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Issue Date: 29 November 2007

CASE NO.: 2003-STA-00050
(Former Related Case: 2002-STA-00023)

In the Matter of:

JAMES HARRELL,
Complainant,

v.

SYSCO FOODS OF BALTIMORE,
Respondent

Appearances:

George A. Rose, Esq., Rose Law Firm, LLC, Baltimore, MD
For Complainant

Edward S. Mazurek, Esq., Morgan, Lewis & Bockius, LLP, Philadelphia, PA
For Respondent

Before: PAMELA LAKES WOOD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

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.[1] 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.

[1] The STAA was amended by Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007) to expand its applicability and remedies.

This case arises out of the second of two STAA complaints filed by the Complainant Harrell ("Complainant").[2] 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")[3] on behalf of himself and other similarly situated employees.[4] While the first complaint was still pending before the Occupational Safety and Health Administration ("OSHA"), Complainant entered into a July 2, 2001 settlement agreement with Respondent in a state workers' compensation case and an associated settlement in a federal district court case, pursuant to which he resigned from his employment.[5] 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, and Complainant filed objections and requested a hearing on September 10, 2003. Thereafter, additional proceedings (summarized below) took place, which provide part of the factual predicate for this case.

Following denial of Respondent's motion for summary decision, a hearing was held in this matter on June 29, 2006. The parties were represented by counsel and were given an opportunity to present evidence and arguments. Respondent's Post-Hearing Brief was filed on January 4, 2007 and Complainant's Post-Hearing Brief was filed on January 9, 2007. The case is now ready for decision.

SUMMARY OF PROCEEDINGS AND RECORD

As noted above, this action arises from Complainant's letter complaint dated June 4, 2002. 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.

[2] 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.

[3] 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. As used herein, "Respondent" or "Sysco" refers to both entities, as well as to "Smelkinson Sysco." In this regard, Sysco's counsel in the Howard County matter, Mr. Skomba, testified that Smelkinson Sysco was the same company as Sysco. (Tr. 119-20).

[4] The other employees involved in the first STAA action were David May, Robert Linkenhoker, Rodney Moore, and John Womack. The all appeared at the hearing before me.

[5] The July 2, 2001 Settlement (discussed below) was not submitted to OSHA for approval and has not been approved by OSHA, the Office of Administrative Law Judges, or anyone else from the Department of Labor.

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

On September 24, 2003, the undersigned issued a Notice of Assignment and Hearing. A hearing scheduled for October 7, 2003 was continued because Complainant was unrepresented by counsel.[6] An Order Staying Proceedings, issued on October 7, 2003, advised the parties of the undersigned's 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 concerning the status of the Howard County case.

On February 13, 2004, a Supplemental Notice of Hearing was issued, and Respondent filed a March 18, 2004 letter inquiring whether the hearing would be rescheduled due to the pending appeal of the Howard County (Maryland) Circuit Court decision. In response, the undersigned 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, on April 5, 2004, Respondent filed a Motion to Recuse Administrative Law Judge 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 that matter was pending, Complainant forwarded a copy of a decision by the Court of Special Appeals of Maryland, dated June 2, 2005, discussed below.

In an Order of November 3, 2005, Respondent's Motion for Summary Decision was denied. That Order is quoted from herein as appropriate. Essentially, the Order provided that Complainant's status as a former employee did not preclude him from filing this action, as the acts complained of arose out of the employment relationship; that Complainant was engaged in protected activity based upon his involvement in the initial STAA action; that Sysco had notice of the protected activity; that there was a factual issue as to whether an adverse employment action was taken against Complainant; and that there were material factual issues concerning the nexus between the protected activity and the adverse action, whether there was a legitimate business reason for the adverse action, whether the asserted basis for the adverse action was a pretext, and whether the adverse action was based upon both prohibited and legitimate activities ("mixed motive.")

After having been duly noticed, a hearing was held before the undersigned administrative law judge on June 29, 2006, in Washington, D.C.[7] At the hearing, Complainant's Exhibits 1, 2,

[6] A copy of the Transcript of the October 7, 2003 proceeding appears as Complainant's Exhibit 22.

[7] References to the transcript of the June 29, 2006 hearing appear as "Tr." followed by the page number. Complainant's Exhibits will be referenced as "CX" followed by the exhibit number and Respondent's Exhibits will be referenced as "RX" followed by the exhibit number.

3, 7, 8, 9, 10A, 10B, 11, 15, 16, 19, 20, 22, and 23 and Respondent's Exhibits 8, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 28 were admitted into evidence.[8] Testimony was provided by James E. Harrell (Complainant), David A. Skomba (Sysco's attorney in the Howard County case), Charles J. Ware (Complainant's attorney in the Howard County case), Robert M. Linkenhoker, Jr. (former Sysco truck driver and a complainant in the first STAA case), John B. Womack, Jr. (former Sysco truck driver and a complainant in the first STAA case), and Rodney M. Moore (Sysco truck driver and a complainant in the first STAA case). At the conclusion of the proceedings, the parties verified that they had rested; however, the record was kept open for thirty days following receipt of the transcript for three purposes. (Tr. 271-72). First, Respondent's Exhibit 29, the original letter from Complainant identified at the hearing, was provisionally admitted and was to be submitted post hearing, at my request. (Tr. 206, 265). Second, as CX 18 was excluded based on foundational/authenticity and hearsay objections, certified copies of the medical records contained therein were to be submitted. (Tr. 266). Third, documentation concerning Complainant's legal fees and expenses was to be submitted. (Tr. 270-71). Simultaneous briefs were to be submitted thirty days thereafter, with any responses to be filed within thirty days. These periods were subsequently extended.

As noted above, Respondent's Post-Hearing Brief was filed on January 4, 2007 and Complainant's Post-Hearing Brief was filed on January 9, 2007. No responses were filed.

Along with his post-hearing brief, Complainant submitted CX 18A, consisting of supplemental records relating to medical treatment and attorney fees.[9] At the hearing, I had asked that certified copies be provided, even though uncertified medical records are admissible under 29 C.F.R. §18.803(a) (hearsay) and §18.902 (self authentication).[10] Although these copies are supported by a certification, I would note that the original certified copies have not been included and a couple of the pages (relating to laboratory test results) are too light to be legible. Further, apart from an invoice for the records, the exhibit encompasses medical records and does not relate to attorney fees or expenses.[11]

Under cover letter of March 26, 2007 (and by facsimile), Respondent submitted the actual letter referenced and quoted in the decision of the Court of Special Appeals of Maryland (RX 26 at page 4 to 5), and that exhibit has been marked as RX 29. It is accepted as timely as a housekeeping matter.

In view of the above, CX 18A and RX 29 are now ADMITTED and the record is CLOSED. **SO ORDERED.**

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[8] Although not reflected on the transcript summary page, CX 19, setting forth attorney fees paid by Complainant (to which Respondent subsequently stipulated) was formally admitted. (Tr. 77-78, 206-07). CX 18, a medical record, was not. (Tr. 79-81).

[9] Although in his brief, Complainant refers to these records as "CX 18-b," they have been marked as "CX 18-A."

[10] The Office of Administrative Law Judges Rules of Practice and Procedure in 20 C.F.R., Part 18 are applicable to STAA claims under 29 C.F.R. §1978.106(a).

[11] In view of the stipulation to CX 19 and CX 20 by Respondent, the actual receipts are unnecessary to the extent that the charges are already included in those exhibits. (Tr. 206-07, 220-21).

The findings of fact and conclusions of law which follow are based upon my analysis of the entire record, including all evidence admitted and arguments made. Where pertinent, I have made credibility determinations concerning the evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROCEDURAL AND FACTUAL BACKGROUND

Complainant's Employment and July 2, 2001 Settlement

Complainant James Harrell ("Complainant") was employed by Respondent Sysco ("Sysco") as a commercial truck driver from May 1989 until July 2001.[12] (Tr. 27-28; CX 2). During the course of his employment, he filed various claims against Respondent in both state and federal courts, including a safety claim under OSHA (i.e., the first STAA complaint), an NLRB claim, employment discrimination charges, and various workers' compensation claims. (Tr. 28-30).

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.[13] (Tr. 32-36; CX 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 workers' compensation claims) "from the beginning of time to the present," and under Paragraphs 6 and 10, a contemporaneous settlement of the workers' 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 workers' compensation benefits;[14] (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. (CX 2). The agreement included a severability provision in Paragraph 12. (CX 2). With respect to the STAA claim that was pending before OSHA, Paragraph 19 provided:

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[12] Although the transcript reflects Complainant's testimony that he worked until "July 1, '02," he later indicated that the employment relationship ended in July 2001 (Tr. 27-28) and other records (e.g., the July 2, 2001 settlement agreement) establish the termination date as July 2, 2001. (CX 2).

[13] The July 2, 2001 Settlement, which Complainant signed on August 9, 2001, related to a case brought in the U.S. District Court for the District of Maryland, under Civil Action Nos. L-00-CV-2098, L-00-CV-3225. (CX 2). The associated Workers' Compensation Case before the Workers' Compensation Commission for the State of Maryland, which was also dated July 2, 2001, related to Claim Nos. B278385, B278386, B270013, B271314, B413351, B470951, and B512102; it was filed with the Workers' Compensation Commission on August 10, 2001 and was approved as modified on August 31, 2001. (CX 3).

[14] Apart from general "breach of contract" remedies, there was no stipulation as to damages payable by Sysco in the event of a breach by Sysco.

> 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. [Emphasis added.]

(CX 2). However, this provision was never approved by OSHA or anyone else at the Department of Labor, and to the extent that it barred future claims, it would be void as against public policy.[15] (CX 23 at 14-19, 36-37).

In the associated Agreement of Final Compromise and Settlement ("Workers' Comp. Agreement") dated the same date and filed with the Workers' Compensation Commission for the State of Maryland on August 10, 2001, the parties agreed that Complainant would receive $149,999 in a lump sum, reduced by $8,000 previously paid, less attorney fees and expenses, for injuries of 8/3/92, 8/10/92, 12/1/92, 6/4/97, 6/30/99 and 8/30/00. (CX 3). As modified, the Workers' Comp. Agreement was approved by the Commission on August 31, 2001, and Complainant was allowed the lump sum of $124,437.42 plus fees and expenses. *Id.*

First STAA Complaint

On October 6, 2000, Complainant, on his own behalf and on behalf of five other workers, filed a complaint with OSHA ("first STAA complaint"). (RX 8, RX 12). 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). (RX 8, RX 21; *see also* Tr. 90-91). OSHA found the first STAA complaint to be meritorious on or about January 16, 2002. (RX 12). As the claim was found to have merit, the Assistant Secretary of Labor was the prosecuting party. (RX 12, 13).

