

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 21 June 2005**

Case No: 2003-STA-0054

In the Matter of:

MARK N. SAFLEY,

Complainant

v.

STANNARDS, Inc., d/b/a  
STANNARD MOVING & STORAGE,

Respondent

Appearances:

Paul J. McAndrew, Jr., Esq.  
McAndrew Law Firm  
Coralville, Iowa  
For the Complainant

Joseph Johnston, Esq.  
Johnston, Potterfield & Nathanson, P.C.  
Cedar Rapids, Iowa  
For the Respondent

BEFORE: RUDOLF L. JANSEN  
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The action arises under the Surface Transportation Assistance Act of 1982 (hereinafter the "Act"), as amended, 49 U.S.C. Section 31105 and the Regulations found at 29 C.F.R. Part 1978. Section 31105 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules.

Complainant, Mark N. Safley ("Complainant" or "Safley") filed a complaint with the Secretary of Labor, Occupational Safety and Health Administration ("OSHA") on May 19, 2003, alleging that Stannards, Inc., d/b/a Stannard Moving & Storage ("Respondent") discriminated against him in violation of the Act. Following an investigation, the Secretary of Labor served its Findings and Order on July 31, 2003, denying relief. On September 12, 2003, Complainant appealed that finding to this office.

A formal hearing commenced on June 24, 2004, in Cedar Rapids, Iowa, where the parties were afforded full opportunity to present evidence<sup>1</sup> and argument. The record was held open until August 31, 2004, for submission of briefs, and until September 17, 2004, for submission of reply briefs. The Findings of Fact and Conclusions of Law that follow are based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and on my analysis of the entire record, arguments of the parties, and applicable regulations, statutes and case law. Each exhibit received into evidence has been carefully reviewed. My Pre-hearing Order provided for a Stipulation of Facts to be completed by the parties that has been received into evidence as Joint Exhibit (JX 1).

#### ISSUES<sup>2</sup>

1. Whether the Complainant, Mark N. Safley, engaged in protected activity within the meaning of 49 U.S.C. § 31105 of the Act;

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<sup>1</sup> In this Decision, "JX" refers to Joint Exhibits, "ALJX" refers to the Administrative Law Judge Exhibits, EX 1-5 refers to the Claimant's Exhibits, EX A-G refers to the Respondent's Exhibits, and "Tr." refers to the Transcript of the hearing.

<sup>2</sup> The record contains ten pages of correspondence sent by Complainant Mark Safley to the United States Department of Labor (CE 3-1 through 3-10). In these letters, Complainant alleges several internal complaints regarding Respondent's activities that could colorably violate Motor Carrier Safety regulations. Neither party developed these allegations at the hearing or in their briefs. The October 22, 2003, Notice of Hearing and Pre-Hearing Order states that any issue and all contentions concerning fact and law as to individual issues which are not specifically addressed on brief will be considered waived and/or abandoned by that party for decisional purposes. As neither party addressed these complaints on brief, the allegations are considered waived by all parties, and they will not be considered for decisional purposes.

2. Whether the Respondent, Stannard Moving & Storage violated the Act by discharging, disciplining, or discriminating against Mark N. Safley for engaging in protected activity;
3. Whether the Respondent, Stannard Moving & Storage, would have terminated Mark N. Safley in the absence of his protected activity; and
4. Whether the Complainant, Mark N. Safley, is entitled to a back pay award, reinstatement, compensatory damages, costs and attorney fees.

STIPULATION OF FACTS<sup>3</sup>

1. The Office of Administrative Law Judges, U.S. Department of Labor, has jurisdiction over the parties and the subject matter.
2. Stannards, Inc., d/b/a Stannard Moving & Storage is engaged in interstate trucking operations and is an employer subject to the Surface Transportation Assistance Act ("STAA") of 1982. (49 U.S.C. § 2305).
3. Mark N. Safley is now, and at all times material herein, a "person" as defined in § 401(4) of the STAA, 49 U.S.C. § 2301(4).
4. Mark N. Safley was an employee of Stannard Moving & Storage during the applicable periods in that he was employed as a driver of a commercial motor vehicle having a gross vehicle weight rating of 10,000 or more pounds that was used on the highways in interstate commerce to transport cargo.
5. Pursuant to § 405 of the STAA, Mark N. Safley filed a complaint on May 19, 2003, with the Secretary of Labor.
6. The original complaint filed with the Secretary was timely.

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<sup>3</sup> See JX 1.

7. Following an investigation, the Regional Administrator, Occupational Safety and Health Administration, issued his findings on the complaint on July 31, 2003.
8. Complainant received those findings by mail on August 13, 2003.
9. Complainant mailed an appeal and request for hearing to the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. on September 12, 2003.
10. The appeal letter was received by the Office of Administrative Law Judges on September 15, 2003.
11. The appeal of the Complainant satisfies the 30-day time constraints provided by 29 C.F.R. § 1978.105(a).

#### Credibility of the James Jones Affidavit

The record contains an Affidavit signed by James Jones (hereinafter Jones) (CE 4-1). Jones was a friend of Safley's, and he was employed as a driver with Respondent when Randy Stannard (hereinafter Stannard) asked Safley to make the Rogers, Minnesota truck run on March 20, 2003 (Tr. 21). Jones quit working for the Respondent a "couple of weeks" after Safley's Minnesota run to take a truck driving job with Action Moving (Tr. 24). At hearing, Jones recanted many sections of his Affidavit and brought into question the integrity of the information contained in the Affidavit.

Jones did not participate in the preparation of the Affidavit (Tr. 44). His testimony was that he "somewhat" read the Affidavit before signing it (Tr. 30-31). Jones stated that he and Safley had been partying and drinking intoxicating liquor before Safley prepared the Affidavit (Tr. 39, 43). On the day the Affidavit was signed, Jones had consumed two bloody mary's during the day and had consumed a "couple" of beers during lunch (Tr. 48).

