



Issue Date: 06 January 2017

Case No.: 2014-STA-00008
OSHA No.: 7-5880-12-068

In the Matter of:

SCOTT GREENE,
Complainant,

v.

CENCON, LLC, ERIK FRANKLIN, and CLINT MOORE
Respondents.

DECISION AND ORDER

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (“the Act” or “STAA”), and implementing regulations set forth at 29 C.F.R. Part 1978. The pertinent provisions of the Act prohibit the discharge, discipline of, or discrimination against an employee in retaliation for the employee engaging in certain protected activity.

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, the arguments of the parties, and applicable regulations, statutes, and case law.

PROCEDURAL BACKGROUND

On May 25, 2012, Scott Greene (“Complainant” or “Mr. Greene”) filed a complaint, which was later amended on May 31, 2013, with the Secretary of Labor alleging violations of the STAA by Respondent CenCon LLC (“CenCon” or “the Employer”), and Respondents Erik Franklin and Clint Moore. The complaint was investigated by the Department of Labor’s (“DOL”) Occupational Safety and Health Administration (“OSHA”). On October 31, 2013, OSHA issued Secretary’s Findings dismissing the complaint. The Secretary’s Findings stated that “[e]ven if Complainant engaged in protected activity, the evidence indicates that the decision to terminate Complainant’s employment was for a legitimate, non-retaliatory reason.” On November 6, 2013, Complainant objected to the Secretary’s Findings and requested a hearing

before an administrative law judge (“ALJ”). On March 24, 2014, the case was assigned to me. Complainant filed a prehearing statement on August 5, 2014. On August 15, 2014, Complainant faxed a motion to exclude Respondents’ exhibits and testimony, and Respondents faxed their prehearing statement. On August 18, 2014, Respondents filed their objection to the Motion to Exclude. The Motion to Exclude was eventually withdrawn by Complainant during the hearing. (Tr. 6:22). The hearing was held on August 20, 2014, in Kansas City, Missouri. The parties agreed to some stipulations. At the hearing, I admitted the following evidence: Complainant’s Exhibits (“CX”) 1-4 and 7-10; Respondents’ Exhibits (“RX”) A-C and E-H.

At the hearing, six witnesses testified: during Complainant’s case-in-chief, I heard the testimony of Clint Moore, Mr. Greene’s former supervisor; Erik Franklin, the Employer’s co-owner; Mr. Greene himself; and Matthew Wilmoth, a former co-worker of Mr. Greene’s. During Respondents’ case-in-chief, I heard the testimony of Kenneth Eudy, a former co-worker of Mr. Greene’s, and Mr. Moore and Mr. Franklin again. Their testimony is summarized below.

At the hearing, I closed the record with respect to documentary evidence. (Tr. 228:22-23). Both parties were directed to file post-hearing briefs. After the hearing, I received Complainant’s proposed findings of fact and legal argument (“C’s Brf.”) and Respondents’ proposed findings of fact and conclusions of law (“R’s Brf.”).

FACTUAL BACKGROUND

A. Complainant’s Case-in-Chief¹

Testimony of Ivan “Clint” Moore

1. Direct Testimony

Mr. Moore began working for the Employer in February 2012 as a supervisor and stayed for six months. (Tr. 31:9-10).² He supervised crews in the field and typically two crews, one underground and one aerial, would go out on a workday. (Tr. 31:24-25). Mr. Moore also oversaw subcontractors. (Tr. 33:1-5). He was Complainant’s supervisor, and terminated Complainant’s employment on March 19, 2012 after conversing with Mr. Erik Franklin, an owner of CenCon. (Tr. 32:5, 7).

a. Complainant’s Phone Usage

Mr. Moore was questioned about a number of entries on CX-2, the “CenCon Weekly Time Report” or “Time Report.” He also testified about a number of events and dates listed on CX-4, the “Employee Notes,” but only a few are pertinent here.

Employees are not supposed to use cell phones at work “when they’re on the clock.” (Tr. 34:13). According to the Employee Notes, on February 28, 2012, Mr. Franklin caught Complainant on his cell phone. (Tr. 45:11-14). On February 29th, there is an entry that

¹ Events testified to occurred in the year 2012 unless specifically noted otherwise.

² At the time of the hearing he worked for a different company, BNSF. (Tr. 31:3).

Complainant was playing games on his cell phone in his truck, and that Complainant said he was sick and went home. Mr. Moore admitted that Complainant did not look well, and that it was acceptable for him to rest in his truck and use his phone while resting. (Tr. 44:9, 20-24). The Employee Notes for March 15th state that Mr. Moore found Complainant on his cell phone. Mr. Moore testified that he did not work with Complainant on the 15th and further, he claims he is “sure” of this because he would have been in a different city, Gardner, Kansas, on a different job. (Tr. 42:1-3, 14-15). Therefore, the entry on the Employee Notes for March 15th which states that Mr. Moore found Complainant on his cell phone could not have happened. (Tr. 45:6-10).³ Between the events on February 28, 2012, and March 19, 2012, there were no other instances of improper cell phone use recorded in the Employee Notes. (Tr. 45:17).

Mr. Moore admitted that he uses his phone for personal reasons at work, but he does “try to keep it to a minimum,” and he and the aerial supervisor typically only use their phones at work for business. (Tr. 36:5-8).

b. Events on March 14, 2012.

On March 14, 2012, Complainant told Mr. Moore that the ditch witch on a trailer was not properly secured in accordance with Department of Transportation (“DOT”) regulations. (Tr. 46:4-5). Complainant stated that he believed it was not safe to drive. (Tr. 46:7-8). Mr. Moore denied that Complainant said he would not drive it until he fixed the load securement. (Tr. 46:10-11; 47:4-5). He further denied that Complainant sat down on the trailer and stated that he was not going to move until the load was properly secured. (Tr. 47:7-9). However, Mr. Moore admitted to understanding that Complainant wanted the load fixed before he would drive it. (Tr. 46:13-14). Mr. Moore also admits that it is part of Complainant’s job duties to make sure the cargo was safely secured. (Tr. 48:17-19). Mr. Moore claimed Complainant was argumentative during the conversation, but he denied raising his own voice. (Tr. 48:24; 49:4-6). He explained that Complainant ultimately drove the trailer after putting a different load securement on. (Tr. 49:10-11).

c. Events on March 19, 2012

Mr. Moore testified that on March 19, 2012, he found Complainant on his cell phone in the yard. The Employee Notes reflect this as well. (Tr. 34:3-4). Complainant was also thirty minutes late and arrived at 7:30 am. (Tr. 35:14-15). Mr. Moore explained that he had not decided to fire Complainant yet but the fact that Complainant was using his cell phone “tipped the scale for [him] in making the decision to fire” him. (Tr. 34:24-25). Around 7:45 am he fired Complainant in his office “particularly because he was using his cell phone on the clock.” (Tr. 35:20-21).

Mr. Moore further testified that he was sure that Complainant had clocked in that day. (Tr. 37:2-3). When shown the CenCon Weekly Time Report, which stated that Complainant was let go at 7:00 am, Mr. Moore explained that Complainant was actually terminated at 8:00 am, not

³ Mr. Taylor at one point in the questioning states that the entry about Mr. Moore finding Complainant on his cell phone occurred on March 13th. (Tr. 42:16-18). As there was no entry for the 13th on CX-4, and because Mr. Taylor was directly quoting the entry for March 15th, “March 13th” was clearly a misstatement.

7:00 am, but that he had been told to put down “7:00 am” because that was when Complainant was supposed to report to work. (Tr. 37:18-19). It is noted on the Time Report that Complainant was given a final pay check on March 19th. While Mr. Moore did not know that Complainant was actually given a final paycheck he testified that employees are paid weekly on Fridays by automatic deposit and that if Complainant had been “on the clock” on March 19th, as stated, he should have been paid for that time and there should be a time report for that day (Tr. 38:20-25; 39:18; 40:6).⁴

2. Cross-Examination

a. Complainant’s Phone Usage

Mr. Moore claimed that he was unaware that Complainant had been reprimanded for using his cell phone prior to his mentioning it to Erik Franklin. (Tr. 50:17-18). He was unaware of the verbal warning that Complainant received on February 28th, and was not involved in that warning. (Tr. 51:11-12). On February 29th, the day that Complainant had felt ill, Mr. Moore testified that when Complainant came back to work after his rest in the truck, Mr. Moore found Complainant on his cell phone. (Tr. 52:4-5). At this point, Mr. Moore indicated that Complainant was supposed to keep his cell phone in his lunchbox, and that this was a normal practice for employees. (Tr. 52:14-18).

b. Events on March 14, 2012

On March 14, 2012, Mr. Moore had a disagreement with Complainant about the proper way to secure a ditch witch. (Tr. 62:21-22). Mr. Moore explained that in his understanding DOT regulations required that there be four points of contact when chaining down equipment—and this can done with one chain. (Tr. 62:6-9). Mr. Moore explained that Complainant believed that the regulations required two chains rather than one chain. (Tr. 63:20-23). Mr. Moore testified again that there was never a point at which Complainant refused to operate the trailer, and he re-secured the equipment before he drove that day. (Tr. 64:14, 21).

c. Events after March 14th

Regarding the incident on the Employee Notes during which Mr. Moore found Complainant on his phone on March 15th, Mr. Moore claimed at this point in the testimony that he actually “was at the job site.” (Tr. 52:24-25). He also testified that he had a conversation with Complainant on the phone about whether Complainant was entitled to be paid for driving the night before. (Tr. 54:18-20). Mr. Moore explained that he received complaints on March 15th about Complainant from three different employees who stated that Complainant was sitting in his truck, talking or playing on his cell phone. (Tr. 55:18-25). Mr. Prophet asked Mr. Moore: “So even though you weren’t at the job site, you had complaints. Did you address those with [Complainant]?” (Tr. 56:2-3). Mr. Moore explained that he did address them by explaining to

⁴ I note that despite Mr. Moore’s testimony, the Time Report only shows that Complainant worked for 53.5 hours that week, which is the total time between March 12th and March 18, and does not include any time for March 19th. (CX-2). It appears therefore that Complainant never clocked in on March 19th.

Complainant that he was hired to both drive trucks and to “labor when there was no equipment” that needed to be delivered. (Tr. 56:12-14).

The next notable incident occurred on March 16th. (Tr. 56:20). On that day, Complainant was supposed to have been back from a project around 5:30 or 6:00 pm, but did not return on time and Mr. Moore tried to reach him on his cell phone. (Tr. 57:17-25). Two other employees claimed that when they went to the jobsite, they did not see Complainant. (Tr. 58:7-10). The project Complainant was doing at the jobsite should have taken at most three hours, but he was gone for approximately seven. (Tr. 58:20-25). Mr. Moore testified that he went to the job site that day and discovered that the job was not done. (Tr. 59:17-25). He also explained that he had an argument with Complainant, though this was not unusual, and it had to do with the way that equipment was tied down. (Tr. 61-62).

On March 16th, Mr. Moore testified that he called Mr. Franklin to discuss whether Complainant should be fired. (Tr. 60:15-16). He had not officially come to the conclusion that Complainant should be fired—Mr. Moore reiterated that the “tipping point” was Complainant’s phone use on March 19th—but the phone call to Mr. Franklin on the 16th began the conversation. (Tr. 60:18-23). The conversation with Mr. Franklin that night revolved around the problems Mr. Moore had been having with Complainant and Complainant’s unwillingness to work. (Tr. 61:6-11). Mr. Moore claimed he was going to notify Complainant of the conversation on March 19th. (Tr. 61:12-13).

