U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 July 2015

CASE NO: 2013-STA-00027

In the Matter of:

MICHAEL WILLIAMS,
Complainant,

v.

D.L.F., INC.,
Respondent.

Appearances: Jeffrey S. Burg, Esq.
For the Complainant

Mark H. Davidson, Esq.
Hill Devendorf, P.C.
For the Respondent

Before: Paul C. Johnson, Jr.
District Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee-protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "the Act") and its implementing regulations found at 29 C.F.R. Part 1978. Complainant Michael Williams, a driver employed by Respondent D.L.F., Inc., filed a complaint with the Occupational Safety and Health Administration alleging that his hours were cut and his pay reduced after having complained to Respondent that he was being required to drive more hours than was legally permissible. After Mr. Williams submitted his complaint to OSHA, he was first suspended and then terminated from employment with Respondent. His suspension and termination were included in the OSHA investigation and in proceedings before this Office. Respondent disputes Mr. Williams' claim, and alleges that Mr. Williams did not have his hours cut or his pay reduced, and that he was suspended and terminated for misconduct and poor performance. For the reasons set forth below, I find that Complainant has met his burden to prove that he engaged in protected activity, that Respondent had knowledge of Complainant's protected activity, that Complainant's protected activity contributed to Respondent's decision to terminate his employment, and that Respondent has failed to show by clear and convincing evidence that it would have terminated Mr. Williams absent the protected activities. Accordingly, I will order that Respondent pay certain compensatory damages to Complainant.

Procedural History

Mr. Williams filed his complaint with OSHA on June 13, 2012. On February 12, 2013 the OSHA Regional Supervisory Investigator dismissed the complaint, and Mr. Williams timely objected to the dismissal and requested a hearing. The requested hearing took place on April 8 and June 26, 2014 in Detroit, Michigan. The parties were represented by counsel. At the hearing, Exhibits 1-27 and 29-33 were received into evidence. Exhibit 28 was withdrawn. After the hearing, I gave the parties time, later extended, to submit written closing argument. The parties did so, and the matter is now ripe for decision.

Summary of Evidence

A. Testimony[1]

Complainant Michael Williams

Mr. Williams was born on October 27, 1959. When he started working for Respondent, he was 53 years old, and had been driving commercial motor vehicles since he was almost 30 years old. He had 23 years' driving experience, having earned his commercial driver's license (CDL) at age 30. He completed a defensive driving course in 1998 (Exhibit 1). As of three days before the hearing, the last ticket he received driving either a commercial vehicle or his personal vehicle was in 2006, for speeding.

Complainant was hired at D.L.F. on May 18, 2012, and was formally discharged on July 24, 2012. Exhibit 11 is a copy of the formal notice given to him that he was being suspended pending advisability of termination. Mr. Williams does not recall whether he received it from Brian Pitt, his immediate supervisor, or from Dennis Fetty, the owner of D.L.F. The notice is dated July 17, and Complainant was told when he was handed the notice that he was being fired. He later received notice that the formal termination date was August 1. May 18 was a Friday, and Mr. Williams is not sure whether he underwent a road test or actually started working on that day, although he was in a truck. Exhibit 4, a load and time log, shows that he made some pickups and deliveries on May 18. Mr. Williams made the hand-written notation on Exhibit 4 stating, "I did not fill this one out. D.L.F. changed this, not my handwriting." The next page of Exhibit 4 shows that Complainant picked up a load and delivered it on Monday, May 21.

D.L.F. was located in Riley Center Township, about three miles from Complainant's house in Richmond Township. On work days, Mr. Williams drove his personal vehicle to D.L.F., parked, did a pre-trip inspection on an empty truck, and then drove the truck elsewhere to pick up a load of sand or gravel. He took the load somewhere else and dumped it. He then returned to the pickup point and picked up another load, and delivered it elsewhere. He did so as many times during the day as possible.

Exhibit 4 shows that on May 22, 2012, Mr. Williams picked up his first load at Plant 1 at 6:05 a.m. It takes an hour and ten to fifteen minutes to drive from D.L.F to Plant 1, so he left

[1] Summaries of testimony and of documentary evidence are not findings of fact. They are simply summaries of the evidence.

D.L.F. at 4:45 or 4:50 a.m. When he picked up his load at Plant 1, he took it to Taxiway Z at Metro Airport. The drive from Plant 1 to Metro Airport takes about 15 minutes, and Complainant drove seven loads on May 22. He dumped his last load at 3:30 p.m., and then drove back to D.L.F. Due to the rush hour traffic, the drive took about an hour and 40 minutes, and he arrived at 5:10 p.m. He left D.L.F. at 4:45 a.m. and returned at 5:10 p.m., an elapsed time of 12 hours and 25 minutes.

When he started at D.L.F., Mr. Williams was told that he could drive up to 16 hours per day. His understanding of hours-of-service rules was that on duty time was time doing things while not driving, such as pre- and post-vehicle inspections. Loading and unloading are considered driving time because the driver has to remain behind the wheel and move when the line moves. Complainant had discussed hours-of-service rules with previous employers, most of whom gave him a little green book with Department of Transportation (DOT) rules. It was his responsibility to be sure he knew the rules. The DOT green book is a federal publication containing the rules and regulations governing trucks on highways throughout the United States. On May 22, 2012, after operating his truck for 12 hours and 25 minutes, Mr. Williams mentioned to Brian Pitt that he had worked over hours, and asked Mr. Pitt to take into account the hours of service requirements and rush-hour delays before assigning him loads at the end of the day. Each day, Mr. Pitt would tell Mr. Williams what his assignment would be for the next day, and did so orally.

Exhibit 4 shows that on May 23, 2012, Mr. Williams picked up his first load at 6:10 a.m. at Levy Plant Number 2, which is a pickup site at essentially the same location as Plant 1. To arrive at Levy Plant 2 at that time, he left D.L.F. between 4:45 and 5:00 a.m. Mr. Williams' last dump on May 23 was at 5:30 p.m. at Hough and Van Dyke, which is about eight miles from D.L.F. in Riley Center. As it was rush hour, it took Mr. Williams about 15 or 20 minutes to return to D.L.F., so he arrived at 5:45 or 5:50 p.m., resulting in a 13-hour day. He again brought to Mr. Pitt's attention that he had worked more than 12 hours, and used a tone of voice that showed he was concerned about breaking the law.

During his first week of employment with D.L.F., Mr. Williams brought up the hours-of-service violations to Mr. Pitt three times, and also mentioned it to Mr. Fetty. He told them that he was breaking the 12-hour rule. Mr. Fetty was an experienced driver who was familiar with the little green book, and when Mr. Williams showed him that he was limited to 12 hours, Mr. Fetty said that there was an exception to that rule for intrastate drivers. Those drivers could drive for 12 hours but work for up to another 2 hours, for a total of 14 hours a day with a minimum of 10 hours off before driving again. Mr. Williams had conversations with Mr. Pitt about the 12-hour/14-hour rule; at first, Mr. Pitt did not seem to object to Mr. Williams bringing it up, but after a few times he got annoyed. At the beginning of the second week of Mr. Williams' employment, Mr. Pitt told Mr. Williams that if he kept going by the guidelines in the little green book, he would not be employed by D.L.F. very long. Within a week of that conversation, Mr. Williams was discussing the rules with Mr. Fetty, who told him that he could drive more than 12 hours, and he should not count loading and unloading time on his timesheets. Mr. Williams tried to have Mr. Fetty show him in the book where it said that he did not have to count loading and unloading time as drive time, and Mr. Fetty could not show him anything in the book. Mr. Fetty said that if he kept following the green book, he would not be working there very long. Mr.

Williams and Mr. Fetty disagreed about whether loading and unloading time should be counted as drive time, and in Mr. Williams' experience before working for D.L.F., it was always counted.

Exhibit 4 shows that on May 24, Mr. Williams started driving at about 4:45 a.m. and returned to D.L.F. at 5:15 to 5:30 p.m., for a work day of about 12 hours and 45 minutes. On May 25, he started work at about 4:45 a.m. and returned to D.L.F. at about 4:10 p.m., for a work day of less than 12 hours. On May 29, he started at about 4:30 a.m. and ended about 13 hours later at 5:30 p.m., and he wrote a notation of those times on his timesheet (Exhibit 4) on that day. He decided to start documenting his hours because it seemed to him that the company was ignoring the 12-hour rule. By May 29, Mr. Williams' relationship with Mr. Pitt had deteriorated; it started out friendly, but by that time Mr. Pitt was getting annoyed with him.

On May 30, Mr. Williams started driving at 4:45 a.m. and returned to D.L.F. between 5:25 and 5:55 p.m., for a total of more than 12 hours. On May 31, Mr. Williams worked a proper 12-hour day. On June 4, he worked from 4:30 a.m. to 5:00 p.m., more than 12 hours. On June 5, he worked more than 13 hours of driving time. On about that date, he decided, and told Mr. Pitt, that he was not going to drive more than 12 hours in a day any more. To stay under 12 hours, he would calculate how long it would take him to do the last load, and decide whether to make the run or return to D.L.F. He would do fewer loads in his discretion in order to stay within the 12-hour rule. Mr. Williams worked on June 6, 7, 8, 11, and 12, driving 12 hours or less on each day.

Although he had been driving for less than 12 hours on recent days, Mr. Williams was still concerned about the number of hours he had been driving before June 6, and on June 13, he filed a complaint with OSHA. His complaint asserted that he was only allowed 11 hours' driving time per day, with a total work day of 12 hours, and that he was violating that driving rule when he started working for D.L.F. Mr. Williams had been subject to the 11-hour rule at jobs before he started working for Respondent, although the Seasonal Act allows driving for 12 hours. It was his belief that when he was driving for more than 12 hours during the first two weeks of his employment with D.L.F., he was violating a regulation. The OSHA complaint says that on June 5, after Mr. Williams spoke to Mr. Pitt about driving over 12 hours, Mr. Pitt told him, "If you don't like it, you can always park the truck." Mr. Williams has an independent recollection of that comment, which was made over the phone. He interpreted it to mean that if he didn't want to work over 12 hours, he could park the truck and not come back any more. He wrote in the complaint, and told Mr. Pitt, that he was not going to quit, but he didn't want to break the law anymore.

As reflected in the OSHA complaint, Mr. Williams went to speak to the Michigan state police on or about June 8, 2012, about his hours of service concerns. He was told "point blank" that he was not allowed to drive or work more than 12 hours per day, with 10 hours off, under the 100-mile rule. He understood that to mean that he had to have the truck back at D.L.F. no more than 12 hours after he left. On June 11, Mr. Williams told Mr. Pitt what the state police had told him, bringing the FMCS[2] rule book with him. Mr. Pitt told him that he didn't want to talk to Mr. Williams any more about the matter, and told him to talk to Mr. Fetty. Mr. Pitt was "absolutely" just tired of Mr. Williams talking to him about the green book. Mr. Williams

[2] Mr. Williams is uncertain what FMC stands for, but upon suggestion from his counsel, said that it has something to do with Federal Motor Carrier rules.

believed, as reflected in his OSHA complaint, that his reduction in pay and hours was related to his continued complaints about hours of service rule violations. After he decided to stay within the 12-hour rule, Mr. Williams was told not to come to work on certain days, and was reduced from five days to three days a week.

As of June 13, he had not yet told D.L.F. that he was not going to drive more than 12 hours a day. The timesheets in Exhibit 4 show that he voluntarily restricted his hours on June 16, because he dumped his last load at 1:40 p.m., and he normally would have dumped another load later than that. He cannot explain why, if he dumped his last load at 1:40, his timesheet shows that he ended his day at 4:00 p.m., almost 2½ hours later. On June 18, he worked a short day, because he was called back into the yard. He believes it was a punishment. He had told Mr. Pitt a week before filing his OSHA complaint that he was going to file it, and either Mr. Pitt or Mr. Fetty told him that they had received a copy of it after he filed it.

Mr. Williams drove for less than 12 hours on June 19, 20, 21, and 22. He was intentionally restricting his driving to stay under 12 hours, as shown by the early times of the last dumps. Respondent was getting annoyed, because they thought he could do another load or two. Mr. Williams did not work on Monday or Tuesday, June 25 or 26; he was told his truck was out of service. He learned that the truck had had an oil change, was greased, and had an alternator belt replaced, and Mr. Williams objected because he had written up those problems 15 or 20 times and they could have taken care of them over a weekend, but they chose to do it on days he was supposed to work. He felt as though he were being punished for costing Respondent money by cutting his days short by one load. They did not take it well. Likewise, on June 29 Mr. Williams was kept off the job; by that time, he had been told that D.L.F. knew about his June 13 OSHA complaint. Mr. Williams was kept off work on July 3 and July 5; he does not know whether the company was operating on July 3, but it was operating on July 5. The company was not operating on the holiday, July 4. Mr. Williams did not work on July 10 or 11, and does not know why; he was never ill while working for D.L.F. On the days he worked between June 28 and July 13, he drove for less than 12 hours each day. He did not work between July 13 and July 17, and does not recall being told why not.

As reflected in Exhibit 9, on or about July 10, 2012, Mr. Williams contacted the state police with a complaint of "CVED." He does not know what CVED means. He first contacted the state police by telephone, and then, he thinks, sent the complaint by mail and email. He had contacted the state police earlier, within a week of his employment with D.L.F., to inquire about the 12-hour rule, but had not filed a complaint with the state police before July 10. His complaint to the state police on July 10 was about D.L.F.'s violating the 12-hour rule. He had not recently driven more than 12 hours in a day, but Mr. Pitt and Mr. Fetty were trying to intimidate him into doing so. They told him his refusal to take additional loads that would put him over 12 hours of driving was costing the company money, but they never showed him that loading and unloading time should not be counted. One example of intimidation was when Mr. Fetty and his daughter sitting in Mr. Fetty's truck at the end of his street with his wife and children outside. Mr. Fetty had stopped at the house to use the bathroom on his way back to D.L.F. from the airport, and when he left the house, he saw Mr. Fetty and his daughter, who followed him back to D.L.F. When they reached the yard, Mr. Fetty told Mr. Williams that he was taking pictures of him.

Mr. Williams took pictures of Mr. Fetty another time, on the day that Mr. Williams broke the hydraulic line. He does not remember the date, but it was about three weeks after he filed the OSHA complaint. Before Mr. Williams filed his OSHA complaint, Mr. Fetty did not take pictures of him, but after he filed his OSHA complaint, Mr. Fetty took pictures of him on the day he broke the hydraulic line and told him that he had taken pictures at his house.

The state police report of investigation into Mr. Williams' hours-of-service complaint indicates that Mr. Williams told a state police officer that he was working 90 hours per week with less than 10 hours off between days, but the investigating officer found no violations. Mr. Williams believes the reference to 90 hours is a typo, and he never failed to get at least 10 hours off between days. The author's report also says that the officer met with Mr. Fetty on July 13, 2012 at 1120 hours. Mr. Williams did not see the state police at D.L.F., and does not know whether they came. The state police contact was on July 13, a Friday, and on Tuesday, July 17, Mr. Fetty was given the suspension memo.

Mr. Williams never saw the employee warnings dated May 24, May 25, June 17, or June 18 (Exhibits 15-18) before he received his personnel file sometime after July 20. Exhibit 15 discusses inconsiderate, reckless, and aggressive driving around the plant site, but he had never been accused of that conduct around May 24. Exhibit 16 refers to speeding, no tarping, inconsiderate, nonprofessional display of character on plant site, but Mr. Williams had not heard of any of that at that time (May 25). Exhibit 17, dated June 5, refers to speeding down Omo Road; Mr. Pitt had asked Mr. Williams whether he had driven on Omo Road, but Mr. Williams was not going 55 or 60 miles per hour because the tail end of an empty double starts swiveling and flipping over at more than about 30 miles an hour. Exhibit 18 states that "Mike is still not tarping." Mr. Williams saw other D.L.F. drivers not tarping their loads, and never heard of or so anybody being punished for not tarping.

Each of the employee warning forms that Mr. Williams testified he did not see states that D.L.F. "expect[s] immediate correction of the problem otherwise we shall have no alternative but to consider termination of your employment." Since he never saw the forms, he did not have notice that he had problems that needed to be corrected. The only problem D.L.F. ever had with him was that he was demanding to drive 12 hours or less.