When the first STAA complaint was initially referred to this tribunal, Complainant indicated (via a January 23, 2002 letter addressed to OSHA that was faxed to my former law clerk, Jamie Wolf) that he wished to withdraw his claim because of an agreement, although he did not wish to do so, and the Assistant Secretary moved for withdrawal of findings relating to him and his dismissal on the same basis. (RX 13, 14). That letter was the first time that Complainant asked OSHA to withdraw his claim. (Tr. 95). Further consideration of the withdrawal request, and of Respondent's motion for summary decision, became unnecessary because the parties reached a settlement agreement for the first STAA case relating to all parties. (RX 21).

[15] 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).

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). (RX 21). The proposed settlement related to all five complainants, including Complainant Harrell. *Id.* 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. *Id.* Respondent also agreed to stipulate to a dismissal of a case that it filed against the Secretary of Labor in the U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 01-2566.[16] (RX 21). Complainant did not receive any apparent benefit under the terms of the proposed settlement apart from dismissal of the action. Significantly, the proposed settlement did not incorporate the terms of the July 2, 2001 Settlement, which has never been approved by anyone from the Department of Labor.

What next occurred is summarized in the Decision and Order Approving Settlement and Dismissing Complaint in Case No. 2002-STA-00023, issued by the undersigned administrative law judge on September 30, 2002 (RX 21) [footnotes omitted]:

> By letter of June 4, 2002, Mr. Harrell expressed qualms about signing the settlement agreement because of a suit that had allegedly been filed against him by Sysco in February 2002 in retaliation for his filing of the complaint that gave rise to this action, and he indicated that he was represented by an attorney in that action, which was still pending.[17] Counsel for the parties had previously advised me at a telephone conference of only one related action that was currently pending, specifically the case that Sysco Corporation brought against the Secretary of Labor in the U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 01-2566. In my response to Mr. Harrell of June 5, 2002, I cautioned him about the prohibition against ex parte contacts and advised him that I could not give him legal advice and assistance and that he should consult his counsel. Thereafter, Mr. Harrell signed the agreement, and my concern that he knowingly read, understand, and sign the settlement agreement was satisfied by the execution by all parties of a single document incorporating the entire agreement between the parties. However, I still had some concerns as to the fairness and reasonableness of the settlement due to the other alleged pending action.
>
> In response to my Order of July 10, 2002, counsel for the parties submitted copies of the pleadings filed in Case No. 13-C-02-50866 in the Circuit Court for Howard County, Maryland. The parties disagreed as to whether that case was related to the instant case, so a conference was scheduled to be held before the undersigned for the purpose of discussing the current settlement.[18] At

[16] A copy of that complaint (dated May 24, 2001) was provided by facsimile of March 19, 2002 to the undersigned by counsel for the Department of Labor in connection with the previous case. Inter alia, it sought declaratory and injunctive relief in the form of compelling the Secretary of Labor to dismiss or issue written findings in pending STAA actions, including that brought by Complainant.

[17] The June 4, 2002 letter from Complainant is the complaint in this matter and is not an exhibit.

[18] The transcript of the August 14, 2002 conference appears as CX 23.

> the August 14, 2002 conference, at which representatives for the Assistant Secretary, Mr. Harrell, and Sysco attended, the merits of the settlement, the extent to which the Assistant Secretary may be deemed to represent the interests of individual Complainants, the subject matter of the Howard County case, and other issues were discussed. At the conference, the parties were able to state their positions on the issues pending before me and I was able to question counsel. Following a break, the parties proposed that Sysco agree that the case pending in Howard County did not include breach of contract due to Mr. Harrell's failure to dismiss his STAA claim. I agreed to approve of the proposed settlement if the Howard County judge were so advised and a copy of such advice were filed before me. (Transcript of Conference at pages 47 to 49). The transcript was not received until September 10, 2002, and at that time the Assistant Secretary filed a Motion for Order to Show Cause and Request for Status Hearing, because Respondent had not yet filed the agreed upon notice. However, Respondent filed with the undersigned a copy of a September 24, 2002 letter (referencing Case No. 13-C-02-050866 in the Circuit Court for Howard County) sent from its counsel to Mr. Harrell's counsel indic[a]ting that, contingent upon dismissal of this STAA action, "any claim for breach of contract against [Mr. Harrell] as a result of his participation in and failure to take steps to effectuate a dismissal of the STAA action, will be waived by [Respondent]", and the correspondence was file-stamped by the Circuit Court for Howard County.[19] Thus, Respondent has filed the agreed upon document with the Howard County Court and the Assistant Secretary's motion is now moot.

(RX 21). The settlement of the previous STAA case was therefore approved. *Id.*

Subsequently, Complainant's counsel, Mr. Ware, argued that the filing by Respondent was inadequate, and the Director's counsel, Ms. McMullen, expressed the same sentiments in a letter to Respondent. (RX 23). In response, in a letter to counsel of October 9, 2002, the undersigned stated the following:

> The conference was noticed so that I could determine whether the settlement in this action, which had been signed by all of the parties, was fair, adequate and reasonable, in view of the pending action against Complainant Harrell in Howard County Court. At no time did any party move to withdraw the settlement agreement from my consideration, seek to withdraw from participation in the settlement, or submit an amended agreement for approval. Thus, any agreement made at the time of the conference was solely made in the context of the request for my approval of the settlement. At the conference, after consultation with the other parties, Sys[c]o agreed that it would be willing to send Mr. Ware a formal letter memorializing that Sysco's claims against Complainant Harrell in the Howard County action were not based upon his filing of a complaint or participation in this STAA matter, and I indicated that I would prefer it to be handled more formally by a submission to the Court. I did not specifically require that a formal motion be filed nor did I require specific language to be included.

[19] The letter that Respondent filed with the Howard County Circuit Court appears as RX 20.

(RX 23; *see also* CX 23).

A December 10, 2002 "Decision and Order Denying Complainant Harrell's Reconsideration Request and Denying Respondent's Request for Sanctions" denied both Complainant's subsequent letter request (which was treated as a motion for reconsideration) and Respondent's motion for sanctions (based upon its assertion that the filing was frivolous). (RX 24). That decision reiterated that the proposed settlement was fair, adequate and reasonable, and that concerns regarding the pending Howard County action had been satisfied. *Id.*

In approving the settlement of the previous STAA case, I did not at any time approve of the July 2, 2001 Settlement or its terms.

Second STAA Complaint

As noted above, this action arises out of Complainant's letter complaint dated June 4, 2002, which alleged that Respondent filed a lawsuit against him in retaliation for his having "filed against their unlawful practice concerning DOL, OSHA and STAA safety rules" (i.e., the first STAA complaint). The complaint was found to lack merit by OSHA's findings set forth in a letter of August 12, 2003 from Regional Administrator Richard D. Soltan, to which Complainant filed objections on September 10, 2003. The proceedings that have been conducted in the instant case are summarized above.

Proceedings in the Maryland State Court System

The complaint filed by Sysco on January 31, 2002 in the Circuit Court of Howard County included a count based on breach of contract (¶ 11-14) and a count for specific performance (¶ 15-17), and it sought $300,000 plus interest, attorney's fees, and costs. (CX 1). It alleged the following three breaches of contract claims:

1. Defendant disparaged the Company in material breach of the obligation imposed by Paragraph 7 of the Settlement Agreement and General Release. (¶ 12).
2. Defendant voluntarily aided and voluntarily assisted third party claims against Company in breach of Paragraph 16 of the Settlement Agreement and General Release. (¶ 13).
3. Defendant failed to take reasonable and appropriate steps to effectuate a dismissal, abandonment and/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. (¶ 14).

(CX 1; Tr. 144-45). As noted above, Sysco filed a copy of a letter sent to Complainant's counsel with the Clerk of the Court, reflecting that Sysco would waive any claim for breach of contract against Complainant based upon his participation in and failure to take steps to effectuate a dismissal of the STAA action, contingent upon dismissal of the STAA action. (RX 20). Consistent with that agreement, Sysco did not pursue the third claim for breach of contract listed

above, apart from including it in a summary judgment motion, although the supporting memorandum did not mention it.[20] (CX 10A, CX 10B).

Judge Dennis M. Sweeney, who presided over the Howard County matter, issued two orders prior to trial, neither of which mentioned waiver of the STAA claim. First, in an Order of Specific Performance, dated June 6, 2003, Judge Sweeney 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 (i.e., the July 2, 2001 settlement). (RX 25). While the Order did not find a violation based upon the third claim for breach of contract, the Order did not exempt the portion of the agreement relating to the STAA claim from the specific performance requirements.[21] *Id.* Second, in a Memorandum and Order of June 10, 2003, Judge Sweeney addressed the issue of whether Paragraph 7 of the Settlement Agreement entitled Sysco to liquidated damages in the amount of $185,000. (RX 25). 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.*

A trial was held in the Howard County case before Judge Sweeney on September 22, 2003 (RX 29, Transcript). Judge Sweeney stated that, in view of his finding of violations (based upon disparagement and aiding and abetting), the only issue that remained for the jury was that of damages. *Id.* at 13, 28.

Testimony was provided by Sysco Risk Manager Linda Turkin. *Id.* at 74 to 146. She explained that the purpose for the omnibus settlement was "to buy peace" with Complainant. *Id.* at 87. However, she testified that, as a result of a grievance and EEOC charge brought against the company, Sysco became aware that Complainant was assisting third parties with claims. *Id.* at 90-91. She stated that Sysco obtained that knowledge though a letter dated December 11, 2002 that was given to it by Mr. Mike Cutchember, shop steward, during a meeting relating to Mr. Womack's grievance. *Id.* at 92-93. Additionally, she indicated that Mr. Womack had filed an EEOC claim. *Id.* at 93. Both the grievance and the EEOC claim were filed after Complainant's letter. *Id.* at 142. Ms. Turkin candidly testified that Sysco was half union and half nonunion, and that the labor contract negotiations were very contentious and subject to being stirred up by instigators. *Id.* at 101-02. When asked to allocate the amount of money expended by Sysco as a result of Complainant's disparagement and aiding and abetting, she was only able to identify one bill (for $197.50) that was directly attributable. *Id.* at 104-05, 122. On cross examination, she explained that the $197.50 was a legal fee (from Morgan Lewis) identified as the Womack Arbitration Fee. *Id.* at 122. At that point, Mr. Skomba asked to approach the bench and clarified that the action was unrelated to the STAA claim:

[20] At the hearing before me, Sysco's counsel in the Howard County case, Mr. Skomba, explained that a partner had signed the motion in his absence. (Tr. 176-186).

[21] 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. Moreover, responsibility for the enforcement of STAA settlements lies in federal district court. *See* 49 U.S.C. § 31105(e) [formerly (d)]; 29 C.F.R. §1978.113.

> MR. SKOMBA: Your Honor as counsel may recall there was collateral litigations going on in this case matter with the STA, with the OSHA, etc. It has nothing to do with this. We're not making any claims for that. We're not including the fees for that. We're not including any of that part of it in the case. We agreed that we would drop that as part of settling that case.
>
> MR. WARE: But that was what that money was for, I believe Morgan Lewis and Bockius [mistranscribed as "Bacchus"] is the same firm.
>
> MR. SKOMBA: I just want him to tread carefully because if he's going to go into the STA claim, then I'm going to want to bring up the fact that this guy had that going on at the time.

