U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 13 July 2015

Case No.: 2014-STA-00025

In the Matter of

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH
Prosecuting Party

and

BRIAN FORD
Complainant

v.

NEW PRIME, INC.
Respondent

RECOMMENDED DECISION AND ORDER

This case arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Section 31105 of the Surface Transportation Assistance Act of 1982 ("STAA" or "the Act"), 49 U.S.C. § 31105, and its implementing regulations found at 29 C.F.R. Part 1978 (2013).

Brian Ford ("Complainant") alleged that his former employer, New Prime, Inc. ("Respondent") retaliated against him in November 2008, after he discovered that Respondent provided a report that he had abandoned a loaded vehicle to U.S. Investigation Services, Inc. ("USIS") which resulted in an unfavorable notation on his Drive-A-Check ("DAC") Report. Complainant alleged that the USIS report was made in response to his refusal to drive a commercial vehicle to Springfield, Missouri from South Carolina and his reporting of a back injury which impaired his ability to safely operate a commercial vehicle.

On August 18, 2009, Complainant filed a formal complaint with Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor ("DOL"), alleging he was retaliated against by Respondent by "blacklisting" in violation of the Act. OSHA issued its determination including the Secretary's findings that there was reasonable cause to believe Respondent violated the Act in its action against Complainant and directed Respondent's payment of lost wages, compensatory damages, and punitive damages, as well as Respondent's

expungement of Complainant's employment records and posting of a notice of the Secretary's findings.

Respondent timely objected to the OSHA determination and requested a hearing before the DOL Office of Administrative Law Judges ("OALJ"). The matter was assigned to me on February 6, 2014 and I held a hearing on July 14, 2014 in Cherry Hill, New Jersey. Respondent and Complainant were both represented by counsel.

Complainant testified on his own behalf, as did James McCormack and Steve Crawford. Jared Young also testified. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing argument or briefs: Complainant submitted his "Proposed Findings of Fact and Legal Argument" ("Complainant's Proposed Findings") which was received on October 14, 2014; Respondent's "Proposed Findings of Fact and Conclusions of Law" ("Respondent's Proposed Findings") was also received on that date.

At the hearing, the following exhibits were admitted to the record: Joint Exhibit ("JX") 1; Complainant's Exhibits ("CX") 1; 3-7; 9-10, as well as Respondent's Exhibits ("RX") 1-7; 9-17.[1] *See* Hearing Transcript ("HT") 6; 9; 13.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law. I considered all evidence admitted into evidence, whether or not specifically cited herein.

I. STIPULATIONS

The parties have stipulated and I find supported by the record that:

1. DOL has jurisdiction over this proceeding and the parties.

2. At all material times, Respondent was a motor carrier operating in interstate commerce and an employer subject to the employee protection provisions of the Act. Respondent has its principal place of business at 2740 North Mayfair Avenue, Springfield, MO 65083.

3. Complainant was an "employee" of Respondent within the meaning of the Act. Respondent employed Complainant to operate commercial motor vehicles having a gross vehicle rating of 10,001 pounds or more on the highways to transport property in interstate commerce.

4. On August 18, 2009, Complainant filed a complaint with the Assistant Secretary of Labor for OSHA alleging that Respondent had violated the Act by discriminating against him and blacklisting him.

[1] CX 2, CX 8 and RX 8 were withdrawn. HT at 9-10.

5. HireRight Solutions was formerly known as USIS. HireRight Solutions maintains employment records on truck drivers. Subscribing carriers report to USIS about drivers' work records. Subscribing carriers may obtain employment record information from USIS relating to prospective employees. The report issued by USIS to prospective employers is commonly known as a "DAC Report."

6. Respondent is a subscribing employer utilizing the services of HireRight Solutions and providing information on its truck drivers to HireRight.

7. In or about November 2008, Respondent reported to USIS the code 953. Specifically the work record information set forth in RX 12.

II. ISSUES PRESENTED

1. Whether Complainant engaged in protected activity as defined by the STAA.

2. Whether Respondent took discriminatory action against Complainant in violation of the STAA.

3. Whether Complainant is entitled to damages and attorney's fees.

III. FINDINGS OF FACT

Complainant currently holds a NJ commercial driver's license. HT at 124. He executed an Independent Contractor Operating Agreement with Respondent on June 19, 2008. RX 2. That Operating Agreement provided, in part, that Respondent "shall have exclusive possession, control and use of" the tractor truck and addressed the manner in which Respondent would compensate Complainant for his services. RX 2 at 1-8. The Operating Agreement also provided for termination by either party with thirty-day written notice and with five-day written notice in the event of a material breach of its terms. RX 2 at 8.

On June 19, 2008, Complainant also executed a Lease Agreement with Success Leasing under which Complainant leased a tractor trailer from Success Leasing. RX 4. That Lease Agreement provided, in part, that it could be terminated with five-day written notice by either party upon the other party's breach of any of its delineated obligations, including failure to pay rental or other amounts required. RX 4 at 4. The Lease Agreement also allowed for Success Leasing to terminate it upon written notice if abandonment or voluntary surrender of the tractor trailer occurs. RX 4 at 5. Complainant was a leased operator for Respondent: the truck he leased from Success Leasing he then, in turn, leased back to Respondent.[2] HT at 30.

Jared Young, an employee of Respondent, served as Complainant's fleet manager and immediate supervisor during Complainant's tenure with Respondent. HT at 29. As a fleet

[2] Success Leasing is an affiliate of Respondent: both entities share common ownership. HT at 29-30.

manager, Mr. Young served as an immediate supervisor to a pool of 70 to 90 drivers. HT at 28-29. Mr. Young described his responsibilities as fleet manager to include "[d]ispatch functions of the trucks on a daily basis, monitoring DOT regulations, [and] profitability of the trucks." HT at 54.

On October 17, 2008, Respondent dispatched Complainant to pick up a load in Mount Crawford, VA. HT at 134, 136. While at the vendor's facility, Complainant experienced a "sharp pull" in his lower back and a "very sharp pain" down his right leg, but he continued working. HT at 135.

On October 28, 2008, Complainant advised Mr. Young that his back symptoms persisted and asked Mr. Young to be dispatched to his home, then in Belton, SC, to see a doctor. HT at 40; HT 61, 138. The tractor movement log for Complainant noted "PTA doctor appointment" for October 28, 2008. RX 17 at 6.

Complainant went to the emergency room on November 1, 2008. CX 3; HT at 139. The emergency room physician prescribed Complainant multiple narcotic pain medications and a muscle relaxant for pain management. CX 3 at 3-4; 12; HT at 142-143.

