U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 03 November 2005

CASE NO.: 2003-STA-0050
(Former Related Case: 2002-STA-0023)

In the Matter of:

JAMES HARRELL,
Complainant

v.

SYSCO FOODS OF BALTIMORE.
Respondent

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

The instant case arises from a claim brought under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105 ("STAA") with implementing regulations at Title 29, Part 1978 of the Code of Federal Regulations. The STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee regarding pay, terms or privileges of employment because the employee has undertaken protected activity either (1) by participating in proceedings relating to the violation of commercial motor vehicle safety regulations or (2) by refusing to operate a motor vehicle due to concerns about such violations or reasonable apprehension of serious injury because of the vehicle's unsafe condition.

This case arises out of the second of two STAA complaints filed by the Complainant Harrell ("Complainant" or "Harrell").[1] The first complaint was filed by Complainant on September 14, 2000 against Respondent Sysco Corporation doing business as Sysco Food Services of Baltimore ("Respondent" or "Sysco")[2] on behalf of himself and other similarly situated employees. While the first complaint was still pending before the Occupational Safety and Health Administration ("OSHA"), Complainant entered into a July 2, 2001 settlement

[1] The former case (2002-STA-0023) is also outlined in this decision, because the nature of the Complainant's second complaint is premised on facts related to the former case.
[2] For reasons that are unclear, OSHA identified Respondent herein as "Sysco Foods of Baltimore." However, it is clear that the same entity is involved here as in the first STAA complaint.

agreement with Respondent in a state worker's compensation case and an associated settlement in a federal district court case, pursuant to which he resigned from his employment.[3] The first complaint was found to be meritorious by OSHA, but that finding was appealed by Sysco on February 14, 2002. While proceedings related to a proposed settlement of the first complaint (discussed below) were pending before me, Complainant filed a June 4, 2002 letter alleging that Respondent filed a civil suit in Howard County Circuit Court against him in retaliation for the first STAA complaint; that letter was treated as a second complaint and forwarded to OSHA for resolution. On August 13, 2003, OSHA found that the second complaint lacked merit because Complainant was not an employee, and Complainant filed objections and requested a hearing on September 10, 2003.

The matter now before me is Respondent's Motion for Summary Decision filed on December 1, 2004, and Complainant's Opposition to Respondent's Motion filed on January 27, 2005.

PROCEDURAL HISTORY OF INSTANT CASE

This action arises from Complainant's letter complaint dated June 4, 2002 and filed with the undersigned. That letter, which alleged that Respondent filed a civil suit in retaliation for his failure to dismiss his first STAA complaint, was forwarded to the OSHA office for investigation by counsel for the Assistant Secretary. On August 13, 2003, OSHA found that the June 4, 2002 complaint (the second STAA complaint) lacked merit because Complainant was not an employee within the meaning of 49 U.S.C. §31101 as he had resigned on July 2, 2001, before the second complaint was filed. OSHA's findings further stated that the facts did not establish the prima facie elements of protected activity or adverse action in view of Complainant's non-employee status at the time he failed to withdraw the pending claim and at the time Respondent filed the civil suit.

Complainant filed objections to OSHA's findings on September 10, 2003, and the case was transferred to the Office of Administrative Law Judges. The objections stated in relevant part:

> Mr. Baron called me and said, Mr. Mazurek called him for him to tell me Sysco is going to sue me because of the OSHA letter.
>
> In October 2001, a witness told me he was told by Phil Millerson, shop steward that Sysco is going to sue me, and again after January 02 letter from OSHA.
>
> In a meeting in Howard County before Judge Sweeney, Mr. Steinberg, who represented Sysco indicated to Judge Sweeney the civil suit, was because of the OSHA matter, and that was stressed. Mr. Steinberg made no reference on the record to assisting any other employee or any breach of confidentiality. The letter I gave to shop steward Mike Cutchember was a union protected activity. I did not

[3] The July 2, 2001 settlement agreements (discussed below) were not submitted to OSHA for approval and have not been approved by OSHA, the Office of Administrative Law Judges, or anyone else from the Department of Labor.

know anything about a third party lawsuit; I did not assist in a third party lawsuit against Sysco. The civil suit filed against me is retaliation because of the OSHA matter.

On September 24, 2003, I issued a Notice of Assignment and Hearing. On October 7, 2003, at the time of the scheduled hearing, I granted Complainant's request for a continuance because he was unrepresented by counsel. On the same day I issued an Order Staying Proceedings, which advised the parties of my preliminary determination that the whistleblower provisions of the STAA applied to former employees. Additionally, the Order stated that the proceedings were stayed for thirty (30) days and parties were advised to update the undersigned of the status of the Howard County case.

On February 13, 2004, a Supplemental Notice of Hearing was issued, and Respondent on March 18, 2004 filed a letter inquiring whether the hearing would be rescheduled due to the pending appeal of the Maryland Circuit Court decision. In response, I issued a letter dated March 24, 2004 stating that the hearing would proceed as scheduled and sought to clarify the relevant issues to be addressed at the hearing. Thereafter, Respondent filed a Motion to Recuse Administrative Law Judge on April 5, 2004 alleging that the undersigned's comments in the March 24, 2004 letter demonstrated predisposition in favor of the Complainant. On April 6, 2004 Respondent submitted a Motion to Continue the hearing, which was denied without prejudice, and an Order Denying Recusal was later issued on April 8, 2004. Respondent resubmitted an Unopposed Motion for Continuance on April 12, 2004, which was granted on April 13, 2004.