Id. at 122. At the Court's prompting, Ms. Turkin clarified that the bill for $197.50 (from 2002) was the only one she could find referencing Mr. Womack, and she identified it because she wrote "Womack" on the summary sheet. *Id.* at 124-25. She also identified expenses of $1,057.70 based upon one week of time spent by an employee on the Womack grievance, but she explained that the amount included the entire grievance, not just the portion of the grievance attributable to Mr. Harrell. *Id.* at 128. Likewise, $61.24 for shop steward Mike Cutchember's time related to the entire grievance, as did the amounts of $475 and $40 claimed for other employees. *Id.* at 130. When asked by the Court whether the total amount ($2,823.62) that Sysco identified as having been spent on the Womack grievance would have been lower if Complainant's letter were taken out of the mix, she indicated that she did not know. *Id.* at 131-32. Nevertheless, she testified that there were also intangible employee relations issues that resulted from Complainant's letter. *Id.* at 120. She admitted, however, that she had no tangible proof that it actually affected the morale of the employees or that they even knew about it. *Id.* at 136-38.

At the end of the trial, Complainant moved for judgment in the amount of $1 because no nonspeculative damages resulting from the breach of contract had been proven, and the motion was granted. *Id.* at 148-50, 153-56. Accordingly, the trial court refused to submit the case to the jury and entered judgment in the amount of $1.00 plus costs in favor of Respondent. *Id.* at 155-56. 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. (RX 26).

In an Opinion dated June 2, 2005, the Court of Special Appeals of Maryland 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 July 2, 2001 Settlement. (RX 26). 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.*. 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. Of the $185,000 payable to Complainant under both agreements, the Court noted, in footnote 3, that $149,999 was allocated to the workers' compensation claims and the remaining $35,001 was allocated to Harrell's federal labor and discrimination claims.[22] *Id.* The Court found that Complainant had breached his promises not to disparage Sysco or assist third party claims in writing the letter to Mike Cutchember dated December 11, 2001 (which the Court quoted in its entirety).[23] *Id.* In vacating Judge Sweeney's damage award, the Court of Special Appeals found that the stipulated damages provision outlined in Paragraph 7 was not technically a liquidated damages provision because it also allowed specific damages to be proven and that it was both reasonable and enforceable. *Id.* Thus, the Court remanded for entry of an award in accordance with the July 2, 2001 Settlement Agreement (i.e., return of the amount Sysco paid Complainant to settle the case, including a return of his workers' compensation benefits and attorney fees approved separately by the workers' compensation commission.) *Id.*

By Order entered on October 26, 2005, on remand from the Court of Special Appeals, Judge Sweeney, Circuit Court for Howard County, entered judgment in favor of Smelkinson Sysco and against Complainant in the amount of $187,305.50 plus interest.[24] (CX 15).

Complainant's Testimony

Complainant was 59 years old at the time of the hearing. (Tr. 25). He testified concerning the settlement negotiations relating to the July 2001 Settlement, consistent with the above discussion, except that he indicated that he believed Mr. Skomba had agreed to contact the parties to advise them that Complainant had withdrawn his claims. (Tr. 39). He testified that he

[22] At the hearing, Mr. Skomba confirmed that the settlement had been allocated in that manner. (Tr. 124-25).

[23] Although the Court stated that the letter was written on December 11, 2001, the Court also indicated that it referenced a "12/14/01" [December 14, 2001] conversation. (*Id.* at 3-4). The actual letter reflects the same discrepancy. (RX 29). None of the testimony before me (or before the Howard County trial court) clarified what were the correct dates.

[24] Mr. Skomba testified that Smelkinson Sysco was the same company as Sysco. (Tr. 119-20).

did not become aware that the OSHA claim had not been withdrawn until OSHA sent him a letter concerning the merits of the safety claim on January 17, 2002. (Tr. 44). As a result, he called Mr. Jack Rudsiki of OSHA and told him that he had agreed to drop those charges. (Tr. 44-45). At Mr. Rudsiki's suggestion, he called or wrote other people asking that his name be removed, and he spoke with Gretchen McMullen concerning the lawsuit Sysco had filed against the Assistant Secretary. (Tr. 45).[25] That led to the proceedings discussed above.

Complainant also testified that he first learned that he was going to be sued by Sysco as a result of conversations with Teamsters Tom Leedham, Matt Laso, and Robert Linkenhoker in September to October 2001.[26] (Tr. 48-55). When he eventually was sued, he felt confused and devastated. (Tr. 55).

In addition to the matters discussed above, Complainant indicated that he had to file for bankruptcy as a result of the award of $187,000 to Sysco by the Court of Special Appeals of Maryland. (Tr. 63). He testified that his pay check has been garnished to pay a monthly fee to the trustee for payment of debtors, including Sysco. (Tr. 64-65). The amount deducted from his pay by the Order of the Bankruptcy Court is $315 monthly. (Tr. 67-68, CX 11). He testified that he also had to stop making deductions into his 401(k) retirement savings account and his 401(k) plan with his current employer was canceled as a result. (Tr. 69-70).

Complainant identified two other areas of compensatory damages. First, he indicated that he had to pay Mr. Ware, his attorney in the Howard County lawsuit, approximately $50,000. (Tr. 78-79). In support, he provided copies of bills as CX 19 and copies of receipts and checks in CX 20.[27] (Tr. 77-78). Second, Complainant testified as to how his mental state was affected by the Howard County action, including loss of sleep, loss of appetite, depression, and general difficulty functioning. (Tr. 81). As a result, he contacted Dr. Cheng [mistranscribed as Chang] in 2002, right after the lawsuit was filed, and Dr. Cheng prescribed medication. (Tr. 81-82). Complainant testified that he had to be taken off the medication because of his work driving big trucks. (Tr. 82). In support, he submitted certified copies of medical records (from Patuxent Medical Group, Inc. dated from December 2001 through June 2003) post hearing, as discussed above. (Tr. 79-80; CX 18A). These records document that he received medical treatment from Peter W. Cheng, M.D., Patuxent Medical Group, Inc. on several occasions in late 2002 and 2003 for situational stress, insomnia, and related problems resulting from litigation in which he was involved, and the OSHA complaint was specifically mentioned in an October 29, 2002 entry.[28]

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[25] Complainant also indicated that he was called by a Sysco attorney who told him that he would be sued because of the OSHA letter, but he did not get the name of the person, and he also was told the same based upon conversations with his attorney, Mr. Baron. (Tr. 46-48). His testimony concerning these conversations is too vague and replete with hearsay to be given any weight. *See generally* 29 C.F.R. §1978.106(a); 29 C.F.R. §18.801 to §18.806.

[26] As I ruled at the hearing, this hearsay testimony is not admissible to show Sysco's intent but merely to show Complainant's state of mind. (Tr. 53).

[27] Respondent stipulated to the authenticity of the bills appearing in CX 19 and agreed that Mr. Ware sent the invoices to Complainant and they were what they purported to be. (Tr. 206-07). Respondent also agreed that CX 20 contained documents reflecting payment received by Mr. Ware from Complainant for legal services. (Tr. 219-21).

[28] The October 29, 2002 Progress Note from Dr. Cheng noted that the Complainant complained about stress and depression, and specifically stated, ". . . somehow the OSHA charges have not been withdrawn and the company filed charges against him for breech [sic] of the settlement. Since then, he has been under a lot of stress for the last 9 months. He has had problems with insomnia and that is why he switched to driving truck at nights. Because of insomnia, he only gets probably 2-3 hours of sleep, because he can not sleep. His appetite has been varied,

(CX 18A). According to Dr. Cheng's June 10, 2003 Progress Note, Complainant had a court date scheduled for the following day and was so stressed out he had gone to the emergency room on June 10 and he also had asked his lawyer to postpone the court date. *Id.* These records also confirm that he was placed on medication in October 2002 but did not want to increase the dose, because he was concerned about daytime sedation, and he was no longer taking it in February 2003, because he felt better. *Id.*

On cross examination, Complainant admitted that he had been employed since he left Sysco in July of 2001. Initially, he worked for Jordan Ridder; he had begun working for them part time in April 2001, when he was still employed by Sysco, and he worked there until June 2003. (Tr. 83). At the time of the hearing, he was employed by Conway, and he had worked for them without interruption since June 2003. (Tr. 83-84).

Testimony of David A. Skomba

Mr. Skomba testified that he was an attorney and had been practicing since December of 1986. (Tr. 117-18). He stated that he was an equity principal (colloquially, a partner) in the firm of Franklin and Prokopik and in that capacity he had represented Sysco in a number of matters, since the firm was founded in 1999, and he had also represented Sysco at a previous firm. (Tr. 118). He recalled that in 2001, he represented Sysco in several cases brought by Complainant, including two labor cases and a number of workers' compensation claims, and he participated in the global settlement which led to Complainant relinquishing his employment. (Tr. 120-21). In terms of the way the settlement was allocated between the labor cases and the workers' compensation cases, he testified that it had been structured with Complainant's share payable as workers' compensation so that Complainant would not have to pay taxes on it, but that the two agreements had to be read *in pari materia*. (Tr. 122-23). Sysco also agreed not to contest unemployment, even though Complainant had already lost at the first level and that determination was on appeal. (Tr. 123). When I asked him why he had not obtained Department of Labor approval, he indicated that it was his understanding that Complainant's counsel (Mr. Rose and Mr. Johnson) would take the steps necessary to get the Department of Labor approval, by virtue of the provision that said Complainant would take the appropriate steps to effectuate the dismissal. (Tr. 127-28). He indicated that he was not familiar with the STA (STAA) but that everybody wanted that case, which they referred to as the OSHA matter, to be included, and they specified in the agreement who was to be responsible. (Tr. 128-29). Mr. Skomba further indicated that it was never intended for Complainant to be punished for filing the claims but he was required to affirmatively take the steps necessary to comply with the general release and agreement. (Tr. 129). With respect to the drafting, he testified that he did the initial draft but there were substantial modifications from Complainant counsel's side, and it went back and forth at least ten times. [29] (Tr. 130-31). He also testified that the attorney who was handling the OSHA (STAA) case for Sysco did not participate in the settlement negotiations. (Tr. 134-35).

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sometimes there is a lack of eating and sometimes he overeats. The patient also has experienced some social isolation. He lost interest in socializing with his friends. He has lost interest in sexual activity. The patient denies any suicidal or homicidal ideations. . . ." (CX 18A).

