U.S. Department of Labor

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

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

Issue Date: 18 May 2012

CASE NO.: 2010-STA-00031

In the Matter of:

NICHOLAS SHANE MASON,
Complainant,

v.

NEW PRIME INC., d.b.a PRIME, INC. and SUCCESS LEASING, INC.,
Respondents.

Appearances:

Paul O. Taylor, Esq., Truckers Justice Center, Burnsville, MN
For Complainant.

William S. Robbins, Jr., Esq., Polsinelli Shughart, PC, Kansas City, MO
For Respondents.

Before: Pamela J. Lakes
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case involves a claim under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "Act"), with implementing regulations at 29 C.F.R Part 1978.[1] The STAA prohibits an employer from retaliating against an employee because the employee engaged in, or is perceived to have engaged in, protected whistleblowing activity. In addition, the Act protects employees who refuse to operate a commercial motor vehicle because the vehicle violates safety regulations or because the employee has a reasonable apprehension of serious injury to himself or the public due to the

[1] The STAA was amended on August 3, 2007 by Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007) and the implementing regulations were amended on August 31, 2010, 75 Fed. Reg. 53544 (Aug. 31, 2010). References in this decision are to the current version of the statute and regulations.

vehicle's unsafe condition.[2] Complainant, Nicholas Shane Mason ("Complainant"), alleges that New Prime, Inc. and Success Leasing, Inc. ("Respondents") terminated him based on his refusal to drive a truck that was leaking oil.

PROCEDURAL HISTORY

On November 19, 2009, Complainant filed a timely complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") in Kansas City, Missouri. (CX 4).[3] He alleged that Respondents terminated his employment in retaliation for his refusal to drive a truck with a major oil leak. OSHA investigated the complaint, and on March 1, 2010, it concluded that there was no reasonable cause to believe that the Respondents violated the STAA. Specifically, the Area Director determined that there was no evidence indicating that those who made the decision to terminate Complainant were aware of his protected activity. On March 4, 2010, Complainant filed a timely objection and request for a hearing.

After several continuances and a change of venue, a hearing was held on July 14, 2011 in Kansas City, Missouri.[4] At the hearing, Complainant's Exhibits 1 through 15 (CX 1 through CX 15) and Respondents' Exhibits 1 through 17 (RX 1 through RX 17) were admitted. ALJ 1, a stipulation as to facts and exhibits, was also admitted. The parties were allowed until October 3, 2011 to submit post-hearing briefs, which was subject to extension by stipulation. (Tr. 261). Respondents filed their post-hearing brief on September 29, 2011 and Complainant filed his on September 30, 2011. This case is now ready for a decision.

FACTUAL BACKGROUND

Respondents' Relationship and Prime's Safety Policy

New Prime Inc. ("Prime") is a commercial trucking company with 4,200 trucks and over 5,000 drivers. (Tr. 229). Success Leasing Inc. ("Success") is an affiliate of Prime. (Tr. 16). Prime drivers can work as direct employees of Prime, known as company drivers, or they can work as independent contractors, known as lease drivers. (Tr. 15-16, 42-45, 141; CX 1, 2). Lease drivers lease trucks from Success then lease them back to Prime. (Tr. 16).

All Prime drivers are subject to its safety policy, which follows a points system. (Tr. 50). Under this system, one moving violation equals one point and one preventable accident also equals a point. (Tr. 108). A driver will not be hired by Prime if he earned two points in the previous year or more than four points in the previous three years. (Tr. 12-13, 233).

[2] As amended on August 3, 2007, the STAA was amended to include three other categories of protected activity: (1) accurately reporting hours on duty; (2) cooperating with a safety or security investigation by certain federal entities; and (3) furnishing information to federal entities relating to an accident or incident resulting in injury, death, or property damage. Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007).

[3] Complainant's and Respondents' exhibits will be referred to as "CX" and "RX," respectively, followed by the exhibit number or letter. "Tr." followed by a page number refers to the transcript of the hearing in this case.

[4] The case was originally set to be heard in Harrisonburg, Virginia, but the parties jointly moved for a change of venue to Kansas City, MO for the convenience of counsel and witnesses.

Furthermore, current employees are referred to the safety department for counseling if they receive five points within a three-year period. (Tr. 78-79, 110). Drivers are counseled to determine whether further training can help them improve their record. (Tr. 116-17). After counseling, the safety department will determine whether the driver should be retained, sometimes with input from the fleet manager. (Tr. 79, 231). However, Prime always disqualifies a driver at six points. (Tr. 33, 250; RX 16). Points an employee received in the three years preceding his hire will count towards the maximum number of allowable points. (Tr. 109).

At the hearing, Don Lacy, Director of Safety for Prime, testified that the safety department has some discretion in determining whether to hire or fire an employee even if he does not have the maximum number of points allowed. (Tr. 233). For instance, an applicant who has one moving violation for reckless driving will not be hired. *Id.* Mr. Lacy testified that the point system provides a general guide; however, employees have been terminated with only one or two points depending on the nature and extent of their violation(s). (Tr. 234). Furthermore, the safety department has discretion in determining whether something such as a blown tire constitutes an incident, resulting in no points, or an accident, resulting in one point. (Tr. 13).