On December 1, 2004, Respondent filed a Motion for Summary Judgment Decision, and Complainant filed an Opposition to Respondent's Motion on January 27, 2005. While this matter was pending, Complainant forwarded a copy of a decision by the Court of Special Appeals of Maryland, dated June 2, 2005, pursuant to which an award of $1 to Respondent by the Circuit Court for Howard County was vacated and the case was remanded for a damage award of $185,000 (essentially, return of settlement proceeds, including worker's compensation benefits paid) based upon a stipulated damage remedy in Paragraph 7 of a July 2, 2001 district court settlement (discussed below) and breach of the non-disparagement covenant in the settlement. The Court of Special Appeals decision will be addressed to the extent that it bears upon the material factual issues in this case.

FACTUAL BACKGROUND

Complainant Harrell was employed by Respondent Sysco as a commercial truck driver, and he filed various claims against Respondent in both state and federal courts during the course of his employment, including the former STAA complaint (2002-STA-00023), race discrimination charges, and various worker's compensation claims. As a result of these complaints, Complainant and Sysco entered into a July 2, 2001 Settlement Agreement and General Release ("July 2, 2001 Settlement"), pursuant to which he received the amount of one dollar ($1) plus thirty-five thousand dollars ($35,000) for attorneys' fees, payable under Paragraphs 1 and 2. Under the July 2, 2001 Settlement, (1) Respondent agreed under Paragraph 3 that it would not contest Complainant's application for unemployment benefits; (2)

Complainant agreed under Paragraph 5 that he would release Respondent from any and all claims (including OSHA claims and worker's compensation claims) "from the beginning of time to the present," and under Paragraphs 6 and 10, a contemporaneous settlement of the worker's compensation claims was incorporated by reference; (3) under Paragraph 7, Complainant agreed not to disparage Sysco and Sysco agreed not to disparage Complainant, the parties agreed to maintain the confidentiality of the agreement, and the parties agreed breach of this provision would entitle the parties to damages for breach of contract, including return of the proceeds under Paragraphs 1 and 2 and worker's compensation benefits; (4) under Paragraph 8, Complainant resigned effective July 2, 2001; (5) under Paragraph 9, Complainant agreed to be responsible for all taxes, penalties or interest; and (6) under Paragraph 16, Complainant agreed to neither voluntarily aid nor voluntarily assist in any way in third party claims against Sysco. With respect to the STAA claim that was pending before OSHA, Paragraph 19 provided:

> 19. Mr. Harrell agrees, in accordance with Paragraph 5, above, that he will not pursue any Claims which may be presently pending or could in the future be asserted against the Company and will take all reasonable and appropriate steps to effectuate any dismissal, abandonment or relinquishment of such claims and that he will neither preserve nor pursue any Claims now or in the future.

However, this provision was never approved by OSHA or anyone else at the Department of Labor.[4] In the associated Agreement of Final Compromise and Settlement dated the same date and filed with the Workers' Compensation Commission for the State of Maryland, Complainant received $149,999 in a lump sum, in addition to $8,000 previously paid, for injuries of 8/3/92, 8/10/92, 12/1/92, 6/4/97, 6/30/99 and 8/30/00.

The first STAA complaint was actually filed under section 11(c) of the Occupational Safety and Health Act (prohibiting an employer from undertaking discriminatory action against an employee who filed a complaint alleging health and/or safety violations), and was deemed a complaint under the STAA pursuant to 29 C.F.R. §1978.102(e). OSHA found the first STAA complaint to be meritorious on or about January 16, 2002, and Respondent Sysco appealed to the Office of Administrative Law Judges on February 14, 2002. As the claim was found to have merit, the Assistant Secretary of Labor was the prosecuting party.

Thereafter, the parties reached a global settlement agreement, which included the dismissal of the first STAA claim, and counsel for the Assistant Secretary submitted on June 26, 2002 the "Stipulation of Settlement and Consent Order" for approval by the undersigned pursuant to 29 C.F.R. §1978.111(d)(2).[5] The proposed settlement related to all five

[4] To the extent that provisions in settlements of federal whistleblower cases seek to bar future claims, they are void as against public policy unless construed as relating solely to the right to sue in the future on claims or causes of action arising out of facts occurring before the date of the agreement. *See generally McCoy v. Utah Power*, 1994-CAA-0001 (Sec'y. Aug. 1, 1994).

[5] When the first STAA case was initially filed, Complainant indicated that he wished to withdraw his claim because of a settlement he had reached in a state worker's compensation case (and an associated settlement reached in the U.S. District Court for the District of Maryland, L-00-CV-2098, L-00-CV-3225), and the Assistant Secretary moved for withdrawal of findings relating to him and his dismissal on the same basis. However, my May 20, 2002 "Order Amending Case Caption, Denying Respondent's Motion for Summary Decision and to Dismiss, and Canceling

complainants, including Complainant Harrell. It expunged disciplinary points and warning letters from the personnel records of the complainants, nullified a one-day suspension of one complainant, and, in an attached Exhibit A, modified Sysco's attendance policy for impaired drivers. Complainant did not receive any benefit under the terms of the proposed settlement apart from dismissal of the action.

