U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 February 2005

CASE NO.: 2004-STA-53

In the Matter of

MARK T. RIDGLEY,
Complainant

v.

C.J. DANNEMILLER COMPANY,
Respondent

APPEARANCES:

Nancy Grim, Esq., and
Richard R. Renner, Esq.
For the Complainant

Todd T. Morrow, Esq.
For the Respondent

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. JURISDICTION

This proceeding arises under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 [hereinafter "the Act" or "STAA"], 49 U.S.C. § 31105 (formerly 49 U.S.C. app. § 2305), and the applicable regulations at 29 C.F.R. Part 1978. The Act protects employees who report violations of commercial motor vehicle safety rules or who refuse to operate vehicles in violation of those rules.

II. PROCEDURAL HISTORY[1]

Complainant, Mr. Mark Ridgley (hereinafter "Ridgley"), filed a complaint of discrimination with the Department of Labor, under Section 405 of the Act, against C.J. Dannemiller Company (hereinafter "Dannemillers"), on or about April 19, 2004, alleging he was discharged by respondent, C.J. Dannemiller Company, in retaliation for making safety complaints concerning Dannemillers' operations and trucks. The complaint was investigated by the Department of Labor and found not to have merit. On June 15, 2004, the Secretary issued her Findings dismissing the complaint. By motion dated July 12, 2004, Ridgley, through counsel, objected to the Secretary's Findings and requested a hearing. I issued a Notice of Hearing, on July 28, 2004. The matter was tried on November 16-18, 2004, in Akron, Ohio. In their pre-hearing submissions, both the complainant and respondent joined the issue of whether Mr. Ridgley was discharged in violation of the STAA. Post-hearing briefs were filed by C.J. Dannemiller Company and Ridgley on January 28, 2005.

III. STIPULATIONS AND THE PARTIES' CONTENTIONS

A. Stipulations

The parties agreed to, and I accepted, the following stipulations of fact (TR 12-15):

1. The respondent is a motor carrier engaged in Commercial motor vehicle operations which maintains a place of business in Norton, Ohio.
2. The respondent's employees operate commercial motor vehicles, in the regular course of business, over interstate highways and connecting routes, principally to transport cargo.
3. The respondent is and was a "person," as defined in the STAA, 49 U.S.C. § 31101(3).
4. The complainant was hired as an employee of the respondent, on or about July 1, 1991 and that he was discharged.
5. The complainant was made a driver employee of the respondent in March of 1998.
6. The complainant worked as a driver of a commercial motor vehicle with a gross weight in excess of 10,000 pounds used on the highways to transport cargo.
7. The complainant's employment with the respondent ended on or about December 1, 2003.
8. On or about April 19, 2004, the complainant filed a complaint with the Department of Labor, OSHA, under the provisions of the STAA.
9. The complaint was timely filed with the Department of Labor.
10. On or about June 15, 2004, the Area Director of the Occupational Safety and Health Administration (OSHA) issued "Secretary's Findings" concluding Mr. Ridgley's complaint to be without merit.

[1] References in the text are as follows: "ALJX ___" refers to the administrative law judge or procedural exhibits received after referral of the case to the Office of Administrative Law Judge; "CX ___" refers to complainant's exhibits; "RX ___" to respondent's exhibits; and "TR ___" to the transcript of proceedings page and testifying witness' name.

11. The Office of Administrative Law Judges, U.S. Department of Labor properly exercises in personam and subject matter jurisdiction to hear this matter.

B. The Parties' Contentions:

1. *Complainant*:

The complainant argues that the inspection reports and verbal truck repair requests he provided C.J. Dannemiller Company, during his work as a truck driver, constituted protected activity covered by the STAA. As a result of his protected activities, C.J. Dannemiller Company terminated him, on or about December 1, 2003. Ridgley contends that a driver engages in protected activity under the STAA when he files safety complaints and/or refuses to drive due to unsafe conditions.

2. *Respondent*:

C.J. Dannemiller Company does not agree that the complainant engaged in protected activity or that he was discharged for an impermissible reason. C.J. Dannemiller Company argues that complainant was terminated for questioning the credibility and integrity of the company president. Further, C.J. Dannemiller Company contends that the termination of Mr. Ridgley is simply a management matter which does not run afoul of the STAA. It argues that it disciplined and/or discharged Ridgley for a legitimate, non-discriminatory reason, namely, because Ridgley had called the Company owner a liar and had threatened him.

IV. ISSUES

A. Whether, under 49 U.S.C. § 31105(a)(1)(a), the respondent discharged, disciplined or discriminated against an employee, to wit the complainant, regarding pay, terms or privileges of employment, because,

> He had filed a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order, or

B. Whether, under 49 U.S.C. § 31105(a)(1)(b)(i), the respondent discharged, disciplined or discriminated against an employee, to wit the complainant, regarding pay, terms or privileges of employment, because,

> He refused to operate a vehicle because its operation violated a regulation, standard, or order of the United States related to commercial motor vehicle safety or health, specifically 49 C.F.R. § 392.3 regarding "ill or fatigued operators."

C. If the respondent so violated 49 U.S.C. § 31105, what are the appropriate sanctions or damages?

V. PRELIMINARY FACTS

The complainant was hired as an employee of the respondent commercial motor carrier, on or about July 1, 1991. Complainant's first position with respondent was in production in the nut roasting room for about seven years. Thereafter, complainant worked as a driver of a commercial motor vehicle for C.J. Dannemiller Company until he was discharged on or about December 1, 2003. (TR 54). Mr. Ridgley worked at C.J. Dannemiller Company's Norton, Ohio facility, where it maintains a small production facility, a warehouse and an office. The Norton facility produces nuts and popcorn products. The company employs drivers to make deliveries of such products to customers in Ohio and neighboring states. A majority of the company's deliveries are located within a 100-mile radius of the Company's warehouse. During his employment with Dannemiller in the production room and as a delivery truck driver, Ridgley had a history of complaining about work assignments and about co-workers. He was notified of his discharge from C.J. Dannemiller Company on December 1, 2003. The discharge was effective on December 1, 2003. Since his discharge, Ridgley has been unable to find employment in the trucking industry. He found new employment with Tom's Sunoco in December 2004.

Mr. Ridgley obtained a GED high school equivalency. Thereafter, Mr. Ridgley attended George Brown College, Medina County Joint Vocational School and the University of Akron. He did not receive a degree from any of these institutions. He studied political science, criminal justice, music, and machine technology. Mr. Ridgley obtained a certificate in welding. (TR 316-317). I found Mr. Ridgley to be sufficiently articulate and intelligent to comprehend the proceeding and the advice of his counsel.

There being adequate support in the record for the parties stipulations in Paragraph IIIA herein, those stipulations are hereby incorporated by reference into Paragraph VI as Findings of Fact and Conclusions of Law, as if fully set forth.

VI. DISCUSSION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact and Law

The C.J. Dannemiller Company of Norton, Ohio, is a small, family-owned wholesale business founded in 1935. It roasts nuts and other products which it sells and ships to its customers in its own fleet of trucks.[2] Mr. James Dannemiller, the current president and a 1/6th owner, began working for his father, at the company, when he was in high school. He worked his way up to his present position. All of Dannemillers' twenty-one employees are "at will" employees, who may be terminated. The employees are informed of this fact through the Company's 1992 Employee Policy. (RX 2). The policy advises that employees may be discharged for insubordination or use of abusive language. Eight close family members hold

[2] Dannemillers drivers also pick up raw popcorn, cans of syrup and cartons from suppliers.

several supervisory positions. Dannemillers' busiest delivery periods are during the summer and November through December. As a policy, it guarantees employees eight hours work per day even during its slowest periods, which is admittedly unprofitable during the first quarter.

