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Issue Date: 05 April 2011

Case No.: **2010-STA-00065**

In the matter of:

DENETTE D. YOUNG,
Complainant,

v.

PARK CITY TRANSPORTATION,
Respondent.

Appearances: Denette Young, Pro Se
For the complainant

Donnie Novelle, Pro Se
For the respondent

Before: Richard K. Malamphy
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Surface Transportation Assistance Act (STAA or the Act), 49 U.S.C. § 31105 (2007), and the implementing regulations found at 29 C.F.R. Part 1978 (2008). Section 405 of the Act provides protection to covered employees who report violations of commercial motor vehicle safety rules or refuse to operate vehicles in violation of those rules from retaliatory acts of discharge, discipline, or discrimination.

On January 21, 2009, Denette Young ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that Park City Transportation ("Respondent") terminated her employment on January 20, 2009 in retaliation for having informing the company dispatcher she was too tired to drive and going home before the end of her scheduled shift. On July 20, 2010, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, found that Complainant's claim did not have merit. On August 3, 2010, the Complainant filed requested a formal hearing before an Administrative Law Judge.

A formal hearing was held in Salt Lake City, Utah on November 2, 2010, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. At the hearing, the following exhibits were admitted: Complainant's exhibits ("CX") 1 through 12 and Respondent's exhibits ("RX") 1 through 3. (TR 6).

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

ISSUES

1. Whether Complainant engaged in activity protected under the Act, and if so,

2. Whether the protected activity was a substantial factor in the adverse employment action against Complainant, and if so,

3. Whether the Respondent's reason for suspending and then terminating the Complainant was a pretext for discrimination, and if so,

4. Whether the Complainant is entitled to damages.

SUMMARY OF THE EVIDENCE

A. Testimony of Donnie Novelle

Although Donnie Novelle never specifically called herself to testify or was called by the Complainant to testify, she was sworn in as a witness and responded to questioning by the undersigned.

Ms. Novelle explained that Park City Transportation Services, Inc. was a family business. (TR 5). Her father owned it and decided to sell. She bought out the rest of the partners in August of 2001, making her the sole owner. (TR 6). The business was not going well and in June of 2009 she sold it to a competitor. (TR 6-8). A new company, Park City Transportation, Inc. was formed and she was hired as president. (TR 7). She is a five percent owner in the new company. The previous company did not go into bankruptcy and still owes debts. The new company did not take over the debts of the old company. (TR 8). The previous company, the one the Complainant worked for, currently has no assets and no income. (TR 53).

Ms. Novelle said that the Complainant worked seven and a half hours on January 14, 2009 and was released at 1:30 p.m. She worked eleven hours on the 15th and was released at 3:30 p.m. (TR 33). On the 16th she started at 5 a.m. and went until 12 p.m., went to get a city vehicle sticker, and then returned to work at 4:40 p.m. until 7 p.m. for eleven hours. (TR 34, 38). Ms.

Novelle estimated it was about 40 minutes from Park City to the Complainant's home and 20 minutes to the airport from her home, for a total drive time of about 15 hours. (TR 35).

Ms. Novelle said that on the 17th the Complainant "came to work and said she was too tired and needed to go home. She did not call in. She came to work. And I think in this situation it could have been a very stressful back to back, back to back situation. She was probably encouraged to stay at work. We would have done that because people would have missed their flights. Why she was tired was not because she was over worked. She was tired for other reasons. Or, she just did not want to work that day." (TR 52). Ms. Novelle explained that the company made the Complainant an envelope for the 17th so she could get paid because she was "terminated." (TR 46).

B. Testimony of Denette Young

Complainant testified she began working for Respondent in November of 2007 as a driver. (TR 8-9). When she was fired she was driving a ten passenger van, which she agreed weighed 10,000 pounds or more. (TR 9).

The week she was fired, Complainant testified she started work on January 14. She had her vehicle at home and got on the road at 5 a.m. to drive to Park City to pick up her manifest, fuel her vehicle, and go to her first pick up of the day. She was released from duty at 9 p.m. (TR 10). The next day, the 15th, she testified she left her home in Salt Lake City at 3 a.m. to start work at 4 a.m. She was released from duty at 8 p.m. (TR 11).

The next day, the 16th, Complainant said she left home at 4 a.m. to start work at 5 a.m. She was released at 9 p.m. (TR 11). From 1:30 to 3:30 p.m. she was getting a vehicle sticker. She picked up nine people at the airport at 4:40 p.m. and made eight stops. (TR 37). She then met Connie Eye to pick up Tim Becker during a blizzard at between 7 and 7:30. (TR 36).

