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Issue Date: 07 October 2014
Case No.: 2013 STA 00003

In the Matter of

DOUGLAS RODENGEN,
Complainant,

v.

B & G SANITATION,
Respondent.

Appearances: **Mr. Douglas Rodengen**
Pro se Complainant

Mr. Neil Bergeson
Pro se for Respondent

Before: **Christine L. Kirby**
Administrative Law Judge

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, Title 49 United States Code Section 31105, and the corresponding agency regulations, Title 29, Code of Federal Regulations ("C.F.R.") Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules or cause serious injury.

Procedural History

This case was originally scheduled for hearing in Sioux Falls, South Dakota on April 16, 2013, pursuant to the November 6, 2012, *Notice of Assignment, Hearing and Prehearing Order.*

On November 14, 2012, this tribunal received an unsigned letter stating that Mr. Bergeson[1] ("Bergeson" or "Respondent") was no longer in business and therefore the case could not go forward. In response, on November 27, 2012, I issued an Order for the Respondent to

[1] Neil Bergeson is the Owner of B&G Sanitation.

show cause why it was not potentially liable for either monetary or equitable remedies, and why the case should not go forward to hearing.

On December 11, 2012, this tribunal received a letter from Bergeson on behalf of Respondent, which I treated as a motion to dismiss. Bergeson argued that Complainant was collaterally estopped from pursuing this claim based on a denial of unemployment compensation by the South Dakota Department of Labor Unemployment Insurance Appeals; Bergeson also argued that Complainant had failed to present a prima facie case for relief; and finally he argued that Complainant was not entitled to equitable relief.

In an *Order Denying Motion to Dismiss and Compelling Complainant to Specify Remedy Sought*, I denied Respondent's motion to dismiss and compelled Complainant to explain with specificity the remedy he was seeking, given that Respondent, B&G Sanitation, Inc., was no longer in business, and no longer existed as a corporate entity.

In response, on February 6, 2013, I received a letter from Complainant stating that he still wished to pursue his claim and had been told by an Occupational Safety and Health Administration ("OSHA"), United States Department of Labor ("DOL"), official that he could be entitled to back pay from the time of termination until his job was reinstated and the record cleansed. He stated he was seeking back pay from October 23, 2009, to February 2, 2010, which was when he started a new job.

On March 5, 2013, I issued an *Order Cancelling Hearing and Mandating Selection of Hearing Method*. In the order, I found that Complainant had explained theoretically a remedy to which he might be entitled provided he could meet his burden of proof, and I found insufficient basis to dismiss the claim. However, on March 1, 2013, due to the federal spending cuts (sequestration), I had been advised that travel for the Office of Administrative Law Judges was being suspended for an indefinite period of time. Accordingly, my March 5, 2013, Order canceled the hearing scheduled for April 16, 2013 and instructed the parties to consider alternative hearing options within 14 days.

On March 22, 2013 I received a response from Respondent requesting a hearing on the record. I did not receive a response from Complainant within the 14 day deadline. On April 10, 2013, I issued a *Supplemental Notice of Hearing* informing the parties that, absent objection, I intended to resolve this matter on the record, detailing the documentation in the record to date, and granting the parties additional time to submit supplemental documentation and written argument.

After my April 10, 2013, Notice, Complainant contacted my office and stated that he had responded to my order, he objected to a hearing on the record and desired postponement of the hearing until such time as funding for travel to the original hearing site became available. On April 17, 2013, I received a written letter from Complainant requesting postponement of the hearing. On April 24, 2013, Complainant faxed a letter to my office reiterating his desire for postponement of the hearing.

On May 22, 2013, I conducted a telephonic conference with the parties to discuss their desires regarding the method of hearing this case. During the telephonic conference, I discussed with both of the Pro se parties the complicated nature of the issues in this case and conducted an inquiry as to whether or not they desired to retain legal counsel. I informed them that if they so desired, I would provide time for them to retain counsel. Both parties stated they wished to continue representing themselves in this matter. During the telephonic conference, it was agreed that the parties would send their documentary exhibits to me as well as the other party and we would set a date for a telephonic hearing in which witness testimony and arguments could be presented.

On July 1, 2013, I issued a *Notice of Telephonic Hearing* stating that the formal telephonic hearing was scheduled for July 15, 2013. On July 15, 2013 I conducted a telephonic hearing with Complainant and Neal Bergeson, on behalf of Respondent, B&G Sanitation Inc., present by telephone. The Orders that I issued in this case are admitted into evidence as ALJ Exhibit 1, (ALJ I)[2]. My decision in this case is based on the testimony presented at the telephonic hearing and the following documents admitted into evidence: Complainant's Exhibit No. 1, Respondent's Exhibit No. 1. (CX 1, EX 1).

Issues

1. Whether Complainant engaged in protected activity within the meaning of the STAA.

2. Assuming Complainant engaged in protected activity, whether Respondent was aware of the protected activity.

3. Whether Complainant suffered an adverse action(s).

4. Assuming Complainant engaged in protected activity and suffered adverse action, whether his protected activity was a contributing factor in Respondent's alleged discrimination against Complainant.

5. Whether Respondent has demonstrated by clear and convincing evidence that it would have taken the same adverse action irrespective of Complainant having engaged in protected activity.

Stipulations

1. Complainant worked for Employer from August 2, 2007 to October 23, 2009.

2. Complainant's job duties included driving a truck and collecting garbage on collection routes.

[2] The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

Complainant's Position

Complainant asserts that Respondent terminated his employment because he reported safety issues with the garbage truck he was required to drive and refused to drive the truck until it had been properly repaired.

Respondent's Position

Respondent asserts that Complainant's employment was terminated due to poor performance and poor attendance which resulted in Respondent losing multiple contracts for garbage pick-up.

Complainant's Statement of the Case[3]

Complainant asserts he worked for B&G Sanitation for two and a half years, and was terminated for refusing to drive a truck and arguing with Respondent over the issue. Claimant asserts that although Respondent said there was nothing unsafe about the truck, the Department of Labor and the South Dakota Highway Patrol, Motor Carrier Division said the truck could not be legally driven due to a rear loose end and a cracked tire rim.

The truck broke down on October 15, 2009, and was taken to a mechanic in Webster. The mechanic telephonically told Bergeson the truck could not be driven and should not even be taken out of the parking lot. Nevertheless, Bergeson had Complainant drive the truck to Waubay and switch drivers with another truck. When the mechanic found out that Bergeson was going to have them drive the truck to Waubay, he did not even write up a repair bill. After the mechanic heated the bolts, they still would not tighten, and he said the truck should not be driven. When Complainant told the mechanic he had to drive it back to Waubay, the mechanic would not provide a bill and said Complainant had to finish tightening the drive shaft himself so the mechanic would not be liable. When Complainant got back to Waubay he told Bergeson that the truck had to be taken back for further repair.

The truck was taken and switched on October 15, 2009, by Kenny Brown, who came to Waubay to meet Complainant and gave him a different truck so he could complete his garbage route. Brown took the broken truck and parked it at D&B Repair. It sat there from October 15 to Friday, October 23, 2009, when Bergeson sent Complainant to drive it again. Complainant assumed it had been repaired by then, but it was not repaired. He called the shop to ask for Bergeson, and told him that the truck repairs were not done. Bergeson asked him to bring it to the shop and Complainant drove the truck to B&G. Complainant drove the truck from D&B Repair to the shop (Respondent, B&G Sanitation) and made an issue of it, showing Bergeson that the truck had not been fixed.

Due to the other garbage truck also being broken, Bergeson said that they had no choice and that Complainant had to drive the unrepaired truck. Kevin Bosch's statement shows that the

[3] This information is a summary of Complainant's hearing testimony. *See* opening statement (TR, p. 22-24, 25-28) and closing statement (TR, p. 135-139).

truck was not repaired, because the truck was taken before repairs were complete. After this confrontation, Bergeson tried to get Complainant to drive again, but Complainant parked the truck and told him that he was not going to drive the truck until it was repaired and would pass inspection. That morning before he left, in front of Tonya (Complainant's wife) and Mitch Lawrence, Complainant and Bergeson argued about the truck. Complainant told Bergeson the truck was not fixed and should not be driven. Bergeson responded that if Complainant did not take the truck out he would find somebody else to drive it. Complainant responded that he was not going to drive the broken truck.

Complainant ended up taking the truck out for a while on the morning of October 23, 2009, but as the day progressed and more weight was put in the truck, its condition worsened. When Complainant talked to Kevin Bosch (of D&B Repair), Complainant knew the truck had not been repaired. Kevin also said the truck was taken and it was not done. So Complainant took the truck, called Bergeson from the road and told him that he was taking it back and parking it at D&B Repair and was not driving it until it was fixed. This was Friday, October 23, 2009.

Complainant testified that the truck was never moved from the spot where he parked it at D&B over the weekend. On Monday, October 26, 2009, Complainant was asked by Bergeson if he would drive the truck, and he replied, "No." Complainant was terminated. Complainant filed a claim with the Department of Labor that day and later filed for unemployment, which Bergeson denied. Complainant talked to Bergeson on Monday and informed him that he had contacted the Department of Labor and the agency said that Bergeson could not make him drive the truck.

The evidence, including the statement from the mechanic in Webster on October 15, 2009, shows that the truck was broken. On October 23, 2009, in front of witnesses, Bergeson had Complainant take the truck out on a garbage route. Evidence shows that on November 9, 2009, the truck was still not repaired. No one has presented a repair bill from D&B stating that the repairs were complete, and the mechanic stated the truck was taken before repairs were complete.

Complainant's record shows that he never had any issues at work up until the last two or three months before his termination. Bergeson asked Complainant to drive the truck and he refused. Bergeson fired Complainant and his wife, Tonya, in retaliation. Complainant contends that everything Bergeson has done has been an attempt to avoid accountability for the decisions he made. Something had to be fixed or repaired but Bergeson did not want to take the time to do the repairs that day. Complainant contends that he could prove the truck was broken when Bergeson made him take it out. He did not want to take it that Friday morning, but was ordered to take the truck by Bergeson. On October 26, 2009, Bergeson called Complainant and they argued over the phone. Mitch was present and he looked at the rear of the truck and shook the shackles. After this, Bergeson told Mitch not to have any contact with Complainant. All of the evidence shows that the truck was unrepaired, and it was not Complainant's work, progress or habits that led to his firing. His termination was retaliation for not driving the unrepaired truck.