Mr. Mark T. Ridgley, the present complainant, was recruited and hired by Jeff Troup, in July 1991, to work in the nut roasting facility. Jeff Troup is related to a family owner of the company and was Ridgley's supervisor. Ridgley worked in nut roasting for about seven years. Around the time another employee-driver was considering retirement, in March 1998, he was transferred and became a truck driver. He thus worked as a delivery driver of trucks with a gross weight over 10,000 pounds. Another person was hired for the nut roasting facility. So, several months later when Ridgley asked to return to his old position, it was no longer available. Jeff Troup had informed Mr. Dannemiller that Ridgley had become unhappy there. Mr. Dannemiller testified Ridgley had had some difficulty getting along with people in the roasting room, such as Terry Russo and Shane Robinson. Moreover, Ridgley had had some friction with fellow workers in nut roasting, had become moody and "a little paranoid", and Mr. Dannemiller did not consider his return there to be prudent. Even Ridgley admitted that Mr. Dannemiller had told him he was not wanted there. Ridgley complained about co-workers and his work. (TR 692). He was particularly resentful of Will Dannemiller whom he thought was trying to boss him. (TR 224).

The parties do not dispute the fact that occasionally Dannemillers' trucks, like any other vehicles, had items which required repair and that Ridgley was very adamant reporting them. The evidence establishes Dannemillers had an excellent safety record, took good care of its trucks, serviced them regularly, and did not allow trucks with serious safety defects to operate. The evidence establishes that Ridgley was easily agitated, demonstrated bouts of temper, was suspicious that others were out to get him (to the extent he carried a camera to work)(TR 496)(assumed he would be fired if he did not obtain a CDL)(TR 527) and chronically complained with a tendency to exaggerate. While he was patiently tolerated at Dannemillers, some of Ridgley's persistent "complaints" were exaggerated.

The record is filled with a number of Ridgley's specific complaints reflecting his efforts to establish that he was fired for making "safety" complaints. The record is nearly devoid of similar written safety or "repair" concerns expressed by any of the other drivers who utilized the very same trucks. The Annual Vehicle Inspection Reports for several of the trucks do not reflect all the many defects Ridgley allegedly observed. Ridgley admitted Dannemillers had never refused to repair the brakes on the trucks or most of the other items Ridgley had complained about; they were, for the most part, repaired. (TR 506-509; RX 33).[3] Moreover, Ridgley admittedly had never received a traffic citation related to the condition of Dannemillers' trucks nor did any other driver testify they had.[4] Nor had Ridgley (or the other drivers) ever been cited for operating an overweight truck, despite having fully-loaded trucks cross the weigh-scales.

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[3] For example, Ridgley had complained about the brakes on truck 9, on January 24, 2003, a Friday. (RX 9). They were repaired on January 29, 2003, the following Wednesday. (RX 33).

[4] Ridgley testified that he had been admonished by the Highway Patrol over truck registration materials and back-up lights. (TR 336, 383-4).

(TR 525, 588). In several instances, i.e., concerning lawful work hours and CDL requirements, and logging trips under an 100 air-mile radius, Ridgley was patently misinformed about the law. Although Mr. Dannemiller, whom I find very credible, was wrong in his interpretation of what is and what is not a "safety" complaint, he reasonably corrected safety-related problems.

As discussed below, I find the reason Ridgley was fired, on or about December 1, 2003, was simply and solely because he called his boss, Mr. Dannemiller, a "liar" during a heated telephone exchange.[5] In fact, the ever-patient Mr. Dannemiller testified that if Ridgley had not called him a liar, he would not have fired him. This was particularly convincing given the very busy holiday season. The name-calling was not the proverbial "straw that broke the camel's back"; there were no other straws, according to Mr. Dannemiller.[6] Ridley was willing to drive the 12/1/03 route with a helper which reflects that the actual driving time was not a problem. Ridgley agreed Mr. Dannemiller had sought to accommodate his concerns. Ridgley had refused trips before and not been disciplined. (TR 510-513). Ridgley had also previously accepted and driven routes resulting in a 10 to 13-hour workday.[7] (TR 533; RX 10). Moreover, the taped message Mr. Dannemiller left Ridgley, on December 1, 2003, does not show an employer on the verge of firing an employee; in fact, it is just the opposite.

Dannemillers, which qualifies as a motor carrier engaged in commercial motor vehicle operations, had three full-time delivery drivers: Ed Busson, Frank Evans, and Ridgley. Young Will Dannemiller, who joined the company in 1997, served as a substitute driver. Each presently has a Commercial Drivers License ("CDL") which Dannemillers only required in the past several years. These drivers operated commercial motor vehicles, in the regular course of business, over interstate highways and connecting routes, principally to transport cargo. Mr. Dannemiller testified drivers are not easy to find. He testified (and Ridgley admitted) that Dannemillers only very infrequently discharges employees; finding it undesirable to so.[8] He prefers to develop and retain employees although a few have left over the years. Dannemillers had no formal driver training program, per se, but trained new drivers by having them ride along with experienced drivers.

The delivery drivers' duties included driving to the customers' locations, unloading their delivery orders, and having customers sign invoices. Sometimes the driver unloaded the delivery

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[5] I observe that Mr. Dannemiller embellished this sole ground in certain testimony and documents, prepared with and without the assistance of counsel, well after the termination occurred. (For example, see CX 2, Aug. 2004 Response to Interrogatories, page 2, answer to #5, Ridgley was "unwilling or unable to get the job done. . . was insubordinate and had an improper work attitude. (And). . anger management problems"). In his April 23, 2004, letter to OSHA, Mr. Dannemiller related the dismissal to Ridgley's "inability or unwillingness to do his job." (CX 19). However, in CX 8, a contemporaneous writing, Mr. Dannemiller did not mention any other grounds for the termination.

[6] I reach this conclusion, despite Complainant's counsel very skillful examination of Mr. Dannemiller, suggesting otherwise, at trial and during his deposition.

[7] Department of Transportation regulations, in effect at the time, limited driving time to 10 hours (after 8 consecutive hours off) and total duty time of 15 hours. 49 C.F.R. section 395.3.

[8] Back in 1999, when Ridgley had first started driving and claimed he was not ready to make deliveries alone, he asked Mr. Dannemiller what he would do about that "fire me." Mr. Dannemiller said he would if he could not do the job. (RX 20).

items; other times the customers would or would help the driver unload. Drivers must inspect, clean, and fuel their assigned truck. Warehouse personnel loaded the trucks prior to departure. Most of Dannemillers customers are located in Northeastern Ohio. Thus, most delivery routes were within a 100-mile radius of the warehouse and could be completed in eight to ten hours. (TR 687-688). The one route per week beyond the 100-mile radius for each driver could be completed with fewer than ten (10) hours of driving time and fewer than fifteen (15) hours on the job. Dannemillers established that Ridgley had completed this same Monday (12/1/03) route approximately 150 times without once exceeding permissible DOT time limits.[9] (RX 27-30). Moreover, Ridgley's time records and logs for 2002 and 2003 showed he never exceeded the DOT limits. Stops were frequently removed from Ridgley's routes and given to the other drivers in order to accommodate Ridgley. (TR 663-4).

Dannemillers has an excellent safety record. None of its employees or drivers has been injured in 70 years. Mr. Dannemiller testified, "We take safety seriously; it's good business." The five trucks are numbered. It also has a van and a pick up truck. The drivers do not have assigned trucks and each drove all of them at various times. Most are International trucks. Ridgley drove truck numbers: 5, 7, 8, 9, 10, a Chevrolet pickup, and a Ford van. None of the trucks are tractor-trailers. Truck number 5 was the oldest and largest truck. As the trucks aged, they required repairs.