By the time Mr. Williams filed his OSHA complaint, he had not received any written reprimands or discipline from D.L.F. He had never seen the form used by D.L.F. for employee warnings at least up to June 18, 2012.

Mr. Williams made notations that he had received an employee warning on his timesheets for May 25 and June 5. He did not actually receive warnings on those days, but made the notations after he was terminated and received his personnel file that had copies of employee warnings with those dates on them.

Before starting to work for D.L.F, Mr. Williams was familiar with the procedure of placing tarps over loads in commercial vehicles.

Exhibit 19 is a "documentation of events" signed by Mr. Pitt and Chris Freeman bearing dates of June 20, 21, and 22. The document indicates that Mr. Freeman worked for Toebe Company. Mr. Williams never saw that document until after receiving his personnel file. Someone he presumes to be Mr. Freeman once spoke to him about paying attention to the loader when he came into the yard, but never gave Mr. Williams the impression that he was not allowed to be at the plant. Nobody else at Toebe every told him he had done anything wrong. Neither Mr. Fetty nor Mr. Pitt told him that he had done anything wrong at Toebe around June 20-22.

Mr. Williams never saw the employee warning forms dated June 21 (Exhibit 20) or June 25 (Exhibit 21) before he received his personnel file after July 20. By June 25, the date of Exhibit 21, D.L.F. knew about Mr. Williams' OSHA complaint, because he had told Mr. Pitt and, he thinks, Mr. Fetty, that he had filed it.

Exhibit 22 is a document dated June 29, 2015 containing several numbered questions, which Mr. Williams answered. All the hand writing on the document is by Mr. Williams. The incident reflected in that document involved Mr. Williams getting lost after making a delivery on M29, so it took him about a half-hour too long to get back to the yard. He did not try to evade responsibility, and answered the questions to the best of his knowledge. He did see the document around June 29.

After Mr. Williams returned Exhibit 22 to Mr. Pitt on June 29, Mr. Pitt prepared two more documents with more questions (Exhibits 23 and 24), both dated June 29. When Mr. Pitt gave Mr. Williams the questions, Mr. Williams did not have any understanding that his job was in jeopardy.

Exhibit 7 is an employee warning form dated June 28, indicating that Mr. Williams was "not paying attention to detail while unhooking trailer" with the result that the hydraulic line was broken off the trailer. Mr. Williams did see and sign the form at about that time. It was handed to him by Mr. Pitt.

Mr. Williams never saw the employee warning forms dated July 6, July 20, or July 11, 2012 (Exhibits 25, 26, and 29) until after July 20, 2012. Exhibit 29 refers to Mr. Williams' failure to show up on time for a job in Florence. He does not recall being late for any job that he was assigned. He did not receive Exhibit 30, a second employee warning form dated July 11, 2012 referring to leaving a job early and being late to work. He does not recall any of that happening, although there was a time that he mistakenly left the last load picked up on one day in his truck, and dumped it the next morning. He does not know what date that occurred.

Exhibit 12 is a letter dated July 20, 2012 that Mr. Williams received from D.L.F. When he was handed Exhibit 11 on July 17, he knew he was going to be fired, so he went home and wrote a request for his personnel file, which he mailed on July 18. The second paragraph of Exhibit 12, written by Mr. Fetty, alleges that from near the beginning of his employment, Mr. Williams refused to recognize that D.L.F.'s operations were regulated by Michigan law and refused to work the allowable hours under that law. Mr. Fetty's description coincides with Mr. Williams' memory of those first days of his employment. The third paragraph says, "you filed a DOL complaint after you were issued discipline." Mr. Williams had not been issued discipline

before filing his complaint with DOL. Exhibit 12 contains a number of bullet points referring to dates that coincided with the employee warnings that Mr. Williams testified about; his reaction upon receiving Exhibit 12 was that every one of them was false except for breaking the hydraulic line on June 28. Mr. Fetty said in Exhibit 12 that Mr. Williams had told D.L.F. that he wanted to be fired so he could have a big payday; that is false, because he is willing to drive the trucks and make the company money. He is willing to stay there and work for it. He did not have any intent to gain from the complaints he made to Mr. Pitt, Mr. Fetty, OSHA, or the state police. He just wanted them to stop following him around and giving him the attitude; once he told them he was not going to drive beyond 12 hours and they understood it, the attitude and treatment changed drastically in a short period of time.

Exhibit 12 refers to Toebe asking that Mr. Williams be removed from their project. Before the letter, he had not been aware of any such request from Toebe. The exhibit also refers to Mr. Williams being removed from the Florence Cement project, thereby reducing the available work options. Mr. Williams had not been told about being removed from the Florence Cement project; in fact, he cannot believe that Mr. Volkman asked for his removal from the Florence Cement job, because he got out of his truck and spent a half hour helping a woman who works there dig bricks out of the concrete sidewalk while Mr. Volkman was standing right there. If Mr. Volkman did ask that he be removed from the job, it could only be because Mr. Williams made it clear to him that he would leave the job site at a certain time in order to return to D.L.F. within 12 hours. Mr. Williams never heard any discontent from Mr. Volkman about Mr. Williams' work at Florence Cement. Before receiving Exhibit 12, Mr. Williams had not heard from either Mr. Fetty or Mr. Pitt that they were unhappy with his conduct or performance at Florence Cement.

Exhibits 13 and 14 are Mr. Williams' responses to Exhibit 12. He is sure he sent Exhibit 13 to D.L.F., with a copy of Exhibit 12 with some hand-written markings that he made, but is not sure whether he sent Exhibit 14. As reflected in Exhibit 14, Mr. Williams believed that there was no doubt that Mr. Fetty decided on his future employment when he told Mr. Williams that his employment wouldn't last long if he used and referred to the DOT regulations regulating his driving time and off time.

Exhibit 14 also refers to his paycheck being in three different places after he filed his complaint. Initially, he picked up his paycheck in the yard where the trucks are kept from a drawer in the desk in the garage. Three of the last four paychecks, however, were in different places, and he had to make extra efforts to find them. He thought it was childish harassment.

Mr. Williams did have one or two conversations with Mr. Pitt about tarping. Both of them knew it was against the law not to tarp. Mr. Pitt indicated that he understood why not tarping would save time, and make the company more money. One or two times Mr. Williams could not tarp because the tarp was broken; Mr. Pitt told him to do the best he could with the broken tarp and try to finish the day.

After Mr. Williams was handed the suspension letter by Mr. Pitt, he understood he was being terminated, and did not speak personally to either Mr. Fetty or Mr. Pitt again.

At the time he was terminated, Mr. Williams and his wife Janet had been married for 28 years and had two children, one in high school and one ending grade school. Mrs. Williams worked in the radiology department at Beaumont Hospital, earning about $40,000 per year. While working at D.L.F., Mr. Williams initially made $700-850 per week, but by the time he was fired, his pay was down to $200-300 per week. Losing his job with D.L.F. caused his family economic difficulties. They fell behind on house payments and had to ask Mrs. Williams' parents for money, which was humiliating. Mrs. Williams was not sure whether to believe Mr. Williams' explanation that he was not willing to break the law and that he was under pressure. Although they did not split up, Mr. and Mrs. Williams slept apart for four months due to the tension, with no conjugal relations during that time and for a little while longer. They tried to keep it from the children, but it was virtually impossible when they were sleeping apart, and they had to say no more than they would have liked. They did not have a real Christmas or Thanksgiving. Mr. Williams testified that he did not want to experience something like that again "because you just absolutely lose your pride."

After his termination, Mr. Williams was depressed and had difficulty sleeping, and was prescribed sleep medicine. He had chest pain that turned out to be heartburn, and received medication. He took the sleep medicine long enough to get two refills, and is still taking medication for heartburn. The heartburn also began two or three weeks after his termination, and went away with the medication. Before being fired by D.L.F., he had never experienced chest pains or heartburn. His sleeping difficulties began two or three weeks after his termination because he started getting worried; it was hard to look for a job when every job search cost money for gas. It was becoming harder to take $20 or $30 away from the food bill to pay for gas to look for a job.

Mr. Williams' relations with his children were affected by his termination; they looked at him as though he were not providing, and he was humiliated. Although he and his wife tried to hide their arguments from the children, they did not always succeed. Mrs. Williams would say that Mr. Williams was not being a provider and that he had failed to provide for four or five months.

Mr. Williams obtained employment with Stafford Transportation on December 1, 2012. As reflected in Exhibit 32, a W-2 form from D.L.F., Mr. Williams earned $5,426.53 with D.L.F. between May 18 and July 27, 2012. At Stafford, he was paid by the load at a lower rate – but not much lower – than the rate paid by D.L.F. It was a full time job, like the job at D.L.F. The Stafford job was interrupted, and at the time of the hearing Mr. Williams was scheduled to return to work at Stafford on April 14, 2014.[3] As shown in Exhibit 33, Mr. Williams earned $6,665.00 for the year 2013 working for Stafford. Although he was employed by Stafford on December 1, 2012, he received no pay from Stafford until March of 2013. Exhibit 33 also has a copy of a report of unemployment insurance payments; Mr. Williams collected unemployment based on his employment with Stafford. He worked for Stafford for about three months, then was laid off and collected unemployment benefits.

[3] Mr. Williams testified on April 8, 2014 that he was scheduled to return "this coming Monday." The Monday following April 8 was April 14.

Mr. Williams had never worked for a seasonal trucking company before working for D.L.F., and does not know how long D.L.F. operated in 2012.

While working for D.L.F., Mr. Williams picked up his truck at D.L.F. and drove it to a plant to pick up a load. He had to wait in line, and when he got to the point of picking up the load, it took 3½ to 4 minutes. From D.L.F., he drove two miles on a road to Boardman, turning left on Boardman and then a right onto Memphis. He then turned right on M19, which he took all the way to Richmond, where he turned right onto Gratiot. After about seven miles, he would exit off Gratiot onto I-94 and take that all the way into Detroit. About three or four miles after crossing I-75, he exited off I-94 at Lonyo, taking an immediate left and going for 2½ miles onto Outer Drive, turning right into the yard after a quarter mile. After getting loaded and weighted at the plant, he would exit the plant onto Outer Drive and go about 4 ½ miles on surface streets before exiting onto I-94 and taking that highway to the Detroit Metro, which is the major international airport in Detroit.

Mr. Williams was terminated from employment with Stafford when he tried to get a union started there. He filed a complaint with the NLRB, which was settled on terms including reinstatement at Stafford. Before working for D.L.F., Mr. Williams worked for Stone Transport and D&K Services. Stone Transport is in Saginaw; Mr. Williams was terminated from Stone Transport because he wouldn't drive overweight loads from Canada to the United States, and he filed a whistleblower complaint against Stone Transport. He was terminated from D&K Services in Warren for running the truck out of fuel. Mr. Williams filed a written complaint against D&K but did not pursue it. Mr. Williams was convicted of a felony 35 years ago for breaking and entering into a garage.

Exhibit 4 is a form provided to Mr. Williams by D.L.F. to log the loads, the material, the load time, the dump time, and the destinations. Mr. Williams started logging the load and dump times on his third day of employment. He never filled out the spaces for lunch time or travel time. If he had, there might be a better indication of his actual driving time, but he was never asked to fill them out. He never took a lunch break or asked for one; however, the log entry for July 6, 2012 shows that he took a lunch break.

Mr. Williams did not bring a copy of the little green book to the hearing. It includes the federal regulations for motor carrier safety, and the safety regulations apply to trucks in interstate commerce. Mr. Williams has no knowledge that Mr. Fetty was involved in interstate commerce. He has no knowledge that any of Mr. Fetty's trucks went outside the 100-mile limit. He agreed that certain activities listed in the Federal Motor Carrier Regulations constituted on-duty time, but not necessarily driving time. Typically, he would have to wait in line when he went to pick up a load or to unload the material, and none of those time periods are logged in the time logs.

When Mr. Williams recorded his time, the start time would be when he arrived at D.L.F. in the morning, and his pre-trip inspection would take place after that time. The end time was the time he arrived back at D.L.F. at the end of the day, and his post-trip inspection would take place after that time. His average wait time when loading and unloading was about 4 minutes; if he did seven trips in a day, that would account for about one hour. Loading and unloading is driving time.

Exhibit 3 is Complainant's pay stubs for his D.L.F. employment. They reflect payment at $12 per hour for "shop time." He only worked in the shop one Saturday, and believes that references to "shop time" were to his pre-trip and post-trip inspection time.

Exhibit 9 is the police report filed by Mr. Williams. He does not agree with the officer's conclusion that there were no infractions involving exceeding the 12-hour rule; he believes the officer made a mistake.

When Mr. Williams made his complaints to OSHA and to the state police, he was sincere in his belief that something was wrong. He looked up the DOT rules on line. Mr. Fetty and Mr. Pitt gave him a copy of the Michigan seasonal trucking rules, which said nothing about loading or unloading time. Throughout his employment with D.L.F., he was never persuaded that his understanding of the laws was incorrect and Mr. Fetty's and Mr. Pitt's understanding was correct; in fact, it was the opposite.

Nobody at D.L.F. ever explicitly told Mr. Williams to drive more than 12 hours in a day. But the job was an hour and a half away and they wanted the job done, and if that meant driving more than 12 hours, then so be it.

During the lunch break in the first day of the hearing, Mr. Williams and his attorney walked near Mr. Fetty, who coughed and said "Fuck you" as they passed. That comment reminded Mr. Williams of his treatment at D.L.F., where "if you speak up, this is the attitude you get."

Brian Pitt

Mr. Pitt was employed as the trucking coordinator ("truck boss") for D.L.F. during the 2012 season, starting in about April of 2012. He has been in the trucking business for about 30 years, and has owned his own trucking company. On a typical day in 2012, the phones would start ringing before daylight, with calls from customers and drivers alike. He used his own pickup truck in his supervisory role, and there were times he drove a truck for D.L.F. when it was necessary. There were four or five trucks on the road at any given time. The turnover for an operation like D.L.F.'s can vary; sometimes there is high turnover because people don't know what they're doing. Mr. Pitt's entire career has been in seasonal trucking, mainly paving asphalt roads, while Mr. Fetty is more involved with supplying materials to the plants. In general, the work is seasonal, and drivers can expect to be laid off and collect unemployment for a period of time.

Mr. Pitt is familiar with the federal motor carrier safety rules as well as the seasonal local construction rules under Michigan law. He remembers Mr. Williams bringing up the hours of service issue more than once, and Mr. Williams would be very stern about the hours he could drive. At the end of the day, he would go on about not driving more than 12 hours a day.

Mr. Pitt recalls interviewing Mr. Williams, as Mr. Williams testified he did. He did tell Mr. Williams that if he could drive, Mr. Pitt could teach him the job. There is a difference

between being able to drive and being able to do the job; this job requires more than driving down the road, but includes backing up and a lot of technique.

The drivers' log sheets, Exhibit 4, were turned in by the drivers by putting them in a box in the office. It was not part of Mr. Pitt's responsibilities to look at them. Mr. Williams frequently did not turn his paperwork in and the company had to call him and ask for it. The driver's pay depended on having the information on the log sheets.

Exhibit 5 is an employee warning form. Mr. Pitt did not play any part in developing the form; he received one as part of his hiring packet. There were other employees besides Mr. Williams who received employee warnings during the summer of 2012. Exhibit 15 is the employee warning to Mr. Williams dated May 24. Mr. Pitt presented it to Mr. Williams and talked to him about the issues, such as brokers or other operators calling Mr. Pitt and complaining about Mr. Williams' actions on the job site. When Mr. Williams testified that he did not receive this document, he was lying. Mr. Williams received every one of the employee warning forms. Mr. Pitt presented Mr. Williams with Exhibit 16, the employee warning form dated May 25; his practice was to present the forms at the end of the day, when Mr. Williams returned and parked his truck and came up to the shop. Or, Mr. Pitt would catch him on the job site and give him a warning then. He always asked Mr. Williams to sign the warning forms, and Mr. Williams always said he would not. Mr. Williams had a "smirky" look and was defiant when he refused to sign.

Exhibit 17 is an employee warning form dated June 5. Mr. Pitt received a call from a neighbor concerning Mr. Williams' speeding down the gravel road. The neighbor asked if Mr. Pitt could ask Mr. Williams to slow down because their children were playing outside. Mr. Pitt discussed it with Mr. Williams and, as the note at the bottom of the exhibit shows, asked Mr. Williams to stay off Omo Road. Mr. Williams refused to sign Exhibit 17.

