U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 June 2015

CASE NO.: 2014-STA-55

In the Matter of:

TODD D. HOFFMANN,
Complainant

v.

NOCO ENERGY CORPORATION,
Respondent

Appearances:

Counsel for the Complainant:
Mark R. Walling, ESQ.

Counsel for the Respondent:
Thomas A. Desimon, ESQ.

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER GRANTING RELIEF

I. JURISDICTION

This proceeding arises under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 [hereinafter "the Act" or "STAA"], 49 U.S.C. § 31105 (formerly 49 U.S.C. app. § 2305), and the applicable regulations at 29 C.F.R. Part 1978. The Act protects employees who report violations of commercial motor vehicle safety rules or who refuse to operate vehicles in violation of those rules.

II. PROCEDURAL HISTORY[1]

Complainant, Mr. Todd D. Hoffmann (hereinafter "Hoffmann"), filed a complaint of discrimination with the Department of Labor, under Section 405 of the Act, against NOCO Energy Corporation (hereinafter "NOCO"), on or about July 2, 2013, alleging he was discharged by the respondent in retaliation for making protected-activity complaints related to violations of Department of Transportation hours-of-service regulations. The complaint was investigated by the Department of Labor which found no reasonable cause to believe the respondent violated the Act. On or about May 27, 2014, the Secretary issued her Findings dismissing the complaint. (RX 7). By letter, dated June 16, 2014, Mr. Hoffmann timely objected to the Secretary's Findings and requested a hearing. (CX 6). I issued a Notice of Hearing, on July 2, 2014. The matter was tried, on October 7, 2014, in Buffalo, New York.

Complainant's exhibits ("CX") 1-8, 13, and 15-16 and Respondent's exhibits ("RX") 1-3 and 6-8 were admitted in evidence. [2] Administrative Law Judge exhibit ("ALJ") I, Stipulations, was admitted without objection.

III. STIPULATIONS AND THE PARTIES' CONTENTIONS

A. Stipulations

The parties agreed to, and I accepted, the following stipulations of fact (TR 9-10):

-The respondent is a motor carrier engaged in commercial motor vehicle operations, i.e., supplying gasoline, commercial fuels, industrial lubricants, bio-products and home energy fuels, which maintains a place of business in Tonawanda, New York.
-The respondent's employees operate commercial motor vehicles, with a gross vehicle weight of 10,001 pounds or more, in the regular course of business, over interstate highways and connecting routes, principally to transport and deliver fuels.
-The respondent is and was a "person," as defined in the STAA, 49 U.S.C. §31101(3).
-The complainant was hired o/a January 19, 2003, as a truck driver. He was an employee within the meaning of 49 U.S.C. § 31105. His principal job was to transport and deliver propane to commercial and private users.
-The complainant worked as a driver of a commercial motor vehicle with a gross weight in excess of 10,000 pounds used on the highways to transport cargo.
-The complainant held a commercial driver's license (CDL) with special endorsements for driving a tanker truck and transporting hazardous materials.
-The complainant's regular work schedule was 6:00 am to 4:30 pm with periodic "on-call" times for emergency off-hours deliveries.
-On January 10, 2013, the complainant had completed his regular shift and was on-call for the evening.

[1] References in the text are as follows: "ALJX ___" refers to the administrative law judge or procedural exhibits received after referral of the case to the Office of Administrative Law Judge; "CX ___" refers to complainant's exhibits; "RX ___" to respondent's exhibits; and "TR ___" to the transcript of proceedings page and testifying witness' name.
[2] CX 12 was not admitted in toto, but relevant portions were, e.g., Williams' testimony. (TR 57, 105, 191).

-During this on-call period, on January 10, 2013, the complainant was contacted by the secretary for the respondent's operation manager who told him a residential customer had called requesting a home delivery.
-The complainant's employment with respondent ended, on or about January 11, 2013.
- By a letter, dated February 1, 2013, the respondent confirmed the complainant's employment with respondent "ended effective January 11, 2013."
-On or about July 2, 2013, the complaint filed a complaint with the Department of Labor, OSHA, under the provisions of the STAA.
-The complaint was timely filed, i.e., within 180 days of the alleged adverse action.
- On or about May 27, 2014, the Area Director, OSHA, issued "*Secretary's Findings* "finding "there is no reasonable cause to believe that respondent violated" the Act.
- The complainant timely filed objections to the Secretary's Findings on or about Jun 16, 2014.
-The complainant did not, on or before filing his complaint, commence or cause to be commenced, a proceeding under the STAA, had not and was not about to testify in a proceeding under the STAA, had not or was not about to participate in any proceeding under the STAA.
-The complainant is not presently employed and has not been employed since his employment with respondent ended.
[If the Complainant made efforts to find new employment, please agree to and complete the following:]
-The complainant submitted employment applications on the following dates to the following potential employers, whose business is described:

DATE	*EMPLOYER*	*BUSINESS*	*RESULT*
01/18/13	Just Energy	Energy Company	Not hired
01 or 02/13	Main Mobility	Handicap accessibility- Interviewed	Not hired
01 or 02/13	Drum Oil & Propane	Propane & Oil Co.	Not hired
02/13	Autism Services	Development disabilities	Not hired
02/13	Morgan Services Inc	Linen service	Not hired
02 or 03/13	Rosina Foods	Food service	Not hired
02 or 03/13	Latina Blvd Food	Food service	Not hired
03/13	Edu-Kids	Day care	Not hired
03/15/13	Funk Lawn Care	Lawn Treatment- Interviewed	Not hired
03/27/13	Greenfield Health & Rehab.	Health care facility	Not hired
03/27/13	P. S. Elliott Services	Cleaning service	Not hired
03/27/13	Krystal Klear	water supplier	Not hired
04/02/13	Superior Lubricant	- interviewed	Not hired
04/03/13	Whiting Door	door manufacturer	Not hired
04/03/13	Weinberg Campus	maintenance	Not hired
04/03/13	Kreher's	egg company- interviewed	Not hired
04/04/13	Niagara Falls Bridge Comm.		Not hired
04/04/13	Uniland	maintenance	Not hired
04/05/13	Embassy Apartments	apartment complex	Not hired
05/28/13	Family & Children Services of Niagara Inc.	social services	Not hired
06/02/13	Reid Petroleum	energy company 2 interviews	Not hired
06/10/13	Pure Water of WNY	bottled water service	Not hired
06/24/13	Babcock Lumber	lumber company	Not hired

06/26/13 We Care Transportation- transportation van company	Not hired
06/28/13 UNYTS- blood & organ donation	Not hired
07/02/13 ADDS- drug & alcohol rehabilitation	Not hired
07/02/13 Dynabrade- manufacturing	Not hired
07/08/13 Niagara Thermal Products- thermal products	Not hired
07/10/13 Lakeshore MHC- mobile home maintenance	Not hired
07/10/13 Grand Island Schools	Not hired
07/10/13 Hershey Ice Cream	Not hired
07/23/13 Absolut Care- health care facility	Not hired
08/06/13 LoVullo- insurance company	Not hired
08/13/13 McGard- manufacturing	Not hired
08/13/13 Chason Affinity- apartment complex	Not hired
08/13/13 Stainless Steel Brake Corp.- brake manufacturer	Not hired
08/13/13 FedEx- delivery service	Not hired
08/13/13 Coffee Pause – coffee supplies	Not hired
08/13/13 Aspire of WNY – development disabilities	Not hired
09/03/13 Company name unknown (applied through WNY Jobs)- apartments	Not hired
09/04/13 Company name unknown (applied through WNY Jobs)- apartments	Not hired
09/04/13 Heritage Centers – development disabilities	Not hired
09/04/13 Sisters of St Frances- retirement facility	Not hired
09/20/13 CSI International – manufacturing	Not hired
09/20/13 Bassett Park Manor – health care facility	Not hired
09/23/13 Irish Propane – energy company – interviewed	Not hired
10/30/13 Elderwood (pharmacy driver position) – health care facility-interviewed	Not hired
12/09/13 Company name unknown (applied through WNY Jobs)- apartments	Not hired
12/09/13 Company name unknown (applied through WNY Jobs) – deliveries	Not hired
12/10/13 Cazenovia Recovery- drug & alcohol treatment	Not hired
12/10/13 PCB Piezotronics Water supply	Not hired
12/13/13 Frito Lay Snack company	Not hired
12/17/13 Clarence Schools School district	Not hired
12/18/13 Company name unknown - Unknown (maintenance technician position)	Not hired
12/18/13 Sierra Management Apartment management	Not hired
12/26/13 Elderwood (maintenance position)Health care facilities	Not hired
12/26/13 Company name unknown - Unknown	Not hired
12/26/13 KBS Commercial cleaning	Not hired
12/26/13 Genesis Logistics Trucking company	Not hired
1/19/13 Roy's Plumbing - Plumbing company	Not hired
01/22/14 Company name unknown (applied through WNY Jobs' Apartment complex*)*	Not hired
02/03/14 Home Depot - Lockport Hardware store	Not hired
02/05/14 Home Depot - Williamsville Hardware store	Not hired
02/06/14 Carquest - Auto parts company	Not hired
05/21/14 Advanced Auto - Auto parts company	Not hired
06/25/14 NAPA - Auto parts company	Not hired
06/30/14 Carquest - Auto parts company	Not hired