Dannemillers inspected the trucks regularly and made every effort to repair trucks as needed. It replaced two trucks in 2004. (See i.e., RX 33). New trucks, numbers 11 and 12, replaced numbers 5 and 7. L & L, which Dannemillers has used for the past twelve years, at an annual cost of $15,000-$20,000, regularly serviced the trucks as needed or every 15,000 miles. (Respondent's Exhibit ("RX") 33). This was corroborated by Robin Lippert from L & L Truck Sales, a former International Truck dealership. Mr. Dannemiller testified that vehicle defects effecting safety were repaired immediately; other repairs were made at scheduled maintenance intervals.[10] Trucks had been taken out of service for safety defects.

Ms. Lippert identified several work orders for L & L's repairs of Dannemiller trucks: one for cracked brake rotors on truck number 9 (CX 32); one for a radiator on truck 9 which was not fixed; one for the clutch on truck 8 (CX 34); and, one for truck 5 (CX 35). Ms. Lippert testified that Dannemillers' trucks are in "very good shape" and safe to operate. RX 32 contains several Annual Vehicle Inspection Reports, conducted by L & L, for trucks 5, 7, 8, 9, and 10, for the period of 2000 through 2003. The reports do not show all the many defects complained of by Ridgley.

David Troup worked the past two years as the (driver) dispatcher since his father, Richard Troup, retired. David Troup started with Dannemillers, in the roasting room, right after

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[9] Dannemillers admits it exceeded 10 total hours twice; once on November 25, 2002 (for 11.5 work hours) and December 16, 2002 (12.5 work hours). (See, brief at page 25). Both were within DOT limits.

[10] The brakes and transmission on truck 5 were repaired in July 2003 before it was traded in on a new truck. (RX 33).

high school, in 1982. He had never heard of the STAA before Ridgley filed his complaint. Troup said Ridgley was a good driver. He testified that if Ridgley was reinstated, he could work with him despite his earlier problems, i.e., Ridgley had once threatened to "kick his ass." Ridgley denied this threat had been made. He testified that Ridgley had complained about the condition of the trucks orally and in writing on the inspection sheets.[11] He would then refer Ridgley to Mr. Dannemiller, who was responsible for repairs. When Ridgley would not relay the concern to Mr. Dannemiller David Troup would. According to Troup, Dannemillers would repair the major items "right away" and handle other concerns during the major service intervals or at the shop. The trucks were serviced every 15,000 miles, about three to four times a year.

David Troup's dispatcher duties included determining the drivers' routes for deliveries. He testified that Ridgley had previously "declined" taking a delivery assignment. In fact, Mr. Dannemiller had prepared a memo about such an incident, in 1999. (RX 21). Ridgley testified that he had declined to drive truck number 8, with a gross vehicle weight of 26,100 pounds, because based upon the advice of a state trooper who had stopped him, he believed he lacked the required CDL to drive it at the time. He admitted Mr. Dannemiller, who believed otherwise, allowed him not to drive it. Ridgley obtained his CDL in April 2003 pursuant to Mr. Dannemiller's instructions.

Dannemillers' drivers are required to inspect their vehicles before and after every trip. Defects are noted on a daily trip inspection sheet. (See, e.g., CX 19). The company is required to maintain the inspection reports and a copy is kept in each truck. (RX 8, 32). Mr. Dannemiller considered the reporting of defects by drivers was a "matter of routine" versus being safety complaints. He considered a report a "safety complaint" if it involved a hazard. If safety was implicated by any report he would order immediate repairs and not risk possible damage or injury. Mr. Dannemiller had never disciplined or threatened to discipline any driver because the latter had reported a safety problem. Moreover, he had taken trucks out of service when they needed repairs. He testified that he wanted employees to inform him when something is wrong with a truck.

Ridgley testified that he had complained about the brakes on various trucks and the brake pressure indicator lights malfunctioning. Most of his complaints are listed on the driver's daily inspection sheets.[12] (CX 19). He claimed Dick and David Troup advised him to remove the fuse to prevent the brake warning indicator from activating. Ridgley had driven with the fuse removed. He claimed he had experienced a brake failure where the pedal hit the floor, near Lewisville, in truck number 9. Mr. Dannemiller testified that the truck had a split system making it impossible for the brake pedal to go all the way to the floor and that he had never heard that Ridgley had ever had a brake failure. He complained about cracked mirrors, damaged fenders, fluid leaks, brake lights, turn signals, tachometer problems, speedometer problems, shock

[11] Respondent readily admitted this. (CX 1).

[12] 49 C.F.R. section 396.11 requires pre-trip correction of those reported defects which "would be likely to affect the safety of operation of the vehicle" by the motor carrier. Moreover, drivers must be satisfied that the vehicle is in safe operating condition before driving it. 49 C.F.R. section 396.13.

absorbers, holes in the truck beds, leaky fuel tanks (CX 7) and steering problems. (TR 506-510; RX 9; CX 1). Ridgley also complained about the transmissions of various trucks, i.e., 5, 7, 9, and 10, (CX 1), where they would pop out of gear. According to Ridgley, when he advised Mr. Dannemiller, the latter told him to continue driving. (TR 509). Number 9's transmission problem was repaired after several weeks. Ridgley also felt uncomfortable driving truck 8 before he acquired a CDL, believing a CDL was required. However, he was misinformed; no CDL was required in that situation and Mr. Dannemiller told him he did not have to drive it. Ridgley revealingly admitted he had never been given a traffic citation related to the condition of Dannemillers' trucks. (TR 503). Ridgley's daily truck inspection reports for 2003 are included in the record as Complainant's Exhibit ("CX") 19.

To illustrate Ridgley's occasional exaggerations, one need only look at his Daily Vehicle Inspection reports for November 14 –November 28, 2003. (RX 9). There, he notes truck number 7 has defects with the steering mechanism, gas tank leaks, and exhaust leaks. Yet when one examines the L & L Annual Inspection Report, dated November 24, 2003, for truck 7, other than an exhaust leak, those other alleged defects are not reflected. (RX 32).

Ed Busson has worked at Dannemillers as a delivery truck driver for twenty-eight years. He had always completed drivers' logs and vehicle inspection reports. If something was wrong with a truck, he would tell Mr. Dannemiller. Usually, it would get fixed "fast", except if a part was missing. If the defect affected safety, he testified the truck "didn't leave." He believes Dannemillers' trucks are in "good condition" and it is a safe place to work. Busson testified that Ridgley had a "poor attitude", did not like anyone and complained. He always complained about the work and did not care for Will Dannemiller or Mr. Dannemiller himself. He observed Ridgley's upset demeanor in the mornings, i.e., slamming papers, cursing, and complaining, more so on Monday mornings. He felt Ridgley was prone to exaggeration, i.e., concerning warning lights and a brake pedal incident. Ridgley gave him the impression he did not want to work. Ridgley frequently complained of having too many delivery stops; the stops would then be removed from Ridgley's route and often assigned to Busson. Ridgley complained about his Monday route, but would not swap with Busson when the latter offered.

Frank Evans has worked at Dannemillers as a delivery truck driver for three years. Mr. Dannemiller hired him because he needed a job. CDLs were not require at Dannemillers until December 2003, when Mr. Dannemiller wanted to upgrade to trucks which carried 33,000 pounds. He holds a class "A" CDL. He has been on all of Ridgley's routes. He testified drivers' logs must be completed for trips with a radius over 100 miles. He inspects his trucks before and after each trip. If something was wrong, he would inform Dave Troup or Mr. Dannemiller verbally - - because it is a small company. It was never a problem getting repairs. He testified, "if there is a problem, the truck doesn't go out." Dannemillers' trucks are fine. He found Dannemillers' a safe place to work and he had never been asked to do anything which was unsafe. He observed that Ridgley and he got along fine on routes they did together, but Ridgley constantly "complained about everything and everybody." He found Ridgley to be disgruntled, angry and hostile. While he never saw Ridgley threaten a coworker, Ridgley hated Will Dannemiller and told Evans "I'm going to get him some day." Evans had himself had a few

"words" with Will Dannemiller. He observed Ridgley in the mornings when he would get mad and unpleasant. He saw Ridgley grumbling in front of customers and getting mad having to stack the delivered product. He finds Dannemillers a nicer place to work now that Ridley is gone. Evans was involved in a serious traffic accident, but testified the condition of the Dannemiller truck played no role in it. Evans has crossed highway scales with Dannemiller trucks, but had never received post-it notes concerning avoiding them.