Exhibit 18[4] is an employee warning form dated June 19, 2012, referring to a complaint from another D.L.F. driver that Mr. Williams was "still not tarping" his loads. Mr. Pitt asked Mr. Williams to sign it, and he said he would not.

Exhibit 20 is a warning form dated June 21. "Terria" at Levy complained to Mr. Pitt about Truck 410 leaving the Levy plant untarped. The purpose of tarping is to keep the load from blowing out of the truck while it's going down the road. There is a regulation requiring tarping, and there are industry standards for it. The only time Mr. Pitt would allow a load to continue without a tarp would be if the tarp broke while the truck was loaded, and the truck had to keep going down the road. The police could pull a driver over for not having a tarp, and the driver would be responsible for the ticket.

Exhibit 21, dated June 25, 2012, involved Mr. Williams leaving work early. His trailers were broken and D.L.F. swapped a set of trailers so he could work. The replacement trailers had an older manual tarping system, and Mr. Williams claimed he didn't know how to work it and

[4] The hearing transcript refers to this as "Exhibit 1," but the witness identified the document as the employee warning dated June 19, 2012. I conclude that the reference to "Exhibit 1" is in error, and the witness was referring to Exhibit 18.

went home. Mr. Pitt showed Mr. Williams Exhibit 21 the next morning, and Mr. Williams did not sign it.

Exhibit 7, dated June 28, 2012, involved Mr. Williams tearing off the hydraulic line by not paying attention. The hydraulic line breaks when it is not unhooked from the "lead pup," and it gets pulled off from the other trailer. Mr. Williams did sign Exhibit 7 on that day.

Exhibit 25 is an employee warning dated July 6. Mr. Williams was driving near Port Huron, and was loaded with his lift axle up. Driving with the lift axle up causes the truck to be overloaded, which can result in a several-thousand-dollar ticket. If he had lowered the lift axle, he would have been allowed to carry the extra weight, but instead of dropping it to be legal, he was running with the lift axle up. Mr. Williams also failed to use his turn signals. The raised lift axle and the failure to use turn signals came to Mr. Pitt's attention on July 6. Mr. Pitt asked Mr. Williams to sign Exhibit 25, and he refused to sign it. Mr. Pitt made a notation on Exhibit 25 that Mr. Williams refused to sign it. He had not noted previous times that Mr. Williams refused to sign because he didn't think the warnings were a big deal, but it seemed to Mr. Pitt after a while that Mr. Williams was very defiant in failing to follow any course of action to correct the issues.

Exhibit 26 is an employee warning dated July 10, 2012, involving Mr. Williams' failure to do his pre-trip inspections in the morning. Doing a pre-trip inspection is an important thing for a trucking company. There is a federal requirement to do certain checks in the morning before the truck leaves, and they are required even if it's a seasonal operation.

Exhibit 29 is an employee warning dated July 11, involving Mr. Williams' being late to a job site that morning. Mr. Pitt asked him to sign the warning, and he did not.

Exhibit 30 is a second employee warning dated July 11, involving Mr. Williams' leaving a job site early on the same day that he reported late.

Exhibit 27 is a set of notes written by Mr. Pitt, prepared so he could remember. Cheryl must have put it in Mr. Williams' employee file.

Exhibit 19 is a typed form called "Documentation Form of Events." The information came from Toebe. Mr. Pitt jotted down the complaints and took it to Toebe, and it was reviewed and signed by a Toebe employee. Toebe had particular routines for the trucks that came in to dump at a plant site. The site has sand trucks and stone trucks coming in, and they are all trying to dump at the same time. The loader operator is responsible for keeping everybody in check, and telling when what to do when, where, and how. For some reason, Mr. Williams would cut in front of other trucks, jumping in, and dumping. He unhooked his trailer where he dumped the load, or somewhere else, instead of where the loader operator told him to. Mr. Pitt observed this behavior himself. There came a time when Mr. Williams' truck was asked not to be at Toebe. As a result, Mr. Pitt had to hire more trucks to be sure D.L.F. covered its quotas. Mr. Pitt told Mr. Williams that he had been asked by both Toebe and Florence not to send Mr. Williams' truck to their locations. It would have been shortly after it happened.

As truck boss, Mr. Pitt did not have the authority to terminate drivers. Drivers were hired on his recommendation to Mr. Fetty, but Mr. Fetty did the hiring and firing. As of July, Mr. Pitt would assess Mr. Williams' work performance as poor. He tried "over and over" to work with Mr. Williams. For example, on the day that Mr. Williams drove with the lift axle raised, he tried to explain to Mr. Williams that he had to use the lift axle, and Mr. Williams said that he had been using it. He had numerous conversations with Mr. Williams, who would initially be cordial and then turn right around and "do it again."

Mr. Pitt does not recall if he was involved in the decision-making process for terminating Mr. Williams. His role was to make reports. He does not have a recollection of making any recommendation to Mr. Fetty, although he does recollect discussing the write-ups and how frequent they were.

Mr. Pitt recalls reading and giving Exhibit 11 to Mr. Williams. Although he heard Mr. Williams testify that he told Mr. Williams he was getting fired, he never said that to him.

Seniority plays a role in work assignments. The most senior driver gets the first choice, and then it goes down the list. If a more senior driver refuses a job, it goes on to the next person. Mr. Williams was at the bottom of the seniority list at D.L.F. in the summer of 2012.

Mr. Pitt heard Mr. Williams testify that he didn't get as many hours in a couple of weeks in July as others did. Besides seniority, other factors can enter into the number of hours. Weather could be a factor; if the stock piles in the plant were full, the plant would cancel the work. The jobs can't run it's raining, and they have to shut the trucks off if there is not a lot of stock pile room.

During the lunch break in the first day of testimony, Mr. Pitt heard Mr. Fetty cough in the hallway. He did not hear him say "f you." If he had heard it, he would remember it. He heard the cough, and he heard the "you," but did not hear the "F" part. It could have been said that way, but Mr. Pitt didn't hear it. He is sure that he has heard it said that way, with a cough, before.

Mr. Pitt gave Mr. Williams a driving test and, based on that test, recommended to Mr. Fetty that Mr. Williams be hired. He tried to train Mr. Williams on the job site by giving him pointers two or three times on how to hook and unhook more quickly – he could drive the truck already. Mr. Pitt tried to schedule Mr. Williams for jobs that he knew he could do.

When Mr. Williams first started working for D.L.F., he could drive the truck; he had some trouble backing up, but he could get by. During that first week, Mr. Williams was trying. Mr. Pitt can't comment on Mr. Williams' specific performance, because the records he kept on Mr. Williams' job assignments have been discarded. The ability to back up and dump a load properly is an essential job requirement for a D.L.F. driver, and Mr. Pitt would not have sent Mr. Williams to a personal residence to back up and dump a load at any time during his employment with D.L.F. It did not hurt D.L.F.'s operations for the most part that Mr. Williams could not be sent to residential jobs. It also did not hurt D.L.F.'s business with Toebe, but it did affect D.L.F.'s business with Florence, as D.L.F. came very close to losing that job.

The 2012 season at D.L.F. lasted until the end of October or the first part of November. The level of work for D.L.F. drivers did not remain the same during that period of time. By the end of October and November, the drivers were spreading gravel on a road, which meant having the ability to dump and spread the load without hooking and unhooking. Between the time Mr. Williams left D.L.F. and the season ended, D.L.F. continued to operate. By the end, they were down to two drivers working, one of whom was Mr. Pitt.

Mr. Pitt is familiar with the little green book, which is a Federal Motor Carrier guideline book. He does not personally have a copy of it. Mr. Fetty's business was a seasonal business, and it is Mr. Pitt's understanding that as a seasonal business there were different hours-of-service rules than for non-seasonal businesses. He believes that under the seasonal rules, a driver can be on duty up to 16 hours in a day, and can drive for 14 hours in that day. Mr. Williams was "heavy on this 12-hour deal," meaning that Mr. Williams claimed he needed to be back in within 12 hours of leaving, and as a result Mr. Pitt felt that it didn't matter whether the correct rule was 12 or 14 hours of driving time. D.L.F., through Mr. Fetty and Cheryl Paquin, researched the correct rules and after Mr. Pitt read what was posted for seasonal workers, he disagrees with Mr. Williams about how many hours a driver can drive. He explained to Mr. Williams what the law said, with both of them reading it, and Mr. Williams failed to recognize it.

Mr. Pitt's understanding is that a driver has to be off-duty 10 consecutive hours. He doesn't know anything about Mr. Williams complaining to any authority that D.L.F. was not allowing its drivers 10 hours off between runs. He remembers the state police coming to D.L.F. and doing an audit, and was told that there were no violations.

During the first week of Mr. Williams' employment, Mr. Pitt got along with him about "as good as you could get." Then he started getting defiant, meaning that he would not respond to Mr. Pitt's telling him what he was doing wrong and trying to work on it to get better. He started becoming defiant very noticeably about half way through his employment.

Mr. Pitt's responsibilities included supervising the drivers, scheduling them, and monitoring their performance. He does not recall disciplining anybody. When he started with D.L.F., he received a packet of materials that included contacts and some write-up forms. He understood the purpose of the form was to make the employees aware of things that they weren't doing correctly. He did not decide disciplinary action, but Dennis "or whomever" would. The forms say, "We expect immediate correction of the problem, otherwise, we shall have no alternative but to consider termination of your employment." Mr. Pitt carried the forms with him in his vehicle, and his procedure was to write up the warning and then give it to the driver at the end of the day, if they were there. He recalls giving other employees warning forms during the summer of 2012, including "Bill," but he has no idea what he gave Bill a warning about. He believes he gave a warning form to "John," and doesn't remember if "Jason" received one; that was all the drivers D.L.F. had. The other drivers knew what they were doing; they tarped.

It is a violation of law not to tarp loads. Companies are rated by "motor carrier" and the more tickets that a company gets, the higher the rating system is. So Mr. Williams' repeated failures to tarp could have caused the company to be at risk for some consequence. Failing to tarp is a serious matter when it is repeated over and over. Mr. Williams received an employee

warning for not tarping on May 25, one week after he started with D.L.F., and on June 19 and 21. The warning on June 21 was based on a complaint from a customer that Mr. Williams was not tarping. On a scale of 1 to 10, the seriousness of these failures to tarp were 4's and 5's. Mr. Pitt's understanding that if a tarping ticket were issued, it would go to the driver. He does not know how the state works their rating system for trucking companies, but only knows that they have one. Speeding is, in Mr. Pitt's opinion, a serious problem for a D.L.F. truck driver. He doesn't know whether a speeding ticket would factor into the company rating system, because it's more of a driver violation.

Exhibit 15 mentions speeding and reckless and aggressive driving practices. That conduct places people and property in danger, so Exhibit 15 is a pretty serious write-up. The information came from Ajax. Exhibit 16 says that Mr. Williams engaged in speeding, failure to tarp, and an inconsiderate and unprofessional display of character. The last referred to arguing with the loader operator at Ajax. Mr. Pitt does not recall whether he learned of the conduct from Ajax or from other drivers. Mr. William claimed he did not behave unprofessionally. Exhibit 17 is a write-up for speeding again, and Exhibit 18 is a write-up for not tarping. Mr. Pitt did not write "refuse to sign" on Exhibits 15-18 after Mr. Williams did not sign them.

Early in Mr. Williams' employment, Mr. Pitt intended to write Mr. Williams up but, after checking with Mr. Williams and getting his version of the facts, decided not to do so. He had three other drivers and up to 40 brokers to deal with. Brokers are trucks that D.L.F. hires for D.L.F. jobs. Mr. Pitt had to make sure that they were accountable, and passed on complaints to their bosses. There was one occasion when a broker was asked not to return to a customer site, and although he does not remember how many, there was more than one. It is pretty extreme for a customer to ask a driver not to come back to a job, and those other drivers were being pretty extreme. Mr. Pitt never recommended discharge of a D.L.F. driver or broker because they were asked not to come back to a customer site.

Mr. Pitt turned the write-ups of Mr. Williams into the office, and does not know whether Mr. Fetty knew about them. Cheryl Paquin was the secretary, and Mr. Pitt did see them meeting with each other and talking about the business. Mr. Pitt was part of D.L.F. management in his job as supervisor or truck coordinator. He thinks it likely that Mr. Fetty and Ms. Paquin discussed the employee warnings that Mr. Pitt was distributing to drivers; it is a crucial aspect of the business that D.L.F.'s drivers perform their jobs properly.

There came a time that Mr. Pitt was aggravated by Mr. Williams, mainly at the end of his employment. Over the course of employment, he grew not to like Mr. Williams; he got tired of receiving calls about Mr. Williams every day. He didn't have a problem with Mr. Williams, but Mr. Williams would "just stick the prod in you and just keep turning it if he knew he could."

There came a time after multiple phone calls, complaints about Mr. Williams' driving, passing cars at 70 miles per hour and cutting them off, driving down gravel roads, speeding incidents at the plants, that Mr. Pitt wrote something up because he was frustrated with the way

Mr. Williams drove a truck. Exhibit 10 is the document he wrote up and signed on July 6, 2012.[5] He turned it in to Cheryl and told her that if Mr. Williams killed somebody, he didn't want to be any part of it. By that point, Mr. Williams was a challenge to manage. Exhibit 10 indicates that Mr. Pitt believed Mr. Williams to be a liability and an extremely risky driver, and that he had never met a "more road rage-ish aggressive driver." He agrees that a driver with road rage should not be on the road. Mr. Pitt does not know whether Mr. Williams was under any kind of discipline on July 6, when he wrote Exhibit 10. He turned it in to Cheryl to be in his own file, and did not know it was going into Mr. Williams' file. It was not intended for either Mr. Fetty or Mr. Williams. Mr. Pitt said in Exhibit 10 that Mr. Williams is "quick to pull the DOT regs out for his benefit and then blatantly disregard the laws for his own twisted reasoning." He also wrote, "I hope that none of my family or yours ever encounter this individual on Michigan roads," that Mr. Williams is "a bomb waiting to go off," and that he has "never felt so certain of an individual needing to be removed from driving a commercial vehicle and felt so helpless in doing so." He turned the letter in, and it's up to Mr. Fetty to hire and fire his drivers. He's sure he had some discussion early on with Mr. Fetty to the effect that Mr. Williams could do the job, but he never said so after July 6. Mr. Pitt thinks that Cheryl would have shared the letter with Mr. Fetty. Mr. Pitt did not write Exhibit 10 several weeks after July 6 and back date it; he sat in Cheryl's office and wrote it on July 6. He does not know why he didn't recommend that Mr. Williams be terminated. He does not recall what he and Mr. Fetty talked about with regard to Mr. Williams' termination.

Mr. Pitt did tell Mr. Fetty that Mr. Williams had complained about hours of service violations, and that Mr. Williams had told him he was opposed to breaking the law. Mr. Fetty's reaction was nothing extreme; they just took in the information and were going to find out what Mr. Williams was referring to. He remembers Mr. Williams expressed to him several times that he was violating the hours of service regulations, and he had the little green book in his hand. The book that Mr. Williams had was about 5-10 years old and was out of date. The age of the book made it possibly not accurate. As laws are added, the book gets updated,

Exhibit 10 was intended to "protect my butt" in case Mr. Williams killed somebody. It was Mr. Pitt putting his feelings down. He was afraid that Mr. Williams was going to hurt somebody. Mr. Pitt doesn't know whether Mr. Fetty had similar feelings about Mr. Williams at that time. By July 6, Mr. Pitt had issued warnings on May 25, June 5, June 18, June 19, June 20, June 21, June 25, June 28, and June 29, each of which was serious misconduct by Mr. Williams. But Mr. Pitt did not tell Mr. Fetty that he had to fire Mr. Williams. Mr. Pitt didn't care about Mr. Williams' filing complaints with OSHA and the state police; they didn't mean anything, and Mr. Williams was getting written up for what he did wrong.

Mr. Pitt became aware that Mr. Williams had filed an OSHA complaint because he heard Mr. Williams bragging about it around the garage. He didn't know what Mr. Williams had filed, just that he had filed something with OSHA. The OSHA complaint was filed on June 13. Before that date, Mr. Pitt had issued three warning notices; the rest were issued after that date.