When asked why he had signed the Affidavit, Jones stated that Safley told him that he needed a letter for workers' compensation purposes, to explain why he had missed a doctor's appointment after making the Rogers, Minnesota run (Tr. 30-31).

Jones testified that he signed the Affidavit because he was trying to help a buddy (Tr. 39).

Jones then recanted several statements in the Affidavit<sup>4</sup>:

Affidavit: before mark left he told them he was taking pain pills that are very strong. They are Hydrocodone. He should these to me and dan and mike they knew he was taking them, he told them. They still made him drive a truck and a forklift too.

Jones' Testimony: Jones did not see Safley show the Hydrocodone to Dan Callahan (hereinafter Callahan), Mike Krantz (hereinafter Krantz), and Randy Stannard (hereinafter Stannard) (Tr. 45). Stannard did have Safley drive a forklift, but Safley was not taking pain medication that day at work (Tr. 45).

Affidavit: I Jamie Jones have witness on many time's, Dan the general manager and Mike the J.C. dispatcher. Have mark do things at work that are against doctor's orders.

Jones' Testimony: Jones stated that the only physician ordered restriction on Safley's work that he was aware of was a 20-pound lifting restriction (Tr. 34). Jones stated that after Respondent raised questions about Safley's work restrictions, he never observed Respondent order Safley to complete a task beyond his restrictions (Tr. 60). He testified that Safley was adamant about protecting his own restrictions and that Safley would argue about any assignment that he felt he could not complete within his physical restrictions (Tr. 60).

Affidavit: mark has giving them time's of his rehab appointments and they make him come to work anyway.

Jones' Testimony: Jones testified that the only rehab appointment that he was aware of was the appointment on the day after the Rogers, Minnesota trip. He stated that the company tries to work with doctor appointments, and that this statement in the Affidavit is false (Tr. 49). Further, it was Jones' understanding that the truck Safley would be riding in on the way back from Rogers, Minnesota had a sleeper, and that it was anticipated by the company that Safley could sleep on the way

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<sup>4</sup> The grammar in the Affidavit is poor. Affidavit sections are reproduced here as presented without grammar corrections.

back home and be back in time for his therapy appointment the next day (Tr. 59).

Affidavit: I jamie jones stopped working for Stannard moving after seeing these things happen to Mark Safley.

Jones' Testimony: Jones stated that this statement was not correct (Tr. 46). Jones "had a friend that needed me to drive his truck, and I went to help out a friend" (Tr. 46).

The record indicates that Jones did not prepare the Affidavit, that he had been drinking before signing the Affidavit and that he gave the Affidavit, at most, a cursory reading before signing it to help a buddy. Given the number of Affidavit statements recanted at hearing, I find the Affidavit of Jamie Jones, Exhibit CE 4-1, to be of very limited probative value and I give it little weight in my Decision.

#### Testimony Credibility Findings

In addition to Complainant Mark N. Safley's testimony and that of Jamie Jones, testimony was also heard from: Dan Callahan, General Manager for Respondent; Mike Krantz, an employee of Respondent; Curtis Walker (hereinafter Walker), an employee of Respondent; and Randy Stannard, President of Stannard Moving & Storage.

I found all witnesses credible with the exception of portions of the testimony of the Complainant, Mark N. Safley. Testimony from other witnesses and documents contained in the record contradict Safley's testimony in numerous areas.

Safley testified that he and Jones consumed no intoxicating beverages while the Jones Affidavit was being prepared (CE 4-1; Tr. 64). Jones testified that he and Safley were partying while Safley prepared the document (Tr. 39). Jones stated that he had consumed two bloody mary's and a couple of beers before signing the Affidavit (Tr. 48).

Safley testified that Jones read the Affidavit before signing it (Tr. 45), while Jones stated that he "somewhat" read it (Tr. 31), and that he was really just trying to help a buddy (Tr. 39).

Safley testified that he immediately took his March 17, 2003, work restrictions to Krantz after leaving the physician's office on March 17<sup>th</sup> (Tr. 75). Krantz, Callahan and Stannard

testified that Krantz received the March 17, 2003, physician work restrictions from Safley on or after March 18, 2003 (Tr. 159, 187, 216; CE 1-26).

Safley testified that he told Krantz that he would be taking Hydrocodone, a strong sedative (Tr. 76). Krantz testified that Safley told him that the medication Safley would be taking was not any different from taking Ibuprofen for sore muscles (Tr. 195).

Safley testified that he told Krantz that he could do no repetitive lifting, long-term sitting or standing (Tr. 76). Safley's March 17, 2003, restriction states only "no lifting > 20 lbs. for one week" and it does not restrict repetitive lifting, sitting or standing (CE 1-25). The March 25, 2003, restriction states "no lifting over 20 lbs. May drive" (CE 1-25). The April 24, 2003, restriction is a summary of past restrictions. It states:

Light duty from 3/17/03 - 4/3/03 (less than 20 lbs).  
Off work from 4/3/03-4/14/03. Return to ½ time work.  
No more than 20 lbs. lift. Avoid repetitive  
lifting/bending. May now lift 40-50 lbs. Repetitive  
lifting to be avoided.

(CE 1-24) (original emphasis).

No work restriction addresses sitting. None addresses Hydrocodone or any other medication. None restricts driving while Safley was employed with Respondent.<sup>5</sup> Only the April 24, 2003, restriction discusses repetitive lifting and bending and that restriction does not restrict standing or sitting.

