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Issue Date: 12 September 2011

Case No.: 2010-STA-00074

In theMmatter of:

BOBBY COLLIER,

Complainants,

v.

J.L. ROTHROCK, INC.,

Respondent.

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

DECISION AND ORDER

This action arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act ("STAA" or "Act") of 1982, as amended and re-codified, 49 U.S.C. § 31105, and the corresponding agency regulations, 29 C.F.R. Part 1978.

The Complainant, Bobby Collier, was employed by the Respondent, J.L. Rothrock, Inc. ("Rothrock") as a truck driver until his resignation on January 21, 2010. He filed his complaint on May 20, 2010. The Occupational Safety and Health Administration ("OSHA") investigated the complaint and issued a determination dismissing the complaint on September 3, 2010. The Complainant requested a hearing on September 30, 2010. A hearing on the complaint was held in Greensboro, North Carolina on June 14, 2011.[1]

STATUTORY PROVISIONS AND BURDEN OF PROOF

[1] The following abbreviations will be used in citing evidence from the hearing:
TR – Hearing transcript
CX – Complainant's Exhibit
EX – Employer's Exhibit

The Act provides:

> **Sec. 31105. Employee protections**
>
> (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, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

49 U.S.C. §31105(a)(1)(A).

The Administrative Review Board has laid out the standards for finding an STAA violation as follows:

> To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because he engaged in protected activity. 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 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). 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).

Byrd v. Consolidated Motor Freight, 97-STA-9 (ARB May 5, 1998).

BACKGROUND

Mr. Collier filed an earlier STAA complaint in February, 2008. That complaint was settled without going to a hearing on April 24, 2008. He contends that, beginning in late 2009, Rothrock committed several acts in retaliation for this complaint. An earlier complaint, even one that has been resolved, can give rise to retaliatory intent and can constitute protected activity under the Act. *Stack v. Preston Trucking Co*., 86-STA-22 (Sec'y Feb. 26, 1987). I accept for

purposes of this proceeding that the 2008 complaint was protected activity within the meaning of 49 U.S.C. §31105(a)(1)(A).

The second element of a complainant's *prima facie* case is that the respondent knew of the protected activity. That element is clearly established in this case, because Rothrock settled the earlier complaint with Mr. Collier. The remaining two elements are that he suffered adverse employment action and that there was a causal link between the protected activity and the adverse action.

Mr. Collier testified to his dissatisfaction with actions that Rothrock took and policies that it implemented after his original complaint. In particular, he was dissatisfied with the truck that he was assigned and with the policy of requiring local drivers to check in with the dispatch office every hour. On January 21, 2010, he was driving and got into an argument with a dispatcher, who alleged that he had not checked in as required. Mr. Collier disputed the dispatcher's allegation. He testified that because of this disagreement he decided while driving back to the company's terminal that he would resign. When he arrived at the terminal he was told that he had been selected to take a drug screening test. He stated that he was resigning and believed that he therefore did not have to take the test.

This case differs from many whistleblower cases in that Mr. Collier does not allege that he was fired as retaliation for his protected activity. (TR 33-35) His claim is that he resigned voluntarily, as he had a right to do as an at-will employee. The retaliatory activity that he alleges is that Rothrock reported to the North Carolina Department of Transportation (NCDOT) that he had refused a drug test that he was not required to take.

WITNESS TESTIMONY

Andrea Russell

Ms. Russell is employed by Rothrock as a customer service representative. In that capacity she seldom interacts with drivers and does not know Mr. Collier (TR. 65-66). In January of 2010 she received a telephone call from a woman who said "I want to report a driver is doing drugs." The caller did not give either the driver's name or her name. She simply said, "I want to make an anonymous call that one of your drivers is on drugs." (TR 67). Ms. Russell transferred the call to the voicemail of Bonnie Everette, the company's safety administrator. The call came early in the morning, no later than 8:30, and stood out in Ms. Russell's memory because she has never, before or since, received a call of that nature. (TR 69-70)