[5] Again, although the transcript reads "July 16," the document itself is dated July 6, and in immediately subsequent questioning the date was described as "July 6." It is unclear whether "July 6" was a misstatement by the questioner, or a typographical error in the transcript, but the date of the document is July 6.

To complete seven loads in a day is a tough day, both physically and in the time it takes to do the work. On May 22, Mr. Williams did seven loads, which is a good day. He also did seven on May 24, eight on May 29 with the last load in a different location from the first seven, nine loads on May 30, eight loads on May 31, eight loads on June 4, nine loads on June 5, and seven loads on June 20. Mr. Pitt doesn't know where he was going on those days, and more loads can be done when the work location is closer.

On Exhibits 15, 16, 17, 18, 20, and 21, Mr. Williams did not sign the warning form, and Mr. Pitt did not write "refused to sign." At some point, Mr. Pitt decided to write "refused to sign," and did so on Exhibit 25. Mr. Pitt printed the information on Exhibit 25, and also wrote "refused to sign." The second page of Exhibit 25 is in Mr. Pitt's handwriting. On Exhibit 26, Mr. Pitt wrote, "refused to acknowledge and sign," but on Exhibit 29, he did not. Mr. Pitt wrote "refused to sign" on Exhibit 30. He was never told to either obtain the employee's signature or write "refused to sign." That was something he started doing because there was a pattern of refusing to sign.

Mr. Pitt learned for the first time during Mr. Williams' testimony that Mr. Fetty wrote a letter around July 20 to Mr. Williams outlining all the things that Mr. Williams had supposedly done. He does not recall that Mr. Williams wrote some responses to that letter. It appears that Mr. Fetty's letter dated July 20 has bullet points on it that reflect the various employee warnings that Mr. Pitt had written up before that letter. Mr. Fetty would have no way of knowing about the violations other than looking at the warning notices or witnessing them himself. Mr. Pitt was never aware of Mr. Williams' responses to the letter; Mr. Fetty never showed them to Mr. Pitt or discussed them with him. He didn't think it strange that Mr. Fetty did not share Mr. Williams' responses with him, because hiring and firing were Mr. Fetty's decision. Mr. Pitt didn't think or feel anything about Mr. Fetty's opinion whether Mr. Williams was a good or a bad employee.

Complainant's Counsel

Jeffrey S. Burg, Esq., testified that during the lunch break on the date of his testimony, he and Mr. Williams were walking down the hall, and Mr. Pitt and Mr. Fetty were standing at an elevator. Mr. Burg heard Mr. Fetty say "fuck you" with a cough. He turned around and told Mr. Fetty that he would let the Court know that Mr. Fetty said that, and Mr. Fetty was looking at him with an "abashed look" and a half smile.

Dennis Fetty

Mr. Fetty is the sole owner and operator of D.L.F., Inc., formerly known as D.L.F. Trucking, Inc. He started the business as a dba about a year before it was incorporated in 1992. He has been in the trucking business since he was 14 years old.

The basic line of Mr. Fetty's business is seasonal construction trucking. The company starts work in April or May, when the weather improves, and stops at the end of November or beginning of December. His business is completely different from freight hauling. Freight haulers go down the road hauling about 4500 pounds; Mr. Fetty's trucks will haul up to 160,000 pounds. His operation involves pulling the truck into a job site, raising the trailer and dumping

it, and hooking and unhooking. Every time the truck pulls in, the driver has to back up the pup, dump it, pull ahead, unhook the trailer, back the front trailer in, raise it, and make sure it's level so it doesn't tip over. Then, the truck will pull up, hook the other trailer back on, and go back down the road. A pup is the second trailer in a train set, which consists of the tractor, the lead trailer, and then the pup or back trailer. The lead trailer is about 27 feet long. D.L.F. currently has seven train sets and two leads; a lead is a one-trailer rig with a trailer that's a little bit longer so only one trailer is pulled rather than two.

It's very difficult to find drivers in D.L.F.'s business. Over the past several years, funding for roads has dropped down to a third, and the work has dried up so there are just no drivers available. It was the same case in 2012. The company starts with ads in the local papers, because it works out better when the drivers are closer to the yard. If that doesn't work, they go to outside papers. They have tried Craigslist and the Michigan unemployment office.

In 2012, D.L.F. started out with two drivers, and Mr. Fetty then hired Mr. Pitt as truck boss; part of his job was to find more drivers. After Mr. Pitt was there, they interviewed a few drivers and hired a couple. They had four drivers, and Mr. Pitt would fill in. Mr. Fetty rarely drove in 2012.

The first person at D.L.F. to talk with Mr. Williams about hiring him was Cheryl. After that, Mr. Pitt had him come out for a road test. After Mr. Pitt met with Mr. Williams at the yard, Brian came to Mr. Fetty and said that they could use him; he needed some help on different things, but he could drive the truck. Mr. Fetty then spoke to Mr. Williams and told him he would be hired, and Mr. Williams said that he didn't have enough money to pay for gas to get to work for the next two weeks. Mr. Fetty gave him $50 cash for gas money. Mr. Williams did not receive his first paycheck until he had worked for about two weeks, because each week's paycheck goes out on a Friday for the work done the previous week.

In about the second to fourth week that he was with D.L.F., Mr. Williams came to Mr. Fetty and brought to his attention the issue he had about driving time. Mr. Williams had his little green book with him, and told Mr. Fetty that he was working more hours than he thought he was supposed to work. Mr. Fetty told him that the book was outdated, and that he would look into it for him; the rules that Mr. Williams was discussing were for over-the-road drivers, and the rules for seasonal construction driving are different. Mr. Fetty went into the office and had the secretary make copies of the Michigan construction act, and he gave a copy to Mr. Williams the next day. A seasonal construction company is allowed to drive more hours per day and be on duty more hours than an over-the-road company is. After Mr. Fetty had the copies made, he had the secretary call the state police, who verified that those were the rules.

Mr. Williams was paid 22% of what the company was paid for each load. The drivers have some control over how much they make. Some drivers come in early, and others come in a little later, and it makes a difference. When a truck goes to Levy to get loaded in the morning, there is a line of 40 trucks waiting to get loaded. Each has to get weighed in, go to the loader, get weighed again, wait for the ticket, and then drive to the job site. At the job site, they have to wait for the trucks in front of them to dump. So the drivers who start work early will be at the front of the line, and the people who show up a little later have to wait behind everyone. The

driver who gets there first will get an extra load in at the end of the day, and the driver who gets there late may get one load fewer because he had to wait for everyone to dump off. So the drivers are in control of what they make – if they are first in line, they might make $800 more than the driver who worked the same hours on the same job because of the wait time. The way the drivers were paid varied depending on the job.

Mr. Fetty is sure that his understanding of the seasonal hours-of-service rules was correct, because the police came to D.L.F. after Mr. Williams complained about his hours. The officer went through all the time cards and driving records, and did not find any violations. Exhibit 9 is the state police report of the hours of service. D.L.F. was given a warning for a couple of drivers who did not get the required 10 hours of off-duty time. The state police came out a second time because Mr. Williams kept calling the investigating officer's sergeant to say that the officer didn't know what he was talking about. This time the officer made copies of all the time cards and daily logs and took them with him. He later called Mr. Fetty and told him that they found nothing wrong.

In the first couple of weeks of his employment, D.L.F. had problems with Mr. Williams, and he started getting write-ups. A write-up is given when a driver is doing something wrong, to tell them what they did wrong and to try to help them to correct it. Exhibits 15, 16, 17, 18, 19, 20, and 21 are the employee warnings that Mr. Fetty recalls being issued. Mr. Fetty heard Mr. Williams testify that he did not receive them. Usually, Mr. Fetty tried to be present when Mr. Pitt served them, and on several occasions he saw Mr. Pitt read to Mr. Williams what the warning said, asked him he understood the warning, and after Mr. Williams acknowledged that he did, asked him to sign them. Mr. Williams would just say he was not going to sign them. Mr. Fetty didn't think twice about Mr. Williams decision not to sign; he was warned and understood the warning, and Mr. Fetty was fine with that. The warnings went into Mr. Williams' employee file.

A couple of weeks after Mr. Williams left, he requested a copy of his file. Mr. Fetty instructed Cheryl to make a copy of the complete file and send it to Mr. Williams.

It takes a lot to get fired from D.L.F.; to get fired, "you have to want to get fired." The company has fired drivers over the years, but it is not a common practice. D.L.F. tries to help them to correct their problems. In the seasonal business, drivers are laid off at the end of the season, and they have families and bills so they find other jobs. It makes it difficult to keep a driver every year.

D.L.F. has company policies requiring drivers to follow the laws regarding weight restrictions, tarping, and all the rules that apply to the seasonal trucking business. The driver employees are provided with the laws. There were times that it came to Mr. Fetty's attention that Mr. Williams was not doing things right. It started with the neighbors calling about his speeding down the roads, so D.L.F. put a memo in every driver's check telling them to drive 7 miles per hour on the roads near the shop, and also told Mr. Williams directly not to drive faster on those roads because there are kids out. Tarping, speeding, and keeping the tailgates locked are all a matter of state law, not D.L.F. policies. Mr. Fetty was aware that Mr. Pitt had spoken with Mr. Williams about not tarping, and on the day that Mr. Williams was in Port Huron, Mr.

Fetty received a call from the foreman that Mr. Williams refused to tarp his load. Mr. Fetty left the office to go to the gravel pit where Mr. Williams was going, and when Mr. Williams pulled in, Mr. Fetty saw that the tarps were forward and that both tailgates were unlatched. The tailgates were open about three inches, and the dirt was coming out the back. Mr. Fetty told Mr. Williams that his tarp was rolled back and asked why his tailgates were open. Mr. Williams said that his tailgates were locked, and somebody must have snuck up and unlocked them before he left, sabotaging his truck. It would have been impossible for somebody to do that, or to untarp his load, without him seeing them do it, because both would have required somebody to physically climb on the trailers while he was being loaded.

Mr. Fetty regards employee warnings as discipline. If they don't work, the next step is for Mr. Fetty to talk to the driver. It's hard to find drivers to begin with, so it's to the company's advantage to work with them and get them to do things the right way. It seems to work better for the owner of the company comes to talk to the driver rather than the foreman.

Exhibit 12 is a D.L.F. letter dated July 20, 2012, captioned Suspension Pending Advisability of Termination. It was generated when D.L.F. got to the point that they thought there was nothing they could do to help Mr. Williams, and that he was doing what he was doing because he didn't want to work for D.L.F. The exhibit includes a list of the violations that had been noted up to that point, and Mr. Fetty signed it himself. Mr. Williams was still working for D.L.F. at the time he filed his first complaint with the Department of Labor, and D.L.F. was in the process of defending that claim, but Mr. Fetty nevertheless made the decision to terminate Mr. Williams after Exhibit 12. Mr. Fetty recalls Mr. Williams' testimony that when he received Exhibit 12 from Mr. Fetty, Mr. Fetty said that he was done and would never work there again; but that is totally untrue. Mr. Fetty was present when Mr. Pitt read the letter to Mr. Williams and asked Mr. Williams if he had any questions, but did not say a word to anybody. He listed and watched as a witness, and at no point did he tell Mr. Williams that he was fired.

There were a lot of factors that went into the decision to terminate Mr. Williams. The fact that he had filed a complaint with the Department of Labor regarding his hours of service was not a factor in the decision. If D.L.F. is doing something wrong, Mr. Fetty welcomes being told by his employees, or turn them in, or do whatever they need to do; if he is doing something wrong, he wants to know about it. Mr. Williams turning in D.L.F. did not play a part in the decision at all.

There were a couple of occasions when Mr. Fetty and Mr. Williams were in the shop and words were exchanged, and Mr. Williams basically told Mr. Fetty nose-to-nose that he had no idea how much this was going to cost him. On one occasion, Mr. Williams came in and accused Mr. Fetty's 14-year-old daughter of sabotaging his truck. Numerous things started the confrontations. Mr. Fetty would walk in and tell Mr. Williams that he had to tarp his trailers, or that the neighbors reported him for speeding down the road, and Mr. Williams would "get in my face"; it was never his fault, he never did anything wrong. Mr. Williams would walk away and throw out comments like accusing his daughter or calling names.

Mr. Williams being banned from two of D.L.F.'s jobs affected the company's operations. After Levy asked them not to send Mr. Williams to their plant, they had to find another place to

send him, so they tried sending him to Florence. He did not follow Florence's instructions on dumping his loads, so after a while Florence called and asked them not to send Mr. Williams to their job. When there is a driver that can't be sent on jobs along with the other drivers, it got to the point that they could not work around it. That was a factor in the decision to discipline and terminate Mr. Williams.

When a foreman informs him of complaints about a driver, Mr. Fetty begins to think about disciplining the driver. At some point in Mr. Williams' employment, Mr. Pitt came to Mr. Fetty and told him that Mr. Williams was not performing properly. Mr. Fetty was present most of the times that Mr. Pitt gave Mr. Williams some form of discipline, but not every time. The procedure as that Mr. Pitt would write up the discipline form and read it to Mr. Williams, and then the form would go to the office for placement in Mr. Williams' file. If Mr. Pitt wrote up a driver and gave it to Cheryl, Mr. Williams wouldn't necessarily know about it unless Mr. Pitt informed him. He was aware of the times that Mr. Williams received discipline if he was there to witness it.

Mr. Fetty recalls the day that Mr. Williams was at the yard and they were talking to him about hiring him. Exhibit 12, the suspension letter, states, "From near the beginning of your employment, you have refused to recognize that our interstate construction-related operation is regulated by Act 181, MCLA 480.15, and refused to work the allowable hours under the state rules." "From near the beginning" could have referred to the first, second, third, fourth week of Mr. Williams' employment. Mr. Fetty believes that Mr. Williams raised his concerns about driving hours in the first or second week of his employment, and that is why Mr. Williams called the state police. Mr. Fetty became aware of Mr. Williams' complaints when Mr. Williams complained to him about hours of service.

When Mr. Fetty gave Mr. Williams $50 for gas, Mr. Williams thanked him; so at the beginning of employment, the two of them were on good terms.

Exhibit 12 states, "We tried to work with you to accommodate your objections, as we tried to help you understand and apply state regulations, which are different than the federal regulations you may have been used to. Your attitude, however, was belligerent." So in the first or second week, rather than being on good terms, Mr. Williams showed belligerence. He took the paper that Mr. Fetty had printed off showing the rules and regulations for seasonal work, and threw it, saying he didn't care because he had his book. Mr. Fetty considered that belligerent, but it didn't bother him. He listens to belligerence every day. He did not write up Mr. Williams for being belligerent toward his boss or for throwing the paper out the window.

Mr. Fetty learned that Mr. Williams had contacted the state police when the police showed up in his driveway. It would have been in late June or early July. Mr. Williams' DOL complaint was filed on June 13, but Mr. Fetty does not remember whether he found out about the DOL complaint before he found out about the complaint to the state police.

The first violation listed in Exhibit 12 is for failing to tarp on June 18, which would be a violation of state law. Mr. Fetty is sure he learned about Mr. Williams' failure to tarp at some point in time, but he didn't fire Mr. Williams for not tarping. If Mr. Fetty testified at his

deposition that as of July 20, Mr. Williams' conduct had not risen to the level of requiring his discharge, then he meant that. That's why the letter was given to him: so D.L.F. could take a chance to look at everything that he had done, and review it and go from there. On the day that Mr. Williams did not tarp, Mr. Fetty did not think he should be fired, and Mr. Fetty was willing to maintain his employment even though he was violating state law repeatedly.

Customers complained about Mr. Williams, and banning him from customer property caused a serious effect on the company's business; but Mr. Fetty did not fire Mr. Williams for that reason, and tried to put him on other jobs. The company used brokers during the summer of 2012, when there were orders that could not be filled with D.L.F.'s trucks. There is a list of brokers, but it was pretty tough to find them. Many days the company was short on material because they couldn't find enough brokers. The brokers would receive 100% of what the truck was getting paid; D.L.F. didn't make any money using brokers, but saved face with the contractors.

Mr. Fetty suspended Mr. Williams on July 20, and Mr. Williams did not commit misconduct after that date.

Mr. Williams was a truck driver, and Mr. Pitt was his supervisor/foreman. Mr. Pitt was in a position to see what Mr. Williams was doing, and how he was conducting himself, and reported to Mr. Fetty. He told Mr. Fetty that Mr. Williams regularly is not doing his job, and Mr. Fetty was present on some or most occasions that Mr. Pitt handed disciplines to Mr. Williams.