Safley testified that on March 20, 2003, the day of the Minnesota run, he told Krantz that he was on Hydrocodone and Skelaxin and that he should not be driving (Tr. 83, 84, 126). Krantz testified that Safley never mentioned that he was taking medication that would impair driving ability and that had Krantz known that Safley was taking such medication, he would not have allowed Safley to come to work, since Safley drove daily to and from his job (Tr. 194). Safley testified that making the Minnesota trip while taking the medication would violate Department of Transportation rules (Tr. 84). Jones (Tr. 29) and

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<sup>5</sup> The record does contain a May 22, 2003, work restriction prohibiting operation of a commercial vehicle, which was written after Dr. Feldkamp placed Safley on Darvocet (CE 1-44). This work restriction was written *after* Safley had been terminated from Stannard Moving & Storage.

Stannard (Tr. 221) testified that Safley specifically told Stannard that he had not taken pain medication on March 20<sup>th</sup> while at work. There is no credible evidence nor support from any witness that Safley discussed violation of DOT regulations with any company supervisor.

Safley testified that the trip to Minnesota was beyond his work restrictions because it involved prolonged sitting (Tr. 93). None of Safley's restrictions prohibit sitting for prolonged periods (CE 1-24, 25). The March 20, 2003, physician's note places only a 20-pound lifting limit on Safley (CE 1-25). Safley acknowledged that none of the physicians' excuses restricted him from driving (Tr. 128). The March 25, 2003, excuse, explicitly states that Safley "may drive" and Dr. Felkamp wrote this work release after prescribing Celebrex, Skelaxin and Hydrocodone (Tr. 129).

In view of Safley's inconsistent and contradictory testimony with other record evidence including the testimony of other witnesses, I discount his testimony and find him not to have been a credible witness.

#### FINDINGS OF FACT

The Complainant, Mark N. Safley, lives in Iowa City, Iowa and was 34 years old at the time of the hearing (Tr. 61). Safley spent most of his adult life in the trucking industry (Tr. 62). Safley's father had an ownership interest in the business that later became Stannard Moving & Storage (Tr. 62). Dean Stannard purchased the company from Safley's father in 1978 (Tr. 62) and Randy Stannard, the current President, came in to help manage the business (Tr.62).

When the business was sold in 1978, Safley continued to work for Stannard Moving & Storage for about one year (Tr. 62-63). Safley became involved in a controversy over the number of hours paid on a trip near Okoboji or Storm Lake and he was terminated (Tr. 62-63).

Safley returned to employment with Respondent in May 1993 until approximately January 1994 (Tr. 63-64). In early 1994, Safley got into an altercation with Jackie Goodall, Respondent's bookkeeper (Tr. 205-206). That confrontation led to a second altercation between Safley and Goodall's husband, who was a warehouse employee with Respondent (Tr. 206). The altercation between Safley and Goodall's husband nearly led to fisticuffs (Tr. 206). Following the confrontation, Safley did not show up



for work for one to two days (Tr. 206). Stannard reviewed Safley's prior incidents of not showing up for work or calling in, the current situation with the Goodalls, and Safley's demeanor with all employees and determined that Safley would not be permitted to return to work since he had voluntarily left without notice (Tr. 206).

In 2002, Safley contacted Stannard to ask if he could come back to work for the Respondent (Tr. 207). Stannard remembered that conversation as follows:

[Safley] had worked for a competitor for some time, had been injured, had been off work for a long time, had been laying around the house, felt he was getting a little overweight and was really out of shape, and felt that getting back in the business would be good for him ... and he really knew the business well and could be an asset to us. And I said there are a couple of major issues here. One, you have had a back injury before; are you going to be able to do the work? Are you putting yourself at risk, because I don't want to have an issue where you hurt your back again, and, you know, have it be permanent or something. And he was like, 'No, I'm totally fully recovered; I shouldn't have any issues at all.' I said the second thing is, the last time you left it was under a very negative situation where we had confrontations in the office, and some with me, and a variety of issues regarding your demeanor. Have you grown up? And he said, 'Hell, yeah, I've grown up, and I'm much more mature now, and you just won't see that kind of thing.' And I said on the condition if you have any issue with me, whatsoever, that you will come in as a gentleman and sit down and discuss them, I'll let you come back.

(Tr. 207-208). Safley corroborated that Stannard wanted assurances that Safley's attitude and behavior would improve if he returned to work (Tr. 121)

Safley returned for a third stint at Stannard Moving & Storage in August 2002 (Tr. 64). Callahan, Respondent's General Manager, would not have recommended rehiring Safley (Tr. 158). While Callahan felt that Safley was a good truck driver, he found Safley very arrogant and felt that Safley had a "very serious attitude problem" (Tr. 158, 177). Stannard rehired Safley while Callahan was away on vacation (Tr. 157).

Safley's first several weeks were without incident (Tr. 208). Safley was generally considered a good worker, and he did not tell other drivers things that later were determined to be untrue (Tr. 17, 25). Thereafter, Safley started to complain more frequently about issues (Tr. 208). He complained that helpers sent with him were too weak, too stupid, or that they did not know what they were doing (Tr. 208).

Safley was loud and abusive to others in the company and was especially argumentative with office and management employees (Tr. 19, 25, 26, 43). Safley had a particularly loud and boisterous voice, and it was sometimes difficult to determine whether Safley was upset or just talking at a normal tone of voice (Tr. 26).

As a result of Safley's repetitive complaining, Stannard counseled Safley at least two or three times. Stannard stated that he told Safley that if there was an issue on a job, the time to raise it was before going out and that it was inappropriate to "wait until you get out on a job and call one of the girls [in the office] and read her the riot act and cause them a bunch of grief. Don't threaten to drive the truck back here and park it because you are fed up with the guy you're working with... If you are going to bring up an issue, bring it up in the office in a quiet manner before you ever start the job, and let's deal with it in that manner." (Tr. 36).

