U.S. Department of Labor

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

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

Issue Date: 12 January 2015

Case No.: **2013-STA-00056**

In the Matter of:

LUIS PEREZ,
Complainant,

v.

DIRECT TRUCKING CORPORATION,
Respondent.

Appearances:

Luis Perez, Cicero, IL
Pro se Complainant

Jeno Han, Melrose Park, IL
Vice President, Direct Trucking Co.

Before: Pamela J. Lakes
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case involves a claim under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "Act"), with implementing regulations at 29 C.F.R. Part 1978.[1] The STAA prohibits an employer from retaliating against an employee because the employee engaged in protected whistleblowing activity. Specifically, inter alia, the Act protects employees who refuse to operate a commercial motor vehicle when operation would violate a Federal safety regulation or when the employee has a reasonable apprehension of serious injury to himself or the public due to the vehicle's unsafe condition; it also protects employees who file complaints or report safety violations. Complainant, Luis Perez

[1] The STAA was amended on August 3, 2007 by Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007); the implementing regulations were amended on August 31, 2010, 75 Fed. Reg. 53544 (Aug. 31, 2010) and on July, 27, 2012, 77 Fed. Reg. 44121 (July 27, 2012). References in this decision are to the current version of the statute and regulations.

("Complainant"), alleges that Direct Trucking Corporation ("Respondent") sent him home and then terminated his employment based on his refusal to drive his assigned truck and his reporting of an unsafe condition.

PROCEDURAL HISTORY

On January 17, 2013, Complainant filed a timely complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") in Chicago, Illinois. (ALJ 1).[2] Complainant alleged that Respondent sent him home and then terminated his employment in reprisal for refusing to drive his assigned truck and reporting an unsafe condition with the truck's brake compressor. *Id.* OSHA investigated the complaint, and on May 29, 2013, concluded that there was no reasonable cause to believe that Respondent had violated the STAA. Specifically, the Area Director determined that Complainant's alleged protected activity was not a contributing factor to Complainant's no longer being employed as a driver for Respondent. On June 20, 2013, Complainant filed a timely objection and requested a hearing. (ALJ 2).

A hearing was held before the undersigned administrative law judge on October 24, 2014 in Chicago, Illinois. At the hearing in open court, Administrative Law Judge's Exhibits 1 through 5 were admitted. (Tr. 7). There were two witnesses, as discussed below, and an interpreter appeared to translate the proceedings for Complainant.[3] During the hearing, the parties agreed to leave the record open for a telephonic continuation of the hearing, to obtain the testimony of Mark Park, a mechanic who worked for Respondent. Tr. 42. The telephonic continuation of the hearing was held on November 7, 2014 and was transcribed; an interpreter also participated to assist Complainant. The record closed at the end of the telephonic proceedings and the case is ready for decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTUAL BACKGROUND

Witness Credibility

The following witnesses testified at the hearing before me and at the telephonic continuation of the hearing: Complainant, Luis Perez; Respondent's former employee, Reyvelin Estrada; and Respondent's Mechanic, Mark Park. I found Complainant to be credible by demeanor; however, Complainant submitted inconsistent statements and testimony and he did not satisfactorily explain the reason for the discrepancies. Therefore, the weight of Complainant's testimony is diminished. I found the remaining witnesses to be credible. Where there were discrepancies in the testimony or the witnesses' testimony differed from the other evidence of record, I found this to be due in part to difficulty recalling the events in question,

[2] Administrative Law Judge's exhibits will be referred to as "ALJ," followed by the exhibit number. "Tr." followed by the page number 1-45 refers to the transcript of the October 24, 2014 hearing. "Tr." followed by the page numbers 46-64, refers to the transcript of the November 7, 2014 telephonic hearing in this case.

[3] Although Complainant understands and speaks some English, his native language is Spanish and he did not feel that he was proficient enough in English to proceed without the assistance of an interpreter.

which took place nearly one year prior to the hearing, compounded by language and communication challenges.

Complainant's Employment with the Respondent

Complainant's Testimony

At the hearing, Complainant testified that he was employed by Respondent as a truck driver for eight years, which ended in January 2013. Tr. 10. Complainant's hourly wage while working for Respondent was $19 to $20 per hour. Tr. 11.