Complainant submitted a letter dated June 4, 2002 expressing concerns about signing the settlement agreement because Sysco allegedly had filed suit against him in Howard County Circuit Court. The letter stated, in part:

> She [Ms. Mullen- counsel for Assistant Secretary] is aware of Sysco has filed a lawsuit against me in February 2002, because of DOL finding Merit in our complaint. They have filed a no cause lawsuit against me. This is because I filed against their unlawful practice concerning DOL, OSHA and STAA safety rules [.]

After Complainant filed the June 4, 2002 letter in the first case (which became the complaint in the second case), I requested the parties to submit the court filings from the Maryland State case for my review in order to ensure the fairness of the proposed settlement agreement. The court records revealed that Respondent filed a complaint on January 31, 2002 in the Circuit Court of Howard County alleging the following three breaches of contract claims:[6]

1. Defendant disparaged the Company in material breach of the obligation imposed by Paragraph 7 of the Settlement Agreement and General Release.
2. Defendant voluntarily aided and voluntarily assisted third party claims against Company in breach of Paragraph 16 of the Settlement Agreement and General Release.
3. Defendant failed to take reasonable and appropriate steps to effectuate a dismissal, abandonment an/or relinquishment of a claim released under Paragraph 5 in material breach of the obligation imposed under Paragraph 19 of the Settlement Agreement and General Release

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Out of concerns as to the fairness and reasonableness of the settlement due to the alleged pending action, a conference was held on August 14, 2002.

At the conference, counsel for the Assistant Secretary (Ms. McMullen and Mr. White), counsel for Mr. Harrell (Mr. Ware), and Sysco's counsel (Mr. Mazurek) were in attendance, and the parties discussed the merits of the settlement and other relevant issues. I agreed to approve the proposed settlement contingent upon the Respondent Sysco advising the Howard County Circuit Court that the "portion of the pending case [relating to the STAA claim] was withdrawn."

Hearing," advised the parties that the case would be dismissed if stipulated to by all parties, under Fed. R. Civ. P. 41(a)(1)(ii). Further consideration of this matter became unnecessary in view of the proposed settlement.

[6] The outcome of the civil action, which is discussed in more detail below, was as follows: The Circuit Court held that the $185,000 damages provision was an unenforceable liquidated damages provision and awarded Respondent $1.00 in actual damages. *Smelkinson Sysco, et al v. Harrell,* 13-C-02-50866 CN (Howard Co. Cir. Court, June 10, 2003). However, the Court of Special Appeals reversed the Circuit Court's decision and remanded for entry of damage award consistent with the July 2, 2001 Settlement. *Smelkinson Sysco v. Harrell,* No. 2644 (Md. Ct. Spec. App., June 2, 2005).

On September 26, 2002, Respondent submitted a copy of a letter addressed to Complainant's attorney dated September 24, 2002, which stated that "contingent upon the dismissal of the STAA action, any claim for breach of contract against your client [Complainant] as a result of his participation in and failure to take steps to effectuate a dismissal of the STAA action, will be waived by my client [Respondent]." The letter further stated that a copy was being sent to the Circuit Court for inclusion in the Court file. Upon receipt of the letter, I issued a Decision and Order Approving Settlement and Dismissing Complaint on September 30, 2002, which stated that the proposed settlement was fair and that my concerns as to the pending Howard County action against Mr. Harrell have been satisfied. Thereafter, I issued a letter, in response to the Complainant and the Assistant Secretary's objections, dated October 9, 2002, stating that my concerns as to the pending action were adequately addressed by the letter filed by Sysco's counsel with the Howard County Circuit Court.[7]

Complainant later personally submitted a letter dated October 21, 2002 stating his dissatisfaction with the letter submitted by Respondent Sysco and expressing concerns about the terms of the settlement agreement. The letter stated that the "Consent Order Approving Settlement needed to be amended for [his] protection and action in the STAA, 11c case." Complainant's correspondence was treated as a Motion for Reconsideration, which was denied in the December 10, 2002 Decision and Order Denying Complainant Harrell's Reconsideration Request and Denying Respondent's Request for Sanctions.[8] In the Decision Denying Reconsideration, I stated that the proposed settlement was fair, adequate and reasonable, and my concerns regarding the pending Howard County action had been satisfied. The case was then closed.

Regarding the Maryland State action, although Respondent submitted the waiver letter to the Circuit Court of Howard County, the Court failed to acknowledge the dismissal of the STAA count in its Summary Judgment Decision. In the Memorandum and Order, the Court addressed the issue of whether Paragraph 7 of the Settlement Agreement entitled Sysco to liquidated damages in the amount of $185,000. *Smelkinson Sysco, et al v. Harrell,* 13-C-02-50866 CN (Howard Co. Cir. Court, June 10, 2003). The Court held that the $185,000 damages provision was an unenforceable liquidated damages provision (which imposed a penalty), and the parties proceeded to trial on the question of whether Respondent sustained any actual damages. *Id.* In an Order of Specific Performance, the Circuit Court further held that, as a matter of law, Complainant breached his obligations not to disparage the Company under Paragraph 7 and his duty not to voluntarily assist third party claims under Paragraph 16, and the Court ordered Complainant to specifically perform each and every obligation imposed by the contract.[9] *Id.* A trial was held on September 22, 2003, and after taking testimony and evidence regarding Respondent's alleged damages, the trial court granted Complainant's motion for judgment on the ground that Respondent failed to present sufficient evidence to support damages and refused to

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[7] Complainant's attorney and counsel for the Assistant Secretary's Office objected to validity of Respondent's letter filed with the Howard County Circuit Court. Although Complainant's attorney argued that the letter was insufficient because the court operated on a motions practice, Complainant did not seek disapproval of the settlement nor, apparently, did he file a motion with the Circuit Court asking for dismissal of the STAA count.