During a telephone conversation with Complainant on November 4, 2008, Mr. Young requested Complainant re-send the doctor's note Complainant indicated he had previously sent. HT at 42-44; 147. On that date, Mr. Young requested that Success Leasing issue a five-day notice of default to Complainant. RX 16 at 88a; HT at 33, 41. Also on that date, Mr. Young made the following internal entry into Respondent's Driver Incident System:

> Driver went home to visit doctor. He claims to have faxed a dr note but nothing arrived. Disp has requested him resend but no response. Disp has also made several attempts to contact driver at home with no success. No phone calls have been returned either. Disp has called cell/home/emergency #s provided by the driver. 5 Day letter issued to start process of trk recovery.

RX 16 at 1; CX 6 at 3.

On November 4, 2008, Mr. Young also entered an "abandonment" notation into Respondent's internal records that Complainant and forwarded that notation to Respondent's personnel department. RX 15 at 1; RX 16 at 2; HT at 47-49.

Mr. Young arranged for another of Respondent's drivers to retrieve the truck tractor from Complainant on November 7, 2008. HT at 81, 148. On that date, Mr. Young made the following internal entry into Respondent's "Reason for Driver Termination":

> Recovered trk for medical reasons. [D]river unable to reload trk. Under DR care and prescribed painkillers. Drv faxed in DR note. Driver struggles with profitability in the lease program. Problems with trk utilization. Driving was making improvements when med issue arised [sic] but would need additional training before doing the lease program again.

RX 16 at 3; CX 6 at 4; HT at 73.

On November 7, 2008, Mr. Young also changed internal entry to reflect Complainant was eligible for rehire. RX 16 at 3; CX 6 at 4. On or about November 8, 2008, Success Leasing sent a letter to Complainant informing him that his lease had been canceled. CX 10 at 15-16; RX 6. On November 11, 2018, Respondent's driver personnel department entered code "953" or "Unauthor. Location – W/O Notice (QUIT UNDER LOAD/ABANDONMENT)" and "Eligible for Rehire: No" on Complainant's USIS DAC Report. JX 1, ¶7; CX 9 at 15-18, 30-31, 33; RX 12.

Complainant testified that he underwent microdiscectomy surgery in April 2009 and his doctor released him to return to full, unrestricted duty on July 1, 2009. HT at 152-153. In May 2009, he stated that he commenced applying for employment in the trucking industry. He applied for work with Beacon Transport and its recruiter advised him that Respondent had indicated on his DAC report that Claimant had abandoned his equipment. HT at 155-156.

Beacon Transport offered Claimant a job in late August 2009. HT at 156-157. Claimant accepted and then declined the job offered. RX 7 at 2; HT at 156-158, 174-175. He then took a driver position with a sand hauling company in New Jersey and began attempting to have the abandonment notation removed from his DAC report. HT at 157-158. Claimant earned about $600 weekly in the driver position with the sand hauling company. HT at 158, 163.

On or about September 29, 2009 – after Complaint filed his complaint with OSHA upon which this matter is based – Respondent removed Code 953 abandonment notation from Complainant's DAC report. RX 13 – RX 15; HT at 110-111, 121.

Since September 2010, Claimant has been an insulin-dependent diabetic and is prohibited from operating a commercial vehicle interstate. HT at 125.

IV. CONCLUSIONS OF LAW

The STAA prohibits discrimination against an employee who refuses to operate a vehicle when "the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health . . . ." 49 U.S.C. § 31105(a)(1)(B)(i). Congress extends whistleblower protection to employees in the transportation industry because these employees are often best situated to discern safety violations. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

To prevail on his claim in an STAA case, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that the respondent took an adverse employment action against him, and that his protected activity was a contributing factor in the unfavorable personnel action; if the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the unfavorable personnel action, a respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. *Beatty v. Inman Trucking Management, Inc.*, 2008-STA-20 and 21 (ARB May 13, 2014).

An adverse action is anything an employer does that could well dissuade a reasonable worker from engaging in protected activity. *Strohl v. YRC, Inc.*, 2010-STA-35 (ARB Aug. 12, 2011). The implementing regulations prohibit as adverse action and make it a violation for an employer to "intimidate, threaten, restrain, coerce, *blacklist*, discharge, discipline, or in any other manner retaliate against an employee[.]" 29 C.F.R. §§ 1978.102(b), (c)(emphasis added).

The STAA regulations specifically provide a cause of action on behalf of an employee whose former employer blacklists him because he engaged in protected activity, 29 C.F.R. §§ 1978.102(b), (c), and the Board has recognized that blacklisting may be the adverse action in a STAA complaint. *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 11-021, ALJ Nos. 2008-STA-020, -021; slip op. at 6 (ARB June 28, 2012). Blacklisting is "'quintessential discrimination,"' that is often "'insidious and invidious [and not] easily discerned."' *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056, 02-059; ALJ No. 2001-ALJ-018, slip op. at 9 (ARB Nov. 28, 2003) (quoting *Leveille v. New York Air Nat'l Guard*, No. 1994-TSC-003, slip op. at 18 (Sec'y Dec. 11, 1995)). "Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment." *Id*. at 5.

Employers found in violation may be ordered to take affirmative action to abate the violation; reinstate the complainant to the former position with the same pay and terms and privileges of employment; pay compensatory damages, including backpay with interest and for any special damages sustained as a result of the violation, including litigation costs, expert witness fees, and reasonable attorney fees; and pay punitive damages in an amount not to exceed $250,000. 49 U.S.C. § 31105(b).

Unless it is impossible or impractical, reinstatement is an automatic remedy under the Act and respondent employers must make a bona fide reinstatement offer. *Dickey v. West Side Transport, Inc.*, 2006-STA-26 and 27 (ARB May 29, 2008). However, reinstatement may be waived. *Young v. Park City Transportation*, 2010-STA-65 (ARB Aug. 29, 2012). A respondent employer may be ordered to compensate complainants for having experienced depression and hardship, if the weight of the evidence supports such an award. *Id*. Complainants are entitled to backpay from the date of discharge to the date when the employer makes a bona fide, unconditional offer of reinstatement, with a reduction in liability for other earnings and an adjustment for pre and post judgment interest. *Hobson v. Combined Transport, Inc.*, 2005-STA-35 (ARB Jan. 31, 2008); *Dale v. Step 1 Stairworks, Inc.*, 2002-STA-30 (ARB Mar. 31, 2005). Punitive damages are appropriate where a respondent has acted with reckless or callous disregard or intentionally violated the law. *Ferguson v. New Prime, Inc.*, 2009-STA-47 (ARB Aug. 31, 2011). Respondents may also be ordered to expunge or correct a complainant's work record and post a workplace notice. *Shamel v. Mackey*, 85-STA-3 (Sec'y Aug. 1, 1985); *Scott v. Roadway Express, Inc.*, 1998-STA-8 (ARB July 28, 1999).

The STAA provides as follows:

> (a)Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against any employee regarding pay, terms, or privileges of employment, because –

> (B) the employee refuses to operate a vehicle because . . . (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee had a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.

49 U.S.C. § 31105(a)(1)(B).

The regulation found at 49 C.F.R. § 392.3 provides, in part, the following:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3.