[29] Scott B. Baron, III, Esq. was representing Complainant in his workers' compensation claim while the law firm of Rose & Johnson was representing him in his other claims. (CX 2). Mr. Baron was awarded a fee of $10,000 while Rose & Johnson received $35,000. *Id.*

Some time prior to the January 2002 filing of the Howard County lawsuit against Complainant, according to Mr. Skomba's testimony, he was contacted by Sysco and became aware that Complainant had not taken reasonable steps to voluntarily abandon the OSHA (STAA) matter.[30] (Tr. 143- 46). However, he testified that the December letter (RX 29) that disparaged the company was the "real genesis of the lawsuit." (Tr. 146-7; *see also* 159-61, 205-06). That letter was addressed to Mike Cutchember from Complainant and, although it was dated "December 11, 2001," inexplicably referenced a "12/14/01" call from John Womack concerning Mr. Womack's problem with a white female supervisor. (RX 29). In the body of the letter, Complainant described problems he had had with the same supervisor, and he stated the following:

> This was a time when Sysco was doing everything they could to frame me for anything so they could fire me; but [there] was no legal reasons, but the charges I filed against them concerning racial discrimination.

Id. Complainant went on to discuss problems with a district sales manager, and he concluded by stating: "If I can be of any more help let me know." *Id.* Mr. Skomba explained that, with respect to aiding or assisting in third party claims, the word "voluntarily" had been placed in the agreement at Complainant's assistance, and the offer in the letter to provide assistance was a breach, as was the disparagement in the letter. (Tr. 161-62). Thus, the letter violated two provisions of the agreement – voluntarily aiding and abetting of a third party and disparaging the company. (Tr. 162).

With respect to the Howard County complaint itself, Mr. Skomba clarified that paragraph 14 (which alleged that Complainant "failed to take reasonable and appropriate steps to effectuate a dismissal, abandonment and/or relinquishment of a claim released under Paragraph 5 in material breach of the obligation imposed upon him by Paragraph 19 of the Settlement Agreement and General Release" [i.e., the July 2, 2001 Settlement]) referred to the OSHA (STAA) claim. (Tr. 150-51, 156). He further stated that the case was "prosecuted for the three reasons that he breached three paragraph[s] of the general release as we understood it at the time, disparaged the company, voluntarily aided and assisted a third-party claim and did not take reasonable steps, as we understood it, to effectuate the voluntary abandonment of a claim that was covered by paragraph 5." (Tr. 164).

Mr. Skomba also indicated that he prepared the letter addressed to Complainant's counsel that was filed with the Howard County clerk of the court as a result of the previous STAA case. (Tr. 166-70; RX 20). While he took the position that it was a stipulation binding upon Sysco, he agreed that it was contingent upon dismissal of the STAA action. (Tr. 170-73). He also admitted that he did not know of any other formal filings concerning the waiver. (Tr. 174-75). However, he indicated that the judge knew that the STAA case was dismissed and that they were not pursuing a claim based on paragraph 14 of the complaint. (Tr. 175-76).

[30] Mr. Skomba testified that he could not tell from the date stamp whether the suit was filed on January 1, 2002 or January 31, 2002 (Tr. 146-47). Although the copy in the record is not entirely clear (CX 1), the copy filed with this tribunal on July 15, 2002 in connection with the previous action clearly reads "January 31, 2002."

When asked about Judge Sweeney's order of specific performance, Mr. Skomba stated that affirmative steps would be required for Complainant to be held in contempt for failing to comply with the order; however, Sysco took no steps to enforce the order and was not pursuing the paragraph 14 breach, so the order had no effect. (Tr. 190-93). Mr. Skomba admitted, however, that he took no steps to clarify the order of specific performance either. (Tr. 197).

Testimony of Charles Ware

Mr. Ware testified that he was the attorney who represented Complainant in the Howard County proceedings as well as in the prior STAA case. (Tr. 207). Counsel for Sysco stipulated that the bills entered into the record (appearing in CX 19) were authentic. (Tr. 206-07). His recollection of the Howard County proceedings was (as he stated during the conference before me on August 14, 2002) that Mr. Steinberg, who was representing Sysco, stressed the Department of Labor matter (i.e., failure to dismiss the STAA claim) as a basis for the lawsuit.[31] (Tr. 211-12; *see also* CX 23 at 11-12, 18). He testified that there had been more than one hearing on the Howard County matter, all of which were transcribed, and he was also under the impression that the dismissal of the OSHA-related count was reflected on the record for one of the hearings.[32] (Tr. 213-16). He did not feel it to be necessary for him to file a motion clarifying the status of Sysco's claim. (Tr. 223). His testimony did not otherwise materially differ from that of Mr. Skomba.

Testimony of Robert M. Linkenhoker, Jr.

Mr. Linkenhoker testified that he had previously been employed with Sysco for 18 or 19 years but had left that job about one month before the hearing at the recommendation of his family physician because of the stress involved. (Tr. 225, 232). He testified that he had been involved in the OSHA (STAA) claim brought by Complainant in 2000, and he also learned about the claim filed against Complainant in Howard County in January of 2002 because he was subpoenaed to testify, although he did not testify. (Tr. 225-26, 243). He identified CX 9 as a letter that he wrote which referenced a September or October 2001 conversation that he had with Phil Mellerson, who was a shop steward at the time, although he had previously been in Sysco management.[33] (Tr. 228-31). He indicated that the conversation took place after "he had gotten the letter either from Jack [Rudsiki from OSHA] or from the court telling us that it was going to go forward and process our complaints."[34] (Tr. 237). Mr. Linkenhoker testified that his coworkers were not happy when they found out that Complainant was being sued in Howard County and he stated: "I think it was kind of like a blow to everyone that if you do something, you try to help yourself that sooner or later they will come back after you." (Tr. 240). He

[31] The Howard County pleadings that are of record mention Mr. Skomba, not Mr. Steinberg.

[32] The only Howard County transcript of record relates to the September 22, 2003 jury trial. (RX 28).

[33] The document contains hearsay within hearsay and was only admitted for the purpose of the witness's state of mind and for impeachment purposes. (Tr. 51-52, 247-48). As Mr. Mellerson was not in Sysco management at the time that he made the statement, I do not find that it constitutes an admission by a party opponent or fits within any of the exceptions to the hearsay rule, nor does it carry such other indicia of reliability as to make it admissible for the truth of the matter stated. *See generally* 29 C.F.R. §18.801 to §18.806, applied to these proceedings under 29 C.F.R. §1978.106(a).

[34] Due to the hearsay/reliability problem, this communication has little probative value.

personally felt that he was being singled out and watched because of his involvement in the OSHA matter. (Tr. 241-42).

Testimony of John Womack

Mr. Womack was also a former truck driver with Sysco who was involved in the 2000 OSHA/STAA claim. (Tr. 254-55.) He testified that he had worked for Sysco for 18 years until he was terminated in November 2006. (Tr. 255). His termination case was still in arbitration at the time of the hearing and he was employed elsewhere. (Tr. 255-56). Like Mr. Linkenhoker, he learned about the Howard County case when he was subpoenaed to testify as a witness for Complainant. (Tr. 257). With respect to the OSHA/STAA case, he met with Gretchen [McMullen] at the airport, along with David May, Mr. Linkenhoker, and Mr. Moore. (Tr. 258). Mr. Womack testified that there were rumors circulating concerning these matters, to the effect that the persons filing complaints concerning the labor laws or EEOC were outcasts and were unwanted. (Tr. 259). Also, at times he could sense tension on the part of management in its dealings with him. (Tr. 259-60).

Testimony of Rodney M. Moore

Mr. Moore testified that he was a driver with Sysco and had been so employed for ten years and six months. (Tr. 261). He, too, had been involved in the 2000 OSHA/STAA claim and he indicated that, although that case was resolved, there was still a point system in effect at the time of the hearing. (Tr. 262). He also sensed tension on the part of management that he attributed to his participation in the case and he felt that he was being singled out with respect to route and work assignments. (Tr. 263). With respect to the Howard County case, he learned about the possibility that Complainant might be sued at the airport meeting with Ms. McMullen.[35] (Tr. 264).

DISCUSSION

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.

In order to prevail on an STAA complaint, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that the employer was aware of the protected activity, that he suffered an adverse action, and that the employer took the adverse action because of his protected activity. *Muzyk v. Carlsward Transportation,* ARB No. 06-149, ALJ No. 2005-STA-060 (ARB Sept. 28, 2007). In order to show that the adverse action was

[35] Ms. McMullen's assessment of the basis for the Howard County suit is also inadmissible as hearsay for the truth of the matter stated. *See generally* 29 C.F.R. §18.801 to §18.806.

taken because of the protected activity, the complainant must show that his protected activity was a "motivating factor" in the employer's decision to take the adverse action. *See id.*

Recently, the Administrative Review Board discussed the framework for analyzing cases under the STAA:

> In analyzing a whistleblower case, the ARB and reviewing courts generally apply the framework of burdens developed for use in deciding cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, et seq., and other discrimination laws. *Hirst v. S[outheast] Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. [20]03-AIR-47, slip op. at 9 (ARB Jan. 31, 2007); *Jenkins v. U.S. EPA*, ARB No. 98-146, ALJ No. [19]88-SWD- 2, slip op. at 17 (ARB Feb. 28, 2003). To establish a prima facie case of unlawful discrimination under the whistleblower statutes, a complainant need only to present evidence sufficient to raise an inference, a rebuttable presumption, of discrimination. *Schlage[l] v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. [20]01-CER- 1, slip op. at 5 n.1 (ARB Apr. 30, 2004).
>
> A complainant meets this burden by initially showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in protected activity under the statute of which the employer was aware, that the complainant suffered adverse employment action and that a nexus existed between the protected activity and the adverse action. *Jenkins,* slip op. at 16-17. Once a complainant meets his initial burden of establishing a prima facie case, the burden then shifts to the employer to simply produce evidence or articulate that it took adverse action for a legitimate, non-discriminatory reason (a burden of production, as opposed to a burden of proof). When the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, non-discriminatory reason, the rebuttable presumption created by the complainant's prima facie showing "drops from the case." *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Schlagel,* slip op. at 5 n.1; *Jenkins,* slip op. at 18. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).
>
> After a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a prima facie showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent took adverse action against the complainant because of protected activity. *Schlagel*, slip op. at 5 n.1; *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. [20]01-STA-33, slip op. at 9 n.9 (ARB Oct. 31, 2003), *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. [20]00-ERA-31, slip op. at 6 n.12 (ARB Sept. 30, 2003), *Simpkins v. Rondy Co., Inc.*, ARB No. 02-097, ALJ No. [20]01-STA-59, slip op. at 3 (ARB Sept. 24, 2003),

Johnson v. Roadway Express, Inc., ARB No. 99-111, ALJ No. [19]99-STA-5, slip op. at 7-8 n.11 (ARB Mar. 29, 2000).

Luckie v. United Parcel Service, Inc., ARB Case No. 05-026, ALJ Case No. 2003-STA-39 (ARB June 29, 2007), slip op. at 6-7. *See also Byrd v. Consolidated Motor Freight*, ARB No. 98-064, ALJ No. 1997-STA-9 at 4-5 (ARB May 5, 1998).