Bonnie Everette

In January of 2010 Ms. Everette was employed by Rothrock as safety administrator. She reported to Gary Hudson. Among her responsibilities were the administration of the company's drug testing program. The company tested a randomly selected group of drivers every month. An outside company made the random draw and provided the list of names to Ms. Everette. She

would provide the list to management and the dispatch office and as drivers were available in the dispatch office they would be sent to her. (TR 72-74)

Her office was in a trailer separate from the building in which the dispatch office was located. When each driver reported for the test she would customarily tell the driver "you've won the lottery" in the hope of injecting humor into the process. (TR 75) She used this term for any test, whether it was the monthly random sampling that could be analogized to a lottery or, as in this case, a test directed on other grounds. (TR 97) Samples were not collected at Rothrock's facility. The company contracted with a nearby medical care facility to collect and test the samples. (TR 76-77)

On the morning of January 21, 2010, Ms. Everette was not at her desk when Ms. Russell forwarded the anonymous telephone call to her. Shortly after arriving at work she listened to the voicemail from the caller. The caller called again and Ms. Everette spoke to her at least three times. The caller eventually gave her name as Gwen Stevens and said that the diver who was on drugs was Bobby Collier. She said that she was his fiancée. (TR 77-79) Ms. Everette had three conversations and received two voicemails from this caller. (TR 88)

Ms. Everette described her next actions as follows:

> Q What did you do?
> A I started keeping notes. My supervisor, Gary Hudson was not in yet. I didn't have the authority to yank him [i.e. Mr. Collier], you know, off the road. And because this person was or could be possibly related to Mr. Collier, it had to be thought through. I had to be cautious.
>
> Q So were you skeptical of this caller?
> A I wouldn't say skeptical. But because of the circumstances of who she was just led me to believe that I needed to get as much information as possible before making a move. You know, I don't have any authority to make any kind of move, but to inform my supervisors.
>
> Q Did you have authority at that time to make someone submit to a reasonable suspicion drug test?
> A That direction has always come from management.

(TR 79-80)

After Mr. Hudson arrived, she briefed him on the voicemails and telephone calls that she had received. He made the decision to test Mr. Collier on a reasonable suspicion basis and instructed her to handle the paperwork. (TR 80-81)

Until this incident, all of the testing during Ms. Everette's tenure had been regular monthly random tests. This was the first time that the issue of ordering a test on reasonable suspicion had arisen. (TR 94) Mr. Collier had been randomly tested on October 12, 2009 and the results were negative. (EX 7)

When Mr. Collier reported to the safety office he had with him some paperwork, his logbook, and the trailer seal that drivers use to lock up the doors of their trailers. She told him that he had "won the lottery." Mr. Collier said that he was being picked on and slammed his items on a filing cabinet and walked out of the office. He refused to accept the drug test paperwork. She told him that if he refused the test it would result in his being discharged. (TR. 81-83) She did not recall him saying that he was resigning, or any other statements indicating that he was terminating his employment. (TR 96)

After the window of time for taking the test expired without Mr. Collier having reported to the medical facility, Ms. Everette prepared EX 6, the NCDOT form used to report a positive drug test. Because this was a refusal rather than a positive test, she wrote "Failed to take drug screen when asked to for reasonable cause" on the form. (TR 84-85).[2]

Gary Hudson

Mr. Hudson is the General Manager of Rothrock, with responsibility for, among other functions, general operations, accounting, dispatch, safety, compliance, and human resources. The company is based in Greensboro, North Carolina and has a satellite facility in Charlotte, North Carolina. (TR 38-39)

Rothrock conducts drug testing as required by federal regulations, and has a zero tolerance policy for positive drug tests and refusals to take a drug test. (TR 40) The company does not operate any type of sports betting pool or game of chance so it is understood by all drivers that Ms. Everette's habitual reference to "winning the lottery" refers to being directed to take a drug test rather than to a literal lottery. (TR 41-42)