Prime drivers are allowed to dispute citations, and it is standard practice for Prime to write an upcoming court date in a driver's incident report. (Tr. 32).[5] Mr. Lacy testified that Prime does so because it wants to make sure a driver appears for his court date; if he does not, there is a good chance his license will be suspended. *Id.*[6] In addition, Prime sometimes makes arrangements for a driver to have time off to make court appearances. *Id.* Although Prime asks that its drivers immediately report the citations they receive, they are not required to do so until 30 days after the citation becomes a conviction, unless an accident is involved. (Tr. 78, 224). Nonetheless, Mr. Lacy testified that the safety department sometimes terminates a driver before a conviction based on "logic." (Tr. 246-47). He clarified, "we also are still not going to necessarily wait for every conviction before we make a decision." (Tr. 248-49).

Complainant's Employment with the Respondents

Prior to his employment with Prime, Complainant attended Blue Ridge Community College. (Tr. 137). Complainant had previously worked in construction but was looking to make a career change. (Tr. 136). While at Blue Ridge Community College, he learned how to drive a truck, and at the conclusion of the twelve-week program, he received his commercial driver's license from Virginia. (Tr. 137-38). Complainant applied to numerous driving positions and was hired by Prime in May 2009, with a home terminal in Pittston, Pennsylvania. (Tr. 139).[7]

Because Complainant did not have any on-the-road experience, Prime paired him with a driver as part of its training/apprenticeship program. (RX 13). When Complainant started with

[5] Steve Tassin, Complainant's fleet manager, testified that the driver incident system is "[b]asically documentation for anything and everything in dealing with the driver. It can be anything from an Atta Boy to speeding tickets to accidents to log issues. It just, it's anything to help us document ongoing issues of any kind with the driver, so we have documentation." (Tr. 54).

[6] Mr. Tassin also testified that Prime makes a note of court appearances because they want to make sure that tickets are paid or disputes are handled by an attorney. (Tr. 49).

[7] Complainant is a resident of Virginia. (Tr. 138). *But cf*. ALJ 1 (listing residence as West Virginia).

Prime, he already had two points on his record from prior speeding tickets: one from February 7, 2009 and another from April 3, 2007. (Tr. 80; RX 1). Furthermore, on August 26, 2009—when Complainant was still in Prime's training program—he was involved in a preventable accident, resulting in an additional point. (Tr. 112-13; RX 9).[8] However, as Complainant was still under the point limit, he was officially hired by Prime on October 8, 2009 as a lease driver.[9] (Tr. 60, CX 1).

On November 9, 2009, Complainant was involved in a preventable accident when he hit the top of his trailer on a low overpass, after being distracted by a speeding vehicle. (Tr. 144-45). Complainant reported the accident to Prime immediately. (Tr. 145-46). When he explained that the trailer was too damaged to return to Springfield, Missouri, he was told to take it into a repair shop then return it to Springfield. (Tr. 146-47). Complainant received a point for this accident; he also received a ticket from the Champaign Police Department for disobeying a traffic control device, resulting in another point.[10] (CX 9, RX 4).

While en route to Springfield the following day, Complainant received another ticket. (Tr. 148, 211-12; CX 9). He testified that he was driving in bad traffic when a car cut him off, and he moved into the HOV lane to avoid hitting the car. (Tr. 148-49). Complainant was pulled over and received a ticket for driving in the HOV lane. *Id.* He was in the outskirts of St. Louis, Missouri (Chesterfield) when he received this ticket. (Tr. 148).

After receiving this citation, Complainant continued on to Springfield. (Tr. 150). Upon arrival, Complainant spent the night in his truck. *Id.* The following morning, on November 11, 2009, he reported to the safety department for a counseling meeting, as he had been instructed to do by Steve Tassin, his fleet manager. (Tr. 151).[11] Complainant met with Margaret Banning, Safety Supervisor for Prime, and explained what happened during the accident in Champaign, Illinois. (Tr. 151-52). He admitted the accident was his fault and informed Ms. Banning of the citation he received as a result of hitting the overpass. (Tr. 153). Complainant could not recall telling her about the HOV ticket. *Id.* Ms. Banning testified that she discussed Complainant's moving violations and accidents and the points assigned. (Tr. 117). She confirmed that Complainant did not mention the HOV ticket at their meeting. (Tr. 118).

