U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 April 2014

CASE NO.: 2013-STA-60

IN THE MATTER OF:

CURTIS C. DICK

Complainant

v.

TANGO TRANSPORT

Respondent

APPEARANCES:

CURTIS C. DICK, Pro Se

For The Complainant

BRIAN R. CARNIE, ESQ.

For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA or Act), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms and conditions of employment.

On or about August 22, 2012, Curtis C. Dick (herein Complainant) filed a complaint against Tango Transport (herein Respondent) with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor (DOL), complaining of retaliatory termination in violation of the STAA, after complaining to Respondent on February 1, February 6 and February 16, 2012, about receiving a call from Respondent during his ten-hour break on January 31, 2012, and February 3, 2012, which he alleged violated the Federal Motor Carrier Safety Regulations (FMCSR). An investigation was conducted by OSHA and on July 5, 2013, the Regional Supervisory Investigator on behalf of the Regional Administrator for OSHA issued the Secretary of Labor's Findings concluding that Complainant's complaint lacked merit and there was no reasonable cause to believe Respondent violated the STAA. (ALJX-1). On August 5, 2013, Complainant subsequently filed a request for formal hearing with the Chief Administrative Law Judge, Office of Administrative Law Judges. (ALJX-2).

This matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order was issued scheduling a hearing in Dallas, Texas, on November 4-5, 2013. (ALJX-3). On September 9, 2013, in compliance with the Pre-Hearing Order, Complainant filed a formal complaint alleging the nature of each and every violation claimed as well as the relief sought in this proceeding. (ALJX-4). On September 23, 2013, Respondent duly filed its Answer and Defenses to the Complaint. (ALJX-5). The parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.[1]

Complainant offered 58 exhibits into evidence, Respondent proffered 26 exhibits.[2] The parties entered into the following stipulations of fact:

1. Complainant was hired by Respondent on April 21, 2010. (Tr. 19).

2. Complainant suffered an accidental injury on February 10, 2012. (Tr. 19).

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Complainant's Exhibits: CX-___; Respondent's Exhibits: RX-___; and Administrative Law Judge Exhibits: ALJX-___.

[2] Respondent withdrew RX-6 and RX-7.

3. Complainant was medically restricted from driving from February 10, 2012 to July 9, 2012. (Tr. 19-20).

4. Complainant was terminated by Respondent on May 24, 2012. (Tr. 20).

5. Complainant was medically released by his treating physician without restrictions on July 9, 2012. (Tr. 20).

6. Respondent offered Complainant unconditional reinstatement on September 28, 2012. (Tr. 21; CX-14, pp. 2-3).

7. Complainant accepted reinstatement on October 9, 2012. (Tr. 22).

8. Complainant quit his employment with Respondent on April 17, 2013. (Tr. 22).

9. Complainant was an employee within the meaning of 49 U.S.C. § 31101. In the course of his employment, Complainant directly affected commercial motor vehicle safety. (Tr. 23-24).

10. Respondent is a dry van and flatbed shipping service for numerous companies. (Tr. 24).

11. Complainant filed a complaint with OSHA on August 22, 2013. (Tr. 525).

Post-hearing briefs were received from the Complainant on February 4, 2014, and the Respondent on February 6, 2014. Complainant filed an amended post-hearing brief on February 13, 2014, because he had "inadvertently" omitted pages from his original post-hearing brief. Complainant filed a reply brief on March 5, 2014, and Respondent filed a reply brief on March 6, 2014. On March 3, 2014, Complainant filed a Motion to Strike Respondent's Post-Hearing Brief because Respondent cited to published decisions which were previously withdrawn from the record as RX-6 and RX-7. On March 21, 2014, the undersigned denied Complainant's motion for the reasons set forth therein. Based upon the stipulations of the parties, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. ISSUES

The unresolved issues presented by the parties are:

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

2. Whether Complainant was discharged in retaliation for his protected activities in violation of the STAA?

3. Whether Complainant is entitled to remedies?

II. STATEMENT OF THE CASE

The Testimonial Evidence

Complainant

Complainant testified he was hired by Respondent on April 21, 2010, as a regional truck driver for Texas, Arkansas, Louisiana and Oklahoma. (Tr. 30-31). "Lacey" was Claimant's initial driver manager, and Tammy Lane Smith was his driver manager at the time he quit working for Employer. Driver managers dispatch the drivers and give the drivers their day-to-day work assignments. (Tr. 31).

Complainant stated he filed written complaints with Respondent on January 31, 2012, February 1, 2012 and February 6, 2012, because his break periods were being interrupted by cell phone calls from his driver manager, Tammy Lane Smith. (Tr. 32; CX-4; CX-5). Smith would ask him to look up information during his break. He would tell Smith that he was on his break, and working during break time violated DOT regulations. (Tr. 32, 34-35). Complainant testified Smith told him she would report him to her supervisor for disrespect. (Tr. 35). Complainant reported the incident to Debra Salvail. (Tr. 36).

Complainant received Qualcomm messages, which is a means to communicate with the truck, from his driver manager. (Tr. 33). On February 1 and 6, 2012, Smith contacted Complainant via Qualcomm. She told Complainant there was a problem with his log and he needed to call the log manager, Heather Davini. She told Complainant that he needed to "do it now." (Tr. 36-37). Davini called him on a cell phone and told him he was not showing that he was on sleeper berth time. (Tr. 37). Complainant would not show sleeper berth time on his logs because he would go home

while he was in the Dallas, Texas area. (Tr. 38). Complainant also complained that his truck bunk had coils sticking up through the mattress. (Tr. 39).

Complainant testified the "line 5" of the log is a non-DOT line and is used to show a truck bob-tailing or being used as a personal vehicle. (Tr. 40). He stated he sought clarification about the language "up under load," which could mean an empty trailer or no load. (Tr. 41-42). He sent Davini an e-mail on February 3, 2012, regarding "line 5." (CX-7). Davini told him he could only use the tractor and if a trailer was attached, he could not use the vehicle for personal use. (Tr. 41-42). He stated he also sent an e-mail to Davini asking about other restrictions, but received no response. (Tr. 42). He sent a complaint to Salvail, a driver services liaison. (Tr. 42-43). He was told that his entries must show eight hours in the sleeper berth and two hours off duty. (Tr. 45).

On February 10, 2012, Complainant had an accident and suffered a right knee and neck injury falling from the cab of his truck. (Tr. 46). He was treated at Concerta Medical Center at 9:17 p.m. on February 10, 2012, for a lower leg contusion, shoulder sprain, knee sprain, neck sprain and abrasion. (CX-8). He was terminated on May 24, 2012, because he had no more vacation leave. (Tr. 47; RX-12). He had taken FMLA leave for 90 days and his personal leave. He alleges his termination was in retaliation for his sleeper berth complaints. (Tr. 48). He acknowledges that he had not been released from medical care or to return to work as of May 24, 2012. (Tr. 49).

In June 2012, Complainant called April Perkins to inquire about his job status. (Tr. 49). Complainant recorded the telephone conversation which was played at the hearing and transcribed as part of the record. (Tr. 59-71; CX-42). Complainant complained of his medical problems and delay in treatment. (Tr. 49, 60-64; CX-42). Perkins told Complainant that he had been terminated in May 2012, but she told him that he could be reinstated if he was able to return to work within 60 days of his termination. (Tr. 50-51, 64-65, 68-70; CX-42). Complainant believed he would have been back at work but for a delay by the insurance company. (Tr. 65, 67; CX-42). He was medically released on July 9, 2012, within 60 days of his termination, but was not rehired by Respondent. (Tr. 52-53).

On July 11, 2012, Salvail called to inform him that he was not being rehired. (Tr. 52, 73). Complainant recorded the telephone conversation which was played at the hearing and transcribed as part of the record. (Tr. 74-81; CX-43). Salvail told Complainant that Respondent was not interested in re-hiring him and there were no openings they felt Complainant was a "good fit" for at the time. (Tr. 74; CX-43). Complainant complained that Respondent was hiring drivers at the time. (Tr. 75; CX-43). Salvail was told that Complainant was not being re-hired, but no reason was given to her by her bosses. (Tr. 76; CX-43). Complainant also complained that his DAC report should not have anything on it. (Tr. 76-77; CX-43).

On October 9, 2012, Complainant was reinstated by Respondent. He was released to return to work on July 9, 2012. (Tr. 86). In that interim, he worked for Redden Transport as a driver for one week to ten days. (Tr. 86-87). He also worked a contract driving job for a few days. (Tr. 87). After his reinstatement, he worked for Respondent until April 17, 2013. (Tr. 89).

Complainant testified he was reinstated to work for a dedicated company, Rheem. (Tr. 90). However, he was not always assigned to the same account. He also hauled scrap paper to International Mills where there may be 20-30 trucks in line to unload. With Rheem, he had home time, which was a benefit. (Tr. 91).