3. Redirect

On redirect, Mr. Moore again stated that “it was an irregular day when” he did not have an argument with Complainant. (Tr. 65:2-3). He also admitted though, that despite many previous arguments, and instances of personal phone use, Complainant was not fired until March 19th. (Tr. 65:12-15).

At previous points in his testimony, Mr. Moore had stated both that he was and was not at the job site with Complainant on March 15th. Mr. Moore explained at this point in the testimony that he traveled to job sites periodically and did go to the job site that day. He was told by other employees that Complainant was on the phone. (Tr. 65:22-24). He did not personally see Complainant on the phone. (Tr. 66:2). He claims four other employees were present that day, but the Time Report does not document two of the people he claims were there. (Tr. 66:6-9). Mr. Moore was also not listed on the crew that day, but Complainant has listed him on other logs previously. (Tr. 66:10-11).

Mr. Moore claimed to have a conversation with Complainant on March 15th about Complainant being paid for his commuting time back to a terminal, and Mr. Moore explained there was nothing wrong with an employee expecting to get paid for his time. (Tr. 67:5). Mr. Moore “didn’t have a problem” with Complainant wanting to be paid for the driving time, and it had nothing to do with Complainant’s firing. (Tr. 67:20). Mr. Moore admitted that Complainant was not the only person who used his cell phone for personal reasons, and also explained that he had not fired anybody else for using their cell phone but did give warnings. (Tr. 67-68).

With respect to March 16th and the issue of timely completing work, Mr. Moore also explained that he did not fire Complainant because of the work not having been completed that day, and in fact, it “played no role in his firing.” (Tr. 68:21-22).

Testimony of Erik Franklin

1. Direct Examination

Mr. Franklin is an owner of CenCon, LLC, and is also the President and Chief Executive Officer of the company. (Tr. 71:1-6). He has owned the company since the late 1990s, and his father, Dale Franklin owned it before him. (Tr. 71:10-14). After Dale Franklin sold the company, he remained on as a superintendent and was eventually replaced by Mr. Moore. (Tr. 71:19-21). CenCon had a location in Wellsville, Kansas until December 31, 2013. (Tr. 73:17-18). Now there is only the location in Scottsbluff, Nebraska. (Tr. 72:3-4). Nobody is currently performing Complainant’s former job for CenCon in Kansas. (Tr. 73-43). In March 2012, CenCon had nineteen employees between two offices but as of August 2014, the company only had four employees. (Tr. 74:17-21). The estimated annual gross revenue in 2012 was \$5 million. (Tr. 75:1-3). Mr. Franklin testified that he does not believe he has ever been cited for improper load securement when driving. (Tr. 87:18-20).

a. Employee Notes and Reasons for Firing

Mr. Franklin explained that to his knowledge, CenCon had “probably” fired two employees for using their cell phones for personal reasons, one was Complainant and the other one he “believe[s]” was a man named “Michael.” (Tr. 75:9, 14-15). Tifani Franklin, Mr. Franklin’s wife and co-owner of the company, handles the human resources functions for the company and is the bookkeeper and secretary. (Tr. 75:21-22). She created the Employee Notes exhibit, CX-4, and the complaints listed in the exhibit were logged as they were received. (Tr. 76:1-2).

In the Employee Notes, there is a notation that Mr. Franklin pulled up to a job site and caught Complainant on his cell phone and gave him a verbal warning. Mr. Franklin explained that there was no write-up, no warning that Complainant may be fired if he continued, and this was the only interaction he had with Complainant about his cell phone use. (Tr. 76:5-20). Employees are allowed some casual amount of cell phones for personal reasons at work, including when they are in vehicles going to job sites as a passenger. (Tr. 77:12, 16). On February 29th, it was acceptable for Complainant to be sitting in the truck on his phone when feeling unwell. (Tr. 78:3). On March 8th, Complainant brought a dog to work out of town and asked for a pet deposit—Mr. Franklin testified that he was not fired for bringing the dog to work. (Tr. 79:14). There was a notation for March 9th that Complainant had laid a locator on a boring unit causing property damage, but he was not fired for this reason. (Tr. 78:4-6). The only reason Mrs. Franklin noted it on the Employee Notes sheet was to keep a record of the monetary loss. (Tr. 78:19-20). In regards to the incident in which Complainant argued about being paid for driving on March 15th, Mr. Franklin testified that it is acceptable for an employee to argue about whether he was being paid correctly. (Tr. 84:11). On March 16th, Complainant was accused of not completing a job and not picking up his phone when called. In regards to this

incident, Mr. Franklin explained that if Complainant was on the crew, he “would expect him to have [his cell phone] on him.” (Tr. 82:10-13). Mr. Franklin acknowledged that there are times when one may lose cell phone service, but states that Complainant was working on a cell tower job and so should have gotten signal. (Tr. 83:4-5).

b. The Firing on March 19, 2012

On March 19th, Mr. Franklin received a phone call from Complainant in which he told Mr. Franklin that he had been fired by Mr. Moore. (Tr. 79:20). Mr. Franklin spoke to Mr. Moore, and when Complainant called him back, he told Complainant that he “stood behind” Mr. Moore’s decision to fire him. (Tr. 80:20-21). Mr. Franklin explained that he and Mr. Moore had spoken on March 16th about Complainant and the issues Mr. Moore had been having with him, and he “was fully expecting that Monday morning [March 19th]” Complainant was going to be fired. (Tr. 81:1-5). Mr. Franklin explained that Complainant’s use of his personal cell phone on March 19th “had nothing to do with the firing decision.” (Tr. 81:8-9).

In regards to the time records, Mr. Franklin explained that each employee prepares his own every week, and they list the coworkers they worked with to verify each other’s hours. (Tr. 85:8, 21). Mr. Franklin recognized Mr. Moore’s handwriting at the top of the Time Report, and acknowledged that the Report states that Complainant was let go at 7:00 am. (Tr. 86). He also explained that Mr. Moore was responsible for reviewing the time reports. (Tr. 86:3, 11). Mr. Franklin testified that they paid Complainant for two hours of work on March 19th even though those two hours are not shown on the record. (Tr. 87:2-4).

2. Cross-Examination

CenCon ended all operations in Kansas on December 31, 2013, not just in Wellsville. (Tr. 88:17). Mr. Franklin explained that on the Employee Notes, the first noted incident about cell phone use by Complainant was noted by his father, Dale Franklin. (Tr. 89:4-7). The first time that he had firsthand knowledge of Complainant’s cell phone use was February 28th. (Tr. 89:11-12). On that day, Mr. Franklin found Complainant sitting in a truck on his phone playing a game. (Tr. 90:6-7).

Mr. Franklin clarified the incident on March 15th regarding the disagreement about paid time. (Tr. 90-91). According to Mr. Franklin, Complainant had to sit for two hours waiting for another truck to return so that he could retrieve his cell phone from the other truck. (Tr. 91:1-5). He was paid for the two hours. (Tr. 91:4-5).

On March 16th, Mr. Franklin spoke to Mr. Moore about Complainant on the phone. (Tr. 92:1-2). Mr. Moore mentioned to him how on March 16th, he had been unable to locate Complainant and Complainant was not picking up his cell phone. They also spoke about how there were “some other issues prior” and how “they obviously weren’t getting along and that if [Mr. Moore] confronted [Complainant] . . . he was argumentative about issues.” (Tr. 92:7-17). The other “main issue” spoken about was “cell phone use” and how when arriving at a job site, Complainant would state that there were enough people working and he would wait in the truck. (Tr. 93:1-3). Mr. Moore did not inform Mr. Franklin about any argument on how to tie down

equipment. (Tr. 93:7). Mr. Moore had the direct authority to terminate Complainant and Mr. Franklin testified that Mr. Moore stated affirmatively that he would terminate Complainant the next Monday. (Tr. 93:22-25). Mr. Franklin asserted that no portion of the firing decision was based on Complainant's raising of safety complaints. (Tr. 94:18).

3. Redirect Examination

Mr. Franklin clarified that Mr. Moore was the person who ultimately made the decision to fire Complainant. (Tr. 95:5-7). He also explained that one of the reasons for the firing was that Complainant was "argumentative," but admitted that he did not know all of the things to which Mr. Moore was referring when he stated that Complainant was argumentative. (Tr. 95:12-19). Mr. Franklin explained that Complainant was fired because a number of factors, and if one of the factors was taken away, he would not have been fired. (Tr. 95:23-25).

4. Recross Examination

Mr. Franklin stated further that if he had only known about the incident on March 16th in which Complainant allegedly did not finish a job, he would not have fired Complainant. (Tr. 99:7-8). It was a combination of multiple days of instances. (Tr. 99:13-14).

5. Redirect Examination

When asked about what the combination of issues was that led to the firing of Complainant, Mr. Franklin answered that "in a nutshell" Complainant was argumentative and used his cell phone for personal reasons. (Tr. 100:13).

Testimony of Scott Greene

1. Direct Examination

Complainant began working for CenCon on October 5, 2011. He would normally report to work at 7:00 am Monday through Friday. (Tr. 109:21, 25). His main job duties included hauling heavy equipment and assisting work crews with placing underground line and fiber. (Tr. 109:15-19). He has a commercial driver's license from the state of Kansas, and at the time of the hearing, had had it for five years (Tr. 102-103:19-22). With this license he is able to operate vehicles of 26,001 pounds or greater. (Tr. 103:4-6). Complainant served in the United States Army for seven years. (Tr. 105:3). As a result, he was diagnosed with post-traumatic stress disorder ("PTSD") in 2011 and has taken medications to treat the condition. (Tr. 106:16, 21-25).

a. Work history and record

Complainant's first supervisor was Dale Franklin, Erik Franklin's father. (Tr. 109:5-6). He never had an argument with him. (Tr. 109:11). He testified that he appreciated how CenCon maintained their equipment. (Tr. 111:6-8). Complainant operated on the highways for the Employer hauling machinery. (Tr. 112:17-25). He was responsible for securing the ditch witches when he hauled them. (Tr. 113:3). Complainant looked at the regulations so he knew

how to strap down equipment. (Tr. 113:9-10). He believed there was a load securement portion of the Commercial Driver's License exam. (Tr. 113:13-18).

Phone usage

Complainant's cell phone usage was an oft repeated topic. Complainant explained that Dale Franklin had at "some point" given him a verbal warning about using his cell phone. (Tr. 113:24). During one incident, Dale Franklin told him to "get out of the truck and get to work," but did not specifically tell Complainant that he could not use his cell phone at work. Complainant did not contest his cell phone use at that time. (Tr. 114:10).

At some point, Complainant had a conversation with Erik Franklin about cell phone use. (Tr. 115:21-23). Erik Franklin told him that when a crew was working and if there was nothing to do, "the last thing to do is to be on the phone." (Tr. 116:17-20). There was always work to do, and Complainant "took that to heart." (Tr. 116:20-21).

On February 29, 2012, according to the Employee Notes Clint Moore found Complainant, who was sick, playing games on his cell phone. (Tr. 117:9-12). Complainant explained that he was not playing games on his cell phone; he was trying to contact his wife to pick him up due to his flu-like symptoms. (Tr. 117:19-25). Complainant's wife picked him up and he did not return to work that day. (Tr. 118:21). Complainant denied that Mr. Moore told him that the cell phone had to stay in his lunchbox during working hours. (Tr. 118:17).

On March 15th, there is a notation that Clint Moore came out to the worksite but Complainant contended that Mr. Moore did not do so. (Tr. 121:3). He explained he only worked with "Ken and Garrett" that day and that if he worked with Mr. Moore on a given workday, he "tried to" note that for the record "as often as [he] could." (Tr. 121:18). Complainant claimed that he was not on the phone that day. (Tr. 122:7).