Safley sustained a back injury on March 14, 2003 (Tr. 124, 209-210). For the next two to four weeks, Safley was only available to work sporadically, and he often did not show up or call the office (Tr. 210).

On March 17, 2003, Safley saw Dr. Feldkamp (CE 6-1). After examination, Dr. Feldkamp diagnosed lumbago and told Safley not to lift more than 20 pounds at work for the next week (CE 1-25). He prescribed physical therapy twice a week for the next three weeks, and gave Safley a prescription for Celebrex and Skelaxin. He warned Safley of possible sedative side effects.

On March 18, 2003, Safley arrived at work at 9:30-10:00 a.m. and handed Krantz a physician's note restricting Safley to no lifting greater than 20 pounds for one-week (Tr. 159, 187, 216; CE 1-26). The note did not list restrictions on driving (Tr. 162; CE 1-25). Safley did not tell Krantz about any driving restrictions when delivering the March 17, 2003, physician's release (Tr. 162). Krantz called Stannard to relay the information received (Tr. 216; CE 1-26). Stannard

instructed Krantz to have Safley return to work on March 19, 2003, to discuss the situation more thoroughly (Tr. 216; CE 1-26).

Safley reported to work on March 19, 2003, at 11:00 a.m., filled out an injury report and left sometime before 11:45 a.m. (CE 1-26). Safley did not report to work or call on March 20, 2003, or on March 24, 2003 (CE 1-26). After Safley did not report for work on March 25, 2003, Krantz called Safley at home and told him to check in each morning to see if light duty work was available (Tr. 77-78; CE 1-26).

During his rehabilitation, Safley was always given reasonable light duty jobs (Tr. 57). The company did, at times, fail to consider the requirements of the complete job, and therefore, sometimes Safley was sent on jobs in which some portion of the job could have exceeded Safley's lifting restrictions (Tr. 37-38). Jones testified that

[A]ny time Dan [Callahan] or Mike [Krantz] asked Mark [Safley] to do anything, it was basically an argument. If they asked him to move that chair, it was an argument. Does the chair weigh more than twenty pounds, that type of thing.

(Tr. 36; see also Tr. 96).

Stannard never ordered Safley to exceed his work restrictions (Tr. 37,165). Krantz never ordered nor saw any other employee order Safley to exceed his work restrictions or to perform work that Safley complained was beyond his restricted abilities (Tr. 193).

On March 20, 2003, Dr. Feldkamp issued a prescription to Safley for Hydrocodone (CE 6-2).

On March 20, 2003, Safley arrived at work to perform light warehouse duty (Tr. 214). Stannard testified that:

[w]e had planned, if we could, to send him to Rogers, Minnesota, with a tractor-trailer, an empty one, to be delivered to another driver that I had hired who lived in Minnesota. The theory would be that he would drive it up there, hopefully a five-six-hour run, meet the driver late in the afternoon. The reason we'd send him midday was because there was another driver that was going to be able to come and get him picked up by,

we hoped, 7:00, 8:00 in the evening and drive back here. ... The theory at that point was he would take the truck up, and that would be it. His drive would end at that point; he would be off duty. ... I had said I would pay him for the entire time he was gone, which we subsequently did.

(Tr. 215).

Stannard met with Safley mid-morning on March 20, 2003, to discuss the Rogers, Minnesota run (Tr. 78, 219). Stannard knew of no statements made by Safley or of any restrictions placed on Safley by a physician that would restrict commercial driving (Tr. 220).

When asked about the truck run to Minnesota, Safley replied "I'm taking painkillers" (Tr. 28, 220). Stannard asked him if there were any side effects from the medication (Tr. 220). Safley responded that the medication could produce drowsiness and tired muscles (Tr. 38, 220; CE 6-2). Stannard asked Safley if he was experiencing any of the known side effects (Tr. 220). Safley responded something to the effect of "No, not too bad" (Tr. 220). Stannard asked Safley if he was taking the medications that day, to which Safley responded that he had not taken the pain medication (Tr. 29, 221). Stannard then asked if Safley was feeling pain, "are you going to need it during the course of the day, or do you think you can get five or six hours up the road before you need it?" (Tr. 28, 41, 221). Safley stated that he had physical therapy the next day, but the run was scheduled to return by 10:00-11:00 p.m. that night, which would allow Safley to make his appointment (Tr. 29, 59). Stannard asked Safley three separate times if he could complete the run in a safe manner and Safley replied that he could make the run (Tr. 29, 221). Stannard personally sent Safley to Rogers, Minnesota (Tr. 248). The entire conversation lasted about 10-15 minutes (Tr. 250).

Safley testified that he made the trip because he felt his job was in jeopardy if he said no (Tr. 90). Stannard had previously counseled Safley about his attitude, and Safley was concerned that a refusal might be seen as additional evidence of a poor company attitude (Tr. 91).

After the conversation with Stannard, Safley left work, filled a prescription for Hydrocodone at Walgreen's (Tr. 125-126; CE 6-2) and punched himself back into work around 2:30 p.m. (Tr. 221, 249). Respondent paid Safley from that point until

7:30 a.m. on March 21, 2003 (Tr. 221). Although Safley testified that the truck he was to deliver was unavailable until approximately 4:45 p.m. (Tr. 78), Stannard testified that there was nothing wrong with the truck that would have delayed Safley's departure to Rogers, Minnesota (Tr. 252).

