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CASE NOS.: 2014-STA-00058
2014-STA-00059
2014-STA-00060
2014-STA-00064
2014-STA-00074
2014-STA-00075
2014-STA-00076

IN THE MATTER OF

LAWRENCE COOKS
BILLY RAY PIERCE
TIMOTHY RAX
CHRISTOPHER CARETHERS
THOMAS WILLIAMS
ISAAC GOINS
DEDRICK LILLY
Complainants

v.

GULF COAST BROKERAGE, INC.
Respondent

APPEARANCES:

Savannah Robinson, Esq.,
On behalf of Complainants

Charles Soechting, Esq.,
Kathryn Sullivan, Esq.,
On behalf of Respondent

BEFORE:
Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended and recodified, 49 U.S.C. § 31105 and implemented by the regulations at 29 C.F.R. § 1978.100 *et. seq.* (2001). Complainants, consisting of seven drivers, allege Respondent terminated them in violation of the employee protection provisions of the STAA.[1] Following Complainants' timely filed objections to OSHA's initial finding of no violation, the instant case, pursuant to 29 C.F.R. §1978.106, was referred to the undersigned Administrative Law Judge for hearing. Pursuant to 29 C.F.R. § 1978, the undersigned conducted a hearing on the issues raised by Respondent terminations in Houston, Texas on October 20, 21, and 22, 2014.

In prehearing statements, the parties agreed that all Complainants had been employee drivers of Respondent. Contrary to Respondent, Complainants contend they were fired or constructively discharged for complaining about Respondent making them drive excessive hours in violation of Department of Transportation (DOT) regulations, failing to provide decent working conditions, instructing them, if stopped by law enforcement, to provide false information about the use of time cards and place of dispatch and advising them how to avoid weigh stations. Respondent denies these assertions and contends Complainants were either terminated for cause or resigned their positions for personal reasons unrelated to safety.

I. BACKGROUND

Tony White (a/k/a "T. Ray") started Respondent at a sole proprietorship in 1998 under the name of Gulf Coast Delivery. White managed and drove a truck for Gulf Coast servicing oil rigs for nine years while his wife did customer invoicing and employee payrolls. In 2007, White incorporated the business and changed its name to Gulf Coast Brokerage. In 2012, White renamed the company to Gulf Coast LLC and sold it to Malloy Oil Field Services on December 11, 2013 for $11,000,000. Following the sale, White and his wife continued to perform their previous managerial, invoicing, and payroll duties at annual salaries of $250.000.00 each.

Currently, Respondent has 70 trucks and 63 drivers and three divisions in Texas (Sweeny, Kenedy and Odessa).[2] Respondent operates and sends five trucks from its Sweeny

[1] The Complainants include terminated drivers Christopher Carethers, Lawrence Cooks, Isaac Goins, and constructively terminated drivers Dedrick Lilly, Billy Ray Pierce, Timothy Rax, and Thomas Williams. Two additional drivers (Oscar Graves and Antonio McGee) were originally thought by the undersigned and the parties to be included in the list of complainants. However, the record does not show any appeals being filed with OSHA on their behalf and thus no referral to the Chief Administrative Law Judge and the undersigned for hearing. Thus, I find I have no procedural or jurisdictional basis to decide the merits of their discharges and accordingly cannot and will not render any determination concerning their discharges.

[2] Sweeny served as Respondent's main yard. There, it maintained an office under the management of Mrs. Tanya White who performed accounting, invoicing, and payroll services for Respondent. The Sweeny facility also includes a shop from which it dispatched drivers, performed truck maintenance, and maintained its safety program. (Tr. 758). At Kenedy, Respondent had a small shop and a trailer house where a truck supervisor/dispatcher, pusher, and mechanic worked. Respondent also maintained a yard at Odessa which it opened about six months before the hearing and housed its older trucks. None of the complainants worked out of Odessa. (Tr. 23, 27).

headquarters over state lines into Louisiana, Mississippi, and Oklahoma carrying general freight, machinery, and oil field equipment operating under U.S. DOT number 1899466. Complainants drove vacuum trucks and trailers for Respondent. All of these trucks weighed over 10,001 pounds and used federal highways in transporting fluid oil field waste products to various disposal sites in the Eagle Ford shale area of South Texas. (Tr. 19-24; 705-715; 844-850). Based upon the entire record, I find Respondent employs drivers of commercial motor vehicles as defined in 49 U.S.C. § 31101 (2000). Further, I find Respondent and White are persons and employers and the Complainants are employees as defined in 29 C.F.R. § 1978.101 and 49 U.S.C.§ 31101.