Claimant testified at the hearing that prior to his termination, on more than one occasion, he was "insulted and threatened" that he was going to be terminated by Mark Park, a mechanic for Respondent, who is also the brother of the owner (known as Peter or Ryan Park). Tr. 11-12. Complainant also testified that on more than one occasion, Complainant reported to Respondent's owner, Peter Park, that his assigned truck needed maintenance and that Peter Park ignored these requests. Tr. 19, 24. Complainant's last day of work was on or around Friday, January 18, 2013. Tr. 12-13, 27.[4]

Reyvelin Estrada's Testimony

Reyvelin Estrada is a former employee of Respondent. Tr. 32. Mr. Estrada worked for Respondent for five or six years, ending "around August 2008 or beginning 2009." *Id*. Mr. Estrada testified that there was "a lot of intimidation at the time" and that the trucks did not have good brakes, which Respondent neglected to repair. *Id*. Mr. Estrada testified that on numerous occasions, he was asked to drive trucks that were in disrepair, but he continued to work for Respondent because he needed to work. Tr. 33-34.

Complainant's Other Employment

Complainant's Testimony

Subsequent to his employment with Respondent, Complainant began working for another transportation company, which had the initials "CDS." Tr. 9. Complainant worked for CDS for approximately one month. Tr. 10. He also worked for another company for about one month. Tr. 10. His wages at those two jobs were less than $13 per hour. Tr. 11. Since May 2013, Complainant has been employed with Channel Distribution Corporation ("CDC") as a truck driver. Tr. 9. Complainant receives an hourly pay of $20 per hour, and works about 40 to 50 hours per week. Tr. 10.

[4] At the hearing, Complainant first stated that the incident took place on January 17 or 18, which was a Thursday and Friday, respectively, and was terminated on Monday, January 21. On cross examination, for impeachment purposes, Respondent's Vice President presented Complainant with what Complainant identified as his time card, which purported to show that Complainant worked the week of Monday, January 21. Tr. 27. Complainant then recalled that the incident took place on Monday, January 21. Tr. 27.

Complainant's Termination

Complainant's Testimony

On or around Friday, January 17, 2013, at approximately 5:30 a.m., Complainant was inspecting his truck in Respondent's parking lot, and noticed that the brakes were not working due to the cold.[5] Tr. 13, 16, 26. Complainant notified his supervisor, who is Respondent's owner, Peter or Ryan Park, that the brakes did not work. Tr. 13-14. Complainant testified that Mr. Park advised Complainant to drive the truck anyway because the product needed to be delivered to the client. Tr. 13-14, 16. Complainant began to drive the truck around the parking lot to see if the brakes would start working. Tr. 16-17. As Complainant was leaving the parking lot, Complainant began experiencing problems with the truck's wheels and stopped driving. Tr. 14, 15. At this time, Respondent's mechanic, Mark Park, came and inspected the wheels. Complainant informed Mr. Park that the brakes were frozen and that he would have to wait for the brakes to unfreeze. Tr. 14, 15. Mr. Park told Claimant to stop driving. Tr. 16, 18. Mr. Park then began "screaming" at Complainant. Tr. 17. During this time, Mr. Park began to insult Complainant and pushed Complainant. Tr. 14. Complainant then left and went home without driving that day. Tr. 14. Complainant indicated in a statement he filed with OSHA that he filed for unemployment the next day; however, at the hearing, he explained that this happened several times, although the last time was "more difficult, more intense." ALJ 1; Tr. 21.

The following Monday, January 21, Complainant received a call from Respondent's owner, Pete, to come into work. Tr. 21. When he arrived, Claimant was told that there was no job for him. Tr. 21. Complainant testified that he believes that he was terminated due to the lawsuit that he filed either with OSHA or the Illinois Department of Human Rights. Tr. 22.[6] Complainant later testified that he was terminated because he "didn't want to move a frame that was in bad condition." Tr. 60.[7]

Complainant testified that he is seeking $10,000 in damages for "pain and suffering" and "unsafe conditions." Tr. 23.