On January 17th she left home at 4 a.m. to start work at 5 a.m. She arrived in Park City and went to the office to get her manifest. She testified she told the dispatcher that she felt more tired than usual due to working long hours. She asked if he would find another driver to relieve her so she could get some rest, but the dispatcher refused. (TR 11). Her first pick up was to go to the Salt Lake City Airport, which she did. Along the way she stated that she told dispatch she was tired and felt "that I would be putting passengers and myself and anyone else in danger if I continued to drive through my shift that day." (TR 12). She explained: "I just, I did not feel safe. And I have driven a lot of miles. And I know how it feels to be tired. And sometimes you're tired and then you wake up. But I do know that because I have rolled a vehicle myself falling asleep at the wheel years ago. So I know that feeling. And I did not want to put anybody in danger. And that's how I felt." (TR 12). She testified that dispatch told her there were no other drivers and after she reached the airport she needed to return to Park City. She said she then told the dispatcher she was going home to sleep and would leave the keys in the gas tank if the company needed to pick up the vehicle. (TR 12).

The Complainant testified she then went home and slept until one or two in the afternoon. When she woke up she said she called Park City Transportation and the dispatcher, Lori, told her

she had been taken off the schedule until she talked to Chris Evans. (TR 12-13). She said she called Mr. Evans "numerous" times, leaving a message with the office and on his cell phone. He never called back but on the morning of the 20th she got a call from Tiffany Jones, who she said told her she needed to bring her vehicle to Park City. The Complainant said she asked whether she had been fired, and she said Ms. Jones told her "yes, per Chris Evans." (TR 13). The next morning the Complainant testified she called Ms. Jones back and told her that since she had been fired the company could come pick up the vehicle. (TR 13-14). After a few days someone did come pick up the vehicle. (TR 15). She said she had never spoken to Mr. Evans and had not spoken with anyone from the company since then. (TR 14-15).

She testified she has not worked as a driver since working at Park City but has done some work with a small construction company she owns. (TR 16). She said she is not seeking reinstatement. (TR 17).

C. Testimony of Connie Eye

Connie Eye, a driver who also worked for Park City Transportation, testified she was driving on the evening of January 16. (TR 22). She explained that on that evening she met the Complainant at a convenience store in Park City so the Complainant could pick up a passenger, Tim Becker, and transport him to Salt Lake City. (TR 22). On that night at 4:40 the Complainant came up from the airport with seven passengers and four stops. (TR 30). In a blizzard Ms. Eye said it would take her personally about three hours to three hours and 15 minutes to finish that route. (TR 31). Although the Complainant's manifest may have shown a 4:40 arrival as her last trip of the day, Ms. Eye testifies she knows Complainant later took Tim Becker down the hill. She said she talked to her later to make sure she was okay given the snow. (TR 32).

Ms. Eye testified she was also in the office the morning of January 17. (TR 25). She said she heard the Complainant ask Brett, the dispatcher, if there was anyone else who could drive for her. Brett said no. Ms. Eye said Brett told her that he wasn't going to get anyone else to drive because it was the Complainant's job and she needed to do it. Ms. Eye said she believed there were other people he could have called and she also had extra room to take passengers. (TR 26).

Ms. Eye also stated that the times on the drivers' manifests are not necessarily the times the drivers are released from duty. (TR 27). Ms. Eye explained that drivers are paid on commission during the winter and get paid by submitting an invoice. (TR 32).

D. Testimony of Debbie Clark

Debbie Clark testified she has worked for Park City Transportation for six years. During the 2007-2008 season she testified she and the Complainant both drove Escalades and during the 2008-2009 season they drove 10-passenger vans. (TR 39).

Ms. Clark explained that times on the last manifest of the day are not the times the driver actually gets back home. Drivers are not always released after their last manifests either. Often drivers would have to wait at the airport after their last manifest. During Sundance, a ten day film festival in Park City, 98 percent of drivers would work 16 to 17 hours per day. (TR 40).

Particularly during busy times sometimes the office would not put a manifest in a driver's envelope. (TR 41). If the manifests don't get into the envelopes and the envelopes aren't turned into the company, the driver doesn't get paid. (TR 45).