Thus, it is the complainant's ultimate burden to establish the respondent engaged in unlawful discrimination. While that burden may be satisfied either directly or inferentially, a distinction between the two methods of proof now is unnecessary. *See Majali v. AirTran Airlines*, ARB No. 04-163, ALJ No. 2003-AIR-045 (ARB Oct. 31, 2007), slip op. at 11-12, n.11, *citing Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). *See also Wright v. Southland Corp.*, 187 F.3d 1287, 1290 (11th Cir. 1999), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[36]

In *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133 (2000), the United States Supreme Court explained that if an employer articulated a non-discriminatory reason for the challenged adverse action, the complainant retained the ultimate burden to show the stated reason was a 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 falsity of the asserted justification. *Reeves*, 530 U.S. at 140. Although the employee generally has the burden of demonstrating each proffered nondiscriminatory reason is pretextual, there may be cases in which the pretextual character of one reason is so suspicious that the employee may prevail. *Majali, supra*, slip op. at 11-12, n. 11, *citing Wilson v. AM Gen. Corp.*, 167 F.3d 1114, 1120 (7th Cir. 1999).

If a factfinder determines that the employer was motivated by both prohibited and legitimate reasons, it is a "dual" or "mixed motives" case. *Muzyk, supra*, slip op. at 5; *see also Talbert v. Washington Public Power Supply Systems*, ARB No. 96-23, ALJ No. 1993-ERA-35 (ARB Sept. 27, 1996) (ERA case). In STAA cases, the employer can avoid liability by proving, by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected activity.[37] *Muzyk, supra*, slip op. at 5*; see also Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133 (6th Cir. 1994). Direct proof is no longer required for a complainant to be entitled to a mixed motive analysis. *See Desert Palace, Inc., supra.*

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[36] Under the *McDonnell-Douglas* analysis, once a complainant has successfully raised the presumption of discrimination, then the respondent may produce evidence that the action was motivated by a legitimate nondiscriminatory reason, at which point 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 determining whether unlawful discrimination has been proven, it may be appropriate to employ the Title VII burden shifting pretext framework. *Muzyk v. Carlsward Transportation*, ARB No. 06-149, ALJ No. 2005-STA-060, slip op. at p. 5, n. 22 (ARB Sept. 28, 2007), *citing Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip. op. at 14 (ARB Jan. 31, 2006).

[37] As noted by the ARB in *Muzyk*, slip op. at 5, n. 23, the ERA was amended in 1992 to require proof by "clear and convincing evidence" that it would have taken the same action in the absence of protected activity but the "preponderance of the evidence" standard applies to STAA and environmental whistleblower cases.

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. Sysco argues that Complainant ceased to be an employee (within the meaning of the STAA) long before Sysco filed suit against him. *Respondent's Post-Hearing Brief* at 7. OSHA's findings stated that Complainant resigned as an employee of Sysco on July 2, 2001 and agreed not to seek reemployment (in accordance with the July 2, 2001 Settlement) and he was not an employee on June 4, 2002 (the date of the instant complaint) within the meaning of 49 U.S.C. §31101. On summary decision, I found that the protection afforded under the STAA extends to former employees, including Complainant, and I continue to so find for the same reasons.

Here, Complainant entered into a global settlement agreement covering various employment actions (including an employment discrimination case and an STAA case) and at the same time entered into a settlement of various workers' compensation claims; the two settlement agreements were to be read *in pari materia*. As a result of three alleged breaches of this agreement, one of which involved Complainant's failure to take reasonable steps to dismiss the STAA case, Sysco sued Complainant in Maryland state court, in Howard County. Complainant's allegation that this action was retaliatory in nature, based upon his involvement in the initial STAA case, is the basis for the instant case. The initial STAA case was ultimately dismissed by the undersigned based upon a settlement also involving other cases, which did not incorporate the terms of the prior settlement. However, at the time of the latter settlement, Sysco agreed not to pursue the STAA portion of the Howard County case, as reflected by its filing of a letter to that effect with the clerk of court and counsel's statement in open court. Although unable to prove any actual damages (apart from $1) referable to the two other breaches of contract (based upon disparagement and assisting other claimants), Sysco ultimately recovered all of the global settlement and workers' compensation proceeds based upon a stipulated damages remedy that the Maryland appellate court found to be enforceable. Thus, taking the entire factual predicate into account, the retaliatory acts complained of had their genesis in Complainant's employment relationship with Sysco.

As defined in the STAA, 49 U.S.C. §31101, "employee" includes drivers of commercial motor vehicles (including independent contractors when operating commercial motor vehicles), mechanics, freight handlers, or other individuals (except for employers or government employees) "who directly affect[] commercial motor vehicle safety when employed by a commercial motor carrier." 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. Initially, the Supreme Court noted that both the provision barring retaliatory discrimination in section 704(a) and the definition of employee in section 701(f) of Title VII lacked any temporal qualifier and therefore would be consistent with either current or past employment. Further, 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, and the pertinent STAA provision lacks a temporal restriction, like its Title VII counterparts. 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 as well as the retaliation against employees for participating in Title VII actions, the STAA prohibits the termination of the employees engaged in protected activity; 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 the 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*, the respondent fired the petitioner in 1991. 519 U.S. 337 at 339. Shortly thereafter, the petitioner filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that the respondent had discharged him because of his race. *Id.* While that charge was pending, the petitioner applied for a job with another company, and he claimed that the respondent gave him a negative reference in retaliation for his having filed the EEOC charge. *Id.* The 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. *Id.* Judge Johnson also found that the second claim was not barred by the settlement of the first, but he ultimately denied benefits. *Id.* Finding actionable discrimination under the STAA, the Secretary of Labor noted 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. *Id.* Therefore, the complaint by the former employee against his former employer was upheld. *Id.* Other STAA cases have found blacklisting of former employees to be actionable notwithstanding the nonexistence of a current employer-employee relationship. *See, e.g., Leideigh v. Freightway Corp.*, 1988-STA-13 (Sec'y June 10, 1991).

Recently, in *Muzyk v. Carlsward Transportation,* ARB No. 06-149, ALJ No. 2005-STA-060 (ARB Sept. 28, 2007), the ARB found that the STAA covered a former employee who was on lay-off status at the time he brought his STAA action, and who claimed protected activity while on lay-off status, following a temporary assignment. The Board found both that an employment relationship existed and that the employer's refusal to rehire the former employee was an adverse action. *Muzyk,* slip op. at 5-6.

In *Flener v. H.K. Cupp, Inc.*, 1990-STA-42 (Sec'y Oct. 10, 1991), the Secretary of Labor found a former employee of a trucking company to be covered under the STAA, when his former employer failed to pay medical expenses under workers' compensation laws. Although the case was ultimately denied on the merits, the Secretary agreed with the administrative law judge who heard the case that the complainant had established a prima facie case of retaliation under the STAA. *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). The issue of whether the alleged discrimination arose out of Complainant's employment is discussed below as related to the issue of whether an adverse employment action is involved.

Protected Activity

It is undisputed that Complainant was engaged in protected activity during his employment, and I continue to so find, as I did in the Order denying Sysco's motion for summary decision. 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 filing of the initial STAA complaint filed by Complainant on September 14, 2000 constitutes protected activity satisfying this element of the Complainant's case. *A fortiori*, any action (or inaction) taken with respect to that STAA complaint, including Complainant's failure to take reasonable steps to dismiss it, would also constitute protected activity.

Notice of Protected Activity

Likewise, it is undisputed that Sysco had notice of the protected activity, and I continue to so find, as I did in the Order denying summary decision. In this regard, the complaint filed on September 14, 2000, provided Sysco with notice of the protected activity, because OSHA

informed Sysco of the alleged violation during its investigation. Further, Sysco was informed of OSHA's finding that the initial STAA complaint was meritorious and that Complainant was still a party when it received OSHA's determination letter. Thus, this element has also been satisfied.

Adverse Employment Action

Although Sysco did not specifically challenge the "adverse employment action" element of the Complainant's case in its summary decision motion, it is now arguing that this element of the claim has not been satisfied, because the filing of the Howard County lawsuit had nothing to do with Complainant's pay, terms, or privileges of employment. *Respondent's Post-Hearing Brief* at 8. That was also one of the bases upon which OSHA denied the claim. On summary decision, I found that there was 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. Based upon consideration of the entire record, I now find that this element has been satisfied.

Adverse employment action is defined in the STAA 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).

The salient facts on this issue are the same as those stated with respect to the employee and employer relationship, above. The two issues are interrelated in the instant case.

Just as I have found that Complainant was an employee under the STAA at the time of the alleged adverse action, so too do I find that Sysco's filing of a civil action to recover the settlement amounts constitutes adverse employment action within the meaning of the Act. In this regard, the $185,000 settlement amount was paid to settle employment-based litigation and workers' compensation claims. As the global settlement amount was paid in exchange for Sysco's agreement to sever the employment relationship, any attempt to recover the amounts paid is related to pay and/or the terms of employment and is therefore actionable to the extent a causal relationship with the protected activity can be shown. Similarly, any attempt to recover workers' compensation payments made in the context of that settlement would relate to injuries sustained during the course of employment and therefore would also relate to the terms and conditions of employment. Thus, Sysco's attempt to recover the settlement proceeds through litigation would be actionable as post employment retaliation for protected activity, provided that the causal nexus can be shown. *See generally, e.g., Earwood, 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).

Sysco now argues that *Robinson* is distinguishable because the filing of the Howard County lawsuit "had to do exclusively with his contractual obligations" (and not with "the pay terms or privileges of employment.") *Respondent's Post-Hearing Brief* at 8. While Sysco is quite correct that *Robinson* did not involve a contract such as was involved in the instant case, a careful reading of that decision makes clear that is a distinction without a difference, as the focus of the case is that post-employment retaliation is actionable. While *Robinson* did not specifically address the issue of what sort of post-employment retaliatory acts would be covered, *Earwood* and *Flener* have made it clear that the "pay terms or privileges of employment" language should be interpreted broadly.

Here, the relationship of the Howard County lawsuit with the terms and conditions of Complainant's employment is clearly established by the nature of the suit and the damages sought, notwithstanding the fact that the claim of entitlement was based upon breach of contract. As noted above, *Flener v. H.K. Cupp, Inc.*, 1990-STA-42 (Sec'y Oct. 10, 1991) found the failure by a former employer to pay medical expenses under workers' compensation laws to constitute an adverse employment action under the STAA. An attempt to recover workers' compensation payments, or settlement proceeds for employment-based litigation, is clearly analogous. Likewise, *Earwood* and like cases have found blacklisting of former employees to constitute adverse employment action, even though such actions do not directly relate to the former employee's employment, suggesting that any retaliatory action – including the lawsuit involved here -- may be covered to the extent that it had its genesis in protected activity.