Mark Park's Testimony

Mark Park testified in a telephonic hearing on November 7, 2014, that he has been employed as a mechanic by Respondent for about 12 years. Tr. 50-51. Mr. Park testified that he

[5] The incident may have occurred on Monday, January 21, 2013. See footnote 4 above.

[6] Although at the hearing, Complainant indicated that he was discharged, he previously also suggested that he was forced to quit (i.e., he was constructively discharged). In a June 11, 2013 affidavit (ALJ 2), Complainant stated that "[b]ased on the investigation report [he] believe[d] that just by the fact that [he] wanted to refuse to drive the truck in those dangerous conditions was just an excuse that the company Direct Trucking Corporation used to fire [him]." ALJ 2; see also Tr. 28. However, in the same statement, he indicated that the harassments and threats he received "forced [him] to have to quit his job to avoid a bigger problem." *Id.* When asked about the discrepancy at the hearing, he simply stated that the situation was very hard for him and he felt that "those were the last days for [him] because it was so difficult." Tr. 28.

[7] Complainant first raised the issue with the frame during his rebuttal testimony at the hearing. Tr. 60. It appears that Complainant has complained about a number of occurrences that took place during his employment with Respondent and is not entirely clear about what happened on his last day of employment.

is the brother of the owner, Peter Park. Tr. 51. Mr. Park has known Complainant for two or three years, through their work relationship. Tr. 52. Mr. Park testified that on the day of the incident, he noticed that the wheel on Complainant's truck was frozen, so he tried to stop Complainant from driving. Tr. 53. Complainant did not hear Mr. Park and kept driving, so Mr. Park followed Complainant. *Id*. Complainant then stopped his truck, and Mr. Park told Complainant not to continue to drive because the wheels were frozen. *Id*. As a result of this confrontation, Complainant walked away. Mr. Park does not know whether Complainant left work that day or why he left. Tr. 54. On cross examination, Mr. Park admitted that he did not have a mechanic license or certificate.[8] Tr. 56-57.

According to Mr. Park, Complainant had problems understanding English, which led to errors. Tr. 55-56. Mr. Park denied intimidating Complainant. Tr. 58.

DISCUSSION AND ANALYSIS

Legal Standard

The employee protection/whistleblower provisions of the STAA prohibit covered employers from discharging or otherwise retaliating against employees because of their participation in protected activity. 49 U.S.C. § 31105; 29 C.F.R. § 1978.102. Specifically, the STAA prohibits retaliation against employees who have filed a complaint or participated in a proceeding related to the violation of commercial motor vehicle safety or security regulations, and, as amended, the Act also protects employees whom an employer believes to have engaged in such activity. 49 U.S.C. § 31105(a)(1)(A); 29 C.F.R. § 1978.102(b), (d), (e). Similarly, the Act protects employees who refuse to operate a vehicle either because operation of the vehicle would violate motor vehicle safety regulations or because they have a reasonable apprehension of serious injury to themselves or others due to the vehicle's hazardous condition. 49 U.S.C. § 31105(a)(1)(B); 29 C.F.R. § 1978.102(c)(1).[9]

A determination that a violation has occurred may only be made by an administrative law judge when the complainant has demonstrated by the preponderance of the evidence that the protected activity (or perception of protected activity) was a contributing factor in the alleged adverse action. 29 C.F.R. § 1978.109(a). If the complainant satisfies this burden, the respondent may avoid liability by demonstrating through clear and convincing evidence that the complainant would have been terminated even absent his protected activity. 29 C.F.R. § 1978.109(b); *Jordan v. IESI*, ARB No. 10-076, 2009-STA-00062 (ARB Jan. 17, 2012).

As amended by the 9/11 Commission Act of 2007, whistleblower complaints under the STAA are governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. §

[8] On rebuttal, Complainant testified that Mr. Park repaired items, such as frames, that were delicate and should have been fixed by certified mechanics. Tr. 60.

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

42121(b); 49 U.S.C. § 31105(b)(1); *see also* 75 Fed. Reg. 53544, 53547 (Aug. 31, 2010); 77 Fed. Reg. 44121 (July 27, 2012) (preambles to STAA regulations). Under the AIR 21 standard, "a violation may be found only if the complainant demonstrates that protected activity was a contributing factor in the adverse action described in the complaint." 77 Fed. Reg. 44122 (July 27, 2012). The "contributing factor" standard (which is to be contrasted with the "motivating factor" standard) is not a demanding one and does not require proof of retaliatory animus or motive. *Hutton v. Union Pacific Railroad Company*, ARB Case No. 11-091, ALJ No. 2010-FRS-020 (ARB May 31, 2013), slip op. at 7.