In running Respondent's operations White employed two supervisors, safety manager Jamie Sohrt and supervisor and truck pusher Roy Wasson (incorrectly identified in the record as Roy "Watson"), who ran the Kenedy yard for Respondent. (Tr. 654-655). Neither White, Sohrt, Wasson, or any of the named Complainants used, maintained, or kept driver logs. (Tr. 25-35, 851). In fact, White claimed he did not and could not keep up with driver hours although he maintained a GPS system that monitored every truck location and movement. Respondent paid drivers, including all Complainants who drove vacuum trucks and trailers, based upon their time records which they maintained without use of a time clock. (Tr. 863-867).[3]

II. HOURS OF SERVICE REGULATIONS

As of July 1, 2013, the following maximum Hours of Service regulations applied in this case as set forth in 49 C.F.R. § 395.3:

1. **11-hour driving limit:** May drive a maximum of 11 hours after 10 consecutive hours off duty.

2. **14-hour limit:** May not drive beyond the 14th consecutive hour after coming on duty following 10 consecutive hours off duty. Off-duty time does not extend the 14-hour period.

[3] White testified he paid the drivers for waiting time at job sites as well as for driving time. (Tr. 834). Drivers recorded their work time on personal note pads or on the back of invoices or bills of lading, and then for payroll purposes, transferred their time to time sheets showing dates, start and ending times, total hours, driving hours, and truck numbers. Respondent instructed drivers to use these time sheets in place of driver logs even though the drivers did not qualify for the short-haul exemption set forth in 49 C.F.R. § 395.8 because the driver did not **(1)** operate within a 100-air mile radius of a normal work reporting location (in this case Respondent's yard); **(2)** return to that yard and be released from work within 12 consecutive hours; **(3)** have 10 consecutive hours off duty separating each 12 hours on duty; and **(4)** exceed the maximum driving specified in § 395.3 following 10 consecutive hours off duty with Respondent maintaining the drivers' accurate driving records for six months showing the time the driver reported for duty each day. In fact, supervisor Sorht admitted Respondent was operating on an oilfield exemption and not the 100 air-mile or short-haul rule as set forth in 49 C.F.R. § 395.8. (Tr. 57).

The drivers recorded their total time invoices or bills of lading or personal notes as seen in Williams' case. (CX-10, pp. 95-163). Complainant Williams admitted many of his weekly hours in excess of 100 were illegal hours exceeding the 70-hour rule. Drivers never recorded more than 11 hours of driving on the time sheets. In fact, White instructed driver Pierce to record no more than 11 hours to appear compliant if stopped by law enforcement. (CX-3,4,5; Tr. 602). Moreover, many of these time sheets showed no breaks in service. (CX-2, pp. 11,20; CX-3, pp. 14-20; CX-4, pp.59.90. 99. 103, 112, 144).

3. **Rest breaks:** May drive only if 8 hours or less have passed since end of driver's last off-duty or sleeper berth period of at least 30 minutes….

4. **60/70-hour on duty limit:** May not drive after 60/70 hours on duty in 7/8 consecutive days. A driver may restart a 7/8 consecutive day period after taking 34 or more hours off duty. Must include two periods from 1 a.m. to 5 a.m. home terminal time, and may only be used once per week, or 168 hours, measured from the beginning of the previous restart.

5. **Sleeper birth provision:** Drivers using the sleeper berth provision must take at least 8 consecutive hours in the sleeper berth, off duty, or any combination of the two.

Although Complainants argued that the oilfield operations exemption of 49 C.F.R. § 395.1(d)(2) did not apply because Respondents drivers were not *specially trained drivers* of commercial motor vehicles that were *specially* constructed to service oil wells, I find that testimony from not only White but Complainants show such training (40 hours of training by seasoned employee who accompanied new hires) and equipment (modified trucks and trailers) to qualify for the exemption. (Tr. 143-146; 147, 148, 156, 157, 180-182, 416, 481, 536, 537, 577-580, 616,761-765, 810).[4] Complainants' argument that vacuum trucks and trailers could be used to pump other fluids did not negate fact that trucks and trailers after purchase were modified to meet requirements of fluid transfer of oilfield waste.