Also, the regulation found at 49 C.F.R. 392.4 provides, in part that, "[n]o driver shall be on duty and possess, be under the influence of, or use, . . . [a] narcotic drug or any derivative thereof."

A. Protected Activity

In its Proposed Findings submitted post-hearing, Respondent contends that Complainant was not subject to an adverse action and, even assuming arguendo, the placement of the abandonment notation on his DAC report is deemed to be an adverse action, Complainant's refusal to drive was not a contributing factor to the placement of that notation his DAC report. Thus, it appears Respondent concedes that Complainant engaged in protected activity when he refused to operate his lease commercial vehicle due to his use of prescription pain medication beginning on November 1, 2008.

As Complainant stated in his Proposed Findings submitted post-hearing, "[a] refusal to drive due to illness, injury or fatigue can be protected under either 49 U.S.C. 31105(a)(1)(B)(i), the 'actual violation' clause, or under 49 U.S.C. 31105(a)(1)(B)(ii), the 'reasonable apprehension' clause, or under both clauses. Complainant's Proposed Findings at 13, *citing Stauffer v. Wal-Mart*, ARB No. 99-107, ALJ No. 199-STA-21 at 7 (ARB Nov. 30, 1999); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 199-STA-5, at 8-9 (ARB Mar. 29, 2000).

On November 1, 2008, the record shows Complainant went to an emergency room when, according to Complainant, his pain symptoms from the injury he incurred had become intolerable and impaired his ability to operate a motor vehicle. CX 3; HT at 139. The record, including Complainant's testimony and emergency physician notes, also supports my finding Complainant was prescribed narcotic pain medication when he went to the emergency room on November 1, 2008. CX 3; HT at 142-143. A reasonable person in Complainant's position would

apprehend that operation of a truck-tractor while taking such medication could result in harm. I find Complainant's refusal to operate a commercial vehicle while under the influence of prescribed pain medication is also protected because operation of a vehicle would have resulted in an actual violation of 49 C.F.R. § 392.4, which prohibits commercial drivers from being under the influence of such medication while on duty.

I find that Complainant did engage in protected activity when he advised Respondent's fleet manager, Mr. Young, that he was unable to operate his leased vehicle due to medical reasons and pain medication prescriptions. On November 4, 2008, Mr. Young made an internal notation that Complainant went home to visit a doctor. RX 16 at 1; CX 6 at 3. On November 7, 2008, Mr. Young made an internal notation of medical reasons and pain medication prescriptions, in part, as the reason for Complainant's driver termination. RX 16 at 3; CX 6 at 4; HT at 73-74. I find then that Respondent had knowledge of Complainant's protected activity prior to the November 11, 2008 entry of the "Code 953" denoting abandonment on the DAC report. RX 12.

B. Adverse Action

The Administrative Review Board ("ARB") has recognized that blacklisting may be the adverse action in a STAA claim. *Murphy v. Atlas Motor Coaches, Inc.*, ARB No. 05-055, ALJ No. 2004-STA-036 (ARB July 31, 2006). Blacklisting is "'quintessential discrimination,'" that is often "'insidious and invidious [and not] easily discerned.'" *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056, 02-059; ALJ No. 2001-STA-018, slip op. at 9 (ARB Nov. 28, 2003) (quoting *Leveille v. New York Air Nat'l Guard*, No. 1994-TSC-003, slip op. at 18 (Sec'y Dec. 11, 1995)). We have said that "blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment." *Id.* at 5. Therefore, to prevail, Complainant must prove that Respondent disseminated damaging information about him that would or could prevent him from finding employment.

As the Board noted in *Beatty v. Inman Trucking Management, Inc.*, meeting the test for 'blacklisting' does not require a complainant to prove that the negative DAC report actually led to negative consequences for him. ARB No. 11-021, ALJ No. 2008-STA-00020 and 00021, slip op at 6. (ARB June 28, 2012). As the Secretary found in *Earwood v. Dart Container Corp.*:

> The fact that Complainant would not have lost an employment opportunity due to [the Respondent's] improper statement should not shield [the Respondent] from liability because its statement "'had a tendency to impede and interfere with [Complainant's] employment opportunities.'" *Ass't Sec'y v. Freightway Corp.*, slip op. at 3. . . . [E]ffective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result.

No. 1993-STA-016, slip op. at 3 (Sec'y Dec.7, 1994)(footnote omitted).

Complainant's witness, Mr. McCormack, owns Trucking Careers of America, a truck driver recruiting company. HT at 87-88. He averred that trucking companies access DAC Reports and rely on them to make hiring decisions. HT at 90-91. Mr. McCormack maintained that an abandonment notation in a DAC Report would make it nearly impossible for a driver to be hired. HT at 91-92. On cross-examination he acknowledged he was unware that Complainant had been offered a truck driver job by Beacon Transport with an abandonment notation on his DAC Report. HT at 97.

I find Respondent put negative information on the DAC report for Complainant including notations of "Unauth. Location – W/O Notice (QUIT UNDER LOAD/ABANDONMENT)," and "Eligible for Rehire: No." CX 5. It is undisputed that that negative information remained on Complainant's DAC Report from November 2008 until September 2009 when Complainant, through his counsel, brought the negative information on the DAC report to the attention of Respondent. Complainant's unrebutted testimony indicated that, in August 2009, a Beacon Transport recruiter advised him of the abandonment notation in his DAC report. The preponderant evidence, including hearing testimony, supports finding that DAC report abandonment notation was therefore available to potential employers and constituted facially damaging information that would affirmatively prevent Complainant from finding employment.

The record also shows that Respondent initiated termination of Complainant's lease agreement with Success Leasing. On November 4, 2008, Mr. Young requested that a "five-day notice" be sent to Complainant. RX 16; HT at 33, 41. This notice indicated that Complainant was in default on his lease agreement with Success Leasing and gave Complainant an opportunity to cure the default within five days. CX 10 at 15-16; RX 6. Mr. Young arranged for a driver to retrieve the leased truck-tractor from Complainant which occurred on November 7, 2008, after Complainant drove it to a truck stop seven mile near his home.[3] HT at 148. On or about November 8, 2008, Success Leasing sent a letter to Complainant, notifying him that his lease had been canceled. CX 10 at 15-16; RX 6.

Respondent contends that the negative information on the DAC report is not an adverse action because Complainant did receive a job offer for a truck driver position from Beacon Transport in August 2009: Complainant was to commence working for Beacon Transport on August 31, 2009, but he declined the offer before his scheduled start date. RX 7 at 2; HT at 156-157; 174-175. Whether the negative information caused any damages to Complainant I find is immaterial. The abandonment notation in Complainant's DAC Report constitutes an improper reference to Complainant's protected activity. It is that improper reference for which Respondent must account under the employee protection provisions of the STAA. I find the evidence of record is sufficient to conclude that the content of the DAC Report from November 11, 2008 until September 29, 2009 qualifies as blacklisting which is expressly prohibited by STAA implementing regulations. Therefore, Respondent subjected Complainant to an adverse employment action for that time period.