E. Phone Records

Complainant submitted records from her personal cell phone for January 17 through January 21. She lists phone numbers that she states are for Park City Transportation, Chris Evans's cell phone, and Tiffany Jones's cell phone. The records indicate calls with Park City Transportation on the 17th at 4:11, 4:14, and 4:21 p.m.; a call with Chris Evans's cell phone at 5:36 p.m.; and calls with Park City Transportation at 7:06, 7:08, and 7:43 p.m.. On the 18th there is a call with Park City Transportation at 1:25 p.m.. On the 20th there is a call with Tiffany Jones's cell phone at 8:25 a.m.. On the 21st there is a call with Tiffany Jones's cell phone at 8:59 p.m.. (CX 8).

F. Tim Becker Affidavit

An affidavit dated November 1, 2010 signed by Tim Becker states that on January 16, 2009 the Complainant picked him up in Park City at a 7-Eleven where he had been dropped off by Connie Eye, who picked him up from work. The Complainant picked him up between 7 and 7:30 p.m. and transported him to Salt Lake City. (CX 11).

G. Chris Evans Letter

In a letter dated February 25, 2009 and addressed to the U.S. Department of Labor Regional Supervisory Investigator, Chris Evans explained what he said transpired with the Complainant beginning January 16. On that day the Complainant began work at 5 a.m. and the last run was at 4:40 p.m., so he estimated she would have finished with all customers by 6 p.m. He stated that she would have had down time between her five runs that day. At no time during the day did the Complainant request time off from the dispatcher due to being tired. She called in at 8 p.m. that evening, as is the procedure, to get her schedule for the next day and did not request the day off due to being tired.

On the 17th she called customers at 4 a.m. to change their times for pick up and then notified dispatch. She notified the dispatcher on duty she was too tired and he immediately sent her home. She called the company a week later to tell them to pick up her vehicle. Mr. Evans wrote that at no time did he tell the Complainant she was fired. (RX 1)

H. Manifests

The Complainant's manifests list the following times for pickups:

- January 14: 6 a.m., 9 a.m., 11 a.m., 1:29 p.m. (CX 12)
- January 15: 4 .m., 6 a.m., 8 a.m., 10 a.m., 12:37 p.m., 2 p.m., 3:28 p.m., 6:44 p.m. (CX 13)
- January 16: 5 a.m., 6 a.m., 7 a.m., 10 a.m., 12:16 pm., 4:40 p.m. (CX 14)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I find the evidence shows that respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101 and falls under the Surface Transportation Assistance Act. I further find that Complainant is a commercial motor vehicle driver within the meaning of 49 U.S.C. § 31101.

The STAA employee protection provision prohibits disciplining or discriminating against an employee who has made protected safety complaints or refused to drive in certain circumstances:

> (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; or
>
> (B) the employee refuses to operate a vehicle because—
>
> (i) the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
>
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 31105(a). Subsections (A) and (B) of the quoted provision are referred to as the "complaint" clause and the "refusal to drive" clause, respectively. *LaRosa v. Barcelo Plant Growers, Inc.*, ALJ Case No. 96-STA-10, slip op. at 1-3 (ARB Aug. 6, 1996). The Act protects three types of activities: filing a complaint, refusing to operate a vehicle because of an actual violation or refusing to operate a vehicle because of a reasonable apprehension that the vehicle is unsafe.

In order to prevail on an STAA complaint, a complainant must make a *prima facie* case of discrimination by showing that: (1) he engaged in protected activity, (2) the employer was aware of his activity, (3) he was subject to adverse employment action, and (4) there was a causal link between his protected activity and the adverse action of his employer. *See Clean Harbors Envtl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Moon v. Transp. Drivers*, 836 F.2d 226, 229 (6th Cir. 1987); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987). Under the STAA, the ultimate burden of proof usually remains on the complainant throughout the proceeding. *Byrd v. Consol. Motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, slip op. at 5 n.2 (May 5, 1998).

The employer may rebut the *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The employer must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse action. The explanation provided must be legally sufficient to justify a judgment for the employer. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995). Once the employer 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 v. Hicks*, 509 U.S. 502, 507-11 (1993).