Complainant contends that because Respondent annotated his DAC report with "other" as the reason for leaving employment in May 2012, he was blacklisted from employment. (Tr. 94; CX-13). His work record showed "other" rather than "satisfactory." (Tr. 95; CX-13). He spoke with Cindy Watson sometime between July 9, 2012 and August 2012, who indicated she would change his DAC report to reflect a satisfactory work record. (Tr. 96). His DAC report was later amended to show his employment dates as April 2010 to April 2013. (Tr. 96). Complainant testified the DAC report continues to show "other" as his reason for leaving. (Tr. 99).

Complainant testified he was assigned a load on December 31, 2012, for Lowe's Home Improvement, which he could not perform because he was sick. (Tr. 100-101). He was taken off the load. (Tr. 101).

On October 31, 2012, he wrote a letter to Robbins concerning mistreatment by a manager regarding a mistake in drivers getting the wrong loads. (Tr. 103-106; CX-15). Robbins put Complainant and the other driver on 90-day probation. (Tr. 106). Robbins also put Complainant on notice that any other mistakes would result in immediate termination. (Tr. 108). Complainant contends Respondent has a progressive disciplinary system. (Tr. 108, 127; CX-49).

Complainant was off work from March 6, 2013 to April 4, 2013, after having knee surgery. (Tr. 110; CX-32). He was on FMLA leave. When he returned to work, he was not given a physical exam which he contends violated DOT regulations. (Tr. 111). Because he was repetitively dropping and releasing trailers, a physical exam was required according to Complainant. Complainant's doctor had released him to return to work without restrictions. (Tr. 112-113).

Complainant testified on April 16, 2013, Complainant was assigned to haul water. Jan Baxter told him that he would be terminated if he did not haul the load. Baxter told him over the Qualcomm system that he had to do the load. (Tr. 116). Complainant disputed this assignment because he was reinstated as a dedicated truck driver for a specific customer, Rheem. (Tr. 117). On April 17, 2013, Complainant was assigned a paper load rather than his dedicated load. (Tr. 120). Complainant called his wife to come pick him up and took the tractor to Respondent's facility. (Tr. 120-121). He went on the Qualcomm system and quit his job with Respondent. (Tr. 121; CX-36).

Complainant was evaluated by a psychologist for depression following his termination. (Tr. 122-123; CX-51).

A service failure is given when a driver does not get to the destination point on time. Complainant testified that Baxter gave him unwarranted service failures. (Tr. 124).

On cross-examination, Complainant testified that in January 2012 he had truck issues with truck No. 8175 breaking down. (Tr. 130-131; RX-1, p. 26). On January 3, 2012, Complainant complained about a cooling leak. (Tr. 131-133; RX-1, p. 26). On January 4, 2012, Complainant notified Respondent that his truck was broken down in El Paso, Texas. (Tr. 133-134; RX-1, p. 27). The truck was in repairs for a couple of days and Complainant was 500 to 600 miles from home. (Tr. 134-135). He notified Respondent on January 6, 2012, that the truck repairs were completed. He was given $250.00 in breakdown pay. (Tr.

135). Complainant did not receive another load for several days and requested layover pay. (Tr. 135-136; RX-1, p. 35). He was paid $150.00 for the layover. (Tr. 136; RX-1, p. 35). Complainant complained that the $150.00 layover pay was not enough. (Tr. 137; RX-1, p. 35).

On January 19, 2012, Complainant's truck broke down again in Waco, Texas, and had to be towed. (Tr. 137). He was assigned Respondent truck No. 8208 on January 23, 2012. (Tr. 139-140). Complainant complained about preventative maintenance done on his truck. (Tr. 140; RX-2, p. 65). On January 26, 2012, Complainant complained about the mattress in his truck and was told he would be assigned a load which would bring him to the shop to look at the mattress. (Tr. 141; CX-6). He also complained about the air conditioning in the truck. (Tr. 141-142). Complainant's written complaint to Respondent about the truck mattress is set forth in CX-6. (Tr. 142; CX-6).

On January 27, 2012, Complainant wrote on the Qualcomm system that he needed to be home for a dental appointment on January 30, 2012, and he was frustrated. (Tr. 142-144; RX-2, pp. 81-83). Smith suggested that Complainant request a new truck. (Tr. 144-145; RX-2, p. 85). Complainant was frustrated with the repairs performed by the shop. (Tr. 145). The following day, Complainant complained that Smith interrupted his break. (Tr. 146). On February 1, 2012, Complainant filed a complaint with Salvail regarding Smith interrupting his break. (Tr. 147; RX-15; CX-5).

On February 3, 2012, Complainant received a Qualcomm message about his paper log or e-log issues from Smith while he was on sleeper berth time. (Tr. 148-150; RX-2, p. 112). Smith asked Complainant to call "Heather" in the log department "ASAP." (Tr. 150-151; RX-2, p. 112). On February 6, 2012, Complainant filed a complaint with Salvail about his mattress and being off duty when interrupted by Smith's call. (Tr. 150; RX-16; CX-4). In his complaint, Complainant alleged that Smith told him to call Heather "NOW." (Tr. 150-151).

On February 9, 2012, Complainant sought clarification from Smith about "line 5" of the e-logs, and was told he may need additional e-log training from Respondent. (Tr. 155-156; RX-2, p. 134). Complainant told Smith he did not need additional training. Complainant was told to contact Ruben to set up training, but no training was provided because Complainant was injured the following day. (Tr. 156; RX-2, p. 134).

On February 10, 2012, Complainant injured his knee at work, and his doctor restricted him from driving. On February 16, 2012, Complainant sent a letter to the safety department detailing his injury. (Tr. 157; RX-18). On February 16, 2012, Complainant sent an e-mail to Ivan Buckner with an attached complaint. (Tr. 157-158; RX-19; CX-9). "Heather" told Complainant that his logs must show eight hours in the sleeper berth. Complainant contends DOT requires that the driver be away from the truck for ten hours. (Tr. 159-160; RX-19; CX-9). He believed "Heather" was telling him to falsify his logbook. (Tr. 160). He acknowledged that "Heather" did not tell him to drive while he was logged as sleeper time. (Tr. 161).

On February 28, 2012, Complainant sent a letter to Salvail complaining about Karen Hooks's treatment of his workers' compensation claim while he was on workers' compensation with his injury. (Tr. 161-162; RX-20).

On April 11, 2012, Complainant filed another complaint against Respondent. (Tr. 162; RX-22; CX-11). Complainant reiterated his prior complaints and complained about problems with getting his medical treatment approved by the insurance company. (RX-22; CX-11). On May 23, 2012, Complainant received a physical status report which was sent to Respondent, but he could not drive. (Tr. 163; RX-14). He was terminated by Respondent on May 24, 2012. (Tr. 163).

Complainant acknowledged that he signed and received the Respondent's Handbook. (Tr. 164; RX-21).

Complainant stated that there were no other reasons but his complaints why Respondent would discharge him. (Tr. 165). No one at Respondent would address his complaints. (Tr. 166). His complaints were referred to legal counsel.

In mid-August 2012, Complainant received his DAC report. (Tr. 167).

On October 10, 2012, Complainant refused a load due to low mileage. (Tr. 168-169; RX-3, p. 142). Jan Baxter told Complainant that dedicated Rheem drivers were not allowed to refuse loads. (Tr. 169; RX-3, p. 150). Complainant informed Baxter that he preferred not to drive on the weekends, particularly Sundays. (Tr. 169-170). Drivers could request days off on a "Michael-46" form, but were not guaranteed their requested days off. (Tr. 170-171). He did not want to drive on

New Year's Day because of the drunks on the road. (Tr. 171-173; RX-3, p. 390).

On December 28, 2012, Complainant sent an e-mail to Baxter complaining that he was being discriminated against because of his race. (Tr. 174; CX-18). Complainant called in sick on New Year's Day and did not take his assigned load. (Tr. 175). On January 2, 2013, Baxter gave him a service failure (T-call) even though Complainant told Respondent and Reuben Gonzales the manager in Laredo for Rheem that he had a cold and could not take the load. (Tr. 175-178; RX-3, p. 402; CX-40). Baxter rescheduled the delivery date with the same load number, which Complainant claims meant he would not be paid. (Tr. 178). He filed a written complaint on January 2, 2013. (Tr. 179; CX-21). Complainant also sent complaint e-mails to Watson on January 3, 2013, about his log duty status. (Tr. 179-180; CX-22). Watson indicated that Complainant should log time spent waiting in line or at the dock as on duty time in line four. (Tr. 180; CX-22, p. 1). Complainant testified that this was consistent with DOT regulations. (Tr. 180).

On January 25, 2013, he refused a load because of "hours of service." Baxter told him he had enough hours to do two other loads and there was no declining a load. (Tr. 181; RX-3, p. 497). Complainant claimed he had put his time in and Baxter cancelled the load. Baxter requested a "face-to-face" meeting with Complainant. (Tr. 182). Complainant was afraid he would be fired. (Tr. 183). No meeting was held and it was not rescheduled. (Tr. 183-184).