Thus, in addition to the above hours of service regulations I find that the following oilfield operations provision of 49 C.F.R.§ 395.1 (d)(2) also applies:

> In the case of **specially trained** drivers of commercial motor vehicles that are **specially constructed** to service oil wells, on-duty time shall not include waiting time at a natural gas or oil well site. Such waiting time shall be recorded as "off duty" for purposes of §§ 395.8, with remarks or annotations to indicate the specific off-duty periods that are waiting time, or on a separate "waiting time" line on the record of duty status to show that off-duty time is also waiting time. Waiting time shall not be included in calculating the 14-hour period in §395.3(a)(2). Specially trained drivers of such commercial motor vehicles are not eligible to use the provisions of § 395.1 (e)(1) [Short-haul operations within 100 air miles of normal reporting location]. (emphasis added)

In applying this section as Sohrt claimed he was using, Respondent became ineligible to use the short haul operations provisions (100 air-mile radius driver) of § 395.1 (e)(1). In addition, the oilfield exemption did not waive the DOT required logs but rather required it with appropriate notations indicating off-duty periods that constituted waiting time. (Tr. 57). Failure to complete the record of duty activities of §§395.1 or 395.8 made the driver and/or the carrier

[4] White testified that when new trucks were purchased, pumps were installed on them to permit oilfield work. (RX-13; Tr. 759-760).

liable to prosecution under §395.8(e). None of the drivers' time records met the requirement of a DOT log. Rather, at most the time records constituted a list of billable hours (driver standby or waiting time at oil well sites combined with driver driving time) used by Respondent to charge its customers (e.g., Marathon Conoco-Phillips) and pay it drivers for services provided. (Tr. 34, 35, 67, 481, 538, 539).[5]

Aside from the statutory prohibition, the record showed Respondent's drivers, such as Cook and Thomas, operating out of Sweeny, Texas servicing rigs located more than 100 miles from Sweeny and being told by Respondent's supervisors, White and Wasson, to lie to law enforcement if stopped and claim their dispatch station as Respondent's closest depot or yard where their non-existent time card was. (Tr. 102, 103, 143-146, 376, 482-485). Williams, as a driver trainer, followed White's instruction and told other drivers to lie to law enforcement if stopped. (Tr. 142-146). As Respondent's supervisor and truck pusher, Wasson went even further and told driver Antonio McGee if stopped by law enforcement to say they were oilfield exempt from keeping a log book. (Tr. 439). Wasson also told McGee how to avoid truck scales and thus avoid DOT inspection. (Tr. 446). Williams routinely drove more than 100 miles from Kenedy, worked more 12 hours, only occasionally returned to their dispatch depot in the same day and never (as did other Complainant drivers) punched a time clock. (Tr. 61, 62, 372, 421, 422, 538, 539).

White was apparently successful in avoiding some detection as shown on the Federal Motor Carrier Safety Administration (FMCSA) internet website[6] which showed Respondent's vehicles during the 24-month period prior to October 14, 2014 being put out of service 18 times, or 27.3% of the time as compared to a national average of 20.72%, while its drivers were put out of service 7.4% of the time as opposed to a national average of 5.51% and with a hazmat out of service rating of 100%. As of March 8, 2015, the website showed 16 out of 62 vehicles or 25.8% being placed out of service with the national average being 20.72% with 7 out of 64 drivers, or 10.9% being placed out of service with the national average being 5.51%. There were no hazmat inspections.

As far as actual driving hours were concerned, none of the time sheets utilized by the drivers showed the actual driving time. However, the pay records show drivers in many cases being paid in excess of 100 hours per week by Respondent. For example, Williams who like other drivers utilized federal highways, was paid for 40 hours at $18.00 per hour and 90 hours of overtime at $27.00 for a gross pay of $3,150.00 during the week of July 12, 2013 to July 18, 2013 . (CX- 10, p.44). A summary of Williams' paid weekly hours (CX-10, pp. 2,3) showed 26 weekly periods where he was paid 100 or more hours. Williams admitted it was common for him to violate the 70-hour rule in so driving. (Tr. 64-65).