Thus, to prevail in an STAA case, a complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity;[10] (2) the employer was aware of the protected activity; (3) the employer took adverse action against him; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052 at 5 (ARB Jan. 31, 2011), *appeal filed* No. 11-903 (2d Cir. March 8, 2011). *See also* 29 C.F.R. § 1978.104(e)(2) (relating to investigatory phase of proceedings.) If the complainant satisfies this burden, the respondent may avoid liability by demonstrating through clear and convincing evidence that the complainant would have been terminated even absent his protected activity. 29 C.F.R. § 1978.109(b); *Jordan v. IESI*, ARB No. 10-076, 2009-STA-00062 (ARB Jan. 17, 2012).

Liability Under the STAA

Protected Activity

Protected Activity-Refusal To Drive

Complainant bears the burden of showing that his refusal to drive constituted protected activity. 49 U.S.C. § 31105(a)(1)(B). The refusal to drive clause provides two categories of circumstances in which an employee's refusal to drive will be protected under the STAA. First, the STAA prohibits an employer from retaliating against 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, health, or security." 49 U.S.C. § 31105(a)(1)(B)(i). This is known as the "actual violation" provision. *See Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 2002-STA-5, slip op. at 3 (ARB July 31, 2003). The statute similarly prohibits retaliation by an employer where an employee refuses to operate a 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." 49 U.S.C. § 31105(a)(1)(B)(ii). This is known as the "reasonable apprehension" provision of the STAA. *See Leach*, slip op. at 3. Whether a refusal to drive qualifies for STAA protection requires evaluation of the circumstances surrounding the refusal under the particular requirements of each of the provisions. *See Eash v. Roadway Express, Inc.*, ARB Nos. 02-008, 02-064, ALJ No. 2000-STA-47 slip op. at 6 (ARB Mar. 13, 2006).

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

To invoke protection of the refusal to drive provision under 49 U.S.C. § 31105(a)(1)(B)(i), the threshold inquiry is whether the employee's operation of the vehicle, as scheduled, would have constituted a violation of an applicable regulation. *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 10 (ARB Oct. 31, 2007). "[T]he protection Section 31105(a)(1)(B)(i) affords 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 "the reasonableness of the refusal must be subjectively and objectively determined." *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19 (ARB Dec. 18, 2012).

To invoke the protection under the refusal to drive under 49 U.S.C. § 31105(a)(1)(B)(ii), the threshold inquiry is whether the employee's apprehension of serious injury is reasonable, meaning that only if a reasonable individual in the same circumstances would conclude that the safety or security condition establishes a real danger of accident, injury, or serious impairment to health. 49 U.S.C. §31105(a)(2). To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition. *Id.* This clause covers more than just mechanical defects of a vehicle, but is also intended to ensure "that employees are not forced to commit . . . unsafe acts." *Garcia v. AAA Cooper Transp.*, ARB No. 98-162, ALJ No. 1998-STA-023, slip op. at 4 (ARB Dec. 3, 1998). Thus, a complainant may establish a violation when the unsafe condition at issue is caused by the physical condition of a driver that could affect safe operation of the equipment. *Palazzolo v. PST Vans, Inc.*, 1992-STA-23 (Sec'y Mar. 10, 1993) (holding that the "complainant did not show by a preponderance of the evidence that he sought a correction of the unsafe condition, which in this case would entail informing [the respondent] that he was not able to drive the truck safely due to pain and medication.") The employee's belief must be both subjectively and objectively reasonable. *Brown v. Wilson Trucking Co.*, ARB No. 96-164, ALJ No. 1994-STA-054, slip op. at 1 (ARB October 25, 1996).