Regarding his 90-day probation, Complainant acknowledged he picked up a load at Hawkins, Texas. (Tr. 184). "CJ" was the other driver involved. Complainant delivered a Louisiana load to San Antonio, and "CJ" delivered the San Antonio load to Louisiana. (Tr. 185). Robbins gave both of the drivers a 90-day probation. (Tr. 185-187; RX-3, p. 580).

On March 1, 2013, Baxter told Complainant he could not be operating trucks based on his hours of service. (Tr. 187). Complainant stated he used his truck as a personal vehicle for a dental appointment, but he also completed his work assignment. (Tr. 187-188).

On March 6, 2013, Complainant took family leave for his knee treatment. He returned to work on April 9, 2013. (Tr. 188-189). He was released by his doctor with no restrictions, on April 3, 2013. (Tr. 189-190; RX-24, p. 8).

When he was medically released to return to work on July 11, 2012, Complainant contends there was no other reason for Respondent not to re-hire him other than his complaints. (Tr. 190-191).

In October 2012, Complainant was extended an unconditional offer and restored to employment with pay and benefits. (Tr. 192-193). Employer offered back-pay to Complainant from July 9, 2012 through October 9, 2012. (Tr. 193). He submitted to a drug test and physical exam and spent the night in Shreveport, Louisiana, and waited on a truck assignment. (Tr. 194).

Complainant had interim employment at Redden where he earned $1,100-$1,200, but voluntarily quit the employment on August 23, 2012. (Tr. 196-198; RX-27, p. 6). He stated his DAC report which shows he worked for Progressive in August 2012 was incorrect. (Tr. 196).

Complainant signed the driver's daily logs. (Tr. 198-199; RX-26).

Complainant quit his employment with Respondent on April 23, 2013. He thereafter complained that he should have been given a physical. (Tr. 200; RX-28). He filed an EEO complaint in June 2013. (Tr. 203; RX-5). He sought counseling in April 2013 while on leave for knee surgery. (Tr. 204).

David Robbins

Robbins is the Dedicated Operations Manager for Respondent. (Tr. 208). He oversees a fleet dedicated to a particular customer. (Tr. 209). He has seven driver managers under his supervision. (Tr. 209-210).

Robbins testified he received letters from Complainant. He did not respond to the letters, and instead sent them to Human Resources. He was told by legal counsel not to respond to the letters. (Tr. 210). No reasons were given for not responding to the letters. (Tr. 210-211). Complainant's complaints involved one of his driver managers. (Tr. 213).

Robbins recalled placing Complainant on 90-day probation, but does not recall the reason for the probation. (Tr. 213-216). He recalled two drivers were involved and both drivers received probation. (Tr. 216). Only Robbins would put drivers on probation, not the driver managers. Calvin Stark was the other driver given 90-day probation. (Tr. 218).

On cross-examination, Robbins stated he had no problems with Complainant after he was reinstated in October 2012. (Tr. 223). Baxter reported Complainant was frustrated about back hauls and loads. Respondent had an agreement with a dedicated alcohol customer that drivers would not leave the loads unattended. (Tr. 224). Complainant wanted to drop one of its loads and use the truck for personal business. (Tr. 224-225). Complainant was told he could not leave the load and use of the truck for personal business was against Respondent's policy. Robbins explained this policy to Complainant. (Tr. 225).

In January 2013, Baxter wanted a face-to-face meeting with Complainant, which Robbins thought was a good idea, but it did not happen because Complainant's dispatch was changed. (Tr. 226-227).

Robbins testified he would have placed any other driver on 90-day probation for similar acts as Complainant. (Tr. 227).

Dedicated customers, including Rheem, get 80 percent of the revenue for return loads to Laredo, Texas. (Tr. 228). The high season for Rheem accounts is April to September. (Tr. 229). Complainant was an original senior driver for Rheem. Senior drivers are given priority to stay on during the slow season. (Tr. 230). Senior drivers have to take other accounts during the slow season. (Tr. 230-231).

On re-direct examination, Robbins confirmed that "line 5" of the logs allowed use of trucks only to go home. The drivers could drive their trucks home, but they could not use the trucks for personal business. (Tr. 239).

On examination by the undersigned, Robbins testified he has given 90-day probations and terminated other drivers for similar events. Respondent has a written progressive disciplinary policy. (Tr. 242). After a 90-day probation is given, the next step in the progressive disciplinary policy would be removing the driver from a dedicated position or terminating the driver. These decisions are made by a driver board composed of

operations managers. The driver board will consider the driver's history. (Tr. 243). Complainant's 90-day probation was issued over Qualcomm. (Tr. 244).

Cindy Watson

Watson is Safety Assistant and Office Manager for the Respondent. (Tr. 246). She is the manager of personnel in the office, and oversees drug screenings, logs and driver files. (Tr. 246-248). She works directly under Ivan Buckner, and has seven employees working for her. (Tr. 247-248). The driver files do not contain pictures of the drivers. (Tr. 248-249). Watson has never met Complainant. (Tr. 249). She makes entries in the DAC. (Tr. 249-250).

On July 9, 2012, she may have talked to Complainant. (Tr. 250). She does not recall being off work in July 2012. She did not know of a reason why another employee would not allow Complainant to speak to her. (Tr. 251). She did not recall any conversations with Salvail about Complainant. (Tr. 252). Respondent has 800 drivers and she makes 25 DAC entries per week. (Tr. 253).

Watson recalls Complainant wanted his DAC entry changed. He wanted the reason for leaving and his work record to be changed from "other." (Tr. 254). Complainant was reinstated as a rehired driver in October 2012. (Tr. 256, 259). Ralph Nelson told her not to change Complainant's DAC report. (Tr. 258-259, 263). Complainant received an unconditional offer of reinstatement. (Tr. 261).

It is Watson's understanding that line 5 of the log allows a driver to use his truck for personal use one hour per day with a driver manager's permission. (Tr. 265, 268).

On cross-examination, Watson explained the Hire Right DAC is a database that documents drivers' hiring history. (Tr. 277). Respondent is not required to use the Hire Right DAC. It can use the service without reporting it. A DAC report is created when a driver leaves employment. If a driver is reinstated, the DAC report is not updated unless the driver leaves employment for a second time. (Tr. 278). Complainant's DAC report showed two periods of employment. (Tr. 280). To her knowledge, Complainant's DAC report was not changed to remove the gap in employment from May to October 2012. The status options for the DAC report are resigned, discharged, retired and "other." (Tr. 281). From April 2012 to May 2012, the term

"other" on Complainant's DAC report was more beneficial to Complainant than terminated or discharged. (Tr. 281-282). The status of "other" is often used when a driver cannot work due to health reasons. "Other" was not a disqualifying circumstance. (Tr. 282).

On re-direct examination, Watson was presented with a letter from Hire Right to Complainant indicating that his dates of employment were changed to reflect employment from April 20, 2010 to April 20, 2013. (Tr. 284-285; CX-30). She did not know who changed Complainant's report. (Tr. 287).

Richard Lawson

Lawson has been Director of Risk Management for Respondent since November 2005. (Tr. 299). He oversees insurance, workers' compensation claims and investigation of accidents. (Tr. 299-300). He recalls that there was dispute about Complainant's provider for his workers' compensation claim since he wanted to go elsewhere for treatment. (Tr. 300-301).

Lawson testified that when family leave ends, if the worker is unavailable for dispatch, he is terminated. (Tr. 301-302). The dispatch policy in effect in 2012 is set forth in the Employee Driver Handbook. (Tr. 301-302; RX-8, p. 5). Other drivers have been terminated for the same reason as Complainant. Lawson estimated that 30 to 40 employees were terminated for the same reason as Complainant. Lawson testified that Complainant made no complaints to him about Respondent or Lawson. (Tr. 303).

In July 2012, Lawson received an e-mail from Complainant about being re-hired. (Tr. 303). Lawson gave that information to the HR department. He had no role in re-hiring Complainant. When Complainant was medically released it must be without restrictions. (Tr. 304). The re-hire policy in effect in 2012 required that reinstatement be within 60 days of termination. The policy does not mandate reinstatement. It simply allows the employee to be credited with their original hire date. (Tr. 305-306; RX-8, p. 8).

On cross-examination, Lawson stated he was the decision maker to terminate Complainant on May 24, 2012. (Tr. 306-310). Following his work-injury, Complainant went to the emergency room, and was directed by Respondent to go to Concentra. Lawson did not recall giving Complainant permission to obtain immediate treatment at the emergency room. (Tr. 312). Drug tests are not

mandatory for workers' compensation cases, because it is a non-DOT drug test. (Tr. 313-314). Complainant performed the drug test. (Tr. 314).

Lawson was notified by HR that Complainant's family leave was exhausted. (Tr. 315). Complainant was unavailable for dispatch, therefore he had to be terminated. (Tr. 316). Complainant was informed that he could still be rehired. Lawson had no recollection of the problems Respondent had with Complainant's medical issues. (Tr. 317, 325).