Mr. Hudson initiated a call-in policy for local drivers. The term "local" includes not only the immediate Greensboro and Charlotte regions, but trips throughout the Carolinas and Virginia. The company has from 30 to 45 local drivers out on any given day and the dispatch office was having difficulty keeping track of where they were. The policy required drivers to call in on an hourly basis using two-way radios. This was implemented to reduce downtime for drivers on the road by keeping the dispatch office better informed of their location and availability. (TR 44-46)

Mr. Collier had been an over-the-road driver, but requested to become a local driver so that he could be home every night. As a local driver he was subject to the call-in policy. The call-in policy was uniformly enforced, regardless of the skill or experience level of the driver. (TR 46-47)

On January 21, 2010, Mr. Hudson heard Mr. Collier's radio conversation with the dispatcher. He described Mr. Collier as "being very belligerent. He was talking very loud, being very obnoxious about the situation, that he did not like our policy with the calls. And there was a misunderstanding of whether he had called in or not. And it got pretty loud there." (TR 51)

[2] The NCDOT form that Ms. Everette used, CDL-8, is designed for reporting a positive drug test. She did not use the form for reporting a refusal to submit to a test, which is CDL-9 "Refusal to Submit to a Federal Drug or Alcohol Test."

Ms. Everette relayed to him the telephone calls that she had received. On the basis of those reports he determined to have Mr. Collier undergo a drug test. He directed the dispatcher to have Mr. Collier report to the safety office when he returned from his run. (TR 51-53)

Later that day Ms. Everette reported to him that Mr. Collier had refused to take the test. Mr. Hudson called Mr. Collier on his cell phone. (TR 54-55) He hoped to convince Mr. Collier to return and take the test.

> "I wanted to reason with him, to let him know that he needed to go ahead and take this test because I wanted to inform him of what would happen if he did not do this, and that I felt like that maybe if I talked with him and this lady was just being vindictive, he could go take the drug test and everything would be okay."

(TR 55)

Mr. Collier was angry and hung up on Mr. Hudson. A few days later he came to the terminal to turn in his uniforms. (TR 55-56)

Bobby Collier

Mr. Collier was working as an over-the-road driver when he filed his first STAA complaint in 2008. This complaint involved allegations of violation of duty hour limitations. (TR 10-11) This complaint was settled before it reached the stage of an OSHA investigation. (TR 16-17)

At some point after the 2008 complaint was settled Mr. Collier requested to switch to local driving and his request was approved (TR 31-32) When Rothrock introduced the call-in policy for local drivers, he believed that it made sense for inexperienced drivers, but should not be applied to experienced and reliable drivers. (TR 19-20)

On January 21, 2010, Mr. Collier was on a run to Forest City, North Carolina. When he had unloaded his cargo, he called the dispatcher and was told to return to Greensboro. The dispatcher said that Mr. Collier had not checked in as required, and Mr. Collier responded that he had checked in. Mr. Collier described the dispatcher as "very, very arrogant about it, 'and if you don't start calling in, from now on, you're going to be penalized,' meaning that I would be fired, because most of J.L.'s rules and regulations revolve around being fired, a deduction from your safety bonus or your performance bonus." (TR 13)

On the return leg of his trip Mr. Collier decided to resign from Rothrock because of his dissatisfaction with his employment. The sources of his dissatisfaction included the call-in policy, the recent argument with the dispatcher, and his reassignment to a different truck than the one that he preferred. He did not tell anyone of his intention to resign before his meeting with Ms. Everette. (TR 20-21)

When he returned to the Greensboro terminal, the dispatcher told him to report to the safety office. At the safety office Ms. Everette told him that he had "won the lottery." He described his response as follows:

> "Well, give me my money and let me go home. I quit." Then she informed me about the drug test. I said, "Bonnie, you didn't hear me. I said I quit." I laid my paperwork on the -- it was a file cabinet. I laid my paperwork and the keys on the file cabinet. And I reached in my pocket and gave her the fuel card. We talked for a minute, okay. I explained all the things that I had gone through with Rothrock and how I've been treated. Then I got in my car and I came home.