Complainant was not required to have a cell phone for work. (Tr.123:18). On March 16th, there is a notation in the Employee Notes which states that Complainant "would not answer [his] phone." (Tr. 123:23). Complainant explained that the cleanup job he was working on that day had gone well and that the customer was "actually pretty pleased" with his work. (Tr. 124:15). He admitted he did not answer his phone that day, because first, he was told not to and, second, because his battery had died. (Tr. 124:21-23). Complainant asserted that despite the Employee Notes stating that an employee was sent to check on him, nobody came, and he did not "disappear" from work. (Tr. 125:3). With regard to the Employee Notes stating that Complainant "got argumentative with [Mr. Moore]," Mr. Moore was not at work on March 16th when Complainant returned to the office; he had already left work that day. (Tr. 125:9-16).

Miscellaneous Incidents

One incident occurred after Complainant had been given permission to work on his personal vehicle in December 2011 while he was off-duty. As a result of this, he caused damage to company property. (Tr. 114:11-13). Another incident was on March 8, 2012 when Complainant admittedly brought his border collie to work. (Tr. 119:8-9). He claims that he did

not stay in a hotel that night, despite the fact that the Employee Notes says he called for a pet deposit on a room. (Tr. 120:7).

On March 15th there was also an incident regarding a two-hour wait. Complainant had inadvertently left his personal cell phone on a truck that was in another town. He had to wait until the crew, which was out for the day, got back so that the gate could be opened and he could secure the equipment inside. (Tr. 123:10-11). He asked the company to pay for those hours of waiting. This conversation about the two hours was “pretty heated.” (Tr. 141:17).

There was an issue with a locator on March 9th, according to the Employee Notes, and Complainant explained that he did not lay a locator on the boring unit, one of his co-workers did. (Tr. 120:9-10). Complainant explained that he was actually across the street talking to general contractors. (Tr. 120:11-13).

Safety Issue

There was an incident regarding safety that Complainant testified about. On February 13th, Erik Franklin gave him a verbal warning about moving equipment without chaining it down. (Tr. 114:19-25). Mr. Franklin told Complainant, “Don’t ever do that again.” (Tr. 114:24-25). Complainant explained that he had moved a piece of equipment from one location to the shop in the same city without properly securing the load. (Tr. 115:2-3). After the verbal warning, Complainant changed his conduct and started chaining equipment down “like they wanted.” (Tr. 115:14-15).

b. Events on March 14, 2012

On March 14th Complainant reported for work at 7:00 am in Harveyville. (Tr. 126:20-23). That day he was going to be hauling a ditch witch plow. (Tr. 127:1). A ditch witch plow is used to lay cable underground.⁵ (Tr. 111:23-24). Load securement was occasionally a team effort, but ultimately he was responsible for the securement. (Tr. 127:15-16). The ditch witch he was going to haul was originally secured by Matt Wilmoth and Kevin Coons. (Tr. 127:25). Complainant believed that only the back part of the load had been secured, and proceeded to try and finish the securement himself. (Tr. 128:12, 25). He believed that anything over 10,001 pounds required four direct binding points and any other attachment would have a separate chain to secure it to the trailer. (Tr. 129:3-8).

While securing the load, he was stopped by Mr. Moore and told that he was securing the load improperly. (Tr. 129:18-19). He tried to explain to Mr. Moore that the way his colleagues had secured it initially was wrong. (Tr. 129:23-24). The conversation became heated at that point—both individuals raised their voices. (Tr. 135:5-7). Complainant asserted that he told Mr. Moore that according to the DOT regulations, the way his colleagues had secured it was wrong. He estimated that he referenced the regulations many times—“ten times if I said it once.” (Tr. 137). He offered to call his State Trooper friends to do an inspection and make sure the equipment was secured. (Tr. 130:11-13). He explained that there needed to be four direct binding points. (Tr. 131:10-11). Mr. Moore told Complainant that if did not like the way that

⁵The ditch witch was approximately 15-20 feet, and it weighed between 15,000 and 16,000 pounds. (Tr. 133:18-20).

his colleagues had secured the load, he “can walk.” (Tr. 130:18-21). Complainant claims he “sat down on the trailer in disbelief” because he did not want to be fired. (Tr. 130:20-21) At this point, Complainant stopped doing his own load securement and he and a few other individuals undid most of the chains. (Tr. 131:18-22). It was re-secured, but Complainant believed that it still was not secured properly. (Tr. 132:1-2). Complainant expressed to Mr. Moore that he did not wish to drive with the load secured the way his colleagues had done it. (Tr. 130:25). After it was re-secured Complainant told Mr. Moore that he believed it was not secured properly, and Mr. Moore knew from the context of the conversation that he was driving under protest. (Tr. 132:5-13). His colleagues were securing it with only one chain and there were not four tie-downs. (Tr. 133-134).

This was the first argument that he had had with Mr. Moore. (Tr. 135:14). They had had disagreements before, but not arguments. (Tr. 135:16). The argument lasted about 30 minutes. (Tr. 136:11-12). After eventually delivering the load, Complainant decided to look up the regulations to confirm that he had been correct. (Tr. 138:24). Mr. Moore was told Complainant was playing games and so found Complainant and told him that he “could be on the cell phone as long as [he] was not sitting in the vehicle.” (Tr. 139:7-9) Complainant told Mr. Moore that he was looking up the regulations and denied playing games. (Tr. 139:16). In response, Mr. Moore told him that “if [he] was on the phone, [he] should not be in the truck. [He] should be standing out by the crew and being on the phone. [sic].” (Tr. 139:23-25).

c. Firing on March 19, 2012

Complainant went to work on March 19, 2012 at 7:00 am. (Tr. 126:4). After he was dropped off, he was met at the front door by Mr. Moore who asked him to come to his office. (Tr. 126:7-8). He claimed he had not “clocked in” that day, and he was not on his cell phone. (Tr. 126:14-16).

Mr. Moore told Complainant that he would have to let him go because he was “argumentative” and “took too long to do a job” and that he used his personal cell phone during work. (Tr. 141-142). In response, Complainant mentioned that several other employees had “bumped chests with each other” and they were not fired; that there were several occasions where a job would be estimated to be done in a few days but it would take weeks, and that several other people had used their cell phones too. (Tr. 142:3-14). Complainant cleaned out his belongings, went outside to where his co-workers were and then called his wife to pick him up. (Tr. 143:9-11). While he waited, he called Mr. Franklin. (Tr. 144:17-18).

Mr. Franklin appeared surprised by the conversation because of his tone of voice and slowness to respond. (Tr. 145:15-16). Mr. Franklin told Complainant that he stood behind Mr. Moore’s decision and that due to his military experience he should know that when somebody above him tells him to do something he should do it. (Tr. 146:14-17).

d. Damages

In regards to requested damages, during the hearing, Complainant explains that he is currently employed by Bear Communications, and has been with that company since May 2014. (Tr. 102).

His total compensation from CenCon in 2012 was \$8,332.50. (Tr. 147:4). His hourly rate of pay was \$15, and he believes he earned a Christmas bonus of \$50. (Tr. 147:12, 20). He would receive overtime for any time worked over 40 hours. (Tr. 147:24). In 2011, his total compensation was \$8,427.50. (Tr. 148:7). His last day of work for CenCon was March 16, 2012. (Tr. 147:9). He was unemployed for one month after being fired. (Tr. 148:12). He describes the firing from CenCon, as “devastating” and he explains that he felt “worthless” because he could not provide for himself and his wife. (Tr. 151:2-11).

He began working at K&W Underground from April 13, 2012 until approximately July 15, 2012, and made a comparable salary to when he was at CenCon. (Tr. 148-152). He quit the job because he ran out of medication to treat his PTSD and was not taking the job very well. (Tr. 149:21-22). Complainant’s attorney admitted that this job was “substantially equivalent to what he had.” (Tr. 27:10-11).

Complainant testified that he continually looked for work after he was fired by Mr. Moore, and after he separated from K&W Underground. (Tr. 150:8, 21-22).

After his time at K&W Underground he started school in January 2013. (Tr. 151-152). Despite being in school, he continued to look for work. (Tr. 152:10-11). His next job was with Santa Fe Tow Services, which he worked from October or November 2013 until March 2014. (152). His last day of actual work for Santa Fe Tow Services was in January because that is when he fell and broke his leg. (Tr. 153:24-25). He collected workman’s compensation. (Tr. 154:25). He officially left the company in March 2014. (Tr. 153:24). He made \$1,440 every two weeks. (Tr. 153:19).

He started working for Kaw Valley on April 14, 2014 (Tr. 154:15). He was there for two months and then moved to Bear Communications, where he is currently employed. (Tr. 155:10). Normally he makes about \$1,440 per two weeks with this current company. (Tr. 155:19). Up until his employment with Bear Communications, he was making approximately the same amount as he did at CenCon. (Tr. 155:24).

Complainant seeks back pay, compensatory damages for mental pain and emotional distress, punitive damages, and attorney’s fees. (Tr. 156). He also asks that CenCon purge his work record of adverse information related to the alleged protected activity and to post a copy of the decision favorable to him at its premises. (Tr. 157:2-3, 7-8).

2. Cross Examination

a. Work History and Record

Phone Usage

Complainant admitted that he was warned about his cell phone use. (Tr. 168:23). He denied that Mr. Moore asked him to keep his cell phone in his lunchbox on February 29th. (Tr. 169:13). He explained further that on March 15th, Mr. Moore told him that if he was going to use his phone he should not to be in the truck but be outside with the rest of the crew. (Tr. 169:21-25).⁶ Complainant admitted using a phone call on the morning of March 19th, but only to call his wife and have her pick him up; he did not use it before the conversation with Mr. Moore during which he was fired. (Tr. 170:20).

Miscellaneous

During his cross-examination, Complainant admitted that he had been argumentative or confrontational with direct supervisors. (Tr. 160:5). He also stated that he would be “okay” with the termination had it been for the correct reasons. (Tr. 160:9). Complainant understood that it would have been possible to be fired for cell phone use, and for being confrontational, and that it was also possible to be fired for taking too long to do a job. (Tr. 160:12, 15, 20). Nevertheless, he believed that he was fired because he complained about the load securement on March 14, 2012. (Tr. 161:3).

Complainant was questioned about the complaints that he filed with various agencies. He admitted that at the time of filing his claim with the Kansas Human Rights Commission, he filed his discrimination claim on the basis of having a disability, and it was not until two months later that he filed his claim on the basis of retaliation for voicing a safety concern. (Tr. 165:6).⁷ At the time of his termination, he believed he was fired in retaliation for voicing a safety concern. (Tr. 161:6).

Complainant admitted that there were other incidents regarding his work performance at CenCon that did not necessarily make it on the list of Employee Notes. (Tr. 167:1-2). For example, he explained that there was one incident with Kenneth Eudy in which there was a misunderstanding and a physical fight. (Tr. 167:7-18). This is not listed in the Employee Notes. There were no other instances of physical confrontations. (Tr. 167:23-24).

Safety Issue

In regards to the incident on February 13th, he admits that he moved equipment on a trailer without securing it down, and that Mr. Franklin was very clear that this was not acceptable. (Tr. 171:23; 152:2). Mr. Moore was not close by when the conversation with Mr.

⁶ I note that Complainant says this occurred March 15th, but the description of the conversation sounds like it occurred on March 14th.

⁷ The complaint filed with the Kansas Human Rights Commission, Exhibit F, was missing page 2. I obtained the second page from counsel after the hearing.