In *EEOC v. Outback Steakhouse of Florida, Inc.*, 75 F.Supp.2d 756 (N.D. Ohio 1999), the United States District Court for the Northern District of Ohio addressed the issue of whether a counterclaim filed by a defendant in a Title VII action constituted unlawful retaliation against a former employee under section 704(a) (42 U.S.C. § 2000e-3) (which prohibits an employer from discriminating against any of its employees because they testified or otherwise participated in a Title VII investigation or proceeding.) Citing *Robinson*, the district court noted that the statute applied to former employees and stated that the question was whether the kind of discrimination prohibited by the statute was "limited only to discrimination affecting employment or whether it includes other kinds of discrimination that may be adverse to the employee or former employee," and found that it was not so limited.[38] *Id.* Moreover, noting that the impetus behind the anti-retaliation provision was to prevent employers from discouraging victims of discrimination from complaining, the Court stated:

[38] In dicta, the Court noted that its conclusion was bolstered because the retaliatory provision was not confined to employment-related matters in contrast with the substantive provisions of Title VII, which are confined to "compensation, terms, conditions, or privileges of employment." As noted above, I have found the attempted recovery of settlement proceeds relating to employment-based litigation and workers' compensation benefits to provide a nexus with employment. Moreover, it is well settled that claims by former employees based upon blacklisting are covered by the STAA provision, as discussed above. *See, e.g., Earwood, supra.*

> . . .It is certainly true that "a lawsuit. . . may be used by an employer as a powerful instrument of coercion or retaliation" and that such suits can create a "chilling effect" on the pursuit of discrimination claims. *Bill Johnson's Restaurants, Inc. v. National Labor Relations Bd.*, 461 U.S. 731-740-41, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). . . . [39]

Id. at 758. Citing *Robinson, supra*, the district court noted that its conclusion carried persuasive force given its coherence and consistency with a primary purpose of the anti-retaliation provisions – maintaining "unfettered access to statutory remedial mechanisms." *Outback Steakhouse*, 75 F.Supp.2d at 758. Other courts have differed as to whether litigation can be retaliatory under the *McDonnell Douglas* analysis. *Compare Ward v. Wal-Mart Stores, Inc.*, 140 F.Supp.2d 1220, 1230 (D. N. M. 2001) (finding the filing of a frivolous appeal of an unemployment case can be a retaliatory action under the ADA) *with Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528 (5th Cir. 2003) (finding a post-employment retaliatory counterclaim is not an actionable ultimate employment decision as required in the Fifth Circuit for Title VII cases). While there is a basis for distinguishing initial suits from counterclaims, non-employment-related litigation has generally been found to be retaliatory only when first found to be objectively baseless. *See Rosania v. Taco Bell of America, Inc.*, 303 F.Supp.2d 878 (N.D. Ohio 2004) (FMLA case by former employee in which employer counterclaimed; discussing Title VII case law and following *Outback Steakhouse*).

It is beyond cavil that the policy concerns behind the STAA would be undermined if a party were allowed to conduct parallel proceedings relating to an STAA action in state court against an STAA complainant while the same case was pending before a federal administrative tribunal. Yet that is exactly what occurred here. In this regard, there was direct proof that the lawsuit filed by Sysco in Howard County on January 31, 2002, actually included a count related to Complainant's failure to make reasonable efforts to dismiss the OSHA/STAA claim, as ultimately conceded by counsel for Sysco (Mr. Skomba) at the hearing before me. (Tr. 150-51, 156, 164; CX 1). It is also undisputed that the July 2001 global settlement was not approved by anyone at the Department of Labor prior to the filing of the Howard County complaint – indeed, it could not have been approved to the extent that it barred future claims. In fact, the STAA claim had been found to have merit by OSHA and that determination was in the process of being appealed to the Office of Administrative Law Judges when the state court action was filed. The count originated from the employment relationship that gave rise to the original STAA action. To say that it can not be deemed to be adverse action because it does not directly involve the pay, terms or privileges of employment, and that therefore parallel proceedings against an employee may be conducted in state court, is specious.[40]

Based upon the facts set forth above, I find that the filing of the Howard County lawsuit, for the purpose of obtaining settlement amounts relating to employment-based litigation and

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[39] The NLRB case cited addressed retaliatory litigation in state court which was objectively baseless, which the NLRB had been asked to enjoin as an unfair labor practice. Of course, the potential enjoinment of litigation is not involved here.

[40] In view of the jurisdiction over STAA enforcement matters in federal court, it also could be argued that such a lawsuit would be objectively baseless. *See* 49 U.S.C. § 31105(e) [formerly (d)]; 29 C.F.R. §1978.113. However, as I have found the lawsuit to be employment-related, that issue need not be resolved.

workers' compensation, constituted an adverse employment action that is actionable to the extent it was causally related to Complainant's protected activity. The nature of the litigation satisfied the terms and conditions of employment requirement.

These matters will be discussed further in connection with the causal element of this claim, below.

Causal Relationship between Protected Activity and Adverse Action

Sysco also disputes that Complainant can establish a causal relationship between the protected activity and the alleged adverse employment action. Specifically, Sysco argues that the lawsuit against Complainant was not filed because Complainant filed a complaint or began a proceeding related to motor vehicle safety violations but, rather, was filed because Complainant breached his contractual obligations to Sysco. *Respondent's Post-Hearing Brief* at 8. Further, Sysco argues that it had a legitimate non-discriminatory basis for suing Complainant for breach of contract based upon his failure to seek dismissal of his earlier STAA claim and notes that it is undisputed that he failed to do so from the time he signed the agreement (July 1, 2001) until after the Howard County suit was filed (January 31, 2002). *Id.* Complainant disagrees and argues that even though the STAA case was filed in September 2000, the Howard County suit was filed two weeks after OSHA issued its determination, and that Complainant was advised that the suit would be filed prior to that time. *Complainant's Post-Hearing Brief* at 16. Further, Complainant argues that the breach of contract justification was a pretext in view of its counsel's admission that the case was filed because of Complainant's participation in Case No. 2002-STA-0023. On summary decision, I found that there was a factual dispute concerning this element of the case. I now find that Complainant has established a causal relationship between his protected activity and the filing of the Howard County lawsuit.

A preponderance of the evidence establishes that the Complainant's protected activity was one of the reasons Sysco filed the law suit against him. First, the lawsuit filed by Sysco in Howard County on January 31, 2002, actually included a count related to the OSHA/STAA claim (i.e., failure "to take reasonable and appropriate steps to effectuate a dismissal, abandonment and/or relinquishment of a claim"), as ultimately conceded by counsel for Sysco for the Howard County case (Mr. Skomba) at the hearing before me. (Tr. 150-51, 156, 164; CX 1). Second, in addition to this direct proof, the lawsuit was filed on January 31, 2002, in temporal proximity with the adverse ruling issued on January 16, 2002, by OSHA on the claims filed by Complainant and the other truck drivers. (RX 12). 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). Third, the testimony by both Mr. Skomba (Sysco's counsel) and Mr. Ware (Complainant's counsel in the Howard County matter) at the hearing before me (discussed above) makes it clear that the Complainant's failure to take reasonable steps to dismiss the previous STAA case was one of the bases upon which the Howard County suit was filed.

The justification provided by Sysco – that the Howard County action sounded in contract and was therefore unrelated to the prior action – is insufficient to constitute a non-discriminatory

reason for the challenged adverse action, as one of the bases for the breach of contract action involved Complainant's failure to take reasonable steps to dismiss the previous STAA case. In this regard, I reject Sysco's contention that a breach of contract action premised upon the paragraph of the July 2, 2001 settlement agreement requiring Complainant to take reasonable steps to dismiss the STAA action is separate and apart from the STAA case. It cannot therefore constitute a legitimate, non-discriminatory business reason for filing the civil action, because it subsumes the alleged discriminatory reason. Thus, I need not conduct a "pretext" analysis. However, the breach of contract action included two counts in addition to the one based on the STAA case – one, based upon disparagement, and the other, based upon aiding and assisting in third party claims. Both of these two counts had their genesis in the December, 2001 letter sent by Complainant to Mike Cutchember, union steward, in connection with the grievance filed by Mr. Womack.[41] A careful reading of the letter reveals that it had nothing to do with OSHA or STAA claims or motor vehicle safety. The lower court found both the disparagement and assisting third party claims to have been breached as a matter of law, and I do not disagree. Thus, because the breach of contract action was premised upon three alleged breaches, one of which is discriminatory and two of which are non-discriminatory, this is a mixed motive or dual motive case.

In *Shannon v. Consolidated Freightways,* ARB No. 98-051, ALJ No. 1996-STA-15 (ARB Apr. 15, 1998), at n. 5, *aff'd,* 181 F.2d 103 (6th Cir.) (table), *cert. den.*, 528 U.S. 1019 (1999), the Administrative Review Board described how the dual motive or mixed motive test operated:

> . . . . [U]nder a "dual motive" analysis, a complainant may prove, by a preponderance of the evidence, that a respondent took adverse action *in part* because she engaged in protected activity. For example, a respondent may admit, or direct evidence may establish, that protected activity provided part of the motive for the adverse action. In this event, the burden of persuasion shifts to the respondent to demonstrate that the complainant would have been disciplined *even if* she had not engaged in the protected activity. . . . The burden of persuasion shifts under the "dual motive" model because the complainant has proved retaliation, *i.e.,* that the respondent took adverse action "because" the complainant engaged in protected activity. . . . A violator then must establish a form of affirmative defense in order to avoid liability. . . . [Citations omitted.]

Shannon, supra, slip op. at 5-6.[42] Thus, the burden of persuasion has shifted to Sysco to demonstrate that the adverse action would have been taken even if the complainant had not engaged in the protected activity. *See id; see also Pogue v. U.S. Dep't. of Labor,* 940 F.2d 1287, 1289-90 (9th Cir. 1991). A respondent bears the risk that the influence of legal and illegal motives cannot be separated. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159,

[41] The actual date of the letter is unclear, as the letter was dated December 11, 2001 but stated "John Womack called me on 12/14/01, about a problem with. . . a white female supervisor at Sysco." (RX 29). No explanation has been provided for the discrepancy.

[42] *Shannon's* construction of the standard for mixed motive cases was cited with approval in *Leach v. Basin Western, Inc.,* ARB No. 02-089, ALJ No. 2002-STA-5 (ARB July 31, 2003) at n. 5.

1162, 1164 (6th Cir. 1983), *citing NLRB v. Transportation Management Corp.*, 462 U.S. 392, 403 (1983).