Complainant testified that he then met with Mr. Lacy right after this meeting just a few feet over to the side. (Tr. 154). Complainant testified that he reiterated what happened during the accident and told Mr. Lacy about the consequent citation he received. *Id.* He testified that he also told Mr. Lacy about the HOV ticket he received in St. Louis, Missouri. (Tr. 155). Mr. Lacy testified that he did not recall meeting with Complainant on November 11, 2009 and that there would have been notes to that effect if he had, just as there were notes on Ms. Banning's meeting with Complainant. (Tr. 238; RX 1). Mr. Lacy also testified that if Complainant had informed him of the HOV ticket, it would have been documented in the incident report system. (Tr. 255-

[8] Complainant was backing up a truck when he hit a street light, bending it over. (Tr. 143-44).
[9] Complainant chose to work as a lease driver rather than a company driver and leased a truck from Success then leased it to Prime. (Tr. 42; CX 2).
[10] This accident occurred in Champaign, Illinois.
[11] Ms. Banning testified that because Complainant had 5 points—the two speeding tickets, the preventable accident while a trainee, the accident with the overpass and the consequent ticket—he was required to come in for counseling with the safety department. (Tr. 116).

56). Ms. Banning testified that she could not recall whether she referred Complainant over to Mr. Lacy after she met with him, but she did not believe so. (Tr. 119).

Complainant also met with Mr. Tassin, his fleet manager. (Tr. 155). Mr. Tassin testified that the safety department wanted to terminate Complainant because he had a number of points on his record and had only been with Prime for a very short period. (Tr. 59). Mr. Tassin testified that he intervened on Complainant's behalf and requested that he simply be demoted to a B-2 position and go through more training. (Tr. 59-60). He felt that Complainant had been good to work with, and he wanted to give him a second chance. *Id.* Mr. Tassin explained to Complainant that due to the recent accident, Prime was downgrading him from his position as a lease driver to a second seat driver, or a B-2 driver, and that he would have to drive for 50,000 miles with a qualified and experienced trainer until he could again be promoted. (Tr. 44). Complainant was given the choice of being terminated or taking the B-2 position, and he chose the latter. (Tr. 62). At this point, his lease with Success was cancelled. (Tr. 42; CX 13).

Mr. Tassin testified that although B-2 drivers are typically assigned to a trainer, he did not immediately assign Complainant to one because Thanksgiving was approaching and many drivers return home for the holiday. (Tr. 61). When Complainant accepted the offer for the B-2 position, Prime got him a rental car so that he and his wife could return to their home in Virginia. (Tr. 62).

Complainant's Termination

On November 17, 2009, Mr. Tassin contacted Complainant to see if he could pick up a truck that had been abandoned due to the previous driver's arrest. (Tr. 63-66). The truck was located in Clearfield, Pennsylvania, and Mr. Tassin asked Complainant to drive it approximately 161 miles to Prime's terminal in Pittston, Pennsylvania. (Tr. 63-66; 158). Complainant agreed to pick up the truck the following day. (Tr. 158-59).

This same day, Margaret Banning called Complainant to ask him about the HOV ticket he received in St. Louis on November 10, 2009. (Tr. 164). Ms. Banning testified that she learned about the HOV ticket through an anonymous phone call. (Tr. 121). The notes she entered into Prime's incident report system reflect the following: "[s]poke with [Complainant] after rec'g call from 'Lisa' that he rec'd a ticket for a lane violation after the accident of 11/9/09." (CX 9 at 6). This entry was made on November 17, 2009, the day Ms. Banning spoke with Complainant. *Id.* The time entry was 2:47 p.m., and Ms. Banning testified that she would have made this entry anywhere between half an hour and an hour after she spoke with Complainant. (Tr. 121). Ms. Banning testified that when she spoke with Complainant, he immediately admitted he received this ticket and alleged that he forgot to mention it during their counseling session on November 11, 2009. (Tr. 123). Ms. Banning testified that she would have then told Mr. Lacy that Complainant had another point on his record because Complainant then had six points, which was over the maximum allowed. (Tr. 124-25). She stated that the entry

she made in the system about this ticket would have been forwarded to Mr. Tassin, Complainant's fleet manager. (Tr. 126).[12]

Complainant testified that at approximately 6 a.m. the following day—November 18, 2009—which was the day he was supposed to pick the truck up, he called the police to find out why the previous driver had been arrested. (Tr. 159).[13] Complainant explained that he was nervous there may be contraband in the truck. *Id.* Complainant testified that the officer with whom he spoke informed him that there was no contraband; however, he told him the truck was not drivable. (Tr. 159-60).[14] Complainant testified that he then called Sapp Brothers, a repair shop where the truck was, to find out what was wrong with it. (Tr. 160). He stated that he spoke with two employees who informed him there was a major oil leak and that the truck was not safe to drive because the engine could lock up, causing it to fail in the middle of traffic. (Tr. 161). At the hearing, Robert Rothrock, service manager for Sapp Brothers, confirmed that Sapp Brothers found an oil leak and that Prime told them they would arrange to have the truck towed. (Tr. 91). He also confirmed that the oil leak was severe and that Sapp Brothers informed Complainant the truck should not be driven. (Tr. 92). Mr. Rothrock testified that Complainant asked him to fax over a note outlining what could happen if he drove the truck. (Tr. 94). From Mr. Rothrock's testimony, it was unclear whether he spoke with Complainant on November 18 or November 19, 2009. (Tr. 95-97; CX 3). Complainant believed he received the fax on the November 19th, which is the date reflected on the fax printout; however, he testified that he spoke with Mr. Rothrock on the morning of November 18, 2009. (Tr. 179; CX 3;). Mr. Rothrock believed he sent the fax shortly after he spoke with Complainant, which would indicate that he spoke with Complainant on November 19, 2009. (Tr. 96-97).