Respondent's Statement of the Case[4]

Complainant is using the issue of the truck as a smokescreen to cloud the issue of his poor performance. On October 15, 2009, Complainant's truck needed repair and Bergeson told him to take the truck to the local shop in Webster for repair. Complainant called Bergeson and said some bolts were loose in the rear end. Complainant then called and said it was tightened well enough to get back to Waubay, and Bergeson said "okay" and "we'll send another truck to replace this." Complainant met the driver of the replacement truck in Waubay. Bergeson did not want Complainant to drive anything that was unsafe either, and was not forcing him to do so. They switched trucks in Waubay and Complainant was instructed to finish the route with the replacement truck. Complainant did not finish the route, and B&G received several messages from customers complaining that trash was not picked up.

The reason for Complainant's termination was that he was supposed to be at work October 5 and 12, 2009, and did not show up as scheduled, even though he knew he was supposed to be there. He was subsequently confronted about it and talked back to Bergeson and turned around and walked away. He would not call or return phone calls, and there were several additional days that he did not show up for work. He was terminated for insubordination and misconduct. He disobeyed direct orders to pick up customers' trash. As a result of Complainant's neglect, Bergeson lost many customers. Complainant would not tell Bergeson that he did not pick trash up. This behavior cost Bergeson thousands of dollars of revenue. This misconduct, along with his insubordination, forced Bergeson to terminate him.

Bergeson further stated that Complainant called a few times to threaten and harass him. He called and tried to extort Bergeson. Complainant called Bergeson and harassed him and his wife, Darla. He said that if they gave him a week's pay and his job back, he would not get reported to the DOT, or OSHA. Complainant is being a manipulator. Some of the accounts that switched to another carrier because of Complainant's insubordination, neglect, and misconduct include: Waubay Wildlife, Prairie Wood Inn, Harry Miklish, Dale Renas, Doug Martinson, and Town of Butler.

Bergeson stated that B&G Inc. is a legally defunct corporation, and therefore Complainant cannot collect any monies on said corporation. Nor can he collect any money from Bergeson personally. The corporate veil cannot be pierced and the record is devoid of fraud. Therefore, Complainant can prove no set of facts for which relief can be granted to him. Bergeson moves for a dismissal with prejudice based on the record and filings that he filed with the Court of Appeals, Decision No. 64825.

[4] This information is based on Bergeson's testimony. *See* opening statement (TR, p. 90-93) and closing argument (TR, p. 139-140).

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

Hearing Testimony

Mr. Douglas Rodengen (Complainant)
(TR, p. 29-57)

[Direct examination] Complainant's duties were to come to work in the morning, get the truck ready, go out on garbage routes, pick up trash, go to the landfill, dump the trash, and bring the truck back at the end of the day. He did not have set hours, but usually the route would take seven to eight hours. He worked five days a week, Monday through Friday. Complainant's protected activity occurred when he reported the safety problem on October 15, 2009, telling Bergeson that the tire rim was loose. The only other times before this when things were wrong with the truck, cords hanging out, tires, or things like that, Complainant would tell Bergeson and most of the time they would be fixed right away. After the pre-trip inspections and after he took care of those things which need to legally be done, he would put a circle around the items. He would have to check the tires, make sure nothing was leaking, and check the lights and other things.

When Complainant drove to Webster (on October 15, 2009) and applied the brakes, there was a big "thunk," so they pulled over and could see the rear-end was flexed. When they pulled into the mechanic's shop, the shackle bolts were loose, and the truck had been rocking so badly that it pulled the pinion seal in the front of the rear end where the drive shaft hooks up and was dripping grease. The bigger issue was that the four big shackle bolts holding the rear drive axle were loose. They had been stretched so badly due to the rear-end flexing, that they could not be tightened.

The only other issue that Complainant had before was on August 27, 2009, when the Motor Carrier Department of Transportation pulled him over for a check on the way to the landfill. They found a bald tire and cords hanging out on the pusher axle, a condition that violated safety regulations. The inspector said that if the problem was fixed right away, he would not write it up. Complainant gave the inspector Bergeson's number. He talked to Bergeson, and they went and dumped that truck. Complainant told the inspector that they would fix it. Complainant took the truck to the shop and talked to Bergeson about it. Bergeson sent him to Twin Valley Tire, but they could not fix it right away. Rather than waiting, Bergeson said that Complainant would just have to take the truck out. Complainant explained that this was not what he told the inspector they would do, and it was unsafe to drive. Complainant was disturbed that he had made a deal with the Motor Carrier Department that they were not keeping. Bergeson told Complainant that if he was pulled over again to show the inspector a signed check and tell him that he was taking the vehicle to be fixed.

On October 15, 2009, Complainant took the truck out at 7:00 a.m. He noted that the safety problem occurred about 11:30 a.m. He talked to Bergeson that day, as did the mechanic. Complainant told Bergeson what the mechanic found and Bergeson asked if they could finish the route and fix the truck afterward. Complainant informed Bergeson that the mechanic said the truck should not be driven. The mechanic then spoke to Bergeson and told him the same thing.

The mechanic said that new shackle bolts should be ordered, the old ones should be cut off, rebolted, and the pinion fixed. After this conversation, Bergeson said that Complainant should drive the truck to Waubay and another driver would meet him there and give him a different truck to drive. Complainant drove the broken truck to Waubay, which was nine miles away. That is where he met Kenny with a different truck, took that truck, and finished the route in Waubay. Kenny took the truck that needed repair and drove it to D&B Repair where the truck sat all week until October 23, 2009.

Complainant drove the other truck (Kenworth) the rest of the week until the morning of October 23, 2009. On that date, he started up the Kenworth to complete his route, but Bergeson sent Complainant over to get his other truck (i.e., the International, the truck that had broken on October 15, 2009). Complainant assumed the truck had been repaired. When he put the truck into gear and went to pull out of the lot, the rear end clunked. Complainant climbed underneath it, grabbed the shackle bars and shook them. When they rattled, he knew the truck had not been repaired. Complainant said they could not take the truck because it was not fixed, but Bergeson told him to bring the truck to the shop anyway.

Complainant pulled in front of the shop and showed Bergeson that the truck was not fixed. They had an argument about the truck being illegal and unsafe. Complainant shook the shackles for Bergeson, so he knew it had not been repaired. Bergeson said that they had no choice because it was the only truck they had, since the other truck had also broken down. The International truck was stick shift and Complainant was the only one who could drive it. Complainant said he did not want to drive it. Bergeson said that Complainant had no choice. Bergeson told Complainant that if he did not drive it, Bergeson would find somebody who would. Complainant took the truck out, but did not complete the route. At about 12:30 or 12:45 p.m. they started putting weight on the truck and as they loaded it up, the rear end started to crank and bang. When the brakes were applied, the rear-end would roll down from the force of the brakes. Then when the brakes were let off, it would just slam back and send a shudder through the whole truck. Complainant told the other rider, Mitch Lawrence, that he was done with it. Complainant called Bergeson around 1:15 or 1:30 and said that he was finished driving the truck until it was fixed because it would fall apart. They drove the truck back about 25 miles per hour from Bristol, South Dakota back to D&B Repair, parked the truck and left it there.

When Complainant returned the truck, he called Bergeson and told him that he was done until the truck was fixed, and he parked the truck at D&B and went home. He watched all weekend, and the truck sat in the same place it was parked. On Monday, October 26, 2009, around 9:00 or 9:30 A.M., Complainant heard from Bergeson again, who asked if he was going to drive that truck. Complainant refused. Complainant talked to the Department of Labor that morning and was told that he could not be forced to drive the truck. He told Bergeson what the Department of Labor had said. Bergeson said, "You had to call them." His whole demeanor towards Complainant changed. Bergeson also said, "Yeah, well, I run this company."

Complainant filed his complaint the next day after talking to Bergeson, who told Complainant that if he did not drive the truck he did not have a job. Bergeson said that if he did not drive the truck, Bergeson would find somebody who would. Friday, October 23, 2009, was Complainant's last day of work and the last day that he received a paycheck.

On October 27, 2009, Complainant filed for unemployment. Bergeson went out of his way to deny Complainant unemployment. He told unemployment that Complainant was hard on equipment and a bad worker. However, Complainant had worked for two and a half years and those incidents only happened in the last three months of his employment. Starting in August 2009, when "the DOT thing happened" was when things were not getting taken care of. Complainant explained that it was not about the truck not being fixed in a timely matter because "there is no timely manner when the rear end is ready to fall out of that truck and for, you know, it's blatantly illegal by the reports and paperwork and anybody would know that, and then not to mention the fact unsafe and that was it. I just wasn't going to do it anymore."

The remedy that Complainant is seeking is for his record to be cleared of the false things Bergeson said about him during the unemployment process. He believes the file shows that the truck was temporarily fixed one day, then it was repaired again, but Complainant contends that the truck was not repaired and there is no invoice or bill showing that it was ever repaired. In addition, Complainant seeks back pay from the date he was terminated until his job is reinstated.

Complainant testified that Bergeson is still working out of the same office with the same phone number and most of the same equipment. The only difference is that the business is now under his son's name. However, Bergeson is still the person who is in charge and gives orders. Complainant asserts that the things Bergeson has said and done were just to deny him unemployment and punish him for making an issue about the truck.

[Testimony about Exhibits] The photographs in Complainant's exhibits show the rim and go along with the statement from Harry Moshier. Mitch Lawrence called Complainant and asked if he wanted to see the rim and tire that was taken off the truck to go along with his statement. The photograph proves that on November 9, 2009, the bolts in the rear end were still loose. The truck was still not repaired, and the same rim that Complainant complained about was replaced on November 9, 2009. There was a picture of the rim that was taken off along with the signature of Harry Moshier stating that it was the rim he took off and the bolts were still loose on the rear end.

Complainant included three tickets from trips to the landfill. The tickets establish which truck the Complainant was driving during his routes. Bergeson told the unemployment department that Complainant had driven the truck just fine the rest of the days of the week (after October 15, 2009), but the tickets show that he was driving a different truck (the Kenworth).