Upon consideration of the entire record, I am unable to separate out the motives for the filing of the lawsuit. Although Mr. Skomba testified that the primary purpose for the lawsuit was the December 2001 letter, he did not exclude the STAA case as a factor. (Tr. 146-47, 159-61, 205-06). Complainant's counsel testified that Sysco's other attorney (Mr. Steinberg) stressed the STAA case was the basis for the action.[43] (Tr. 211-12; CX 23 at 11-12, 18.) There was no testimony from high level or even mid level Sysco managers indicating Sysco's motivation in filing the action against Complainant that would allow me to separate out the STAA claim. Although the December 2001 letter (RX 29) provides an independent basis for the lawsuit, I simply do not find it credible that the extensive proceedings conducted by Sysco against Complainant were motivated by the single letter sent to the union steward, which related to a grievance filed by Mr. Womack, for which only $197.50 in actual expenses (or $2,283.62 in total damages) could be identified (and then, only based upon the notion that Complainant was responsible for the entire cost of defending the grievance that was filed by another employee.)[44] The weight of the evidence suggests, rather, that Sysco wanted to make an example of Complainant based upon his involvement in a myriad of activities against the company that apparently continued to some small degree after Sysco paid substantial sums of money to make peace with him. Sysco's filing of the Howard County action had the effect of showing its employees that it was not worth the effort to go against the company because of the devastating effects on their personal lives and financial states that would ensue. The potential chilling effect of such action upon the likelihood of future STAA claims being filed by Sysco employees is clear. However, it is unclear to what extent the retaliatory intent by Sysco was due to Complainant's actions under the STAA as opposed to other areas in which Complainant had gone against Sysco, such as by filing and assisting in the filing of race discrimination complaints or grievances. From the record before me, I am unable to separate the STAA complaint from the other areas in which Complainant made himself a nuisance to Sysco. Thus, the motivation for the lawsuit included both discriminatory and non-discriminatory elements.

In view of the above, I find that Sysco retaliated against Complainant in the form of filing a complaint in state court as a result of his participation in the initial STAA action, and I further find that Sysco was motivated by Complainant's failure to dismiss the STAA action. Thus, I find that Complainant was retaliated against as a result of his participation in protected activity. I further find that Sysco has not established by a preponderance of the evidence that it would have filed the lawsuit in the absence of the protected activity.

That does not end the matter, however, as Sysco subsequently took action to advise the court that it would not be pursuing the portion of the Howard County case related to the OSHA/STAA claim. That led to approval of the settlement in the first STAA action; however, the second STAA claim, the one that is now before me, was not covered by that settlement.

[43] The only reference to Mr. Steinberg was in Mr. Ware's testimony before me in the instant case and at the conference held in Case No. 2002-STA-0023. The transcript for that conference appears as CX 23.

[44] Sysco Risk Manager Linda Turkin testified in state court about the damages allocable to the two counts. The $2,283.62 in damages included time spent by Sysco employees on Mr. Womack's grievance. Only $197.50 in legal fees could be separated out from the other fees spent on matters relating to Complainant. (RX 25 at 104-132.)

While the removal of the STAA portion of the case would not affect whether the filing of the Howard County complaint was retaliatory in nature, it could have an impact upon the damages to which Complainant is entitled.

In its brief, Sysco states that "the ALJ in this case explicitly stated her satisfaction that Sysco's maintenance of the Howard County lawsuit was not retaliatory – at least 3 times (RX 21, 23, 24)" and therefore argues that Complainant's claim of retaliation was spurious. (*Respondent's Post-Hearing Brief* at 7, 9). However, that is not strictly accurate. What I did say (as summarized above) is that I was satisfied that the settlement of the prior STAA action was fair, adequate and reasonable and that my concerns regarding the pending Howard County action had been satisfied as a result of the filing of Mr. Skomba's letter with the court. Subsequent events reflected that, even though Sysco complied with its agreement, the letter may not have had its intended effect. Although the letter was dated September 24, 2002 and was filed with the court, Judge Sweeney issued an Order of Specific Performance on June 6, 2003 that ordered Complainant to specifically perform each and every obligation imposed by the July 2, 2001 agreement. (RX 25). Inexplicably, the paragraph related to taking reasonable steps to dismiss the STAA action was not exempted from that Order. On the other hand, Judge Sweeney found a violation of the two non-discriminatory counts but did not address the STAA count, suggesting that he was aware that the STAA count was no longer included. To the extent that there may have been any confusion, however, it was addressed by Mr. Skomba at the time of the September 22, 2003 Howard County jury trial.[45] (RX 25 at p. 122). At that point, Mr. Skomba stated at a sidebar, on the record, that there had been "collateral litigation going on involving the STA and OSHA" but they were "not making any claims for that" and "not including any of that part of it in the case." *Id.* Although the appellate court referenced the STAA/OSHA case, it apparently did so by history alone. (RX 26). Thus, putting aside the issue of what may have motivated Sysco, it is clear that it acted in accordance with the agreement it made in connection with the previous STAA action and it did not pursue the STAA claim.

However, Sysco's "motive and intent are at the heart" of this analysis, and the Supreme Court has stated that the critical inquiry in a case such as this is whether or not an improper motivation "was a factor in the employment decision *at the moment it was made*" [emphasis in the original]. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989); *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 570 (8th Cir. 2007). Sysco's counsel, Mr. Skomba, acknowledged that Complainant's failure to dismiss the STAA case was one of the motivating factors for prosecuting the state court action. (Tr. 156, 164). No Sysco employee testified that the motivation for the suit was wholly proper, nor even that the suit would have been instituted were it not for Complainant's participation in the STAA matter. Moreover, Sysco did not attempt to sever the improper motive – explicitly listed in the complaint and confirmed by testimony as a motivating force for the suit – from the legitimate one until well into the legal proceedings. That being said, I am not in any way disparaging actions taken by Sysco's counsel: Mr. Skomba's actions reflected an attempt to sever and isolate Sysco's improper motivations, and the testimony and evidence he presented at the damages trial in state court was so confined. In so doing, he complied with my instructions and satisfied the limited set of concerns I articulated in connection

[45] The trial was conducted in such a manner that no damages based upon the STAA matter (such as attorney fees) were claimed by Sysco, as reflected by Ms. Turkin's difficulty in separating out the fees attributable to the disparagement and aiding and abetting counts. (RX 25).

with the settlement of the first STAA case. Nevertheless, the great weight of the evidence suggests that, at the time the decision to file suit was made, improper motives were a significant factor.

Sysco did go on to pursue the aiding and assisting third parties and disparagement portions of the case. It could prove no actual damages (apart from one dollar) based on the two remaining claims. However, the stipulated damages remedy associated with the latter of the two remaining claims (i.e., the provision requiring the return of all the settlement proceeds in the event of the breach of the portion of the global settlement prohibiting disparagement) was found by the Maryland Court of Special Appeals to be enforceable under Maryland law.[46] Although certainly the punitive nature of the clause could be debated, the appellate court's interpretation of Maryland law is controlling and is tantamount to a finding that the claim based upon disparagement had a valid objective basis. The clause also operated independently of the portion of the global settlement addressing the dismissal of pending claims (specifically, the portion relating to the OSHA/STAA claim) and was therefore not dependent upon it. In other words, the stipulated damages provision was specific to the disparagement and confidentiality restrictions and was not a liquidated damages provision relating to the entire agreement.

These matters do not affect my finding that there was a violation of the STAA, but they are relevant on the issue of the damages to which Complainant is entitled. The issue of damages is addressed below.

Damages

Damages in STAA cases may include abatement of the violation, reinstatement, compensatory damages (including back pay), costs (including attorney fees), and (effective August 3, 2007) punitive damages. 49 U.S.C. §31105(b)(3) (as amended); 29 C.F.R. §1978.104. Compensatory damages may include back pay, damages for mental or emotional distress, and reimbursement for out-of-pocket expenses. As amended by Public Law No. 110-053, § 1536, 121 Stat. 465, 466 (Aug. 3, 2007), compensatory damages specifically include "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."

Punitive Damages

Punitive damages were not available under the STAA prior to its recent amendment. *Nolan v. AC Express,* ALJ No. 1992-STA-037 (Sec'y, Jan. 17, 1995), slip op. at 8. As amended

[46] The provision, appearing in paragraph 7 of the July 2, 2001 settlement, generally provided that Complainant would not disparage Sysco and Sysco would not disparage him and that both Complainant and Sysco would keep the terms of the July 2, 2001 settlement and the associated workers' compensation agreement (and related settlement negotiations) in strict confidence (with certain exceptions). It further stated that the paragraph was "a substantial and material provision" of the agreement and a breach of it would support a cause of action for breach of contract that would entitle the aggrieved party to recover damages including the recovery of any payments made under the agreement or under the associated workers' compensation agreement, and it was agreed that such non-exclusive damages in the event of a breach were "not a penalty but are fair and reasonable in light of the difficulty of proving prejudice to the Company in the event of such a breach." The parties also agreed that breach of confidentiality could subject either party to contempt proceedings. (CX 1).

by Public Law No. 110-053, § 1536, 121 Stat. 465, 467 (Aug. 3, 2007), the STAA allows punitive damages to be awarded in an amount not to exceed $250,000. *See* 49 U.S.C. §31105 (b)(3)(C). Complainant has not sought punitive damages here and I do not find a basis for them to be awarded.

Abatement, Reinstatement, and Back Pay

Under the circumstances concerned here, which are fully discussed above, there is no basis for abatement, reinstatement, or an award of back pay. The initial STAA claim was dismissed and Complainant was no longer employed by Sysco at the time he filed his second STAA complaint. Abatement is not applicable here, as this was a claim based upon retaliation and the suit that gave rise to the claim is no longer pending. Likewise, reinstatement is not a viable option in this case given the history between Sysco and Complainant, and Complainant has not asked for reinstatement. Complainant has not sought back pay either, and any claim for back pay was extinguished when the previous STAA case was dismissed.

Compensatory Damages – Mental or Emotional Distress

The ARB has held that compensatory damages under the STAA may be premised upon pain and suffering, mental anguish, embarrassment, and humiliation. *Michaud v. BSP Transport*, ARB No. 97-113, ALJ No. 1995-STA-029 (ARB Oct. 9, 1997). In *Michaud*, the ARB affirmed an award of $75,000 in compensatory damages based on complainant's depression, for which he received treatment from his treating physician, when the complainant lost his house through foreclosure, his savings, and his ability to obtain credit, and received public assistance. The ARB also found the complainant was entitled to damages based on back pay, front pay, prejudgment interest, the net value of health insurance, attorney's fees, and out of pocket expenses for health care. *Id.*

The ARB has also considered awards for damages for emotional and mental distress in other STAA cases, when the claims were unsupported by medical evidence. *See, e.g., Bigham v. Guaranteed Overnight Delivery*, 1995-STA-037 (ARB Sept. 5, 1996) (increasing recommended award for emotional distress to $20,000); *Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, ARB No. 97-090, ALJ No. 1995-STA-034 (ARB Sept. 23, 1997), slip op. at 6, *aff'd on other grounds*, 146 F.3d 12 (1st. Cir. 1998) (affirming award of $30,000 based on severe emotional distress due to relocation, concerns for family's survival, difficulties with marriage, and ongoing peptic ulcer disease); *Murray v. AirRidge, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-034 (ARB Dec. 29, 2000) (affirming "modest award" of $20,000 when complainant gained weight from depression and stress, had trouble sleeping, and had damaged self-esteem); *Jackson v. Butler & Company*, ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004) (affirming finding of $4,000 for emotional distress that was unsupported by professional counseling or medical evidence); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 03-095, ALJ No. 02-STA-035 (ARB Aug. 6, 2004), slip op. at 17 (affirming award of $10,000 for humiliation and emotional distress based on complainant's testimony).