Franklin happened. (Tr. 172:9-10). Mr. Franklin did not instruct Complainant on how to properly chain down equipment after this incident. (Tr. 173:20).

b. Events on March 14, 2012

In regards to the March 14th incident, Complainant explained that he took issue with how the equipment was being chained down. (Tr. 177:15). Mr. Moore instructed Complainant on the way to use the single chain to make two attachments. (Tr. 177:22). Mr. Moore had requested four indirect points of attachment—which is using one chain for two locations. (Tr. 178:5, 8-9). Complainant admitted that if he had followed instructions there would have been four indirect binding points. (Tr. 178:21). The argument with Mr. Moore was strictly that Complainant “thought regulations required four separate chains and not four points of attachment.” (Tr. 179:22-24). Complainant believed that in not using four chains, the load was insecure and could shift during transport. (Tr. 181:1-3). Complainant chained down the equipment as he was told and the load arrived securely, but he still believed it was not safe. (Tr. 181:18-23).

c. After CenCon

Complainant explained that he left his job at K&W Underground because the equipment was not to the same standard as CenCon’s, and he ran out of his medication for his PTSD. (Tr. 182:11-16). He admitted to having “temper tantrums” at K&W Underground. (Tr. 184:19).

3. Redirect Examination

Complainant explained that he was not on his medication at K&W Underground, but he was on them while working for the Employer. (Tr. 185:7-11). Complainant did not have “temper tantrums” while working for the Employer. (Tr. 185:13-15). In his view, things went smoothly while at CenCon. (Tr. 186:9).

In regards to the incident on March 14, 2012, Complainant clarified that he believed that to use indirect binding points was a violation of DOT regulations. (Tr. 187:10). He had received some training the first few days he worked for the Employer. (Tr. 198:24-25). He also spoke with friends who had experience in hauling prior to the incident in March 2012 about how to secure loads. (Tr. 188:7). When asserting that the securement was not safe, Complainant relied not only on his friends’ advice but also on the DOT regulations. (Tr. 190:3-5). Complainant explained that he would not normally file a whistleblower complaint with the Kansas Department of Human Rights. (Tr. 190:11-13). Complainant again testified that it was March 14, 2012 that Mr. Moore told him that he should be outside of a truck if using his cell phone. (Tr. 191:7-8). He explained that he was never warned that he took too long to clean up or perform work. (Tr. 191:11).

Testimony of Matthew Wilmoth

1. Direct Testimony

Mr. Wilmoth worked for CenCon previously and installed underground telephone lines. (Tr. 234:18). He was working there when Complainant was there in 2011 and 2012. (Tr. 235:12-13). On the Employee Notes, there is an entry which states that “Scott and Matt laid locator on boring unit” causing a \$9,000 loss, but Mr. Wilmoth explained that this was not true. (Tr. 237:13-14). He testified that he laid the locator and Complainant was across the street. (Tr. 237:13-17). Mr. Wilmoth testified that he used his cell phone at work for personal reasons and explained that “[e]verybody does.” (Tr. 237:20-22). He knew Mr. Moore used his phone for personal reasons not only because of the people Mr. Moore was talking to, but also because Mr. Moore said he was. (Tr. 238:8-9). Mr. Wilmoth was never reprimanded for using his phone for personal reasons. (Tr. 238:14). He never saw a supervisor or Mr. Moore call an employee out for using his personal cell phone at work. (Tr. 238:18).

On March 14th, the day Complainant complained about the securing of a ditch witch, Mr. Wilmoth had started securing the load at Mr. Moore’s instructions. (Tr. 239:3). Mr. Wilmoth remembered that Complainant complained that the way it was being secured was not according to DOT regulations. (Tr. 239:13-18). The argument got heated. (Tr. 239:22-23). Mr. Moore “wanted it tied down his way because he was the boss.” (Tr. 240:2). Mr. Moore was yelling and screaming. (Tr. 240:7-9).

In regards to his own behavior, Mr. Wilmoth acknowledged that he had “bumped chests” with Kenneth Eudy “all the time.” (Tr. 241:18). They had gotten into arguments and gotten pushy, but had not gotten into a physical fight. (Tr. 241:20-21). Mr. Wilmoth was never counseled for being argumentative. (Tr. 242:1). Mr. Wilmoth is no longer employed at CenCon because he refused to sign a write-up stating that he did a job on his own accord, when he claimed did not do so—he did it according to the way Mr. Moore wanted it done. (Tr. 242:7-9).

2. Cross Examination of Mr. Wilmoth

The argument on March 14th had to do with the number of point tie-downs. (Tr. 243:1-2). Mr. Wilmoth does not recall any other complaint from Complainant about securing the load that day.

B. Respondents’ Case-in-Chief

Testimony of Kenneth W. Eudy

1. Direct Examination

Mr. Eudy worked for the Employer from October 2009 to December 2013. (Tr. 193:6-8). He had to leave his job with the Employer because they lost a contract. (Tr. 193:11). He did mostly aerial work, but some underground work. (Tr. 193:15). He testified that working with Complainant was fine when his medication was working, but Complainant could be difficult to

work with when his medication was not working. (Tr. 194:1-3). He claimed that there was an incident almost daily, though he also admitted he did not work with Complainant on a daily basis. (Tr. 194:9-12). An incident could include “voicing his opinion to somebody else’s opinion, right or wrong.” (Tr. 194:11-12).

Mr. Eudy was in an altercation with Complainant once—Complainant pushed him and argued that he should be able to drive a truck, not Mr. Eudy. (Tr. 195:1-10). Another co-worker eventually diffused the situation and Complainant allowed Mr. Eudy to drive back to the shop. (Tr. 195:12-14). Mr. Eudy put in for a transfer because he did not want to work with Complainant, but also explained that Complainant apologized for the incident the next day. (Tr. 195:19-20).

Mr. Eudy testified about Complainant’s cell phone use. He stated that there “was at least one time” that Complainant was in his truck but he “[did not] know if he was using his cell phone.” (Tr. 196:1-4). Complainant had driven a truck from one side of the street to the other and had not come back to help finish the job. (Tr. 196:7-8). It was common for Complainant to separate from people at the worksite and act like he was just the truck driver. (Tr. 196:12-13). Mr. Eudy testified that he saw Complainant playing a game on his cell phone but notes that “[t]he times I heard it, we were in the shop. Whether or not we were technically on the clock, we were on break, what not, we were in the shop.” (Tr. 197:6-8).

Mr. Eudy was present for the argument on March 14th, regarding securing the ditch witch. (Tr. 197:14-15). He testified that at first, there was actually an issue with the binding—“when he walked out there . . . the binder was at an angle.” (Tr. 198:9-10). After Mr. Eudy explained the situation to Complainant, Complainant changed the binding but still claimed it was wrong. Mr. Eudy states then that “I knew it was right because we’ve been doing it and we’ve been stopped and we’ve never gotten in trouble for it.” (Tr. 198:13-15). Mr. Eudy claimed that Complainant was concerned about getting a ticket, not about safety. (Tr. 200:22-23).

2. Cross-Examination

Mr. Eudy again stated that he believed Complainant’s original complaint was correct, and that the load had not been secured properly, but he did not believe that Complainant handled the situation correctly. (Tr. 201:24; 202:1). Mr. Eudy clarified that Complainant objected because he thought the securement “wasn’t by DOT regulations.” (Tr. 202:19). After it was secured a different way, Mr. Eudy told Complainant that the securement was not wrong, but it may also not be right. (Tr. 203:6-7).

Mr. Eudy also admitted to playing games on his phone during his lunch break, and to the fact that he did not know if Complainant had played games during work hours. (Tr. 203:13-16).

In regards to the aforementioned physical altercation with Complainant, when Mr. Eudy went to Erik and Dale Franklin, the impression he got from them was that he should “let it go” and stay out of Complainant’s way. (Tr. 204:7-8). Mr. Eudy also had an altercation with Mr. Wilmoth but did not get fired for being argumentative. (Tr. 204:11-14).

Testimony of Clint Moore

1. Direct Examination

Mr. Moore worked with Complainant for approximately 30 days. (Tr. 205:22). He witnessed disputes with Complainant “on almost a daily basis.” (Tr. 206:8). Complainant had a “short fuse” and would “lose his cool” when stating his opinions or ideas. (Tr. 206:13-16). He testified that Erik Franklin instructed Complainant on how to secure equipment in February, but this equipment was not the same as the equipment being secured during the March 14th incident. (Tr. 207:15, 24). The general idea of using one single chain at two points of attachment is still the same between the loads. (Tr. 208:14-16). On March 16th, Mr. Moore spoke to Mr. Franklin and it was his understanding that he (Mr. Moore) was going to let Complainant go the next Monday morning. (Tr. 210:17-18).

2. Cross-Examination

When Mr. Moore started working there, Complainant had a few altercations but he was not fired or written up. (Tr. 212:18-20). Mr. Moore explained that he brought Complainant into his office at one point to counsel him about his behavior. (Tr. 212:25). He also explained that not every employee incident ended up on the Employee Notes. (Tr. 213:12). Complainant was not fired for lacking in candor. (Tr. 214:1). He was not fired for his workmanship. (Tr. 214:4). Mr. Eudy was also argumentative, but was not fired for being argumentative. (Tr. 214:15).

Testimony of Erik Franklin

1. Direct Examination

He was Complainant’s direct supervisor for approximately three or four weeks after Complainant was hired. (Tr. 215:17-18). Complainant was typically a good worker but had a short fuse. (Tr. 216:1). He was occasionally confrontational. (Tr. 216:10). Regarding the incident in February 2012 during which Complainant drove without securing a load, Mr. Franklin testified that he approached him and told him that it was not safe and then showed Complainant how to secure the load. (Tr. 217:23-24). The ditch witch plow, at issue in the March 14th incident, would have had similar type points as the load he instructed Complainant on during this incident. (Tr. 219:9-12).

2. Cross-Examination

When he found Complainant driving without a secure load in February 2012 he “immediately” instructed him on how to secure it. (Tr. 221:2). He, rather than Mr. Moore, instructed Complainant. (Tr. 221:23). Mr. Franklin admitted that it could be possible that Complainant was right about the DOT regulations and how to secure loads. (Tr. 222:2). Mr. Franklin understood that there is a regulation which requires that a driver assure himself that cargo is properly distributed and adequately secured and that some drivers may have different standards about what is safe. (Tr. 222:10, 18).

Mr. Franklin claims that Mr. Moore did not tell him about the argument on March 14th regarding the load securement until Friday, March 16th. (Tr. 223:23). Mr. Franklin had at one point allowed Complainant to bring his personal vehicle to the shop and work on it but there was no argument about this incident. (Tr. 224:13-15, 25).⁸ The other incident about Complainant being upset regarding backing up a truck into the shop was not a big deal, and Mr. Franklin just “blew it off.” (Tr. 225:15, 22).

ISSUES

The parties stipulated that (Tr. 22-24):

1. CenCon, LLC was, at all material times, an employer subject to the employee protection provisions of the STAA.
2. Complainant was an employee of CenCon, and in the regular course of business operated a commercial motor vehicle with a gross vehicle weight rating of 10,001 pounds or more on the highways, in commerce, and that he was an employee covered by the STAA’s employee protection provisions.
3. Complainant was an employee from October 5, 2011 to March 19, 2012.
4. The complaint and the subsequent amended complaint were timely filed with OSHA.
5. On November 6, 2013, Complainant timely objected to the Secretary of Labor’s preliminary order in this case and timely requested a hearing de novo.