[3] Complainant averred that he refrained from taking his pain medication the night before driving the truck-tractor to the truck stop. HT at 149.

C. Contributing Factor

The ARB relies on the interpretation of "contributing factor" specified by the court of appeals in *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). *See Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024 (Apr. 25, 2013). In *Marano*, the court of appeals interpreted "contributing factor" in the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 5 U.S.C. § 1221(e)(1), to mean "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." 2 F.3d at 1140. "Any weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the 'contributing factor' test." *Id*. The federal courts have consistently applied this definition of "contributing factor." *See, e.g., Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008); *Kewley v. U.S. Dep't of Health & Human Svcs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998). In proving contributing factor, a complainant can show "either direct or circumstantial evidence" of contribution. *Smith v. Duke Energy Carolinas LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 7 (ARB June 20, 2012).

When relying on circumstantial evidence, knowledge of the protected activity coupled with close temporal proximity of the protected activity and the adverse employment action raises an inference of discrimination. *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103 & 04-161, ALJ No. 2003-STA-00055 at 7 (ARB Jan. 31, 2006), *aff'd sub nom. Roadway Express v. U.S. Department of Labor*, 495 F.3d 477 (7th Cir. 2007).

The record demonstrates that Mr. Young was aware as early as October 28, 2007 that Complainant wanted to return home to see a doctor. HT at 138. Mr. Young acknowledged that he had a telephone conversation with Complainant on November 4, 2008 regarding faxing a doctor's note to Respondent; Mr. Young also previously answered affirmatively under oath when asked if he knew Complainant had some condition which prevented him from driving on November 4, 2008. HT at 43, 47. It was after that conversation that Mr. Young had the notice of default issued to Complainant, started the process of truck recovery and directed Respondent's personnel department to place an abandonment notation on Complainant's work record. RX 16 at 1-2;HT at 45; 48-49. The close temporal proximity between Complainant's protected activity and Mr. Young's actions on November 4, 2008 requesting that "an abandonment be placed" on Complainant and requesting that a 5-day letter be issued terminating Complainant's lease agreement support my finding that Complainant's protected activity was a contributing factor in the blacklisting, i.e., negative notation in Complainant's DAC Report which resulted from Mr. Young's request.

Respondent contends that Complainant's refusal to drive was not a contributing factor in the placement of the negative abandonment notation in Complainant's DAC Report at issue. Instead, Respondent argues, it was Complainant's failure to communicate with the fleet manager during the period after October 28, 2008 and before November 4, 2008, as well as Respondent's failure to receive Complainant's doctor's note on November 4, 2008, that resulted in the negative abandonment notation on Complainant's DAC Report. Respondent maintains that Complainant had, in fact, abandoned his lease vehicle during that period.

Both Complainant and Mr. Young testified at hearing that they spoke with each other on October 28, 2008, at which time Complainant indicated that he wanted to go home to see a doctor. HT at 40, 42; 137-138. Complainant further testified that he telephoned a Respondent night dispatcher on November 1, 2008 after returning from his emergency room visit. HT at 145. He told her that he would be faxing to Respondent a doctor's note. *Id*. Complainant averred that he then spoke with Mr. Young on Monday November 3, 2008, the first time Mr. Young came in after the weekend which would have been, but he was "not positive about that." HT at 146. Mr. Young acknowledged that he spoke with Complainant again on November 4, 2008. HT at 43.

I find the testimony of Mr. Young to be inconsistent. When asked by Employer's counsel how many days elapsed between when he last heard from Complainant and when he decided to place an abandonment on the truck, Mr. Young initially stated he could not recall then exact number but then asserted that it was "[a]pproximately a week." HT at 75-76. However, the record shows that, on November 4, 2008, he noted the following in Respondent's Comment Entry/Update: PLZ PLACE ABANDONMENT ON THIS DRIVER LOOKS LIKE I'M GOING AFTER THIS TRK." RX 16 at 2. Mr. Young therefore requested the abandonment notation on *the same day* that he spoke with Complainant and when he admittedly became aware of Complainant's assertion of inability to operate his vehicle due to a medical condition. HT at 45-49. In Respondent's internal Driver Incident System on November 4, 2008, Mr. Young first entered comments indicating that a doctor's note had not been received from Complainant and then, within minutes, entered a comment requesting an "abandonment be placed on" Complainant.[4] RX 16 at 1; HT at 84-85.

On November 4, 2008, Mr. Young entered these comments about Complainant in Respondent's internal Driver Incident System: "HE CLAIMS TO HAVE FAXED A DR NOTE BUT NOTHING HAS ARRIVED. DISP HAS REQUESTED HIM RESEND BUT NO RESPONSE." RX 16 at 1. I find these comments support the testimony of Complainant that he contacted Respondent's night dispatcher prior to November 4, 2008, because they appear to refer to Respondent dispatcher contact with Complainant prior to November 4, 2008.

When questioned by Complainant's counsel at hearing, Mr. Young acknowledged that Complainant was authorized to drive the lease vehicle home to South Carolina and to be in that location with the truck. HT at 85. Mr. Young also acknowledged Complainant was not under load at the time Complainant advised him he could not operate the truck on November 4, 2008. *Id*. Mr. Young's testimony that Complainant was authorized to return home and not under load contradicts the negative notation in the DAC Report that Complainant abandoned equipment or a load or had his truck in an unauthorized location which resulted after Mr. Young requested that an "abandonment" be placed on Complainant on November 4, 2008.

Respondent also maintains that Mr. Young, the Respondent official with knowledge of Complainant's protected activity "had no role or responsibility for communicating information her responsibility to enter driver information into DAC Report. CX 9 at 10-11, 14. However,

[4] In his hearing testimony, Mr. Young confirmed that these notes were entered sequentially and the record reflects the first entry was made on November 4, 2008 at 15:52:24 and the second on November 4, 2008 at 16:00:18. RX 16 at 1-2; HT at 84.

Ms. Mayhew also testified that, when a driver left operations, the fleet manager entered information into Respondent's database which was then directed into her department. CX 9 at 10.

In *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), a case arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Court held that, "if a supervisor performs an act motivated by [discriminatory] animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." *Id*. at 422. This is the rule when the supervisor influences, but does not make, the ultimate employment decision. *Id*. at 413. In *Staub*, employer liability was found under what has been referred to as the "cat's paw" theory. *Id*. at 415-16.

The "contributing factor" standard applicable in this matter requires no particular state of mind: the act could be unintentional or inadvertent and yet contribute to the result. The focus is on the effect of the act, not the actor's intent, motive, or purpose. Consistent with this, the term "contributing factor" is a lesser standard than the "motivating factor" standard articulated in case law under statutes like USERRA which prohibits discrimination based on veteran status.[5] Thus, to apply *Staub* to this matter where the STAA require only that the protected activity be a contributing factor to the adverse action, the question must be whether the act of the fleet manager contributed to the adverse action ultimately taken by Respondent's personnel department as a proximate cause irrespective of intent.