Here, Complainant experienced severe situational stress as a result of the lawsuit that Sysco filed against him, which led to his bankruptcy, and he required medical treatment on

several occasions as a result. The causal relationship between his symptoms and the lawsuit is corroborated by medical evidence. Although the record does not reflect that Complainant experienced any kind of permanent emotional or mental ailment as a result of the lawsuit, the stress was significant enough to warrant repeated medical visits and even emergency treatment. Medical records show that Complainant was only able to sleep two to three hours per night and consequently switched to a nighttime truck driving schedule. Moreover, Complainant experienced radical shifts in eating habits, felt socially isolated, and lost interest in both friendly interaction and sexual activity. Complainant credibly testified about these matters and the significant impact the suit has had on his emotional well-being. Based on a review of Complainant's testimony, the supporting medical evidence, and the awards discussed above, I find that Complainant is entitled to $20,000 based on emotional distress.

Compensatory Damages – Litigation Expenses/Attorney Fees in Retaliatory State Court Action

Compensatory damages – ultimately designed to compensate for a wrong or injury suffered – are awarded to make a complainant whole by restoring him to the position he occupied prior to the wrong or injury. These "injuries" include not only emotional and mental suffering, as discussed above, but also direct pecuniary losses. *See Hobby v. Georgia Power Co.,* ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), slip op. at 31; *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993- SDW-1, slip op. at 17 (ARB July 30, 1999), *citing Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305-307 (1986). In this instance, Complainant's monetary losses do not stem from his resignation, which was undertaken voluntarily pursuant to the terms of a settlement agreement, but rather from the defense of Sysco's retaliatory lawsuit. As such, no back pay is due, but the expenses Complainant incurred associated with the litigation in Howard County, Maryland, merit redress.

Although some bases of the suit were proper, at least one was not. Sysco is unable to establish that it would have instituted the state court case if it were not possessed of these discriminatory or retaliatory motives. Briefly put, because it cannot show that it would have filed the Howard County suit absent improper motivation, and because Complainant Harrell was burdened with the economic injury of the court costs, damage award, and legal expenses associated with defending the suit, Sysco must compensate Complainant for these expenses.

It is worth mentioning that Complainant's expenditures retaining counsel and defending the Maryland state court claim are not the attorney fees specifically enumerated in 49 U.S.C. §31105(b)(3)(B). That section of the statute states that the Secretary of Labor "may assess against the person against whom the order is issued the costs (including attorney fees) reasonably incurred by the complainant *in bringing the complaint*" [emphasis added]. *Id.* In the instant case, the costs for retaining counsel were related to defense of a retaliatory suit, not initiating or maintaining Complainant's. However, because the payments were direct pecuniary losses suffered in the course of defending a retaliatory suit brought by Sysco, they are properly addressed as "compensatory damages" under 49 U.S.C. §31105(b)(3)(A)(iii). As amended, subsection (b)(3)(A)(iii) provides that a violator is responsible for payment of "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* [emphasis added]."[47]

Complainant testified that his attorney in the Howard County, Maryland, litigation, Mr. Charles Ware, provided legal representation at a total cost of approximately $50,000. (Tr. 76-77). However, the evidence of record reflects that the total sum of fees was $24,779, of which, Complainant has paid $13,250. The seven submitted invoices provide that 93.4 hours of legal work were undertaken in conjunction with that claim.[48] (CX 19). Specifically, the following invoices were submitted:

Invoice Date	**Date of Services**	**Hours**	**Amount Billed**
03/05/2002 (retainer of $5000); 09/26/2002	3/11/2002 through 09/26/2002	20.5 attorney 5.15 paralegal	$5637.50 atty. fees 386.25 paralegal 14.65 costs
02/07/2003	[unspecified] through 02/04/2003[49]	18.25 attorney	$5018.75 atty. fees
05/05/2003	05/05/2003	4.0 attorney	$1100.00 atty. fees
05/15/2003	05/09/2003 through 05/14/2003	18.0 attorney	$4950.00 atty. fees 110.00 appeal costs
07/23/2003	05/27/2003 through 07/02/2003	3.0 attorney	$ 825.00 atty. fees
09/30/2003	09/15/2003 through 09/23/2003	24.5 attorney	$6737.50 atty. fees

In all, Complainant was billed $24,779.65, consisting of $24,268.75 for attorney fees, $386.25 for paralegal fees, and $124.65 in postage and filing costs. *Id.* For the reasons discussed above, these fees and costs are the direct result of Sysco's improper conduct in filing a lawsuit based in part upon improper motives; therefore, Complainant must be compensated for his loss in incurring them. Accordingly, I find that Complainant is entitled to damages in the amount of $24,779.65 to compensate for expenses incurred in retaining counsel and maintaining a defense of the Howard County, Maryland, suit.

Compensatory Damages – Judgment on Remand in Retaliatory State Court Action

The final issue is whether Complainant is entitled to recover the $187,305.50 that Judge Sweeney ordered him to pay Sysco, as ordered by the Maryland Court of Special Appeals and as requested by Sysco in its motion for entry of judgment (appearing as in CX 16). I find that he is entitled to recover that amount as a measure of compensatory damages. The total figure of $187,305.50 includes $185,000 in stipulated damages that the Court of Special Appeals ordered

[47] Because these fees are categorized as "compensatory damages" under subsection (b)(3)(A) of section 31105 rather than enumerated "attorney fees" under subsection (b)(3)(B), they may not be subject to the same fee-shifting scrutiny the Administrative Review Board has adopted from the Supreme Court. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004).

[48] Of the 93.4 hours of legal work, 5.15 were provided by a paralegal, billed at $75 per hour ($386.25.) The remaining 88.25 hours of attorney time were billed at a rate of $275 per hour ($24,268.75).

[49] This record includes a summary but does not itemize hours, as the other invoices do. A page may be missing.

him to pay plus the vacated nominal award of one dollar; the remaining amount appears to be costs of $2,304.50 incurred by the appellant (Sysco).[50] (CX 15, 16; RX 26).

I find that the entire $187,305.50 that Complainant was ordered to pay, including the $185,000 awarded by the appellate court, is recoverable. At the outset of this discussion, it is of particular importance to note that this determination is not a commentary on the Maryland Court's holding. As before, that court interpreted a Maryland contract executed between Maryland parties, and I do not disagree with its determinations as they relate to Maryland law. However, the suit from which the award arose was improperly motivated, at least in significant and inexorable part, as a method of retaliation for Complainant's participation in a federally protected activity. The Howard County suit to recover workers' compensation and employment-related settlement proceeds was, of itself, an "adverse action" against Complainant for the reasons set forth above. Thus, the damages Complainant incurred as a result of the adverse action warrant compensation, which the Secretary of Labor may order. 49 U.S.C. §31105(b)(3).

Although Sysco's counsel in the Howard County litigation stated at a sidebar that Sysco was "not making any claims" relating to the STAA action, that assertion does not alter the fact that the lawsuit was predicated on an improper motivation at the time it was originally filed. As stated above, the Supreme Court and several Circuit Courts of Appeal holdings dictate that the central inquiry in this analysis must be the employer's motivation *at the time the decision to file suit was made*. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989); *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 570 (8th Cir. 2007); *Birch v. Cuyahoga County Probate Court*, 392 F.3d 151 (6th Cir. 2004); *Sabree v. United Brotherhood of Carpenters & Joiners*, 921 F.2d 396 (1st Cir. 1990). Both Sysco's counsel and Complainant's counsel in the state court matter testified that the STAA/OSHA claim formed a basis for the Howard County suit. Moreover, the complaint itself articulates Complainant's failure "to take reasonable and appropriate steps to effectuate a dismissal, abandonment and/or relinquishment of [the STAA claim]" as a cause of action. (CX 1). While it is true that, in the course of the proceedings, Sysco filed a letter with the state court indicating its intention not to pursue the contract provision relating to the STAA claim, and its counsel followed through on that representation, Sysco is unable to show that, absent the improper motivation, it would have initiated the suit at all. The action's legitimate and illegitimate motives were inextricably intertwined at the time the action was filed; that fact cannot be altered by any subsequent action. Thus, damages arising from the state court claim – while proper under Maryland's law of contracts – are the fruit of an adverse retaliatory action and compensable pursuant to 49 U.S.C. §31105(b)(3). I therefore find that Complainant is entitled to recover the $187,305.50 awarded to Sysco by Judge Sweeney on remand from the appellate court.

Interest

The Administrative Review Board has determined that an award of prejudgment interest is proper for claims brought under the STAA. *See Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004). Complainant is entitled to pre-judgment interest on this award of damages, calculated in accordance with the IRS penalty rate at 26

[50] Although Sysco sought (and was awarded) $2,304.50 in costs, the itemized appellant costs actually amount to $2,307.50. (CX 16). As appellee, Complainant's costs were $68.40. *Id.*

U.S.C. § 6621. *See id.*; *Drew v. Alpine, Inc.*, ARB No. 02-044, 02-079, ALJ No. 2001-STA-47 (ARB June 30, 2003), slip op. at 4; *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000), slip op. at 17-18.

Total Damages

In light of the above, the total compensatory damages, excluding attorneys' fees in the current action and interest, to which Complainant is entitled is summarized in the following chart:

Damages	**Amount**
Mental or Emotional Distress	$20,000.00
Litigation Expenses/Attorney Fees in Retaliatory State Court Action	$24,779.65
Judgment in Retaliatory State Court Action	$187,305.50
TOTAL COMPENSATORY DAMAGES:	*$232,085.15*

Attorneys' Fees

Where, as here, an STAA complainant has prevailed on the merits, he or she may be reimbursed for litigation costs, including attorneys' fees. *Jackson v. Butler & Company*, ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004). Under section 31105(b)(3)(B), upon the complainant's request, "the Secretary of Labor may assess against the person against whom the order is issued the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint." The section has not been substantively amended. No attorneys' fees are being awarded under this section because no fee petition has been filed. Complainant's counsel may file a fee petition, including a bill of costs, within 30 days, and Respondent shall have 30 days to file any objections.

CONCLUSION

Complainant has established the requisite employee/employer relationship, his engagement in protected activity, Sysco's notice of the protected activity, an adverse employment action taken against him, and its causal relationship with his protected activity. He is therefore entitled to relief, as summarized above. Accordingly,

RECOMMENDED ORDER

IT IS HEREBY ORDERED that the Complainant's complaint is **GRANTED** to the extent set forth above, and:

1. Respondent Sysco shall pay to Complainant James Harrell the sum of $232,085.15 in compensatory damages, subject to prejudgment interest assessed in accordance with the IRS penalty rate at 26 U.S.C. § 6621; and
2. Complainant=s attorney may submit an attorney fee petition and bill of costs within thirty (30) days of the date of this decision and order, and Respondent shall file any objections within thirty (30) days of service of the fee petition and bill of costs.

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.

The relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).