Respondent's Occupational Injury Benefit Plan was in effect in 2009 for all drivers, not just Texas drivers. (Tr. 320-323; CX-50). The policy was not in effect in 2012. (Tr. 322). Complainant's health insurance covered a network of doctors. Complainant should have been made aware of the list of doctors after his injury. (Tr. 325).

Jan Baxter

Baxter is the Dedicated Accounts Manager for Respondent, and has held the position since January 2012. (Tr. 331). She was Complainant's driver manager from October 2012 to April 2013 after Complainant was reinstated as a dedicated driver for Rheem. (Tr. 332).

Baxter described the Qualcomm system as trucking e-mails. (Tr. 333). The system has columns which reflect the truck number, date, time and "o" or "i" for outbound and inbound, respectively, and the message. (Tr. 333-335). RX-3, p. 138 is a preplan load assignment. When a preplan load assignment is sent out, the driver must accept or reject the load. Drivers must give their reasons for rejecting a load. (Tr. 335). RX-10 is an e-mail dated October 10, 2012, from Baxter to Human Resources indicating that Complainant was requesting time off and vacation pay within 24 hours of reinstatement. She was asking for input on how to respond to Complainant's request. (Tr. 336-337). She was informed that Complainant was due vacation pay. Complainant received paid time off from November 19, 2012 to November 23, 2012. RX-9 is an absence request form with an attachment showing Complainant's original hire date as April 2010. (Tr. 338). Baxter was told that Complainant was reinstated to his original hire date. (Tr. 339).

RX-10 also reflects that Complainant refused the first load assignment. Baxter testified that Complainant refused the load because "the miles weren't good enough for him." The assignment was the only assignment she had at the time. (Tr. 339). She talked to Nelson who instructed her to treat Complainant "like any other driver." (Tr. 340).

Baxter sent a Qualcomm message to Complainant on October 11, 2012. She informed him that Rheem account drivers were not guaranteed home time every weekend and were not allowed to refuse loads. (Tr. 341; RX-3, pp. 149-150). Rheem drivers were instructed that they could not take their loads "through the house," meaning they could not take their loads home. (Tr. 341-342; RX-3, pp. 149-150). Rheem drivers were required to work two weekends per month. (Tr. 342).

Baxter stated that there were approximately 35 drivers for Rheem in October 2012. (Tr. 342). The Rheem account increased to 50 or 60 drivers during the spring and summer. (Tr. 343).

On October 11, 2012, Baxter sent another Qualcomm message to Complainant indicating that he could not use the yard in Irving, Texas. (Tr. 343; RX-3, p. 150). She testified that the drivers could not use the yard to drop off loads because of break-ins. (Tr. 343). The policy about the Irving Yard was for all drivers. (Tr. 344).

In October 2012, Complainant inquired about orientation pay. Drivers are paid to go to orientation. Complainant was not paid because he did not go to orientation. (Tr. 344-345). When Complainant returned to work he was administered a DOT physical and drug test. (Tr. 345). Baxter told Complainant that he could only communicate with her and she would then talk to departments about his complaints. (Tr. 345-346). Such instructions were given to all drivers. (Tr. 346).

Baxter described various problems with Complainant to include his refusal to take loads, insubordination and telling other drivers she was "a horrible person." Complainant did not want to work weekends, and would refuse loads that required weekend work. Complainant thought all of his loads should be for Rheem. (Tr. 346). Respondent's policy was to return trucks to Rheem in Laredo, Texas with another load rather than "dead head" back with no load. (Tr. 347).

Baxter testified that she was aware that Complainant complained about her to Robbins. (Tr. 347). She did not treat Complainant any differently because of his complaints. She recalls that on New Year's Eve 2012 she instructed Complainant to "T-call," meaning Complainant would drop a load at the Irving, Texas Yard and pick up another empty trailer to perform a new load. (Tr. 348). Complainant called in sick and did not take the load. (Tr. 349). Complainant told her he would be on the road with all the drunks. (Tr. 349-351; RX-3, p. 402). Baxter gave Complainant a service failure on January 2, 2013, because he did not deliver the "T-called load." (Tr. 351-352). Baxter testified that service failures are indicative of bad service. (Tr. 352).

Complainant also turned down a load in Lancaster on December 21, 2012. Baxter told Complainant turning down the load was not an option. (Tr. 353; RX-3, p. 381). She testified that this was typical of Complainant's attitude during the six months they worked together. (Tr. 354). She had little phone contact with Complainant. They mainly communicated through Qualcomm messages. (Tr. 354).

In January 2013 Baxter requested a face-to-face meeting with Complainant because she thought things were getting out of hand with his refusal to do loads and being rude to her. Robbins agreed with Baxter. (Tr. 355). She also talked to Nelson about Complainant. (Tr. 355-356). The first meeting was cancelled because Robbins had to go out of town. The second meeting was cancelled because Complainant's load was re-directed. No other meetings were scheduled. (Tr. 356).

Complainant had an "hours of service" violation on March 1, 2013. The Qualcomm messages reflect an exchange between Baxter and Complainant where Baxter told Complainant to pull over and take a break because he had exceeded his hours of service. Complainant refused the direction and continued to drive. (Tr. 356-359; RX-3, pp. 753-755). Baxter testified that Complainant's trailer was not empty when she told him to stop driving. (Tr. 362). The Qualcomm messages show that Complainant did not deliver the load until over an hour after Baxter told him to stop driving. (Tr. 362; RX-3, p. 754).

Complainant was on medical leave from March 2013 to April 9, 2013. Baxter continued to experience problems with Complainant after he returned from leave. Complainant was assigned truck No. 8384 after he returned from leave. (Tr. 363).

On April 12, 2013, Baxter sent a Qualcomm message to Complainant stating that he needed to perform a shuttle load and he had "no choice in the matter." (Tr. 363; RX-4, p. 636; CX-37). She told Complainant he would be terminated if he did not accept the dispatch. (Tr. 364; RX-4, p. 636; CX-37). Baxter testified she sent the message at the direction of Nelson. A shuttle load is a short distance load of approximately 30 miles. (Tr. 364). Shuttle loads are not considered desirable loads by the drivers. There were eight drivers working that day, and all of them were assigned shuttle loads. (Tr. 365).

On April 13, 2013, another Qualcomm message was sent to Complainant by Baxter informing him to do water loads or he will be terminated. (Tr. 365-366; RX-4, p. 645). Complainant reluctantly agreed to do so. (Tr. 366). On April 14, 2013, Complainant refused a load because he had a doctor's visit, not because he was out of hours of service. (Tr. 366-367; RX-4, p. 653; CX-46, p. 2). Baxter decided to bring Complainant to Shreveport, Louisiana to terminate him. She assigned Complainant a load to Shreveport. (Tr. 367). The meeting did not take place because Complainant quit his employment. (Tr. 368).

On cross-examination, Baxter explained that RDO is an acronym for "requested days off." Drivers make requests for days off every Monday, and she tries to comply with their requests. (Tr. 369). There is no standard operating procedure in Laredo, Texas for Sundays. (Tr. 370).

Baxter confirmed that she can monitor the location of trucks at all times. (Tr. 372). Drivers must submit their hours each day to determine how many additional hours they can work. (Tr. 373).

RX-3, p. 141 reflects that Complainant requested to be off for vacation from October 13 to October 15, 2012. (Tr. 379-380). On October 10, 2012, Complainant refused a load and told Baxter it was a bad load. (Tr. 382-385; RX-3, pp. 141-142). On October 11, 2012, Complainant accepted a load to Hodge, Louisiana. (Tr. 385-390; RX-3, p. 147). Hodge loads were not assigned to Rheem drivers, but Rheem drivers would periodically take Hodge loads. (Tr. 394-395).

Baxter recalled Complainant being put on probation for delivering the wrong load. (Tr. 395-397). She believed the mistake was Complainant's fault for failing to read the paperwork, not the shipper's fault. (Tr. 397). It is the driver's responsibility to look at the paperwork and confirm that he has the correct load. (Tr. 399).

On January 2, 2013, Complainant filed a written complaint about Baxter. (Tr. 399-402; CX-21).

On December 30, 2012, Complainant had a load to be picked up at Carrollton, Texas. (Tr. 403). He had a T-call at Irving, Texas, rather than deliver to the customer. (Tr. 404-405). He terminated the load so that he could perform a new load for Lowes, but he got sick and did not take the Lowes load. (Tr. 406-409). Baxter received an e-mail from Rueben Gonzales regarding Complainant calling in sick. (Tr. 410-413; CX-20, p. 3). Baxter reassigned Complainant to the original load that he had T-called. (Tr. 415; CX-20, pp. 1-2). She did not assign a new load number because it was Complainant's original load. (Tr. 422). Complainant would receive decent pay of $25.00 and $00.38 per mile for delivering that load. (Tr. 424). During the formal hearing, while testifying on the stand, Baxter told Complainant to "shut up," and was obviously frustrated over having to deal with him and/or his questioning. (Tr. 425).