07/08/14 Hogan & Willig - Law firm	Not hired
07/19/14 Weatherpanel - Material supply company	Not hired
07/29/14 Heritage Centers - Developmental disabilities	Not hired
07/29/14 Cardinal Health - Pharmaceutical delivery	Not hired
08/08/14 Company name unknown - Apt. painter/maintenance (applied through WNY Jobs)	Not hired
08/12/14 Heinrich Chevrolet - Car dealership	Not hired
08/14/14 Dayferts Truck & Auto- Car repair	Not hired
08/25/14 Karauction Car - auction company	Not hired
09/05/14 All Pro Parking - Parking company	Not hired
09/16/14 Buffalo Pumps - Manufacturing	Not hired
09/16/14 Holiday Inn - Hotel company	Not hired
09/23/14 Baker Victory Services - Health care facility	Not hired
09/24/14 Genisis Logistics - Trucking company	Not hired
09/24/14 Stanley Falk School - School	Not hired
09/24/14 Chudy Paper - Paper company	Not hired
09/26/14 Hausrath Snowplow-landscape co.	Hired, starting date of mid-Nov. 2014 or later.

-The office of Administrative Law Judges, U.S. Department of Labor properly exercises in personam and subject matter jurisdiction to hear this matter.
- The parties waive the 30-day requirement for the issuance of a decision, under 29 C.F.R. § 1978.109(a).

B. The Parties' Contentions:

1. *Complainant*:

The complainant argues that he complained five or six times to NOCO's Operations Manager, David Williams, and his predecessor, that NOCO's on-call system was forcing him to work hours in excess of the limits allowed by 49 C.F.R. 395.3. On January 10, 2013, he told Mr. Williams the same thing after which Mr. Williams told him he was "done" and to turn in his business items. Mr. Williams had testified that Mr. Hoffman had refused to make the January 10, 2013 on-call delivery, but later admitted that he had authored an email to Michelle Tinney, on January 11, 2013, stating, "Todd said he would go." (TR 181, CX 16). Mr. Hoffman had been on duty for 10.22 hours, on January 10, 2013, and believed making the on-call out-of-gas customer delivery would have taken about four hours which would have caused him to exceed his 14-hour limitation. Mr. Hoffman had not worked from the date his employment with NOCO ended until his projected mid-November 2014 start date with snow-removal employer Hausrath Landscaping. He had previously applied for 83 jobs, submitted numerous resumes, and took classes to enhance his appeal. Both Mr. Hoffman and his wife suffered emotional distress and mental pain for being out-of-work, having no income from early February 2013 until April 2013, and lacking health insurance coverage. Finally, the complainant believes punitive damages are appropriate in this case.

2. *Respondent*:

The Respondent argues against the complainant's contentions averring that NOCO neither discharged nor discriminated against the complainant and took no action against him in response to complaints related to commercial motor vehicle safety regulations, standards, or orders. Mr. Hoffman never made such complaints. Mr. Hoffman was the assigned "on-call" delivery truck driver on January 10, 2013 pursuant to a predetermined schedule and had not exceeded his hours of service limitations. In fact, for that work week, January 6-12, 2013, he had not exceeded the 60/70 service-hour limitation having worked a total of only 37.97 hours. He unilaterally and voluntarily quit, i.e., saying he was "done," due to his disagreement over which delivery truck driver should be responsible for the emergency, "on-call," delivery of fuel oil to a customer to be made after regular business hours, on January 10, 2013. He believed another driver, who had originally had the delivery scheduled, should make it. Such a concern is not a "protected activity." Further, Mr. Hoffman had informed another NOCO employee that he intended to quit once his spouse became employed. Mr. Williams testified that had the complainant merely declined the on-call delivery, he would have been subject to NOCO's progressive discipline policy and likely still be working for NOCO. The day after this, January 11, 2013, Mr. Hoffman made a Facebook posting stating he was intending to go to a bar "to celebrate my retirement."

IV. ISSUES

I. Whether, under 49 U.S.C. § 31105(a)(1)(a), the respondent discharged, disciplined or discriminated against an employee, to wit the complainant, regarding pay, terms or privileges of employment, because, he had filed complaints related to a violation of a commercial motor vehicle safety regulation, standard, or order?

II. If the respondent so violated 49 U.S.C. § 31105, what are the appropriate sanctions or damages?

V. DISCUSSION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact and Law

The facts relating to the initial stages of this controversy are essentially not in dispute and were accurately set forth by the employer. Mr. Williams had been the propane operations manager at the Akron facility since 2009. (TR 139, Williams). The complainant was employed as a propane delivery truck driver at NOCO's Akron, New York, Plant for about ten years, as of January 10, 2013. (TR 41, Hoffman). He worked full time for part of 2011 and 2012 with regular duty hours of 6:00 am to 4:30 pm. (TR 46). In 2011, he voluntarily changed his status from full-time to "seasonal" whereby he voluntarily took a number of months off each year, including , i.e., furloughed May through September 2011, and seven months in 2012, from May 2012 returning in November 2012. (TR 43, 69, 97, Hoffman). During his "off" periods he

would collect unemployment. (TR 33, Mrs. Hoffman). Like all other delivery drivers, he was expected to perform "on-call" duties, beyond his regular work day, on a schedule predetermined a month in advance. (TR 45, 70, Hoffman). He testified the on-call driver "would have to go out and handle the call if it was an out-of-gas (call) . . ." (TR 45). Each day had a single driver assigned to be on-call. (TR 70-71, Hoffman). On-call drivers would be paid their hourly rate if they made a delivery in addition to a regular $15.00 on-call bonus payment. (TR 72, Hoffman). Mr. Hoffman added, on cross-examination, that "normally, if there were still guys working, we would try to get them to handle the call because we knew we were on call the rest of the evening. . ." (TR 84, Hoffman).

NOCO had a policy memorandum concerning "on-call" procedures. (CX 8). It divided the drivers into two groups, one for the East and one for the West. (TR 141-142, Williams). Messrs. Hoffman and Reiss were among the four drivers in the East group. The policy was discussed at the December 1, 2012 safety meeting and no one protested.[3] (TR 142-3, Williams).