Will Dannemiller, the substitute driver and Mr. James Dannemiller's nephew, testified that he initially had gotten along with Ridgley, but at the end it "was not smooth sailing." He found Ridgley to be a chronic complainer and unpleasant to work with. Will testified Ridgley was like a "Jekyll and Hyde", temperamental and moody.[13] He had observed Ridgley slamming things and being upset by various routes. Will had never been officially disciplined. He admitted he and Ridgley had had a heated argument in May 2003. Ridgley was sent home and he, admittedly angry, was sent to the back room, following Mr. Dannemiller's inquiry. He testified that Ridgley had, at the time, threatened to kill him some day. He had also heard Ridgley threaten David Troup with a beating. Although Will has gotten traffic citations and broken a mirror, the company had not disciplined him for them. He felt a way to do the job quickly and efficiently was to avoid truck weighing stations. Although he never bypassed an open scale, he would plan routes to avoid them. Occasionally, his duties included loading trucks; over which Ridgley had complained the trucks were incorrectly loaded. He loaded the truck Ridgley was scheduled to drive 12/1/03. He corroborated the fact truck number 5 had a fist-sized hole in its bed, but it was patched because Dannemillers could not deliver their product otherwise.

Mr. Dannemiller testified that most of Ridgley's trips were eight hours long. Occasionally, he would put in one to two hours of overtime. The overtime records reflect Ridgley typically worked two to five hours overtime, of a permissible seven overtime hours permitted, on Tuesday routes. (RX 28, 29). Ridgley testified that he had complained about the length of some of his trips. He felt his safety could be affected by potentially exceeding the ten-hour maximum driving time rule. Ridgley admitted his Tuesday trips were fatiguing, but he said he had never refused a Tuesday trip. Most of his trips involved loading and unloading product which contributed to fatigue. Ridgley admitted he had twice complained the trucks had not been safely loaded, were off-balance, and had been allowed not to drive. Mr. Dannemiller admitted Ridgley had complained some loads were too heavy, i.e., requiring too much lifting. Mr. Dannemiller testified Ridgley did not want to work past 4:00 PM on Mondays. He accepted that because Ridgley had an early departure for his regular Tuesday route.

A great deal of testimony concerned Mr. Dannemiller's use of post-it notes on Ridgley's route assignment sheets, stating "No Scales". (See CX 5). This is somewhat of a red-herring. Ridgley contended such notes constituted instructions to avoid highway scales because the trucks were overweight and a penalty could result if that was discovered. Mr. Dannemiller testified that

[13] Richard Simms, Jr., Ridgley's close friend testified that Ridgley was "pretty easy going" and "really liked his job."

the instructions were not meant to avoid weight penalties, but rather to save time and money. (See also CX 1). He explained that sometimes the trucks' loads shifted which could result in load shifting with too much weight on one axle versus a truck exceeding its overall weight limit. That could result in a delay at the scales. Moreover, there were a few routes where Dannemillers vendors loaded the trucks. Likewise, the evidence concerning the creation of back drivers' logs is a red-herring. These newly-created back logs, dealing with "local" trips under a 100-mile radius, had not been required by law and were created for internal management purposes. Likewise, much was suggested about a phantom-stop along the Ohio Interstate, I-70, which might have caused the 12/1/03 trip to take longer, but was never established. (See CX 11, stop #12).

On the last day of November 2003, a Sunday, Dave Troup, the dispatcher, had scheduled Ridgley's Monday, 12/1/03 route. (RX 13; 34). He, however, was not at work on the Monday in question. Ridgley had done this trip over 150 times. Ridgley arrived at Dannemillers about 8:15 AM, 12/1/03. He had not worked the preceding weekend. Upon reviewing his trip sheet, he was concerned the trip would take too long; i.e., he thought perhaps 14 hours of work time and that would make him too tired for the Tuesday trip.[14] He also suspected that Will Dannemiller, his nemesis, rather than Dave Troup had setup the trip. (TR 525). He sought out and told Mr. Dannemiller, "I told you I don't want to work after 4:00 PM- - this is a bigger trip than normal."[15] The trip, in fact, had a total of twelve stops, two or three more stops than usual. (RX 34).

According to Mr. Dannemiller, Ridgley did not expressly state he was concerned about safety or exceeding DOT hours, rather, merely that he did not want to work beyond 4:00 PM. Ridgley asked for a helper, but none was available. Mr. Dannemiller admittedly wanted to accommodate Ridgley so he suggested removing some stops. But, the products for the stops which could be cut from his trip were loaded in the nose of the truck and could not be accessed. Moreover, no warehouse workers were available to unload the truck. Mr. Dannemiller suggested Ridgley take a substitute route to Marc's Warehouse, in Cleveland, Ohio. Ridgley was unfamiliar with that location. Since Ridgley had had problems finding new addresses, Mr. Dannemiller decided to let him choose a warehouse assignment instead. Ridgley did not expressly and outwardly decline to take the Marc's Warehouse route. According to Mr. Dannemiller, Ridgley responded to the suggestion by staring at him. Mr. Dannemiller took this as a "no"; so, he told Ridgley to go home.[16] Mr. Dannemiller told Ridgley to call if he did not plan to take the route Tuesday, 12/2/03. Will Dannemiller, the substitute driver, was assigned the trip as it was scheduled. He had driven the route before. Will testified that it had a typical Christmas season Monday load. RX 34 is the invoice reflecting his stops. According to Will, the weather was good 12/1/03. Mr. Dannemiller drove the Marc's Warehouse trip himself.

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[14] In his earlier deposition, he had testified he thought it could have taken 14-16 hours. (TR 597).

[15] Mr. Dannemiller testified that had Ridgley returned from the 12/1/03 trip by 4:00 PM, he would have had the required 15 hours rest before reporting for the Tuesday, 12/2/03 trip.

[16] Complainant's counsel concedes the parties agree Ridgley did not refuse to drive that day. (Complainant's Brief, page 2, n. 1).

Will Dannemiller, who testified at the trial, completed the trip in eight hours and twenty minutes, by 4:35 PM that day. There was no scheduled stop near I-70; i.e., the phantom stop. Since he had not heard from Ridgley, whom he had expected to work Tuesday, Mr. Dannemiller called his home around 5:00 PM. Ridgley did not answer, so Mr. Dannemiller left a taped message. (RX 5). He informed Ridgley that Will Dannemiller had completed the trip in eight hours and twenty minutes. Mr. Dannemiller's message asked Ridgley whether he was coming in on Tuesday, because, if not, the Tuesday route would be reassigned. The recording and transcript of the taped message shows a calm and patient Mr. Dannemiller. It does not show Mr. Dannemiller was at all considering terminating Ridgley for not taking the trip; quite the opposite, in fact. Ridgley returned the call.

Ridgley's version and Mr. Dannemiller's version of the evening call differ.[17] I set forth the version I find. Ridgley admittedly asked if stops had been removed to which Mr. Dannemiller replied "no". Ridgley said, "I don't believe it" or "that's hard to believe". Ridgley agreed that Mr. Dannemiller responded, "[A]re you calling me a liar?" (TR 486). Ridgley said, "Yes, you've been lying to me for years." This angered Mr. Dannemiller who told him there was no need to return, "he was finished." Ridgley replied, "you're finished too," which Mr. Dannemiller took as a possible threat. Will Dannemiller corroborated the portion of Mr. Dannemiller's conversation he overheard, observing the latter get angry, raise his voice and slam down the phone.