(TR 13-14)

After he left the terminal Mr. Hudson called him to try to convince him to return and take the drug test. Mr. Collier knew the consequences of an employee refusing to take a drug test, but did not believe that he was required to take the test because he had already resigned. (TR 22-24)

After the report of his refusing a drug test was forwarded to the NCDOT, Mr. Collier received notice that his commercial driver's license (CDL) had been suspended. (TR 27-28, EX 4)

DRUG TESTING REGULATIONS

The Federal Motor Carrier Safety Administration ("FMCSA") issued 49 C.F.R. Part 382 to regulate alcohol and controlled substance testing for operators of commercial motor vehicles. The regulation provides for testing on several grounds, including pre-employment, post-accident, random, and reasonable suspicion, and directs that:

> No driver shall refuse to submit to a post-accident alcohol or controlled substances test required under Sec. 382.303, a random alcohol or controlled substances test required under Sec. 382.305, a reasonable suspicion alcohol or controlled substances test required under Sec. 382.307, or a follow-up alcohol or controlled substances test required under Sec. 382.311. No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

49 C.F.R. §382.211.

Driving a truck in commerce is a safety-sensitive function within the meaning of this regulation. 49 C.F.R. §382.107. The regulations governing reasonable suspicion tests provide that:

(a) An employer shall require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning alcohol. The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

(b) An employer shall require a driver to submit to a controlled substances test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning controlled substances. **The employer's determination that reasonable suspicion exists to require the driver to undergo a controlled substances test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.** The observations may include indications of the chronic and withdrawal effects of controlled substances.

(c) The required observations for alcohol and/or controlled substances reasonable suspicion testing shall be made by a supervisor or company official who is trained in accordance with Sec. 382.603. The person who makes the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

. . . . . .

(f) **A written record shall be made of the observations leading to an alcohol or controlled substances reasonable suspicion test**, and signed by the supervisor or company official who made the observations, **within 24 hours of the observed behavior** or before the results of the alcohol or controlled substances tests are released, whichever is earlier.

49 C.F.R. §382.307(a)-(c), (f) [emphasis added]

"Refusal to submit" is defined, in pertinent part, as follows:

Refuse to submit (to an alcohol or controlled substances test) means that a driver:

(1) Fail[s] to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see Sec. 40.61(a) of this title);

(2) Fail[s] to remain at the testing site until the testing process is complete. Provided, that an employee who leaves the testing site before the testing process commences (see Sec. 40.63(c) of this title) a pre-employment test is not deemed to have refused to test;

(3) Fail[s] to provide a urine specimen for any drug test required by this part or DOT agency regulations. Provided, that an employee who does not provide a urine specimen because he or she has left the testing site before the testing process commences (see Sec. 40.63(c) of this title) for a pre-employment test is not deemed to have refused to test;

49 C.F.R. §382.107

The General Statutes of North Carolina provide that:

> The employer of any employee or applicant who tests positive or of any employee who refuses to participate in a drug or alcohol test **required under 49 C.F.R. Part 382** and 49 C.F.R. Part 655 [dealing with transit systems] must notify the Division [of Motor Vehicles] in writing within five business days following the employer's receipt of confirmation of a positive drug or alcohol test or of the employee's refusal to participate in the test. The notification must include the driver's name, address, driver's license number, social security number, and results of the drug or alcohol test or documentation from the employer of the refusal by the employee to take the test. (1989, c. 771, s. 2; 2005-156, s. 1; 2007-492, s. 2; 2009-416, s. 6.)

N.C. Gen. Stat. 20-37.19. [emphasis added]

EMPLOYER'S POLICY ON DRUG TESTING

Rothrock's Employee Handbook contains a section on substance abuse policy which includes the statement that:

> Reasonable cause testing will be conducted when there is reasonable evidence to suspect that an employee has reported to work impaired or is working impaired. Employees tested under this policy will not be allowed to work until the results of drug and/or alcohol screening are known. **Refusal to submit to such screening typically will be considered as a positive test result and will result in termination. A substantiated positive test finding will typically result in termination.** [Emphasis in original].