On January 10, 2013, Mr. Hoffman worked his regular shift, 6:00 am to 4:30 pm and had been scheduled to be on-call. (R 46, Hoffman). He was the only one on call. (TR 75). He took NOCO's pickup truck home to be able to fulfill his on-call responsibilities. (TR 81-82, Hoffman). He had not exceeded his 14-hour on-duty period or the 11-hour driving period within 14 hours limitations. (TR 86, Hoffman). In fact, his assigned delivery truck "engine-on-time" equaled three hours, fifty-one minutes, and thirty seconds of engine running time comprised of 2:21:40 moving and 1:29:50 with the engine idling. (RX 1; TR 144-147, Williams). He claimed he was paid for 10.22 hours that day. (TR 47, Mr. Hoffman). Mr. Hoffman had previously accepted and been paid for on-call work, most recently on January 2 and January 6, 2010, apparently without incident. (TR 66-69; Mr. Hoffman; RX 2). In fact, between January 1, 2012 and January 10, 2013, he earned $420 in on-call bonuses, equating to 28 occasions. (CX 11; TR 44). RX 1 is a NOCO vehicle use tracking report for January 8-10, 2013. (TR 143, Williams). RX 2, a printout of Mr. Hoffman's January 2010 work hours, reflected 10.22 hours. (TR 148-149, Williams). For the entire week of January 6, 2013, Mr. Hoffman had a total of 37.97 work hours and had not exceeded the 60/70 hours of service limitations of 40 C.F.R. Part 395. (CX 11; CX 9; RX 2).[4]

On January 10, 2013, NOCO Propane Operations Assistant, Nicole Roth, received an "out-of-gas" call from an Attica, NY, customer. (TR 106, 110, Roth). She determined Mr. Hoffman was the on-call driver, the customer was in his area, and called his cell phone to make the assignment. (TR 109-111,113, Roth). When he did not answer, she asked another driver, Ricky Reiss, to call him and ask him to call her back. (TR 112, Roth; TR 17, Mrs. Hoffman). Reiss subsequently left a voicemail for Mr. Hoffman who later called Ms. Roth. (TR 112, Roth). He was on his way home. (TR 48, Hoffman). He seemed agitated to her. Although Ms. Roth conveyed the information regarding the needed on-call propane delivery on the telephone, the parties dispute the substance of the telephone call. (TR 47-48). Ms. Roth related that Mr.

[3] Mr. Hoffman was not at the November 2012 safety meeting and did not recall if there was a December 2012 safety meeting. (TR 78, Hoffman). He had not returned to work until December 2, 2012. (TR 97).

[4] He was off on January 6 and January 9, 2013. CX 11 appears to illustrate he may have exceeded the 60/70-hour weekly limitation in early 20**12** but it appears complaint's counsel has miscalculated, e.g., in one case counting eight days where the driver would have been under 70 hours, and the other instances involved tenths of an hour, yet a technical violation.

Hoffman said he was going to dinner and that Mr. Reiss had the ticket. She testified that Mr. Reiss asked if he should take the assignment and she responded it was not up to her. It was NOCO's policy that the on-call driver was supposed to take all service calls. (TR 120, Roth). When asked whether that was true irrespective of hours of service, she responded that she knew nothing about hours of service. (TR 120, Roth). In any case, Ms. Roth felt she needed to call Mr. Williams, NOCO's Operations Manager, about the situation and, in fact, did so. (TR 113-114, Roth; TR 153-5, Williams). Finally, Mr. Hoffman had never complained to her about hours of service.

There is no dispute that Mr. Williams and Mr. Hoffman then engaged in three to four telephone calls regarding the needed delivery, his job, and that the latter did not make the delivery. (TR 18, Mrs. Hoffman). Both Mr. and Mrs. Hoffman testified they were both present for and heard the calls. (TR 49-50). Both Mr. Williams and Mr. Hoffman memorialized their recollection of the conversations in writing. Mr. Hoffman did so in handwritten notes (CX 2) and Mr. Williams did so in an email (CX 16).

Mr. Hoffman testified that Ms. Roth told him of the out-of-gas customer needing a delivery and asked if he wanted to handle it or if she should get someone else. (TR 48, Hoffman; CX 2). He claims she gave him a choice. (TR 85, Hoffman). He related he told her she should get someone else, i.e., that Ricky Reiss had been assigned that ticket for over a week and he should take care of it. (TR 48, Hoffman; CX 2).

Despite Mr. Hoffman's claims to the contrary, Ms. Roth testified she never gave him the "option" to decline the delivery. (TR 47-48, Hoffman; TR 114, Roth). In fact, she said there was no discussion whatsoever regarding the optional nature of his responsibility for the delivery. (TR 114, Roth). She related the telephone call focused on Mr. Hoffman's claims that Mr. Reiss, rather than he, was responsible for making the delivery because it had been previously placed on the latter's regular delivery schedule and had not been made. (TR 115, Roth; TR 49, Hoffman). She added that there was never any discussion of Mr. Hoffman's hours of service, hours of service limitations, or concern over exceeding allowed hours. (TR 115, Roth).

Mr. Hoffman testified that about 6:00 pm, Mr. Williams called him asking why he had not taken the assignment. (TR 49, Hoffman; CX 2). He explained to Mr. Williams that Ms. Roth had given him the option of going or giving the call to someone else. Mr. Williams related that Hoffman told him it was Reiss' ticket and the latter should handle it. (Williams). Mr. Williams said he would get back to him. (TR 49, Hoffman). Mr. Williams and Mrs. Hoffman agreed this was the substance of their first telephone call. (TR 18-19, Mrs. Hoffman). Mr. Hoffman claims he did not mention Mr. Reiss during that very quick call. (TR 87). Mr. Williams telephoned Mr. Reiss to discuss the matter. (TR 156-7, Williams).

In their second telephone call, Mr. Hoffman testified that Mr. Williams again asked why he had not taken the assignment and if he was refusing it. (TR 86-88, Hoffman; CX 2). He reiterated that Ms. Roth had given him the choice of doing so or not, he believed someone else was handling it and the entire matter was being handled wrong. He claimed he responded to Mr. Williams that he was not "refusing the call" and wanted to see him the next morning at the office to discuss the situation. (TR 50, Hoffman; CX 2). He testified while he did not recall, he could have said to Mr. Williams during this call that it was Mr. Reiss' delivery and the latter should have made it earlier in the week. (TR 88, Hoffman). Mr. Hoffman testified that Mr. Williams said he would get back to him and hung up. (TR 50, Hoffman). Mrs. Hoffman essentially agreed that this is what occurred. (TR 19-20, Mrs. Hoffman). Mrs. Hoffman did not say her

husband complained about hours of service until the last call. (TR 21, Mrs. Hoffman).

Mr. Williams testified that, in their second telephone call, Mr. Hoffman concentrated on driver Reiss' responsibility to take the out-of-gas call and raised no "hours of service" concerns. (This was more or less confirmed by Mr. Hoffman's testimony). He claimed Mr. Hoffman became belligerent, advising him that "this is bullshit" and informing him "I am done." (TR 157, 160, Williams). Mr. Williams interpreted this as a resignation which he then confirmed saying, "you're done." (TR 157, 160, Williams). He testified that he believed Mr. Hoffman had refused the assignment. (TR 159, Williams). He initially did not recall Mr. Hoffman saying he would accept the assignment. (TR 177-8, Williams). However, when confronted with his email (CX 16), he admitted Hoffman had agreed to go, but said he did not send him as he had said he was "done." (TR 181, Williams). Mr. Williams reiterated that at no time had Mr. Hoffman raised "hours of service" concerns. (TR 160, Williams). Nor did Mr. Hoffman ever ask to get his job back the next day. (TR 158-159, Williams; TR 90-95, Hoffman). He claimed Mr. Hoffman left a belligerent voicemail telling him to get NOCO's truck out of his driveway. (TR 158, Williams).