Safley completed the trip to Rogers, Minnesota but he testified that the back of his legs were hurting, his hip was sore and that it was difficult to drive (Tr. 81). The replacement driver was not ready to return to Iowa when Safley arrived in Rogers, Minnesota (Tr. 81). The return driver got tired on the trip back and pulled off the road to sleep for a period (Tr. 81). Safley told the driver that he needed to make a doctor's appointment and that he would drive back (Tr. 81). After the trip, Safley did not report to work for three to four days (Tr. 222).

On March 25, 2003, Safley returned to Dr. Feldkamp for a follow up visit (CE 6-2). Dr. Felkamp noted that Safley has been taking Ibuprofen and Celebrex, and noted that Safley did not think the Skelaxin made much difference. He noted that Safley "also drove up to Minneapolis and rode back with someone else which caused some pain but he managed to get through it ok." Dr. Feldkamp released Safley to work with "no lifting over 20 pounds" and he "may drive" (CE 1-25, 1-54).

Krantz called Safley at 3:30 p.m. on March 25, 2003, to discuss Safley's work situation (Tr. 223). Safley stated that he did not know that he needed to check in each day (Tr. 223). Krantz counseled Safley that just because he was on light duty did not mean that he did not have to show up for work (Tr. 223). Safley stated that he would be in to work the next morning on March 26, 2003 (Tr. 223).

Somewhere around March 27, 2003, Stannard asked Callahan where things stood with Safley and his work restriction documents (Tr. 218). At that point, Callahan asked Safley to sit down and write what his work restrictions were, as he understood them from his doctor (Tr. 164, 218).

Safley hand wrote a two-page statement on March 27, 2003 (CE 2-1-2). The statement discusses Safley's physician appointments and his work schedule and Safley states that he is afraid he will lose his job. The only reference to work restrictions is "Stannard Moving has my doctor's orders on what I can do."

After reading Safley's March 27, 2003, statement, Stannard knew he had a problem with Safley (Tr. 224). Safley appeared to be picking and choosing choice jobs, varying his work restrictions to fit jobs that he wanted to work and restricting himself out of less desirable assignments (Tr. 224). Stannard wanted to have a full understanding of Safley's exact physical restrictions so that efficient scheduling could be accomplished without rearranging work crews at the last minute due to Safley's limitations (Tr. 224).

After March 27, 2003, Safley was sent out as a driver and told to let the helper do the lifting (Tr. 95). This proved problematic because sometimes a portion of the materials being delivered required two people to unload (Tr. 95).

On April 3, 2003, Safley returned to the doctor for a follow up visit (CE 6-3). Safley "reports that he has been assigned to tasks at work that do not involve lifting more than 20 pounds but do involve a fair amount of lifting and carrying. Has been taking ibuprofen 800 mg b.i.d. and not t.i.d. as recommended. States he is hardly taking any narcotic pain medications." The doctor ordered one week off work from April 3-13, 2003, (CE 1-52) and stated that Safley could return to work half time thereafter while avoiding repetitive lifting over 20 lbs. as long as he was given permission to reduce activity further if activity became too painful.

On April 24, 2003, Safley returned to the doctor for a follow up visit (CE 6-3). Safley reported gradual improvement in his back pain until he was sent on a job where he lifted about 150 pounds. The physician wrote a new work release describing Safley's prior work restrictions and he added a 50-pound current lifting restriction, with avoidance of repetitive lifting and bending (CE 1-24, 1-51).

In the first week of May 2003, Stannard heard from another employee that Safley was tape recording drivers' meetings and office conversations (Tr. 225). Stannard became suspicious as to why Safley would be recording such conversations (Tr. 225). Stannard made a decision that if he saw Safley taping anything he would stop it (Tr. 225).

On May 8, 2003, Safley drove a load to Cedar Rapids, Iowa (Tr. 191). Safley discussed with Stannard that a lot of the load contained heavy furniture and Safley did not believe he could help with unloading (Tr. 102). Safley did not complain about driving to Cedar Rapids and Safley had stopped taking all

pain medication by May 8, 2003 (Tr. 138). After arriving at the delivery point, Safley phoned the office and told Krantz that the helper could not lift the furniture to be delivered and that he was unable to assist the helper due to back pain (Tr. 102, 191). Krantz told Safley that he would come and take Safley's place on the delivery (Tr. 108, 191). After finishing the delivery, Krantz took Safley back to the office and sent him home for the day (Tr. 108, 192).

On May 9, 2003, Krantz and Safley entered the office creating a "big commotion" (Tr. 225). Krantz asked Safley why he had threatened to drive the Cedar Rapids truck back to the shop without making the delivery (Tr. 113). Safley replied that he was not threatening to abandon the job, but rather that he was calling Krantz to let him know that he was unable to lift the furniture being delivered (Tr. 113). Stannard was unaware what the particular problem was, so he instructed both men to calm down and to discuss whatever was going on in Stannard's office (Tr. 226). At that point, Safley pulled a tape recorder out of his pocket, put it down on the table in front of them and said "do you know I'm tape recording all of this?" (Tr. 114, 226). Stannard replied "No, I didn't, but now that you have told me, turn it off" (Tr. 114, 226). After telling Safley three more times to turn off the tape recorder, Stannard told Safley three times to "get out" of the building (Tr. 115, 226). Safley eventually left the building (Tr. 226).

Stannard reviewed the situation and decided that he would terminate Safley for insubordination (Tr. 227). He testified that "I'm not going to tolerate anybody tape recording stuff secretly in the office. I won't have an employee working for me that stands in my face and yells back at me and won't be reasonable" (Tr. 227).

Safley called the office on Monday, May 12, 2003, and asked Stannard if he still had a job (Tr. 116, 227). Stannard told Safley that he no longer had a job (Tr. 116, 227). When Safley asked about obtaining his last paycheck, Stannard told Safley to come in on Friday to pick it up (Tr. 227).