Complainant introduced a letter to the editor as an exhibit which showed that Bergeson travels in Minnesota, which makes him an interstate carrier. Bergeson was caught trying to haul trash to the Roberts county landfill, and he tried to tell them it was in-county to save $5 a ton.

[Testimony Explaining Witness Statements] Kevin Bosch is the mechanic at D&B Repair, where the truck sat, who wrote the statement saying that the truck was taken that morning (October 23, 2009), before the repairs were complete. He signed a written statement on October 23, 2009, stating that the garbage truck Doug was driving was in for repairs and left the shop before the work was complete.

Brian Schmahl is the original mechanic in Webster who worked on the truck and said the original shackle bolts and rear end were loose.

Mitchell Lawrence is the co-worker who worked with Complainant for a year during his time at B&G Sanitation.

Bernie Twohearts is the driver and co-worker who worked with Complainant for a little over a year before Mitch Lawrence started.

Tonya Rodengen is Complainant's wife, who worked as a secretary at B&G Sanitation. She stayed there for about three months after Complainant was terminated until she refused to sign a false statement Bergeson told her to sign. He told Ms. Rodengen that if she did not sign the statement about complaints of customers, she could "pack your desk and go home, your job is over."

[Cross examination] While unemployed, Complainant supported himself through his wife and by taking out a loan. He knows what Bergeson said because he spoke to Bergeson. Complainant worked on the trucks. He installed a drive shaft at the landfill. He also went to New Effington on previous occasions and fixed the truck and the batteries when it broke down. Bernie and Mitch can attest that in Webster, there were a number of times where they sat in the truck while Complainant worked on it. Complainant checked fluids, but Bergeson took care of pre-trip inspections.

Mr. Harry Moshier
(Complainant's Witness)
(TR, p. 57-62)

[Direct examination] Mr. Moshier signed his name to the invoice for replacing the broken rim and the loose shackle bolts on the 1998 International truck. As evidenced by the invoice, and to the best of Mr. Moshier's knowledge, the truck was still in the same condition on November 9, 2009, as it was on October 15, 2009. On November 9, 2009, the shackles were loose, and he repaired them.

[Cross examination] Mr. Moshier said that he remembers the shackle bolts being loose and the rims being cracked, but cannot remember the exact date. He remembers the truck was brought in on multiple occasions with problems with the tire rims, but cannot remember the particular dates. The invoice would show what particular work was performed on the date of the invoice.

Mr. Brian Schmahl
(Complainant's Witness)
(TR, p. 63-69)

[Direct examination] He does not recall making a written statement almost three years ago concerning a garbage truck with a loose rear end.

[Complainant read the following statement signed by Mr. Schmahl]:

> Doug brought a garbage truck to Northside Implement where I work. Doug said the rear axle was flexing, and I had him bring the truck into the shop and, upon inspection, saw the shackle bolts were loose, causing flex in the axle. Also, the pinion nut was loose. Doug removed the drive shaft and tightened the pinion nut while I tried to tighten the shackle bolts. I had suggested to Doug to limp this truck back to their mechanic to repair the damage done to the pinion bearings as a result of the loose nut and to replace the shackle bolts with new ones.

(The statement that Complainant read was signed, Brian A. Schmahl, Service Tech at Northside Implement, Webster, South Dakota. After having the statement read to him, Schmahl recalled that he had made the statement.) (TR 66). He recalls trying to repair the truck, but that he could not fix it.

[Cross Examination] He does not recall the date the truck was brought in. He does not remember when he signed the written statement. He does not recall the year, but it was quite a while ago.

Kevin Bosch
Complainant's Witness

Note: An attempt was made to contact Bosch telephonically during the hearing, but he could not be reached. Complainant submitted a written statement by this witness, discussed above.

Ms. Tonya Rodengen
(Complainant's Witness)
(TR, p. 74-87)

[Direct examination] Complainant read a statement written by Ms. Tonya Rodengen (his wife), which stated:

> My name is Tonya Rodengen. I'm the secretary/receptionist at B&G Sanitation. I was present Friday when Doug called and had me tell Bergeson the truck was not repaired. Bergeson told me to tell Doug to take the truck to the shop anyway. Doug stopped at the shop with the truck and spoke with Bergeson again. They took the International, which is Doug's truck. Doug called after that and was upset about having to take the unrepaired truck and stated to me, he's done driving unsafe equipment. They have stated to me that the reason he is the only employee that gets vacation pay is because he is smart and does his job right. I have not

received complaints from customers about Doug's job performance or negligence. Signed, Tonya Rodengen.

After November 2009, Ms. Rodengen started writing a statement saying what Bergeson had told her. Bergeson asked Tonya to write something else, she does not remember word for word what it was, and she told him she was not writing that because it was not true. Tonya further said she was not lying for anybody, and Bergeson said that if she did not write the statement like he wanted, she could punch her timecard and be done.

Complainant was upset that the truck was not fixed and he did not want to drive the truck. She does not remember exactly what Bergeson wanted her to write, but it was about what happened between Bergeson and Complainant on the day Complainant did not want to take the truck. Bergeson said if she did not write the statement, she could punch her timecard and be done. When she inquired "be done as in what?" Bergeson said that she would no longer have a job there. So Tonya stood up, ripped the piece of paper out of the notebook that she was writing in, ripped it up, punched her timecard, and left, because she was "not lying for anybody under no circumstances." At this point, Tonya was terminated. She tried to apply for unemployment and got a letter from unemployment saying that she was on hold because "B&G did not want to pay for the unemployment or agree with it." She did not receive any complaints from customers about Complainant's negligence. She was told Complainant was one of the best drivers they had, and that is why he got raises and a paid vacation.

[Cross examination] She could not remember very much about any of the accounts because many incidents happened a long time ago. She remembers people calling in, though. Complainant is currently employed at Coteau Des Prairies Hospital in Sisseton, South Dakota. She cannot remember exactly when he started working there, but she believes it was before June 2010.

[Redirect examination] From the date of Complainant's termination until he started at work at Coteau Des Prairies Hospital (which Complainant said was in February of 2010) she took all her savings and cashed in her 401K so that they could make a living.

Mr. Bergeson (President of Respondent)
(TR, p. 94-109)

[Direct examination] B&G Sanitation was a corporation in the State of South Dakota. It was owned by the shareholders, so Bergeson did not own it, he was the president. There were between four to seven employees, but the number of drivers and pickers would vary. There was no written contract with Complainant. When anyone was hired, Bergeson gave strict verbal instructions to the driver, to check tires, fluids, windshields, etc., and if there was an issue, the customer was the most important thing. Bergeson also said that during his time in business, the only people who were terminated were Tonya Rodengen and Complainant.

Complainant's duties were to come in the morning, punch in, and see what needed to be done that day. Then he was supposed to go get his truck, check the oil, go through and see if the

tire pressure and everything was good on them, deal with any problems. Then he was responsible for his route, which was to be finished, no matter what.

Bergeson testified that when Complainant first started, he did a fairly good job. Then there started to be issues where some people were reporting that their garbage was not picked up. Then when Complainant came to work, he had a bad attitude and he was not afraid to tell somebody off and turn around and walk out the door. People would complain that their trash was not picked up and Bergeson estimated that he lost around 35 accounts because of Complainant. Bergeson explained that these events took place a month prior to Complainant's October 23, 2009, termination.

Bergeson explained that there were two ways of handling complaints. As soon as the complaint came in, the first thing that would be done, if they or another truck were in the area, would be to call to have someone pick up the trash immediately. Several times Bergeson would call Doug to pick up trash and he just did not do it. The second way that this was handled was to write up a piece of paper as soon as the call came in. On the wall, there would be pouches with the driver's name on them. Bergeson would put the address and phone numbers of individuals who needed trash to be picked up in the pouch. Out of disrespect or disobedience, Doug would mark the address as if he picked up the trash, even though he did not do it.

As far as disciplinary action, the only thing that Bergeson did was warn Complainant two times, saying "you can't keep doing this because I'm not going to, I'm not going to ruin my business. I worked too hard to have somebody lollygagging along and ruin it for me." This was done verbally, with one witness, Franklin Nelson, present. Bergeson explained that Doug had become very hard on vehicles and that he was just trying to destroy them. In one occurrence he'd driven across the river with the truck and busted it all to pieces, and it had to be fixed and ready to go again.

Bergeson explained that he used to run about seven or eight trucks altogether, not just one. There was something wrong with trucks every day, so there was nothing unusual about this situation. When the truck was taken in for repair, Complainant said it was not fixed, but D&B Repair tightened everything up and then Complainant went and took it and Bergeson did not hear any complaints. Then Doug came to Bergeson "flying off the handle and screaming at me." After Doug complained about the bolts being loose, Bergeson told him that he needed to get it fixed as soon as possible. He asked Doug, but never told any driver to go drive it. He asked them if they thought they could drive the truck there, but never made them go out. Bergeson sent another truck to meet Doug. When Doug called Bergeson, Bergeson told him that there was more work to be done. Doug said they could not haul a big load on the truck, and Bergeson said he would send a replacement truck. Bergeson asked if Doug could meet the truck for pick up in Waubay, South Dakota, which was about 9 miles away, to speed things up. So Doug drove to Waubay and the truck was switched, but instead of using that truck to pick up garbage, he took that truck and went home. Bergeson got very upset and people started calling to discontinue service, which cost the company a lot of money. That was when Bergeson made up his mind to get rid of Doug.

Bergeson testified that trucks are repaired every day, and it was nothing unusual. Bergeson reiterated that he never forced Doug or anybody to drive anything. Bergeson stated that he terminated Doug's employment over the phone because Doug was not coming into work.

[Cross examination] Doug wanted to know how Bergeson could maintain that he never made Doug drive a truck that violated safety standards when Bergeson gave him the order to take that truck and said that if he didn't, he wouldn't have a job. Bergeson said that statement was not true and that he told Doug to get the truck repaired. Then when Bergeson said to drive the truck to Waubay, he did not force Doug to do that, but said that it just would save time and money.