[5] A sample driving log used by Williams, who left Respondent and went to work for Maverick Field Services, a competitor of Respondent, appears at CX-10, pp. 169-183 and shows a fifth line for the driver, in this case, Williams to record waiting at the well site. (Tr. 65-67).

[6] *See* SAFER Web – Company Snapshot Gulf Coast Brokerage LLC,USDOT NO 1899466, Federal Motor Carrier Safety Administration, *available at* : http://safer.fmcsa.dot.gov/query.asp (last visited Mar 9, 2015).

III. TERMINATED DRIVERS

A. Christopher Demon Carethers

Of the listed Complainants, Respondent terminated the following vacuum truck drivers for a variety of reasons: Christopher Demon Carethers, Lawrence Cooks, and Billy Ray Pierce.

Carethers currently works for Shamrock Vacuum Services, a competitor of Respondent, and keeps driver logs. Carethers began his employment with Respondent in January 2013 and was terminated on October 24, 2013. (Tr. 370, 371). As a driver for Respondent, Carethers, like other Complainants, used federal highways (I-10, I-35, and I-37) and pulled 130 barrel vacuum trailers but never kept driver logs. (Tr. 372). Respondent dispatched Carethers from its Kenedy yard. Before his termination Carethers testified he violated the 70-hour rule by working 92 hours in a 10-day consecutive period (October 1 to October 11, 2013). Prior to being terminated Carethers complained about his work hours and a shower Respondent provided at the Kenedy yard which smelled foul and was unsanitary. (Tr. 375-76, 400). Carethers, like other Complainants, was told by Wasson on instructions from White if stopped by police to misrepresent facts concerning his work and to tell them he worked 12-hour shifts after which Respondent would relieve him, i.e. the short-haul rule. (Tr. 375-77).

Carethers testified that, on occasion, he fell asleep at the wheel and pulled over to the side of the road and took a nap. When Wasson was on duty nothing was said. However, after White put in a dispatch unit, the dispatch unit would wake him up and tell him he had to go to other assignments, which caused him to have to have stress-related problems and further caused him to go to the emergency room. (Tr. 385-86). Carethers complained to White and Wasson about his mandated long working hours and on October 24, 2013, after informing White of his admission to the emergency room at Metropolitan Methodist Center in San Antonio, was terminated. (Tr. 385-397, 399).

According to Respondent, Carethers frequently reported to work late and Respondent had difficulty contacting him by phone to assign additional work. In addition, Carethers was caught with a woman in his truck at the Kenedy yard while he was supposed to be working and prior to discharge lied to Respondent about time he supposedly spent in the hospital for treatment because of chest pains related to excessive work hours and that he never produced hospital records as requested. (Tr. 753, 802, 804).

Carethers admitted having an unidentified woman is his truck while it was in the Kenedy yard but denied Respondent ever asked for hospital records. (Tr. 404, 412). None of Respondent's disciplinary records show Carethers being warned for reporting to work late or being hard to reach by phone or violating company rules by having a woman in his truck. (RX-6, pp. 70-72). In fact, Carethers credibly testified on the day of his discharge that when he informed Sohrt of his visit to the emergency room for chest pains which Carethers attributed to being tired and stressed, Sohrt merely told him White was going to be upset and neither White nor Sohrt gave him any reason for his discharge. (Tr. 387).

B. Lawrence Cooks

Cooks worked as a vacuum truck driver for Respondent from June 1, 2012 to August 5, 2013 and, like Sohrt, had a past criminal record having spent time at the Texas Department of Corrections. The two currently shared the same probation officer. (Tr. 479, 481). While employed by Respondent, Cooks worked and was paid for more than 100 hours on 27 weekly payrolls. (CX-3). Cooks, with the exception of a three months, worked out of the Kenedy yard during which period Respondent had no functioning time clock. (Tr. 482,483).

Cooks testified White directed him if stopped by law enforcement (DPS) to tell them he was oil field exempt and was working on a short haul basis and had clocked in at the closest yard to where he was stopped. (Tr.482-84).[7] On October 15, 2012, White terminated Cooks for allegedly not showing up to work on a Monday but reinstated him three weeks later when White realized there had been a misunderstanding on the date Cook was to report for work. (RX- 4, p. 56; Tr. 485-86).