(EX 1)

Mr. Collier acknowledged receipt of the handbook on July 16, 2007 (EX 2). On the same day he signed a three-page document (EX 3) labeled "Company Drug Abuse Policy." This document listed the four categories of testing premises already mentioned and explained

"reasonable suspicion" as "[i]f an employee exhibits behavior which leads management to suspect that the driver is impaired."

Section 382.307 of the FMCSA regulation quoted above requires that reasonable suspicion testing "must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver" and the required observations "shall be made by a supervisor or company official who is trained in accordance with Sec. 382.603."

There was no evidence concerning whether Mr. Hudson was trained in accordance with Section 382, but even if he was, he did not base the decision to test Mr. Collier on the observations required by the regulation. He made the decision while Mr. Collier was still on the road, and he had no opportunity to make any of the required observations. When Mr. Collier returned to the dispatch office Mr. Hudson had a brief opportunity to observe him, and did not testify to any of the behavioral peculiarities listed in the regulation.

EX 1, the excerpt from the Employee Handbook, purports to give the employer authority to conduct reasonable cause testing "when there is reasonable evidence to suspect" impairment. This standard could arguably include evidence such as a call from an informant, depending on whether such evidence is considered to be "reasonable" in any particular case. However, the standard stated in EX 1 is not the standard under the FMCSA regulation.

EX 3, the company drug abuse policy handout, more accurately reflects the FMCSA regulation, by stating that reasonable suspicion testing applies when "an employee **exhibits behavior** which leads management to suspect that the driver is impaired." [emphasis added]. However, Mr. Hudson did not apply the standard of EX3 and Section 382.307 in ordering the test.

N.C. Gen. Stat. 20-37.19, quoted above, does not purport to create an independent basis for testing under state law. It incorporates by reference the federal regulation and requires a report to the Division of Motor Vehicles in the case of "any employee or applicant who tests positive or of any employee who refuses to participate in a drug or alcohol test required under 49 C.F.R. Part 382 and 49 C.F.R. Part 655."

Mr. Hudson's order for a drug test of Mr Collier, far from being "required under" the FMCSA regulations, was in violation of those regulations.

DISCUSSION

The meeting in the safety office

The testimony of all of the witnesses throughout the hearing was generally consistent. The most substantial inconsistency is in the two accounts of the conversation in the safety office. Mr. Collier testified that during this conversation he told Ms. Everette that he was resigning. She testified that she did not remember him using the words "quit" or "resign" or otherwise indicating that he was quitting his job.

Mr. Collier had formed the plan to resign in response to his argument with the dispatcher and had several hours during the drive back to Greensboro to think about it. Ms. Everette had no reason to anticipate a refusal of the test, much less a resignation. She anticipated, based on past experience, that Mr. Collier would take the paperwork to the medical facility, as all drivers including Mr. Collier had done when they had "won the lottery" in the past. Mr. Collier's angry denunciation of the company was completely unexpected, and prevented her from doing what Mr. Hudson had directed her to do—send Mr. Collier for a drug test. The bottom line result of the incident from her point of view was that the test that had been directed would not be performed, and her focus was understandably on that rather than on the completely unexpected statement that he was quitting the company.

The conversation between Mr. Collier and Ms. Everette was startling and emotionally tense. I believe that both of them testified honestly to what they remember of that conversation. He remembers saying that he was quitting while she does not. I find his memory on that issue more reliable, because he had formed the plan to quit several hours before and was focused on that issue.

Although I find that Mr. Collier announced his plan to quit during the conversation with Ms. Everette, it is clear that he did not do so until after he was told that he had "won the lottery." His testimony on that point was clear and consistent. He made the decision to quit after his argument over the radio with the dispatcher and had the duration of the drive to think about that decision. But when he arrived at the terminal he did not tell Mr. Hudson, the dispatcher, or anyone else that he was quitting. He did not state his reason for quitting either to Ms. Everette in the safety office or to Mr. Hudson during their telephone conversation later that day.