Complainant testified that after speaking with Sapp Brothers, he then spoke with Mr. Tassin.[15] He testified that Mr. Tassin asked if he was ready to pick up the truck, at which point he told him he could not because the truck had a major oil leak. (Tr. 163). He testified that Mr. Tassin then informed him that he would call him back, and approximately 20 minutes later, he called Complainant back and told him he was fired. *Id.* When he was questioned about what reasoning Mr. Tassin provided, Complainant stated, "something about safety regulations. I don't know what it was." *Id.* [16]

Mr. Tassin provided a different account of the events. He testified that he called Complainant on the morning of November 18, 2009 to see if he had left yet, because early that morning, he received a call from Ms. Banning notifying him of the HOV ticket. (Tr. 66). Mr.

[12] At the hearing on July 14, 2011, Ms. Banning could not specifically recall whether she had told Mr. Lacy or Mr. Tassin about this ticket; however, in a written statement to OSHA dated January 12, 2010, she stated that she informed both of them about it. (Tr. 125-26, RX 14).

[13] At the hearing, Robert Rothrock, service manager for Sapp Brothers, testified that the previous driver had brought the truck in and subsequently got in a fight with the passenger, at which point the police were called and the driver was arrested. (Tr. 90).

[14] The original complaint suggests that Complainant's wife contacted the police; however, this is not significant for the purposes of this opinion. (CX 4).

[15] Complainant could not recall if he called Mr. Tassin or vice versa. (Tr. 162).

[16] In a written statement made to OSHA on January 18, 2010, Complainant stated that Mr. Tassin told him that he was "fired for having too many points on [his] record" but that he felt he was fired because he refused to drive an unsafe truck. (RX 13).

Tassin testified that he called Complainant to ask about the ticket and that Complainant told him about it, at which point he told Complainant he would call him back. (Tr. 67). He testified that he then called Ms. Banning back, at which point she informed him that the HOV ticket put Complainant over the number of allowable points and that he was now disqualified. *Id.* Mr. Tassin testified that when he first spoke with Complainant that morning, Complainant did not tell him he was refusing to drive the truck. (Tr. 68). An entry from the driver incident system reflects that Mr. Tassin entered that Complainant was "dq'd by safety department" at 7:13 a.m. CT on November 18, 2009. (RX 10).[17] He stated that he would have made this entry shortly after he spoke with Complainant and informed him that he was fired. (Tr. 70). Mr. Tassin testified that he did not inform Ms. Banning or Mr. Lacy that he was planning to send Complainant out to pick up the abandoned truck. (Tr. 70-71). He also testified that he did not make the decision to terminate Complainant; this was made by the safety department. (Tr. 73). Mr. Tassin admitted that Complainant had told him that a mechanic said the truck had an oil leak and should not be driven. (Tr. 77). Prime records also reflect that on November 15, 2009, the truck Complainant was supposed to pick up had broken down and was driven to Sapp Brothers after oil was put in it. (CX 8; Tr. 18-27). A sworn statement by Aaron Crane, a dispatcher for Prime who was working on the night of November 15, 2009 also states that the previous driver of the truck called to report that the truck was leaking oil and that he was taking it to Sapp Brothers. (CX 7). After Complainant was terminated, Prime arranged for another driver to return the truck, and records reflect that 15 quarts of oil were added after the truck reached Pittston, Pennsylvania. (CX 12 at 10).

Mr. Lacy testified that he recalled learning of Complainant's HOV ticket from Ms. Banning. (Tr. 242). He testified that, as he understood it, an unknown woman called Ms. Banning and informed her of the ticket. *Id.* He testified that at this point, he felt that Complainant could no longer continue his employment with Prime. (Tr. 243). He stated that Mr. Tassin "convinced us prior to knowing about this ticket, that we should go ahead and try him and put him back out there, perhaps retrain him to help solve his situation. But then we found out about this other ticket. There was no discussion at that point." (Tr. 245). Mr. Lacy believed that the safety department simply called Mr. Tassin to inform him that Complainant could no longer remain employed with this additional ticket. (Tr. 245-46). He conceded that at the time Complainant was terminated, he had not been convicted of any offense as a result of the accident with the overpass or the HOV violation. (Tr. 251, 256-57).

At the hearing, Mr. Lacy clarified that it was his decision to terminate Complainant based on his record. (Tr. 243-44). He stated that at the time the safety department spoke with Mr. Tassin, he was not aware Complainant had been dispatched to pick up the truck in Clearfield, Pennsylvania. *Id.* Ms. Banning also testified that she did not have any conversations with Complainant, Mr. Tassin, or Mr. Lacy about the oil leak and Complainant's refusal to drive the truck. (Tr. 126).