Based on the deposition testimony of Respondent's driver personnel director, Ms. Mayhew, I find Mr. Young's actions are indisputably the proximate cause of the negative abandonment notation on his DAC Report at issue in this matter. But for its receipt of the information from the fleet manager, Respondent's personnel department would not have entered a "Code 953" denoting abandonment in Complainant's DAC Report where it remained from November 2008 until September 2009 – after Complainant's counsel raised the issue with Respondent as part of the OSHA complaint which gave rise to the instant matter.

D. Clear and Convincing Evidence

As noted above, Respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.

The ARB has described the burden of proof under the "clear and convincing" evidence standard in *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014). In *Speegle*, for the employer to prove it would have made the same decision, the ARB held that the clear and convincing standard required a balancing of three statutory factors on a case-by-case basis:

[5] *See Lopez v Serbaco, Inc.*, ARB No. 04-158, ALJ No. 04-CAA-5, slip op. 5 n.6 (Nov. 29, 2006) ("[a] complainant must prove more when showing that protected activity was a 'motivating' factor than when showing that such activity was a 'contributing factor'"); *accord*, *Vander Meer v. Western Ky. Univ*., ARB No.97-078, ALJ No. 1995-ERA-38, slip op. at 4 n. 4 (ARB Apr. 20, 1998) (Energy Reorganization Act of 1974).

> The plain meaning of the phrase "clear and convincing" means that the evidence must be "clear" as well as "convincing." "Clear" evidence means the employer has presented evidence of unambiguous explanations for the adverse actions in question. "Convincing" evidence has been defined as evidence demonstrating that a proposed fact is "highly probable." The burden of proof under the "clear and convincing" standard is more rigorous than the "preponderance of the evidence" standard and denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.

Speegle, ARB No. 13-074, slip op. at 6 (*citing Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)).

As the ARB explained in *Speegle*, the third part of the statutory "same decision" defense requires that the employer prove it would have made the same decision "in the absence of protected activity." It further explained "[t]o properly decide what would have happened in the 'absence of' protected activity, one must also consider the facts that would have changed in the absence of the protected activity." *Id.* at 12.

If an employer raises the "same decision" defense, I must also determine "as best as possible, which material facts necessarily would have changed in the absence of protected activity, meaning facts directly connected to the protected activity, not every fact that hypothetically might change or facts tangentially connected to the protected activity." *Robert Benjamin v. CitationShares Management, LLC*, ARB No. 14-039, ALJ No. 2010-AIR-001 (ARB Jul. 28, 2014), slip op. at 3.

Here, Respondent does contend that it would have taken the same action even if Complainant had not refused to operate his lease vehicle. Employer's Proposed Findings at 17. I find Respondent's explanation for the abandonment notation in the DAC Report, i.e., Complainant's failure to communicate for one week and to provide a doctor's note prior to November 4, 2008 is clear, but not convincing. I find Respondent has failed to meet its evidentiary burden, i.e., it has not shown that it is highly probable or reasonably certain it would not have blacklisted Complainant had he not refused to operate his lease vehicle. Mr. Young conceded as much during this exchange with Complainant's counsel at hearing:

> Q. If Mr. Ford had simply driven the truck and turned it in in Springfield, Missouri at the home terminal there, there wouldn't be an abandonment on this DAC Report, would there?
>
> A. If he was physically able. If he had his contract, it would state that he needed to turn it in that terminal.
>
> Q. Okay. If he had simply gotten behind that wheel and endured the pain and turned the truck in, there would not be an abandonment on his DAC Report, correct?
>
> A. Again, he would have to be physically able to do that.

Q. Okay. Well –

A. He wasn't.

HT at 52-53.

As Complainant's Proposed Findings correctly state, any contractual obligation Complainant may have to return Success Leasing's truck-tractor to Springfield, Missouri, "cannot trump the protections afforded [him] under the STAA." Complainant's Proposed Findings at 22.

The abandonment notation on Complainant's DAC Report made by Respondent's personnel department resulted from Mr. Young's request for such a notation on November 4, 2008. Mr. Young made that request when Complainant advised him that he was not able to safely operate the leased vehicle due to a medical condition. Respondent has failed to show by clear and convincing evidence that it would not have placed the negative notation of abandonment in Complainant's DAC Report absent Complainant's refusal to drive. Therefore, I find Respondent liable under the STAA and its implementing regulations.

E. Relief

As the successful litigant, Complainant is entitled to an order requiring Respondent to take affirmative action to abate the violation, to reinstate him to his former position with the same pay, terms and privileges of employment, and to pay him compensatory damages, including back wages.[6] 49 U.S.C.A § 31105(b)(3)(A)(ii); 29 C.F.R. § 1978.109.

1. Reinstatement

Under the STAA, reinstatement is an automatic remedy designed to re-establish the employment relationship. *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, ALJ No. 03-STA-26, slip op. at 7 (ARB Aug. 21, 2004). *See Palmer v. Western Truck Manpower,* ALJ No. 85-STA-6, slip op. at 19 (Sec'y Jan. 16, 1987) (an order of reinstatement is not discretionary). Reinstatement not only vindicates the rights of the complainant who engaged in protected activity, but also provides concrete evidence to other employees, through the return of the discharged employee to the jobsite, that the legal protections of the whistleblower statutes are real and effective. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169, ALJ No. 1990-ERA-30, slip op. at 8 (ARB Feb. 9, 2001) (citing *Allen v. Autauga County Bd. of Educ*., 685 F.2d 1302, 1306 (11th Cir. 1982)), *aff'd sub nom. Georgia Power Co. v. United States Dep't of Labor,* 52 Fed. Appx. 490, 2002 WL 31556530 (table) (11th Cir. Sept. 30, 2002). Moreover, as the Supreme Court recognized in *Brock v. Roadway Express, Inc.,* the STAA's whistleblower

[6] That subsection provides that the employer shall "reinstate the complainant to the former position with the same pay and terms and privileges of employment" as he or she held before the retaliatory action. The implementing regulation provides that the ALJ's "decision and order concerning whether the reinstatement of a discharged employee is appropriate shall be effective immediately upon receipt of the decision" by the employer. 29 C.F.R. § 1978.109(b).

protection provision "would lack practical effectiveness if the employee could not be reinstated pending complete review." 481 U.S. 252, 258-59 (1987).

Even though Complainant is not seeking reinstatement in this matter, his personal preference cannot control the appropriate remedy under the STAA. *See e.g., Stephen W. Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 02-STA-30 (Mar. 31, 2005), slip op. at 3-4 (ARB found the ALJ erred as a matter of law in not ordering reinstatement notwithstanding former employee's expressed disinterest in it). Thus, Complainant is entitled to be restored to the same or a similar position that he would have occupied but for the discrimination. *Cf. Hobby*, slip op. at 13 (construing the remedies provision of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (b)(2)(B)).