The telephone calls to the Employer

Mr. Collier testified at the hearing that he did not know a Gwen Stevens and argued that the alleged telephone calls from her were part of a conspiracy by Rothrock management to provoke him into quitting. The best way to analyze this theory is to assume for the time being that it is correct and follow where that assumption leads.

If there were no telephone calls alleging drug use, it follows that Mr. Hudson had no basis to believe that a drug test of Mr. Collier would be positive. Directing a drug test on fraudulent grounds would be an annoyance for Mr. Collier, as he would have to go to the medical facility and give a sample. However, if Mr. Hudson ordered the test with no basis, the only thing that he could reasonably expect is that Mr. Collier would take the test and pass, as he had when he was randomly tested three months earlier. He could not reasonably anticipate that Mr. Collier would refuse the test, and still less that he would resign when told to take the test. Ordering a drug test on a driver with no history of drug use, no observable behavior consistent with drug use, and no report of drug use is, on the face of it, an unlikely way to provoke a resignation.

Furthermore, if the drug test was designed to goad Mr. Collier into resigning, it succeeded. If Mr. Hudson committed a fraud to provoke Mr. Collier to quit and, against all probability, it actually worked, the last thing that Mr. Hudson would do would be to call Mr.

Collier and ask him to reconsider. Yet both Mr. Hudson and Mr. Collier testified that he did just that. If Mr. Collier had changed his mind and returned to provide a sample, there would have been no resignation and no report to any government agency of a refusal. In short, Mr. Hudson's telephone call risked undoing the success of the supposed conspiracy, after that conspiracy had succeeded beyond anything that he could have hoped.

We do not know the identity or the motivation of the woman who made the repeated calls to Rothrock. However, the most reasonable interpretation of the available evidence is that the calls were in fact made, rather than being fabricated to provoke a resignation.

FINDINGS OF FACT

1. J.L. Rothrock, Inc. is an employer subject to the provisions of STAA.

2. Bobby Collier was employed as a truck driver by Rothrock beginning in 2007 until his resignation on January 21, 2010.

3. In 2008 Mr. Collier submitted a whistleblower complaint under STAA against Rothrock. He and the company settled the complaint without a hearing.

4. In 2009 Mr. Collier requested to be transferred from over the road to local driving. The company granted this request.

5. After his original STAA complaint the company obtained new trucks. Mr. Collier was assigned to a new truck, although he preferred to continue to use the older truck that he had been using.

6. The company instituted a policy requiring local drivers to check in with the dispatch office every hour. The policy was imposed uniformly, without singling out Mr. Collier. He opposed applying the policy to experienced drivers like himself.

7. On January 21, 2010, Mr. Collier was on a run in the vicinity of Forest City, North Carolina. He had an argument with the dispatcher over the radio. The dispatcher claimed that Mr. Collier had not made his required check-in, while Mr. Collier contended that he had.

8. During the return trip to Greensboro Mr. Collier decided to resign from the company.

9. On the morning of January 21, 2010, a woman who did not initially identify herself called the Greensboro terminal and claimed that one of Rothrock's drivers was using drugs and driving while drinking. The first call was forwarded to Bonnie Everette's voicemail.

10. The woman called a total of five times and eventually spoke to Ms. Everette, identifying herself as Gwen Stevens, saying that Mr. Collier was the driver that she was accusing and that she was his fiancée.

11. Ms. Everette provided this information to Gary Hudson, the manager of the company.

12. Mr. Hudson directed Ms. Everette to conduct a drug test on the basis of reasonable suspicion.

13. When he directed the test, Mr. Hudson had not made, and could not make, any of the behavioral observations that are required for a reasonable suspicion test under 49 C.F.R. §382.307.

14. When Mr. Collier returned to the terminal, he was told to report to the safety office. He did not tell anyone in the dispatch office that he intended to resign from the company.