As far as picking up the truck, Bergeson called D&B Repair and they said that the truck was taken care of and was fixed; Bergeson did not personally look at the truck but went by what he was told by the repairmen at D&B.

[Redirect examination] B&G Sanitation went out of business because the company ran out of money. B&G was in foreclosure with Dakota Bank, and the business was terminated, all accounts were terminated, and the bank took possession of whatever remained. At this point, Bergeson went out of business, and his son, Dennis Bergeson, went into business. So Bergeson's son is running a different company, Dakota Waste Solutions, and B&G Sanitation was dissolved. After the company was dissolved, the assets were gone.

Mr. Franklin Nelson
(Respondent's Witness)
(TR, p. 110-118)

[Direct examination] Mr. Nelson read a statement that he signed under penalty of perjury, which stated:

> I, Franklin Nelson, former coworker of Complainant, do state the following. That Doug would many times drive very speedily and in an unsafe manner and many rural route customers – the boss tells us to slow down or else we will lose customers. B&G lost many, many customers as a result of Doug's disregard of safe driving.
>
> Doug would also not pick up customers he had personal problems with. B&G lost customers. Bergeson told him to pick up those customers, which he did not do. Doug would also leave work early, not telling Bergeson, and missing customers. B&G lost customers. Doug would use it as a ruse that something was wrong with his work truck so he come back to – missing customers. Most times Bergeson would nothing wrong with Doug's truck.
>
> Doug would also use it as a ruse that his truck was full and could not pick up any more customers. B&G lost customers. Bergeson would find out that Doug would pull forward the compactor plates to make the truck appear full. Many times Doug would just cruise by customers not picking them up, using up valuable

diesel gas, which is expensive, and we lost customers. Franklin Nelson – [address]. Under penalties of perjury I sign above as true.

Mr. Nelson was employed by B&G for approximately seven years total, beginning about February 2005. He worked there until the company dissolved and now works for Dakota Waste Solutions. Mr. Nelson worked as a picker with Complainant. As a picker, he would go with the driver to get to know the routes. He would ride along with Complainant and make sure that he got something or didn't miss anything. Then when they would get to the customers, Mr. Nelson would get back out of the truck and get on the side and throw the trash and operate the ladder, and then close it and get back in, and move to the next customer.

Mr. Nelson explained that he knows Complainant lost customers because he watched Complainant miss those customers, and then when he got back to the shop, there would be cancellations from the customers who were missed. Half of it was also because Complainant was going too fast and driving into these farmers' areas where they have kids. None of the customers complained directly to Mr. Nelson. Mr. Nelson explained why he knew that Complainant would use as a ruse that something was wrong with his work truck so he would come back to the shop early and punch out. He said that if he was driving with Complainant he always had a goal of punching out at 3:30pm every day, and if he had to work past then, he would be "tweaked." Most of the time he'd say there was something wrong with the truck so that he could be back at the shop by 3:30, whether or not he fulfilled his duties. Before the trash was fully compacted, Complainant would say that the truck was full and that they should go home. Mr. Nelson personally witnessed Complainant cruise by customers.

[Cross examination] Mr. Nelson reiterated that he worked with Complainant for three to four months towards the end. He started noticing that Complainant was not picking up from the same people from week to week because every day was a different route. This was during the summer of 2009.

Dusty Brown
(Respondent's Witness)
TR, p. 119-125

[Direct examination] Mr. Brown read a statement that he wrote about Complainant, which said: "Doug Rodengen, he quit his route early many times and caused us to lose our accounts. And he did not want – he did what he wanted to do. When he was confronted by Bergeson, he talked back and didn't want to do what he was told. I have heard this many times. Doug was trying to get something for nothing. I worked with him for about a year and he complained about everything."

Mr. Brown started working at B&G Sanitation on November 28, 2008. His position with B&G was a picker. As far as specific accounts that were lost because of Complainant, Mr. Brown named the Waubay Wildlife Refuge. Mr. Brown clarified his statement that Mr. Rodgenen did what he wanted, saying that he would drive fast and drive over potholes and drive hard, tearing up the trucks. Mr. Brown witnessed Complainant talking back to Bergeson when Bergeson confronted him.

Mr. Brown testified that Complainant would complain about everything, such as picking up extra stuff on a route when he was called to locations that other guys missed. Mr. Brown stated that Mr. Bergeson never made him ride in a vehicle that was unsafe. He further stated that Mr. Bergeson's procedure for a reported safety issue was to fix it, and that Mr. Bergeson never made people drive a vehicle before it was fixed.

[Cross examination] Mr. Brown rode with Complainant several times and witnessed him picking up trash that other people missed.

[Redirect examination] Mr. Brown clarified that the trash Complainant was sent to pick up was also at locations that Complainant missed.

Mr. Mitchell Lawrence
(Complainant's Rebuttal Witness)
(TR, p. 131-134)

[Direct examination] Mr. Lawrence did not recall Dusty Brown riding with them, or Franklin, for three months straight. Mr. Lawrence was with Complainant on his route on October 15, 2009, when he reported a safety problem with the truck. He remembers having to change a tire or something, but cannot remember anything further.

Documentary Evidence

South Dakota Department of Labor Unemployment Insurance Appeals
(CX 1, EX 1)

An administrative hearing was held by telephone conference on December 8, 2009, in which Complainant testified, with witness Tonya Rodengen, and Bergeson appeared as a representative and witness for Employer, B&G Sanitation, with witness Darla Bergeson. Based on the evidence, arguments of the parties, and the law, the ALJ found that Employer showed by a preponderance of the evidence that Complainant was discharged for work-connected misconduct. Complainant is disqualified from receiving unemployment insurance benefits and Employer's experience-rating account is exempt from charge.

The South Dakota ALJ concluded that Employer discharged Complainant for reasons that constitute work-connected misconduct as defined by law; Complainant is disqualified from receiving insurance benefits effective October 25, 2009, and continuing until he has been reemployed at least six calendar weeks in insured employment during his current benefit year and earned at least his weekly benefit amount in each of those six weeks; and Employer's experience-rating account is exempt from charge.

Picture of Truck Tire (11/9/09) and Invoice (10/23/09)
(CX 1)

A picture of the truck was attached to the repair shop's invoice. The picture includes a description stating "rearend shackles loose – see statement on invoice." The invoice from D&B Repair, dated October 23, 2009 reads "Garbage truck Doug was driving was in for repairs, left shop before work was comp." signed by Kevin Bosch.

Statement by Brian Schmahl
(CX 1)

Mr. Schmahl stated that Complainant brought in the Garbage truck saying that the rear axle was flexing. Upon inspection Mr. Schmahl saw "that shackle bolts were loose causing flexing axle and the pinion nut was loose." Mr. Schmahl suggested to Complainant to limp the truck back to the mechanic to repair damage done to pinion bearings as a result of loose nut, and to replace the shackle bolts with new ones.

Statement by Mitchell Lawrence, December 4, 2009
(CX 1)

Mr. Lawrence stated that he worked with Complainant for the past year and he is a good driver and coworker. He goes on to state that Complainant "had issues about the truck I think they replaced the transmission one time. I'm not a mechanic I just rode in the truck."

Statement by Bernie TwoHearts, December 3, 2009
(CX 1 p. 11)

Mr. TwoHearts wrote a statement which said that he worked with Complainant for 14 months at B&G Sanitation and in that time he never saw Complainant being rude to other employees or to himself. "As a matter of fact, Doug seemed to get along with everybody." Mr. TwoHearts further stated that they always had trouble with the truck, even before Complainant came to work. Mr. TwoHearts is no longer an employee at B&G Sanitation.

Statement by Tonya Rodengen
(CX 1 p. 12)

Ms. Rodengen was the secretary/receptionist at B&G Sanitation and wrote:

> I was present Friday when Doug called & had me tell Bergeson the truck was not repaired, and Bergeson told me to tell Doug to take the truck anyway. Doug stopped at the shop with the truck and spoke with Bergeson again. They took the internat, which is Doug's truck. Doug called after that and was upset about having to take the unrepaired truck, and stated to me that he was done driving unsafe equipment.
>
> They have stated to me the reason he is the only employee that gets vacation pay is because he is smart and does his job right. I have not received complaints from customers about Doug's job performance or negligence.

Statement by Dusty Brown, June 21, 2013
(EX 1)

Mr. Brown stated that Complainant quit his route many times early and caused B&G to lose its accounts. When confronted by Bergeson, Complainant would talk back and did not do as he was told. Mr. Brown observed many times that Complainant was trying to get something for nothing. Mr. Brown worked with Complainant for one year and said that "he complained about everything."

Statement by Franklin Nelson, June 21, 2013
(EX 1)

Mr. Nelson stated, in writing:

> That Doug would many times drive very speedily and in an unsafe manner in many rural route customers' driveways with kids. Bergeson, my boss, would tell Doug to slow down or else we will lose customers. B&G lost "many, many" customers as a result of Doug's disregard of safe driving. Doug would also not pick-up customers he had personal problems with, B&G lost customers. Bergeson told him to pick-up those customers which he did not do. Doug would also leave work early without telling Bergeson and missing customers. B&G lost customers. Doug would use as a ruse that something was wrong with his work truck, so he would come back to the shop early and punch out, missing customers. Most times Bergeson would find nothing wrong with Doug's truck. Doug would also use as a ruse that his truck was full and could not pick-up any more customers, B&G lost customers, Bergeson would find out that Doug would pull forward the compactor plate to make the truck appear full. Many times Doug would just cruise by customers not picking trash up, using up valuable Diesel gas, which is expensive, we lost customers.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Preliminary Jurisdictional Findings

Because Respondent is engaged in the picking up and transportation of sanitation in interstate commerce on public highways with commercial vehicles, B&G Sanitation is a commercial motor carrier within the meaning of the STAA and subject to its provisions, including the prohibition regarding employee discrimination. 49 U.S.C. § 10102(13) and 29 C.F.R. § 1978.101(e). *See also Killcrease v. S & S Sand and Gravel, Inc.* 92 STA 30 (Sec'y Feb. 2, 1993). Similarly, as an employee of B&G Sanitation, driving B&G's trucks, who picked up and transported sanitation while employed for about two years, and who directly affected commercial motor vehicle safety, Complainant fell within the Act's definition of "employee." *See* 29 C.F.R. § 1978.101(d)(1), TR p. 16.