As articulated at the hearing, the following are the issues that need to be decided (Tr. 8-9):

1. Whether Complainant engaged in protected activity on or about March 14th, 2012, by filing complaints concerning improper cargo securement on his assigned tractor trailer set.
2. Whether Complainant engaged in a protected activity on or about March 14th, 2012, by refusing to operate a commercial motor vehicle in violation commercial vehicle safety regulation and because he had a reasonable apprehension of serious injury.
3. Whether Complainant’s protected activities were contributing factors in Respondents’ decision to fire him.
4. Whether Respondents can show by clear and convincing evidence that they would have taken adverse action against Complainant in the absence of his protected activities.
5. Depending on the resolution of the preceding issues, to what relief, if any, is Complainant entitled under the STAA.

DISCUSSION

A. Applicable Standards

In a STAA proceeding the initial burden of proof is on the complainant, who must establish by a preponderance of the evidence that the employer took adverse action against him for engaging in protected activity. *U.S. Postal Service Board of Governors v. Aiken*, 460 U.S.

⁸ The Employee Notes state that “Scott was doing work on his personal vehicle without permission” despite testimony from both Complainant and Mr. Franklin to the contrary. (Tr. 114, 224).

711, 713-14 (1983); *Calhoun v. United Parcel Service*, No. 04-108, ALJ No. 2002-STA-31, slip op. at 8 (ARB Sept. 14, 2007) *aff'd* 576 F.3d 201 (4th Cir. 2009). The protected activity need only be a contributing factor to the Employer's decision to terminate the Complainant. 29 C.F.R. § 1978.109(a) ("A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."); *Palmer v. Canadian Nat'l Railway*, No. 16-035, ALJ No. 2014-FRS-154, slip op. at 17-18 (ARB Sept. 30, 2016) ("The relevant statutory text says 'demonstrate[],' and it does not say, for example, 'make a prima facie showing' or 'meet a burden of production' or 'make an inference.'"). Thus, Complainant must show (1) that he engaged in protected activity; (2) that Respondents took an adverse employment action against him; and (3) that his protected activity was a contributing factor in the adverse personnel action. *Warren v. Custom Organics*, No. 10-092, ALJ No. 2009-STA-030, slip op. at 6 (ARB Feb. 29, 2012); *Williams v. Domino's Pizza*, No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011); 29 C.F.R. § 1978.109(a). If Complainant makes this showing, Respondents may escape liability only by showing by clear and convincing evidence that they would have taken the same adverse employment action in the absence of Complainant's protected activity. *Warren*, slip op. at 12; 29 C.F.R. § 1978.109(b).⁹

B. Complainant Has Shown that He Engaged in Protected Activity

The STAA protects employees who, among other activities, file complaints regarding commercial motor vehicle safety or who refuse to operate commercial motor vehicles that the employee reasonably perceives to be unsafe. *See* 49 U.S.C. § 31105(a)(1)(A)-(B). More specifically, the STAA prohibits an employer from disciplining an employee because:

(A)

(i): the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order . . . ;

...

(B): the employee refuses to operate a vehicle because

...

(ii): 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.

Id.

⁹ It appeared from the testimony that the Employer thought the *McDonnell-Douglas* burden of proof standards applied. They do not apply in STAA cases after legislation was passed in 2007 replacing that framework. *Beatty v. Inman Trucking Management Inc.*, No. 13-039, ALJ Nos. 2008-STA-020 and 2008-STA0921, slip op. at 16 (May 14, 2014).

1. Mr. Greene's Complaints Regarding the Cargo Securement

Complainant engaged in protected activity on March 14, 2012 by complaining¹⁰ about the securement of the load he was supposed to transport. Respondents' sole argument regarding the complaints voiced by Complainant is that the regulations were not violated, and that Complainant was apparently only motivated by a concern for getting a ticket. R's Brf. 10, *see also* Tr. 200.¹¹

For a complaint to be protected under the STAA, the complaint must "relate" to a violation of a safety standard and a specific standard need not be expressly cited in the complaint. 49 U.S.C. § 31105(a)(1)(A)(i) ("... filed a complaint ... related to a violation ..."); *see also Ulrich v. Swift Transportation Corp.*, No. 11-016, ALJ No. 2010-STA-00041, slip op. at 4 (ARB Mar. 27, 2012). Furthermore, "a complainant must show that he reasonably believed he was complaining about the existence of a safety violation." *Id.*, slip op. at 4. It need not be true that the complaint concern an *actual* violation of the regulations.

[A] "mistaken but sincere" defense has no place in STAA jurisprudence; an employer may not escape liability for discharging an employee for protected activity merely by claiming a "mistaken but sincere" belief that the employee's safety complaint was groundless. An employee's complaint based upon a reasonable, albeit mistaken, belief that a potential or actual violation of a commercial motor vehicle safety regulation under 49 U.S.C.A. § 31105(a)(1)(A)(i) has occurred is sufficient to establish protected activity. [citations omitted]. Accordingly, protection is not dependent upon the employer's belief in the accurateness of the employee's complaint. The primary consideration is assuring the right of employees to raise concerns, not the accuracy of those complaints. *See Passaic Valley Sewerage Comm'rs v. U. S. Dep't of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993).

Elbert v. True Value Co., No. 07-031, ALJ No. 2005-STA-036, slip op. at 3 n.5 (ARB Nov. 24, 2010).

Complainant complained about the securement of a ditch witch to a trailer. He complained that the securement as done by his colleagues was incorrect. (Tr. 129:23-24). He explained that there needed to be four direct binding points. (Tr. 131:10-11). Eventually the securement was changed and re-secured, but Complainant believed that it still was not secured

¹⁰ Though not explicitly argued by either party, I note that the ARB and several federal appellate courts have held that to 'file' a complaint under § 31105(a)(1)(A)(i), an employee need not submit a formal, written complaint but may instead orally complain to a supervisor or employer about a safety violation. *See Warren*, slip op. at 15 n.6 (Brown, J., concurring) (citing cases). Complainant's oral complaints to Mr. Moore about the load securement therefore qualify as filing a complaint.

¹¹ I note that while I am satisfied that Complainant was, in fact, concerned about the safety and securement of the load, even if the only concern Complainant had was whether he would or would not get a ticket, this would be sufficient to have been related to safety. After all, tickets are stereotypically issued as a result of someone engaging in an unsafe or illegal behavior.

properly. (Tr. 132:1-2). His colleagues were securing it with only one chain (Tr. 133:12-13) and there were not four direct tie-downs. (Tr. 134:1). He was concerned that the load would move in transport. (Tr. 133).

The complaints Mr. Greene articulated relate to numerous regulatory provisions regarding safety and therefore sufficiently relate “to a violation of a commercial motor vehicle safety or security regulation, standard, or order.” 49 U.S.C. § 31105(a)(1)(A)(i). As articulated in Complainant’s brief, numerous provisions of the Code of Federal Regulations relate to the securement of heavy machinery such as the ditch witch in question. 49 C.F.R. §§ 392.9, 393.100, 393.102, 393.106, 393.110, and 393.130 relate to securing loads, preventing shifting, and the number of tie downs needed to be safe. Clearly the complaints he made regarding securement, a shifting load, and the proper number of tie downs relate to these regulatory provisions.

Other regulations Complainant cites less clearly relate to safety. 49 C.F.R. § 392.9 relates to whether a driver is satisfied that the cargo is adequately secured. 49 C.F.R. § 393.1 requires that a driver be satisfied that the motor vehicle is in safe working condition. 49 C.F.R. §§ 392.1, 393.1 and 396.1 deal with compliance as a whole—they define the scope of the following regulations which require drivers to comply with the section. These regulations no doubt in some form relate to safety overall, but they do not specifically relate to a safety issue. I need not determine if all of these provisions relate sufficiently to safety, as it is clear that Mr. Greene’s complaints relate to 49 C.F.R. §§ 392.9, 393.100, 393.102, 393.106, 393.110, and 393.130.

It is clear from the testimony that there is a difference of opinion between Complainant and the Employer on whether there needs to be “direct” or “indirect” binding points securing a load. (Tr. 178). Complainant was of the opinion that there needed to be four *direct* binding points and four chains, but admitted that Mr. Moore’s instructions would have resulted in four *indirect* points. (Tr. 178). Complainant believed that the indirect binding points would not be safe, and that at the end of the argument, the load was still not secured correctly. (Tr. 181).

Reasonable apprehension of a violation is based on whether the driver, with his training and experience, would perceive a violation. *Calhoun*, slip op. at 11. In this case, Complainant had been working for the company for approximately five months, had read the regulations, had spoken to friends who had hauled equipment before, and reasonably interpreted the regulations as requiring four direct binding points. (Tr. 188, 190). He testified credibly that he believed that the load needed four direct binding points from four chains, and that in not securing the load this way, there was a risk that the load would shift. (Tr. 180). Furthermore, the testimony is unclear whether Complainant received actual training from the Employer on how to properly secure loads. After an incident in which Complainant drove without securing a load Mr. Eric Franklin testified that he instructed Complainant to use four points of attachment when securing a load, (Tr. 219), but Complainant denied that he was instructed how to properly chain down equipment at that time. (Tr. 173:20). Complainant admitted that he received some training during the first few days he worked for the Employer, (Tr. 198), but it is unclear exactly how detailed this training was. It is also unclear whether that training involved direct or indirect tie downs. After reviewing the regulations I, too, find it unclear whether direct or indirect binding points were

necessary. A co-worker of Complainant insists that Mr. Greene was actually correct in complaining about the attachment. (Tr. 198, 201). All of this evidence together leads me to the conclusion that Complainant had the reasonable belief that direct tie downs were necessary, and furthermore that his belief of a violation of the regulations was reasonable. His complaints regarding the securement of the load were therefore protected activity.

2. Mr. Greene's Drive Under Protest

49 U.S.C. § 31105(a)(1)(b) prohibits the discharge of an employee 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 has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition.” The first provision is known as the “actual violation” category while the second is known as the “reasonable apprehension category.” *Shields v. James E. Owen Trucking Co., Inc.*, No. 08-021, ALJ, No. 2007-STA-22, slip op. at 13 (ARB Nov. 30, 2009). In this case, Complainant’s refusal to drive is protected activity under the “reasonable apprehension category.”

Complainant acknowledges that to qualify for protection under § 31105(a)(B)(i), or the “actual violation” category, “a complainant must show that an actual violation of a regulation would have occurred but for the refusal to drive.” (C’s Brf. 22). He then argues that the regulation requiring proper securement would have been violated had he driven. 49 C.F.R. § 392.1. As stated above, based on the facts presented, I cannot determine whether an actual violation occurred in regards to the securement of the ditch witch.

Complainant also argues that the regulation which requires a driver be satisfied that all the regulations had been complied with would have been violated had he driven the vehicle. *See* 49 C.F.R. §§ 392.1, 392.9, 396.1, 396.13. Or in other words, Complainant argues that an “actual violation” of the regulation would have occurred had he driven the vehicle because he would not have been satisfied that the cargo was secure, regardless of the reasonableness of that dissatisfaction. I do not find this argument compelling. The drafters of this statute clearly had the ability to insert “reasonableness” into the described protected activity. In fact, “reasonableness” is in the very next provision, § 31105(a)(1)(B)(ii). The drafters did not insert that “reasonableness” language into subsection (i). They required instead an “actual violation.” Case law, as cited by Complainant, also states that an “actual violation” is necessary to find protected activity under the first section. *Shields*, slip op. at 6. It is illogical to assume that the drafters in using the words “actual violation” also meant to include within that definition a reasonable *belief* that a vehicle was unsafe to drive, which is what Complainant argues when he states that regulation 49 C.F.R. § 392.9 would be violated. This argument essentially tries to work around the “actual violation” requirement by reading in a reasonable belief aspect. I find that Complainant has not shown that an “actual violation” would have occurred, and therefore he is not protected by the “actual violation” category of this statute.