Complainant asserts that he engaged in protected activity when he refused to drive his assigned truck on or around January 17, 2014. (Tr. 28; ALJ 1, 2). According to Complainant's testimony, he notified his supervisor, who is Respondent's owner, Peter or Ryan Park, that the brakes did not work. Tr. 13-14. The supervisor advised Complainant to drive the truck anyway because the product needed to be delivered to the client. Tr. 13-14, 16. Complainant began to drive the truck in Respondent's parking lot, at which point Respondent's mechanic, Mark Park, told Complainant not to drive the truck until the brakes were unfrozen. *Id*. Complainant also asserted that after engaging in an argument with Respondent's mechanic, Mark Park, Complainant left for the day. Tr. 14. The following Monday, January 21, Complainant received a call from Peter Park, to come into work. Tr. 21. When Complainant arrived, he was told that there was no job for him. Tr. 21.

However, Complainant's testimony and the evidence presented are inconsistent on the issue of whether Complainant drove his assigned truck. Complainant alternates between asserting that he refused to drive his assigned truck and that he drove the truck in Respondent's parking lot. At the hearing in court and during the telephonic portion of the hearing, Complainant testified that he complied with Peter Park's direction to drive the truck, and he drove the truck around Respondent's parking lot. Tr. 14, 15, 18, 53, 54. In contrast, in

Complainant's statement to OSHA, Complainant stated that "Peter [Park] then told me that either I want to work or I have a choice to either go home or look for another job," at which point Complainant decided on his own to leave and went home without driving the truck. (ALJ 1). Also, in Complainant's appeal of the OSHA determination, Complainant asserts that he was fired for refusing to drive his assigned truck. (ALJ 2). In addition, during the telephonic portion of the hearing, Complainant stated that he refused to drive because "didn't want to move a frame that was in bad condition." Tr. 60.

In view of the above, I find that Complainant has failed to establish that that he engaged in protected activity by a preponderance of the evidence under 49 U.S.C. § 31105(a)(1)(B)(i) or under 49 U.S.C. § 31105(a)(1)(B)(ii). Since I have found that Complainant did not establish that he refused to drive on or about January 17, 2013, I find that Complainant's is not protected by the failure-to-drive protected activity provision of the STAA. Furthermore, as Complainant was not engaged in protected activity, Complainant cannot demonstrate that Respondent was aware of the activity; that Respondent took adverse action; or that the protected activity was a contributing factor in Complainant's termination.

Protected Activity-Internal Reporting of Safety Violations

Complainant alternatively asserts that he engaged in protected activity when he informed Respondent's owner, Peter Park of the frozen brakes, but was directed to drive his assigned truck regardless. Internal complaints to supervisors which are related to violations of commercial vehicle safety regulations are protected under 49 U.S.C. § 31105(a)(1)(A), the complaint provision. *Zurenda v. J & K Plumbing & Heating Co.*, ARB No. 98-088, ALJ No. 1997-STA-16 (ARB June 12, 1998). A complainant need only have a reasonable belief that the respondent violated a motor vehicle safety regulation. *Guay v. Burford's Tree Surgeon's, Inc.*, ARB No. 06-131, ALJ No. 2005-STA-045 (ARB June 30, 2008). Respondent does not confirm or deny that Complainant informed Peter Park that the brakes were frozen on or around January 17, 2013.

In Complainant's statement to OSHA, Complainant states that he reported to Peter Park that there was an issue with the air compressor, which made operating the truck unsafe. Peter Park then told Complainant that he had a choice to either drive the truck or "or go home or look for another job." (ALJ 1). In his testimony at the hearing, Complainant stated that Peter Park told him to drive even though the brakes were frozen, in order to get the product to Respondent's clients on time. Tr. 13-16.[11]

As such, I find that Complainant engaged in protected activity under 49 U.S.C.A. § 31105(a)(1)(A) when he informed Peter Park that the brakes were frozen and that he would not be able to drive until they were unfrozen. [12]

[11] At the hearing, Complainant did not mention whether Respondent threatened to fire him for reporting that the brakes were frozen.

[12] Complainant also complained of multiple problems with his assigned truck during the period of his employment with Respondent, and he produced a witness (Mr. Estrada) who corroborated the continuing maintenance problems with the trucks during his employment, which ended in 2008 or 2009. Complainant also produced a report verifying that citations were issued on November 16, 2010 due to the truck's condition. (ALJ 4). In addition to these events being remote in time, Complainant has not alleged or shown that they played a part in his discharge or constructive discharge in January 2013.