The face-to-face meeting Baxter requested with Complainant was cancelled because Complainant's load was re-consigned to South Louisiana. (Tr. 430). He sent an e-mail to Baxter regarding the reason for the meeting. (Tr. 430; CX-25). Baxter stated that Complainant's e-mails did not influence not having the meeting. (Tr. 433).

A driver is allowed to call the payroll department regarding problems with pay. (Tr. 435).

On March 1, 2013, Baxter stated Complainant was in violation of his hours and was told to pull over before the load was delivered. (Tr. 436). Baxter did not recall if Complainant had a dental appointment and used the truck for personal reasons. (Tr. 437).

On April 12, 2013, Complainant was one of eight drivers assigned to run shuttle loads over the weekend or he would be terminated. (Tr. 439-441; RX-4, p. 636).

On April 14, 2013, Complainant was told to go home. Complainant had been off one month and did two loads and wanted to go home. (Tr. 447-449; RX-4, pp. 653-654). Baxter did not know who sent the message telling Complainant to go home. (Tr. 451). Shuttle loads are more demanding work. (Tr. 453). Baxter told Complainant to turn the truck around and go back to Louisiana to pick up a load, after someone else told him to go home. (Tr. 454). Baxter testified that she asked Complainant to turn around because there was a broken down truck in Shreveport, Louisiana, and he was the closest driver. (Tr. 455-456).

Complainant's final load on April 17, 2013, was a T-call. (Tr. 457-458). On April 17, 2013, Complainant left the truck in Shreveport and quit his job. (Tr. 458).

Ralph Nelson

Nelson is Senior Vice-President and General Counsel of Respondent and has held those positions since 2003. (Tr. 465-466). He is head of Human Resources and Risk Management and all legal affairs. He reports to the President of Respondent. (Tr. 465).

Nelson testified that Respondent is primarily an irregular route carrier. Respondent also has some dedicated customers, which are easier to plan. The area serviced is from Laredo, Texas to the Carolinas, Chicago and Minneapolis. (Tr. 466). Respondent is a "forced dispatched company," which means the driver must accept the dispatch. Respondent also employs 20 to 30 truck driver owners, who are allowed to turn down dispatches. Complainant was a company driver not a truck driver owner. (Tr. 467).

Respondent's trucks have to operate at 90 percent full to maintain a profit, meaning each truck must be carrying a load 90 percent of its driving time. Varying factors affect the percentage such as sick drivers, break downs and hours of service. Drivers are paid by the mile or by the load. (Tr. 468).

Nelson identified RX-8 as excerpts from the Respondent's driver handbook which was in effect from 2012 to present. (Tr. 469-470). CX-49 was described as the Respondent's progressive discipline policy in effect in 2012. (Tr. 470-471). Respondent employs 850 drivers and has a turnover in excess of 100 percent each year. (Tr. 471). Nelson stated that steps in the

progressive discipline policy can be skipped depending on the seriousness of the conduct or act. (Tr. 472).

Nelson had no role in the decision to terminate Complainant in May 2012. He had a role in establishing the policy that drivers who are unavailable for dispatch after the expiration of FMLA leave would be terminated. (Tr. 472).

Nelson's first involvement with Complainant was a complaint letter, which came to his attention in January or February 2012. It is usual for him to get involved with drivers. (Tr. 474). He told managers to ignore Complainant's letters, but he looked into the issues. (Tr. 475). One of the issues raised was sleeper berth interruption; he spoke to Buckner who informed that **de minimis** interruption is not a DOT violation. Nelson had never heard of the issue before. (Tr. 475-476). He did not speak with Complainant. The second issue raised was falsification of Complainant's log book. Nelson looked into the issue and determined that Heather Davini had done nothing wrong and did not violate DOT regulations. (Tr. 477). He did not respond to Complainant. Complainant sent more letters of complaints than any other drivers Nelson has worked with. (Tr. 478). Nelson concluded that there was nothing to be gained by responding to Complainant. (Tr. 478-479).

In July 2012, Complainant sought re-employment. Nelson decided not to re-hire Complainant. Nelson testified Complainant was not happy with Respondent and Respondent did not want Complainant back. (Tr. 480). Nelson stated Complainant's complaints played no role in his decision. (Tr. 480-481). Nelson testified he would have made the same decision not to re-hire Complainant if no complaints had been filed. (Tr. 481).

In August 2012, Complainant filed an OSHA complaint. (Tr. 481). An unconditional offer of reinstatement was extended to Complainant. Nelson made the decision to extend the offer which Complainant accepted. His start date remained April 2010 for purposes of accumulation of vacation time. The DAC report changes were not included in the offer. (Tr. 482).

RX-8, page 8 is Respondent's vacation policy. Complainant was offered a more beneficial vacation period with his original start date. (Tr. 483). Respondent offered Complainant reinstatement with his original start date even though he had been out of employment for more than 60 days, treating Complainant more favorably than the policy typically allowed. (Tr. 485). Complainant was not required to go to orientation

when he returned to work in October 2012. He was treated more favorably than the policy typically allowed when not required to attend orientation. (Tr. 486). Respondent tried to settle the OSHA complaint, but was not able to do so. (Tr. 487).

Nelson talked to Baxter, Complainant's driver manager, about his return to work. (Tr. 487). She was not "thrilled." He told her to give Complainant the average or more miles. Complainant began refusing loads or work on weekends making Baxter's job more difficult. (Tr. 488). Nelson stated a refusal to take a load is a terminable offense. Complainant was given far more liberality with refusals than other drivers. (Tr. 489).

Nelson instructed managers not to respond to letters from Complainant who had an agenda with protection of whistleblower complaints. At the time, Complainant had an attorney and Nelson told managers not to communicate directly with Complainant regarding his complaints. (Tr. 490).

In March 2012, Baxter told Complainant to stop driving because he had driven four hours over his service hours. (Tr. 491-492). Nelson had Buckner look into it and it was clear Complainant drove more than his service hours. Respondent did not terminate Complainant, but other drivers have been terminated for such a violation of service hours. (Tr. 492). RX-26 represents Buckner's investigation or audit of Complainant's logging errors. Nelson testified that Complainant violated logging regulations on a regular basis by reporting that he was in places when he was not. (Tr. 493-494). Such a violation is a terminable offense. The Qualcomm satellite tracking system is accurate. (Tr. 494). It is a DOT violation to exceed hours of service and falsify logs. (Tr. 495).

On April 8, 2013, Buckner issued a notice to Complainant indicating that his logs were in violation of Part 395 of the Motor Carrier Regulations. On February 13, 2013, Complainant exceeded fourteen hours of work. On February 28, 2013, there was an "hours error" and miles per hour violation. (CX-34, p. 1).

Complainant did not want to work on weekends and refused loads. Nelson told Baxter she should tell Complainant he would be terminated if he refused to take loads. (Tr. 496). Nelson decided to terminate Complainant for refusing loads and insubordinate behavior toward Baxter. (Tr. 497). No one told Complainant he was going to be terminated. He never had a

meeting with Complainant. (Tr. 498). Complainant resigned from employment by a Qualcomm message. Nelson testified he would have fired Complainant long before this time except for his pending complaint with OSHA. Other drivers have been fired for similar offenses. (Tr. 499).

Nelson testified that he never heard about the need for a physical exam upon being re-hired. The DAC report is a voluntary system. (Tr. 500). The entry "other" is false because Complainant did not work for 12 weeks from July to October 2012. (Tr. 501). Respondent amended the DAC report based on a complaint filed by Complainant with Hire Right. (Tr. 502; CX-12). Nelson testified that changing the report was not accurate, but he changed the report in an effort to resolve "difficulties" with Complainant. (Tr. 503).

On cross-examination, Nelson affirmed that he was not involved in Complainant's May 24, 2012 termination. (Tr. 503-504). In July 2012, Nelson made the decision not to re-hire Complainant. Nelson was aware of multiple complaint letters sent by Complainant to Respondent. Nelson testified that the decision not to re-hire Complainant was not based on the complaint letters. He stated that the decision was based on conversations with Tammy Lane Smith regarding Complainant not being a satisfied driver. (Tr. 505). Nelson testified that the letters influenced his decision "to the extent that [Complainant was] constantly complaining about [his] unhappiness" but not because Nelson was concerned Complainant would "go to the DOT or some other protected activity." (Tr. 505-506). Nelson was aware of Complainant's letters and was concerned enough to tell people not to respond. (Tr. 506). Nelson testified that Complainant was not re-hired because he was not a happy driver based on the totality of everything when he was working with Respondent. (Tr. 509).

49 U.S.C. § 391.45 states that any driver whose ability to perform his normal duties has been impaired by a physical or mental injury or disease "must be medically examined and certified...as physically qualified to operate a commercial motor vehicle." (CX-48, p. 1). Nelson testified that Complainant's knee surgery could have been classified as an impairment under the regulation and may have required a DOT test. (Tr. 516). Respondent had a medical release from Complainant's doctor indicating that he was fully qualified to return to work as a truck driver. (Tr. 517).