[8] Respondent filed a request for an imposition of sanctions based upon the Complainant's "utterly frivolous" filing.

[9] The Circuit Court did not exempt the STAA count from its Order. If the court intended to order compliance with the provisions relating to the STAA claim, it is unclear where it derived the authority to do so. The July 2, 2001 Settlement was never approved by OSHA, OALJ, or the Labor Department, as noted above.

submit the case to the jury. (Tr. at 155). Judgment in the amount of $1.00 plus costs was entered in favor of Respondent. *Id.* Thereafter, the court denied Respondent's Motion to Alter or Amend Judgment or for a new trial, and Sysco filed an appeal with the Court of Special Appeals of Maryland.

The Court of Special Appeals held that the damages provision (which it did not consider to be a liquidated damages provision) was a reasonable and enforceable remedy, and the lower court's decision was vacated and the case remanded for entry of a damage award consistent with the Settlement Agreement. *Smelkinson Sysco v. Harrell,* No. 2644 (Md. Ct. Spec. App., Sept. 2003). The Court of Special Appeals, in summarizing the facts of the case, stated that Complainant and Respondent entered into a global settlement covering all pending and potential claims involving Harrell and Sysco. *Id.* at 2. The Court outlined, in footnote 2, the following litigation claims that were pending between Sysco and Harrell at the time the July 2, 2001 Settlement Agreement and General Release was executed:

> - In 2000, Harrell filed race discrimination charges with Equal Employment Opportunity Commission (EEOC), and then in the United States District Court for the District of Maryland, Case Nos. L-00-CV-2098, L-00-CV-3225.
> - On September 14, 2000 Harrell filed a complaint on behalf of himself and similarly situated employees against whom he alleges SYSCO discriminated on the basis of their participation in activities protected **under the Surface Transportation Assistance Act, 49 U.S.C. §31105**, which provides that employers may not discipline, discharge, or discriminate against employees who lodge or aid safety complaints or who refuse to operate a vehicle they reasonably consider to be unsafe. [Emphasis added].
> - Harrell had claims pending before the Workers' Compensation Commission alleging accidental injuries that occurred on 8/3/92, 8/10/92, 12/1/92, 6/4/97, 6/30/99, and 8/30/00.
>
> According to SYSCO, previous claims made by Harrell against the company were resolved in favor of SYSCO.

Id. The Court further stated that the Settlement Agreement dated July 2, 2001 was submitted to the Workers' Compensation Commission for approval and became effective upon the Commission's August 31, 2001 approval, which required Harrell to abide by covenants not to "disparage" Sysco or voluntarily assist in third party claims against the Company. *Id.* at 2-3. In turn, Sysco agreed not to challenge Harrell's unemployment compensation appeal and agreed to pay Harrell a total of $185,000. *Id.* at 3. The Court further noted, in footnote 3, that of that payment, $149,999 was allocated to the workers' compensation claims and the remaining $35,001 was allocated to Harrell's federal labor and discrimination claims.[10] *Id.* The court found that Harrell breached his promises not to disparage Sysco or assist third party claims in writing

[10] Of the $35,001 for the labor and discrimination claims, $35,000 was for attorneys fees and $1 was payable to Mr. Harrell. Of the worker's compensation award in the amount of $149,999, $123,820.42 was payable to Mr. Harrell (after credit for an advance of $8,000), $10,000 was for attorney fees, and the remainder was for legal fees and medical expenses. Arguably, a portion of the worker's compensation payments were actually paid for purposes of the labor and discrimination claims.

the letter dated December 11, 2001[11] to Mike Cutchember, and the Court of Special Appeals reasoned that the damages provision outlined in Paragraph 7, while not technically a liquidated damages provision, was both reasonable and enforceable. *Id.* at 3-4; 17. The Court held that Sysco was entitled to damages in the amount it paid Harrell to settle the case (including a return of his worker's compensation benefits and attorney fees approved separately by the worker's compensation commission). *Id.* at 17.

DISCUSSION

Summary Judgment Standard

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at Title 29 C.F.R. Part 18, provide that an administrative law judge "may enter summary judgment for either party if 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." 29 C.F.R. §18.40(d); *see also* Fed. R. Civ. P. 56 (c).[12] Summary judgment is appropriate when the record "shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R.Civ.P. 56(c). When applying this standard, the evidence and reasonable inferences therefrom are considered in the light most favorable to the non-moving party. *E.g., Kendrick v. Penske Transportation Services, Inc.*, 220 F. 3d 1220 (10th Cir. 2000).

The party who files a motion for summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, (1986). This burden may be met by showing that there is an absence of evidence to support the nonmoving party's case. *See Id*. Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

STAA Standard

The employee protection provisions of the STAA, 49 U.S.C. §31105, prohibit discriminatory treatment of employees who have engaged in certain activities related to commercial motor vehicle safety. Under 49 U.S.C. §31105 (a)(1)(A), an employee is engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order.

