, 321). She agreed that Mr. Anderson's log book said that he delivered the load on December 14, two days later. (TR 321-22). She believed that the bill of lading was more credible because it was made by a third party who had no reason to misrepresent the date. (TR 322).⁹
59. Ms. Krapukaityte testified that she was the one who made the decision to discharge Mr. Anderson. The San Francisco load was a factor in her decision because Mr. Anderson failed to communicate with the office. (TR 330).
60. On cross examination Ms. Krapukaityte testified that Mr. Anderson's stop in Weed, California was not a factor in Anderson's termination. To the question, "didn't he miss his delivery appointment because he stopped in Weed?" Ms. Krapukaityte answered, "There was no delivery appointment." However she agreed that CX 16, the termination letter, states, "You missed your delivery point to San Francisco." The termination letter was prepared by Angela, one of Ms. Krapukaityte's subordinates. (TR 331). Ms. Krapukaityte told Angela to write a letter to Anderson setting forth all the reasons why he was fired. (TR 331-332).
61. The witness agreed that RX 1 notes "missed delivery, no communication with driver" with respect to the San Francisco load. (TR 332). Ms. Krapukaityte testified that she does not

⁸ In trying to follow Ms. Krapukaityte's testimony with the log itself, it appears as if Ms. Krapukaityte erred; she must have meant that Anderson went to sleep at 7:45 p.m. but even the time is wrong in comparing the testimony with the log itself: the log indicates that Anderson was in the sleeper berth beginning at 8:15 p.m. See CX 4, Page 2.

⁹ The witness explained that she ordinarily gets bills of lading back from the drivers. In this case, the driver "failed to turn it in," so she called the receiver in Auburn, WA and asked if they could fax a copy to her. She got about a month after delivery. (TR 327). She testified that she did not alter it. (TR 327-28). I still believe that this is a business record insofar as bills of lading are kept in the ordinary course of business; Milda Krapukaityte is the ultimate custodian of the records, and the bill of lading itself was sent to her by a reliable source.

expect drivers to answer the phone while driving. They provide their own cell phones; she does not pay that bill, and when they are off duty, they don't have to answer the phone. (TR 334).

62. Ms. Krapukaityte testified that she first saw CX 14, the load confirmation sheet, on December 15, 2010. She did not see it before Anderson took the load from Seattle to San Francisco. The broker has the right to tell the company how many drivers he wants on a delivery (i.e. there must be two drivers or there must be a team). (TR 348). Despite the language reading "drivers straight through and deliver," she was not promising the broker two drivers, as the company doesn't have teams. (TR 349).
63. Isa and Darius dealt with the broker for the San Francisco load. (TR 350). When she found out on the afternoon of December 15 that they were not able to get a hold of Mr. Anderson, she first told Darius to continue to try to reach him, and then she tried to call Mr. Anderson herself. (TR 351-52). When that was unsuccessful, she instructed Darius to call XTRA Lease and to track the trailer. (TR 351). It was about 9:00 p.m. Chicago time. (TR 352).
64. She found out at 10:00 p.m. Chicago time that the state police had talked to Mr. Anderson in Weed, California. He was okay but he never called the office. (TR 353-54). She learned from Darius on the same night that the broker wanted to switch drivers. She authorized Darius to give permission to the broker to change drivers. She said "try to reach Mr. Anderson and if we cannot we don't have any other options." (TR 354).

Rickie Anderson was recalled as a witness for the defense

65. Mr. Anderson testified that he applied for work after being fired by Timex by going on line at his daughter's house on her computer but he does not have any printed applications. (TR 357). He agreed that his employment agreement stated "trial period," which meant he was on probation. (TR 359).

Milda Krapukaityte was recalled as a witness at my request

66. Ms. Krapukaityte testified that before driver takes a load from the dispatcher, he has the opportunity to say that he cannot take it or that he needs a later appointment. (TR 363).

Kenneth Petti was recalled as a witness

67. Mr. Petti testified that when he first started out as a new driver for Timex he was on probation for approximately three months. It required extra contact; he was called by the office a lot and he called them. (TR 365). The normal procedure for receiving an offer for a load was that he would get a direct telephone call or a text on his phone. (TR 365-66). He was instructed where to pick up and deliver the load, and the time for it to be delivered. They would ask if he was able to deliver on time. It was his responsibility to schedule breaks or time off. He has refused to take a load from Timex. (TR 366). He might have to refuse because he didn't have enough hours to take a load. Milda or Darius did not get upset; they would try to rearrange the load. He would not be punished for refusing a load. (TR 367).