The complainant then has the opportunity to prove, by a preponderance of the evidence, that the employer's reason for the adverse action was mere pretext for discrimination. *Burdine*, 450 U.S. at 253. Specifically, complainant must establish that the proffered reason for the adverse action is false and that his protected activity was the true reason for the adverse employment action. *St. Mary's Honor Center*, 509 U.S. 502, 507-508 (1993); *see also Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995) (holding that the complainant must "establish that the employer's proffered reason is pretextual by establishing either that the unlawful reason, the protected activity, more likely motivated the [employer] or that the employer's proffered reason is not credible and that the employer discriminated against him."). Although the burden of production shifts, the ultimate burden of persuasion remains with the complainant to show that the employer intentionally discriminated against him. *St. Mary's Honor Center*, 509 U.S. at 507-508. If the proof establishes that the adverse action was undertaken for both discriminatory and nondiscriminatory reasons, i.e. "mixed motives," the employer must show by a preponderance of the evidence that it would have taken the same adverse action absent the complainant's protected activity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

A. Complainant's *Prima Facie* Case

1. Protected Activity

The Complainant's claimed protected activity consists of refusing to drive on January 17, 2009 because she was fatigued. The Complainant did not cite a specific motor safety vehicle standard that she believed would be violated by her operation of the vehicle on that day. Although a complainant, particularly one who is pro se, is not required to cite standards or rules, 49 U.S.C. § 31105(a)(1)(B) nonetheless requires that the Complainant's refusal to drive be because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health" or because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C. § 31105(a)(1)(B)(i), (ii).

49 U.S.C. § 31105(a)(1)(B)(i)

The regulation at 49 C.F.R. § 392.3 qualifies as a regulation under § 31105(a)(1)(B)(i). Section 392.3 states that "a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to

become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle." However, 49 C.F.R. § 390.5 defines "commercial motor vehicle" as one "used on a highway in interstate commerce." "Interstate commerce" means "trade, traffic, or transportation in the United States— (1) Between a place in a State and a place outside of such State (including a place outside of the United States); (2) Between two places in a State through another State or a place outside of the United States; or (3) Between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States." 49 C.F.R. § 390.5. In the instant case, the evidence indicates the Complainant drove solely within the state of Utah and therefore the so called "fatigue rule" at 49 C.F.R. § 392.3 does not apply to her. A further review of the Department of Transportation Federal Motor Carrier Safety Regulations does not reveal any regulation or standard which would apply to the facts of this case.

Arguably, a state motor vehicle law may also qualify as a regulation under § 31105(a)(1)(B)(i). The Department of Transportation regulation 49 C.F.R. §392.2 provides, in pertinent part, that every commercial motor vehicle "must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated." Hence, because the Complainant was driving in the State of Utah, Utah motor vehicle law was subsumed and incorporated within 49 U.S.C. § 31105(a)(1)(B)(i) as a "regulation" or "standard" of the United States by reason of 49 C.F.R. §392.2. *See, e.g. Beveridge v. Waste Stream Environmental*, 1997-STA-15 (Dec. 1997). A review of Utah Title 41, the motor vehicle code, does not reveal a similar "fatigue rule" or any other regulation which would apply to the facts of this case.

49 U.S.C. § 31105(a)(1)(B)(ii)

The regulation at § 31105(a)(1)(B)(ii) protects refusal to drive when "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." The regulation has been construed to apply to conditions such as driver fatigue in addition to unsafe conditions involving the vehicle itself. *See, e.g., Eash v. Roadway Express, Inc.*, ARB No. 04-036, ALJ No. 98-STA-28 (ARB Sept. 30, 2005); *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008); *Somerson v. Yellow Freight Sys., Inc.*, ARB Nos. 99-005, 036, ALJ Nos. 98-STA-9, 11, (ARB Feb. 18, 1998). To qualify as protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii), an employee's refusal to drive must be based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the employee or the public. *Jackson v. Protein Express*, ARB No. 96-194, ALJ No. 1995-STA-038, slip op. at 3 (ARB Jan. 9, 1997); *Byrd v. Consolidated Motor Freight*, ARB Case No. 98-064, ALJ Case. No. 97-STA-9, ARB Final Dec. and Ord., May 5, 1998, *appeal filed*, May 27, 1998 (11th Cir.) (stating that the standard is if "a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury if he drove.") Under 49 U.S.C. § 31105 (a)(2), an employee's apprehension of serious injury is reasonable "only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health." Further, the employee "must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." 49 U.S.C. § 31105 (a)(2).