[17] Mr. Tassin entered into the system that Complainant had 5 points at the time of his dismissal; however, Ms. Banning had testified that Complainant had 6 points because he received a citation in Champaign, Illinois for topping out the trailer, so this incident would have counted as two points due to the accident and subsequent citation. (CX 9; CX 14; Tr. 116-125; Tr. 55-56). In a statement to OSHA dated January 12, 2010, Mr. Lacy wrote that a driver who receives a citation for a preventable accident will receive two points: one for the accident and one for the violation. (RX 16).

LEGAL STANDARD

The employee protection/whistleblower provisions of the STAA prohibit covered employers from discharging or otherwise retaliating against employees because of their participation in protected activity. 49 U.S.C. § 31105; 29 C.F.R. § 1978.102. Specifically, the STAA prohibits retaliation against employees who have filed a complaint or participated in a proceeding related to the violation of commercial motor vehicle safety or security regulations, and the Act also protects employees who are believed to be engaged in such activity. 49 U.S.C. § 31105(a)(1)(A); 29 C.F.R. § 1978.102(b), (e). Similarly, the Act protects employees who refuse to operate a vehicle either because operation of the vehicle would violate motor vehicle safety regulations or because they have a reasonable apprehension of serious injury to themselves or others due to the vehicle's hazardous condition. 49 U.S.C. § 31105(a)(1)(B); 29 C.F.R. § 1978.102(c)(1). To prevail, a complainant must prove by a preponderance of the evidence that: 1) he engaged in protected activity[18]; 2) the employer knew or suspected he engaged in protected activity; 3) he suffered adverse action; and 4) the circumstances were sufficient to raise the inference that his protected activity was a contributing factor in the adverse action. *Williams v. Domino's Pizza*, ARB No. 09-092, 2008-STA-00052 at 5 (ARB Jan. 31, 2011). *See also* 29 C.F.R. § 1978.104(e)(2) (relating to investigatory phase of proceedings.) A determination that a violation has occurred may only be made by an administrative law judge when the complainant has demonstrated by the preponderance of the evidence that the protected activity (or perception of protected activity) was a contributing factor in the alleged adverse action. 29 C.F.R. § 1978.109(a). If the complainant satisfies this burden, the respondent may avoid liability by demonstrating through clear and convincing evidence that the complainant would have been terminated even absent his protected activity. 29 C.F.R. § 1978.109(b); *Jordan v. IESI*, ARB No. 10-076, 2009-STA-00062 (ARB Jan. 17, 2012).

DISCUSSION

Witness Credibility

The following witnesses testified at the hearing: Complainant; Don Lacy, Director of Safety for Prime; Margaret Banning, Safety Supervisor for Prime; Steve Tassin, Complainant's fleet manager at Prime; Robert Rothrock, service manager at Sapp Brothers; and James Allen Bryan, a technician at Sapp Brothers. I found all of the witnesses to be credible. Where there were discrepancies in the testimony or the witnesses' testimony differed from their earlier sworn statements, I found this to be due to difficulty recalling the events in question, which took place nearly two years prior to the hearing.

Respondents' Employment Relationship with Complainant

Respondents assert that the claims against Success should be dismissed because Success was not in an employment relationship with Complainant at the time of his termination. Although Success is clearly covered by the Act—it is a business that affects interstate commerce

[18] The Act also protects employees whom an employer believes to have engaged in protected activity. 29 C.F.R. § 1978.109(a).

and it leased a commercial vehicle to Complainant—Success terminated its lease with Complainant on November 11, 2009, at which point Prime demoted him to a B-2 position (CX 2, CX 13). *See* 20 C.F.R. § 1978.101. As Complainant's alleged protected activity did not occur until November 18, 2009, it is clear that the decision to terminate his lease was not retaliatory. Accordingly, I find that the claims against Success should be dismissed.

By contrast, Prime stipulated at the hearing that it is covered by the Act and that Complainant meets the definition of an employee under 49 U.S.C. §§ 31101 and 31105. (ALJ 1). As such, I must determine whether Complainant can prove by a preponderance of the evidence that Prime retaliated against him.

Elements of the Present Claim

Protected Activity

Complainant asserts that he engaged in protected activity when he informed Mr. Tassin of the oil leak. Internal complaints to supervisors which are related to violations of commercial vehicle safety regulations are protected under 49 U.S.C.A. § 31105(a)(1)(A), the complaint provision. *Zurenda v. J & K Plumbing & Heating Co.*, ARB No. 98-088, ALJ No. 1997-STA-16 (ARB June 12, 1998). Mr. Tassin concedes that Complainant told him on the morning of November 18, 2009 that a mechanic reported the truck had an oil leak and should not be driven. (Tr. 77). This complaint involved a violation of 49 C.F.R. § 396.5 which holds, "Every motor carrier shall ensure that each motor vehicle subject to its control is (a) Properly lubricated; and (b) Free of oil and grease leaks."