Milda Krapukaityte was recalled as a witness

68. Ms. Krapukaityte testified that Angela Rogius, the safety manager, wrote CX-15, as well as the termination letter. (TR 371).

Findings of Fact and Conclusions of Law

69. “Congress passed the Surface Transportation Assistance Act in order to ‘combat the ‘increasing number of deaths, injuries, and property damage’ resulting from vehicle accidents in the interstate trucking industry.’ Additionally, Congress sought ‘to assure that employees are not forced to drive unsafe vehicles or commit unsafe acts,’ and to ‘provide protection for those employees who are discharged or discriminated against for exercising their rights and responsibilities.’” *Brink’s v. Herman*, No. 96-4162 (2d Cir. June 25, 1998)(case below 95-STA-4)(internal citations omitted).

70. In relevant part, the STAA states that “[a] person may not discharge an employee, or discipline or discriminate against any employee regarding pay, terms, or privileges of employment, because. . . [t]he employee refuses to operate a vehicle because – (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security. . . .” 49 U.S.C. § 31105(a)(1).

71. In cases arising under the STAA, “the parties’ burdens of proof . . . were [historically] understood to be analogous to those developed for retaliation claims under Title VII of the Civil Rights Act of 1964.” 77 Fed. Reg. 44,122 (July 27, 2012)(internal citations omitted).

72. As explained in the Federal Register:

The 9/11 Commission Act amended paragraph (b)(1) of 49 U.S.C. 31105 to state that STAA whistleblower complaints will be governed by the legal burdens of proof set forth in AIR21 at 49 U.S.C. 42121(b). . . . Under AIR21, a violation may be found only if the complainant demonstrates that protected activity was a contributing factor in the adverse action described in the complaint. 49 U.S.C. 42121(b)(2)(B)(iii). Relief is unavailable if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 49 U.S.C. 42121(b)(2)(B)(iv).

77 Fed. Reg. 44,122 (July 27, 2012)(internal citations omitted).

73. Pursuant to the parties’ stipulations, I find that Respondent, Timex Logistics is a commercial trucking company engaged in Interstate Commerce within the meaning of 49 U.S.C. § 31105 and subject to the Surface Transportation Assistance Act, that Complainant was employed by

Timex Logistics as an over-the-road truck driver assigned to Timex's facility located in Countryside, Illinois and that he is an employee covered by 49 U.S.C. § 31105.

74. Pursuant to the parties' stipulations, I also find that Complainant filed a written complaint with the Secretary of Labor alleging that his employer, Timex Logistics, retaliated against him in violation of the Act and that the Complaint and the parties' objections to the Secretary's findings were timely filed.
75. I find that on or about December 14, 2010, Timex Logistics received a load confirmation sheet from Act International Corp. sent by Jon Ervin, dispatcher. The load was to be picked up at Menzies Aviation, 2427 S. 161st Street, Seattle, Washington on December 14, 2010 at 8:00 p.m. and delivered to Air Container Transfer, 440 Grandview Road, Suite A, San Francisco, CA on December 14, 2010,¹⁰ between the hours of 3:00 and 7:00 p.m. (CX 14).
76. Janis Jushkevich, Timex dispatcher, directed Complainant to pick up and deliver the Seattle-San Francisco load on December 14, 2010 and to communicate with the broker as well as Jushkevich. He knew it was a "hot load" which means it was a "critical shipment." He also knew that a single driver could not drive straight through from Seattle to San Francisco without taking a 10 hour rest break. Janis told Anderson to pick up the load and go. *See* paragraph 25 and 43, *supra*.¹¹
77. The broker lost communication with Complainant at 4:00 or 6:00 p.m. in the afternoon of December 15, 2010. Although Mr. Jushkevich ultimately confirmed with the police officer that everything was okay with the trailer, he nevertheless gave the broker permission to send another driver to take it. *See* paragraphs 30 and 33, *supra*.
78. When the police came, Mr. Anderson was still on his 10 hour break, but when the load was taken away from him, his 10 hour break was up. Mr. Anderson tried calling his dispatcher, but the phone just rang. *See* paragraphs 46 and 47, *supra*.
79. I find that by taking a 10 hour break while in Weed, California, Mr. Anderson was engaging in protected activity. I further find that, at the time Mr. Jushkevich gave permission to John Ervin to send another driver to pick up the trailer, he had to know Anderson was on his 10 hour break.
80. Complainant's termination letter expressly states that he "missed [his] delivery appointment in San Francisco and the broker charged [Timex] \$1500.00 for sending another company to come pick up the load . . ." (CX 16). Therefore, I find that Mr. Anderson's protected activity was a motivating factor in his discharge.