Although reinstatement is the presumptive remedy under the STAA, circumstances may exist in which alternative remedies are appropriate. For example, front pay in lieu of reinstatement may be appropriate where the parties have demonstrated "the impossibility of a productive and amicable working relationship," or where reinstatement otherwise is not possible or is impractical because, for instance, the company no longer employs workers in the job classification the complainant occupied or has no positions for which the complainant is qualified. *See Hobby*, slip op. at 8-13, and cases cited therein for a thorough discussion of exceptions to reinstatement.

Although the STAA does not specify front pay as a remedy, the ARB has determined it is available to a successful litigant. *Michaud v. BSP Transp., Inc.*, ARB No. 97 STA 113, ALJ No. 95 STA 29, slip op. at 5-6 (ARB Oct. 9, 1997). Additionally, the entitlement to, and amount of, front pay are equitable issues to be decided by a judge. *Price v. Marshall Erdman & Assocs., Inc.*, 966 F.2d 320, 324 (7th Cir. 1992).

Here, Complainant testified that is not currently able to operate a commercial vehicle in interstate commerce because he is an insulin-dependent diabetic. HT at 124-125. He stated that he "was put on insulin September of 2010." HT at 125. According to Complainant, under federal regulations, his status as an insulin-dependent diabetic "disqualifies" him "under DOT laws to operate a commercial vehicle." *Id*. I credit Complainant's testimony as Respondent has proffered no evidence to refute it. Therefore, I find Complainant's reinstatement would be impractical in this case.

The litigant who would be entitled to an award of front pay must provide "the essential data necessary to calculate a reasonably certain front pay award." *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992). Such information includes the amount of the proposed award, the length of time the complainant expects to work, and the applicable discount rate. *Id*. Moreover, front pay awards, while often speculative, cannot be unduly so. *Ass't Sec'y & Bryant v. Medenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005).

I find that Complainant has failed to provide sufficient data to calculate a front pay award. Complainant's testimony on cross-examination by Respondent revealed that, since his separation from Respondent, Complainant worked for a sand truck company from September

2009 until January 2010 when he resigned; he then worked for New Century, a trucking company, from April to October 2010. HT at 164-166. Complainant also acknowledged that he broke his elbow during that period for which he had surgery and then underwent vocational rehab for job re-training from March 2011 to March 2012, when he then began working as janitor full-time for two or three months; he also had a one-week stint in May 2012 as a driver-in-training with K & R Vendor; next, as a part-time job as a driver working 16 hours per week for Sparrow Transport from March 2012 to October 2013, and a job with the Veterans Memorial Home in Vineland, which he still held at the time of the hearing. HT at 166-167.

Complainant did not provide sufficient information about the compensation he received for all of the jobs he identified in his hearing testimony. Based on Complainant's past work history, it would be unduly speculative for me to determine how long Complainant would have maintained a job with Respondent before becoming disqualified to operate a commercial vehicle interstate due his insulin dependency. Accordingly, I am unable to make an award for front pay.

2. Back pay

An employee whose employment is wrongfully terminated is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc*., ALJ No. 90-STA-44, slip op. at 18 (Sec'y Jan. 6, 1992) (citation omitted). Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in section 706 (g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e et seq. (West 1988). *See, e.g., Polgar v. Florida Stage Lines*, ARB No. 97-056, ALJ No. 94-STA-46, slip op.at 3 (ARB Mar. 31, 1997).

Here, Respondent contends that Complainant is not entitled to any back pay award because there was no evidence offered regarding the rate or amount of Complainant's wages during Complainant's tenure with Respondent. Respondent's Proposed Findings at 18. I disagree.

Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 1995-STA-043, slip op. at 11-12, n.12 (ARB May 30, 1997). Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co.*, No. 1990-STA-037 (Sec'y June 3, 1994); *Kovas v. Morin Transp., Inc.*, No. 1992-STA-041 (Sec'y Oct. 1, 1993).

I find Complainant did present evidence of wages in the form of testimony from Mr. McCormack, a truck driver recruiter. Specifically, Mr. McCormack testified that in 2009, a truck driver of Complainant's experience and safety record should have been able to obtain work that paid about 40 cents per mile and drive about 2,500 to 3,000 miles per week. HT at 94. Respondent proffered no evidence to rebut the testimony of Mr. McCormack regarding the truck driver work and pay rate available in 2009.

Based on Mr. McCormack's testimony, Complainant is seeking back pay in the amount of $1,200 (i.e., 3,000 miles x .40 per mile) for each week from July 1, 2009 to mid-September when he began working for the local sand truck company in New Jersey, for a total of $13,200 (i.e., $1,200 x 11 weeks) unless a failure to mitigate damages is found then making the period of entitlement from July 1, 2009 to August 31, 2009 – the date he was scheduled to commence working for Beacon Transport. Complainant's Proposed Findings at 24.

Though a complainant has a duty to exercise reasonable diligence to attempt to mitigate damages awarded as back pay, the ARB has held that an employer bears the burden of proving that the employee failed to mitigate. *Dale*, slip op. at 7. The employer can satisfy its burden by establishing that "substantially equivalent positions were available [to the complainant] and he failed to use reasonable diligence in attempting to secure such a position." *Hobby*, slip op. at 19-20. A "substantially equivalent position" provides the same promotional opportunities, compensation, job duties, working conditions, and status. *Id.* at 20.

Complainant's unchallenged testimony indicates that he underwent back surgery in April 2009 and his doctor cleared him for full unrestricted duty on July 1, 2009. HT at 152-153. Complainant responded affirmatively when asked if he was ready and willing to work for various trucking companies as of July 1, 2009. HT at 158. Complainant maintained that, after separating from Respondent, he applied for employment with approximately 11 trucking companies and received no response. HT at 154, 172-173.

Complainant does not dispute that he was offered a truck driver job with Beacon Transport on August 18, 2009 and he was then scheduled to start that job on August 31, 2009. HT at 156-157, 174-175; RX 7 at 2. Instead, Complainant declined the job with Beacon Transport. In his hearing testimony, Complainant explained that he declined that job because he was offered another job with a local sand trucking company in New Jersey and he wanted to work on clearing the negative notation on his DAC Report. HT at 157-158. He testified that he began working for that local sand company in mid-September 2009, earning between $500 and $700 per week. HT at 158.

It was unreasonable for Complainant to decline a 'substantially equivalent position' to that which he had with Respondent in order to challenge the negative notation then in his DAC Report. I find therefore that Complainant's expressed reasons for declining the position with Beacon Transport in August 2009 constitute a failure to exercise reasonable diligence to offset damages to be awarded as back pay.

Given Complainant's failure to mitigate his damages, I find he is entitled to back pay for the period from July 1, 2009 to August 31, 2009 or eight weeks at the rate of $1,200 per week for a total of $9,600.