Upon reflection, Mr. Dannemiller called Ridgley back, about two hours later, and asked him to come to the office the next day, December 2, 2003. Mr. Dannemiller testified he probably said he was sorry the way things ended. To give Ridgley a break, out of kindness over the holidays for a long-term employee, and legitimate concern over Ridgley's veiled threat, Mr. Dannemiller offered to let the record reflect Ridgley was laid-off versus fired so he would be eligible for unemployment benefits. He hoped his kindness would ameliorate Ridgley's threat. Mr. Dannemiller was not happy to fire Ridgley and he knew Tom Dannemiller had not wanted him fired as well. In April 2004, Mr. Dannemiller agreed with Ridgley's request to provide a letter of recommendation and provided the same.

Mr. Dannemiller testified that despite his nature, Ridgley was a good driver without a disciplinary record. He had never sent Ridgley home without pay. Following a fight Ridgley had with Will Dannemiller, in April 2002, when Ridgley threatened to kill Will, he had sent him home with pay. Ridgley's claim that Mr. Dannemiller threatened to fire him after that incident if he did not leave the building then was inconsistent with his earlier deposition testimony. Given the fact Dannemillers' employs family members and folks known to the family, it does not discipline employees much or at all. (CX 1, Admission 9).

[17] CX 8 is Mr. Dannemiller's 12/2/03 handwritten memo concerning the incident which he signed two to three months later. CX 29 is Mr. Dannemiller's unsigned, typed, letter to OSHA.

Ridgley met with Mr. Dannemiller, as requested, on December 2, 2003, at the latter's office. Mr. Dannemiller said he was still let go, but would be paid through the holidays. Ridgley claims he asked to return to the warehouse and that Mr. Dannemiller said "no."

In conclusion, although Ridgley had made innumerable "safety" complaints, that is, reports concerning necessary repairs to Dannemillers' trucks, many of which were legitimate complaints, and although he had been a fairly good employee over the years albeit one with a disagreeable personality, the reason he was terminated was solely because, in so many words, he called Mr. Dannemiller a liar. Dannemillers had the normal defects one would expect with a fleet of vehicles, but, for the most part, had them regularly and timely inspected and repaired. Dannemillers "pushed the limit" at times allowing drivers to operate trucks with mechanical defects. Dannemillers, as a small, family owned and run business, valued its employees and very rarely ever fired or formally disciplined an employee. As evidenced by the testimony concerning Will Dannemiller, some conflicts arose because of the nature of a family-run business. Despite Mr. Dannemiller's later embellishments of the reasons for Ridgley's termination, it is established that the insubordination was the sole reason for his termination.

Company policy advised employees that insubordination and name-calling could result in termination. Under the circumstances, Mr. Dannemiller cannot be reasonably criticized for exercising his prerogative to terminate Mr. Ridgley. Despite having tolerated Ridgley's behavior for years, the latter unappreciatively accused him of lying. Mr. Dannemiller surely realized the burden he would face discharging a needed driver over the busy holiday period. It is clear Mr. Ridgley could no longer fit in having expressed his belief the President of the company had been lying to him for years.

B. STAA violations -- Overview

A complainant may recover under the Act under three circumstances:

First, by demonstrating that he was subject to an adverse employment action because he has filed a complaint alleging violations of safety regulations. 49 U.S.C. § 31105 (a)(1)(A). This provision of the Act provides specifically and in pertinent part:

> (a) Prohibitions. -- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --
>
> > (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, . . .

The U.S. Department of Labor (DOL) interprets this provision to include internal complaints from an employee to an employer. DOL's interpretation that the statute includes

internal complaints has been found "eminently reasonable." *Clean Harbors Environmental Services v. Herman,* 146 F.3d 12 (1st Cir. 1998)(case below 95-STA-34). The Circuit Court of Appeals has stated internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. *Id*.

Second, by demonstrating that he was subject to an adverse employment action for refusing to operate a vehicle "because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C. § 31105(a)(1)(B)(i).

In such a case, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service*, 1994-STA-55 (Sec'y Aug. 4, 1995). However, protection is not dependent upon actually proving a violation. *Yellow Freight System v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992).

Third, by showing that he was subject to an adverse employment action for refusing to operate a motor vehicle "because [he] has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." 49 U.S.C.§ 31105(a)(1)(B)(ii). To qualify for protection under this provision, a complainant must also "have sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C § 31105(a)(2).[18] This provision is applicable to the case *sub judice*.

The burdens of proof under the Act have been adopted from the model articulated by the Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993). *See Anderson v. Jonick & Co.,*1993-STA-6 (Sec'y, September 29, 1993).

In *Byrd v. Consolidated Motor Freight*, 97-STA-9 at 4-5 (ARB May 5, 1998), the Administrative Review Board (ARB), summarized the burdens of proof and production in STAA whistleblower cases:

> A complainant initially may show that a protected activity likely motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STA-15, Final Dec. and Ord., Apr. 15, 1998, slip op. at 5-6. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment

[18] Under 49 U.S.C.A. § 31105(a)(1)(B)(ii) a complainant must prove by a preponderance of the evidence that his or her alleged reasonable apprehension of serious injury due to the vehicle's unsafe condition, was objectively reasonable. *Brame v. Consolidated Freightways*, 1990-STA-20 (Sec'y, June 17, 1992) slip op. at 3 and *Brunner v. Dunn's Tree Service,* 1994-STA-55 (Sec'y, Aug. 4, 1995).

> action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec'y of Labor*, 64 F.3d 261, 277 (7th Cir. 1995).[19] A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

In a footnote to the above paragraph, the ARB provided further explanation on this last phase of the adjudication process:

> Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant, throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by the prima facie case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." *St. Mary's Honor Center,* 509 U.S. at 510-511. *See Carroll v. United States Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a prima facie case becomes irrelevant once the respondent has produced evidence of a legitimate nondiscriminatory reason for the adverse action).

Once the complainant satisfies these four elements, a rebuttable presumption of discrimination arises, and the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. The burden shifting to the employer at that point is only to articulate a legitimate, nondiscriminatory, reason for the adverse action. The employer's burden at this point is one of production, not of proof.

With only one exception, the burden always remains with the claimant to establish the elements of his case: (1) protected activity; (2) a causal nexus between the protected activity and the adverse action; and (3) in response to employer's evidence of an allegedly legitimate reason for its action, evidence of pretext.[20]

The one exception to the claimant's burden of proof arises under the "dual motive" analysis: once the evidence shows that the proffered reason is not legitimate, and that the discharge was motivated at least in part by retaliation for protected activity, then the employer must establish by a preponderance of the evidence that it would have discharged the complainant independently of his protected activity. *Faust v. Chemical Leaman Tank Lines,* , 93-STA-15 (Sec'y, April 2, 1996); *Moravec v. HC & M Transportation*, 90-STA-44 (Sec'y, January 6, 1992), slip op. at 12, n. 7.

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[19] As C.J. Dannemmiller Company points out, if other factors are present supporting discipline, then timing alone may not be sufficient to establish the necessary causal link. *Moon*, 836 F.2d at 229-230.

[20] In *Moon v. Transport Drivers*, 836 F.2d 226 (6th Cir. 1987), the court noted the addition of a fourth factor, i.e., that the employer knew of the plaintiff's protected activity.

Ridgley alleged violations of both the complaint provision at 49 U.S.C. § 31105(a)(1)(A), and the refusal to drive provisions at § 31105(a)(1)(B).[21] I will examine the complaint provision first.

C. The Complaint Provisions

Ridgley complained, either in writing or verbally, to company superiors, that C.J. Dannemiller Company's refusal to repair safety defects on the delivery trucks and lengthy delivery routes violated federal trucking regulations. Ridgley contends that he communicated his safety concerns to Dannemiller through daily trip inspections and through verbal statements regarding truck maintenance requests. In addition to complaints related to mechanical problems, Ridgley complained to his supervisors when deliveries appeared to be overweight. Ridgley's extensive list of complaints includes things such as a leaky fuel tank, bad steering, brake problems, cracked mirrors, a malfunctioning speedometer, clutch problems, and non-functioning turn signals.