Nelson stated Respondent was under no obligation to respond to letters from Complainant. (Tr. 530, 532). He had no knowledge of meetings between Robbins and Baxter and Complainant. (Tr. 531). He would not have objected to the meeting. (Tr. 532).

Nelson testified he was not involved in DAC reporting. He instructed Cindy Watson to make no changes to Complainant's DAC report. Subsequently, he instructed Watson to change the DAC report. (Tr. 534).

CX-14 is a series of e-mails dated October 2, 2012 and October 3, 2012, between Paul Taylor, Complainant's former attorney, and Brian Carnie, an attorney for Respondent. (Tr. 542). Mr. Carnie made an unconditional offer of reinstatement to Complainant. The reinstatement offer was not conditioned on settlement. (Tr. 547; CX-14, p. 2). Complainant was reinstated to the same position at the same pay rate. (Tr. 545-546). Nelson testified that DAC was not considered in the decision to reinstate Complainant. (Tr. 548). Complainant's complaint letters were looked into, there were no violations found. (Tr. 555). Based on the totality of the circumstances, Nelson concluded that Complainant should not be rehired because he was not happy being an employee of Respondent. (Tr. 555-556, 559).

The Contentions of the Parties

Complainant argues that he was a good employee for Respondent and received satisfactory ratings. He contends that his driver manager treated him badly and disparately.

Complainant contends he engaged in protected activity on the following dates: January 31, 2012, when his driver manager interrupted his sleep; February 1, 2012, when he complained to Salvail that his driver manager threatened him; February 1 and February 6, 2012, when he wrote complaint letters to Driver Services regarding break interruptions by his driver manager; February 16, 2012, when he complained to Buckner of break interruptions; and April 11, 2012, when he forwarded his complaints to Human Resources.

Complainant asserts his protected activities were contributing factors in Respondent's decision to terminate his employment in May 2012. He points to Respondent's knowledge of the protected activities coupled with the close temporal proximity of the protected activities and his termination. Complainant argues Respondent had no legitimate basis not to re-

hire him and continued to report incorrect information on his DAC report to blacklist him in the driving industry. He further argues that Respondent has maintained the erroneous report knowing it is false.

Complainant asserts Respondent has not shown by clear and convincing evidence that it would have discharged him in the absence of his protected activity. He argues it is not highly probable or reasonably certain that Respondent would have fired him absent his protected activity. He asserts that he was forced to quit working for Respondent in April 2013 based on his disparate treatment, which he argues constituted a constructive discharge.

Finally, Complainant contends Respondent has not met its burden of showing that he failed to mitigate his damages. He argues Respondent offered no evidence that substantially equivalent jobs were available or that Complainant failed to make reasonable efforts in finding substantially equivalent employment. Complainant seeks back wages, emotional distress and mental pain damages, punitive damages, interest, attorney fees and costs. He also seeks abatement of the violation to include requiring Respondent to post a copy of the decision and order for 90 consecutive days, provide a copy of the decision and order to all present employees and employees who worked for Respondent during Complainant's employment and to expunge all references to Complainant's discharge from his personnel records.

Respondent argues that Complainant failed to prove that he engaged in protected activity. It contends that Complainant's complaints about interference with his break times in February 2012 are not safety violations. Under the "contributing factor" standard, Respondent contends Complainant has failed to provide any evidence that his alleged protected activity played a role in Respondent's decision to fire him in May 2012. It asserts that Complainant's employment was terminated on May 24, 2012, because he could not be dispatched after exhausting all of his leave for his medical problems. Respondent contends that many other drivers have been terminated for the same reason. Respondent argues it did not rehire Complainant on July 9, 2012, because Complainant was unhappy with Respondent. It contends Complainant voluntarily quit on April 17, 2013.

Respondent does not dispute that Complainant filed internal complaints alleging interference with his sleeper berth time. It argues Complainant failed to identify a single regulation, standard or order specific to such an interference. It contends Complainant has failed to prove any actual violations of safety regulations.

Respondent contends Complainant's termination was not related to his complaints made in February 2012. It argues Lawson, the decision maker, had no knowledge of Complainant's complaints when he made the decision to terminate Complainant. It asserts the temporal proximity between Complainant's alleged protected activity and his termination is not sufficient evidence of retaliation. It contends the dispatch requirement was enforced, and other drivers were terminated for failing to meet the ability to be dispatched.

Respondent argues it has presented clear and convincing evidence that Complainant would have been fired absent any alleged protected activity. It contends Complainant failed to mitigate his damages, and Complainant failed to prove that he suffered any genuine emotional distress.

In his reply brief, Complainant contends Respondent's argument that he did not engage in any protected activity is without merit. He argues his complaints were based upon reasonably perceived violations of the commercial vehicle safety regulations. He asserts his termination was related to his protected activity, and Respondent failed to show by clear and convincing evidence that it would have fired Complainant in the absence of his protected activity. Finally, he contends he is entitled to an award of damages because Respondent offered no evidence showing that comparable jobs were available to Complainant and that he failed to make reasonable efforts to find substantially equivalent employment.

III. DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available

evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe ... Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Generally, I found Complainant's testimony to be consistent and credible. I also found Robbins, Watson, Lawson, Baxter and Nelson to be sincere, unbiased and credible witnesses. The consistency and believability of their testimony is more fully analyzed below.

B. The Statutory Protection

The employee protection provisions of the STAA provide, in pertinent part:

> (a) Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --
>
> (A)
>
> (i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

49 U.S.C. § 31105(a). Thus, under the employee protection provisions of the STAA, it is unlawful for an employer to impose an adverse action on an employee because the employee has complained or raised concerns about possible violations of DOT regulations. 49 U.S.C. § 31105(a)(1)(A). See e.g., Reemsnyder v. Mayflower Transit, Inc., Case No. 1993-STA-4 @ 6-7 (Sec'y Dec. and Ord. On Recon. May 19, 1994).

Furthermore, it is unlawful for an employer to impose an adverse action on an employee who has refused to drive because operating a vehicle violates DOT regulations **or** because he has a reasonable apprehension of serious injury to himself or the public. 49 U.S.C. § 31105(a)(1)(B).

The purpose of the STAA is to promote safety on the highways. As noted by the Senate Commerce Committee which reported out the legislation, "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (Daily ed. December 7, 1982). The Secretary has recognized that "an employee's **safety** complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective action immediately and limits the necessity of enforcement through formal proceedings." (Emphasis added). Davis v. H.R. Hill, Inc., Case No. 1986-STA-18 @ 2 (Sec'y Mar. 19, 1987).

C. Burden of Proof

In 2007, Congress amended the STAA's burden of proof standard as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). Under the amendment, STAA whistleblower complaints are governed by 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, complainants must show by a "preponderance of evidence" that a protected activity is a "contributing factor" to the adverse action described in the complaint. 49 U.S.C. § 42121(b)(2)(B)(i); see also 75 Fed. Reg. 53545, 53550. The employer can overcome that showing only if it demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545, 53550; 49 U.S.C. § 42121(b)(2)(B)(i). Where, as here, a case is tried fully on the merits, it is not necessary to determine whether the complainant has established a **prima facie** case of discrimination under the STAA. Pike v. Public Storage Companies, Inc., Case No. 1998-STA-35 @ 2 (ARB Aug. 10, 1999).

Under the 2007 amendments to the STAA, to prevail on his STAA claim, the complainant must prove by a preponderance of the evidence that he engaged in protected activity; that the respondent took an adverse employment action against him; and that his protected activity was a contributing factor in the unfavorable personnel action. Clarke v. Navajo Express, Inc., Case No. 2009-STA-18 @ 4 (ARB June 29, 2011) (citing Williams v. Domino's Pizza, Case No. 2008-STA-52 @ 6 (ARB Jan. 31, 2011)). A contributing factor is "any factor which, alone or in

connection with other factors, tends to affect in any way the outcome of the decision." Id. The complainant can succeed by "providing either direct or indirect proof of contribution." Id. "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." Id. If direct evidence is not produced, the complainant must "proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating" the complainant's employment. Id. "One type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." Id. (citing Riess v. Nucor Corporation-Vulcraft-Texas, Inc., Case No. 2008-STA-11 @ 3 (ARB Nov. 30, 2011)). If the complainant proves pretext, an ALJ may infer that the protected activity contributed to the termination, but he is not compelled to do so. Williams, supra @ 6.

If the complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. Williams, supra @ 6 (citing 49 U.S.C. § 4212(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" Id. (citing Brune v. Horizon Air Indus., Inc., Case No. 2002-AIR-8 @ 14 (ARB Jan. 31, 2006)).