In this case, the Complainant testified she had previously rolled a vehicle when she fell asleep at the wheel and that on January 17, 2009 she felt similarly tired. She stated she believed she would be putting herself and her passengers in danger if she continued to drive. (TR 17). She offered testimony and evidence as to her hours worked on the three days leading up to Jan. 17, as did the Respondent. The exact totals are disputed, resulting from disagreements over the amount of time it would have taken the Complainant to drive between her home and her first and last routes of the day, the amount of personal time she had between routes, and whether she picked up an additional passenger the evening of Jan. 16. At the minimum, based on the Complainant's manifests, the parties agree that Complainant's first pick-up on Jan. 14 was at 6 a.m. and her last drop-off was picked up at 1:29 p.m., for a difference of 7.5 hours. On Jan. 15 her first pick-up was at 4 a.m. and her last drop-off was picked up at 6:44 p.m., for a difference of 14.75 hours. On Jan. 16 the parties agree her first pick-up was at 5 a.m. The Respondent contends Complainant's last run began at 4:40 p.m., for a difference of approximately 11.75 hours. The Complainant claims she picked up an additional passenger between 7 and 7:30 p.m. The manifests do not list what time Complainant finished her last runs each day.

The Complainant alleges on Jan. 14 she was released from duty at 9 p.m., but she failed to explain why she would have been released from duty so late when her manifest listed her last pick-up of the day as a single passenger at 1:30 that afternoon. I credit the Complainant's testimony that she left her house at 5 a.m. to meet her first pick-up at 6 a.m., but with no evidence as to how long her last assignment took her, I find she would have been off work by that afternoon. Crediting her testimony that she left home the next morning at 3 a.m. she would have had possibly 12 hours off after dropping off her last passenger.

On Jan. 15 the Complainant testified she was released from duty at 8 p.m., which I find credible and supported by her manifest showing her last pick-up at 6:44 p.m. and her explanation that during the middle of the day when she had no transports she was getting a sticker for the vehicle. Therefore, I credit the Complainant with approximately 17 hours of work that day. She then had about eight hours off between when she testified she was released from duty and when she stated she left for work the next morning at 4 a.m.

On Jan. 16 the Complainant contends she made a final run not reflected on her manifest. She testified she picked Tim Becker up between 7 and 7:30 after finishing her 4:40 p.m. run. Another driver, Connie Eye, testified she dropped him off for the Complainant to pick up and Tim Becker signed an affidavit stating he was picked up by the Complainant between those times. I find the evidence supports that the Complainant did drive Mr. Becker that night and the fact that it is not reflected in the company's paperwork was simply an inadvertent omission. Therefore, I credit the Complainant with approximately 17 hours of work that day. She then had about seven hours off before leaving for work the next morning at 4 a.m.

Given the Complainant's long work hours in the days preceding her refusal to drive, I find the Complainant had an objectively reasonable belief that serious injury would result due to her fatigue if she drove. She was an experienced driver who knew what it felt like to fall asleep at the wheel and knew her own capabilities. She had driven approximately 17 hours the previous

two days and had started her day on Jan. 17 at 4 a.m. after having been off only seven hours. She had driven approximately 33 of the preceding 48 hours.

To qualify for protection under 49 U.S.C. § 31105(a)(1)(B)(ii), the Complainant must also have "sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." 49 U.S.C. § 31105 (a)(2). In this case, the Complainant testified and Connie Eye confirmed that she explicitly requested the dispatcher find someone else to drive for her so she could get some sleep but the dispatcher refused. Thus I find the Complainant sought and was unable to obtain correction of the unsafe condition.

Therefore, I find the Complainant's refusal to drive was protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii).

2. Subject to Adverse Employment Action

The employee protection provisions of the STAA provide that "[a] person may not discharge an employee" for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). Respondent argues in a note submitted with her exhibits that the Complainant was not fired, but rather was sent home on January 17 due to fatigue and did not report back for work. (RX 1). She further submitted a letter from Chris Evans stating that after the Complainant complained of being tired she was "immediately" sent home and the company had no further contact with her until a week later when she called to have the company pick up her vehicle. In contrast, Complainant testified that after the company failed to return her phone calls for several days she was informed by Tiffany Jones in a phone call that her boss, Chris Evans, had terminated her. I find Complainant's testimony in that regard to be credible. Given the testimony of Connie Eye that the dispatcher refused to find a substitute driver for the Complainant after she informed him she was tired, I find Chris Evans' contention that she was immediately sent home when she told the dispatcher she was fatigued to be entirely unbelievable. I further find Respondent's suggestion that the Complainant was not actually fired to be unbelievable, particularly given that she used the word "terminated" herself during the hearing rather than stating that the Complainant quit of her own accord. I find the Complainant was terminated on January 20, 2009, therefore I hereby find that she was subject to adverse employment action within the meaning of the Act.