Prima Facie **Case & Initial Adjudication Principles**

In order to provide protection for STAA whistleblowers, 49 U.S.C. § 31105(a)(1) mandates that a "person" may not discharge, discipline, or discriminate against an employee regarding pay, terms, or privileges of employment because the employee filed a complaint, began a proceeding, or testified in such a proceeding related to a violation of a commercial motor vehicle safety or security regulation standard or order; or refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial vehicle safety, or would cause serious injury to the employee or public due to a vehicle's hazardous safety or security condition.

On August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 1536, § 31105, 121 Stat. 266, 464-67 (2007), Congress amended paragraph (b)(1) of 49 U.S.C. § 31105 to make applicable in the adjudication of STAA whistleblower claims the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b) ("AIR 21"). Under the AIR 21 standard set out in 49 U.S.C. § 42121(b)(2)(B)(iii), complainants must show by a "preponderance of evidence" that a protected activity was a "contributing factor" to the adverse action described in the complaint. Once a complainant has established that a protected activity was a contributing factor in the employer's decision to take adverse action, then under 49 U.S.C. § 42121(b)(2)(B)(iv), an "employer" may escape liability only by providing clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *See also* 29 C.F.R. § 1978.109(B)51 and *Sacco v. Hamden Logistics, Inc.*, ARB No. 09-204, ALJ Nos. 2008 STA 43, 44; slip op. at 4-5 (ARB Dec. 18, 2009).

Accordingly, to establish that a respondent subject to the Act has committed a violation of the employee protection provisions of STAA, a complainant must prove by a preponderance of the evidence: a) protected activity; b) unfavorable personnel action or adverse action; and, c) causation/contributing factor. With these general adjudication principles in mind, I turn to the specific issues in Complainant's case.

Credibility Assessments

Based on his direct answers, consistency, and the absence of confusion or equivocation, I find Complainant to be a credible witness. I find that Bergeson was also generally credible in his testimony that he fired Complainant due to poor attendance and insubordination. However, I find that Complainant's refusal to drive the broken truck was also a contributing factor in the termination, which Bergeson denied. The basis for this finding is the temporal proximity of Complainant's discharge in relation to his protected activity. This will be discussed in more detail below. Bergeson did not adequately explain why he waited until the very day that Complainant refused to drive the truck that he believed was broken to discharge Complainant, thereby diminishing his credibility on this key point. Although he may, in fact, have had issues with Complainant's performance on previous occasions, he did not take any disciplinary action until Complainant refused to drive the truck which he believed was unsafe.

Protected Activity

As previously mentioned, the STAA prohibits the discriminatory treatment of employees who have engaged in certain activities related to commercial motor vehicle safety. Two such activities include making safety complaints and refusing to drive in violation of regulatory standards.

Safety Complaints

Under 49 U.S.C. § 31105(a)(1)(A), an employee is protected if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. DOL interprets this provision to include internal complaints from an employee to an employer. DOL's interpretation that the statute includes internal complaints "is eminently reasonable." *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12 (1st Cir. June 10, 1998) (case below 95 STA 34). The U.S. Circuit Court of Appeals also stated that internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. *Id*. For example, a complainant's expressed preference to make shorter runs due to his inability to continue making longer trips like he could as a younger driver, in the absence of any stated safety-related concern, is not a STAA protected activity. *Barr v. ACW Truck Lines, Inc.*, 91 STA 42 (Sec'y Apr. 22, 1992). On the other hand, a complainant's motivation for making a safety complaint has no bearing on whether the complaint is a protected activity. *Nichols v. Gordon Trucking, Inc.* 97 STA 2 (ARB July 17, 1997).

Additionally, under 49 U.S.C. § 31105 (a)(1)(A), the complaint or concern need only "relate" to a violation of *any* commercial motor vehicle safety standard. Neither the Act nor the legislative history draw in the limitation in 49 U.S.C. § 31105 (a)(1)(B)(i) concerning a violation of a federal safety standard. *See Nix v. Nehi-RC Bottling Company, Inc.*, 84 STA 1 (Sec'y July 13, 1984), slip op. at 8-9. Complaints relating to alleged violations of DOT regulations constitute protected activities. *Hernandez v. Guardian Purchasing Co.*, 91 STA 31 (Sec'y June 4, 1002). Specifically, the operation of overweight trucks involves commercial motor vehicle safety. *See Galvin v. Munson Transportation, Inc.* 91 STA 41 (Sec'y Aug. 31, 1992). Similarly, in light of 49 C.F.R. § 392.6,[5] exceeding applicable local speed limits involves a violation of a federal motor carrier safety regulation. *Nolan v. A.C. Express*, 92 STA 37 (Sec'y Jan. 17, 1995). Further, to invoke protection under this provision, the employee need only demonstrate that he *reasonably believed* he was complaining about a safety hazard. *Schuler v. M & P Contracting, Inc.*, 94 STA 14 (Sec'y Dec. 14, 1994).

Finally, the Secretary, through the ARB, has determined that if an employee makes an objection regarding an unsafe condition and then actually drives the vehicle, the complaint

[5] No motor carrier shall schedule a run or permit the operation of any commercial motor vehicle in a manner that would necessitate the vehicle "being operated at speeds greater than those prescribed by the jurisdiction in or through which the commercial motor vehicle is being operated."

should be more properly analyzed under the "complaint" provision of 49 U.S.C. § 31105 (a)(1)(A). *Zurenda v. J & K Plumbing & Heating Co., Inc*., 97-STA-16 (ARB, June 12, 1998).

I find, based on the record, that on October 26, 2009, Complainant filed a complaint with the Department of Labor (DOL). Complainant testified that the Department of Labor told him Bergeson could not make him drive the unrepaired truck. Later that day, Complainant informed Bergeson of the content of his discussion with DOL. At the time, Complainant did not know that the incident fell under the Transportation Act. He said "it just seemed right to me that you shouldn't be out on the road in stuff like that and that law was there to protect that." I find Complainant's complaint with the Department of Labor on October 26, 2009, was a protected activity under 49 U.S.C. § 31105(a)(1)(A).

Refusal to Drive – Regulatory Violation

Title 49 U.S.C. § 31105(a)(1)(B)(i) protects an employee who refuses to operate a commercial motor vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." The complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service*, 94 STA 55 (Sec'y Aug. 4, 1995). In that regard, a driver's refusal to drive due to hazardous and dangerous conditions is a protected activity since forcing the employee to drive would have violated a federal regulation (49 C.F.R. § 392.14). *Robinson v. Duff Truck Lines, Inc.*, 86 STA 3 (Sec'y Mar. 6, 1987), *aff'd Duff Truck Line, Inc. v. Brock*, 48 F.2d 189 (6th Cir. 1988)(per curiam)(unpublished decision available at 1988 U.S. App. 9164). Further, although 49 U.S.C. § 31105(a)(1)(B)(i) refers to federal rules, regulations, and standards, the ARB has concluded that a refusal to drive in violation of local law is also covered by this section. *Beveridge v. Waste Stream Environmental, Inc.*, 97 STA 15 (ARB Dec. 23, 97).[6] For example, refusal to drive an overweight truck is a protected activity. *Galvin v. Munson Transportation, Inc.* 91 STA 41 (Sec'y Aug. 31, 1992). Similarly, refusal to drive when the contemplated run would cause a driver to violate the federal hours of service regulation (49 C.F.R. § 395.3) is a protected activity. *Paquin v. J.B. Hunt Transport, Inc.*, 93 STA 44 (Sec'y July 19, 1994).

Title 49 U.S.C. § 31105(a)(1)(B)(ii) protects an employee who refuses to operate a commercial motor vehicle because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." Complainant need only show that the operation of the truck would have violated a safety regulation under his reasonable belief of the facts at the time of the refusal to operate the truck.

In *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19 (ARB Dec. 18, 2012), the ALJ found that the Complainant had engaged in other protected activity, but not on the day of his constructive discharge in regard to a refusal to drive based on his belief that a

[6]The ARB reasoned that New York motor vehicle laws were incorporated by the U.S. Department of Transportation's regulation, 49 C.F.R. § 392.2, which requires every commercial vehicle to operate in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. *Id.*, slip op. 4.

flat tire had not been fixed on his assigned truck. The ARB disagreed. The Complainant had earlier complained that this truck had a flat tire. A few days later he was assigned the same truck and refused to drive that truck because of the flat. In ruling on whether this was protected activity the ALJ indicated that the "refusal to drive" provision of the STAA required that the Complainant establish that the tire was actually flat rather than just that he believed the tire was flat. The ARB found that this was error, and that it had recently ruled that "the statute does not include the qualifier 'actual'", and that "the protection Section 31105(a)(1)(B)(i) affords also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined." USDOL/OALJ Reporter at 5, citing and quoting *Ass't Sec'y & Bailey v. Koch Foods*, ARB No. 10-001, ALJ No. 2008-STA-61, slip op. at 9 (ARB Sept. 30, 2011). The ARB found that the Complainant only needed to show that operation of the truck would have violated a safety regulation *under his reasonable belief of the facts at the time of the refusal to operate the truck*. Although the Respondent's owner testified that he had repaired the flat, there was no evidence of record to support that claim and there was no evidence showing that the Complainant no longer reasonably believed the tire was flat at the time of the second assignment of the truck.

The ARB acknowledged that the record was silent as to whether the Complainant inspected the truck at the time of the second assignment, but found it undisputed that the owner did not inform the Complainant that he had fixed the truck, but had instead told the Complainant that "it's just one trip" and that he should "drive or go home." The ARB found that these statements suggested that the tire was not fixed. The ARB stated that had the owner informed the Complainant that the tire was fixed, the Complainant could not have reasonably refused to drive. In this case, however, the facts were sufficiently clear for the ARB to conclude that the Complainant reasonably believed the tire was flat on the day in question, and therefore the Complainant engaged in protected activity.

October 15 through October 26, 2009, Findings of Fact

During three instances, on October 15, 23 and 26, 2009, Complainant refused to drive his truck and engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i). I find that the record establishes the following facts.