However, Complainant is protected by § 31105(a)(B)(ii), the “reasonable apprehension category.” Complainant had a reasonable apprehension of serious injury to the public because of the alleged lack of proper securement. Section 31105(a)(B)(ii) requires that the “unsafe

condition . . . must be such that a reasonable person, under the circumstances, would perceive a bona fide hazard.” *LeBlanc v. Fogelman Trucklines, Inc.*, 1989-STA-8, slip op. at 1 (Sec’y Dec. 20, 1989). Just as it was reasonable for Complainant to read the regulations and believe that four direct tie downs were needed to secure the load, it is reasonable for him to worry that the load could shift. He testified repeatedly his concerns about the equipment not being secured, and stated that he was concerned that because of the indirect binding points, the equipment could roll, or shift as a result of needing to make a correction while driving. (Tr. 181). The “reasonable apprehension category” requires that the employee seek correction from the employer but be unable to obtain it. *Shields*, slip op. at 13. It is clear from the testimony that not only did Complainant try to correct the problem that he perceived with the securing of the load, but that he also tried to complain to the Employer about the problem. (Tr. 128-134).

It is true that Complainant did eventually drive the truck, as the Employer points out. Though I note that the Employer makes little to no argument about the significance of this driving, it is most likely implying that Complainant’s driving disqualified him from protection under the statute. However, this is not the case. Complainant drove because he felt that he would be fired. (Tr. 130). He testified that Mr. Moore said that if he didn’t like how they were securing the load, he could “walk” and he “sat in disbelief because [he] didn’t want to lose the job.” (Tr. 130). “The fact that [Complainant] because of the fear that he would be discharged, ultimately decided to take out the load did not make this initial refusal to do so any less of an activity protected.”¹² *Palmer v. Western Truck Manpower*, 1985-STA-6, slip op. at 4 (Sec’y Jan. 16, 1987). Therefore, I find that Mr. Greene’s driving under protest is also protected activity.

C. Respondents’ Firing of Complainant Was an Adverse Action

“It is a violation for any person to . . . discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee” because the employee has engaged in protected activity. 29 C.F.R. §§ 1978.102(b)-(c). While neither party at the hearing explicitly contested or stipulated to this, Complainant’s firing was an adverse action. *Douglas v. Skywest Airlines, Inc.*, No. 08-070 & 074, ALJ No. 2006-AIR-14, slip op. at 22 (ARB Sept. 30, 2009).

D. Complainant’s Protected Activities Were a Contributing Factor in His Firing

To establish a case, “[a] contributing factor is ‘any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.’ We want to reemphasize how low the standard is for the employee to meet, how ‘broad and forgiving’ it is. ‘Any’ factor really means any factor. The protected activity need only play some role.” *Palmer v. Canadian Nat’l Railway*, slip op. at 53 (citations omitted). “[T]he complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence.” *Beatty*, slip op. at 20 (citations omitted). If I find that the protected activity and the non-retaliatory reasons both played a role in the firing, “the analysis is over and the employee prevails on the contributing-factor question” and therefore the employee does not need to prove

¹² This case dealt with the older version of the statute located at 49 U.S.C. App. § 2305(b). That code section dealt with refusing to operate a vehicle so as to not violate a regulation. The idea that refusing to operate the vehicle for fear of violating a regulation but then agreeing to drive for fear of being fired is protected activity, is still applicable to the current statute.

that reasons alleged by the employer were pre-textual. *Palmer v. Canadian Nat'l Railway*, slip op. at 53. (citations omitted).

Complainant has shown that his protected activity was a contributing factor in the decision to discharge him. “Temporal proximity between protected activity and adverse employment action supports an inference of discrimination.” *Cefalu v. Roadway Express, Inc.*, Nos. 04-103 & 04-161, ALJ No. 2003-STA-55, slip op. at 7 (ARB Jan. 31, 2006) *aff'd sub nom.*, *Roadway Express v. Dept. of Labor*, 495 F.3d 477 (7th Cir. 2007) (citation omitted). Previously the ARB has held that a number of months may still be sufficient to establish an inference of causation. *Warren*, slip op. at 6 (holding that a difference between the protected activity occurring in the spring and summer of 2008 and the termination occurring in the summer of 2008 was sufficient to establish an inference) (citing three cases which held that 30 days to even 7-8 months demonstrate temporal proximity). In this case, it is clear that Mr. Moore knew of Complainant’s concerns regarding the ditch witch on Wednesday, March 14, 2012 as a result of their argument. The firing officially took place on Monday, March 19, 2012, which is only three business days after the incident regarding the ditch witch. Even if the final decision to fire Complainant was not made until March 19th, three business days or five calendar days is sufficient to establish an inference of discrimination. This being said, Mr. Moore testified to discussing Complainant’s termination on Friday March 16th, only two days after the incident. Mr. Franklin seems to believe that the decision to fire Complainant was actually made on Friday March 16th. (Tr. 81). It is unclear from the testimony precisely when the decision to fire Complainant occurred. Regardless, a time frame of two to three business days, or two to five calendar days is sufficient to establish an inference of discrimination based on temporal proximity.

As Complainant argues in his brief, retaliation may be proven by establishing that the proffered reasons were pre-textual, “but such a showing is not required.” *Warren*, slip op. at 25 (citing *Bechtel v. Competitive Techs., Inc.*, No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (stating that circumstantial evidence may be useful in Title VII discrimination cases and that an explanation for an adverse employment action which is not credible is one form of such circumstantial evidence of discrimination). “[W]here the employee presents evidence that the employer’s adverse actions *were* pre-textual, this may warrant a finding by an ALJ that the employer failed to prove by clear and convincing evidence that the adverse action would have occurred even absent the protected activity.” *Warren*, slip op. at 25-26 (emphasis in original). Complainant argues that the reasons given by the Employer were in fact pre-textual. I find that they are.

The Employer’s argument in its brief for firing Complainant is the assertion that Complainant was fired for violating company cell phone policy many times, and for being argumentative and confrontational. An oft-referenced exhibit, the Employee Notes, CX-4, allegedly details numerous incidents on Employee’s records, and I will discuss the listed events in turn.¹³

¹³ I note that it was admitted by Complainant and Mr. Moore that this exhibit is not comprehensive. (Tr. 167, 213).

In regards to the information contained in the Employee Notes, Mr. Franklin explained that many of the “marks” on Complainant’s record had nothing to do with his firing. For example, despite this exhibit stating that Complainant worked on his personal vehicle without permission both Complainant and Mr. Franklin testified that he had permission to work on the vehicle and there was “no argument” about it. (Tr. 224). On February 29th Mr. Moore apparently found Complainant playing games on his phone but Complainant was sick. Mr. Franklin said it was acceptable for Complainant to be on his phone when sick. (Tr. 78). Complainant also explained that he was actually calling his wife to pick him up. (Tr. 117). Complainant was not fired for bringing a dog to work on March 8th according to Mr. Franklin. (Tr. 79). He was not fired for laying a locator on a boring unit on March 9th according to Mr. Franklin. (Tr. 79). The next recorded event took place March 15th. On this day Mr. Moore claims he pulled up to the jobsite and found Complainant on his phone, and they argued about wanting to be paid for two hours of work. Mr. Moore provided conflicting testimony about whether he was at the site or not. (Tr. 42, Mr. Moore says he was sure he was not there; Tr. 52, he says he was there). Therefore the entry on March 15th is unreliable, and the conflicting accounts call into question Mr. Moore’s credibility. On March 16th, the Employee Notes and testimony show that Complainant allegedly took too long to complete a project. Mr. Moore conceded that Complainant “did the best job he could” and that he was not accusing Complainant of being lazy and that the incident “played no role in his firing.” (Tr. 68). The last incident on the Employee Notes is for March 19th and states that Mr. Moore found Complainant on his phone and then fired Complainant. Mr. Franklin testified that, as he understood it, the decision to fire Complainant had been made on March 16th and the incident on March 19th had no effect on the decision to fire Complainant. (Tr. 81) (“The conversation I left on Friday [March 16th], he was going to show up and . . . [be] gone.”) In conclusion, this means that whatever “marks” on Complainant’s record, only a select few could have even contributed to Complainant’s firing: (1) an undated “verbal warning” about cell phone use, (2) a “verbal warning” about moving equipment from a jobsite on February 13, 2012 which Complainant acknowledges was a mistake (Tr. 115), and (3) a “verbal” warning to stay off his cell phone on February 28th, which did not result in a write-up or warning of being fired. (Tr. 76).

I base my finding of pretext on the following grounds:

First, the Employer does not affirmatively make the assertion that the fact Complainant moved equipment without securing the load on February 13th had anything to do with Complainant’s firing though it mentions the incident in its brief. (R’s Brf. 8). Complainant acknowledges his mistake, and asserts that he began chaining down equipment properly after the incident. (Tr. 115). In fact, the very allegation of the safety complaint shows Complainant’s concern with safety after this incident, and does not indicate, as the Employer seems to imply, that Complainant did not care about safety.

Second, phone usage is an oft repeated topic, and makes several appearances on the “Employee Notes” even if as part of events deemed not to have contributed to the firing by Mr. Franklin. Other employees used their cell phones for personal use. Mr. Moore for example, admits to using his phone at work for personal reasons and was not disciplined. (Tr. 36). In response to whether he used his cell phone for personal reasons, Mr. Wilmoth stated that he did and that in fact “everybody does.” (Tr. 237) He also listed the names of five other employees

who used their phone, including Mr. Moore. (Tr. 237-38). Yet despite other employees using their phones for personal reasons, only Complainant, and “probably” one more employee have ever been fired for improper use of his or her cell phone. (Tr. 75) (Mr. Franklin stated that “probably two” people had been fired). Even Mr. Moore admits that Complainant was not the only person who used his cell phone for personal reasons at work, but that he didn’t terminate anybody for it, just gave warnings. (Tr. 67-68). “Disparate treatment of similarly situated employees may also provide evidence of pretext. ‘Similarly situated’ employees are those involved in or accused of the same or similar conduct but disciplined in different ways.” *Douglas*, slip op. at 37 (citing *Speegle v. Stone & Webster Const., Inc.*, No. 06-041, ALJ No. 2005-ERA-6, slip op. at 10 (ARB Sept. 24, 2009)). The disparate treatment in this case is evidence of pretext.

Furthermore, Mr. Franklin testified that “some level of at least casual use of a cell phone for personal reasons at work” is allowed. (Tr. 77). It is also acceptable for employees to be texting, or even playing games on their phones as long as they are not driving, and they are finishing a job and going back to the terminal at the end of the day. (Tr. 77).

Moreover, in regards to the cell phone use, Mr. Moore and Mr. Franklin berated Complainant for *not picking up* his cell phone on March 16, 2012 when he was out on a job. Complainant asserted that he was not required to have a phone at work. (Tr. 123). Mr. Moore claims he told Complainant to leave his phone in his lunchbox. (Tr. 52).¹⁴ Yet despite this, Mr. Franklin states that he would expect Complainant to answer his phone while on a project. (Tr. 82). This conflict between actually having to pick up his cell phone, while not being allowed to use it, is more evidence of pretext. Mr. Moore also told Complainant on March 14th after the argument about securing the ditch witch that if he was going to be on his phone he should be “standing out by the crew” to do so. (Tr. 139). This is contradictory to the alleged company policy.