Safley attended a physical therapy evaluation on May 12, 2003, at Performance Therapies, P.C. (CE1-42). Safley relayed to the therapist the details of his earlier 1999 back injury, his current March 14, 2003, injury and the treatment he had received to date. He was assessed with low back pain, was told to take Tylenol and Flexural, was recommended physical therapy, and was given a work modification of "maximum lift, push, pull

of 15-20 pounds. No repetitive bending, lifting, stooping or twisting. No lifting from floor to waist."

On May 16, 2003, Safley returned to the physician for a follow up visit (CE 6-4). Safley reported the loss of his job, and the physician noted diabetes, abdominal pain with cramping, and "reports his back pain has improved over the past week since he hasn't been lifting."

Safley did not come in on Friday, May 16, 2003, to get his final check (Tr. 227). On Saturday, May 17, 2003, Stannard received a call from the office, stating that Safley was at the office banging on the locked door trying to get in (Tr. 228). The office employee, who was working alone, partially opened the locked door to determine who was banging (Tr. 228). Safley entered the business and demanded his paycheck (Tr. 228). Stannard told the employee that he was not coming down to deliver Safley's paycheck, and Stannard told the employee to relock the door and to call the police (Tr. 228). The office employee called the police, and Safley left the parking lot before the police arrived (Tr. 228).

Safley telephoned Stannard at home later that day to demand his check (Tr. 229). Stannard instructed Safley to come to the office on Monday, May 19, 2003, to receive his final check during normal business hours (Tr. 229).

Stannard reviewed company records and drafted a letter to Safley explaining his termination (Tr. 229; CE 1-17). Attached to the letter was a spreadsheet showing money advances outstanding to the company and showing the calculations used to determine the correct dollar amount of Safley's last check (Tr. 230; CE 1-23-25). Safley came to Respondent's business on Monday, May 19, 2003, and was lead into the office with Stannard, Callahan and Krantz (Tr. 232). At that meeting, Safley refused to sign Stannard's letter of explanation and he refused his final paycheck (Tr. 231; CE 1-18). Safley showed Stannard a tape recorder, implying that he was taping the conversation, and he told Stannard that his lawyer would be calling (Tr. 231; CE 1-18).

Stannard terminated Safley on May 19, 2003, for "continuing practices which you have been warned about before, such as making threats and arguing with management" (CE 1-17). Only Stannard has firing approval (Tr. 253). If an incident warranting termination occurs, company policy is for the supervisor to send the employee home immediately, for the



supervisor to discuss the incident with Stannard, and then for Stannard to make a decision regarding continued employment (Tr. 254).

CONCLUSIONS OF LAW

Applicable Law:

Section 405 of the STAA provides:

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

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

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

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

(ii) the employee has a reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

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

49 U.S.C. §31105.

To establish a *prima facie* case of discriminatory treatment under the STAA, Safley must prove: (1) that he was engaged in an activity protected under the STAA; and (2) that he was the subject of adverse employment action; and (3) that a causal link exists between his protected activity and the adverse action of

his employer. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). At a minimum, Safley must present evidence sufficient to raise an inference of causation. *Carroll v. J.B. Hunt Transportation*, 91-STA-17 (Sec'y June 23, 1992). The establishment of the *prima facie* case creates an inference that the protected activity was the likely reason for the adverse action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

### Protected Activity

Under Section 405(a)(1)(A), protected activity may be established through complaints or actions with agencies of federal or state governments, or it may be the result of purely internal activities, such as internal complaints to management. *Reed v. National Minerals Corp.*, 91-STA-34 (Sec'y July 24, 1992).

To establish protected activity, the employee must demonstrate a reasonably perceived violation of the underlying statute or its regulations. *Johnson v. Old Dominion Security*, 86-CAA-3 to 5 (Sec'y May 29, 1991). The employee need not prove an actual safety violation, but complaints must be made in good faith. *Ashcraft v. Univ. of Cincinnati*, No. 83-ERA-7, slip op. at 9 (July 1, 1983); *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). If Safley reasonably perceived that the Respondents were in violation of the Act, the fact that he had other motives for engaging in protected activity is irrelevant. *Carter v. Electrical District No. 2 of Pinal County*, 92-TSC-11 (Sec'y July 26, 1995).

Complainant asserts that "Safley engaged in protected activity, beginning when he confronted management about driving under the influence of sedative medication and ending when he was fired after being unable to complete a job clearly outside his work restrictions." Comp. Br. at 7. Specifically, Safley asserts that he engaged in protected activity involving two commercial truck runs. The first incident involved the March 20, 2003, trip to Rogers, Minnesota. The second incident involved the May 8, 2003, trip to Cedar Rapids, Iowa.

### March 20, 2003, Trip to Rogers, Minnesota

Complainant argues that Safley made an internal complaint to Respondent, informally complaining that Safley's driving of the empty tractor trailer to Rogers, Minnesota would violate Federal Motor Carrier Safety Regulations § 392.3. Comp. Br. at 6. Section 392.3 states in relevant part:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause as to make it unsafe for him/her to begin or continue to operate the commercial vehicle.

Complainant asserts that:

On March 20, 2003 Respondent told Safley to make a run to Minnesota to pick up a new driver. At the time, Safley was taking hydrocodone, a medication with sedative effects. Because Safley informed Respondent he would be violating such a policy if he made the run to Minnesota he was engaged in protected activity under § 31105.

Comp. Br. at 6.

Complainant's argument is without merit. While Complainant cites Section 392.3 of the Federal Motor Carrier Safety Regulations, which deals with ill or fatigued operators, he fails to cite the next section, § 392.4 which deals with drivers under the influence of impairing drugs.