3. Interest

The STAA expressly provides that a successful complainant is entitled to interest on an award of back pay. 49 U.S.C. § 31105(b)(3)(A)(iii); 29 C.F.R. § 1978.109(d)(1). This includes pre-judgment interest on any accrued back pay, as well as post-judgment interest "for the period

between the issuance of this [Recommended Decision and Order] and the payment of the award." *Bryant*, ARB No. 04-014, slip op. at 10 (citing *Murray v. Air Ride, Inc.*, ARB No. 00-045, slip op. at 9 (ARB Dec. 29, 2000) (STA)). Interest is calculated using the rate that is charged for underpayment of federal taxes, pursuant to 26 U.S.C. § 6621(a)(2). *Id.* (citing *Drew v. Alpine, Inc.*, ARB Nos. 02-044, 02-079, slip op. at 4 (ARB June 30, 2003) (STA)). *See* 26 U.S.C. § 6621(a)(2) and (b)(3) (The applicable interest rate is the sum of the Federal short-term rate determined by the Secretary in accordance with 26 U.S.C. § 1274(d) plus 3 percentage points, rounded to the nearest full percent.). The applicable interest rates are posted on the web-site of the Internal Revenue Service ("IRS").[7] In addition, the interest accrues, compounded quarterly, until Respondent satisfies the back pay award. *Id.* (citing *Assistant Sec'y of Labor & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, slip op. at 3 (ARB Jan. 12, 2000) (STA).

The ARB has outlined the procedures to be followed in calculating compounded pre-judgment interest. In *Doyle v. Hydro Nuclear Services*, the ARB initially found that an Administrative Law Judge should use the "'applicable federal rate' (AFR) for a quarterly period of compounding." ARB Nos. 99-041, 99-042, 00-012, slip op. at 19 (ARB May 17, 2000). The ARB then held that "[t]o determine the interest for the first quarter of back pay owed, the [judge] shall multiply the back pay principal owed for that quarter by the sum of the quarterly average AFR plus three percentage points." *Id*. In order to determine the quarterly average interest rate, a judge must "calculate the arithmetic average of the AFR for each of the three months of the calendar quarter, rounded to the nearest whole percentage." *Id*. While *Doyle* arose under the Energy Reorganization Act, the ARB has subsequently found that these computation procedures apply to claims under the STAA. *See Assistant Sec'y of Labor & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, slip op. at 10 (ARB June 30, 2005). Such procedures should therefore be applied in calculating the pre-judgment interest owed by Respondent in this case.

As stated above, I find that Complainant is entitled to an accrued back pay award of $9,600 for a period of 8 weeks from July 1, 2009 to August 31, 2009. This entire period falls within Quarter 4 of Federal Fiscal Year ("FY") 2009. The applicable monthly AFR for July 2009 is .82% and for August 2009 is .83%, resulting in an arithmetic average AFR of .825% for those two months. The arithmetic average AFR of .825% plus 3.0%, rounded to the nearest whole percentage point, is therefore 4.0%. Because the accrued back pay amount due falls within a single quarter, compounding is not required. The interest due on $9,600 for Quarter 4 of FY 2009 would be $384 (i.e., $9,600 x .04).

4. Emotional distress

The STAA permits awards of compensatory damages for emotional distress and mental pain. Here, Complainant requests $50,000 compensation for emotional distress caused by his termination. Complainant's Proposed Findings at 25.

Complainant described the effect of his learning about the abandonment notation in his DAC Report:

[7] Index of Applicable Federal Rates (AFR) Rulings, IRS, *available at* http://www.irs.gov/app/picklist/list/federalRates.html (last visited Jul. 8, 2015).

> Q. How did it affect you finding out from Kelly that there was an abandonment notation on your DAC Report?
>
> A. Extremely stressful.
>
> Q. Why?
>
> A. Because that meant that end of my career. I knew that pretty much no trucking company would ever touch me. I mean, I as fortunate with Beacon, but they were a brand new company that just started up, but as far as your long term big carriers that offer better benefits, well, they wouldn't touch me.

HT at 159-160.

He further testified that "[i]t bothered" and "angered" him that the DAC Report indicated that he had "quit under load" and was in unauthorized location without notice. HT at 160. Complainant also stated it was "stressful after not getting any job offers or anything." *Id*. He stated he had to leave his home of 14 years in South Carolina to move in with family in New Jersey because of his inability to pay rent. HT at 160-161.

On cross-examination, Complainant acknowledged that he made a suicide attempt in 2011 – almost three years after his separation from Respondent and that he began taking Lexapro for depression after his wife died in 2005. HT at 169-170. He also acknowledged that when he began treatment with a primary care physician in July 2009, he did not mention his separation from Respondent, but rather the losses of his home and care upon his relocation to New Jersey when discussing his feelings with her. HT at 170-172.

Complainant did not provide any medical evidence to support his claim of emotional distress and mental pain, but such evidence is not required for such an award to be made. A key step in determining the amount of compensatory damages is a comparison with awards made in similar cases. *Evans v. Miami Valley Hospital*, ARB 07-118, -121, ALJ 2006-AIR-22 (ARB June 30, 2009). I reviewed the case cited by Complainant: *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-47, at 8 (ARB Aug. 31, 2011) (the ARB affirmed as supported by substantial evidence the ALJ's award of $50,000 in compensatory damages for emotional distress based on the Complainant's unrefuted and credible testimony, even though the testimony was not supported by any medical evidence) and *Fink v. R & L Carriers Shared Services*, LLC, 2012-STA-6 (ALJ Nov. 20, 2012) (ALJ awarded $100,000 in compensatory damages to a driver who was fired in violation of the STAA based on his testimony that he lost his home, borrowed money from family, neglect his hobbies, felt embarrassed, disappointed, sleepless, and upset as a result of his termination). In *Youngerman v. United Parcel Service*, ALJ No. 2010-STA (ALJ May 5, 2011), also cited by Complainant, an award of $5,000 was made to compensate for emotional distress where employee was out of work for 10 days.

I find an award $10,000 as compensatory damages for emotional distress is warranted in this case, which is more like *Youngermann* than *Ferguson*. Complainant was offered a job two months after he was physically able to return to work in 2009 and he started in another job in

September 2009 – shortly after learning of the negative notation in his DAC Report. I credit Complainant's hearing testimony that he felt stressed when he learned of that notation. However, I find Complainant's emotional distress cannot be solely attributed to Respondent's adverse action. Complainant was unable to work due to his back condition and in his testimony, Complainant referenced the expiration of temporary disability for his back surgery as contributing to the stress he experienced. HT at 160.

5. Punitive damages

Complainant seeks punitive damages in the amount of $250,000.00. The STAA provides that "Relief in any action under subsection (b) may include punitive damages in an amount not to exceed $250,000." 41 U.S.C. § 31105(b)(3)(C).