On October 15, 2009, while driving the 1998 International truck on his garbage route, Complainant experienced problems with the truck and brought it to a mechanic, Brian Schmahl at Northside, located in Webster. Schmahl confirmed in his written statement that the rear axle was flexing, the shackle bolts were loose and the pinion nut was loose. Schmahl suggested that Complainant "limp" the truck back to his own mechanic for further repair as there was damage to the pinion bearings as a result of a loose nut and the shackle bolts needed to be replaced. On October 15, 2009, after leaving the repair shop in Webster, Complainant drove the truck slowly to D&B repair shop, the shop normally used by Respondent for its vehicle repairs.

After his truck (International) broke down on October 15, 2009, and was brought to D&B for repairs, Complainant drove another truck (Kenworth) to complete his route and again on October 22, 2009, as corroborated by testimony and receipts from the Roberts County Landfill.

On October 23, 2009, Complainant reported to work and started the Kenworth truck to go out on his assigned route, but Bergeson stopped him and sent Complainant to D&B to retrieve the International truck. At that time, Complainant assumed that the International truck had been repaired. However, when Complainant put the International truck into gear and started to pull out of the lot, the rear end "clunked." Complainant then climbed underneath it, grabbed the shackle bars and shook them. When they rattled, he believed the truck had not been repaired. Complainant credibly testified that he called the shop to tell Bergeson they could not take the truck because it was not fixed. Bergeson told him to bring the truck to the shop anyway, as confirmed by the statement of Secretary Tonya Rodengen. A signed statement from Kevin Bosch of D&B Repair confirmed that the truck was taken from the shop before repairs were completed. Complainant pulled in front of the shop and showed Bergeson that the truck had not been fixed by shaking the shackle bars. The two men had an argument concerning whether the truck was safe to drive. Complainant testified credibly that Bergeson said that they had no choice, because it was the only truck they had, since the other truck had also broken down. Since the International truck was stick shift, only Complainant was able to drive it. Complainant continued to argue with Bergeson and assert that the truck was illegal and unsafe and he did not want to drive it. Mr. Bergeson said that Complainant had no choice since the other truck was broken. Bergeson told Complainant that if he did not drive the International, he would find somebody who would drive it.

Under threat of losing his job, Complainant took the International truck out on the morning of October 23, 2009, but did not complete the route. At about 12:30 or 12:45 p.m., as they started putting weight on the truck, the rear end started to "crank and bang." When the brakes were applied, the rear end would roll down from the force of the brakes. Then when the brakes were released, it would slam back, sending a shudder through the whole truck. Complainant called Bergeson around 1:15 or 1:30 and said that he was done driving the truck until it was fixed, because he believed it was unsafe and would fall apart. He drove the truck back about 25 miles per hour from Bristol, South Dakota back to D&B Repair, parked the truck and left it there. He then called Bergeson, told him that he was done until the truck was fixed, and informed him that he had parked the truck at D&B. Complainant observed all weekend that the truck sat in the same place he had parked it.

On Monday, October 26, 2009, around 9:00 or 9:30 a.m., Complainant was called by Bergeson who asked if he was going to drive the International truck. Complainant refused to drive it until it had been repaired. Bergeson informed Complainant that if he did not drive the truck, Bergeson would find somebody who would and terminated Complainant's employment. Friday, October 23, 2009, was the last day for which Complainant received a paycheck.

During Complainant's testimony, he explained that he shook the shackles on October 23, 2009, and thus knew that the truck had not been repaired. He had an argument with Bergeson in which Complainant demonstrated that the truck had not been fixed, and told him it was illegal and unsafe to drive. Rather than refuting Complainant's assertions, Bergeson responded that they had no choice because the other truck that B&G Sanitation had was broken down. Furthermore, one of the major areas of contention between Complainant and Respondent concerns whether or not the truck was actually repaired on October 23 and October 26, 2009,

when Bergeson was demanding Complainant complete his routes. This contention, however, clouds the determinative issue regarding Complainant's protected activities, as the ARB found in *Klosterman,* that the Complainant in the instant case only needed to show that operation of the truck would have violated a safety regulation under his *reasonable belief* of the facts at the time of the refusal to operate the truck. Therefore, my determination regarding Complainant's credibility in testifying that he reasonably believed the truck was still not repaired based on the loose shackles and rear end clunking, satisfies Complainant's burden of establishing that he reasonably believed, given the facts at the time of his refusal to operate the truck, that operating the truck would violate safety laws. I find that Complainant's belief was subjectively and objectively reasonable based on the loose shackles and unusual noises that the truck was making.

As supported by the applicable case law on this issue, Complainant's refusal to finish his route on October 23, 2009, and refusal to drive the truck again on October 26, 2009, due to safety concerns, based on his belief that the truck had not been repaired, and remained unsafe, were protected activities under 49 U.S.C. § 31105(a)(1)(B)(i). In addition, I find that after driving the truck on October 23, 2009 for half of the day until sometime between 12:30 and 1:30pm, Complainant's refusal to finish his route after experiencing the vehicle's hazardous safety conditions, was a protected activity under 49 U.S.C. § 31105(a)(1)(B)(i). Similarly, his refusal to drive the unrepaired vehicle on October 26, 2009, was also a protected activity.

Summary of Protected Activity

For the reasons set out above, I find that Complainant engaged in the following categories of STAA protected activities: a) under 49 U.S.C. § 31105(a)(1)(A) when he filed a complaint with the South Dakota Department of Labor on October 26, 2009; b) under 49 U.S.C. § 31105(a)(1)(B)(i) when he refused to finish his route on October 23, 2009, and when he refused to drive the truck on his route on October 26, 2009; and, c) under 49 U.S.C. § 31105(a)(1)(B)(ii) when he brought the truck back prior to completion of his route due to the hazardous safety condition of the truck and his reasonable apprehension of injury.

Adverse Personnel Action

As previously discussed, the Act prohibits an employer from discharging, disciplining, or discriminating against an employee regarding pay, terms or privileges of employment because he engaged in a protected activity. 49 U.S.C. § 31105(a)(1). Having engaged in STAA protected activities, Complainant must next prove that he suffered an adverse personnel action.

On October 26, 2009, Bergeson terminated Complainant's employment at B&G Sanitation, after his refusal to drive the truck. Since employment termination represents the most severe adverse personnel action, Complainant has proven this requisite element. In addition, after Complainant filed for unemployment on October 26, 2009, Bergeson told the unemployment benefit officials that Complainant was hard on the equipment, and a poor worker, which prevented Complainant from receiving unemployment benefits.

Bergeson does not dispute that he terminated Complainant's employment on October 26, 2009, or prevented him from receiving unemployment benefits. However, Bergeson asserts that

the cause of these adverse actions was unrelated to protected activity and rather was due to Complainant's alleged poor performance and attendance issues.

Causation

Having established STAA protected activities and an adverse personnel action, Complainant must also prove by a preponderance of the evidence a causal connection between these two elements. Specifically, Complainant must prove that his complaint to the Department of Labor on October 26, 2009, his refusal to finish his route with the broken truck on October 15 and 23, 2009, and his refusal to drive the truck on October 26, 2009, were contributing factors, or a contributing factor individually, in the termination of his employment relationship with B&G Sanitation on October 26, 2009.

The Courts have defined "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action, *Marano v. U. S. Dept. of Justice,* 2 F.3d 1137 (Fed. Cir. 1993). Based on this definition, the determination of contributing factor has two components: knowledge and causation. In other words, the respondent must have been aware of the protected activity (knowledge) and then taken the adverse personnel action in part due to that knowledge (causation).

Knowledge

Mr. Bergeson terminated Complainant's employment. As the first step in establishing that one or more of his protected activities were contributing factors, Complainant must demonstrate that Mr. Bergeson was aware of one or more of his protected activities.

Safety Complaints

Claimant testified that he informed Bergeson that he had spoken to DOL on October 26, 2009, and was told he did not have to drive the truck. Mr. Bergeson did not specifically reference the safety complaint that Complainant made on October 26, 2009, but testified generally that Complainant would threaten and harass Mr. Bergeson and his wife, Darla, saying that "if we gave him a week's pay and his job back he wouldn't get reported – we wouldn't get reported to the DOT, OSHA – I said that's blackmail." TR. 92. It thus appears that Bergeson had some knowledge about a complaint being filed at DOL and the possibility of reports being filed with the DOT and OSHA. However, I find the evidence is vague as to when Bergeson had knowledge of Claimant's complaints with DOL, DOT and OSHA or the contents of any such complaints.

Refusal to Drive – October 23 and 26, 2009

Mr. Bergeson terminated Complainant's employment on October 26, 2009 after he refused to drive the truck that Complainant claims remained unrepaired. Complainant had a conversation with Mr. Bergeson on both October 23 and October 26, 2009, when Complainant

refused to drive the truck. Both Bergeson and Complainant testified that such conversations took place. Consequently, I find that Respondent had knowledge of these protected activities.

Causation

I must determine whether Complainant can prove that one or more of his protected activities were a contributing factor in either the determination by Mr. Bergeson to terminate his employment with B&G Sanitation or Mr. Bergeson's negative comments to the South Dakota Department of Labor, which denied Complainant's claim for unemployment benefits.

In *Beatty v. Inman Trucking Management, Inc.,* the ALJ applied the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-804 (1973) Title VII burden shifting paradigm to the Complainants' STAA blacklisting complaint, and denied the complaint based on his finding that the Complainants had not established by a preponderance of the evidence that the Respondent's articulated, legitimate non-discriminatory reason for filing negative DAC reports about the Complainants was pretext. On appeal, the ARB found that the *McDonnell Douglas* burden of proof framework was supplanted by the 2007 amendments to the STAA adopted as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (Aug. 7, 2007). That Act imposed the legal burdens of proof and framework imposed by AIR 21:

> Under the AIR 21 standard, a new burden of proof framework is established in which the complainant is initially required to show by a preponderance of the evidence that protected activity was a "contributing factor" in the alleged adverse personnel action. Should the complainant meet the "contributing factor" burden of proof, the burden shifts to the employer who is required, in order to overcome the complainant's showing, to prove by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected conduct.