Third, Complainant was allegedly fired for being argumentative and confrontational. Complainant admits that he could be confrontational. (Tr. 160). He even admitted to once having gotten into a physical fight with a fellow employee. (Tr. 167). The other employee involved in that incident was told by Mr. Franklin (and by Mr. Franklin’s father) to “let it go,” which suggests that the argumentative nature of Complainant was not a real reason for termination. (Tr. 204). Also I note that while allegedly Complainant’s argumentative nature was such that it resulted in his firing, the physical altercation did not even warrant being noted on the Employee Notes. This makes the claim that Complainant was fired for his argumentative nature seem disingenuous. Furthermore, Mr. Eudy and Mr. Wilmoth both admit that they have been in arguments with each other and had “bumped chests” and while their arguments did not turn physical they were not fired for their actions nor counseled for being argumentative. (Tr. 204, 241). This disparate treatment between employees is yet another example of how the alleged reasons for Complainant’s termination were pre-textual. *Douglas*, slip op. at 37. Finally despite the alleged concern over Complainant’s argumentative nature Mr. Moore testified that the incident on March 16, 2012, in which he allegedly argued with Mr. Moore played no role in his firing. (Tr. 68).

¹⁴ Mr. Greene denies that Mr. Moore told him this (Tr. 118), but being as Mr. Moore claims he said it and it is contradictory to the stated company policy, it is still indicative of pretext.

The fact that Complainant was not fired until *after* engaging in protected activity despite allegedly being a problematic employee who used his cell phone and was argumentative smacks of pretext. *See generally Pollock v. Continental Express, Inc.*, No. 07-073 & 07-073, ALJ No. 2006-STA-1, slip op. at 22-23 (ARB April 7, 2010).

Finally, I note that Mr. Moore and Mr. Franklin have changed their stories regarding incidents in Complainant's work history. Mr. Moore seemingly went back and forth multiple times on whether he was or was not at a worksite with Complainant on March 15, 2012 and whether or not he could have spoken to Complainant that day. Mr. Franklin claims at one point that he did not speak to Mr. Moore about the safety allegation incident when Mr. Moore and he discussed Complainant's firing on March 16th but then later admits that he did find out about the incident on the 16th. (Tr. 130, 223). Mr. Moore claims that the March 19th incident of Complainant speaking on the phone was a "tipping point" for him in making a decision to fire Complainant when it was apparent to Mr. Franklin that the firing was going to take place as of March 16th.¹⁵ Mr. Moore later stated that he also had the understanding after his conversation with Mr. Franklin that Complainant would be fired the next Monday contradicting his statement about Complainant's March 19th phone use being the final straw. (Tr. 210, 34). The shifting stories lead me to the conclusion that the reasons for Complainant's firing were pre-textual and the protected activity was a contributing factor in Complainant's firing.

E. Respondents Have Not Shown that They Would Have Suspended Complainant Absent His Protected Activities

The Employer may escape liability only by showing by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant's protected activity. *Warren*, slip op. at 12; 29 C.F.R. § 1978.109(b). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Warren*, at 13 (quoting *Williams v. Domino's Pizza*, No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB. Jan. 31, 2012)). "As the Eleventh Circuit has remarked, '[f]or employers, this is a tough standard, and not by accident. Congress appears to have intended that companies . . . face a difficult time defending themselves.'" *Beatty*, slip op. at 32-33 (quoting *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997)).

In this case the Employer has failed to show by even a preponderance of evidence, let alone clear and convincing evidence that it would have taken the same action absent the protected activity. The sole argument for firing Complainant is that he violated the company cell phone policy and was argumentative and confrontational. (R's Brf. 11). As noted above, these reasons are pre-textual. Not only were other similarly situated employees not fired for the same or similar conduct, but the explanations provided by the Employer fluctuated. Also, the Employee Notes were not complete documentation of employment incidents. It is odd that if the

¹⁵ This incident on March 19th is also contradicted by Complainant, who claims that he was not on his phone. It is further contradicted by the evidence of Complainant's time log which states that he was fired as of 7 am, and he was not actually paid for any work that day. This means that Mr. Moore's statement that Complainant was fired later in the morning, and that Complainant was on the phone, while "clocked" in, is in direct contradiction with the evidence submitted.

company was so concerned about his confrontational nature, an incident such as a physical altercation did not make it to the record, while others did. The Employer must show that it “would have” terminated Complainant not only that it “could have.” *Douglas*, slip op. at 36 n.108. (citing *Kester v. Carolina Power & Light Co.*, No. 02-007, ALJ No. 2000-ERA-031, slip op. at 12-13 (ARB Sept. 30, 2003)). Finally, Mr. Franklin testified that if any one of the series of factors for Complainant’s firing were removed, he would not have been fired. (Tr. 95). This means that if the contributing factor of the protected activity were removed, Complainant would not have been fired. Therefore, Respondents have not shown by clear and convincing evidence that they would have fired Complainant absent his protected activity.

F. Mr. Franklin and Mr. Moore Are Personally Liable

Complainant has requested that both Mr. Franklin and Mr. Moore be held personally liable. Respondents present no argument against this. The statute provides that “[a] person may not discharge an employee” for conduct protected by the statute. 49 U.S.C. § 31105(a)(1). The regulations define a person as “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, more any other organized group of individuals.” 29 C.F.R. § 1978.101(k).

In *Wilson v. Bolin Associates, Inc.*, 1991-STA-41 (Sec’y Dec. 30, 1991), the respondent made the argument the shareholder and chief executive officer could not be held liable for damages as an employee of the respondent. In response, the “Assistant Secretary contend[ed], however, that Bolin’s liability flows from the express language of the STAA, and that it is unnecessary to pierce the corporate veil.” *Wilson*, slip op. at 2.

The Secretary went on to hold the following:

I agree with the Assistant Secretary that Bolin, as the person who discharged Complainant, is liable under the express language of Section 2305, and that it is unnecessary to employ the doctrine of piercing the corporate veil. Thus, I do not accept the ALJ’s conclusion that the doctrine is appropriate here. I note, however, that the ALJ properly pointed out that the express language of the STAA permits individual liability. R.D. and O. at 4. The statute provides that “[n]o *person* shall discharge” (emphasis added) an employee for conduct protected by the STAA, and defines a person as “one or more individuals. . . .” 49 U.S.C. §§ 2305(a), (b); 2301(4).¹⁶ Not only is this approach permitting individual liability consistent with that taken under Section II(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1988), an analogous employee protection provision, but the approach also finds support in other substantive law areas with similar statutory language, *i.e.*, Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9607 (1988). *See Donovan v. Diplomat Envelope, Inc.*, 587 F. Supp. 1417, 1425 (E.D.N.Y. 1984), *aff’d*, 760 F.2d 253 (2d Cir. 1985) (unpublished); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1541-45 (W.D. Mich. 1989).

¹⁶ The statute has actually been amended and this citation no longer exists. However the definition remains contained in the regulations at 29 C.F.R. § 1978.101(k).

See also *Smith v. Lake City Enterprises, Inc.*, Nos. 08-091 and 09-033, ALJ No. 2006-STA-32 (ARB Sept. 24, 2010) (Employer made the argument that she was acting in the course of her employment and therefore was not individually liable; the ALJ rejected this argument and the ARB affirmed). Therefore, in spite of stereotypical notions of corporate law, the STAA has been interpreted to expressly allow for personal liability. See also *Gagnier v. Steinmann Transportation, Inc.*, 1991-STA-46, slip op. at 4 n.4 (Sec’y July 29, 1992).

In *Anderson v. Timex Logistics*, No. 13-016, ALJ No. 2012-STA-11 (ARB April 30 2014), the ARB affirmed the individual liability of one of the employees who discharged the complainant. The ARB noted that “[a]n integral factor for determining individual liability under the Act is whether an individual exercises control over the employee.” *Id.*, slip op. at 8 (citing *Smith*, slip op. at 9). “Such control includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant.” *Smith*, slip op. at 8 (citing *Williams v. Lockheed Martin Energy Sys., Inc.*, No. 98-059, ALJ No. 1995-CAA-010, slip op. at 9 (ARB Jan. 31, 2001)). In the case of *Anderson*, one of the individuals held individually liable was the respondent’s sole owner and made the final decision to fire the complainant. *Anderson*, slip op. at 8. The other individual who was not held individually liable, was not an owner and testified that it was not his duty fire people, he only recommended termination. *Id.*, slip op. at 9. In *Smith v. Lake City Enterprises, Inc.* the president and sole shareholder of the company at issue was individually liable for violating the STAA. *Smith*, slip op. at 8. The person in *Smith* who was found not liable only advised the sole shareholder but did not exercise sufficient control over the complainant in that case. *Id.* It is possible for more than one person to be held liable—in *Gagnier*, the Secretary affirmed holding two employees of the respondent personally liable because “[t]he termination decision was made by [both individuals], and another manager to some extent.” *Gagnier*, slip op. 4 n.4.

In the case before me, Mr. Moore clearly had the authority to fire Complainant. He testified that after conversing with Mr. Franklin, he made the decision to fire Complainant. (Tr. 32). He was also the one who spoke with Mr. Greene on March 19th and told him that he was fired. (Tr. 35). Mr. Franklin testifies that he “stood behind [Clint’s] decision to fire him.” (Tr. 80), that Mr. Moore had the “direct authority to terminate Mr. Greene,” (Tr. 93) and that he agreed with the decision. (Tr. 94). Mr. Franklin is the owner of CenCon, as well as the President and Chief Executive Officer of the company. (Tr. 71). Both these men had the authority over Complainant to fire him. Mr. Franklin had the authority, as the owner of the company to stop Mr. Moore from firing Complainant. Therefore, I find that both of these men had sufficient control over Complainant. Pursuant to case law, both Clint Moore and Erik Franklin are held individually liable for their actions in violating the STAA.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO DAMAGES

A. Reinstatement

Complainant asks for reinstatement “in the event [CenCon] recommences operations in Kansas and has any truck driving job available.” (C’s Brf. 35). Reinstatement is an automatic remedy. *Dale v. Step 1 Stairworks, Inc.*, No. 04-003, ALJ No. 02-STA-030, slip op. at 6 (ARB

Mar. 31, 2005). However, “circumstances may exist in which alternative remedies are preferred.” *Id.*, slip op. at 9. For example, reinstatement may be impossible or impractical because the company no longer has people in that job occupation the complainant had or there are no positions for which the complainant qualifies. *Id.* In this case, Mr. Franklin explains that the company no longer operates in Kansas. (Tr. 73). Their Wellsville location shut down and there were no plans to reopen it as of the time of the hearing. (Tr. 73). There is no one performing Complainant’s former job. (Tr. 73). The company has shrunk—it employed 19 people in two offices as of March 2012 but now only employs four employees due to the loss of a phone company contract. (Tr.74). No employees were transferred from the Wellsville location to the Scottsbluff, Nebraska location. (Tr. 73). Even Complainant acknowledges the decline in business. I find that as a result of the closure of the Kansas locations, it is currently impossible to order reinstatement and it is impractical to order reinstatement “in the event” operations begin again in Kansas. The request for reinstatement is denied.

B. Back Pay and Mitigation of Damages

Because Respondents violated the Act, Complainant is entitled to compensatory damages, “calculated in accordance with the make-whole remedial scheme embodied in” Title VII of the Civil rights Act of 1964. *Dale*, slip op. at 4. “Back pay liability begins when the employee is wrongfully discharged or suspended.” *Id.* As discussed above, Mr. Greene was wrongfully terminated and is therefore entitled to compensatory damages. Respondents make no arguments regarding damages, other than to state that Complainant was only unemployed for a month, found comparable employment and voluntarily quit that employment to pursue a college education and find other comparable employment.