Section 392.4, Drugs and Other Substances, states in relevant part:

- (a) No driver shall be on duty and possess, be under the influence of, or use, any of the following drugs or other substances:
  - (3) A narcotic drug or any derivative thereof:
  - (4) Any other substance, to a degree which renders the driver incapable of safely operating a motor vehicle.
- (b) No motor carrier shall require or permit a driver to violate paragraph (a) of this section.
- (c) Paragraphs (a)(2), (3), and (4) do not apply to the possession or use of a substance administered to a driver by or under the

instructions of a licensed medical practitioner, as defined in § 382.107 of this subchapter, who has advised the driver that the substance will not affect the driver's ability to safely operate a motor vehicle.

The record does not support Safley's assertion that he started taking Hydrocodone after discussing the matter with Dr. Feldkamp on March 17, 2003. Dr. Feldkamp's March 17, 2003, treatment notes document prescriptions only for Celebrex and Skelaxin. Dr. Feldkamp wrote a work excuse on March 17, 2003, (after prescribing Celebrex and Skelaxin) restricting Safley to lifting less than 20 pounds at work. The work release did not restrict driving, and Safley did not discuss driving restrictions with Krantz when turning in the physician's excuse on March 18, 2003. Had Safley indicated that his medications could impair driving ability, Krantz testified that he would not have allowed Safley to report to work at all, since Safley drove daily to and from his job at Stannard Moving & Storage.

Dr. Feldkamp prescribed Hydrocodone on March 20, 2003, and Safley filled the prescription that day at Walgreen's while he was at lunch. Dr. Feldkamp had now prescribed Skelaxin, Celebrex and Hydrocodone, and he made no changes to Safley's work restrictions. The lifting restrictions remained in place and there was no restriction on Safley's ability to drive a commercial vehicle.

Dr. Feldkamp's notations at the March 25, 2003, follow-up examination of Safley corroborate that Dr. Feldkamp did not intend to restrict Safley's ability to drive a motor vehicle. Dr. Feldkamp issued an updated work release on March 25, 2003, knowing that Safley was taking Skelaxin, Ibuprofen, Celebrex and Hydrocodone, and in the new work release, Dr. Feldkamp specifically states that Safley "may drive."

Stannard met with Safley mid-morning on March 20, 2003, to discuss the Rogers, Minnesota run. When asked about making the run to Minnesota, Safley told Stannard that he was taking painkillers. Stannard asked what side effects the medicine could produce and then asked if Safley was experiencing any of those side effects. Safley responded that he was not experiencing drowsiness or other side effects. Stannard asked Safley if he had taken the medication that morning. Safley responded that he had not taken any pain medication yet that day. Stannard asked Safley if he was feeling pain and asked

Safley whether he thought he could make the run to Minnesota without having to take any medication. Stannard asked Safley three separate times whether he could make the run in a safe manner and Safley responded that he could.

Under § 392.4, a driver may take narcotic drugs under the instructions of a physician who has advised the driver that the substance will not affect the driver's ability to operate a motor vehicle. Safley was under the care of Dr. Feldkamp, and he did not restrict Safley's driving ability at any point during his employment with Respondent. Safley drove to and from work. Safley had no reasonable belief that his pain medication would impair his driving ability. Ultimately, however, that conclusion is moot because Safley did not take narcotic pain medication on March 20, 2003. He was not experiencing any side effects, and he told Stannard that he could complete the run without taking any pain medication and that he could drive the truck in a safe manner.

The record does not demonstrate that Safley had a reasonable belief that he would violate a motor carrier safety regulation by driving the tractor-trailer to Rogers, Minnesota. The March 20, 2003, trip to Rogers, Minnesota and all conversations and/or complaints surrounding that trip are not protected activity within the STAA.

May 8, 2003, Delivery to Cedar Rapids, Iowa

Safley's second argument is that he was unable to complete deliveries to Cedar Rapids, Iowa on May 8, 2003, due to Respondent's alleged violation of Safley's lifting restrictions. Comp. Br. at 7. The brief argument does not discuss either Safley's ability to drive or his internal complaints regarding violation of motor carrier safety regulations. Safley testified that "I wasn't complaining about driving to Cedar Rapids at that time" and he testified that he had stopped taking pain medication by the date of that trip (Tr. 138). Safley admits that he made no complaints regarding commercial driving or motor carrier safety and that he was no longer taking the pain medications described in the March 20, 2003, incident. I find that the May 8, 2003, delivery to Cedar Rapids does not involve motor carrier safety in any way and that this incident is not protected activity.

Mark N. Safley has failed to demonstrate that he engaged in protected activity covered under the Act as a result of the two commercial truck runs on March 20, 2003, and May 8, 2003. As

Complainant has failed to establish a key element of his *prima facie* case, his claim must be denied.

#### Adverse Employment Action

Any employment action by an employer that is unfavorable to the employee's compensation, terms, conditions or privileges of employment constitutes an adverse action. *Long v. Roadway Express, Inc.*, 88-STA-31 (Sec'y Mar. 9, 1990). Respondent terminated Safley on May 19, 2003. Safley was subject to an adverse employment action.

#### Causal Connection Between Adverse Action and Protected Activity

Safley has failed to establish that he engaged in protected activity covered under the Act. Assuming, *arguendo*, that Safley had established protected activity, he also fails to prove a causal connection between his termination and his alleged protected activities involving the March 20, 2003, and the May 8, 2003, commercial truck runs.

Complainant argues that Respondent would not have terminated Safley but for his back injury and his inability to work because of physical lifting restrictions. Comp. Br. at 9. In all discussions at hearing and in brief, the Complainant's physical lifting restrictions focused on unloading of furniture at the end delivery point. The Complainant was not required to lift while driving, and no physician restricted Safley's driving ability while he was employed with the Respondent. As Safley's back injury and resulting lifting restrictions are unrelated to driving a commercial motor vehicle, they do not even colorably state a connection to motor carrier safety.