Preliminarily, I find insufficient evidence that Complainant's first protected activity regarding his safety complaints was a contributing factor in his employment termination. Although Complainant may have communicated a threat to contact DOT and OSHA to Bergeson, I do not find that the evidence supports Bergeson's knowledge about such complaints prior to the adverse action against Complainant. From both Bergeson and Complainant's testimony, it remains unclear what if any knowledge Bergeson had about Complainant's complaints to the DOT. Furthermore, Bergeson's testimony evidences that Complainant threatened to report him to the DOT and OSHA, but this was after Complainant's termination, since the threat was an attempt by Complainant to have his employment reinstated. Consequently, sufficient circumstantial evidence to establish causation based on the temporal proximity of this protected activity and adverse personnel action is lacking.

On the other hand, based on the following facts, strong circumstantial evidence of causation exists that Complainant's protected activities in refusing to drive his truck on three occasions in violation of federal safety regulations and in apprehension for his own safety was a contributing factor in his employment termination. First, Complainant worked for B&G Sanitation for two and a half years with the only disciplinary actions, according to Mr. Bergeson, being two unspecified "warnings" about not skipping addresses on his route. Mr. Bergeson

explained that when Complainant first started, he did a fairly good job. However, he started having issues with Complainant when some customers reported that their garbage had not been picked up. Bergeson estimated losing around 35 accounts because of Complainant, and claims these events took place about a month prior to Complainant's October 26, 2009, termination. During this same period, Complainant engaged in protected activity by refusing to finish his route with the broken truck on October 15, 2009 and October 23, 2009, and refusing to drive the truck on his route on October 26, 2009. On October 26, 2009, the same day Complainant engaged in the protected activity of refusing to drive the unrepaired truck on his route, Bergeson telephonically terminated his employment.

Although Complainant and Bergeson mention two different dates of Complainant's termination (October 26, 2009 and October 23, 2009), it is undisputed that October 23, 2009, was Complainant's last day of work. Furthermore, whether Complainant was terminated on Friday, October 23, 2009, or the following Monday does not have a determinative effect on the outcome of the claim. To determine whether Complainant has shown by a preponderance of the evidence that his protected activities were a "contributing factor" in his termination, I must look at the conflicting testimonies of both Complainant, Mr. Bergeson and the testifying witnesses to determine whether Complainant has satisfied his burden of prove.

Complainant

After his truck (International) broke down on October 15, 2009, Complainant drove the other truck (Kenworth) the rest of the week until the morning of October 23, 2009. At that time, Mr. Bergeson sent Complainant to get his truck, which Complainant assumed had been repaired. When Complainant got to the repair shop, the minute they put the truck into gear and went to pull out of the lot, the rear end "clunked." Complainant climbed underneath it, grabbed the shackle bars and shook them, and they rattled, so he knew the truck had not been repaired. Complainant said that they could not take the truck because it was not fixed. Bergeson told him to bring the truck to the shop anyway. Complainant pulled in front of the shop and showed Bergeson that the truck had not been fixed, and they had an argument about whether the truck was unsafe to drive. Bergeson said that they had no choice, because it was the only truck they had, since the other truck had broken down. Complainant still argued with him and said that the truck was illegal and unsafe and he did not want to drive it. Bergeson said that Complainant had no choice and that if he did not drive it, Bergeson would find somebody who would. Complainant therefore took the truck out, but did not complete the route. At about 12:30 or 12:45 p.m., as they started putting weight on the truck, the rear end started to "crank and bang." When the brakes were applied, the rear end would roll down from the force of the brakes. Then when the brakes were released, it would slam back and send a shudder through the whole truck. Complainant told the other rider, Mitch Lawrence, that he was done with it. Complainant called Bergeson around 1:15 or 1:30 and said that he was done driving the truck until it was fixed because it would fall apart. He drove the truck back to D&B Repair, parked it and left it there.

When Complainant returned the truck, he called Bergeson and told him that he was done until the truck was fixed, and he parked the truck at D&B and went home. He watched all weekend, and the truck sat in the same place it was parked. On Monday, October 26, 2009, around 9:00 or 9:30 a.m. Complainant heard from Bergeson telephonically, who asked if he was

going to drive the truck. Complainant refused. Complainant talked to an official at the Department of Labor that morning and filed his complaint the next day after talking to Bergeson, who said that if Complainant did not drive the truck, he did not have a job. Bergeson said if he did not drive the truck, Bergeson would find somebody who would. Friday, October 23, 2009, was Complainant's last day of driving and the last day that he received a paycheck.

Mr. Moshier and Mr. Schmahl

The testimony of Complainant's witness, Mr. Moshier, serves to corroborate Complainant's contention that the truck was in a state of disrepair on October 15, 2009, and remained in disrepair on November 9, 2009.

The testimony and written statement of Complainant's witness, Mr. Schmahl, establishes that the garbage truck was in a state of disrepair when brought to him, although he could not recall the exact date. He confirmed that upon inspection he "saw the shackle bolts were loose, causing flex in the axle. Also, the pinion nut was loose." This description is consistent with Complainant's description of the problems he was having with the truck on October 15, 2009, which prompted him to have Mr. Schmahl prepare a written statement.

Bergeson

Concerning the reasons for the discharge, at the hearing, Bergeson explained that the reason for Complainant's termination was that Complainant was supposed to be at work October 5 and October 12, 2009, but did not show up as scheduled. Mr. Bergeson testified he confronted Complainant about missing work and Complainant talked back to him and proceeded to turn around and walk away. Mr. Bergeson explained that there were several (unspecified) days that Complainant did not show up to work. Mr. Bergeson testified that Complainant was terminated for both insubordination and misconduct. He claimed Complainant disobeyed direct orders to pick up customers' trash. As a result of Complainant's neglect, B&G Sanitation lost many customers. Complainant would not tell Bergeson that he had not picked up trash; instead he would just skip customers, which would cost the company thousands of dollars of revenue. People would complain that their trash was not picked up, and Bergeson estimated that he lost around 35 accounts because of Complainant. Bergeson explained that these events took place a month prior to Complainant's October 23, 2009, termination. This misconduct, along with his insubordination, forced Bergeson to terminate Complainant.

Bergeson further stated the accounts that B&G Sanitation lost as a direct result of Complainant's insubordination, neglect, and misconduct included: Waubay Wildlife, Prairie Wood Inn, Harry Miklish, Dale Rengas, Doug Martinson, and the Town of Butler. Bergeson explained that trucks were repaired every day, and it was nothing unusual to have a broken truck. Bergeson testified that he never forced Complainant or anybody to drive anything. As far as picking up the truck, Bergeson called D&B Repair and they said that the truck was taken care of and was fixed; Bergeson did not personally look at the truck but went by what he was told by the repairmen at D&B. Bergeson stated that he terminated Complainant's employment over the phone because Complainant was not coming to work.

As I explained earlier in my credibility assessment, I find both Complainant and Mr. Bergeson to be generally credible witnesses. I find Complainant's witnesses, Mr. Moshier and Mr. Schmahl, to have diminished probative value based on their inability to recall specific dates and their limited memory of the events leading up to Complainant's termination.

Under this sequence of events, I do not consider Bergeson's alternative reasons for firing Complainant, i.e., poor performance and attendance, to have negated the contributory effect that Complainant's protected activities had on Bergeson's decision to terminate his employment. Regarding the timing of the termination decision, Bergeson testified that Complainant missed two specific days of work (and other unspecified days), and skipped over numerous customers, leading to the loss of several accounts during the month leading up to his termination. Although this basis for discharge may appear legitimate, the timing of Complainant's termination along with the arguments that Bergeson and Complainant had both on October 23 and October 26, 2009, regarding the truck's state of disrepair, is sufficient for Complainant to satisfy his burden of establishing by a preponderance of the evidence that his protected activities were a "contributing factor" in the termination of his employment. Particularly since it appears that the allegations about Complainant skipping customers and causing B&G to lose accounts was ongoing for at least several weeks leading up to his termination, I find Bergeson's stated reliance on Complainant missing two days of work in October and skipping customers in the weeks leading up to his termination to be pretext. The record establishes that no disciplinary action was taken against Complainant until he complained about the broken truck.

Conclusion

In conclusion, upon consideration of all the evidence, and having rendered credibility determinations, I find that some of Mr. Bergeson's stated reasons for termination and his explanation of the timing of Complainant's discharge are inconsistent and pretext.

Furthermore, the preponderance of the remaining evidence, in particular the temporal proximity of protected activities on October 15, 23, and 26, 2009, with the termination occurring immediately after an argument over the phone between Bergeson and Complainant, in which Complainant refused to drive the truck until it was repaired, is probative and establishes that Complainant's STAA protected activities on these three dates were contributing factors in Bergeson's termination of Complainant's employment at B&G Sanitation.

Affirmative Defense

As explained above, if a complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the unfavorable personnel action, a respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.

Mr. Bergeson

As I stated above, Bergeson explained that Complainant was terminated for both insubordination and misconduct. Mr. Rodengnen disobeyed direct orders to pick up customers'

trash. As a result of Complainant's neglect, B&G Sanitation lost many customers. Complainant would not tell Bergeson that he did not pick up trash; instead he would just skip customers, which would cost the company thousands of dollars of revenue. People would complain that their trash was not picked up, and Bergeson estimated that he lost around 35 accounts because of Complainant. Bergeson explained that these events took place a month prior to Complainant's October 23, 2009 termination.

Mr. Brown

Mr. Brown stated that Complainant quit his route many times early and caused B&G to lose their accounts.

Mr. Nelson

Respondent's witness, Mr. Nelson, testified that B&G Sanitation lost many, many customers as a result of Complainant's disregard of safe driving. He stated that Complainant would also not pick up customers he had personal problems with. B&G lost customers. Bergeson told him to pick up those customers' trash, which he did not do. Complainant would also leave work early, not telling Bergeson, and missing customers. As a result of skipping customers, B&G Sanitation lost accounts. Complainant would claim that something was wrong with his work truck so he could come back early, missing customers. Most times Bergeson would find nothing wrong with Complainant's truck.