¹⁰ There is obviously an error with the delivery time; it could not have been for the same day.

¹¹ Whenever I refer to a paragraph under the heading, "Summary of the Evidence," it means that I predicate my finding on testimony and/or evidence set out in that paragraph because it is in fact what happened and/or a true fact.

81. Once Complainant has shown that his protected activity was a motivating factor in his discharge, Respondents can only avoid liability if they can demonstrate “by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.” 49 U.S.C. § 42121(b)(2)(B)(iv). Proof by “clear and convincing evidence” is a high standard. *See Yadav v. L-3 Communications Corp.*, ARB No. 08-090, ALJ No. 2006-AIR-016, at 17 (ARB Jan. 7, 2010)(“Clear and convincing evidence or proof denotes a conclusive demonstration; it is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’ Thus, the clear and convincing standard of proof is more rigorous than the preponderance-of-the-evidence standard but lower than the beyond-a-reasonable-doubt criterion of criminal cases.”). Additionally, “clear and convincing evidence that an employer would have fired the employee in the absence of the protected activity overcomes the fact that an employee’s protected activity played a role in the employer’s adverse action and relieves the employer of liability.” *Id.*
82. I find that Respondents cannot show “clear and convincing evidence” that they would have fired Mr. Anderson but for his protected activity. Specifically, although Ms. Krapukaiyte testified about numerous instances when Complaint was late, missed appointments, or failed to communicate, she also admitted that the San Francisco load was the last straw in making her decision to terminate Mr. Anderson. *See* paragraph 20, *supra*.
83. In addition, I must consider the nature of the Seattle-San Francisco load itself. Timex was to provide a team of drivers and they were to drive straight through from Seattle, Washington to San Francisco, California, a distance of 800 plus miles. Mr. Jushkevich, the dispatcher, had to know that these instructions could not have been legally performed by one driver, despite his testimony to the contrary. He knew it was a “hot load” thus time sensitive and that it needed to be put on an airplane. *See* paragraph 25, *supra*. I find Jushkevich’s testimony that Anderson could have driven for 11 hours, then rest for 10 hours, and that Anderson could have accomplished the mission, to be disingenuous and untrue given the instructions on the load confirmation sheet. *See* paragraph 27, *supra*. I also find that the broker’s desire to change drivers as early as December 15, 2010 at 9:00 or 10:00 p.m. to be more evidence that the drivers (plural) were expected to drive straight through, as the load confirmation sheet indicates. *See* CX 14.¹²
84. I find that Ms. Krapukaiyte’s testimony that the term “straight through” means “as soon as possible” (*See* paragraph 7, *supra*) is also disingenuous and untrue given the circumstances of this case, i.e. the instructions on the load confirmation sheet and the frustration of the broker. I agree that Mr. Anderson should have communicated more frequently with the dispatcher; however, I find that Respondents have not shown clear and convincing evidence that Respondents would have fired Anderson in the absence of his protected activity. In

¹² I also note that, although Mr. Jushkevich did not personally dispatch Complainant on the San Francisco load, he put him in touch with the broker and told Complainant to continue to communicate with them both. *See* paragraphs 25, 29, *supra*. Also, when Complainant informed him that he didn’t have the hours to complete the drive, Mr. Jushkevich told him to go anyway. *See* paragraph 43 and 50 *supra*.

other words, had Mr. Anderson not stopped in Weed, California for a 10 hour break, and had he delivered the load on time without stopping, he would still be working for Timex.¹³

Damages

Mitigation of Damages

85. Once a complainant establishes that he was terminated in violation of the STAA, the employer bears the burden to prove that the employee did not exercise reasonable diligence in mitigating damages. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005) (“Though the complainant has a duty to exercise reasonable diligence to attempt to mitigate damages awarded as back pay, the employer bears the burden of proving that the employee failed to mitigate.”). The employer can satisfy its burden by establishing that “substantially equivalent position[s],” which “provide[ed] the same promotional opportunities, compensation, job duties, working conditions, and status . . . were available [to the complainant] and he failed to use reasonable diligence in attempting to secure such a position.” *Id.* (internal citations omitted). “A complainant is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence.” *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000).
86. Respondents have offered no evidence establishing that substantially equivalent jobs were available to Complainant. Furthermore, even assuming that substantially equivalent employment was available to him, Respondents have not shown that Complainant has failed to make reasonable efforts in securing such a position. In fact, Mr. Anderson sought work as a truck driver by submitting more than 75 on-line employment applications to motor carriers. See paragraph 48, *supra*. Wherefore, I find that Respondents have not met their burden of showing that Complainant failed to mitigate his damages.