Complainant also argues that he was terminated in part for informing his employer that he was unable to legally drive a semi. Comp. Br. at 11. This argument is without factual support, and Safley's testimony does not support the contention. Safley did not state that he could not legally drive a semi. Safley received no driving restrictions from his physician while employed with the Respondent, and he told Stannard that had not taken his narcotic pain medication on the day of the March 20, 2003, run. Safley stated more than once that he could, and ultimately did, safely complete the Rogers, Minnesota trip. The record contains no evidence connecting the May 20, 2003, Rogers, Minnesota run to Safley's termination.

Safley has also failed to demonstrate a causal inference between his alleged protected activity and his termination.

#### Legitimate, Non-discriminatory Reason for Adverse Action

In a STAA whistleblower case, if a complainant presents evidence raising a reasonable inference of retaliatory discharge, the employer has the burden of articulating a non-discriminatory reason for its action. *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995). Assuming that the Complainant had established both protected activity and an inference of causation, Respondent has carried its burden of articulating a legitimate nondiscriminatory reason for terminating Safley.

Respondent asserts that Stannard terminated Safley for insubordination as demonstrated by the fact that Complainant was argumentative with office workers, that Safley was tape recording office conversations, and that he was belligerent with Stannard. Resp. Br. at 1-2.

A complainant is not automatically immune to adverse action subsequent to engaging in protected activity. Even if an employee engages in protected activity, an employer may discipline the employee for insubordination. See, e.g., *Logan v. United Parcel Serv.*, 96-STA-2 (ARB Dec. 19, 1996); *Schulman v. Clean Harbors Env'tl. Servs., Inc.*, ARB No. 99-015, ALJ No. 98-STA-24 (ARB Oct. 18, 1999); *Adjiri v. Emory Univ.*, 97-ERA-36 (ARB July 14, 1998).

Respondent states that Safley was terminated for insubordinate behavior, listing at least three insubordinate acts committed by Safley against Stannard and other employees. I find that Respondent has articulated a legitimate non-discriminatory reason for terminating Safley's employment and that Respondent has met its burden of production.

#### Pretext

If the Respondent articulates a legitimate nondiscriminatory reason for the adverse employment action, the complainant must then show that the articulated reason is a pretext and that the employer discriminated against him because of his protected activity. *Shannon v. Consol. Freightways*, ARB No. 98-051, ALJ No 1996-STA-15 (ARB April 15, 1998).

The Complainant does not present a direct pretext argument. Parts of his brief can be inferred to suggest pretext, however,

and those will be addressed. Respondent states that he terminated Safley due to insubordination. Complainant asserts that:

Respondent rehired Safley in August 2002. Respondent testified that Safley was originally fired because of his bad temper and general poor attitude. Apparently, Respondent thought these personality traits had changed because Safley was hired back. Respondent testified that Safley continued to be rude and insubordinate, even prior to the March 20<sup>th</sup> event. But Safley was not fired immediately; he was only fired after he complained about driving while taking sedative medication and being unable to work without restrictions. ... If Safley was difficult and rude when he first worked for Respondent and he was subsequently hired back, there must be another reason for his termination. The March 20<sup>th</sup> incident did not have to be the predominant reason for firing Safley, it just has to be what tipped the scales. The March 20<sup>th</sup> incident along with Safley's inability to work without restrictions was the cause of his termination.

Comp. Br. at 9-10.

Complainant's arguments are flawed by omissions and factual inaccuracies.

Complainant argues that Respondent must have thought that Safley's attitude problems had changed because Stannard hired Safley back in August 2002. In fact, Stannard only hired Safley back after obtaining assurances that Safley's temper and attitude had improved since his termination in 1994. Safley corroborated that Stannard wanted assurances that Safley's attitude and behavior would improve if he was allowed to return to work.

Complainant also argues that pretext is shown by the fact that he was not immediately terminated when he continued to be rude and insubordinate. In fact, Stannard counseled Safley on at least two or three occasions for his poor behavior. Stannard told Safley that he needed to raise issues in the office in a quiet manner before starting a job, and that it was inappropriate to threaten to bring the truck back after he was on the jobsite because Safley did not like the helper assigned to him. These facts demonstrate that Safley's insubordinate behavior was recognized early, and that in lieu of immediate



termination, Stannard pursued counseling on at least two occasions to try to correct Safley's inappropriate behavior and to avoid termination.

Complainant further asserts that he was terminated only after he complained about driving while taking sedative medication. The factual record does not support that assertion. Such a complaint, had it taken place, would have occurred in March 2002. Respondent terminated Safley two full months later when the Complainant belligerently told Stannard he was tape recording their conversation and that he would not shut off the tape recorder. The March 20, 2003, Minnesota trip was not a part of that conversation, nor is it mentioned in any part of the events surrounding Safley's termination.

Finally, Complainant argues that the termination was due to his inability to work without physical lifting restrictions while delivering furniture. This assertion, even if ultimately proven true, does not involve any activity protected under the STAA, and as such, it does not provide grounds for retaliation against protected activity under the STAA.

The Complainant has failed to establish that the Respondent's asserted, legitimate, non-discriminatory reason of insubordination was a pretext for retaliatory termination due to activity protected under the STAA.

In review of each of the above findings, Complainant has failed to establish a *prima facie* case of discriminatory treatment under the STAA. Therefore, his Complaint should be denied.

RECOMMENDED ORDER

I recommend that Mark N. Safley's claim for reinstatement, money damages and attorney fees be DENIED.

A

Rudolf L. Jansen  
Administrative Law Judge

NOTICE: This recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. See 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. §