D. The Protected Activity: Internal Complaints

An employee engages in STAA-protected activity where he files a complaint or begins a proceeding "related to a violation of a motor vehicle safety regulation, standard, or order." 49 U.S.C. § 31105(a)(1)(A)(i). Internal complaints to management are protected activity under the whistleblower provision of the STAA. Williams, supra @ 6. A complaint **need not** expressly cite the specific motor vehicle standard allegedly violated, but the complaint must "relate" to a violation of a commercial motor vehicle safety standard. Ulrich v. Swift Transportation Corp., Case No. 2010-STA-41 @ 4 (ARB Mar. 27, 2012). An internal complaint must be communicated to management, but it may be oral, informal or unofficial. Id. A complainant must show that he reasonably believed he was complaining about the existence of a safety violation. Id. This standard requires the complainant to prove that a person with his expertise and knowledge would

have a "reasonable belief" that there was a violation of a commercial vehicle safety regulation. Calhoun v. United Parcel Serv., Case No. 2002-STA-31 @ 11 (ARB Sept. 14, 2007).

Complainant contends he engaged in protected activity on the following dates: January 31, 2012, when his driver manager interrupted his sleep; February 1, 2012, when he complained to Salvail that his driver manager threatened him; February 1 and February 6, 2012, when he wrote complaint letters to Driver Services regarding break interruptions by his driver manager; February 16, 2012, when he complained to Buckner of break interruptions; and April 11, 2012, when he forwarded his complaints to Human Resources.

Complainant argues that he made protected complaints on February 1, February 6, February 16 and April 11, 2012, when he made written complaints regarding break interruptions. I find that these complaints were not related to a violation of a commercial motor vehicle safety regulation, standard or order. At the formal hearing and in brief, Complainant does not point to any commercial motor vehicle safety regulation that Respondent was violating. Furthermore, Nelson testified that Buckner informed him that **de minimis** interruptions are not a DOT violation.

49 C.F.R. § 395.1(g)(1)(i)(A) provides that "a driver who operates a property-carrying commercial motor vehicle equipped with a sleeper berth...Must, before driving, accumulate" the following:

> (1) At least 10 consecutive hours off duty;
> (2) At least 10 consecutive hours of sleeper-berth time;
> (3) A combination of consecutive sleeper-berth and off-duty time amounting to at least 10 hours; or
> (4) The equivalent of at least 10 consecutive hours off duty if the driver does not comply with paragraph (g)(1)(i)(A)(1), (2), or (3) of this section

The Federal Motor Carrier Safety Administration ("FMCSA") has a policy allowing for brief contacts with drivers during the off-duty period. Under that policy, those contacts are considered **de minimis** interruptions that do not cause a break in

the off-duty period.[3] During the OSHA investigation, the FMCSA was contacted to determine if phone calls that momentarily interrupt a driver's rest period constitute a change in the driver's duty status. The FMCSA advised OSHA that telephone calls of this type do not prevent the driver from obtaining adequate rest and are not an interruption of off-duty status. (ALJX-1, p. 4).

Accordingly, Complainant's complaints regarding break interruptions did not involve a concern about a violation of a specific safety regulation, nor did it concern conduct that was reasonably necessary to satisfy Complainant about the safe operating condition of his truck. I do not find that Complainant can demonstrate a "reasonable belief" that Respondent was engaging in a violation of a motor vehicle safety regulation. Therefore, I find and conclude Complainant's complaints about break interruptions do not amount to protected activity.

Complainant also argues that he made a protected complaint when he made written complaints that he was being instructed to inaccurately fill out his log books. Complainant's refusal to falsify his log books would be a protected activity under 49 C.F.R. Parts 395.3 and 395.8. However, I find that a preponderance of the evidence establishes that Complainant was not instructed to falsify his log books.

Complainant testified that Heather Davini told Complainant that his logs must show eight hours in the sleeper berth. Complainant contends DOT requires that the driver be away from the truck for ten hours. He believed Davini was telling him to falsify his logbook. He acknowledged that Davini did not tell him to drive while he was logged as sleeper time. Nelson testified that he looked into the issue and determined that Heather Davini had done nothing wrong and did not violate DOT regulations. The FMCSA providing guidance on the sleeper berth provision found at 49 C.F.R. § 395.1(g) notes that "drivers using the sleeper berth provision must take at least eight consecutive hours in the sleeper berth, plus a separate two consecutive hours either in the sleeper berth, off duty or any combination of the two."[4] Accordingly, I find that Davini did not instruct Complainant to falsify his logs, rather she was

[3] See Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, Docket No.FMCSA-97-2350.http://www.fmcsa.dot.gov/rules-regulations/truck/driver/hos/hos-reg.asp.

[4] http://www.fmcsa.dot.gov/documents/hos/HOS-RegulationsSummary-7-1-2013.pdf.

instructing him to comply with and log the required amount of time in the sleeper berth or off duty. I find and conclude Complainant did not engage in any protected activity because he has failed to show that Respondent urged him to falsify his log book and he refused to do so.

The record shows that Complainant was in fact falsifying his log books. On April 8, 2013, Buckner issued a notice to Complainant indicating that his logs were in violation of Part 395 of the Motor Carrier Regulations. RX-26 represents Buckner's investigation or audit of Complainant's logging errors. Nelson testified that Complainant violated logging regulations on a regular basis by reporting that he was in places when he was not. He testified that it is a DOT violation to exceed hours of service and falsify logs.

Complainant also made complaints regarding home time and the amount of loads he was receiving as a dedicated driver. These complaints do not constitute protected activity because they do not relate to a regulation concerning commercial motor vehicle safety, health or security.

Finally, Complainant contends he engaged in protected activity by making complaints regarding his truck. On January 26, 2012, Complainant complained about the mattress in his truck. He also complained about the air conditioning in the truck. The Board has held that "once an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity." Carter v. Marten Transport, Ltd., Case No. 2005-STA-63 @ 7 (ARB June 30, 2008). Complainant testified he was told that he would be assigned a load which would bring him to the shop to address the issues. Complainant failed to present any evidence showing that the safety complaints he made were not addressed. Accordingly, I find that complaints made about previously resolved motor vehicle safety issues do not constitute protected activity under the STAA.

Based on the foregoing, I find Complainant has failed to show that he engaged in any protected activity.

E. Respondent's Adverse Action

Assuming, **arguendo**, that Complainant engaged in protected activity, which the record fails to support by a preponderance of the evidence, I will address whether his alleged safety complaints were a contributing factor in any adverse actions taken against him.

The STAA states that an employer may not "discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment." 49 U.S.C. § 31105(a)(1). Thus, termination or discharge from employment is not required; rather demonstration of an adverse action by the employer is sufficient.

In Long v. Roadway Express, Inc., Case No. 1988-STA-31 (Sec'y Sep. 15, 1989), the Secretary held any employment action by an employer which is unfavorable to the employee, the employee's compensation, terms, conditions or privileges of employment constitutes an adverse action. Thus, regardless of the employer's motivation, proof that such a step or action was taken is sufficient to meet the employee's burden of establishing that the employer took adverse action against the employee. Id. In a case tried fully on the merits, the relevant inquiry is whether the complainant "established, by a preponderance of the evidence" that the employer "subjected him to adverse action in retaliation for protected activity." Walters v. Exel North American Road Transport, Case No. 2002-STA-3 @ 2 (ARB Dec. 10, 2004).

In August 2010 the Secretary of Labor issued new implementing regulations under the STAA that define the scope of discipline or discrimination actionable under the STAA's whistleblower protections. 29 C.F.R. § 1978.102. Those regulations make it a violation for an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]" 29 C.F.R. §§ 1978.102(b), (c). The Administrative Review Board (ARB) has recognized that the regulations broaden prior interpretations of what constitutes an adverse action under the STAA. Strohl v. YRC, Inc., Case No. 2010-STA-35 (ARB Aug. 12, 2010).

Complainant bears the burden of showing that his protected activity was a contributing factor in the adverse actions taken by Respondent. 49 U.S.C. § 31105(b). Complainant asserts that Respondent took four adverse actions against him: terminating his employment in May 2012, refusing to rehire him in July 2012,

blacklisting him and constructively discharging him in April 2013. Complainant contends the close temporal proximity between his alleged protected activities and his May 2012 discharge supports a finding that the protected activities were a contributing factor in Respondent's decision to fire him. Respondent contends Complainant has presented no evidence showing that his protected activities contributed to his termination.

Adverse action closely following protected activity "is itself evidence of an illicit motive." Donovan v. Stafford Const. Co., 732 F.2d 954, 960 (D.C. Cir. 1984). The timing and abruptness of a discharge are persuasive evidence of an employer's motivation. NLRB v. American Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983), citing NLRB v. Advanced Business Forms Corp., 474 F.2d 457, 465 (2d Cir. 1973). See NLRB v. RainWare, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984).

Knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. Bartlik v. TVA, Case No. 1988-ERA-15 @ 4 n.1 (Sec'y Apr. 7, 1993), aff'd, 73 F.3d 100 (6th Cir. 1996). However, "[C]onstructive knowledge of Complainant's protected activities on the part of one with ultimate responsibility for personnel action may support an inference of retaliatory intent." Frazier v. Merit Systems Protection Board, 672 F.2d 150, 166 (D.C. Cir. 1982). The Board has noted that while "knowledge of the protected activity can be shown by circumstantial evidence, that evidence must show that an employee of Respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge of the protected activity." Bartlik v. TVA, supra.