Liability

87. Complainant argues that Milda Krapukaityte and Janis Jushkevich should be individually liable for damages in this case, as they personally participated in the decision to fire him.
88. The STAA clearly contemplates individual liability under the Act. See *Ass't Sec'y & Wilson v. Bolin Associates, Inc.*, 91-STA-4 (Sec'y Dec. 30, 1991) (“The statute provides that ‘[n]o person shall discharge’ (emphasis added) an employee for conduct protected by the STAA, and defines a person as ‘one or more individuals. . . .’”).¹⁴ The Administrative Review Board (ARB) has further explained that an employer engaged in the commercial motor vehicle business cannot escape individual liability because her actions were taken “within the course

¹³ The termination letter alone states he was fired in part for missing his delivery in San Francisco, not for lack of communication. (CX 16).

¹⁴ In this case, the Secretary also found that Respondent, “as the person who discharged Complainant, [was] liable under the express language of Section 2305 . . . [Therefore, it was] unnecessary to employ the doctrine of piercing the corporate veil.” See *Wilson, supra*.

and scope of her employment.” *Smith v. Lake City Enterprises, Inc.*, ARB Nos. 08-091 and 09-033, ALJ No. 2006-STA-32 (ARB Sept. 24, 2010).

89. Milda Krapukaityte is the sole owner of Timex Logistics, a company engaged in the commercial motor vehicle business. *See* paragraph 52, *supra*. Therefore, I find that she is individually liable for damages in this case.
90. In *Smith*, the ARB also set forth particular factors to determine whether “an entity is a joint employer with another.” *See Smith, supra*. Specifically, the Board explained that “[t]he crucial factor in determining whether an entity is a joint employer with another is whether the entity exercised control over the complainant’s employment. Such control includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant.” *Id.* (internal citations omitted).
91. In the present case, Janis Jushkevich testified that he had influenced Ms. Krapukaityte’s decision to fire Complainant, and Mr. Anderson testified that it was Mr. Jushkevich who told him that he was fired. *See* paragraphs 26, 34 and 48, *supra*. Therefore, Janis Jushkevich is properly considered a joint employer in this case, and he is also individually liable for damages.

Remedies

92. The 2007 Amendments to the STAA expanded the remedies available to successful complainants. Specifically, current 49 U.S.C. § 31101 expressly provides for relief under the STAA as set forth below:

If the Secretary of Labor decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary of Labor shall order the person to - (i) take affirmative action to abate the violation; (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and (iii) pay compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees (C) Relief in any action under subsection (b) may include punitive damages in an amount not to exceed \$250,000.

49 U.S.C. § 31101(b)(3).

93. “[A]n award of back pay under the STAA is not a matter of discretion but is mandated once it has been determined that an employer has violated the STAA.”) *Hufstetler v. Roadway Express, Inc.*, 85-STA-8 (Sec’y Aug. 21, 1986). “The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him.” *Ass’t Sec’y & Bryant v Mendenhall Acquisition Corp.* (d/b/a Bearden Trucking Co.) ARB No. 04-014, ALJ No. 2003-STA-36, (ARB June 30, 2005)(internal citations omitted). “Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act. *Id.*

94. “Compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-47 (ARB Aug. 31, 2011)(internal citations omitted). To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm.” *Id.* “The Secretary and the Board consistently have held that compensatory damages under the STAA include damages for pain and suffering, mental anguish, embarrassment, and humiliation.” *Id.* (noting that “‘a key step in determining the amount of compensatory damages is a comparison with awards made in similar cases’,” and that reasonable compensatory damage awards may be predicated solely on unrefuted testimony).
95. Interest on backpay will be computed by daily compounding the interest rate for the underpayment of taxes set forth at 26 U.S.C. § 6621. *See* 77 Fed. Reg. 44,128 (July 27, 2012).¹⁵
96. Various forms of non-monetary relief are customarily granted in STAA cases. *See Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161, ALJ No. 2003-STA-55, at 8 (ARB Jan. 31, 2006)(“accept[ing] the recommendation that [employer] delete references to the adverse action in [complainant’s] employment records and post a copy of the ALJ’s [Decision and Order]”); *Griffith v. Atlantic Inland Carriers*, 2002-STA-34 (ALJ Oct. 21, 2003), adopted ARB Case No. 04-010 (ARB Feb. 20, 2004)(“The Administrative Review Board has held that the ‘standard remedy in discrimination cases [is to] notif[y] a respondent’s employees of the outcome of a case against their employer.’ The ARB also commonly orders employers to delete all information pertaining to an employee’s wrongful or discriminatory discharge from its personnel records.”)(internal citations omitted).
97. In the present case, Mr. Anderson has requested all relief available to him, including reinstatement, back pay, compensatory, interest, attorney fees and costs, and nonmonetary relief.