Mr. Greene is entitled to pay for the 3.4 weeks¹⁷ he was out of work between his termination on March 19, 2012 and April 13, 2012. In 2011 Complainant earned \$8,427.00 and in 2012 Complainant earned \$8,332.50 which means he earned a total of \$16,759.50 for his 24 weeks of employment with the company. (CX 10, 3). \$16,759.50 divided by 24 weeks equals a \$698.31 weekly rate.¹⁸ As he was unemployed for 3.4 weeks Mr. Greene is entitled to \$698.31 x 3.4, or \$2,374.25. Complainant does not ask for back pay during the period which he worked for his next employer, K & W Underground. (Brf. 35).

A successful complainant is entitled to damages, but he is required “to mitigate his damages through the exercise of reasonable diligence in seeking alternative employment. The burden is on an employer to establish any failure by a wrongfully discharged complainant to mitigate damages.” *Pollock*, slip op. at 25 (citations omitted). Mitigating damages requires seeking “substantially equivalent employment” and also acting “to maintain such employment.” *Id.* (citations omitted). An employer can show a failure to mitigate by establishing that “‘substantially equivalent positions were available [to the complainant] and he failed to use reasonable diligence in attempting to secure a position.’ . . . A ‘substantially equivalent position’ provides the same promotional opportunities, compensation, job duties, working conditions and

¹⁷ He was out of work for 3 weeks and 3 days, or 24 days. $24/7=3.4$ weeks.

¹⁸ Complainant’s brief states that the average weekly wage was \$994.05 despite listing the equation as also “\$16,759.50/24.” It appears there was a miscalculation in the math.

status.” *Dale*, slip op. at 12-13 (quoting *Hobby v. Georgia Power Co.*, No. 98-166, 98-169, ALJ No. 1990-ERA-30, slip op. at 19-20 (ARB Feb. 9, 2011)).

In this case, Respondents present very little argument that Complainant failed to mitigate damages. Respondents explain that Complainant was only unemployed for one month before “finding comparable employment.” (R. Brf. 11). However, Respondents make the assertion that Complainant “voluntarily quit that employment, pursued college education, and was able to find other employment comparable to his pay at CenCon.” *Id.* Respondents bear the burden to show that Complainant failed to mitigate damages. As noted above, the complainant must not only seek employment, but also act to “reasonably . . . maintain such employment.” *Pollock*, slip op. at 25. “A failure to mitigate damages through the retention of employment will reduce the employer’s back pay liability in that the back pay award will be reduced by no less an amount than that which the complainant would have made had he remained in the interim employment throughout the remainder of the back pay period.” *Id.*, slip op. at 25-26 (citing *Johnson v. Roadway Express, Inc.*, No. 01-013, ALJ No. 1999-STA-005, slip op. at 10 (ARB Dec. 30, 2002)).

Complainant has conceded that he was “paid about the same at K& W Underground.” (Brf. 35). Complainant also stated that the employment was “substantially equivalent to what he had.” (Tr. 27). Complainant left his job at K&W underground because he ran out of medication for his PTSD, which he developed as a result of his military service. (Tr. 149). The stress levels of the job and his having an adverse reaction to the medication made it difficult to work. (Tr. 149). Complainant tried to show that because “the equipment wasn’t near the caliber of what was at CenCon” he was too stressed to continue to work at this new job. (Tr. 149). However, it is established on the record by Complainant that this new employment was “substantially equivalent.” (Tr. 27). Furthermore, Complainant acknowledges that he was “paid about the same at K&W Underground” and does not seek back pay damages for this time frame. It is true that a “substantially equivalent position” provides the same promotional opportunities, compensation, job duties and working conditions, etc. as the job from which he was terminated, but the fact remains that Complainant conceded substantial equivalency during the hearing.

Johnson v. Roadway Express, Inc., No. 01-013, ALJ No. 1999-STA-005, slip op. at 10 (ARB Dec. 30, 2002), involved a complainant who did not take a job and the employer contended this was a failure to mitigate. The ARB noted that the job was not substantially equivalent to the job he was terminated from, and therefore complainant had not failed to mitigate damages. In another case, *Clifton v. United Parcel Service*, No. 97-045, ALJ No. 94-STA-0016, slip op. at 7 (ARB May 14, 1997), an employee voluntarily left a new job and the respondent in that case also argued that his voluntary resignation showed a failure to mitigate. The ARB stated that the employer had failed to prove a failure to mitigate because the employee successfully argued that he left that job because it was not substantially equivalent—he had to work seven days a week which was not required in his previous job. *Id.* These cases are distinguishable from the case before me. In this case, Complainant has conceded the substantial equivalency of his subsequent job and he concedes that he left it voluntarily. The PTSD he suffered from was a result of his military service, not the adverse employment action taken by CenCon. Therefore I find that Respondents, despite very little argument, have met their burden

to show that Complainant failed to mitigate damages by leaving his substantially equivalent employment. Complainant had a duty to maintain that employment.

The purpose of back pay “is to return the wronged employee to the position he would have been in had his employer not retaliated against him.” *Smith*, slip op. at 21 (citing *Assistant Sec’y & Bryant v. Mendenhall Acquisition Corp.*, No. 04-014, ALJ No. 2003-STA-036, slip op. at 7 (ARB June 30, 2005)). I find that to award damages for the time after Complainant voluntarily left his new job, and for the time that he went to college would be to give Complainant a windfall. Therefore the total amount of back pay damages awarded is \$2,374.25.

“Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 and will be compounded daily.” 29 C.F.R. 1978.105(a)(1).

C. Mr. Greene is Not Entitled to Punitive Damages

Under 49 U.S.C. § 31105(b)(3)(C), a successful complainant may be entitled to punitive damages “in an amount not to exceed \$250,000.” The statute does not specify the standard under which an ALJ may award punitive damages, but the ARB has held that damages may be awarded when a respondent has demonstrated a “reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law.” *Youngerman v. United Parcel Serv., Inc.*, No. 11-056, ALJ No. 2010-STA-047, slip op. at 5 & n.16 (ARB Feb. 27, 2013). Thus the standard for punitive damages has two prongs: respondent must have shown a reckless or callous disregard of plaintiff’s rights, and must have intentionally violated the law. The record does not sufficiently establish that Respondents intentionally violated federal law. Mr. Moore and Complainant got into a heated argument about the securing of the ditch witch to the load, but as stated previously whether or not the load was secured properly is not clear from the record. It follows therefore that Mr. Moore could have reasonably believed the load was properly secured. Accordingly, the evidence does not show an “intentional violation” of federal law.¹⁹ This case is in contrast to the case *Anderson v. Timex Logistics* where the employer “set [the complainant] up for failure” and then “did not help him get home” after firing and withheld money from him for no reason. *Anderson*, slip op. at 18. This case is also dissimilar to *Becker v. Smithstonian Materials, LLC*, 2013-STA-00050, slip op. at 30 (July 31, 2015) in which the prosecuting party “did intentionally violate federal law when it failed to register” a vehicle, and sent an employee home and yelled and cursed at him in front of other employees when he refused to drive the vehicle. Punitive damages are not warranted in this case.

D. Mr. Greene is Entitled to Compensatory Damages

Complainant requests compensatory damages in the amount of \$50,000. Complainant is entitled to payment of compensatory damages pursuant to 49 U.S.C. § 31105(b)(3)(A). The

¹⁹ I note that I believe Respondents did act with reckless and callous disregard for Complainant’s rights however. Mr. Greene objected to the way the load was secured and Mr. Moore and Mr. Greene got into a heated argument. Mr. Moore then told Mr. Greene that he could “walk” (Tr. 130) if he didn’t like how it was secured. This type of behavior in front of other co-workers and employees raises the possibility that other employees would be deterred from exercising their own rights under the STAA.

amount to award is based on the record evidence and compensatory damages made by courts in similar cases. *Smith*, slip op. 25 (citing *Hobby*, slip op. at 32). It is possible in STAA cases to award compensatory damages based on testimony alone, without medical evidence. *Ferguson v. New Prime Inc.*, No. 10-075, ALJ No. 2009-STA-047, slip op. at 15 (ARB Aug. 31, 2011) (The employer in that case made the argument that the record contained “no evidence” of an emotional injury but the ARB found that “[a]lthough [the complainant’s] testimony was unsupported by medical evidence, it was unrefuted and, according to the ALJ credible.”). In *Ferguson*, the judge awarded \$50,000 in compensatory damages but the complainant in that case was out of work for 62 weeks. *Id.* In *Fink v. R&L Carries Shared Services, LLC*, No. 13-018, ALJ No. 2012-STA-006, slip op. at 4 (ARB March 18, 2014), an award of \$100,000 was affirmed, but the complainant in that case had lost his home which he had lived in for years. In *Carter v. Marten Transport. Ltd.*, Nos. 06-101& 159, ALJ No. 2005-STA-63, slip op. at 15 (ARB June 30, 2009), the complainant was awarded \$10,000 in compensation for emotional distress based on the testimony alone. In *Youngerman*, the ALJ awarded a \$5,000 award for depression and distress and the employee was only out of work for 10 days. *Youngerman*, slip op. at 18-19.

Complainant in this case testified credibly that he felt devastated after the firing, that he felt “worthless,” and as if he could not provide for himself and his wife. (Tr. 151). He testified that there were hobbies that he could not participate in, and that he had “just now regained” (after two years) his footing due to the shock of being fired, and that speaking of it brought back “some memories and feelings [and] emotion that [he’d] rather not face.” (Tr. 156). He does not have evidence of medical bills, but testified credibly as to his emotional distress after the firing.

This situation is not as extreme as *Ferguson* in which the employee was out of work for over a year, nor is this situation like the one in *Fink* in which the complainant lost his home. This situation is greater than that of *Youngerman* in which the complainant was only out of work for 10 days. It is similar to a situation like *Carter* in which the complainant in that case also described himself as feeling depressed, being down, and worthless. I find that due to Complainant’s credible testimony regarding emotional distress, \$10,000 is an appropriate amount for compensatory damages.

E. Mr. Greene is Entitled to Injunctive Relief

Complainant asks for an abatement of the violation. “The STAA provides that, if the Secretary decides on the basis of a complaint that a person violated the STAA, the Secretary shall order the person to (1) take affirmative action to abate the violation.” *Smith*, slip op. at 20 (citing 49 U.S.C.A. § 31105(b)(3)(A)). Complainant has asked that (1) the Employer post a copy of the decision for 90 consecutive days in all places where employee notices are customarily posted, and (2) that the Employer expunge all references to his discharge for engaging in a protected activity from its personal records. I have the discretion to grant the relief sought and grant these two forms of injunctive relief. *Shields*, slip op. at 30-31.

F. Attorney's Fees

Complainant is granted leave to file a petition for attorney fees and costs pursuant to 29 C.F.R. § 1978.109(d)(1). Complainant has thirty days from the date of this order to submit a petition for attorney fees, after which Respondents have thirty days to file objections.

CONCLUSION

Mr. Greene engaged in protected activities on March 14, 2012 when he complained about the load securement of a ditch witch and then attempted to not drive the vehicle. On March 19, 2012 he suffered termination—an adverse employment action—and his protected activities were a contributing factor in Respondents' decision to take that action. Respondents were unable to show by clear and convincing evidence that they would have fired him absent his protected activities. Thus Mr. Greene is entitled to back pay in the amount of \$2,374.25 with interest, compensatory damages in the amount of \$10,000, as well as the forms of injunctive relief described above.

SO ORDERED.

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within fourteen (14) days of the date of issuance of the administrative law judge’s decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, 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).