Mr. Hoffman testified that, in their third call, Mr. Williams informed him he had gotten someone else to handle the call and that he did not have to worry about taking it. (TR 50, Hoffman; CX 2). He claims to have begun to tell Mr. Williams "how they wanted us to be on call and exceed our hours of service; that we'd been complaining about it at numerous safety meetings; they would get back to us." (TR 50, Hoffman). He asserted that Mr. Williams cut him off saying "he didn't want to get into a pissing match with me, hand in my keys and stuff in the morning and we were done." (TR 50, 88-89, Hoffman). Mr. Hoffman testified that in none of the calls had he told Mr. Williams he was "done," but that in their third call the latter had told him he was "done." (TR 89, Williams). Mrs. Hoffman essentially agreed that this is what occurred. (TR 19-21, Mrs. Hoffman).

There is no dispute that arrangements were then made for Mr. Hoffman to return NOCO's property and for Mr. Williams to retrieve NOCO's pickup truck the next day. (TR 51, Hoffman; CX 2; TR 158,Williams).

Mr. Hoffman testified in detail about the actions he would have had to have taken had he accepted the assignment which all would have taken about four hours with all the required checks, driving and paperwork. (TR 52-53, Hoffman). He believed that taking the service call would have "put me over on both of them (the 14-hour duty period and 11-hour driving period in 14 hours) severely." (TR 86, Hoffman).

In the contemporaneous handwritten notes "outlining" the incident Mr. Hoffman made absolutely no mention whatsoever of raising any hours-of-service concerns with either Ms. Roth or Mr. Williams. (CX 2; TR 92-93, 94-95).

Mr. Williams' January 11, 2013 email concerning the incident, addressed to NOCO's Michelle Tinney, relates that Mr. Hoffman had given Nicole (Roth) a difficult time regarding the on-call assignment and had tried to blame Ricky (Reiss) for not

delivering to the customer earlier in the week. He reported Ms. Roth informed him that Mr. Hoffman, Mr. Reiss, and Francis had discussed the assignment, no one had taken it and she needed him to handle the matter. He discussed it with Mr. Hoffman and Mr. Reiss and determined it was not Mr. Reiss' obligation. When he called Mr. Hoffman back, the latter "said he would go" but that he was "done" and would hand in his things the next morning. Mr. Williams agreed he was "done" and arranged for other employees to handle the assignment and the remainder of the on-call period. (CX 16).

Mr. Williams testified that had the complainant merely declined the on-call delivery, he would have been subject to NOCO's progressive discipline policy and likely still be working for NOCO. He understood the driver hour limitation as them having 10 hours driving time and 14 work hours. (TR 148, Williams).

In a January 10, 2013, 8:59 pm email to Scott Ernst, Mr. Williams wrote that Mr. Hoffman had "elected to leave the company effective today," a decision supported by Bill Zucco. (RX 3). He also wrote Mr. Hoffman had "performance" issues and "expressed dissatisfaction with our policy and procedures." (RX 3; see RX 5 from 2011). In a letter, dated February 1, 2013, NOCO's Human Resources Ms. Catanese, confirmed Mr. Hoffman's employment with NOCO had ended January 11, 2013. (CX 2). With respect to the Facebook entry, Mr. Hoffman testified that the people it was meant for knew he had been fired. (TR 99, Hoffman).

In addition to claiming he had complained to a previous manager, Mr. Williams and General Manager Bill Zucco, regarding NOCO's on-call system and hours of service, Mr. Hoffman claimed that both he and other drivers had complained about the same at NOCO safety meetings, but he could not identify the exact meetings other than some conducted by Mr. DeVita. (TR 46, 95, Hoffman). I observe that despite his testimony that he had made such complaints "six or seven times" earlier, "over the years," NOCO nevertheless allowed him to return for further seasonal work in 2012 and he testified no one had ever threatened to fire him. (TR 69). He testified that fellow salesman Mr. Richard DeVita, he and others had raised the issue many times. (TR 46, 95-6, Hoffman). Additionally, drivers Dave Lang and Dave Williams had raised questions about it. (TR 96, Hoffman). He added that "[A]nd it was always told to us that they would check on it and they would get back to us, and nothing was ever done about it." (TR 46-47, Mr. Hoffman). Mr. Hoffman claimed there were many days when he exceeded his hours of service limitation but could not specify any particular day.[5] (TR 96, Hoffman).

Richard DeVita has worked for NOCO for ten years, the last five of which he has been responsible for its safety meetings and training. (TR 122-123; DeVita). He testified Mr. Hoffman had attended the December 13, 2013 safety meeting.[6] (CX 15). But, neither he nor anyone else voiced any concern about their hours-of-service at that meeting or any other meeting he had conducted. (TR 128, DeVita). Nor had Mr. DeVita ever raised the topic. (TR 134, DeVita).

[5] CX 11 appears to illustrate less than strict compliance with the 60/70-hour work week requirement, in early 2012.
[6] 2012? (TR 97).

On January 20, 2013, Mr. Hoffman filed an unemployment claim with the State of New York which was initially contested as it was determined he had voluntarily resigned from NOCO. (CX 4). That finding was reversed following a hearing by a state unemployment administrative law judge having determined he had been discharged. (CX 4; CX 12 transcript; TR 57-8). Mrs. Hoffman testified about their 2011-2013 tax returns and income. (TR 22-25, Mrs. Hoffman). In 2011, Mr. Hoffman was paid $27,000 by NOCO for part-year work and $8,100 in unemployment compensation for the time he was on furlough from NOCO. (TR 35). For working part of 2012, he was paid $16,522.50 by NOCO including $9803.81 for health insurance. In 2013, Mr. Hoffman received $19,401 in unemployment compensation. (CX 5, 2013 Tax Return). NOCO paid him $2138.33, in 2013. (CX 5, 2013 Tax Return). He had no other earned income for 2013. (CX 5, 2013 Tax Return). In 2011 and 2012, Mr. Hoffman earned $26,856.31 and $16,522.50 respectively at NOCO. (CX 5).

Most likely, in the fall of 2012, (or not likely in 2009-2010) it was claimed Mr. Hoffman had had a conversation with driver Richard DeVita to the effect that when his wife began earning $100,000 or more he would leave NOCO. (TR 129-130, DeVita). Mr. Hoffman denied any such talk. (TR 97, Hoffman). Mrs. Hoffman had been a NOCO employee, from 2002-2007, and was terminated for attending classes for a pharmacist degree during the work day, which she denied. (TR 26-28, Mrs. Hoffman; RX4). She testified at the hearing and claimed she had been upset over her termination. (TR 31, Mrs. Hoffman). Mrs. Hoffman added that after the NOCO termination, they lacked any health insurance for eleven months and had to limit doctor visits and restrict her use of her asthma medication. (TR 23-24, Mrs. Hoffman). Moreover, it created a financial hardship as she was in school. The termination made her husband very distraught and he did not sleep or eat right and was easily agitated and short-tempered. (TR 25, Mrs. Hoffman). He opined he was a failure and became very frustrated over not being able to obtain a new job, after repeated interviews. (TR 25, Mrs. Hoffman).

Mr. Hoffman testified about his job search efforts and the stipulations. After leaving NOCO, he obtained his GED and attended other classes while looking for work. (TR 61-62, 186-7; Mr. Hoffman). None of the companies Mr. Williams had mentioned was hiring except Amerigas which was seeking part-timers, when he needed full time work. (TR188, Hoffman). He was to begin work as a snow plower and salter at Hausrath Landscaping and Snow Plowing in mid-November 2014 at a pay of $10 per hour. (TR 63-64; Mr. Hoffman).

Mr. Williams testified about the availability of other propane truck drivers' jobs. (TR 164-167, Williams). He also described his job description which was entered into the record. (TR 168-9; Williams). The claimant submitted Mr. Williams' position description as the Plant Manager for Akron whose duties included ensuring conformance with D.O.T. regulations. (CX 7). He related the 10/14 hours of service rules, but admitted somewhat of a lack of familiarity on cross-examination. (TR 169, 176; Williams). Nor did he monitor driver's compliance, instead relying on the drivers to do so themselves. (TR 170-171; Williams).