Order

- A. Respondents are **ORDERED** to reinstate Complainant to his previous job with the same pay, terms and privileges of employment.

¹⁵ In full, the Federal Register explains that, “In ordering interest on backpay, the agency has determined that, instead of computing the interest due by compounding quarterly the Internal Revenue Service interest rate for the underpayment of taxes, which under 26 U.S.C. 6621 is generally the Federal short-term rate plus three percentage points, interest will be compounded daily. The Secretary believes that daily compounding of interest better achieves the make-whole purpose of a backpay award. Daily compounding of interest has become the norm in private lending and recently was found to be the most appropriate method of calculating interest on backpay by the National Labor Relations Board. Additionally, interest on tax underpayments under the Internal Revenue Code, 26 U.S.C. 6621, is compounded daily pursuant to 26 U.S.C. 6622(a).” 77 Fed. Reg. 44,128 (July 27, 2012)(internal citations omitted).

- B. The parties have stipulated that Mr. Anderson earned \$9,700.00 for working for Timex from on or about October 17 until December 21, 2010. (TR 267-68). Therefore, Anderson was earning a gross pay of \$4,850.00 per month. Further, both parties agreed that from the time he was terminated until the time of the hearing, he was out of work for about a year and a half. (TR 268). In addition, Timex withheld \$1,879.50 from his wages. See paragraph 11, *supra*. Wherefore, I find that Complainant is entitled to backpay in the amount of \$ 89,179.50,¹⁶ plus interest computed consistently with paragraph 95, *supra*. Respondents Timex, Krapukaityte and Jushkevich are **ORDERED** to pay backpay and interest in this amount, an award for which they are jointly and severally liable.
- C. Mr. Anderson has provided unrefuted testimony that, as a result of his discharge, he has suffered emotional distress and mental pain. See paragraph 49, *supra* (recounting that Mr. Anderson had to hitchhike home after he was fired, that he must now rely on public assistance and others for support, and that he stays in others' homes). The ARB has affirmed a compensatory damage award of \$75,000 in a similar factual situation. See *Michaud v. BSP Transport Inc.*, 95-STA-29 (ARB Oct. 9, 1997)(vacated on other grounds)(affirming the ALJ's award of \$75,000 in compensatory damages where "prior to the discharge, [Complainant] had substantial savings, owned a house, had good credit, and a stable financial position" but after his unlawful discharge, he "lost his house through foreclosure, his savings, and his ability to obtain credit, and has received public assistance."). Therefore, Respondents Timex, Krapukaityte and Jushkevich are **ORDERED** to pay compensatory damages in the amount of \$50,000.00. They are jointly and severally liable for this amount.
- D. As previously explained, I find that Respondents set Mr. Anderson up for failure. See paragraphs 83 and 84, *supra*. Furthermore, after he was fired, Respondents did not help him get home, showing callous disregard for his welfare, and they even withheld \$1,879.50 from him for no apparent good reason. See paragraphs 11, 31 and 49, *supra*. For Respondents wanton, willful and callous behavior and to deter future violations, I award Mr. Anderson the sum of \$12,500.00. Respondents Timex, Krapukaityte and Jushkevich are **ORDERED** to pay this amount, for which they are jointly and severally liable.
- E. Complainant herein is awarded attorney fees and costs; thirty days is hereby allowed to Complainant's counsel for the submission of such application. A service sheet showing that service has been made upon all parties including the Complainant must accompany the application. The Respondents shall have ten days following the receipt of such application to file any objections.

¹⁶ I have computed this amount by multiplying a monthly wage of \$4,850.00 x 18 months (the amount of time that Complainant was out of work up until the hearing) and adding \$1,879.50. I cannot confirm at this time that Complainant has been out of work since the hearing; however, Complainant may request a second hearing to calculate further damages, if this is the case.

- F. As Complainant has requested, Timex is **ORDERED** to post a copy of the decision and order in this case for 90 consecutive days in all places where employee notices are customarily posted. Timex is also **ORDERED** to expunge from its personnel records all references to Mr. Anderson's discharge for engaging in a protected activity. Finally, I **ORDER** Timex to cause all consumer reporting agencies to which it has made a report about him to amend their report to delete unfavorable work record information, and to show continuous employment with Respondents.

MICHAEL P. LESNIAK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

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

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

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

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

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

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