Exhibit 5 is a blank discipline form, which as a space two write in the alleged unsatisfactory performance, and a space for the employee to sign, as the employee is asked to do. Exhibit 15 is an employee warning dated May 24, and Exhibit 16 is an employee warning dated May 25, both dated in the first week of Mr. Williams' employment. Mr. Fetty does not believe he was standing nearby when Mr. Pitt read them to Mr. Williams, and Mr. Williams did not sign them. Mr. Fetty is sure he saw them at some point in time.

Exhibit 17 is an employee warning dated June 5, 2012, within the first two to three weeks of Mr. Williams' employment, involving speeding down Omo Road. Mr. Williams did not sign the form. Mr. Fetty saw Mr. Williams speeding down Omo Road; he and Mr. Pitt were standing on the corner and saw him. The speed limit on Omo Road is whatever the truck can drive safely; Mr. Fetty does not believe there is a speed-limit sign on that road, so the default speed limit is whatever is safe. The state law speed limit would be 55 if it's not marked, but it would be unsafe to drive a truck down that narrow gravel road at 55 miles per hour. Mr. Fetty estimates Mr. Williams' speed at 40 miles per hour, which is less than 55 miles per hour, but believes that Mr. Williams was going too fast and could never have stopped if someone had pulled out in front of him.

Exhibit 18 is an employee warning dated June 19, 2012, within the first four weeks of Mr. Williams' start date of May 18. The warning involved a complaint from another D.L.F. driver that Mr. Williams was not tarping, which is a violation of state law.

Within the first four weeks of Mr. Williams' employment, he complained about violations of the hours of service, acted belligerently toward Mr. Fetty, drove in an inconsiderate, reckless, and aggressive manner around the plant site, received complaints from drivers and loader/operators, was speeding, not tarping, was inconsiderate, and showed a non-professional display of character, and sped down Omo Road in an unsafe manner. Mr. Williams is not sure whether Mr. Williams got "up in [his] face" during those first four weeks, but it happened a couple of times. Mr. Williams did not actually touch Mr. Fetty's nose, but came pretty close. He was something like two inches away, but Mr. Fetty did not feel physically threatened. Mr. Fetty did not think what Mr. Williams did was right, but neither he, Mr. Pitt, nor Ms. Paquin wrote him up for it.

Exhibit 20 is another employee warning for not tarping, dated June 21, 2012. Mr. Williams did not sign it. Mr. Fetty does not remember standing by Mr. Pitt when he read it to Mr. Williams. By June 21, Mr. Williams had at least five warmings and a belligerent attitude. If Mr. Fetty had considered discharging him, he would have been discharged. Exhibit 21 is another employee warning that Mr. Williams did not sign; Mr. Fetty was standing there when Mr. Pitt handed it to Mr. Williams. The warning involved Mr. Williams leaving Florence early. Mr. Fetty agreed with Mr. Pitt that Mr. Williams should have been written up for it. Mr. Fetty does not know whether that was the first time Mr. Williams had left a job early, but he knew it was a problem. As of June 25, Mr. Williams was not tarping, was belligerent, was driving recklessly and speeding in a residential area, although it doesn't mean that he was doing these every day. It means that he had done it in the past and the company had talked to him about it.

Mr. Fetty does not remember whether he saw Exhibit 10 during Mr. Williams' employment or not. He and Mr. Pitt did discuss Mr. Williams' conduct as a D.L.F. driver on occasion while Mr. Williams was working there. Mr. Fetty did not know that Mr. Pitt did not like Mr. Williams; he never expressed his dislike to Mr. Fetty. If Mr. Fetty saw Exhibit 10, it would have been at the very end of Williams' employment or after he left, but he did not see it when Mr. Pitt wrote it. He would have liked to have known Mr. Pitt's opinion at the time. Mr. Pitt did not tell him that he had never seen in 30 years a more risky driver than Mr. Williams on Michigan roads, although he should have. Mr. Fetty agrees with Mr. Pitt that Mr. Williams would pull out the DOT regulations. When Mr. Pitt wrote that Mr. Williams should be removed from driving a commercial vehicle, Mr. Fetty thinks it looks like Mr. Pitt had a bad day and sat down and wrote out what he was feeling. He did not show Mr. Fetty what he wrote. If Mr. Pitt dated it July 6 and says he wrote it on July 6, then that's when he wrote it. Saying that everything was made up is wrong. Mr. Pitt did not tell Mr. Fetty that Mr. Williams was a bomb waiting to go off. Mr. Fetty had four drivers, Mr. Pitt, Ms. Paquin, and himself, and Mr. Pitt did not come to him and tell him that he was the riskiest driver he had ever seen, was a bomb waiting to go off, or that he had written the document to put in Mr. Williams' file.

Mr. Fetty did not cough into his hand and saw "fuck you" during the first day of trial. He heard Mr. Pitt's testimony, but he just coughed. Mr. Fetty did not appreciate Mr. Williams being belligerent in the first week of his employment. He is not sure what he would have done if Mr. Williams had replied to the letter of July 20. He might or might not have let Mr. Williams keep working for him; he would have taken a reply into consideration. He may have wound up telling him that if he acted and drove better, he could keep his job, because he needed drivers.

Mr. Fetty referred to Mr. Williams as "Mr. Mike" in answer to a question at deposition. He did not say it in a sarcastic way. He calls everybody "Mister."

Mr. Fetty has fired drivers who had less disciplinary action than Mr. Williams, and has fired drivers who had more. It all depends on the situation and the driver. There were drivers with more complaints than Mr. Williams had that he fired, and there were drivers with fewer complaints that he fired. He does not believe that any other drivers he has employed made complaints to the state police or to OSHA.

Mr. Fetty did not ask Ms. Paquin to testify at trial. He would say that Ms. Paquin knew that Mr. Pitt was writing up Mr. Williams. She was keeping the personnel files, and would put everything in them. Mr. Fetty knows there is a dispute between the parties whether Mr. Williams ever received the disciplines; Mr. Williams is lying. Ms. Paquin has personal knowledge whether Mr. Pitt actually wrote them and put them in the file, but she was not present to testify at the hearing. Mr. Fetty did not talk to her about coming to the hearing. Don Volkman is a foreman at Florence, one of D.L.F.'s customers. There is an allegation that Mr. Volkman observed some sort of misconduct by Mr. Williams, and Mr. Fetty is sure that what Mr. Volkman saw had something to do with the decision to discharge Mr. Williams. Mr. Volkman also was not present to testify.

Mr. Fetty continued Mr. Williams' employment in 2012 even though he was belligerent, violated state law repeatedly, was a reckless and inconsiderate driver, and misrepresented something that Mr. Fetty's daughter did, balancing that conduct against his need for drivers. Mr. Williams was violating state law, and D.L.F. kept giving him warnings trying to correct it, and discharged him after six weeks. Mr. Fetty knew about Mr. Williams' complaints to OSHA and the state police, but it was no big deal. There did come a time that Mr. Fetty grew to dislike Mr. Williams personally. It is not correct that Mr. Fetty disliked Mr. Williams when he was discharged; his problem came after the fact, when he spent $40,000 on attorney fees.

D.L.F. received payment at a flat rate per ton, and the driver was paid 22 percent of that amount. The amount of driver pay was not predictable from day to day. The work was seasonal between spring and November, and there was no guarantee that a driver who worked during the season would return to work the following season. Occasionally drivers come back, but there is big turnover. In 2014, Mr. Fetty had four drivers working for him that had never worked for him before. Recently, drivers have been leaving the state to work in the oil fields, and never come back.

Mr. Fetty has fired drivers other than Mr. Williams for multiple violations of failing to tarp and speeding. He tolerates those things, and looks at everything else they do, such as disregard to customers, running over things, tearing things up. A driver who drives off the edge of a four-foot dropoff and tears off the oil pan will be instantly fired. Mr. Fetty tells his drivers that they are in charge of the truck, and every day the job is different. Usually a driver will start tarping after he is told of it, and that is not a serious matter. Everybody speeds down the road here and there, but it is not a reason to fire them. It's a reason to talk to them and try to make it right. What Mr. Williams did was not real serious, and Mr. Fetty kept trying to correct things; he

needed a driver. It hurt the company to have a truck down. But it got to the point that Mr. Williams apparently didn't want to be there anymore, and would tell Mr. Fetty that he was not going to do something or would damage the truck on person, such as pulling the hydraulic line. It was Mr. Fetty's feeling at the end that Mr. Williams did not want to work there. He didn't want to correct anything or to listen.

Mr. Fetty did not write Exhibit 12, the suspension letter; his attorney did. He read it before he signed it, and adopted the words the lawyer had written. He contacted the attorney about three weeks after receiving Mr. Williams' OSHA complaint. Mr. Fetty asked the attorney where they would go from there. He sent the attorney Mr. Williams' files, talked to him a few times on the phone, and then after a few weeks the letter was drafted and served on Mr. Williams.

Cheryl Paquin is no longer with D.L.F. Mr. Fetty was not aware of Mr. Williams' attorney requesting to have her at the hearing. Her address is known so that she could have been subpoenaed. Mr. Fetty has texted her twice since she left, asking her where he could find something.

Complainant (Rebuttal Case)

Mr. Williams heard Mr. Fetty's testimony that he encourages his employees to bring up issues if they are doing something wrong. When Mr. Williams first brought up concerns about the hours of service, it didn't seem important to Mr. Fetty. He didn't seem concerned about going over 12 hours, because he kept referring to loading and unloading as stopping the clock, and the law does not state that you are allowed to stop the clock.

The maximum load hauled at D.L.F. was 160,000 pounds. It was a virtual certainty that all the loads Mr. Williams hauled were above 10,000 pounds. Mr. Williams was not aware that D.L.F. was using broker drivers in the summer of 2012, and nobody ever expressed to him their belief that drivers were hard to find. Neither Mr. Pitt nor Mr. Fetty said anything to him to the effect that he was performing and acting badly, but the company needed drivers.

The one warning form that Mr. Williams signed was Exhibit 7, when he broke the hydraulic line. He was never shown any other employee forms and asked to sign them. Ms. Paquin never said anything to him about the number of employee warning forms in his file. Mr. Fetty did give him $50 for gas money, and Mr. Williams appreciated it and thanked him. At that moment, before he began to complain about hours of service, his relationship with Mr. Fetty was congenial and friendly.

Mr. Fetty kept his book of DOT regulations at home, and brought it out from time to time during his employment with D.L.F. They were not out of date. They did not exclude loading and unloading time from the 12-hour hours of service rule. Whether he was right or wrong about that, he believed in good faith that he was violating the laws and was concerned about it, and brought it to D.L.F.'s attention on the very first day he worked more than 12 hours.

Mr. Williams did return the phone call from the state police officer after the second investigation, but it was quite late, about three or four days later. He should have returned the call sooner.

When Mr. Williams started complaining about hours of service, Mr. Pitt thought he was using the green book to shorten his day, and Mr. Pitt essentially wanted to throw it away and get the job done. When Mr. Pitt says that Mr. Williams wanted to use the green book for his own benefit, that is wrong; it was to the benefit of people on the road. Mr. Pitt wanted him to drive more than 12 hours and he was not going to have some green book dictate to him.

The only time that Mr. Williams laid eyes on the employee warning forms, other than the one involving the hydraulic line, was when he received his personnel file after he was terminated. There were 15 or 20 of them in the file, and he had never seen them except for the one he signed.

Mr. Williams never "got up in" Mr. Fetty's, Mr. Pitt's, or anybody's face. That's an immediate firing, because it's threatening.

Somebody at D.L.F. told Mr. Williams two or three days before he got the suspension letter that he was prohibited from going on certain customers' property, and that was causing the company a problem. He did not drive at high rates of speed in the truck. Mr. Fetty is correct that you can't drive loaded tractor-trailers down gravel roads at 55 miles per hour; it would be idiotic to drive more than 30 or 40 miles an hour. He never did that.

Deposition of Mr. Fetty

Mr. Fetty testified at a deposition conducted on March 18 and April 4, 2014, substantially as follows:

Mr. Fetty is the sole shareholder, president, secretary, and treasurer of D.L.F., Inc. There are no other officer positions in the company. As of March 18, 2014, there were four employees of D.L.F., including Mr. Fetty. His business is a seasonal business; it starts at a different time every year, whenever the weather breaks. When the 2014 season starts, he will gain between one and eight more employees, who will be drivers. Mr. Pitt did not work for Mr. Fetty in 2013, and will not in 2014. He worked for someone else in 2013. In 2013, Mr. Fetty employed around five drivers.

Mr. Williams worked for D.L.F. between May and July of 2012. Mr. Pitt was his supervisor, and Mr. Fetty was as well, as the owner and president of the company. Mr. Fetty had between one and eight drivers, including Mr. Williams, in 2012. Deposition Exhibit ("DX") 1[6] is a copy of the D.L.F. employee warning form. When a person is issued discipline, the form is read to the person and they are asked if the understand it and then asked to sign it. At the time that Complainant was working at D.L.F., the only people authorized to issue the form were Mr. Fetty, Mr. Pitt, and Ms. Paquin.

[6] Complainant introduced 12 exhibits at the deposition, each of which is labeled "Plaintiff's Exhibit." For clarity's sake, they will be referred to as "DX" for "Deposition Exhibit" in this Decision and Order.

DX 2 contains employee warning forms with Mr. Williams' name on them. Mr. Fetty did not draft any of them. In 2012, D.L.F. considered repeat violations of policies to be more and more serious. The employee form contains language that reads, "We expect immediate correction of the problem, otherwise we shall have no alternative but to consider termination of your employment." If the employee were to continue the problem described on the form, termination would be considered. Whether an employee would be terminated after a second or third warning form would depend on the situation, including the type of violation.

The primary duties of a driver at D.L.F. are to drive a truck, maintain a CDL. Mr. Fetty has a CDL, and drives a truck when necessary. D.L.F. hauls gravel, dirt, limestone, sand, millings, and concrete. The company is incorporated in Michigan; the office is in Romeo and the yard is in Riley Center. Mr. Pitt worked out of Romeo and the yard; he would drive around all day and take care of the trucks. The yard contains the trucks, the equipment, and the shop, and some of the materials to be hauled. In general, drivers pick up what they haul from one place in Michigan to another place in Michigan.

The trucking industry is regulated by both the federal government and the state. D.L.F. is subject to both federal and state regulations. The state law is the Construction Act; drivers are allowed to be on duty 16 hours per day, with 12 hours of actual drive time. On duty time other than driving would mean anything a driver does when he is not driving down the road, such as checking oil, filling out paperwork, and sitting in line waiting to get loaded. When a driver is waiting in line, sometimes the engine is on, and sometimes a driver would be out of the truck talking to other drivers. Mr. Fetty believes that sitting in line waiting for loading or unloading does not count toward the 12 hours of allowable drive time. He spoke to the Michigan state police about that, both in person and on the phone, while Mr. Williams was working for D.L.F. He spoke to an officer in person because Mr. Williams had made a complaint about his hours to the state police, and they came to the shop to look into the complaint. The police investigated twice, and found violations of a rule requiring 10 hours of off-duty time. There was no violation issued after the first investigation, and there was a warning issued after the second.

Mr. Williams began working about May 18, 2012. At some point, Mr. Fetty gave him a copy of the Michigan statute, but he does not remember when.

DX 3 consists of log and time sheets, which were in use at D.L.F. when Mr. Williams worked there. They are filled out by drivers to show what they do on a given day, and are used to calculate what to pay the drivers. The drivers fill them out as they are working. On May 18 and May 21, there are no load or dump time entries on Mr. Williams' time logs. At the time he worked for D.L.F., Mr. Williams lived on Deland Road. When he left home, he would report to the yard for work. The time log for May 22 does contain load and dump times; the first load time of 6:05 means that he actually picked up the load at 6:05. Mr. Fetty can't determine from the log sheet what time Mr. Williams arrived at the yard, because Mr. Williams didn't fill it out correctly. The form has places for ticket time, which is when he arrives at the yard; travel time, when he leaves the yard; load time, when he got loaded; dump time, when the load is dumped; finish time for going form the job site to the shop; and shop time, to be filled out when working in the shop.