When confronted with his testimony at the Unemployment Compensation hearing that he remembered Mr. Hoffman or other short-haul drivers raising concerns that the on-call system put them afoul of hourly restrictions, he explained he had not understood the judge's question and the drivers' concerns related to when the on-call obligation would begin. (TR 173, Williams).

Mr. Hoffman testified about the impact of the termination upon him. He had trouble sleeping, weight-gain, and lacked energy. (TR 64-65; Mr. Hoffman). His wife was "stressed-out." He did not ask for his NOCO job back. While at NOCO he had generally good performance reviews which was generally corroborated with his performance reports 2009-2011 and had never been threatened with termination before. (TR 66-72; Mr. Hoffman; CX 13). However, he was placed on a performance improvement plan in 2010, for needing improvement in following supervisor instructions and adjusting his attitude dealing with co-workers; both of which had seen improvement by November 2010. (CX 13; TR 67; RX 5).

B. STAA violations -- Overview

A complainant may recover under the Act under three circumstances:

First, by demonstrating that he was subject to an adverse employment action because he has filed a complaint alleging violations of safety regulations. 49 U.S.C. § 31105 (a)(1)(A). This provision of the Act provides specifically and in pertinent part:

> (a) Prohibitions. -- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –
>
> (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, . . .

The U.S. Department of Labor ("DOL") interprets this provision to include internal complaints from an employee to an employer. DOL's interpretation that the statute includes internal complaints has been found "eminently reasonable." *Clean Harbors Environmental Services v. Herman,* 146 F.3d 12 (1st Cir. 1998)(case below 95-STA-34). The Circuit Court of Appeals has stated internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. *Id.*

Second, by demonstrating that he was subject to an adverse employment action for refusing to operate a vehicle "because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C. § 31105(a)(1)(B)(i).

In such a case, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service,* 1994-STA-55 (Sec'y Aug. 4, 1995). However, protection is not dependent upon actually proving a violation. *Yellow Freight System v. Martin,* 954 F.2d 353, 356-357 (6th Cir. 1992).

Third, by showing that he was subject to an adverse employment action for refusing to operate a motor vehicle "because [he] has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." 49 U.S.C.§ 31105(a)(1)(B)(ii). To qualify for protection under this provision, a complainant must also "have sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C § 31105(a)(2).[7]

The D.O.T. regulation, valid until July 1, 2013, related to hours of service provides that one may drive a maximum of 11 hours after 10 consecutive hours off duty but may not drive beyond the 14th consecutive hour after coming on duty after 10 consecutive hours off duty. Off-duty time does not extend the 14-hour period. (CX 10).

The STAA incorporates by reference, the rules and procedures applicable to the Wendell H. Ford Aviation Investment and reform Act for the 21st Century ("AIR-21") whistleblower cases. See 49 U.S.C. section 31105(b)(1). The burden of proof standard relating to causation established pursuant to the 2007 STAA amendments requires a complainant to show by a preponderance of the evidence that his protected activity was a "contributing factor" of his adverse action. *Abbs v. Con-Way Freight, Inc.,* ARB No. 12-016, ALJ No. 2007-STA-037, 2012 WL 5391429, at 3* (ARB Oct. 17, 2012). Under AIR-21, an employee must show, by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew that he engaged in protected activity; (3) he suffered an unfavorable personnel action; and, (4) the protected activity was a "contributing factor" in the unfavorable action. *Araujo v. New Jersey Transit Rail Operations, Inc.,* 708 F.3d 152, 158 (3d Cir. 2013)(applying the AIR-21 requirements in a Federal Rail Safety Act case).

The notion that the protected activity must be a "contributing factor" in the adverse employment action represents a change from earlier case law. *Mascarenas v. Interstate Hotels & Resorts, Inc.,* 2014-STA-00047 (ALJ Larsen May 12, 2015). Under the 2007 amendments to the Act, I must decide this claim under the so-called "AIR 21 standard," as set forth in 49 U.S.C. §42121, subsection (b):

The complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent's reason for the unfavorable personnel action was pretext, or that the complainant's activity was the sole or even

[7] Under 49 U.S.C.A. § 31105(a)(1)(B)(ii) a complainant must prove by a preponderance of the evidence that his or her alleged reasonable apprehension of serious injury due to the vehicle's unsafe condition, was objectively reasonable. *Brame v. Consolidated Freightways*, 1990-STA-20 (Sec'y, June 17, 1992) slip op. at 3 and *Brunner v. Dunn's Tree Service,* 1994-STA-55 (Sec'y, Aug. 4, 1995).

predominant cause. The complainant "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination." . . . Thus, for example, a complainant may prevail by proving that the respondent's reason, "while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity." Moreover, the complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence. *Mascarenas, supra at* 11-12.

If the complainant proves that his/her protected activity was a contributing factor in the unfavorable personnel action, the burden shifts to the respondent, in order to avoid liability, to prove "by clear and convincing evidence" that it would have taken the same adverse action in any event. "The 'clear and convincing evidence' standard is the intermediate burden of proof, in between 'preponderance of the evidence' and 'proof beyond a reasonable doubt.' To meet the burden, the employer must show that 'the truth of its factual contentions is highly probable.'" Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Beatty v. Inman Trucking Management, Inc*., ARB No. 13-039, ALJ Case Nos. 2008-STA-020, 2008-STA-021 (ARB May 13, 2014), citations omitted. This two-step analysis represents a departure from the three-part analysis applied in older cases under the Act. The former three-part analysis derived from Title VII of the Civil Rights Act of 1964, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). The current two-part "contributing-factor" standard "is far more protective of complainant-employees and much easier for a complainant to satisfy than the *McDonnell Douglas* standard." *Beatty, supra; see also Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No. 14-041, ALJ No. 2008-STA-61, pp. 3-4 (ARB May 30, 2014). *Mascarenas at* 12.

One of the difficulties in applying this standard appears in *Fordham v. Fannie Mae,* ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB October 9, 2014), and in *Powers v. Union Pacific Railroad Company*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB April 21, 2015), particularly in the dissenting opinion. Following the AIR 21 standard has enmeshed the courts in questions of relevance, and trying to distinguish "complainant's evidence" from "respondent's evidence," at various stages of decision. In Judge Larsen's view, these cases instruct that a complainant is not to be thrown out of a hearing, especially at an early stage, simply because his or her employer can rationalize an adverse employment action with an explanation unrelated to protected activity. A complainant, at least in some cases, need not offer direct evidence of the employer's intention. And an employer's explanation of its conduct is not necessarily to be taken at face value when evaluating a complainant's prima facie showing. Ultimately, *Fordham* and *Powers* deal with the question of when it is fair to require the employer to prove, by clear and convincing evidence, that its "adverse employment actions" did not comprise retaliation for protected activity. *Mascarenas at* 12.

In *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB Mar. 20, 2015) (*en banc*), the Administrative Review Board *en banc* panel stated that it was affirming, but clarifying the *Fordham* decision:

> [T]he ARB in *Fordham* held that legitimate, non-retaliatory reasons for employer action (which must be proven by clear and convincing evidence) may

> not be weighed against a complainant's showing of contribution (which must be proven by a preponderance of the evidence). *Fordham*, ARB No. 12-061, slip op. at. 20-37. That holding as set forth in *Fordham* is fully adopted herein. Our decision in this case, considered en banc, reaffirms *Fordham's* holding upon revisiting the question of what specific evidence can be weighed by the trier of fact, *i.e.*, the ALJ, in determining whether a complainant has proven that protected activity was a contributing factor in the adverse personnel action at issue and, more pointedly, the extent to which the respondent can disprove a complainant's proof of causation by advancing specific evidence that could also support the respondent's statutorily-prescribed affirmative defense for the adverse action taken. Yet, while the decision in *Fordham* may seem to foreclose consideration of specific evidence that may otherwise support a respondent's affirmative defense, the *Fordham* decision should not be read so narrowly. This decision clarifies *Fordham* on that point.