Under the STAA, an employee's complaint need only be "related" to a safety violation to be protected. Internal complaints to supervisory employees that are related to a violation of a commercial motor vehicle safety regulation are protected under the STAA. *Moravec v. HC & M Transportation, Inc.*, 1990-STA-44 (Sec'y July 11, 1991). Ridgley testified that he made the various communications to supervisors because he had a reasonable belief that such defects were a safety hazard. As such, Ridgley's written and verbal notifications to his supervisor of truck defects and lengthy delivery routes are eligible for protection under the STAA. Mr. Dannemiller testified that he did not view the daily trip inspections and requests for vehicle maintenance as safety complaints. He described such communications as a routine part of the truck driver's job description. Although it is a daily duty of every driver to inspect their truck, Mr. Dannemiller is incorrect in his determination that such routine activity does not constitute a safety complaint. A communication by an employee to a supervisor, albeit part of their job duties, that a truck has a mechanical defect that would inhibit safety if the vehicle is operated is a safety complaint subject to protection under the STAA. *See Schulman v. Clean Harbors Envtl. Servs., Inc.,* 1998-STA-24 (ARB Oct. 18, 1999) (Vehicle inspection reports filed by the complainant as part of his daily job duties constituted protected activity under the complaint clause).

Ridgley approached Mr. Dannemiller on Monday, December 1, 2003 regarding the length of his delivery assignment. Ridgley routinely had an extended route on Tuesdays. To protect against being fatigued on Tuesdays, Ridgley preferred not work past 4:00 p.m. on Mondays. Deliveries included not only driving, but unloading the product at the customer's location.

[21] Although Ridgley asserted a violation of the refusal to drive provision in his complaint, the parties agree that Ridgley did not refuse to drive.

The STAA covers, among other things, complainants who allege violations of the "illness rule" of the federal motor carrier regulations. No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a 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 to begin or continue to operate the motor vehicle. 49 C.F.R. § 392.3 (1996)(emphasis added). *See, e.g., Self v. Carolina Freight Carriers Corp.*, 1989-STA-9 (Sec'y Jan. 12, 1990). Protection is not dependant on actually proving a violation of a regulation; the complaint need only relate to such a violation. *Nix v. Nehi-R.C. Bottling Co*., 1984-STA-1 (Sec'y July 13, 1984); *Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992). *See Moravec v. H.C. & M. Transportation, Inc.*, 1990-STA-44 (Sec'y July 11, 1991)(Although the complainant did not refer in his conversation to the hours of service regulation, and his uppermost concern might have been that his assignment schedule would interfere with his wife's birthday, his statements concerned workplace conditions subject to the federal service hours regulation, providing those statements with sufficient nexus between complaint and a safety violation to render his statement cognizable under 49 U.S.C. § 2305(a)).

Ridgley did not mention the hours of service regulation in his complaint to Mr. Dannemiller. Ridgley stated to Mr. Dannemiller that the trip would take too long and he doesn't like to work after 4:00 p.m. on Mondays, due to his lengthy Tuesday route. Thus, although Ridgley did not refer to the hours of service regulation or explain to Mr. Dannemiller how the trip would interfere with his necessary rest time before his Tuesday trip, his statements regarding the length of the trip and the extra stops on the trip concerned workplace conditions subject to the federal service hours regulation. As such, I find that Ridgley's statements to Mr. Dannemiller were sufficient to infer a safety concern.

Thus, I find that Ridgley's complaint regarding the length of the December 1, 2003 trip to Mr. Dannemiller constituted protected activity under the STAA. *See Dutkiewicz v. Clean Harbors Environmental Services,*1995-STA-34 (Sec'y Aug. 8, 1997) (internal complaint to superiors is a protected activity under the STAA); *accord, Stiles v. J.B. Hunt Transportation,* 1992-STA-34 (Sec'y Sept. 24, 1993) and cases there cited; and, *Pillow v. Bechtel Construction,*1987-ERA-35 (Sec'y July 19 1993) (under analogous employee protection provision of the Energy Reorganization Act, contacting a union representative about a safety violation is protected), *aff'd sub nom. Bechtel Construction Co. v. Secretary of Labor*, 98 F.3d 1351 (11th Cir. 1996).[22] Additionally, the complainant is not required to prove a reasonable apprehension of injury, an actual violation or that the complaint has merit. *Pittman v. Goggin Truck Line, Inc.*, 1996-STA-25 (ARB Sept. 23, 1997); *Lajoie v. Environmental Management Systems, Inc.*, 1990-STA-31 (Sec'y Oct. 27, 1992); *Barr v. ACW Truck Lines, Inc.,* 1991-STA-42 (Sec'y Apr. 22, 1992); *Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992).

[22] Under the STAA, a safety related complaint to any supervisor, no matter where that supervisor, no matter where that supervisor falls in the chain of command, can be protected activity. *See, e.g., Hufstetler v. Roadway Express*, 1985-STA-8 (Sec'y, Aug. 21, 1986), *aff'd Roadway Express v. Brock*, 830 F.2d 179 (11th Cir. 1987).

D. Refusal to Drive

A refusal to drive is protected under two STAA provisions. The first provision, 49 U.S.C.A. § 31105(a)(1)(B)(i), requires that a complainant "show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive -- a mere good faith belief in a violation does not suffice." *Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993).

The second refusal to drive provision focuses on whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury if he drove. 49 U.S.C.A. § 31105(a)(1)(B)(ii); *Cortes v. Lucky Stores, Inc.*, 1996-STA-30 (ARB Feb. 27, 1998).

An employee must actually refuse to operate a vehicle to be protected under the refusal to drive provision of the STAA. *Williams v. CMS Transportation Services, Inc.,* 1994-STA-5 (Sec'y Oct. 25, 1995). A refusal to drive must be accompanied by a safety basis for employee's refusal to drive. *See, e.g., Smith v. Specialized Transportation Services,* 1991-STA-22 (Sec'y Apr. 20, 1992)(Complainant's statement that she was "too stressed out" to drive during a conversation with her supervisor did not establish that she conveyed to the supervisor that her refusal to drive was because she was unable to do so safely or without danger of injury); *Mace v. Ona Delivery Systems, Inc.*, 1991-STA-10 (Sec'y Jan. 27, 1992) (The complainant could not prevail on his STAA complaint where the record established that his complaint to respondent centered on extra job assignments rather than on perceived safety violations. Because complainant failed to communicate safety defects as a basis for his refusal to work, Respondent was not aware of any vehicle defect and was not motivated by such in discharging complainant).

On December 1, 2003, Ridgley approached Mr. Dannemiller because he believed the trip would exceed the hours of service rule and impair his ability to drive due to fatigue. Ridgley testified that the December 1, 2003 trip would make him too tired to complete the trip safely. Ridgley's actual statement to Mr. Dannemiller was that he could not finish the trip by 4:00 p.m. and that Mr. Dannemiller is aware that he prefers not to work passed 4:00 p.m. on Mondays. Ridgley, however, never refused to drive the assigned route. He merely questioned Mr. Dannemiller on the assigned trip. Thereafter, Mr. Dannemiller sent Ridgley home.

The parties agree that Ridgley did not refuse to drive on December 1, 2003. Complainant states "[A]lthough there was much testimony about the fact that Ridgley did not drive for Respondent on December 1, 2003, ultimately both Ridgley and Jim Dannemiller agree that Mark Ridgley did not refuse to drive on that day." Complainant's post-hearing brief, page 2, n.1.

Even if Ridgley's act of going home was considered a refusal to drive, his refusal is not accompanied by a safety complaint. He merely stated that he did not want to work past 4:00 p.m. Ridgley's complainant centered on extra job assignments.

Based on the foregoing evidence, Complainant did not establish that a genuine violation of a federal safety regulation would have occurred.