Despite Mr. Tassin's concession, Respondents argue there is no credible evidence that Complainant was aware of an 'actual violation' at the time he mentioned the leak; they suggest that he fabricated the story and simply "got lucky" when it later proved true: "[g]iven his recent demotion to a B-2 driver, it is quite plausible that Complainant had an ulterior movie, in concocting a story about an oil leak in a truck that he had never inspected." (Respondent's Brief at 17-18). This argument is baseless. A complainant need only have a reasonable belief that the respondent violated a motor vehicle safety regulation. *Guay v. Burford's Tree Surgeon's, Inc.*, ARB No. 06-131, ALJ No. 2005-STA-045 (ARB June 30, 2008). Furthermore, the Board has specifically held that, "where the complainant has a reasonable belief that the respondent is violating the law, other motives he may have for engaging in protected activity are irrelevant." *Guay*, ARB No. 06-131 (citing *Diaz-Robainas v. Florida Light & Power Co.*, 1991-ERA-010, slip. Op. at 15 (Sec'y Jan. 19, 1996)). Mr. Rothrock testified that he informed Complainant the truck had a severe oil leak; accordingly, Complainant's belief that the truck was in violation of 49 C.F.R. § 396.5 was objectively reasonable.[19] As such, Complainant engaged in protected activity under 49 U.S.C. § 31105(a)(1)(A).

[19] It appears that Sapp Brothers sent the fax noting the truck should not be driven on November 19, 2009, the day after Complainant was fired. (CX 3). At the hearing, Mr. Rothrock testified that he sent the fax the same day he spoke with Complainant; however, Complainant alleges he spoke with Mr. Rothrock on November 18, 2009, the day he was fired, but received the fax the following day. (Tr. 95-96, 179-80). As Mr. Tassin concedes that Complainant informed him that a mechanic suggested the truck should not be driven due to an oil leak, (Tr. 77), I find that Mr. Rothrock must have spoken the Complainant on November 18, 2009, the day he was terminated.

Complainant also asserts that he engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i) when he refused to drive the truck. Under this provision, a complainant must prove that an actual violation of a commercial vehicle safety regulation would have occurred but for his refusal to drive. *Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-022, at 9 (ARB Nov. 20, 2009). Complainant cites to 49 C.F.R. § 396.1(a), which provides in pertinent part:

> Every motor carrier, its officers, drivers, agents, representatives, and employees directly concerned with the inspection or maintenance of commercial motor vehicles must be knowledgeable of and comply with the rules of this part.

According to Complainant, this provision requires drivers to ensure that the vehicles they operate are free of oil leaks in accordance with Section 396.5. As discussed above, Mr. Rothrock confirmed that the truck had a major oil leak. Furthermore, records from Prime's repair shop reflect that fifteen quarts of oil were added to the truck after it finally reached Pittston, Pennsylvania. (CX 12 at 10). Based on this evidence, I find that Complainant's refusal to drive the truck is protected under the Act, as driving the vehicle would likely have resulted in a violation of 49 C.F.R. §§ 396.1 and 396.5. [20]

Finally, Complainant argues that his refusal to drive the truck is also protected under 49 U.S.C. § 31105(a)(B)(ii), which protects drivers who refuse to drive a vehicle because they have a reasonable apprehension of serious injury to themselves or others due to the vehicle's unsafe condition. In order to seek protection under this section, Complainant's apprehension must be objectively reasonable. 49 U.S.C. § 31105(a)(2); 29 C.F.R. §1978.102(f); *Calhoun v. United Parcel Service*, 04-108, ALJ No. 2002-STA-031, at 7 (ARB Sept. 14, 2007), *aff'd sub non. Calhoun v. U.S. Dep't of Labor*, 576 F.3d 201 (4th Cir. 2009). Furthermore, Complainant must also prove that he sought from Prime, but was unable to obtain, correction of the hazardous condition. 49 U.S.C. § 31105(a)(2); C.F.R. § 1978.102(f).

Mr. Rothrock testified that he informed Complainant the truck should not be driven, as the oil leak could cause the engine to lock up, resulting in an accident.[21] (Tr. 92-93). Based on the information he provided to Complainant, Complainant's apprehension was objectively reasonable. Nonetheless, Respondents argue that there is no evidence suggesting Complainant asked Prime to repair the truck and that it refused. (Respondent's Brief at 19). Inasmuch as that requirement is now specifically incorporated in the STAA and implementing regulations, and there has been no showing that the truck could not be repaired, I am inclined to agree with Respondent on that issue. 49 U.S.C. § 31105(a)(2); C.F.R. § 1978.102(f). *See also Palazzolo v. PST Vans, Inc.*, 1992-STA-23 (Sec'y Mar. 10, 1993) (holding that the "complainant did not show by a preponderance of the evidence that he sought a correction of the unsafe condition, which in

[20] Although Mr. Tassin alleges that Complainant did not refuse to drive the truck (Tr. 68-69), he concedes that Complainant informed him that a mechanic reported the truck had a major oil leak.