To prevail in a whistleblower case under the STAA, complainant must establish the following: (1) that he was employed by an employer covered by the STAA; (2) that he engaged

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[11] Although the Court stated that the letter was written on December 11, 2001, that makes no sense as it references a "12/14/01" [December 14, 2001] conversation. (*Id.* at 3-4)

[12] Title 29 C.F.R. §18.1(a) provides that the Rules of Civil Procedure for District Courts of the United States shall be applied "in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation."

in protected activity during the course of that employment; (3) that the employer was aware of his involvement in the protected activity; (4) that he was subjected to adverse employment action; (5) and that there is a nexus between the protected activity and the adverse employment action. *Byrd v. Consolidated Motor Freight,* ARB No. 98-064, ALJ No. 1997-STA-9 at 4-5 (ARB May 5, 1998).

A complainant may establish unlawful discrimination in either of two ways: (1) directly and (2) inferentially. *See Wright v. Southland Corp.,* 187 F.3d 1287, 1293 (11th Cir. 1999).

First, relying on the traditional approach, the complainant may show, through direct evidence, that more likely than not, the respondent engaged in unlawful discrimination. *Id.* For purposes of employment discrimination, direct evidence may be defined as "evidence from which a reasonable trier of fact could find, more probably than not, a casual link between an adverse employment action and a protected [activity]." *Id.* The respondent may avoid liability by asserting an affirmative defense if it can provide evidence of a legitimate purpose for engaging in such discrimination. The burden of proof then shifts, placing the onus on the respondent to show, by a preponderance of the evidence, that it would have taken the same action, in the absence of discrimination. *See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

If a factfinder determines that the employer was motivated by both prohibited and legitimate reasons, it is a "dual" or "mixed motives" case. *Talbert v. Washington Public Power Supply Systems*, ARB No. 96-23, ALJ No. 1993-ERA-35 (ARB Sept. 27, 1996). In such a case, the employer "has the burden of proof or persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct" in order to avoid liability. *Id.; see also Wignall v. Golden State Carriers, Inc.,* 1995-STA-7 (ALJ May 12, 1995) slip op. at 5, *aff'd as modified* (Sec'y July 12, 1995); *Dartey v. Zack Co.*, 1980-ERA-2 (Sec'y April 25, 1983). A mere showing that the employee was "in part" discharged for a legitimate reason does not meet the employer's burden of proof. *Davis v. H.R. Hill, Inc.,* 1986-STA-18 (Sec'y March 19, 1987).

Secondly, since directly proving discriminatory intent may be difficult, the U.S. Supreme Court developed a second approach that enables a complainant to present a rebuttable presumption of illegal discrimination through circumstantial evidence. *See Wright*, 187 F.3d at 1290, *citing McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The ARB has applied this approach in STAA cases, and in *Byrd*, *supra*, the ARB summarized the burdens of proof and production applicable to this type of case (citations omitted):

> A complainant initially may show that a protected activity likely motivated the adverse action. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of a retaliatory motive. A respondent may rebut this *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then

prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action.

Byrd v. Consolidated Motor Freight, ARB No. 98-064, ALJ No. 1997-STA-9 at 4-5 (ARB May 5, 1998). When the nexus between the protected activity and the adverse employment action is established inferentially in this way, temporal proximity may be sufficient to raise the inference that a respondent's adverse actions were taken in retaliation for a complainant's protected activities. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *see also Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389 (8th Cir. 1995).

Once a complainant successfully raises the presumption of discrimination, then the respondent may produce evidence that the action was motivated by a legitimate nondiscriminatory reason. If a respondent is able to meet this burden, then the burden shifts back to the complainant once again to show that the proffered reason for discrimination was not the true reason for the adverse action. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). This concept is referred to as the "pretext" analysis. *Id.* at 803.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the United States Supreme Court explained the "pretext" phase of the analysis as introduced in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993). The Court first reiterated that if an employer articulated a non-discriminatory reason for the challenged adverse action, the complainant retains the ultimate burden to show the stated reason is pretext for unlawful discrimination. To meet that ultimate burden, the complainant may, but not necessarily will, prevail based on the combination of a *prima facie* case and sufficient evidence to demonstrate the asserted justification is false. If the justification is determined to be false, the trier of fact may conclude the employer engaged in unlawful discrimination. *Reeves*, 530 U.S. at 140.

Status as Employee and Employer

The first element of an STAA action that a complainant must prove -- the employee/employer relationship -- is disputed in this case. Employer argues that the Secretary, in her preliminary findings, correctly concluded that there was no basis to the instant complaint because the Complainant was not an employee of Sysco at the time of the alleged retaliatory act. *Respondent's Motion* at 5.[13] OSHA's findings stated that Complainant resigned as an employee of Respondent on July 2, 2001[14] and was not an employee on June 4, 2002 (date of the instant complaint) within the meaning of 49 U.S.C. §31101. Therefore, I will address the issue of whether the protection afforded under the STAA extends to former employees.