Ridgley did not show that a violation of a safety regulation would have occurred if he had driven the assigned route. The Department of Transportation regulations limit driving time to ten hours and total on-duty time to 15 hours. Although Ridgley was mistaken regarding the hours of driving regulations, his driving logs evidence that he had never exceeded the Department of Transportation limitations. Moreover, Will Dannemiller actually completed the route well under the Department of Transportation criteria. As such, Ridgley did not establish how the December 1, 2003 assigned route would have exceeded the hours regulation when that had never been experienced in the past. Furthermore, Ridgley's testimony shows more concern with not being fatigued for his Tuesday route rather than the Monday route in question. Any conclusion regarding the Tuesday route would be pure speculation. There is no evidence that Dannemillers would not have accommodated Ridgley regarding his Tuesday trip if the Monday trip had taken an excessive amount of time. The evidence shows that the trip was finished by 4:30 p.m. Moreover, the fact that Mr. Dannemiller attempted to remove stops from the December 1, 2003 route or obtain a helper for Ridgley is evidence that he would likely have accommodated Ridgley if the Tuesday trip needed alteration. Thus, any safety concern Ridgley had for the Tuesday trip was unfounded.

Thus, I concur with the agreement of the parties and find Mr. Ridgley did not establish protected activity under the refusal to drive provision.

E. Termination or Discharge

Ridgley testified that he had brought safety matters to C.J. Dannemiller Company's attention on December 1, 2003 by stating that the assigned delivery trip was too long. The parties agree that Ridgley was terminated on December 1, 2003.

Whether an employee has been discharged depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer. *Pennypower Shopping News v. N.L.R.B.*, 726 F.2d 626, 629 (10th Cir. 1984). As the Court in *Pennypower* noted:

> The fact that there is no formal discharge is immaterial if the words or conduct of an employer would logically lead an employee to believe his tenure had been terminated. . . . [S]ince the company created the ambiguity which reasonably caused the employees to believe they were discharged, or at least to believe their employment status was questionable due to their strike activity, the burden of the ambiguity must fall on the company.

Pennypower Shopping News v. N.L.R.B., 726 F.2d at 630. Although Ridgley and Dannemiller had a follow-up conversation on December 2, 2003, I find his termination was effective on December 1, 2003.

The complainant has the burden of proof to show that retaliation for protected activity was a reason for the termination. As part of this burden, the complainant must show that respondent had knowledge of complainant's protected activity at the time of employer's adverse action. *See Homen v. Nationwide Trucking, Inc.,* 1993-STA-45 (Sec'y Feb. 10, 1994); *Stiles v. J.B. Hunt Transportation, Inc.,* 1992-STA-34 (Sec'y Sept. 24, 1993). If the complainant meets such burden, the respondent has the burden to prove a legitimate, nondiscriminatory reason for termination. A complainant may show that the employer's reason for termination is pretext by evidence that the employer's proffered reasons have no basis in fact, that the proffered reasons did not actually motivate his discharge, or that the reasons were insufficient to motivate the discharge. *Manzer v. Diamond Shamrock Chemical Company*, 29 F.3d 1978 (6th Cir. 1994).

In establishing his prima facie case, Ridgley need only raise the inference that his engaging in protected activities caused his termination. The proximity in time between protected conduct and adverse action alone may be sufficient to establish the element of causation for purposes of a prima facie case. *See, e.g., Stiles v. J.B. Hunt Transportation, Inc.,* 1992-STA-34 (Sec'y Sept. 24, 1993)(Complainant discharged within one week of raising safety concerns sufficient for inference of causation); *Toland v. Werner Enterprises*, 1993-STA-22 (Sec'y Nov. 16, 1993)(Where complainant was discharged the same day he raised safety complaints, the secretary found that complainant raised the inference that he was terminated because he engaged in protected activity); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989)(Temporal proximity is sufficient as a matter of law to establish the final element in a prima facie case of retaliatory discharge); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987)(Temporal proximity alone did not support an inference of causation where there was compelling evidence that the employer encouraged safety complaints).

I find that Ridgley established the inference that his engaging in protected activity caused his termination. Ridgley complained about the duration of his route around 8:00 a.m. on December 1, 2003 and was terminated that evening. There is no evidence that Dannemillers encouraged safety complaints. Moreover, as noted above, Mr. Dannemiller testified that he does not view Ridgley's statements regarding vehicle maintenance or trip length as a safety complaint. *Moon,* 836 F.2d 226. Thus, Ridgley established his prima facie case. He engaged in protected activity under the complaint provision of the STAA. He was terminated. The proximity in time between his complaint and termination raises the inference of a causal link between his protected activity and the adverse action of the employer. Mr. Dannemiller was the supervisor that Ridgley complained to regarding the duration of his trip. Mr. Dannemiller was also the person to terminate Ridgley. Thus, it is clear that Mr. Dannemiller had knowledge of Ridgley's protected activity at the time he terminated him. As such, Dannemillers has the burden to prove a legitimate, nondiscriminatory reason for Ridgley's termination.

Respondent asserts that Ridgley was terminated for inferring that Mr. Dannemiller, the company president, was lying when he conveyed to Ridgley that no stops were removed from his December 1, 2003 delivery route. Complainant asserts that such explanation for terminating him is direct evidence that his complaint about trip length and fatigue were the reason for his

discharge. Complainant goes on to argue that Mr. Dannemiller's admission that he fired Ridgley for calling him a liar is an admission of an unlawful reason. Complainant asserts that when a complainant engages in spontaneous intemperate conduct privately communicated over the telephone, the intemperate conduct does not remove the statutory protection nor provide the respondent with a legitimate, nondiscriminatory reason for adverse action. *See Kenneway v. Matlack,* 1988-STA-20 (Sec'y June 15, 1989); *Lajoie v. Environmental Management Systems, Inc.*, 1990-STA-31 (Sec'y Oct. 27, 1992).

December is one of the busiest months for C.J. Dannemiller Company. A company with so few drivers would be hard pressed to terminate a driver in the busiest month of the year. As evidenced by the events of December 1, 2003, the company president had to fill-in as a driver to deliver products to a warehouse. Working as a truck driver in the busiest month of the year is not an advantageous position for a company president. As such, it is highly unlikely that the company president would want to put his business in such a state of affairs.

Ridgley was sent home on Monday, December 1, 2003 with instructions to call if he decided not to work his normal route on Tuesday, December 2, 2003. Mr. Dannemiller obviously did not terminate Ridgley at that moment. Ridgley was given the option to continue his employment with Dannemillers or to decide that the strenuous work of delivery driving isn't for him. Thereafter, Mr. Dannemiller, in anticipation of planning the deliveries for a busy Tuesday, telephoned Ridgley to see if he was going to work his normal Tuesday route. The answering machine message is clear that Mr. Dannemiller was anticipating Ridgley performing his job duties on Tuesday. The discussion on the answering machine and during the Dannemiller/Ridgley conversation regarding the Monday route in question was merely informational. Mr. Dannemiller merely informed Ridgley of the duration of the delivery route as performed by another driver. There is no evidence that during the conversation Mr. Dannemiller told Ridgley that he should have driven the route or that he was terminated because another driver was able to make the route within the regulatory time constraints. There is no evidence that Ridgley was going to receive any type of disciplinary action for the events of Monday morning.

The evidence is clear that Mr. Dannemiller had no intention to terminate Ridgley until his credibility and integrity were questioned. Complainant agrees that he was terminated because Mr. Dannemiller inferred from the conversation that Ridgley thought he was a liar. It is apparent from the testimony of both Mr. Dannemiller and Mr. Ridgley that neither party opined that Ridgley was terminated for not working on December 1, 2003.