The ARB's clarification is essentially that the employer's evidence must be *relevant* to the issue presented at the contributory factor stage of the analysis, and that proof of the respondent's statutory defense of proving by clear and convincing evidence that it would have taken the personnel action at issue absent the protected activity is legally distinguishable from the complainant's burden to show contributing factor causation.

Mr. Hoffmann alleged violations of the complaint provision at 49 U.S.C. § 31105(a)(1)(A). His position is that he had not refused to drive due to any potential violation.

C. Department of Transportation Regulations Regarding Hours of Service

49 C.F.R. §§ 395.3 provides:

Sec. 395.3 (2011, 2013). Maximum driving time for property-carrying vehicles.

(a) Except as otherwise provided in § 395.1, no motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle, . . . , unless the driver complies with the following requirements:

(1) *Start of work shift.* A driver may not drive without first taking 10 consecutive hours off-duty;

(2) *14-hour period.* A driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14-consecutive hours period without first taking 10 consecutive hours off-duty

(3) *Driving time and rest breaks. (i) Driving time.* A driver may drive a total of 11 hours during the 14-hour period specified in paragraph (a)(2) of this section.

Sec. 395.2 Definitions.

Driving time means all time spent at the driving controls of a commercial motor vehicle in operation.

On duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. On duty time shall include:

(1) All time at a plant, terminal, facility, or other property of a motor carrier or shipper, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier;

(2) All time inspecting, servicing, or conditioning any commercial motor vehicle at any time;
(3) All driving time as defined in the term driving time;
(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth;
(5) All time loading or unloading a commercial motor vehicle, supervising, or assisting in the loading or unloading, attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded;
(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled commercial motor vehicle;
(7) All time spent providing a breath sample or urine specimen, including travel time to and from the collection site, in order to comply with the random, reasonable suspicion, post-accident, or follow-up testing required by part 382 of this subchapter when directed by a motor carrier;
(8) Performing any other work in the capacity, employ, or service of a motor carrier; and
(9) Performing any compensated work for a person who is not a motor carrier.

D. Discussion of Prima Facie Case

On January 10, 20-13, Mr. Hoffman had, at the most, less than four hours of "driving" time and only 10:22 of on-duty time. Thus, he could have worked an additional three hours and 38 minutes, during which he could have driven the entire time (he had seven more hours of driving time available). He claimed the on-call delivery could have taken four hours.

Mr. Williams testified at the unemployment hearing that Hoffmann and others had verbally complained about the on-call system potentially violating hours of service regulations, which relates to violations of federal trucking regulations. I do not credit his attempted explanation at my hearing to walk that back. Under the STAA, an employee's complaint need only be "related" to a safety violation to be protected. Internal complaints to supervisory employees that are related to a violation of a commercial motor vehicle safety regulation are protected under the STAA. *Moravec v. HC & M Transportation, Inc.*, 1990-STA-44 (Sec'y July 11, 1991). I find Hoffmann's testimony on this matter credible, considering Mr. Williams' admission, and the formers' demeanor and consistency.

Thus, I find that Hoffmann's complaints to Mr. Williams and others at NOCO regarding potentially violating hours-of-service regulations constituted "protected activity" under the STAA. *See Dutkiewicz v. Clean Harbors Environmental Services,*1995-STA-34 (Sec'y Aug. 8, 1997) (internal complaint to superiors is a protected activity under the STAA); *accord, Stiles v. J.B. Hunt Transportation*, 1992-STA-34 (Sec'y Sept. 24, 1993) and cases there cited; and, *Pillow v. Bechtel Construction,*1987-ERA-35 (Sec'y July 19 1993) (under analogous employee protection provision of the Energy Reorganization Act, contacting a union representative about a safety violation is protected), *aff'd sub nom. Bechtel Construction Co. v. Secretary of Labor*, 98 F.3d 1351 (11th Cir. 1996).[8] Additionally, the complainant is not required to prove a reasonable apprehension of injury, an actual violation or that the complaint has merit. *Pittman v. Goggin Truck Line, Inc.*, 1996-STA-25 (ARB Sept. 23, 1997); *Lajoie v. Environmental Management*

[8] Under the STAA, a safety related complaint to any supervisor, no matter where that supervisor, no matter where that supervisor falls in the chain of command, can be protected activity. *See, e.g., Hufstetler v. Roadway Express*, 1985-STA-8 (Sec'y, Aug. 21, 1986), *aff'd Roadway Express v. Brock*, 830 F.2d 179 (11th Cir. 1987).

Systems, Inc., 1990-STA-31 (Sec'y Oct. 27, 1992); *Barr v. ACW Truck Lines, Inc.*, 1991-STA-42 (Sec'y Apr. 22, 1992); *Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992).

I do not find Mr. Williams' testimony completely credible given the contradiction between his email (CX 16) and testimony both before me and at the Unemployment Compensation hearing. Obviously, Mr. Williams knew of the concerns regarding hours-of-service in relation to the on-call system and that Mr. Hoffman's employment with NOCO ended. In their next to last call, I find Mr. Hoffman's claims to have begun telling Mr. Williams "how they wanted us to be on call and exceed our hours of service; that we'd been complaining about it at numerous safety meetings; they would get back to us" and his assertion that Mr. Williams cut him off, credible. Mr. Williams admittedly did say Mr. Hoffman was "done." Thus, I find a (de minimus) contribution element established at this point. However, I find that it was not the substance of Hoffman's "safety" complaint that played a part, but rather the mere fact of his complaining as well as insisting to see Mr. Williams in his office the next day for further discussion. Mr. Williams has repeatedly asserted Mr. Hoffman was "belligerent" and Mr. Hoffman's work record, particularly the performance improvement plans, bear out this and his reluctance to follow supervisor instructions. Moreover, I find Ms. Roth's testimony, essentially that Mr. Hoffman gave her a hard time, credible. I do not find Mr. Hoffman's testimony that Ms. Roth had given him a choice credible; she had not. Given Mr. Hoffman had been assigned "on-call" duties some 28 times in the past,[9] I find his focus, emphasis and vigorous protest was related to his perception that it was unfair for him to have to make the delivery after-hours as Mr. Reiss had been scheduled to do so during regular hours. The evidence suggests that on most occasions no actual extra work had been required or recorded for his on-call days. So, it suggests Mr. Hoffman was accustomed to collecting his $15 on-call bonus but not actually responding to calls. Moreover, he was somewhat agitated as he was on his way home for dinner when he received the call. The incident on January 10, 2013, is more likely than not an example of that behavior.

A complainant need not establish a termination or discharge, but rather only an adverse employment action. In *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB addressed a request on appeal to abandon the "tangible employment consequence" test, and to adopt instead the deterrence standard, i.e., "materially adverse" standard, of *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). A two-member majority found that it does. *Burlington Northern* held that for the employer action to be deemed "materially adverse," it must be such that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination."

I find that although at some point Mr. Hoffman said that he would go, i.e., make the delivery, it was in conjunction with his comment that he was "done." He also said that he was not "refusing" as he asserted he had been given a choice on whether or not to take the assignment. I find he said he was "done." Mr. Williams admittedly repeated that he was "done." Subsequent to the second telephone call it was clear his employment had ended. Had Mr. Hoffman not said that, according to Mr. Williams he would still be working at NOCO. I find

[9] See, e.g., TR 72-74.

that assertion credible, particularly in light of NOCO's progressive disciplinary policy and the fact Mr. Williams had previously given Mr. Hoffman the opportunity to improve in his willingness to follow supervisory instructions, and the fact NOCO had absolutely never even hinted at any action against Mr. Hoffman for the repeated complaints he agreed he had made. However, Mr. Williams' subsequent emails make it less than determinative.