On August 5, 2013, Cooks testified he was terminated a second time for allegedly not showing up on time with Complainant/driver Pierce at 7 a.m. on August 3, 2013 at the Ramsey Prison drill site, and thereafter refusing to do additional cleanup work in South Texas off Highway 73. Cooks appeared at the prison job at 8 a.m. as instructed by the company official (pipeline supervisor) and told White he would do the South Texas but thereafter was going to take his scheduled time off after having just put in three straight days of 15, 14, and 15 hours each. White replied he would let Cooks know when to do the South Texas job but was later told by Wasson he had been terminated for declining the South Texas job and showing up at the prison site at 8 a.m. and not 7 a.m. as allegedly instructed. (RX-4, p. 55; Tr. 487-89, 496-97).

White testified Cooks was terminated for poor performance, not showing up on time for the prison job, and not answering his phone for the entire weekend. According to White he told Cooks to show up for the prison job at 7 a.m. and not 8 a.m. as he did. (Tr. 780-797).

C. Billy Ray Pierce

Pierce worked as a vacuum truck driver for Respondent from June 3, 2013 to the early part of August 2013. During that time he complained to Wasson about the hours he was assigned to work, going from job to job without being allowed much sleep. (Tr. 579-80). Pierce did not refuse to take on additional work following the Ramsey Prison job to which he and Cooks were assigned. Further, he and Cooks appeared at the prison job as instructed by prison officials at 8 a.m. (Tr. 578-585).

As with other drivers, White instructed Pierce to misrepresent to law enforcement officials if stopped and state that his time card was at nearest location (Kenedy or Sweeny) to where stopped. (Tr. 586) Pierce worked and was paid for 123 hours in the nine-day period from July 22 to August 2, 2013. Pierce considered this to be unreasonable work conditions as was having to take a shower with unclean water out of a frack tank at the Kenedy yard. (Tr. 585,

[7] Cook kept his work hours on a personal note book. (Tr. 481).

86). In response, White asserted Pierce was late on multiple occasions including the prison rig site and refused to answer his cell phone on weekends when he was supposed to work. (RX-5; Tr. 753, 799).

IV. CONSTRUCTIVELY DISCHARGED DRIVERS

A. Thomas Williams

Of the remaining Complainants, Isaac Goins, Dedrick Lilly, Timothy Rax, and Thomas Williams assert they quit because of intolerable working conditions or were constructively discharged in violation of the STAA. Thomas Williams was a driver/trainer for Respondent working primarily out of the Kenedy yard from October 2011 to May 22, 2014 and, like other vacuum truck drivers, drove Mack, Freightliners, and Peterbilt trucks weighing over 10,000 pounds on federal and interstate highways hauling vacuum trailers with 130-barrel liquid capacities filled with water-based mud, oil-based waste and mud, and waste water to and from oil rigs. (Tr. 58, 59).

On February 14, 2014, Williams e-mailed White expressing his concern about a lack of safety compliance at rigs with a failure to identify responsible parties from whom the drivers could receive proper documentation and instruction. (CX-1, p. 1). Thomas described this e-mail as a complaint about lack of safety and compliance with service hours limitations but never expressed such concern in his e-mail. (Tr. 69). Thomas testified he felt he was not working in a safe environment with drivers working continuous hours with huge gaps in hours of service and paychecks. (Tr. 71). Williams testified he quit because he felt Respondent was growing too fast with a lack of training, excess hours of service, and three recordable truck incidents. Williams did not want to be responsible for additional accidents. (Tr. 68). Williams had no complaints about lack of work, potable water, or poor shower conditions although the water in the shower stunk and caused him to have dry skin. Williams had no complaints personally about a lack of hours. Rather, in his case he complained about not getting enough hours in his final week. (Tr. 92-101).

Williams admitted telling driver trainees on instructions from White to lie to law enforcement and tell them they were dispatched from the closest yard to where they were stopped to make it appear more plausible the short-haul exception they were claiming. (Tr. 102-03, 141-45). Williams described the dispatch as a call from the dispatcher telling the driver the rig to go to, its location, and direction. When the driver arrived at the rig, a guard logged him in whereupon a company man or contractor overseeing the entire operation told the driver what needed to be done. Once the driver accomplished this task he received a signed manifest allowing him to take the waste material to a disposal site, whereupon the driver disposed of the waste material and had his truck washed out after which the driver received another dispatch, and the process was repeated. (Tr. 104-05).