Complainant, relying on *Kenneway*, argues that he was terminated for making a safety complaint and that calling his supervisor a liar on a private phone conversation does not remove him from the protections of the STAA. In *Kenneway*, the complainant refused to accept a driving assignment. Thereafter, a conversation ensued and complainant was discharged. Respondent argued that the complainant was discharged for vulgar and abusive language. The Secretary agreed with the ALJ's conclusion that the complainant's language and conduct during the conversation did not remove him from protection afforded under the STAA. The *Kenneway*

decision relied on NLRB Fifth Circuit cases for the fact that courts have recognized the use of intemperate-language associated with some forms of statutorily protected activities due to the adversarial nature of these activities. The Secretary applied the following balancing test:

> The right to engage in statutorily-protected activity permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts. A key inquiry is whether the employee has upset the balance that must be maintained between protected activity and shop discipline.

Kenneway v. Matlock, Inc., 1988-STA-20 (Sec'y June 15, 1989). I find that the facts in *Kenneway* and the facts of the current case are clearly distinguishable. And, as such, the *Kenneway* balancing test does not apply to the case at hand. In *Kenneway*, during one conversation, the respondent instructed the complaint to perform an assignment which would have violated the STAA, the complainant refused to drive, an argument occurred and complainant was discharged. In the current case, Ridgley complained that his route was too long and was sent home. Ridgley was not disciplined when he complained about his assignment. Thereafter, in a conversation later that day, Ridgley called Mr. Dannemiller a liar and was terminated. Mr. Dannemiller was not instructing Mr. Ridgley to perform any job that would have violated the STAA during the telephone conversation. He was calling Mr. Ridgley regarding his normal Tuesday route. Ridgley has made no assertion that the Tuesday route would have violated any commercial motor vehicle regulation. Moreover, the evidence presented demonstrates that Ridgley never previously violated the hours of service regulation, nor was instructed by Dannemillers to violate the hours of service regulation. Mr. Dannemiller's conclusion that Ridgley questioned his integrity and credibility was a sign of insubordination and a legitimate, non-discriminatory reason for terminating his employment. *Auman v. Inter Coastal Trucking,* 1991-STA-32 (Sec'y July 24, 1992)(The respondent met his burden of production to present evidence of a legitimate, nondiscriminatory reason for firing the complainant where its manager testified that he fired complainant because of complainant's expressed distrust of the company and its personnel.). Even if an employee engages in protected activity, an employer may discipline an employee for insubordination. *Clement v. Milwaukee Transport Services, Inc.*, 2001-STA-6 (ARB Aug. 29, 2003).

In addition to the differentiating facts, in *Harrison v. Roadway Express, Inc.,* 1999-STA-37 (ARB Dec. 31, 2002) (*aff'd* 2nd Circuit Nov. 30, 2004), the Administrative Review Board determined that "[T]he ALJ inappropriately applied the labor relations standard cited in *Kenneway* to determine whether Harrison was entitled to the protection offered by § 31105(a)(1)(A), the 'filed a complaint' section of the Act. *Kenneway* arose under § 2305(b) (now § 31105(a)(1)(B)), the 'refusing to operate a vehicle' section." As noted above, Ridgley engaged in protected activity under the "complaint" section of the STAA, not the "refusal to drive" section. Thus, following *Harrison*, the *Kenneway* decision does not apply to the current case.

In analyzing whether the articulated reasons for the discharge are credible, I find there is ample evidence demonstrating that Ridgley was far from a model employee. He had numerous

difficulties getting along with co-workers and his supervisors. I find no discriminatory intent in Ridgley's termination. Ridgley was terminated for a legitimate, nondiscriminatory reason, namely insubordination. *See Schulman v. Clean Harbors Envtl. Servs., Inc.,* 1998-STA-24 (ARB Oct. 18, 1999) (Complainant, although he participated in protected activity, was legitimately terminated for insubordination after making it clear to his immediate supervisor, by the use of foul language, that he would not be managed).

When there are both legitimate and discriminatory reasons for an adverse action, the dual motive analysis applies. *Spearman v. Roadway Express,* 1992-STA-1 (Sec'y Jun 30, 1993) *and Yellow Freight System v. Reich*, 27 F.3d 1133, 1140 (6th Cir.1994). Under the dual motive analysis, the burden shifts to the respondent to show that it would have taken the same action against the complainant even in the absence of protected activities. *Asst. Sec. and Chapman v. T. O. Haas Tire Co.,* 1994-STA-2 (Sec'y Aug. 3, 1994), *appeal dismissed,* No. 94-3334 (8th Cir. Nov. 1, 1994).

The answering machine message from Mr. Dannemiller is clear evidence that he expected and hoped that Mr. Ridgley would agree to perform his normal Tuesday route. Mr. Dannemiller was preparing for Tuesdays operations and called Mr. Ridgley to assure that he had an adequate number of drivers for the necessary deliveries. Mr. Dannemiller was not telephoning Mr. Ridgley to discipline him for raising a complaint about the Monday route. As such, it is clear that even if Ridgley would have driven the Monday route, he would have been terminated for questioning the credibility of the company president. As the Sixth Circuit has observed, "The relevant inquiry is the employer's perception of his justification for the firing." *Moon v. Transport Drivers,* 836 F.2d 226, 230 (6th Cir.1987). I find that C.J. Dannemiller Company has established that even absent any protected safety complaints or protected refusals to drive on Ridgley's part, the company legitimately would have fired him for his statements regarding credibility of Mr. Dannemiller and his possible threat to Mr. Dannemiller. In this case, C.J. Dannemiller Company provided a credible explanation for discharging Ridgley. I find that Ridgley did not establish by a preponderance of the evidence that the reasons given for his discharge were pretextual.

F. Hostile Work Environment

In his complaint, Ridgley alleged that while he was employed with Dannemillers, he was subjected to a hostile work environment. Complainant did not address the hostile work environment allegation in his post-hearing brief. The Department of Labor has "recognized that the hostile work environment theory of discrimination is remediable." *Smith v. Esicorp*, 1993-ERA-16 (Sec'y Mar. 13, 1996). To succeed in a hostile work environment claim, the retaliatory harassment must be "sufficiently severe or pervasive as to alter the conditions of employment and create an abusive or hostile work environment." *Id. citing Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Ridgley presented evidence that he had difficulty working with some of the C.J. Dannemiller Company employees. He stated that such problems caused arguments and that Will Dannemiller, a co-worker, intentionally loaded his truck incorrectly. Ridgley did not establish that he suffered intentional, pervasive, and regular harassment based on protected

activity. Ridgley's difficulty in getting along with co-workers on a personal level was not an abusive work environment created by Dannemillers. Thus, I find that Ridgley did not establish a claim under the hostile work environment theory.

VII. CONCLUSIONS

Mr. Ridgley's complaints to his supervisors at C.J. Dannemiller Company, related to the duration of assigned trips and necessary truck repairs, constituted protected activity. However, C.J. Dannemiller Company neither disciplined Ridgley nor discharged him because of his complaints. C.J. Dannemiller Company terminated Ridgley for a legitimate, nondiscriminatory reason.

Mr. Ridgley was given notice of discharge on December 1, 2003, but met with Mr. Dannemiller on December 2, 2003 to discuss the structure of the discharge. The discharge was thus effective on December 1, 2003. The discharge was not based on his complaints and C.J. Dannemiller Company successfully established that it would have discharged Ridgley even in the absence of his protected activities. Ridgley's termination was not causally related to any protected activity under the STAA, and, thus, Dannemillers' adverse actions against Complainant do not constitute a violation of § 405 of the STAA. Moreover, Ridgley failed to establish that Dannemillers' reason for his termination was a pretext to discriminate against him.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Complainant's relief requested is hereby DENIED. It is hereby recommended that the complaint filed by MARK T. RIDGLEY be dismissed.

A

RICHARD A. MORGAN
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file will be forwarded for review to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., Washington D.C. 20210. See 29 C.F.R. § 1978.109 (a); 61 Fed. Reg. 19978 and 19982 (1996).