Ms. Rodengen[7]

As a secretary and receptionist at B&G Sanitation, Ms. Rodengen testified that she did not receive any complaints from customers about Complainant's job performance or negligence.

Summary

I find that Ms. Rodengen's testimony displays some selective memory and inability to recall crucial details regarding Complainant's work performance at B&G Sanitation. In contrast, I find Mr. Nelson and Mr. Brown presented credible testimony regarding Complainant's work performance at B&G Sanitation and bolstered the veracity of Bergeson's affirmative defense citing the loss of customers and Complainant's insubordination and misconduct as part of the reason for terminating Complainant's employment.

Regarding the timing of the termination decision, Mr. Bergeson reasoned that Complainant missed two days of work and skipped over numerous customers leading to the loss of several accounts during the month leading up to Complainant's termination. Although this basis for discharge may appear legitimate, this affirmative defense is not sufficient for Respondent to establish by clear and convincing evidence that it would have taken the same action in the absence of the protected conduct. As I previously mentioned, the timing of Complainant's termination along with the arguments that Bergeson and Complainant had on October 15, 23 and 26, 2009 regarding the truck's state of disrepair is sufficient for Complainant

[7] Ms. Rodengen is the wife of Complainant.

to satisfy his burden of establishing by a preponderance of the evidence that his protected activities were a "contributing factor" in his termination of employment, and Respondent is unable to successfully invoke the affirmative defense establishing it would have taken the same action absent Complainant's protected activities on October 23 and October 26, 2009.

CONCLUSION

I find that Complainant has established by a preponderance of the evidence that his protected activity was a contributing factor in his discharge. Furthermore, I find that Respondent has failed to establish by clear and convincing evidence, that it would have terminated Complainant absent his protected activity.

REMEDIES UNDER THE STAA

Where a respondent is found to have violated the STAA, the statute and regulations provide several remedies for the affected employee. The statute and regulations generally provide that a respondent must "take affirmative action to abate the violation." 49 U.S.C. § 31105(b)(3)(A)(i); *see also,* 29 C.F.R. § 1978.109(d)(1). The available remedies include: (1) reinstatement of the employee to his former position; (2) payment of compensatory damages, including back-pay and compensation for "any special damages sustained as a result of the discrimination;" and, (3) payment of punitive damages. 49 U.S.C. §§ 31105(b)(3)(A), (b)(3)(C); 29 C.F.R. § 1978.109(d)(1). The statute also authorizes an award of reasonable attorney's fees and other costs incurred by the complainant in bringing the complaint. 49 U.S.C. § 31105(b)(3)(B).

Compensatory Damages

Back Pay

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. *Nelson v. Walker Freight Lines, Inc*. 87 STA 24 (Sec'y Jan. 15, 1988), slip op. at 5, *Polwesky v. B & L Lines, Inc.*, 90 STA 21 (Sec-y May 29, 1991), *Moravec v. HC & M Transportation, Inc*., 90 STA 44 (Sec'y Jan. 6, 1992), and *Polgar v. Florida Stage Lines,* 94 STA 46 (ARB Mar. 31, 1996). Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc*., 95 STA 43 (ARB May 30, 1997), slip op. at 11-12, n.12. Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co., Inc*., 90 STA 37 (Sec'y June 3, 1994) and *Kovas v. Morin Transport, Inc*., 92 STA 41 (Sec'y Oct. 1, 1993). At the same time, the lost wages claimed as back pay must have been caused by the employer's misconduct. *Hampton v. Sharp Air Freight Service, Inc*., 91 STA 49 (Sec'y July 24, 1992).

The employer, and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings. *Hadley v. Southeast Corp. Serv. Co*., 86 STA 24

(Sec'y June 28, 1991). Concerning interim earnings, the deduction is warranted only if the complainant could not have obtained the interim earnings if his employment with the respondent had continued. *Nolan v. AC Express*, 92 STA 37 (Sec'y Jan. 17. 1995).

The burden of showing that a complainant failed to make reasonable efforts to mitigate his damages is on the employer. *Polwesky*, 90 STA 21, citing *Carrero v. N.Y. Hous. Auth*., 890 F.2d 569 (2d Cir. 1989) and *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614 (6th Cir. 1983). While the complainant need only make reasonable efforts to mitigate his damages and is not held to the highest standards of diligence, and doubt is resolved in the complainant's favor, *Moyer v. Yellow Freight System, Inc*. 89 STA 7 (Sec'y Aug. 21, 1995), the employer may carry the evidentiary burden by showing that jobs for the complainant were available during the back pay period. *Polwesky*, 90 STA 21. The reasonableness of the effort to find substantially equivalent employment should be evaluated in terms of the complainant's background and experience in relation to the relevant job market. *Intermodal Cartage Co., Ltd. v. Reich*, No. 96-3131 (6th Cir. Apr. 24, 1997) (unpublished decision available at 1997 U.S. App. LEXIS 9044) (case below 94 STA 22).

The record establishes that Complainant was discharged from employment on October 26, 2009, and his last day of pay was October 23, 2009. Testimony established that he secured employment at Coteau Des Prairies Hospital in Sisseton, South Dakota on February 2, 2010. B&G Sanitation makes no assertion that Complainant's effort at reemployment was insufficient. Accordingly, I find that Complainant is entitled to a compensatory award of back pay for the time that he remained unemployed, between October 26, 2009 and February 2, 2010.[8]

Pre and Post-Judgment Interest on Back Pay

The STAA expressly provides that a successful complainant is entitled to interest on an award of back pay. 49 U.S.C. § 31105(b)(3)(A)(iii); 29 C.F.R. § 1978.109(d)(1). Payment of interest on a back pay amount is mandatory in a discrimination case in order to make the complainant whole. *Assistant Sec'y of Labor & Cotes v. Double R. Trucking, Inc. ["Cotes"]*, ARB No. 99-061, ALJ No. 1998-STA-34, slip op. at 34 (ARB July 16, 1999). This includes pre-judgment interest on any accrued back pay, as well as post-judgment interest for the period between the issuance of the decision and the payment of the award. Interest is calculated using the rate that is charged for underpayment of federal taxes, pursuant to 26 U.S.C. § 6621(a)(2). *Id.;* s*ee also,* 26 U.S.C. § 6621(a)(2) and (b)(3) (The applicable interest rate is the sum of the Federal short-term rate determined by the Secretary in accordance with 26 U.S.C. § 1274(d) plus 3 percentage points, rounded to the nearest full percent). The applicable interest rates are posted on the web-site of the Internal Revenue Service ("IRS"). Interest is calculated on a quarterly basis.

[8] As the record does not establish Complainant's wages while employed by Respondent, I am unable to calculate the specific amount of back pay to which he is entitled. The District Director shall make all calculations necessary to carry out this order.

In this case, as set forth above, I have found that Complainant is entitled to a back pay award for the period from October 26, 2009 to February 2, 2010. Accordingly, I find that he is entitled to payment of both pre judgment and post judgment interest at the applicable IRS rate, compounded.

Collection of Compensatory Damages

In the course of these proceedings, Respondent asserted that B&G Sanitation Inc. is no longer in business and submitted a document which appears to establish that the company was dissolved on April 1, 2012. It is beyond the purview of this tribunal to determine the validity and effect of this document. Accordingly, although I find Claimant is entitled to an award of back pay and interest, he may, in fact, be unable to collect on this judgment. However, it is beyond the purview of this tribunal to adjudicate this issue.

Reinstatement

A complainant who prevails in a STAA employee discrimination case is presumptively entitled to reinstatement, *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1171 (6th Cir. 1996). As mandated by 29 C.F.R. § 1978.109(b), a complainant's reinstatement is effective immediately upon receipt of an administrative law judge's decision by the respondent. According to the ARB, reinstatement is normally mandatory except in circumstances such as where the parties have demonstrated the impossibility of a productive and amicable working relationship, or where the company no longer has positions for which the complainant is qualified. *See Dale v. Step 1 Stairworks, Inc*., 02 STA 30 (ARB Mar. 31, 2005).

In situations where reinstatement is not possible, then front pay may be appropriate as an equitable substitute and functional equivalent to provide the complainant as close to the same benefit as possible that he would have received with reinstatement. *Williams v. Pharmacia*, 137 F.3d 944, 952 (7th Cir. 1998). Although the STAA does not specify front pay as a remedy, the ARB has determined it is available to a successful litigant. *Michaud v. BSP Transp., Inc.*, ARB No. 97 STA 113, ALJ No. 95 STA 29, slip op. at 5-6 (ARB Oct. 9, 1997). Additionally, the entitlement to, and amount of, front pay are equitable issues to be decided by a judge. *Price v. Marshall Erdman & Assocs., Inc.*, 966 F.2d 320, 324 (7th Cir. 1992).

As Respondent is no longer in business, Complainant is unable to be reinstated. Complainant has neither requested nor established a basis for front pay. He testified that he found reemployment on February 2, 2010. Accordingly, I do not find an award of front pay to be appropriate in this claim.

Other Damages

Complainant has not itemized any other special damages nor has he sought an award of punitive damages, and I find no basis for an award of punitive damages on the facts before me. Inasmuch as Complainant is unrepresented and there are no allowable costs, no attorney fees or costs are awarded.

I find that Respondent prevented Complainant from obtaining unemployment compensation by asserting to the South Dakota Department of Labor Unemployment Insurance Appeals that Complainant was discharged for work related misconduct. Although this may have been true, in part, I have found that Complainant's protected activity was a contributing factor in his discharge. I therefore find that Complainant is entitled to have his record corrected to reflect that Respondent wrongfully discharged him on October 26, 2009, due to his protected activity rather than solely due to misconduct or poor performance.

ORDER

1. Respondent, B&G SANITATION, INC., **SHALL PAY** Complainant compensatory damages for back pay and interest as discussed above.

2. Respondent shall take all necessary action to clear Complainant's work and unemployment records to reflect the accurate reason for his discharge and enable him to collect any unemployment benefits to which he might be entitled under state law.

SO ORDERED:

Digitally signed by CHRISTINE KIRBY
DN: CN=CHRISTINE KIRBY,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

CHRISTINE L. KIRBY
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS:

To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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 may be found to have waived 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, the Associate Solicitor, 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(b). 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(b).