Sometimes, a truck will be pre-loaded the night before a driver comes in, so it is ready to go in the morning. About 75 percent of the time, a driver picks up an empty truck and drives it from the yard to a job site to get loaded. The closest location to pick up materials is about 4 miles away, about a 10 or 15-minute drive. The farthest location is in Sylvania, Michigan, which is an hour or two away, depending on traffic. The time driving to the site is counted as drive time. On the May 22 time log, Mr. Williams picked up his load at Levy, which as about an hour down I-94. If he picked up the load at 6:05 a.m., he probably left the shop at about 5:05 a.m. Mr. Williams loaded and dumped seven loads on May 22, dumping his last load at 3:30 p.m. at Taxiway Z at Detroit Metro airport. It is an hour to an hour-and-a-half drive from Detroit Metro back to the D.L.F. yard. The time between dumping the last load and arriving at the D.L.F. yard counts as drive time. Mr. Fetty does not know how long it took Mr. Williams to drive from Taxiway Z to the D.L.F. yard on May 22.

After a trailer is loaded, the driver puts a tarp on the load. If he fails to do so, he could be disciplined; tarping is the law.

Mr. Williams came to Mr. Fetty one day near the beginning of his employment and told him about some Federal thing that said he could only work "so many hours." Mr. Fetty does not recall the hours limit or what Mr. Williams was talking about. He did not disagree with Mr. Williams' interpretation of the law. He went online to check with the state police. He asked Cheryl to look into it the next day. A few days later, Cheryl gave him a printout of the Michigan law, and he looked through it and determined that Mr. Williams was wrong. At that time, Mr. Fetty cannot recall whether there was friction in his relationship with Mr. Williams. He did on occasion have a few beers with his drivers at the end of the day.

If a driver were to receive several warning forms, Cheryl would bring to Mr. Fetty's attention the fact that a driver was performing badly or engaging in misconduct regularly. She did not bring Mr. Williams' performance or conduct to Mr. Fetty's attention; neither did Mr. Pitt. It was Mr. Fetty's decision to fire Mr. Williams, based on his having multiple write-ups. Mr. Fetty learned of Mr. Williams' write-ups every time that he was served one. DX 4 is a warning form dated May 24, and the signature looks like Mr. Pitt's. It says that Mr. Williams was doing inconsiderate, reckless and aggressive driving practices in and around the plant site. That type of driving is not permitted by drivers at D.L.F.; whether it's a minor or a serious violation depends on the situation. The form refers to "Burgess drivers and loader," meaning that it was the customer who was complaining about Mr. Williams. Mr. Williams did not sign the form; he refused to sign any of them. Mr. Fetty believes that after DX 4 was read to Mr. Williams, the company expected immediate correction of the problem otherwise it would have no alternative but to consider termination of his employment.

DX 5 is an employee warning dated May 25, 2012. Mr. Williams did not sign that form either. It is about speeding, which Mr. Fetty would say is aggressive driving. It is dated one day after DX 4 and is in part for the same misconduct. It also refers to a failure to tarp one load of 6A stone, which is a material that requires tarping, and not tarping was a violation of state law. DX 6 is an employee warning dated June 5, 2012; Mr. Williams did not sign it. It states that Mr. Williams was speeding down Omo Road and residents were complaining. Mr. Fetty doesn't

know whether he was standing there when Mr. Pitt gave the warning to Mr. Williams, but he does remember getting the phone calls from the neighbors.

DX 7 is an employee warning form dated June 19, 2012. It again involves not tarping a load, which is a violation of state law. A driver who fails to tarp can get a ticket, which is payable by the company. There is no consequence to the company if a driver gets more tickets for not tarping. The individual driver gets points.

DX 8 is a document concerning events on June 20, 21, and 22, 2012, describing disturbances by Truck 410, which was Mr. Williams' truck, at Toebe Construction. The documents shows that Mr. Pitt was asked to keep Mr. Williams off the Toebe job. Mr. Fetty doesn't know whether the documentation of events was brought to Mr. Williams' attention. Mr. Williams did not sign or initial the document.

DX 9 is an employee warning dated June 21, 2012, again involving not tarping. Mr. Williams did not sign it. Mr. Fetty doesn't know whether he was standing there when it was read to Mr. Williams. It does not say anywhere that it was read to Mr. Williams; all employee warnings are read to the employees. Mr. Williams received warnings for not tarping on May 25, June 19, and June 21, so for the first month of his employment he violated state law by not tarping from time to time.

DX 10 is an employee warning form dated June 25, 2012, addressed to Mr. Williams, about leaving early without reporting to the job. It was not signed by Mr. Williams and there is no indication that it was read to him.

DX 11 is a letter dated June 19, 2012, addressed to Mr. Williams from the U.S. Department of Labor acknowledging receipt of a whistleblower complaint under the Surface Transportation Assistance Act. Mr. Fetty is not sure whether he has ever seen it before. There came a time, while Mr. Williams was still employed at D.L.F., that Mr. Fetty became aware that Mr. Williams had filed a complaint with DOL. Cheryl contacted D.L.F.'s attorney, Mr. Scharg, and Mr. Fetty does not know whether Cheryl told Mr. Scharg when the company received the complaint.

DX 12 is an employee warning form dated June 28, 2012; this one is signed by Mr. Williams. Mr. Fetty thinks the handwriting on the form is Mr. Pitt's. Mr. Fetty remembers the incident, recorded on the form as "Not paying attention to detail while unhooking trailer resulting in breaking hydraulic line off trailer and downing trailer, fitting broke at bottom of cylinder." Mr. Fetty witnessed the incident. Mr. Williams did not unhood the hydraulic hose and pulled ahead, and tore it off. Mr. Williams admitted to not paying attention to detail. The incident cost Mr. Fetty around a thousand dollars, and he did not ask Mr. Williams to pay for it. He did not fire Mr. Williams for it.

As of June 28, 2012, Mr. Williams had complained about hours of service, violated state tarping law a number of times, been complained about by customers, residents, and D.L.F. employees, and cost a thousand dollars for repair of the hydraulic. Mr. Fetty does not have an explanation for not terminating Mr. Williams' employment at that time.

DX 13 is an employee warning form dated July 6, 2012. DX 14 is a document dated July 6, 2012, in Mr. Pitt's handwriting. Mr. Pitt wrote that he saw Mr. Williams in the use of lift axles, and also observed Mr. Williams almost run into the back of Mr. Pitt's pickup truck. The document says "I told Mike I was trying to be nice and just discuss these violations, but his aggressive and argumentative manner and disrespect left no choice but to document and issue a warning in writing." Improper use of the lift axle is when the driver doesn't lift the axle when required and doesn't put it down when required.

DX 15 is in either Mr. Pitt's or Ms. Paquin's handwriting, and the lower part is in Mr. Williams' handwriting. Mr. Fetty agrees that the upper part was written, and then Mr. Williams read it and wrote something about it. The document discusses events on July 9 and July 10, 2012. The exhibit is a record of misconduct or failure to perform by Mr. Williams; it is not on an employee warning form because Mr. Fetty's attorney advised him to do it this way.

DX 16 is an employee warning form dated July 10, 2012, and is signed by Mr. Fetty. The handwritten notation "refused to acknowledge and sign" is in Mr. Pitt's handwriting. The document says that Mr. Williams did not perform a required federal pre-trip and had improper footwear at work. The reference to "federal pre-trip" is incorrect, because federal law requires a post-trip, not a pre-trip inspection. As of that date, Mr. Williams was still being warned about his conduct and behavior, and still was not fired, upon advice of D.L.F.'s attorney.

DX 17 is an employee warning dated July 11, 2012, signed by Mr. Pitt and notated "refused to sign." The handwriting could be Mr. Pitt's or Mr. Williams'.

DX 18 is an employee warning also dated July 11, 2012.

DX 19 is a three-page letter dated July 20, 2012, with Mr. Fetty's signature at the end. The letter advises Mr. Williams that he was suspended and remains suspended, and details Mr. Williams' history of poor performance and misconduct while employed at D.L.F. Mr. Fetty stands by everything in the letter as true. Mr. Fetty does not recall whether Mr. Pitt brought the large number of disciplines issued to Mr. Williams to his attention. It was not company policy for Mr. Fetty to know how well or how poorly D.L.F. drivers were doing; he would learn from other drivers or employees, or from the supervisor on a daily business. The forms say that whatever the driver is doing wrong could be serious enough that, if repeated, the driver could be fired. It was not company policy that repeated misconduct or poor performance was potentially terminable; the forms were used to keep everybody informed of what was going on, and the policy was to try to help the driver so there would not be any more problems. At that time, the company needed drivers, so they were doing everything in their power to correct the problems that the drivers were having. Over time, it appeared that Mr. Williams did not want to correct his problems.

The second paragraph contains the language "Your attitude, however, was belligerent." By "belligerent," Mr. Fetty meant that when he would try to discuss things with Mr. Williams, Mr. Williams would get hot-headed and say things that were inappropriate.

Mr. Fetty does not recall why he didn't fire Mr. Williams after the first several disciplines were written up. As of July 20, 2012, Mr. Williams had been disciplined 15 or 16 times; he had not fired Mr. Williams because they were trying to work with him to improve his performance and attitude. As of July 20, it is correct that Mr. Williams' performance and conduct had not risen to the level that he had to be terminated. As of July 20, Mr. Williams was on suspension, and Mr. Fetty had not concluded that his performance or conduct had risen to the level of a discharge.

Mr. Fetty does not recall when the seasonal work ended in 2012, and does not recall whether D.L.F. hired somebody to replace Mr. Williams after he was discharged. He does not know whether the compensation he paid to Mr. Williams was at the high end, low end, or in the middle of what similar drivers make. He was paid a percentage of what the truck makes, which is calculated off the tickets that the drivers fill out and turn in.

Mr. Fetty heard Mr. Pitt testify that he formed a dislike of Mr. Williams. Mr. Pitt never told Mr. Fetty while he was working at D.L.F. that he didn't like Mr. Williams. Mr. Pitt had the authority from Mr. Fetty to have a certain amount of control over the drivers; he was their supervisor, and was entitled to write them up. He partially represented D.L.F. in terms of giving disciplines to drivers.

B. Exhibits

Exhibit 1 is a certificate from Eaton Truck Components, reflecting that the Michigan Truck Safety Commission certified Mr. Williams had completed the Michigan Center for Decision Driving Course on December 2, 1998.

Exhibit 2 is a copy of Mr. Williams' driving record, showing that he had been cited once, on July 24, 2006, for speeding.

Exhibit 3 is a copy of the weekly check stubs related to Mr. Williams' employment with D.L.F.

Exhibit 4 is a copy of Mr. Williams' load and time logs for the period from May 18, 2012 through July 13, 2012.

Exhibit 5 is a blank copy of the D.L.F. Employee Warning form.

Exhibit 6 is a 2012 calendar.

Exhibit 7 is an employee warning form bearing the date June 28, 2012, stating that Mr. Williams did not pay attention to detail while unhooking the trailer, resulting in a broken hydraulic line. It is signed by Mr. Pitt and Mr. Williams.

Exhibit 8 is a copy of the complaint dated June 13, 2012, filed by Mr. Williams with the Occupational Safety and Health Administration.

Exhibit 9 is a copy of an incident report dated July 14, 2012 from the Michigan Department of State Police regarding the July 10, 2012 complaint by Mr. Williams that he was being required to violate hours of service rules.

Exhibit 10 is a copy of the Notice of Concern written by Mr. Pitt and bearing the date July 6, 2012, describing his problems with Mr. Williams' conduct as a driver.

Exhibit 11 is a copy of the memorandum dated July 17, 2012, notifying Mr. Williams that he was being suspended pending advisability of termination.

Exhibit 12 is a copy of the letter dated July 20, 2012, detailing allegations against Mr. Williams, responding to some allegations by Mr. Williams against D.L.F., and giving him the opportunity to show why he should not be terminated.

Exhibit 13 is a copy of a response from Mr. Williams dated July 25, 2012, to the letter of July 20, 2012 (Exhibit 12).

Exhibit 14 is a copy of a response from Mr. Williams dated July 24, 2012, to the letter of July 20, 2012 (Exhibit 12).

Exhibit 15 is a copy of an employee warning form addressed to Mr. Williams and bearing the date May 24, 2012, regarding inconsiderate, wreckless (sic) and aggressive driving around the Ajax plant site. It is signed by Mr. Pitt, and notated "verbally discussed with Mike on complaints."

Exhibit 16 is a copy of an employee warning form addressed to Mr. Williams and bearing the date May 25, 2012, regarding speeding, no tarping, and inconsiderate non-professional display of character at the plant site. It is signed by Mr. Pitt, and notated "verbal discussion."

Exhibit 17 is a copy of an employee warning form addressed to Mr. Williams and bearing the date June 5, 2012, regarding a complaint from a resident named "Joe" that Truck 410 was speeding down Omo Road on the gravel, estimated at 55-60 mph by Joe. It is signed by Mr. Pitt, and notated "verbally discussed and told to stay off Omo Rd."

Exhibit 18 is a copy of an employee warning form addressed to Mr. Williams and bearing the date June 19, 2012, regarding a complaint from another D.L.F. driver that Mr. Williams was not tarping. It is signed by Mr. Pitt.

Exhibit 19 is a typewritten statement designated "Documentation of Events," signed by Mr. Pitt and Chris Freeman, a Toebe plant supervisor. The document describes misconduct by Truck 410 at the Toebe plant, and that Mr. Pitt was asked to keep that truck off the job.

Exhibit 20 is a copy of an employee warning form addressed to Mr. Williams and bearing the date June 21, 2012, regarding a complaint from Terria at Levy that Mr. Williams was not tarping. It is signed by Mr. Pitt.

Exhibit 21 is a copy of an employee warning form addressed to Mr. Williams and bearing the date June 25, 2012, stating that Mr. Williams had left early without reporting to his job, and indicating that Mr. Williams "claimed he did not know how to operate trailer." It is signed by Mr. Pitt.

Exhibit 22 is a copy of a document dated June 29, 2012 containing typewritten questions and handwritten answers to those questions, regarding events that occurred on June 28, 2012. The questions asked about taking too long to report to a job site, an interrupted telephone call between Mr. Williams and Mr. Pitt, an unlocked tailgate and unused tarp, failure to follow procedures for dumping sand, and breaking the hydraulic line.

Exhibit 23 is a copy of a document dated June 29, 2012 containing typewritten questions and handwritten answers to those questions, which were follow-ups to the questions and answers in Exhibit 22.

Exhibit 24 is a copy of the same document contained in Exhibit 23, with additional handwritten answers.

Exhibit 25 is a copy of an employee warning form addressed to Mr. Williams and bearing the date July 6, 2012, regarding the improper use of a lift axle and not using turn signals. It is signed by Mr. Pitt and notated "refused to sign" in the space for the employee's signature. The second page is a handwritten note bearing the same date July 6, 2012 and signed by Mr. Pitt, describing the events he observed that were reflected in the first page of the exhibit.

Exhibit 26 is a copy of an employee warning form addressed to Mr. Williams and bearing the date July 10, 2012, regarding the failure to perform required pre-trip inspection and wearing improper footwear at work. It is signed by Mr. Pitt, and is notated "refuse to acknowledge and sign" in the space for the employee's signature.

Exhibit 27 is a copy of a handwritten note alleging that Mr. Fetty had observed Mr. Williams on July 9, and that Mr. Williams had not performed his pre-trip inspection; that on July 10, Mr. Williams was observed again failing to perform the pre-trip inspection and wearing improper footwear; that Mr. Williams accused Mr. Fetty of having his daughter sabotage Mr. Williams' personnel vehicle; that Mr. Williams accused Mr. Fetty of sabotaging his work truck; that Mr. Fetty removed the dip stick from Mr. Williams' truck on July 10 to see if Mr. Williams would notice it and he did not; and that Mr. Williams was disrespectful and argumentative with his supervisor and the owner. A handwritten note in different handwriting, signed "Mike" and initialed "MDW" stated that the writer did not "agree with any of the above." It further stated that "Dennis shows up early, allegedly sticks blocks of wood where they can fall off, take[s] dipsticks, plays games for first 40 minutes."

Exhibit 29 is a copy of an employee warning form addressed to Mr. Williams and bearing the date July 11, 2012, regarding a failure to show up on time for a job at Florence, and regarding an inability to reach Mr. Williams by phone. It is signed by Mr. Pitt.