A constructive discharge occurs when "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign . . . Furthermore, it is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable conditions." *Shoup v. Kloeppfer Concrete*, ALJ No. 95-STA-33, slip op. at 3 (Sec'y Jan. 11, 1996) (quoting *Hollis v. Double DD Truck Lines, Inc.*, ALJ No. 84-STA-13, slip op. at 8-9 (Sec'y Mar. 18, 1985)). I do not find constructive discharge in this case. There was nothing that would have made one feel compelled to resign or to show the employer intended the employee to work in the intolerable conditions. In fact, despite of his assertion that his hours-of-service complaints were never resolved, that he may have previously exceeded the 60-hour rule, and knowing his responsibility for adherence to DOT regulations, Mr. Hoffman continually returned to work at NOCO.

Nevertheless, I find an "adverse employment action" established because whether or not NOCO "terminated" him, his employment ended.[10] This result is reached because the result was such that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination."

Thus, I find the complainant has established a prima facie case and benefits from the inferences arising therefrom. The employer's evidence does not show otherwise.

E. Employer's Showing

As the complainant has proven that his protected activity was a de minimus contributing factor in the unfavorable personnel action, the burden has shifted to the respondent, in order to avoid liability, to prove "by clear and convincing evidence" that it would have taken the same adverse action in any event. Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain."

I find it quite significant that Mr. Hoffman claimed to have complained about hours of service on six to seven prior occasions, yet his complaints had absolutely no impact whatsoever on his continued employment as a seasonal driver. It is more likely than not that his

[10] In *Williams v. American Airlines, Inc.*, ARB No. 09-018, 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010), the Board further clarified "that the term 'adverse actions' refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Id.* at 15. An adverse action is simply something unfavorable to an employee, not necessarily unfair retaliatory or illegal. *Occhione v. PSA Airlines, Inc., ARB CASE NO. 13-061 (*November 26, 2014).

"complaints" were either not clearly communicated, understood or perceived as such by NOCO's supervisors.[11] Thus, I do not credit Mr. DeVita's denials with respect to Mr. Hoffman's complaints. While he claims to have often violated hours of service rules he was unable to identify any specific occasion, his work records reflect no violations of the 10/14-hour rules, and there is a dearth of evidence that he ever pursued any remedial action. Just as importantly, the evidence establishes that Mr. Hoffman had accepted and been paid extra for his on-call assignments at least twenty-seven times, as recently as days before this incident, and there had not been any issues.[12] While he was paid for the on-call status, the evidence does not show that he had been called upon to make deliveries on most of those prior occasions. The evidence establishes Mr. Hoffman's need for improvement in following supervisor instructions and adjusting his attitude dealing with co-workers. While both had seen improvement by November 2010 and he received generally favorable performance evaluations, the January 10 incident suggests a re-emergence of his prior behavior.

The evidence establishes that Mr. Williams had absolutely no agenda vis a vie Mr. Hoffman on the evening of January 10, 2013. His intent, as was appropriate, was to get the job done and have the customer serviced. There can be little, if any, doubt that it was Mr. Hoffman's duty, as the on-call driver that evening, to handle the service call. Ms. Roth acted appropriately referring the matter to her supervisor, in spite of Mr. Reiss volunteering to take the service call as his shift was ending and it was the duty of the on-call driver. Mr. Williams' initial actions reflect good supervisory practices: he listened to the facts related by Ms. Roth; he listened to Mr. Hoffman's point of view; and, he considered Mr. Reiss' position and the needs of the customer, all before making any decisions and making the subsequent calls to Mr. Hoffman. He wanted to determine whether the drivers had made alternative arrangements or if Mr. Hoffman had some reason he could not make the delivery. (TR 156, Williams). On the contrary, Mr. Hoffman, whom Ms. Roth called as he was leaving the facility, did not initially answer his cell phone. He seemed agitated about this service call likely because he had just left a long day of work and was on his way home to dinner with his wife. He gave Ms. Roth a hard time and argued that a co-worker should have to take the call. Rather than admit he merely did not wish to take the service call, he disingenuously claimed he had been given a choice. Finally, I find he was argumentative and gave Mr. Williams a difficult time.

It is established that NOCO had a progressive disciplinary policy. Mr. Williams' testimony establishes that had the complainant merely declined the on-call delivery, he would have been subject to NOCO's progressive discipline policy and would likely still be working for NOCO. Mr. Williams' opinion that Mr. Hoffman had been "belligerent" and argumentative is quite telling. His emails sent shortly after the incident are instructive. He told Mr. Tinney the complainant had given Ms. Roth a difficult time regarding the on-call assignment and had tried to blame Ricky (Reiss) for not delivering to the customer earlier in the week. He informed Mr. Zucco that Mr. Hoffman had "performance" issues and "expressed dissatisfaction with our policy and procedures." Further, it is at best unusual for a subordinate employee to tell his supervisor that he would see him the next morning in his office in the context of this situation as

[11] See e.g., Mr. Williams' testimony at TR 173.

[12] For example, he was on call on January 2 and January 6, 2013 and had to make no extra service calls. (TR 151-2, Williams).

Mr. Hoffman had done. Again, these behaviors are consistent with the behavior of concern memorialized in his earlier performance improvement plan.

Despite my findings regarding the appropriateness of Mr. Williams' actions and my conclusions about Mr. Hoffman's behavior and the fact that Mr. Hoffman's ruminations regarding hours of service was not the motivating factor behind the ending of his employment relationship, the case law developed by the Administrative Review Board clearly holds that the protected activity need not be "the" motivating factor. Rather, if it is but "a" motivating factor, the complainant will prevail. See, *Abdur-Rahman, et al, v. Dekalb County, ARB Case Nos. 08-00310-074* (ALJ Case nos. 2006-WPC-002 and 2006-WPC-003) (May 18, 2010) *pending appeal to* 11th Cir. (2014). This appears to place a disproportionate burden on employers.

I find the fact Mr. Williams subsequently wrote that Mr. Hoffman had "expressed dissatisfaction with our policy and procedures" reflects that hours-of-service issues as related to the on-call system played a de minimus role in the ending of Mr. Hoffman's employment. This incident primarily reflects Mr. Williams' frustration and dissatisfaction with Mr. Hoffman's apparent petulance, continued reluctance to accept supervisory instructions, and his apparent difficulty adjusting his attitude dealing with co-workers and Mr. Hoffman's shortcomings. In short, as Mr. Williams knew, it was Mr. Hoffman's responsibility to perform the on-call delivery, he had the duty and driving hours remaining to accomplish that, but instead shirked his duty and became argumentative when his supervisor appropriately discussed it with him. Finally, although I conclude there is absolutely no credible showing of animus or any retaliatory intent in this case, that it is not proven by clear and convincing evidence that the complainant's hours-of-service complaints played no part in the ending of his employment relationship.

Thus, I find the employer has not proven "by clear and convincing evidence" that the same adverse action would have taken place in any event.

VI. DAMAGES

Under the Act, a successful complainant is entitled to: reinstatement; back pay; other compensatory damages; attorney fees and costs; and, abatement of any violation. 49 U.S.C. § 31105(b)(2)(A). Punitive damages may also be appropriate. I find Mr. Hoffman made reasonable efforts to mitigate his damages, i.e., he applied for some 83 jobs, submitted numerous resumes, obtained a GED, and took classes to enhance his appeal.