Complainant contends that because Respondent annotated his DAC report with "other" as the reason for leaving employment, he was blacklisted from employment. He asserts that his work record showed "other" rather than "satisfactory." Watson testified that a DAC report is created when a driver leaves employment. If a driver is reinstated, the DAC report is not updated unless the driver leaves employment for a second time. Complainant's DAC report showed two periods of employment. She testified that the status options for the DAC report are resigned, discharged, retired and "other." She testified that the term "other" on Complainant's DAC report was more beneficial than "terminated" or "discharged." She stated that the status

of "other" is often used when a driver cannot work due to health reasons. Watson's testimony is supported by the testimony of Nelson, and Complainant presented no evidence controverting the testimony. Accordingly, I find using the term "other" in Complainant's DAC report was not an adverse action because the term was arguably more beneficial to Complainant than the other status options.

Complainant also contends he was constructively discharged in April 2013. A constructive discharge occurs where "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Held v. Gulf Oil Co., 684 F.2d 427, 434 (6th Cir. 1982); NLRB v. Haberman Construction Co., 641 F.2d 351 (5th Cir. 1981); Cartwright Hardware Co. v. NLRB, 600 F.2d 268 (10th Cir. 1979). "Furthermore, it is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable conditions." Hollis v. Double DD Truck Lines, Inc., Case No. 1984-STA-13 @ 8-9 (Sec'y March 18, 1985).

In the context of a Title VII claim, the Supreme Court has found that a complainant "must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response" to establish a constructive discharge claim. Pennsylvania State Police v. Suders, 542 U.S. 129, 134 (2004). The Court noted that a constructive discharge included "employer-sanctioned adverse action officially changing [the complainant's] employment status or situation" including a humiliating demotion, extreme pay cut or transfer to a position with unbearable working conditions. Id.

The presence of aggravating factors are required for a finding of constructive discharge and adverse consequences such as demotion, failure to promote and failure to provide equal pay for equal work were generally insufficient to substantiate a finding of constructive discharge. Earwood v. D.T.X. Corp., Case No. 1988-STA-21 @ 3 (Sec'y March 8, 1991). In Earwood, the Secretary held that based on the totality of the circumstances the complainant was constructively discharged where there was "pervasive coercion to violate Department of Transportation regulations." Id. @ 4.

The National Labor Relations Board has held that assigning a truck driver fewer loads, according him less seniority and assigning him older, less road-worthy trucks amounts to a constructive discharge. Interstate Equipment Co. and Teamsters Local 135, 172 NLRB 145(1968), 1968-2 CCH NLRB 20,084. In Scerbo v. Consolidated Edison Co. of New York, Inc., Case No. 1989-CAA-2 (Sec'y Nov. 13, 1992), the Secretary found adverse action where a complainant was transferred from a relatively mobile, outdoor job to a constrained, isolated warehouse position, and as a result also lost overtime opportunities.

In Mandreger v. The Detroit Edison Co., Case No. 1988-ERA-17 (Sec'y Mar. 30, 1994), the Secretary found adverse action where the complainant was referred to the Employee Assistance Program, and as a result of the referral, a psychologist found that the complainant suffered from a mental disorder, the complainant was not permitted to return to work at the nuclear power plant where he had been employed, and after his sick leave and vacation days ran out, he was eventually placed in a position in which there was less opportunity to earn overtime pay and less opportunity for advancement.

In the instant case, the evidence shows that Complainant was treated no less favorably than other employees. Complainant refused loads on several occasions, falsified his logs and exceeded the hours of service requirements. Complainant's issues with Baxter primarily related to his not wanting to work weekends or haul loads for accounts other than Rheem. Baxter testified Respondent's policy was to return trucks to Rheem in Laredo, Texas with another load rather than "dead head" back with no load. She also testified that Rheem drivers were required to work two weekends per month. Nelson testified that Respondent is a "forced dispatched company," which means the driver must accept the dispatch. Nelson stated a refusal to take a load is a terminable offense. He believed that Complainant was given far more liberality with refusals than other drivers.

Based on the foregoing, I find Complainant has not established that the working conditions were arguably so difficult or unpleasant that a reasonable person in Complainant's position would have felt compelled to resign. Therefore, Complainant has failed to prove by a preponderance of the evidence that he was constructively discharged by Respondent.

Accordingly, I find Complainant's May 2012 termination and the refusal to rehire him to be the only actionable adverse actions alleged in this case. Complainant relies only on temporal proximity between his complaints and his termination as evidence of a contributing factor. However, I find Respondent has shown a legitimate, nondiscriminatory reason for termination for the reasons discussed below.

F. The Alleged Legitimate, Nondiscriminatory Reason for Termination

The Act does not prohibit an employer from discharging a whistleblower where the discharge is not motivated by retaliatory animus. See, e.g., Newkirk v. Cypress Trucking Lines, Inc., Case No. 1988-STA-17 @ 9 (Sec'y Feb. 13, 1989)(although a complainant engaged in protected activity, he was terminated by the respondent's managers who collectively determined to discharge the complainant for his failure to secure bills of lading); cf. Lockert v. United States Department of Labor, 867 F.2d 513, 519 (9th Cir. 1989)(an employee who engages in protected activity may be discharged by an employer if the employer has reasonable grounds to believe the employee engaged in misconduct and the decision was not motivated by protected conduct); Jackson v. Ketchikan Pulp Co., Case No. 1993-WPC-7 (Sec'y Mar. 4, 1996)(when a respondent's beliefs that the complainants engaged in sabotage, which was not a protected activity, played a major role in its decision to terminate them, it needed to prove only that the managers who decided to fire the complainants had a reasonable and good faith belief the complainants engaged in the unprotected activity).

To prevail under the Act, the employee must establish that the employer discharged him because of his protected whistleblowing activity. Newkirk, supra @ 8-9. It is Respondent's subjective perception of the circumstances which is the critical focus of the inquiry. Allen v. Revco D.S., Inc., Case No. 1991-STA-9 @ 5-6 (Sec'y Sept. 24, 1991)(a complaint was dismissed when the respondent presented evidence of a legitimate business reason to discharge complainant -- falsification of logs of record – and the evidence permitted an inference that the employer believed that the schedule could be run legally and believed that complainant illegally and unnecessarily falsified his logs).

Respondent has presented overwhelming evidence regarding the legitimacy of the decision to terminate Complainant. Complainant was unable to return to work as of May 24, 2012, at the expiration of his FMLA leave. Respondent's written policy mandates termination of those drivers who are unavailable for dispatch at the expiration of FMLA leave. Further, Lawson who made the decision to terminate Complainant was not aware of any purported protected activity. Accordingly, I find there were significant legitimate intervening bases for Complainant's dismissal. Because Complainant's unavailability for dispatch constitutes a legitimate intervening basis for which the preponderance of the evidence is overwhelming, I conclude the temporal proximity between the Complainant's protected activities and adverse action does not establish causation supportive of discrimination.

Complainant also contends Respondent was obligated to rehire him after he was released by his doctor to return to work. Respondent's written policy allows an individual rehired within 60 days of his termination date to be reinstated with his original hire date for purposes of vacation. However, Respondent was not required to rehire Complainant. Nelson testified that Complainant's complaint letters were looked into, there were no violations found. Nelson testified that the decision not to re-hire Complainant was not based on the complaint letters. He stated that the decision was based on conversations with Tammy Lane Smith regarding Complainant not being a satisfied driver. Accordingly, based on the totality of the circumstances, Nelson concluded that Complainant should not be rehired because he was not happy being an employee of Respondent. Therefore, I conclude the temporal proximity between the Complainant's protected activities and alleged adverse action does not establish causation supportive of discrimination.

Assuming, **arguendo**, Complainant had shown any protected activity to be a contributing factor for his dismissal and Respondent's failure to rehire him, Respondent has satisfied its burden of rebuttal by showing through clear and convincing evidence it would have taken the same adverse employment action regardless of Complainant's engagement in protected activity. As discussed above, the evidence clearly establishes that Complainant's employment was terminated because he had exhausted his FMLA leave, and Respondent was not obligated to rehire Complainant. Accordingly, I find that Respondent has demonstrated by clear and convincing evidence that it would have

taken the same adverse actions absent Complainant's protected activities.

IV. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find and conclude Respondent did not unlawfully discriminate against Curtis C. Dick because of his alleged protected activity and, accordingly, Curtis C. Dick's complaint is hereby **DISMISSED**.

ORDERED this 18th day of April, 2014, at Covington, Louisiana.

Digitally signed by LEE J. ROMERO JR
DN: CN=LEE J. ROMERO JR, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

LEE J. ROMERO, JR.
Administrative Law Judge

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, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party’s legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings

from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(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).