Exhibit 30 is a copy of an employee warning form addressed to Mr. Williams and bearing the date July 11, 2012, regarding Mr. Williams leaving a job site early. It is signed by Mr. Pitt and notated "refused to sign" in the space for the employee's signature. The second page is a handwritten note signed by Mr. Pitt, notated "4:15 p.m.," stating that "Don" from Florence had signed out Truck 411 before the end of the day because Mr. Williams told him that he needed to be signed out at approximately 3:45 p.m. The note further says that Mr. Williams failed to bring the last load of millings back to the D.L.F. yard, resulting in the loss of a $300.00 load and lost time working the truck for the rest of the day. The note said, "Round times of ½ hour load to load. Dump site 2 miles away."

Exhibit 32 is a copy of Mr. Williams' W-2 form from D.L.F. reflecting earnings of $5,426.53 in 2012.

Exhibit 33 is a copy of a W-2 from Stafford Transport, showing earnings of $6,665.00 for the year 2013. The exhibit also includes a copy of a Form 1099-G from the State of Michigan reflecting unemployment insurance payments to Mr. Williams in the amount of $6,537.00 for the year 2013.

Exhibit 34 is the deposition of Mr. Fetty taken on March 18 and April 4, 2014, summarized above.

Findings of Fact

In finding the facts of this case, I have considered all the relevant testimony and exhibits admitted into evidence. This is an unusual case, in that the parties directly contradict each other about whether certain events happened or not. Thus, in large part, my findings are based on credibility determinations. To assess witness credibility, I have evaluated the witnesses' demeanor and have compared their testimony to, where applicable, testimony at deposition, other testimony at the hearing, and documentary evidence in the form of exhibits. In general, I find both Mr. Williams and Mr. Fetty not to be credible witnesses. Both of them were hostile to their questioners, and both of them were evasive and inconsistent in their hearing testimony and, in the case of Mr. Fetty, his deposition testimony as well. Mr. Williams was particularly incredible. I discredit his testimony to the extent that it is not corroborated by other testimony or evidence in the case. I find Mr. Pitt to be generally a credible witness; his testimony was internally consistent and consistent with documents admitted into evidence. With those observations in mind, I make the following findings of fact.

Mr. Williams was hired by Mr. Fetty to work as a driver for Respondent D.L.F. on May 18, 2012. At that time, he had many years of experience as a truck driver. He interviewed with Mr. Pitt, who gave him a road test. Although Mr. Pitt thought that Mr. Williams had some difficulties in backing the truck, he thought he could teach Mr. Williams and recommended that Mr. Fetty hire him. Mr. Fetty did so. Mr. Williams asked, when told he was hired, when he would first get paid and, when told it would be about two weeks, told Mr. Fetty that he didn't have enough money for gas to get to work for the first two weeks. Mr. Fetty gave him $50 cash. Mr. Williams' pay was based on a percentage of the amount paid to D.L.F., based on the load weight: he was paid variously at rates of 22 percent and 25 percent of the amount that D.L.F.

received for each load that he transported.[7] He was paid at an hourly rate of $12.00 for work performed for D.L.F. that did not involve driving. Because the number of loads that he drove varied from day to day, and the number of days that he worked varied from week to week, he did not receive a set amount of pay each week.

While working at D.L.F., Mr. Fetty turned in load and time logs that showed he worked on 31 days between May 18 and July 13, 2012, as follows:

- Week of May 13-19: one day driving.
- Week of May 20-26: five days driving.
- Week of May 27-June 2: three days driving, one day (7.25 hours) in shop.[8]
- Week of June 3-9: five days driving.
- Week of June 10-16: four days driving.
- Week of June 17-23: four days driving.
- Week of June 24-30: two days driving.
- Week of July 1-7: two days driving.[9]
- Week of July 8-14: three days driving.

Each of the time sheets on which the times are recorded has different times listed for the first load time of the day, and different times listed for the last load of the day; thus, Mr. Williams worked for different lengths of time every day.

While employed by D.L.F. between May 18 and mid-July, 2012, Mr. Williams received the following employee warnings:

Date	Exhibit	Issue(s) Identified	Issued by	Signed by Mr. Williams?	Remarks
5/24/12	15	Inconsiderate, reckless , and aggressive driving around Ajax Taxiway Z, complaints by customers	Pitt	No	"Verbally discussed with Mike on complaints."
5/25/12	16	Speeding, no tarping, inconsiderate nonprofessional display of character on plant site, reported by D.L.F. drivers Jason and John	Pitt	No	"Verbal discussion."
6/5/12	17	Speeding down Omo Road on the gravel; complaining resident "Joe"	Pitt	No	"Verbally disc. And told to stay off Omo Rd."
6/19/12	18	Complaint from D.L.F. driver John that Mr. Williams "still is not tarping."	Pitt	No	None

[7] Mr. Williams' pay stubs show that he was paid 22% of the load for the pay periods through the pay period ending July 7, 2012, and 25% for the pay periods ending July 14 and July 21, 2012.
[8] Monday, May 28 was Memorial Day.
[9] Wednesday of that week was the Fourth of July.

6/21/12	20	Complaint of not tarping from Terria at Levy.	Pitt	No	None
6/21/12	21	Left early without reporting to job; claimed he did not know how to operate trailer.	Pitt	No	None
6/28/12	7	Not paying attention to detail, resulting in broken hydraulic line.	Pitt	Yes	None
7/6/12	25	Improper use of lift axle, not using turn signals – witness statement by Pitt attached	Pitt	No	"Refused to sign"
7/10/12	26	Not performing required Federal pre-trip.	Fetty	No	"Refused to Acknowledge and Sign."
7/11/12	29	Failure to show up on Florence job on time, inability to contact.	Pitt	No	None
7/11/12	30	Leaving job early after late start time, telling foreman he had to leave.	Pitt	No	"Refused to sign."

In spite of his denials, I find that Mr. Williams received each of these employee warnings at the end of the day they were dated, or on the next day upon reporting to work. Mr. Williams' denial of receipt simply was not credible. He in effect testified that all of the employee warnings, with the exception of Exhibit 7, were manufactured after the fact and placed in his employee file. Mr. Pitt, who has no stake in the outcome of this case – he has not worked for Mr. Fetty since 2012 – and who was consistent and credible in his testimony, testified that he had read each of the warnings to Mr. Williams on the date they were prepared, or on the following day. Mr. Pitt testified credibly that he issued employee warnings to other employees as well, and that his procedure was to complete the form, take them to the driver, read them to the driver, ask the driver if he understood, and asked the driver to sign the form. There is nothing on the face of the forms that would suggest that they were created after Mr. Williams' termination; although Mr. Pitt's signature is similar on each form, it appears in a slightly different location on the various forms. Some forms are notated that Mr. Williams refused to sign, while others are not; had Mr. Pitt maliciously created the forms after the fact, as Mr. Williams contends, it is more likely that he would have placed that notation on each of the forms. The fact that he did not supports the inference that the forms were created contemporaneously with the events noted on them. Having determined that Mr. Pitt (and Mr. Fetty with respect to Exhibit 26) created them contemporaneously, I also find, based on his credible testimony, that Mr. Pitt followed his customary procedure with respect to each of them, and read them to Mr. Williams on the day of the event or the following day. I further find that Mr. Williams did in fact refuse to sign any of the forms, with the exception of Exhibit 7. Mr. Williams' reaction to receiving the warning forms was anger and hostility; he refused to acknowledge that he had done anything wrong, except for breaking the hydraulic line.

In addition to the employee warnings, other exhibits document misconduct and performance issues on the part of Mr. Williams. On June 20, 2012, Mr. Pitt received a request from Chris Freeman, a supervisor at Toebe (a D.L.F. customer) to remove Truck 410, the truck

driven by Mr. Williams, from the job at Runway 4R. Mr. Freeman reported that the driver was not following the instructions of the loader operator, that he pulled ahead of other drivers waiting in line, that he was arguing when told to wait, was uncooperative, and was dumping at the wrong end of the pile to get ahead of other drivers. Mr. Pitt sent Mr. Williams back to the job site the next day, but again Mr. Williams was reported to have refused to follow the loader operator's instructions. On June 22, 2012, Mr. Pitt met with Mr. Freeman, and they discussed the ill manner and inability to cooperate on the part of Mr. Williams, and Mr. Freeman again asked to keep Mr. Williams off the Toebe job. Mr. Pitt asked that Mr. Freeman put his concerns in writing.

On June 28, 2012, Mr. Williams was late reporting to the job site. On June 29, Mr. Pitt prepared a number of questions for Mr. Williams to answer concerning that incident. When Mr. Williams was asked why it took an hour and a half to get from the M-29 job site to the M-19 gravel pit, he said that he had driven the wrong way down the road to get to I-94 east and had to find an alternate route. When asked why his tailgate was unlocked and his tarp was not on the trailer, Mr. Williams stated that the tarp was broken, and that there were three reasons for his tailgate being unlocked: that the clamps didn't close, that being distracted he may not have locked it, and that it had been tampered with. When asked why he did not follow the new procedures for entering the pit to dump dirt, Mr. Williams said that he was never told by anyone. When asked what happened to his hydraulic line, Mr. Williams said that he had broken it. After reviewing Mr. Williams' responses, Mr. Pitt wrote out additional questions. In response, Mr. Williams said that he had been to the M-29 job site three previous times, and that he took M-29 to leave the job site on June 28. With respect to a June 28 telephone conversation with Mr. Pitt, Mr. Williams said that he did not hang up on Mr. Pitt, and that he did not answer Mr. Pitt's return call because he didn't get a call. Mr. Williams provided additional answers, elaborating on the route he took to and from the M-29 job site.

By July 6, 2012, Mr. Pitt had become so concerned about Mr. Williams' driving that he wrote a Notice of Concern outlining Mr. Williams' aggressive nature, characterizing it as "road ragish" and describing Mr. Williams as a "bomb waiting to go off." In his opinion, Mr. Williams was a dangerous driver who was likely to kill somebody, and should have his CDL revoked. Nonetheless, Mr. Pitt did not give a copy of this document to Mr. Fetty or inform Mr. Fetty of his concerns.

Based on the evidence of record, I find that D.L.F. had a valid basis for issuing each of the warning forms, and Mr. Pitt the Notice of Concern, and that Mr. Williams did in fact commit the misconduct and demonstrate the aggressiveness and poor driving habits that are reflected on them. Mr. Williams' conduct was observed and reported by other D.L.F. drivers, by agents of D.L.F. customers, and by Mr. Pitt and Mr. Williams personally. At the hearing, Mr. Williams did not persuasively deny the allegations against him; he denied only that he received any warnings on or around the dates appearing on them. He did not deny at all most of the allegations. He did deny that he sped down Omo Road, but did so half-heartedly and with misdirection, saying that he could not have gone 55 miles per hour, but also saying that the truck kicks up a lot of dust.

Early in the week of May 21, 2012, Mr. Williams worked for more than 12 hours, counting from his arrival time at the D.L.F. yard until completion of any post-trip inspection. He worked more than 12 hours on a number of days that he worked at D.L.F. The first time it happened, he told Mr. Pitt that he thought he was exceeding the number of hours he was legally allowed to drive. Mr. Pitt disagreed, and the matter came to Mr. Fetty's attention. Mr. Fetty asked Ms. Paquin to look into the matter, and she printed a copy of the Michigan state law applicable to seasonal construction truck drivers. That law permits a driver to drive for no more than 12 hours per day. Mr. Williams on the one hand, and Mr. Pitt and Mr. Fetty on the other hand, disagreed over the interpretation of that law. Mr. Pitt and Mr. Fetty believed that the 12-hour limitation did not apply to time spend waiting in line to load or unload a truck; Mr. Williams believed that it did, and also believed that Mr. Pitt and Mr. Fetty never proved to his satisfaction that waiting time did not count toward the 12-hour limitation.

On June 13, 2012, Mr. Williams filed a complaint with OSHA under the STAA, alleging that his hours and pay were reduced after he brought hours-of-service violations to the attention of D.L.F. He made it known at D.L.F. that he had filed the complaint at around the time he did so. At some point, D.L.F. received information from OSHA that Mr. Williams had filed the complaint, but the date that they received notice is unclear.

On July 10, 2012, Mr. Williams filed a complaint with the Michigan state police, alleging that D.L.F. was violating state hours-of-service rules. A state police investigator came to D.L.F. on July 13, 2012, to inspect the records of D.L.F. drivers. After doing so, the investigator determined that there were no hours-of-service violations. Mr. Williams did not accept that result, and complained to the investigator's sergeant that the investigator didn't know what he was doing. The investigator returned, obtained copies of D.L.F.'s documents, and again reported that he found no hours-of-service violations. D.L.F. did receive a warning for allowing drivers to drive without having had 10 hours of rest between runs.

An issue arose during the hearing as to whether Mr. Fetty, during a break, coughed and uttered a vulgarity toward Mr. Williams in the hallway outside the hearing room. I find that he did. I did not find Mr. Fetty's denial credible; his testimony that he coughed, but did not utter any words, is contradicted by the credible testimony of Mr. Pitt and that of Mr. Burg. Further, Mr. Williams was visibly frustrated at the time and expense of defending against the complaint in this matter, and his pugnacious demeanor during the hearing lends an air of truth to the testimony of Mr. Pitt and Mr. Burg. Nonetheless, I give little to no weight to that finding. It is not clear that Mr. Williams directed his comment to Mr. Williams; it is equally likely that he was directing it to the attorney that he blamed for his current situation. Further, any expression of animosity at the time of the hearing is only slightly relevant to his state of mind during the time period that Mr. Williams worked for him, and at the time of Mr. Williams' termination.

Conclusions of Law

To prevail on his STAA claim, Mr. Williams must prove by a preponderance of the evidence that (1) he engaged in protected activity, (2) D.L.F. was aware of the protected activity, (3) D.L.F. took an adverse employment action against him, and (4) the Mr. Williams' protected activity was a contributing factor in the adverse action. *Beatty v. Inman Trucking,*

ARB No. 11-021, ALJ No. 2008-STA-020, -021, slip op. at 5 (ARB June 28, 2012); *see Villa v. D.M. Bowman, Inc.*, ARB No. 08-128, ALJ No. 2008-STA-046, slip op. at 3 (ARB Aug. 31, 2010). If the Mr. Williams cannot prove one of these requisite elements, the entire claim fails. *Beatty, supra,* slip op. at 5; *see West v. Kasbar, Inc. /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005). The employer may escape liability only by proving with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 49 U.S.C. § 31105(b)(2)(B)(iv); *Beatty, supra,* slip op. at 5.

Protected Activity

The STAA provides that a person may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because:

- 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 or security regulation, standard, or order, or has testified or will testify in such a proceeding;
- 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;
- the employee refuses to operate a vehicle because-
    - the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
    - 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;
- the employee accurately reports hours on duty pursuant to chapter 315;
- the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or
- the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

49 U.S.C. § 31105(a)(1); 29 C.F.R. § 1978.102(b).

Mr. Williams did several things that may qualify as protected activity.

First, he spoke to Mr. Pitt and Mr. Fetty several times, stating that he was being asked to violate the federal hours-of-service regulations by driving more than the allowable number of hours per day. Mr. Pitt and Mr. Fetty did not believe that the federal hours-of-service regulations applied to the seasonal construction work being performed by Mr. Williams, and believed that

Michigan state law established the allowable hours of service. Whether Mr. Williams' belief was correct doesn't matter; he indisputably referred to the "little green book," identified as Federal Motor Carrier Safety regulations, when he complained about his hours of service. In the Sixth Circuit, a complainant need not show an actual regulatory violation; "[t]he primary consideration is not the outcome of the underlying grievance hearing, but whether the proceeding is based upon possible safety violations." *Yellow Freight System, Inc. v. Martin*, 954. F.2d 353, 356-57 (6th Cir. 1992); *Lajoie v. Environmental Management Systems, Inc.*, 90-STA-31 (Sec'y Oct. 27, 1992). As Mr. Williams made complaints to his supervisor "relating to" alleged violations of Department of Transportation regulations, his complaints were protected activity under the STAA. A complaint is protected under section 405(a) even if the alleged violation complained about ultimately is determined to be meritless. *Allen v. Revco D.S., Inc.*, 91-STA-9 (Sec'y Sept. 24, 1991), slip op. at 6, n.3.