15. When he reported to the safety office, Ms. Everette told him that he had "won the lottery." Based on past experience, he understood this to mean that he was being directed to take a drug test.

16. Mr. Collier told Ms. Everette that he was quitting. He left the safety office without taking the paperwork for the drug test.

17. After Mr. Collier left the Rothrock's facility, Mr. Hudson called him on his cell phone and attempted to convince him to return and take the drug test. Mr. Collier refused.

18. Rothrock reported a refusal to take a federally required controlled substances test to the NCDOT.

19. Based on the report, the NCDOT revoked Mr. Collier's Commercial Driver's License.

CONCLUSION

Part of a complainant's prima facie case is that there is a causal connection between the protected activity and the adverse employment action. This inference is most commonly supported by proximity in time, as the Administrative Review Board noted in *Byrd*, quoted above. However, it has been recognized that there can be a substantial lapse of time between the protected activity and the adverse action. *See, e.g. Williams v. Southern Coaches, Inc.*, 94 STA-44 (Sec'y Sep. 11, 1995); *Anderson v. Jaro Transportation Services*, ARB 05-011, ALJ 2004-STA-2 and 3 (ARB Nov. 30, 2005); *Goldstein v. Ebasco*,86-ERA-36 (Sec'y, Apr. 7, 1992), *rev'd on other grounds sub nom. Ebasco Constructors, Inc. v. Martin*, 986 F.2d 1419 (5th Cir., 1993).

As noted earlier, the adverse employment action alleged in this case was not terminating Mr. Collier. He voluntarily resigned. The adverse action was reporting to the state agency his refusal to take a drug test that had been ordered in violation of the applicable federal regulations.

The only rationale for filing that report that Rothrock has offered, then or now, is the claim that it was legally required to do so. Rothrock is a business entity whose daily operations are closely regulated by both the state and federal governments. It is clear that the test was not authorized, nor the report to the state required, by the statutes and regulations under which Rothrock operates and with which it is expected to be familiar. Under the particular facts of this case I find that Mr. Collier has established a *prima fac*ie case and that Rothrock has failed to rebut that case with evidence of a legitimate, non-discriminatory reason for its action.

REMEDY

Mr. Collier has been unemployed in the trucking industry since he resigned from Rothrock and without his CDL he could not have obtained employment as a commercial driver. Rothrock did not fire him and he has not requested to return to employment there. He has requested an award of back pay.

He lost his license through Rothrock's actions, but he lost his employment by his voluntary decision to quit before he was notified of the drug test. If Rothrock had made no report he would still have his CDL. However, he would still have been unemployed during a period of slow economic growth and high unemployment, in an industry that is acutely sensitive to cycles of commercial and industrial activity. To assume that he could, even with his CDL, have found employment after resigning from Rothrock is highly speculative. Such speculation on his potential for employment is not an appropriate basis for awarding back pay.

The Administrative Review Board has held that appropriate remedies for STAA violations can include requiring employers to expunge adverse personnel records (*Dickey v. West Side Transport, Inc*. ARB Nos. 06-150, 06-151, ALJ Nos. 2006 STA-26 and 27 May 29, 2008), and to notify third parties of the decision and order. *Shields v. James E. Owen Trucking, Inc.* ARB No. 08-021, ALJ No. 2007-STA-22 (Nov. 30, 2009). In this case the adverse action was a report to a third party, NCDOT. Correcting that report is the most obvious and appropriate remedy.

ORDER

The Respondent is directed to expunge any references to the Complainant having refused to take a drug test from its personnel records. The Respondent is further directed to notify the North Carolina Department of Transportation of my determination that the report of the Complainant having refused to take a federally required drug test was in error. The Respondent is directed to include a copy of this decision and order in its notification to the North Carolina Department of Transportation.

A

KENNETH A. KRANTZ
Administrative Law Judge

Newport News, Virginia
KAK/lec/mrc

NOTICE OF APPEAL RIGHTS:

To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an

original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

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