The definition of "employee" in the STAA, 49 U.S.C. §31101, provides:

2) ``employee'' means a driver of a commercial motor vehicle

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[13] Respondent's Motion for Summary Judgment will be referred to as "Respondent's Motion" followed by the page number, and likewise Complainant's Opposition to Respondent's Motion is referenced as "Complainant's Brief" followed by the page number.

[14] OSHA further stated that Complainant agreed to terminate his employment with Respondent and not seek reemployment in the future under the terms of the settlement agreement executed July 2, 2001.

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

Under 29 C.F.R. § 1978.101(d), "Employee" is similarly defined to include drivers, mechanics, freight handlers, and other individuals (not including employers or government employees) who are employed by commercial motor carriers and directly affect commercial motor vehicle safety in the course of their employment. The statute and regulation do not address the issue of whether former employees are covered by these definitions.

In *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997), the United States Supreme Court held that the term "employees" in Title VII includes *former* employees. The Supreme Court stated that interpreting "employee" to include former employees within the broader context provided by other Title VII sections is more consistent with the primary purpose of maintaining unfettered access to Title VII's remedial mechanisms. *Id.* at 341. The Court noted that several sections of the statute plainly contemplate that former employees will make use of the Title VII's remedial mechanisms, because the provisions apply to discharged [former] employees. *Id.* at 342. Thus, a former employee may sue a former employer for alleged retaliatory actions. *Id. See also Rutherford v. American Bank of Commerce,* 565 F.2d 1162 (10th Cir. 1977).

I find that the Supreme Court's holding in *Robinson v. Shell Oil Co.* is applicable in defining the meaning of "employee" under the STAA. Initially, I note that the Title VII case law serves as a framework in whistleblower cases. As in Title VII cases, the purpose of the STAA is remedial in nature. While title VII prohibits the termination of employees for discriminatory reasons, the STAA prohibits the termination of the employees engaged in protected activity, and thus former employees who were unlawfully terminated would bring the claims under both statutory schemes. Moreover, the STAA was enacted to encourage employee reporting of noncompliance with safety regulations and to protect such employees against retaliation for reporting such violations. *See Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 228 (6th Cir. 1987). Thus, the application of STAA to former employees to protect against post employment discrimination is of especial importance.

Moreover, the facts in *Robinson* are analogous to those in the instant case. In *Robinson,* respondent fired petitioner in 1991. 519 U.S. 337 at 339. Shortly thereafter, petitioner filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that respondent had discharged him because of his race. *Id.* While that charge was pending, petitioner applied for a job with another company, and petitioner claims that respondent gave him a negative reference in retaliation for his having filed the EEOC charge. *Id.* Petitioner subsequently sued under §704(a) alleging retaliatory discrimination. *Id.* at 340. The facts in this case are analogous, in that post employment retaliation for protected activity is alleged. Here, Complainant alleges that Respondent filed a civil action in retaliation for his failure to dismiss

the first STAA complaint. If former employers are allowed to engage in post employment retaliation, then the protection afforded under the Act would be of no effect. Therefore, I find that former employees are covered under the STAA.

Additionally, *Earwood v. Dart Container Corp.,* 1993-STA-0016 (Sec'y Dec. 7, 1994) involved a second complaint filed by an employee who had settled the first case, following termination of his employment in 1987. In 1992, he applied for work with other employers and was denied employment based upon an adverse reference he received from his former employer. He therefore brought the second complaint based upon allegations of blacklisting. Administrative Law Judge Julius Johnson rejected the former employer's challenge to the application of the STAA because no present employer-employee relationship existed between the complainant and his former employer at the time the complaint was filed. 1993-STA-16 at *4 (ALJ Sept. 12, 1994). Judge Johnson also found that the second claim was not barred by the settlement of the first, but he ultimately denied benefits. *Id.* Although finding actionable discrimination, the Secretary of Labor agreed that the STAA prohibited blacklisting and went on to hold that effective enforcement of the STAA required a prophylactic rule prohibiting improper references to an employee's protected activity regardless of whether there were any demonstrable damages. *Earwood v. Dart Container Corp.,* 1993-STA-0016 (Sec'y Dec. 7, 1994). Therefore, the complaint against the former employer was upheld. *Id.*

Whistleblower cases brought under other statutes have also allowed former employees to bring employee protection actions as long as the alleged discrimination is related to or arises out of the employment relationship. *See, e.g., Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003 (ARB Jan. 30, 2004); *Delcore v. Northeast Utilities,* 1990-ERA-0037 (Sec'y May 14, 1995). Here, there is no question that the treatment complained of (the lawsuit brought against Complainant) arose out of the employment relationship (and the settlement pursuant to which that employment was terminated), although it is disputed by the Respondent that it is related to the Complainant's STAA claim.

Protected Activity

It is undisputed that Complainant was engaged in protected activity during his employment. Under 49 U.S.C. §31105 (a)(1)(A), an employee is engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. Thus, the initial STAA complaint filed by Complainant on September 14, 2000 constitutes protected activity satisfying this element of the Complainant's case.

Notice of Protected Activity

The complaint filed on September 14, 2000 provided Respondent with notice of the protected activity, because OSHA informed the Respondent of the alleged violation during their investigation. Thus, this element has also been satisfied.