Additionally, Mr. Williams made a complaint to OSHA on or about June 13, 2012, alleging that he his hours and pay had been reduced because he had complained about hours of service. A complaint to OSHA is "a complaint … related to a violation of a commercial motor vehicle safety or security regulation, standard, or order," which is explicitly a protected activity under the STAA.

It is less clear that Mr. Williams' complaint to the Michigan state police regarding his hours of service qualifies as protected activity under the Act. Under 49 U.S.C. §31105(a)(1)(A)(1), a driver who "has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order" has engaged in protected activity. Under 29 C.F.R. § 1978.102(b)(1), oral complaints to an employer or government agency qualify. "Commercial motor vehicle safety or security regulation" is undefined, but "commercial motor vehicle" is defined as a "self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle … has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds…." 49 U.S.C. § 31101(1)(A). The testimony in this case establishes that Mr. Williams regularly drove on I-94, and that his gross vehicle weight was up to 160,000 pounds. I conclude that he was driving a commercial motor vehicle within the meaning of the Act. Furthermore, the statute and implementing regulations do not define "safety or security regulation, standard, or order." 49 U.S.C. § 31105(a)(1)(A)(1). However, neither that statute nor 29 C.F.R. § 1978.102(b)(1) limits the "safety or security regulation, standard, or order" to *federal* regulations, standards, or orders. In the following sections of both the statute and the regulation, prohibiting discrimination based on a "refusal to drive," both the statute and the regulation specify that the refusal to drive must be based on a "standard, regulation or order *of the United States*." 49 U.S.C. § 31105(a)(1)(B)(1); 29 C.F.R. § 1978.102(c)(1)(i) (emphasis added). Omission of the phrase "of the United States" in the "filed a complaint" portion of the statute and regulation supports the interpretation that the safety or security, regulation, or order need not be federal. I therefore conclude that Mr. Williams' complaint to the Michigan state police, relating to hours-of-service violations of state law, also qualifies as protected activity under the STAA. *See Nix v. Nehi-RC Bottling Company, Inc.*, 84-STA-1 (Sec'y July 13, 1984), slip op. at 8-9.

Accordingly, I conclude that Mr. Williams engaged in protected activity when he complained to Mr. Pitt and Mr. Fetty about possible hours-of-service violations, when he filed

his OSHA complaint on June 13, 2012, and when he filed an hours-of-service complaint with the Michigan state police on July 10, 2012.

Employer's Awareness

There can be no serious dispute that D.L.F. was aware of all of Mr. Williams' protected activities. He complained directly to his supervisor, Mr. Pitt, and to the sole owner of the company, Mr. Fetty, about his hours of service. Mr. Fetty admits that he was aware of both the OSHA complaint and the complaint to the Michigan state police. Accordingly, I conclude that D.L.F. was aware that Mr. Williams engaged in all of the protected activity described above.

Adverse Employment Action

Mr. Williams alleges that he was subjected to adverse employment action including: (1) reduction in hours and pay, and (2) termination. There is no dispute that he was terminated from employment, or that termination is an adverse action.

Mr. Williams' time and log sheets, as well as his pay stubs, show that his hours and pay were reduced effective the week of June 24-30, 2012. Before that week, he worked four or five days every week. He worked only two days during the weeks of June 24-30 and July 1-7, and only one day the week of July 15-21. Clearly, a reduction in hours and pay is an adverse employment action.

Accordingly, I conclude that Mr. Williams suffered adverse employment action when his hours and pay were reduced, and when he was terminated.

Contributing Factor

The crux of the parties' dispute is whether Mr. Williams' protected activity contributed to D.L.F.'s decision to terminate his employment. In *Beatty, supra,* the ARB noted:

> A "contributing factor," the ARB has repeatedly noted, is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision." Thus, for example, a complainant may prevail by proving that the respondent's reason, "while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity." Moreover, the complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence.

Beatty, slip op. at 8-9 (citations omitted).

D.L.F. paints Mr. Williams as a chronic complainer and poor performer, whose misconduct led to his being barred from customer jobs, to complaints from the public, and to damaging company equipment. According to the company, Mr. Williams consistently disregarded instructions from loader operators, cut in line ahead of other drivers, and essentially drove whenever and however he wanted to drive, ignoring orders and endangering the public.

Although the company tried to work with him to correct his performance and conduct, he did not take instruction, and until the last day he worked continued to be a poor employee. I agree with D.L.F. Mr. Williams demonstrated utter disregard for D.L.F. instructions, and caused unnecessary difficulties for the company in meeting their customers' requirements. His performance, conduct, and attitude provided ample reason for the company to terminate him.

However, that D.L.F. had ample reason to terminate Mr. Williams is not the issue. The issue is whether his protected activity contributed in any way, no matter how slight, to the decision to do so. The evidence persuades me that it did. First, although it is not clear precisely when D.L.F. became aware of Mr. Williams' OSHA complaint, it was, according to Mr. Fetty, no more than a few weeks before he was terminated. Additionally, Mr. Pitt testified that Mr. Williams talked about his OSHA complaint in the yard after he had filed it. Given Mr. Williams' aggressive character, I conclude that he talked about the OSHA complaint the day after he filed it, or June 14, 2012, about five weeks before he was suspended and then terminated. D.L.F. received notice of the complaint from OSHA about three weeks before Mr. Williams was suspended. Thus, temporal proximity between the filing of the complaint and Mr. Williams' suspension supports a finding of contribution. More significant was the testimony of Mr. Fetty, who admitted that although he had fired other drivers with records similar to that of Mr. Williams, none of those other drivers had filed complaints with OSHA, and there is no evidence that any of them had engaged in any other protected activity. Still more telling was Mr. Fetty's admission that he has fired drivers with better records and has fired drivers with worse records than that of Mr. Williams – that it all depends on the situation. Based on the record, the situation involving Mr. Williams was different from the rest of the drivers in that Mr. Williams engaged in protected activities, while the other drivers did not – Mr. Fetty did not explain why Mr. Williams' "situation" was different in any other way. Finally, I find that it was Mr. Williams' overall performance, conduct, and character that resulted in the decision to terminate him and, given his continuing complaints about his hours of service and his involvement of two government agencies, his oral and written complaints contributed to D.L.F.'s perception of him.

Accordingly, I conclude that Mr. Williams' protected activities contributed to D.L.F.'s decision to terminate his employment.

Mr. Williams also has shown that his pay and hours were reduced beginning the week of June 24, 2012. That reduction began less than two weeks after D.L.F. learned that Mr. Williams had filed his OSHA complaint, and after he had complained for over a month about the hours he was being asked to drive. Temporal proximity supports an inference that Mr. Williams' protected activities contributed to the decision to reduce his hours. Although there was some testimony that the weather could play a part in the number of hours a driver could work, there was no testimony that the weather in fact played any role in the reduction in Mr. Williams' hours. Indeed, D.L.F offered no explanation at all for reducing his average work week from over four days to two days.

Accordingly, I conclude that Mr. Williams' protected activities contributed to the reduction in his hours and pay.

Affirmative Defense

As Mr. Williams has met his burden on all the elements of his claim, the burden shifts to D.L.F. to show by clear and convincing evidence that the company would have terminated his employment even if he had not engaged in protected activities. This they cannot do. Only a short discussion is necessary. The individual who made the decision to terminate Mr. Williams – the owner and sole operator, Mr. Fetty – admitted that he has retained drivers with worse records than Mr. Williams had, and has fired drivers with better records. Thus, the company cannot demonstrate that his conduct and performance alone would have resulted in termination. Further, the company did not show that it had a policy of terminating a driver's employment after any particular number of warnings, or after any particular type of repeated misconduct, or after receiving any particular number or type of complaints from customers. In short, the company has fallen far short of its burden.

Accordingly, I conclude that D.L.F. has not shown that it would have taken adverse employment action against Mr. Williams if he had not engaged in protected activity. D.L.F. has therefore failed to show that it is not liable for damages.

Remedies

The Act provides for a number of remedies to Mr. Williams, including reinstatement, compensatory damages, special damages, and punitive damages.

Reinstatement

Under the Act, a prevailing complainant is entitled to an order of reinstatement. 49 U.S.C. § 31105(b)(3)(A)(ii). Reinstatement, however, need not be ordered if it is impossible or impractical. *Palmer v. Triple R Trucking*, ARB No. 03-109, ALJ No. 2003-STA-028, slip op. at 4 (ARB Aug. 31, 2005). In this case, the evidence establishes that D.L.F.'s business consists of seasonal contracts that begin in the spring and end in the late fall of each year. There is no evidence that D.L.F. operates continuously, or that it is guaranteed the same contracts from one year to the next. D.L.F. hires different drivers every year. As D.L.F. engages in a series of unconnected seven-month non-guaranteed contracts, I conclude it would be impractical to order reinstatement, and it will not be ordered.

Compensatory Damages

Mr. Williams is entitled to compensatory damages in the form of lost wages. He is entitled to compensation for the reduction in pay beginning on June 24, 2012, and for the loss of all pay after July 17, 2012. Pay records show that Mr. Williams worked an average of about 4.5 days per week before June 24, 2012. He worked two days per week during the weeks of June 24 and July 1; thus, he is entitled to compensation for 2.5 days for each of those two weeks, or 5 days total. He worked three days during the week of July 8, and is therefore entitled to 1.5 days' pay for that week.

Exhibit 4 does not include a load and time log for the week of July 15, 2012. However, Exhibit 3 shows that Mr. Williams was paid for work during that week in the gross amount of $152.63. That pay is roughly equivalent to the average daily pay that Mr. Williams received, as discussed below. Accordingly, I find that he worked one day during the week of July 15, and is entitled to 3.5 days' pay for that week.[10]

Thus, Mr. Williams is entitled to back pay for 10 days' work for the period between June 24, 2012 and July 21, 2012.

In addition, Mr. Williams is entitled to 4.5 days of compensation for each week after his termination from D.L.F., beginning the week of July 22 and ending with the completion of D.L.F.'s season. The evidence of that end date is vague; the season may have ended any time between mid-October and early December. Although Mr. Pitt testified that the season ended in October or November, Mr. Fetty, the owner of the company, testified that the season ends in November or early December. As Mr. Fetty has continued to run the business since 2012, while Mr. Pitt has not been involved in it, I credit Mr. Fetty over Mr. Pitt on this issue. Further, given that the purpose of the STAA remedies is to make a successful complainant whole, I hold the imprecision against D.L.F. Accordingly, I conclude that the season ended for D.L.F. drivers on Friday, December 7, 2012. The period from July 22 through December 7 amounts to 20 weeks, or 90 days of lost pay for Mr. Williams.

Combining the 10 days' lost work before his termination with 90 days of lost wages after his termination, Mr. Williams is entitled to back pay for 100 days of lost work.

For the period that Mr. Williams was employed by D.L.F., he earned $5,426.53. He worked on 30 separate work 30 days during that period; thus, his average daily wage was $180.88. His back pay, therefore, totals $14,832.16 (82 days at $180.88 per day). Although Mr. Williams received unemployment compensation, unemployment compensation is not deductible from the amount due for back pay under the STAA. *Hadley v. Southeast Coop. Serv. Co.,* 86-STA-24 (Sec'y June 28, 1991).

In his written post-hearing brief, Mr. Williams requested back pay for the years 2013 and 2014, based on his speculation that D.L.F. would have re-hired him for those seasons. It is, in fact, speculative to think they would. Based on Mr. Williams' conduct and unprofessional behavior during the 2012 season, I think it probable that he was the last person that D.L.F. would have brought back to drive in 2013 and 2014.

[10] There are handwritten notations on each page of Exhibit 3, where it appears that Mr. Williams tried to calculate the number of days he worked during each pay period. I have disregarded those handwritten notations and made my own calculations. In addition, I have disregarded the blue "post-it" notes on Exhibit 10, as they were added by someone other than the state police officer who prepared the report reflected in that exhibit.

Special Damages

As a successful complainant, Mr. Williams is entitled to an award of reasonable attorney fees, expert witness fees, and litigation costs. 49 U.S.C. § 31105(b)(3)(A)(iii). His counsel will be allowed time to submit an application for an award of fees and costs.[11]

Mr. Williams testified at hearing that he suffered from humiliation after his termination, and that his relationship with his wife and children suffered in many different ways due to his unemployment. He had to ask relatives to help him make mortgage payments, suffered from stress-related physical problems, and had relationship problems with his wife that resulted in their sleeping apart for four months. He and his wife unsuccessfully tried to conceal their marital difficulties from their children. He was distressed over his inability to give his family a normal Thanksgiving and Christmas.

As discussed above, Mr. Williams was generally not a credible witness. On the issue of the effect of his termination on his emotional state, however, his demeanor changed substantially, and it was clear that the termination affected him, his marital relationship, and his family deeply. His testimony was uncorroborated, however, and because of this I will make a lesser award than otherwise would have been made had he offered other evidence such as testimony by others who observed the change in his emotional state. In some STAA cases, the ARB has awarded damages for emotional and mental distress where the claims were unsupported by medical evidence. *See Murray v. AirRidge, Inc*., ARB No. 00-045, ALJ No. 1999-STA-034 (ARB Dec. 29, 2000) (affirming "modest award" of $20,000 when complainant gained weight from depression and stress, had trouble sleeping, and had damaged self-esteem); *Jackson v. Butler & Company*, ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004) (affirming finding of $4,000 for emotional distress that was unsupported by professional counseling or medical evidence); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 03-095, ALJ No. 02-STA-035 (ARB Aug. 6, 2004), slip op. at 17 (affirming award of 10,000 for humiliation and emotional distress based on complainant's testimony). I find that an award of $25,000 is appropriate for Mr. Williams' emotional distress.

Punitive Damages

Punitive damages of up to $250,000 are authorized under the STAA. 49 U.S.C. § 31105(a)(3)(C). "[P]unitive damages may be awarded where there has been 'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law . . . .'" *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 8 (ARB Aug. 31, 2011), citing *Smith v. Wade*, 461 U.S. 30, 51 (1983). The evidence in this case does not

[11] In his written post-hearing argument, Claimant alluded to "Exhibit C" in support of a request for $29,400.00 in attorney's fees, and also provided documents supporting $1001.67 in litigation costs. He did not attach Exhibit C to the brief. Counsel should address both fees and costs in his fee petition and, with regard to his fee petition, should utilize the lodestar method of arriving at an appropriate fee. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *Smith v. Lake City Enters.*, ARB Nos. 12-112, -113, ALJ No. 2006-STA-032, slip op. at 3 (ARB Sept. 12, 2013); *Evans v. Miami Valley Hosp.*, ARB Nos. 08-039, -043; ALJ No. 2006-STA-047, slip op. at 3 n.8 (ARB Aug. 31, 2009); *Eash v. Roadway Express, Inc.*, ARB Nos. 02-008, -064; ALJ No. 2000-STA-047, slip op. at 7 (ARB June 27, 2003); *Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 5 (ARB May 29, 2003).

establish an intentional violation of any law; to the contrary, the evidence shows that D.L.F. made an effort to determine and to explain to Mr. Williams what the correct hours-of-service rules were. Furthermore, I conclude that D.L.F. did not demonstrate a reckless or callous disregard for Mr. Williams' rights. D.L.F. showed restraint in not terminating Mr. Williams earlier than he was, although, as discussed above, there was ample reason to do so. Accordingly, punitive damages will not be awarded.

Interest

Under 49 U.S.C. § 31105(b)(3)(A)(iii), Mr. Williams is entitled to interest on the award of back pay. Interest on back pay must be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621, and must be compounded daily. 29 C.F.R. § 1978.109(d)(1).

ORDER

For the foregoing reasons, IT IS ORDERED:

1. Respondent D.L.F. shall pay back pay to Complainant Michael Williams the amount of $18,088.00**,** plus interest at the legal rate as discussed above;
2. Respondent D.L.F. shall pay the sum of $25,000.00 to Complainant Michael Williams for emotional distress and mental pain; and
3. Complainant may, within 30 days of the date of this Decision and Order, submit a complete application for an award of attorney's fees and costs, after which Respondent shall have 21 days to file any objections it may have thereto.

SO ORDERED.

Digitally signed by Paul Johnson Jr
DN: CN=Paul Johnson Jr,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Newport News, S=VA, C=US
Location: Newport News VA

PAUL C. JOHNSON, JR.
District Chief 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status

of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).