Reinstatement is an automatic remedy under the STAA. The statute does not prohibit voluntary waiver of that right. A complainant's decision not to seek reinstatement must be recognized and respected. *See, e.g., Moravec v. HC & M Transportation, Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992), slip op. at 22 n.14, appeal docketed, No. 92-70102 (9th Cir. Feb. 18, 1992); *Nidy v. Benton Enterprises*, 90-STA-11 (Sec'y Nov. 19, 1991), slip op. at 17 n.15. Reinstatement must be ordered unless the evidence shows that reinstatement would be impossible, impracticable, or cause irreparable animosity, it need not be directed. *Williams v. Domino's* Pizza, ARB No. 09-

092, ALJ No. 2008-STA-52 (ARB Jan. 31, 2011). Reinstatement obligates the respondent employer to "make a bona fide reinstatement offer." Back pay liability does not end merely upon the complainant's obtaining comparable employment, but when the employer makes a bona fide unconditional offer of reinstatement or, in very limited circumstances when the employee rejects a bona fide offer. *Dickey v. West Side Transport, Inc.,* ARB Nos. 06-150, 06-151, ALJ Nos. 2006-STA-26 and 27 (ARB May 29, 2008). Ordinarily, back pay runs from the date of discriminatory discharge until the date that the complainant receives a bona fide offer of reinstatement or gains comparable employment. *Nelson v. Walker Freight Lines, Inc.,* 87-STA-24 (Sec'y Jan. 15, 1988), slip op. at 6 n.3; *Earwood v. D.T.X. Corp.,* 88-STA-21 (Sec'y Mar. 8, 1991), slip op. at 10. Where, however, the complainant declines reinstatement, and has a post-discharge job which is substantially lower-paying and considerably dissimilar, that job does not constitute comparable employment. *See Rasimas v. Mich. Dept. of Mental Health,* 714 F.2d 614, 624 (6th Cir. 1983). *Gagnier v. Steinmann Transportation, Inc.,* 91-STA- 46 (Sec'y July 29, 1992) (In *Gagnier,* the Secretary ordered back pay to continue until the Respondent complied with the Secretary's order).

An award of back pay is mandated once it is determined that an employer violated the Act. *Moravec v. HC & M Transportation, Inc.,* 1990-STA-44 (Sec'y Jan. 6, 1992) *citing Hufstetler v. Roadway Express, Inc.,* 1985-STA-8 (Sec'y Aug. 21, 1986), slip op. at 50, *aff'd sub. Nom., Roadway Express, Inc., v. Brock,* 830 F.2d 179 (11th Cir. 1987). Any uncertainty with respect to wage loss calculations are to be resolved in favor of the non-discriminating party. *See, Johnson v. Roadway Express, Inc.,* 1999-STA-5 at 13 (ARB Dec. 30, 2002). For his seasonal work in January through May and late September through the end of December 2011 he was paid $32,120. He worked five months in 2012 and was paid $17,761.97 plus $9,803.81 for health insurance. In 2011, he collected $8,100 in unemployment compensation and $19,401 for 2012. In 2013, NOCO paid him $2,138.33. Those figures include contributions to his retirement funds. He worked an average of six and one-half months per year. As complainant's counsel shows, his average annual income was close to $24,941. That would amount to about $13,540 for each year of seasonal work. Thus, deducting his 2013 earnings, he is due $11,402 for 2013 and $13,540 less $400 for snow plowing work or $13,140 in 2014. The hearing was held in October 2014 and he was to begin work at a snow plowing company in November 2014 at $30-50 per week or $120-$200 per month. One half of a year less the landscaping work would amount to $6,770 minus $1,200 or $5570 for 2015 as of June 30th. Thus, total back pay owed through June 30, 2015 will be $30,112.

Complainant is entitled to interest on the back pay to compensate for loss suffered due to NFI having deprived him of the use of his money. *Hufstetler v. Roadway Express, Inc*., 1985-STA-8 (Sec'y Aug. 21, 1986), *aff'd sub nom., Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987) Prejudgment interest shall be calculated in accordance with 26 U.S.C. § 6621 (1988), which specifies the rate for used in computing interest charged on underpayment of Federal taxes. *See Park v. McLean Transportation Services, Inc***.**, 1991-STA-47 (Sec'y June 15, 1992), *slip op***.** at 5; *Clay v. Castle Oil Co., Inc.,* 1990-STA-37 (Sec'y June 3, 1994).

"Interest is due on back pay awards from the date of discharge to the date of reassignment. Prejudgment interest is to be paid for the period following [a complainant's]

termination ... until the ALJ's order of reinstatement. Post-judgment interest is to be paid thereafter, until the date payment of back pay is made. ... The rate of interest to be applied is that required by 29 C.F.R. §20.58(a)(1999) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C.A. §6621 (1999). ... [which consists of the Federal short-term rate determined under 26 U.S.C. §6621(b)(3) plus three percentage points. *Doyle v. Hydro Nuclear Services,* ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000).] The interest is to be compounded quarterly." *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000), slip op. at 17-18 (citations omitted).

The rate of interest to be applied on a back pay award under the whistleblower provision of the STAA is that required by 29 C.F.R. § 20.58(a)(1999) that is, the IRS rate of underpayment of taxes set out in 26 U.S.C.A. §6621 (1999). The interest is compounded quarterly. *Ass't Sec'y & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-34 (ARB Jan. 12, 2000).

The following interest payments based upon 4 four percent shall be made: $456 for 2013; $526 for 2014; and $223 for 2015; for a total of $1205 interest. If not agreed to be sufficiently precise, counsel for the complainant shall submit back pay interest calculations to the employer, attempt to resolve any disputes of said interest or reach an agreement and submit the same to the undersigned along with his petition for attorney fees and costs.

Effective August 3, 2007, the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-053 amended the STAA to allow punitive damage awards. The complainant has sought $20,000 in punitive damages. However, given his behavior and the fact his protected activity complaints were not the motivating factor in his employment ending and outweighed by his own reluctance to perform his on-call duty, I do not find such damages appropriate. Nor do I find compensatory damages appropriate for the same reasons.

VII. CONCLUSIONS

The complainant has established that NOCO violated the Act.[13] He is thus entitled to back pay with interest and reinstatement.[14]

ORDER

1. The respondent is ordered to **immediately offer** to reinstate Mr. Hoffman beginning not later than October 1, 2015 for seasonal work, evidenced by a written bona fide job

[13] I do not afford collateral estoppel effect to the State Unemployment hearing decision, in particular to that judge's credibility findings. *See, Ewald v. Commonwealth of Virginia,* 89-SDW-1 (Sec'y Apr. 20, 1995). *See also, Reid v. Scientech, Inc.*, 1999-ERA-20 (ALJ Jan. 28, 2000) and *Brown v. Besco Steel Supply*, No. 93-STA-00030, 1994 WL 897360, at 8-9 (OALJ Aug. 26, 1994)..

[14] Of course, he must be DOT eligible to drive by then. *Pope v. Transportation Services, Inc.*, 88-STA-8 (ALJ May 19, 1988)

offer, with the same pay and terms and privileges of employment and a copy sent to the undersigned;

2. NOCO shall pay **$1,041 per week** with three percent (3%) interest, under 26 U.S.C.A. §6621 (1999), from the date of receipt of this Order, until Mr. Hoffman is provided a bona fide offer of reinstatement and either accepts or declines the same in writing;

3. Back pay in the amount of **$30,112.00** must be paid to Mr. Hoffman by certified check by NOCO, on or before thirty (30) days of the date of this Decision and Order;

4. Additionally, interest, in the amount of **$1205** on the back pay award must be paid to Mr. Hoffman by certified check by NOCO, on or before thirty (30) days of the date of this Decision and Order;

5. Additional interest on the back pay award, at the same rate (4% per annum) shall accrue from the date of this order until the award is paid;

6. If the complainant can prove he spent money for legal advice and litigation costs and a proper fee petition is served upon NOCO with a copy to the undersigned, within ninety days of the date of this Order, such fees may be payable in a supplemental order;

7. NOCO may submit any legitimate objections to the fee petition within thirty days of receiving such a petition;

8. Proof of payment of the above must be provided to the undersigned; and,

9. The complainant must provide both NOCO and the undersigned a written acceptance or declination of the latter's bona fide job offer, if made, within seven calendar days of the same.

Digitally signed by Richard Morgan
DN: CN=Richard Morgan, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Pittsburgh, S=PA, C=US
Location: Pittsburgh PA

RICHARD A. MORGAN
Administrative Law Judge

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

File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, 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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).