3. Causal Link Between the Protected Activity and the Adverse Action

Complainant must next establish a causal link between her protected activity and the Employer's adverse action. A complainant can establish a causal link between the protected activity and the adverse employment action by showing that the employer was aware of the protected activity and that the adverse action followed closely thereafter. *Kovas v. Morin Transport, Inc.*, ALJ Case No. 92-STA-41, slip op. at 4 (Sec'y Oct. 1, 1993) (*citing Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

The Complainant's protected refusal to drive occurred on January 17, 2009. I have previously found that she was terminated on January 20, 2009. Both parties agree they had no

contact in the intervening days. The Complainant did not testify that the Employer gave her an explanation as to why she was fired, but I find that given the short period of time between the two events, there is a causal link between the protected activity and the adverse action.

B. Employer's Rebuttal

In order to rebut a *prima facie* case of discrimination, the respondent must articulate a legitimate, non-discriminatory reason for taking the adverse employment action, and is not required to "persuade the court that it was actually motivated by the proffered reason…" *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The evidence must be sufficient to raise a genuine issue of fact as to whether the respondent discriminated against the complainant. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id.* at 255.

The Employer proffered no alternate explanation for why the Complainant was fired, instead contending that she in fact was not fired at all, but instead quit of her own accord. I have already found that the Complainant's testimony that she was fired was more credible. I further find there was no evidence presented of an alternate reason as to why the Complainant was fired.

C. Relief

Under the STAA, a prevailing complainant is entitled to relief including abatement, reinstatement, and compensatory damages, including back pay. 49 U.S.C. § 31105(b)(3)(A)(i)(iii).

1. Reinstatement

If the ALJ determines that a violation of the STAA has occurred, the judge may order reinstatement. 49 U.S.C. § 31105(b)(3)(A)(ii). However, at the hearing, the Complainant stated that she did not want to return to work for the Employer. (TR 17).

2. Back Pay

A complainant is also entitled to back pay. 49 U.S.C. § 31105(b)(3)(A)(iii). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistance Sec'y & Moravec v. HC & M Transp., Inc.*, ALJ Case No. 90-STA-44 (Sec'y Jan. 6, 1992) (*citing Hufstetler v. Roadway Express, Inc.*, ALJ Case No. 85-STA-8, slip op. at 50 (Sec'y Aug. 21, 1986)). Back pay is awarded to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Shalworth v. Justin Davis Enterprises, Inc.*, ALJ Case No. 09-STA-1, slip op. at 7 (ALJ Dec. 19, 2008) (*citing Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-421 (1975)). To make a person "whole for injuries suffered for past discrimination," the Act mandates an award of back pay as compensatory damages to run from the date of discrimination until either the complainant receives a bona fide offer of reinstatement, is reinstated, or obtains comparable employment. *Cook v. Guardian Lubricants, Inc.*, ARB Case No. 97-05, ALJ Case No. 95-STA-43, slip op. at 11 (ARB May 30, 1997) (*citing Beltway v. American Cast Iron Pipe Co., Inc.*, 494 F.2d 211,

260-261 (5th Cir. 1974). Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co., Inc.*, ALJ Case No. 90-STA-37 (Sec'y June 3, 1994).

The Complainant was a seasonal driver; therefore, she is entitled to back pay from January 17, 2009 until the skiing season ended. Deer Valley, one of the three ski areas near Park City, indicates that the ski season ends on the first Sunday in April, which would be April 5, 2009.

Wages from December 25, 2008, when the Complainant rejoined the company for the 2008-2009 season, have not been reported, but there are pay vouchers for the previous ski season. Between January 6, 2008 and January 19, 2008 the Complainant earned $1,608.70. During the next two week period she earned $1,405.38. This equals earnings of $753.52 per week. There were eleven weeks between January 17, 2009 and April 5, 2009. Therefore, the award would be eleven times $753.52 or $8,288.72.

The Complainant was a seasonal driver and has not made a convincing case for additional damages.

Ms. Novelle testified that the company was sold in May 2009 and that the original company was $200,000 in debt. However, the sales contract indicates that the company was sold for $400,000 with $150,000 paid in May 2009, with one-third of the remainder to be paid in May of the next three years. The purchasing company did not take over the debts of the original company and the original company still exists.

ORDER

For the foregoing reasons, I hereby ORDER that Dennette Young's claim be GRANTED and she be awarded $8,288.72 in back pay and interest on the entire back pay award, calculated in accordance with 26 U.S.C. § 6621.

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RICHARD K. MALAMPHY
Administrative Law Judge

RKM/amc
Newport News, Virginia

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).