[21] Mr. Rothrock also wrote this on the form he faxed to Complainant, but it appears he did not fax this until November 19, 2009, the day after Complainant was fired. (CX 3). As discussed previously, Mr. Rothrock believed he spoke with Complainant the same day he sent the fax; however, Mr. Tassin's testimony suggests that Mr. Rothrock spoke with Complainant on November 18, 2009, prior to his termination. (Tr. 77).

this case would entail informing [the respondent] that he was not able to drive the truck safely due to pain and medication.") I therefore find that Complainant has not established protected activity under this provision.

In light of the above, Complainant has established that he engaged in protected activity when he informed Mr. Tassin of the oil leak. In addition, although the question is a closer one, I have also found that Complainant's refusal to drive the truck was protected under one of the two provisions of the Act relating to a refusal to drive.

Employer Knowledge

Although Mr. Tassin admitted that Complainant mentioned the oil leak, Complainant must show that the person responsible for his termination was aware of the protected activity. *Baughman v. J.P. Donmoyer, Inc.*, ARB No. 05-105, ALJ No. 2005-STA-005 (ARB Oct. 31, 2007). At the hearing, Don Lacy, Director of Safety for Prime, testified that it was his decision to terminate Complainant. (Tr. 243).[22] Mr. Lacy testified that he was not aware that Complainant had been dispatched to pick up the truck in Clearfield, Pennsylvania at the time he decided to terminate him. (Tr. 243).

Although I found all of the witnesses to be credible, Mr. Tassin, Mr. Lacy, and Ms. Banning all had trouble recalling the details of Complainant's termination. Mr. Tassin initially testified that he could not recall whether he spoke with Ms. Banning, Mr. Lacy, or both; however, he later testified that it was Ms. Banning who informed him that Complainant was terminated. (Tr. 48, 67). Ms. Banning, on the other hand, could not recall speaking with Mr. Tassin; she believed that she simply would have informed Mr. Lacy that Complainant had six points. (Tr. 124-26). Furthermore, when Mr. Lacy was asked whether Mr. Tassin was involved in the decision to terminate Complainant, he stated, "I think we just called, notified him, said, 'we've got this other ticket, we can't go any further. Our deal, that's off. We can't go any further." (Tr. 245).

Based on this testimony, it is unclear whether the safety department was aware of the oil leak or of Complainant's refusal to drive the truck when they decided to terminate him. Although Mr. Tassin testified that he did not tell Ms. Banning or Mr. Lacy about Complainant's concerns regarding the oil leak, he had difficulty recalling the events of that morning. (Tr. 85).

[22] Mr. Lacy stated that the safety department determines whether to disqualify a driver, sometimes with input from the fleet manager, while the fleet manager actually conveys the message:

Q In terms of disqualifying a driver for safety related reasons, who has that responsibility, the citations clerk or the safety department?

A We do. The safety department does.

Q And in terms of disqualifying a driver for safety related issues, would the fleet managers have that responsibility?

A They actually do it. We generally in most cases make the recommendation, or in concert. We get their input. We don't just -- well, sometimes we do if it's egregious enough. But we discuss that and get their input. They're going to actually do the disqualification. They're disincentive-ized again for every person that they lose for whatever reason.

(Tr. 230-31).

However, even assuming *arguendo* that Mr. Lacy knew of the protected activity, Complainant has not presented evidence sufficient to raise the inference that his protected activity was a contributing factor to his termination.

Adverse Action and a Causal Nexus

Prime's decision to terminate Complainant clearly constitutes adverse action. Nonetheless, a review of the trial testimony and evidence suggests that Complainant was terminated due to his poor driving record. Under Prime's points system, employees are terminated if they receive more than five points within a three year period. (Tr. 33, 250). Furthermore, points an employee received in the three years preceding his hire will count towards the maximum number of allowable points. (Tr. 109). Claimant had six points at the time of his termination: 1) the speeding ticket from April 3, 2007; 2) the speeding ticket from February 7, 2009; 3) the preventable accident he was involved in on August 26, 2009, while still a trainee; 4) the preventable accident he was involved in on November 9, 2009 when he hit a low overpass; 5) the consequent citation he received from the Champaign police as a result of disobeying a traffic control device when he hit the overpass; and 6) the HOV ticket from November 10, 2009. (Tr. 124-25). In paragraph 20 of his complaint, which he filed the day after he was terminated, Complainant wrote that Mr. Tassin informed him he was being terminated because he had too many points, and he stated the same thing in his statement to OSHA. (CX 4; RX 13).[23] Furthermore, when asked at the hearing what reasoning Mr. Tassin provided, Complainant stated, "something about safety regulations. I don't know what it was." (Tr. 163).