Protected Activity-Filing of Complaint

Complainant also asserts that he engaged in protected activity when he filed a lawsuit, specifically the instant case with OSHA or his case before the Illinois Department of Human Rights; however, he was under the impression that these cases (federal and state) were the same. As the suits were filed following the alleged termination, they cannot constitute actionable protected activity here.

Employer Knowledge

Next, Complainant must show that the person responsible for his termination was aware of the protected activity. *Baughman v. J.P. Donmoyer, Inc.*, ARB No. 05-105, ALJ No. 2005-STA-005 (ARB Oct. 31, 2007). Peter Park, the person allegedly responsible for the termination, was aware of the protected activity of reporting the frozen brakes.

Adverse Action

Based on the testimony and the evidence presented, it is unclear whether Complainant was fired or constructively discharged. Likewise, it is unclear what part his protected activity may have played in his no longer being employed by Respondent. At the hearing and during the telephonic conference, Complainant testified that he went home after a confrontation with Mark Park. Tr. 14-16, 18, 53, 54. In contrast, in Complainant's statement to OSHA, Complainant stated that "Peter [Park] told me that either I want to work or I have a choice to either go home or look for another job," at which point Complainant went home. (ALJ 1). Also, in Complainant's appeal of the OSHA determination, Complainant asserts that he was fired for refusing to drive his assigned truck. (ALJ 2). In addition, during the telephonic portion of the hearing, Complainant stated (apparently for the first time) that he refused to drive because he "didn't want to move a frame that was in bad condition." Tr. 60. At another point in the telephonic hearing, Complainant testified that he believed that he was terminated due to the lawsuit that he filed with the Illinois Department of Human Rights. Tr. 22. Additionally, in a statement appealing the OSHA investigation, Complainant both asserts that he was forced to quit and that he was fired by Respondent. (ALJ 2).[13] In a pre-hearing statement, Respondent asserts that Complainant was never fired; however, there was no testimony or documentation offered in support. (ALJ 5).

Due to the inconsistencies in Complainant's testimony and in the evidence, it is unclear whether Complainant was terminated by Respondent or constructively discharged when he went home or what exactly happened on the day in question. While it is clear that Complainant is no longer employed by Respondent, it is not clear why. Although Complainant's testimony and evidence supports a finding that Peter Park knew that Complainant engaged in protected activity,

[13] See footnote 6 above. In the statement, Complainant asserted, "And finally received harassments and threats heavenly retaliated by Mark Park brother of Ryan Park, which forced me to *quit* my job to avoid a bigger problem." Complainant later states, "Based on the investigation report, I believe that just by the fact that me wanted to refuse to drive the truck in those dangerous conditions was just an excuse that the company Direct Trucking Corporation used to *fire* me." (ALJ 2). (Emphasis added).

it is not clear whether Mr. Park was responsible for Complainant's termination or whether Complainant was terminated at all. Complainant has also failed to assert facts or produce evidence suggesting that he was constructively terminated. Complainant has failed to establish by the preponderance of the testimony and documentary evidence that he was terminated or constructively discharged by Respondent on or about January 17, 2013 when he reported his complaint about the defective brakes and/or refused to drive his assigned truck. Therefore, Complainant has not established an adverse action.

As Complainant has failed to establish that he was terminated or constructively discharged, it is unnecessary to determine whether Complainant has presented evidence sufficient to raise the inference that his protected activity was a contributing factor to his termination.

CONCLUSION

Based on the foregoing, I find that Complainant has failed to prove by a preponderance of the credible evidence that his protected activity of reporting unsafe conditions on or about January 17, 2013 contributed to his termination. I also find that Complainant has failed to prove by a preponderance of the evidence that he engaged in protected activity by refusing to drive his assigned truck on or about January 17, 2013. Accordingly,

ORDER

IT IS HEREBY ORDERED that the complaint filed by Complainant Luis Perez against Respondent Direct Trucking Corporation under the Surface Transportation Assistance Act be, and hereby is **DISMISSED**.

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

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.

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

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

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