Adverse Employment Action

Respondent did not specifically dispute the "adverse employment action" element of the Complainant's case in its Motion, although it (considered along with Complainant's status as a former employee) was one of the bases upon which OSHA denied the claim. Adverse employment action is defined as discharge, discipline, or discrimination against an employee regarding pay, terms, or privileges of employment. 49 U.S.C. §31105 (a)(1). To be actionable, the Administrative Review Board has held that the alleged adverse employment action must involve a tangible job detriment (such as dismissal, failure to hire, or demotion) or it may take the form of harassment that is sufficiently pervasive as to alter the conditions of employment and create an abusive or hostile work environment. *Berkman v. U.S. Coast Guard Academy,* ARB No. 98-056, ALJ No. 1997-CAA-2 (ARB Feb. 29, 2000). *See also Martin v. Dept. of Army,* ARB No. 96-131, ALJ No. 1993-SDW-1 (ARB July 30, 1999). "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth***,** 524 U.S. 742, 760-61 (1998) (Title VII case defining standard without adopting it).

Respondent's filing of, and pursuance of, a civil action to recover the settlement amount may constitute adverse employment action, because the $185,000 settlement amount was paid to settle employment disputes and pay worker's compensation claims. As the settlement amount was paid in exchange for Respondent's agreement to sever the employment relationship, any attempt to recover the amounts paid is related to the terms and/or pay of employment. Similarly, any attempt to recover worker's compensation payments made would relate to injuries sustained during the course of employment and therefore would also relate to the terms and conditions of employment. Further, Respondent's attempt to recover the settlement proceeds may be actionable as post employment retaliation for protected activity, provided that the causal nexus can be shown. *See generally, e.g., Earwoo*d*, supra* (post-termination blacklisting was considered an adverse action under the STAA). *See also Robinson, supra (*post employment retaliation for protected activity is actionable under title VII)*; Michaud v. BSP Transport, Inc.,* ARB No. 97-113, ALJ No. 1995-STA-0029 (ARB Oct. 9, 1997) (compensatory damages in STAA whistleblower action include post-discharge damages that were proximately caused by employer's discriminatory actions).

Construing the facts and inferences in favor of the Complainant, the civil action filed by Respondent would constitute adverse action under the Act. Thus, I find that there is a factual issue as to whether adverse action was taken against Complainant when the civil action to recover the settlement amount was filed and pursued.

Causal Relationship between Protected Activity and Adverse Action

Respondent disputes that Complainant can establish a causal relationship between the protected activity and the adverse employment action. In this regard, Complainant argues that the civil action was in retaliation for his previously-filed complaint with the Secretary of Labor (i.e., the first STAA complaint). *Complainant's Brief* at 2. In response, Respondent argues,

first, that the lawsuit brought by Sysco Baltimore was filed based upon a breach of agreement and "had nothing whatsoever to do with the STAA or Complainant's earlier STAA complaint," as reflected by the stipulation filed in court, and second, that "Complainant can point to no evidence whatsoever from which a reasonable factfinder could rationally infer that Sysco Baltimore's articulated business reason for maintaining a lawsuit against him was pretextual." *Respondent's Brief* at 5 to 7. A factual dispute concerning this element of the case is presented through the assertions of the parties, making this matter unripe for summary disposition.

At the outset, I note that the temporal proximity between OSHA's meritorious findings in the prior case and the filing of the civil action may give rise to an inference of causation. As a general rule, temporal proximity is sufficient to raise the inference that a respondent's adverse actions were taken in retaliation for a complainant's protected activities. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *see also Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389 (8th Cir. 1995). Here, Complainant alleged in his June 4, 2002 complaint letter that "Sysco has filed a lawsuit against me in February 2002, because of DOL finding Merit in our complaint." The parties entered into a settlement agreement on July 2, 2001 to resolve all pending claims, including the STAA complaint.[15] However, the STAA complaint was not withdrawn, and on January 17, 2002, OSHA issued meritorious findings. Shortly thereafter, on January 31, 2002 Respondent filed a civil action against Complainant alleging breach of the July 2, 2001 Settlement based, in part, on Complainant's failure to withdraw a pending claim.[16] A period of fourteen days separates OSHA's findings and the filing of the civil action in Maryland State court, and such temporal proximity may be sufficient to raise an inference of a causal relationship between the two events. In weighing all evidence in the light most favorable to the non-movant, I find that there is a genuine material issue of fact regarding the nexus between the protected activity and the adverse action. Thus, Respondent's Motion for Summary Decision must be denied.

Turning to Respondent's argument that it is entitled to summary decision even if Complainant can establish a causal connection between the protected activity and the adverse employment action, because Respondent had a legitimate business reason for filing the civil action, I also find material factual issues. *Respondent's Brief* at 6. Respondent stated that the lawsuit for breach of the agreement had nothing to do with the STAA complaint, and Sysco made no mention of the STAA complaint in its lawsuit.[17] *Id.* Moreover, Respondent stated that it stipulated to the undersigned administrative law judge that such civil action was unrelated to the STAA action.[18] *Id.* Complainant has disputed Respondent's assertions and, as discussed below, the court documents also call into question Respondent's position. These assertions therefore amount to disputed material issues of fact.

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[15] However, the July 2, 2001 Settlement was not approved by the undersigned or anyone else at the Department of Labor and is unenforceable pursuant to the STAA. The STAA settlement of September 30, 2002 did not incorporate or approve the July 2, 2001 Settlement.