In *Ferguson v. New Prime, Inc.*, ARB 10-075, ALJ 2009-STA-47 (ARB Aug. 31, 2011), the ARB wrote:

> The United States Supreme Court has held that punitive 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 . . . ." *Smith v. Wade*, 461 U.S. 30, 51 (1983). The Court explained the purpose of punitive damages is 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979). The focus is on the character of the tortfeasor's conduct – i.e., whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards.

Id. at 54.

Complainant argues that the maximum amount is sought in punitive damages to deter future retaliatory acts and maintains that Respondent exhibited 'reckless and exhibit callous disregard' for his protected rights under the STAA. Complainant's Proposed Findings at 25. Respondent has not specifically objected to Complainant's request for punitive damages. It does, however, maintain that the blacklisting at issue occurred as a result of "a miscommunication between New Prime's Operations Department (Mr. Young) and the Driver Personnel Department." Respondent's Proposed Findings at 17. Respondent also notes that once Mr. Young received the doctor's note from Complainant he took action on November 7, 2008 to characterize Complainant as eligible for re-hire in Respondent's internal records. CX 6 at 4; RX 16 at 3; HT at 73-74. Respondent argues that such action is inconsistent with the negative notation in Complainant's DAC Report and indicates that such a notation was unintentional. Respondent's Proposed Findings at 17. I agree.

I find then that Complainant has not established that Respondent had the requisite intent necessary for a punitive damages award to be warranted in this case. In *Youngermann*, the supervisor acknowledged at the hearing before the ALJ that he was aware, when he ordered the employee to drive a truck without working marker lamps and tail lamps, that operating the truck in such a condition violated DOT regulations. ARB 11-056, ALJ 2010-STA-047, slip op. at 3 n.

7 (ARB February 27, 2013). Knowing this, the supervisors repeatedly ordered the employee to drive the vehicle in violation of the regulations. *Id.* at 8. Similar testimony or other evidence was not presented in this case.

6. Abatement

Complainant requests that I order Respondent to post a copy of the decision and order in this case for 90 consecutive days in all places where employee notices are customarily posted, and to provide a copy of any decision favorable to Complainant. Complainant's Proposed Findings at 26. Complainant also requests that I order Respondent to expunge all references to Complainant's "protected activity, references to 'abandonment', 'unauthorized work location', 'quit under load', and any other negative reference concerning [Complainant's] work for its personnel records." *Id*. Complainant finally requests that I "order Respondent to cause all consumer reporting agencies to which it has made a report about [Complainant] to amend their report to delete unfavorable work record information including the notation "Work Record: Other" and to show a satisfactory work record and a satisfactory safety record with [Respondent], to the extent it has not already done so." *Id*. at 26-27.

In *Shields v. James E. Owen Trucking, Inc.*, ARB 08-021, ALJ 2007-STA-22 (ARB Nov. 30, 2009), the ARB found that the ALJ did not err when he ordered the Respondent to expunge all negative or derogatory information from the Complainant's personnel records relating to his protected activity or its role in the Complainant's termination; to contact every consumer reporting agency to which it may have furnished a report about the Complainant; to request that the reports be amended; and to conspicuously post copies of the ALJ's recommended decision and of the ARB's final decision and order for 90 days.

Respondent has not specifically objected to Complainant's requests for abatement. Respondent is hereby ordered to post a copy of the decision and order in this case for 90 consecutive days in all places where employee notices are customarily posted; provide a copy of this decision; expunge all references to Complainant's protected activity from its personnel and labor records; and cause all consumer reporting to delete unfavorable work record information.

7. Attorney's fees and costs

A STAA complainant who has prevailed on the merits may be reimbursed for litigation costs, including attorney's fees. 49 U.S.C.A. § 31105(b)(3)(B). This section provides in part that "the Secretary [of Labor] may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint." *Id.*

In accordance with Supreme Court precedent, the starting point is the "lodestar" method of multiplying a reasonable number of hours by a reasonable hourly rate. *See Jackson v. Butler & Co.*, ARB Nos. 03-116, -144; ALJ No. 2003-STA-026, slip op. at 10-11 (ARB Aug. 31, 2004); *see also Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 5 (ARB May 29, 2003). The party seeking a fee award must submit '''adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent

[with] practice in the local geographic area,' as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs." *Gutierrez v. Regents, Univ. of Cal.,* ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 11 (ARB Nov. 13, 2002).

V. CONCLUSION

For the reasons discussed above, I find that Respondent violated the STAA when it caused an abandonment notation to be placed on Complainant's DAC Report on or about November 4, 2008. Complainant has successfully shown by a preponderance of evidence that his refusal to drive his commercial motor vehicle while taking prescribed pain medication was protected activity under the STAA and was a "contributing factor" in negative notation of abandonment placed in his DAC Report by Respondent.

Respondent has failed to show by "clear and convincing evidence" that it have placed the abandonment notation in Complainant's DAC Report even absent his protected activity. Accordingly, I conclude that Respondent violated the STAA.

As a result of this violation, I find that Complainant is entitled to an award of accrued back pay from July 1, 2009 to August 31, 2009. I also find that he is entitled to both pre- and post-judgment interest on his back pay award, which is to be compounded quarterly until Respondent satisfies the award.

In addition, I find that Complainant is entitled to compensatory damages for emotional distress caused by his Respondent's "blacklisting." Furthermore, I find that Respondent is required to take the above forms of abatement for the STAA violation. For the reasons discussed above, however, I find that punitive damages are not warranted in this case.

Finally, Complainant is entitled to reimbursement of reasonable litigation expenses, subject to his timely submission of a supported application.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. Respondent shall pay to Complainant compensatory damages the sum of $9,600 in back pay, covering the period from July 1, 2009 to August 31, 2009.

2. Respondent shall pay Complainant prejudgment interest in the amount of $384 on the back pay award, in accordance with 26 U.S.C. § 6621(a)(2).

3. Respondent shall pay Complainant post-judgment interest on his back pay award, pursuant to 26 U.S.C. § 6621(a)(2). This interest shall compound quarterly until the company satisfies the back pay award in accordance with 26 U.S.C. § 6621(a)(2).

4. Respondent shall pay to Complainant the sum of $10,000 in compensatory damages for emotional distress.

5. Complainant's claim for punitive damages is denied.

6. Respondent shall post a copy of the decision and order in this case for 90 consecutive days in all places employee notices are customarily posted and shall expunge all references to Complainant's engaging in protected activity from its personnel and labor records; and cause all consumer reporting to delete unfavorable work record information, *to the extent it has not already done so.*

7. Counsel for Complainant shall have 30 days from the date of this Recommended Decision and Order to file a fully supported application for fees, costs, and expenses. Respondent shall have 20 days from receipt of the application to file any objections to fee request.

SO ORDERED.

Digitally signed by LYSTRA HARRIS
DN: CN=LYSTRA HARRIS, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

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).