Although Complainant had not been convicted for the HOV incident or the citation for hitting the overpass at the time of his termination, Mr. Lacy testified that the safety department does not always wait for a conviction before terminating a driver. (Tr. 246-49). Mr. Tassin credibly testified that the safety department wanted to terminate Complainant after he hit the overpass; however, he intervened on Complainant's behalf and suggested he simply be demoted to a B-2 position and retrained. (Tr. 59). Although Mr. Lacy could not recall having discussions with Mr. Tassin about the decision to demote Complainant, he said that he had no reason to doubt Mr. Tassin's recollection of the events. (Tr. 240). He stated that when he learned of Complainant's HOV ticket, he felt there was no way to go forward even though Complainant had not yet been convicted of the two most recent incidents. (Tr. 241-43). He emphasized that Complainant had received a number of points in only one month of employment: "He's racking up a very tenuous record that we would have difficulty defending if he was involved in something that was more serious. Plus that, it's almost a precursor or predictor of some more serious problems." (Tr. 241).

Although temporal proximity between an employee's protected activity and the adverse action can raise an inference of causation, here, the evidence establishes that Complainant's

[23] Although Mr. Tassin wrote in Complainant's incident report that he was at 5 points (CX 9), he noted that the safety department made the decision to disqualify Complainant and Ms. Banning testified that Complainant had six points. (Tr. 124-25). At the trial, Mr. Lacy testified that he thought Complainant had five points when he was terminated (Tr. 250); however, he had trouble recalling the details of Complainant's termination. In a statement taken by OSHA on January 12, 2010, Mr. Lacy confirmed that a driver would receive two points if he was involved in a preventable accident and received a citation for the accident. (RX 16).

protected activity did not play a role in his termination. *Cf. Johnson v. Rocket City Drywall*, ARB No. 05-131; ALJ No. 2005-STA-24 (ARB Jan. 31, 2007) (holding that temporal proximity is not always dispositive). Complainant confirmed that Ms. Banning contacted him on November 17, 2009, the day before he engaged in protected activity, to ask about the HOV ticket he received. (Tr. 164, 192).[24] In a statement taken January 12, 2010, Ms. Banning wrote that after verifying this ticket with Complainant, she told Mr. Tassin and Mr. Lacy about it. (RX 14). Mr. Lacy also provided a statement in which he noted that Ms. Banning told him of Complainant's HOV ticket and he told her to fire him. (RX 16). These statements are consistent with Mr. Tassin's testimony and statement that he received a phone call on the morning of November 18, 2009 from Ms. Banning, who told him of the ticket, and that after he spoke with Complainant to confirm the ticket, he called Ms. Banning back and she informed him Complainant was terminated. (RX 15; TR 67).[25]

In light of the above, Complainant has failed to prove that his complaints about oil leaks and his refusal to drive the truck contributed to his termination. Rather, the preponderance of the evidence establishes that Complainant was terminated because he received a number of tickets in a very short period of time and his protected activity played no part in the decision. Furthermore, Ms. Banning questioned Complainant about the HOV ticket before he engaged in protected activity and Mr. Tassin had already stepped in once to save Complainant from termination.

Even assuming, arguendo that Complainant can prove by a preponderance of the evidence that his protected activity contributed to the adverse action, Prime has presented clear and convincing evidence that it would have terminated him even absent his protected activity. As discussed above, Complainant received six points within a short period of time. Although two points were from speeding tickets he received prior to working with Prime and one was from an accident he was involved in while still a trainee, Complainant received three additional points in the one month he was employed as a lease driver. Mr. Lacy and Mr. Tassin both testified that drivers are sometimes disqualified with less than the maximum number of points allowed depending on the severity of an incident. (Tr. 220; 234-35). Furthermore, despite convincing the safety department to retain Complainant after the overpass incident, Mr. Tassin conceded, "when [Complainant] had the serious accident where he topped the trailer and ran into the bridge, that itself was egregious enough that it was going to disqualify him." (Tr. 220). In light of the above, Respondents have presented clear and convincing evidence that they would have terminated Complainant due to his poor driving record even absent his protected activity.

CONCLUSION

Based on the foregoing, I find that Complainant has failed to prove by a preponderance of the evidence that his protected activity contributed to his termination. Furthermore, even assuming *arguendo* that he can prove this, Respondents have presented clear and convincing

[24] Ms. Banning wrote in the incident report system at 2:47 p.m. on November 17, 2009 that she had spoken with Complainant about the ticket. (RX 7).

[25] Although Respondents' witnesses had trouble at the hearing recalling the details of November 18, 2009, their statements to OSHA, which were taken shortly after Complainant's termination, corroborate Mr. Tassin's testimony that Ms. Banning informed him of the HOV ticket then told him to terminate Complainant after he called her back.

evidence that they would have terminated Complainant even absent his protected activity. Accordingly,

ORDER

IT IS ORDERED that the claim of Complainant, Nicholas Shane Mason, against Respondents New Prime, Inc. and Success Leasing, Inc. be, and hereby is, **DISMISSED**.

A

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., 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.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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 a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.