[16] The third cause of action in the January 31, 2002 complaint stated that "Defendant failed to take reasonable and appropriate steps to effectuate a dismissal, abandonment and/or relinquishment of a claim." The only claim that has been identified as falling within the purview of this cause of action is the STAA complaint.

[17] However, see footnote 16 above.

[18] Respondent's agreement to waive a potential claim is not evidence that the claim was unrelated to the STAA. Moreover, Respondent's own correspondence of September 24, 2002 waiving the claim (discussed above) did not go so far as to state that the claim did not fall within the purview of the original complaint.

Even assuming that Respondent has sufficiently articulated a legitimate business reason for the civil action in its Motion, the analysis does not end there. If an employer articulates a legitimate business reason for the adverse action, then the complainant may prevail by establishing that the stated reason is pretext for unlawful discrimination. *Reeves*, 530 U.S. at 140. Here, Complainant stated that he can adduce evidence that would render Sysco's articulated legitimate business reason a pretext. *Complainant's Brief* at 6. Therefore, a factual issue concerning pretext is present and must be adjudicated at the hearing.

Furthermore, the facts asserted by Respondent do not preclude the question of "dual motive" in this case. Under a "dual motive" analysis, a complainant may prove, by a preponderance of the evidence, that a respondent took adverse action for both prohibited and legitimate reasons. *Shannon v. Consolidated Freightways,* ARB No. 98-051, ALJ No. 1996-STA-15 (ARB April 15, 1998) *aff'd.* 181 F.2d 103 (6th Cir.) (table) (unpub.), *cert. den.* 528 U.S. 1019 (1999). For example, a respondent may admit, or direct evidence may establish, that the protected activity provided part of the motive for the adverse action. *Id.* In that event, the burden of persuasion shifts to the respondent to demonstrate that the complainant would have been disciplined (or the other adverse action would have been taken) even if the complainant had not engaged in the protected activity. *Id., citing Pogue v. U.S. Dep't of Labor,* 940 F.2d 1287, 1289-90 (9th Cir. 1991). In such cases, a respondent bears the risk that the influence of legal and illegal motives cannot be separated. Therefore, a dual motive may be proven by Complainant despite Respondent's alleged showing of a legitimate business reason for the adverse action.

Although Respondent argues that the STAA action was not part of the suit, serious questions, potentially impacting a dual motive analysis, arise on that issue from the court documents, as summarized above.

First, as noted above, the complaint itself references a cause of action based upon Complainant's failure "to take reasonable and appropriate steps to effectuate a dismissal, abandonment and/or relinquishment of a claim" and Respondent has not identified a complaint other that the STAA complaint to which that cause of action refers.

Second, neither the Circuit Court nor the Court of Special Appeals acknowledged Respondent's waiver of the potential STAA claim in their respective decisions, and the Respondent's award of damages was not reduced to reflect that a portion of the claim was in fact withdrawn.[19] Although the Court of Special Appeals specifically stated that Respondent Sysco was entitled to damages "in the amount it paid to settle the case," that amount was not reduced to reflect that Respondent was not seeking damages relating to the STAA claim. At the very least, the Court of Specials Appeals should have addressed this factor during their consideration in calculating the damages.

Third, Respondent's request for specific performance of the entire agreement was, in my view, in violation of the September 30, 2002 Order. Respondent's waiver should have limited its ability to enforce the entire agreement, because the right to enforce Paragraphs 5 and 19 of the

[19] In footnote 3 of the Court of Special Appeals decision, the Court noted that $35,001 of the settlement amount was allocated for federal labor and discrimination claims.

agreement relating to the STAA claims was extinguished. Nonetheless, the Order of Specific Performance issued by the Circuit Court on June 10, 2003 stated that "Defendant [shall] specifically perform each and every obligation imposed upon him by the said contract…", which demonstrates that the Court did not take into account Respondent's waiver of rights to enforce Paragraphs 5 and 19 of the agreement as to the STAA claim.

In view of the above, I find that material factual issues remain concerning the extent to which the STAA claim was a part of or motivation for the Howard County suit. In so stating, I recognize that the Court of Special Appeals chronicled a number of other matters that could have provided an independent basis for the Howard County suit, including Complainant's assistance of others in filing race discrimination claims against Sysco and his disparagement of Sysco when discussing the work situation with other employees, and that any hostility Sysco might harbor toward Complainant could well have arisen from the other litigation which Complainant had pursued against Sysco in the past. However, these matters are factual issues that will require a trial on the merits.

In summary, if Complainant Harrell is able to prove directly or circumstantially, through a preponderance of the evidence, that Respondent maintained the civil action in Howard Circuit Court in whole or in part because Complainant failed to withdraw the September 14, 2000 STAA complaint, then the burden will shift to Respondent to prove that the civil action was filed for a legitimate business reason and was pursued after settlement of the first STAA complaint on an independent basis. To prevail, Complainant must then prove that Respondent's articulated reason was not in fact the reason the civil action was pursued but merely a pretext. Alternately, Complainant may prove that there were both legitimate and actionable motives for the civil action, in which case the burden shifts to Respondent to establish that it would have taken the same action absent the actionable motives. Based upon the record before me, I am unable to resolve these material factual issues.

ORDER

IT IS ORDERED that the Respondent's Motion for Summary Decision be, and hereby is **DENIED**.

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.