Williams testified that White and Wasson (incorrectly identified as Watson throughout the record) created a hostile work environment by routinely telling drivers if they did not want to accept their job assignment they could go home and that Respondent had a stack of applications with people applying every day. (Tr. 110, 111). Further, in telephone calls to Sohrt, Williams

told him the reason he was quitting was because Respondent was bring in other companies' rejects who were not being trained properly with Respondent having one person die and he Williams did not want to be the next. (Tr. 112). Further, Williams testified that the new hires were not being trained and that being a commercial driver did not mean they were going to be qualified oilfield operations drivers because most of what they did was in small spaces and not on the road and involved knowing vacuum and discharge pressures which, if not learned, could result in accidents. (Tr. 113). In bringing this suit, Williams testified he was not interested in money but in making Respondent compliant with the law. (Tr. 135, 136).

B. Isaac Goins

Isaac Goins worked for Respondent as a vacuum truck driver from May 2012 until June 27, 2014 when he quit due to the hours he was working which had an adverse impact on his health causing him to go to the emergency room and prevented him from being home with his wife who was also having medical problems. (Tr. 151-56). A summary of the weekly hours he worked from June 14, 2012 to May 29, 2014 showed Claimant working more than 100 hours per week on 40 occasions. (CX-4; Tr. 151). Goins also testified he quit because of an inability to communicate with Wasson, White, and Sohrt, who would not listen to his complaints of not having PPE (personal protective gear), a lack of drinking water, and being required to shower at the Kenedy yard with unclean water coming out of a frack tank or container used to carry drilling fluids. Wasson told Goins on one occasion not to use truck stop showers although Goins had not taken a shower in four to five days and was covered with mud and was living out of his truck most of the time. (Tr. 182-83; 194-95, 197-201).

Goins objected to forced dispatch i.e., being directed to go to one job, then another and another without asking him if he was able to go to the job. (Tr. 221-26). Goins testified that Wasson frequently threatened to fire him if he did not work the hours that he and White wanted him to work. (Tr. 230. 231).

C. Dedrick Lilly

Lilly drove a Freightliner truck for Respondent from November 2011 to December 2012 and from April 2013 to May 2014. This truck weighed more than 10,000 pounds, was driven by Lilly over interstate and federal highways, including I-10 and I-45, and pulled vacuum trailers and end-pumps. (Tr. 334-35). During this time Lilly admitted regularly violating 60/70 rule. (Tr. 337).

Lilly had only partial driving payrolls showing only 17 weeks of his last period of employment with Respondent during which he was paid for 100 or more hours of work. (CX-6). Lilly testified he quit his employment with Employer because he could not work the hours requested by Respondent, and when he asked for light duty, White told him there was no light duty at Respondent. (Tr. 342-345).

In accordance with Respondent's instructions, Lilly testified that when law enforcement stopped him on two occasions and questioned him about log books, he responded that he was working a short haul and had clocked in and out at Kenedy yard when in fact there was no

functioning time clock at that yard. (Tr. 349). Lilly considered Respondent making him work long hours as creating a hostile work atmosphere. (Tr. 361).

D. Timothy Rax

Timothy Rax drove a vacuum truck and trailer for Respondent from October 12, 2012 to September 2013 over federal highways (I-35, I-37 and I-10). (Tr. 615-16). Rax was able to produce payroll records for only 28 weekly periods which showed 10 weeks in which he worked and was paid for 100 or more hours of work. (CX-9; Tr. 17). These hours included on-duty driving and non-driving time. (Tr. 619). Rax worked or was dispatched out of the Kenedy yard and did not use or fill out logs. (Tr. 628-29).

Rax currently works in the oilfield loading up and delivering crude but, contrary to Respondent, keeps five-line logs. (Tr. 630,631). On one occasion while at work for Respondent he used an ice machine at work and subsequently learned the water provided that machine came from a frack tank that he loaded with pond water using his vacuum hoses that not been properly cleaned. (Tr. 633). This was the same water Respondent provided drivers to shower in. (Tr. 633-36).

Rax testified he quit because working conditions were hostile and not DOT compliant and could cause him to lose his license. (Tr. 637). Rax was concerned about Wasson, who ran the Kenedy yard, telling employees like himself to lie. (Tr. 638, 655, 656). Rax fell asleep at the wheel and had some near accidents. (Tr. 638). Rax informed White of conditions at the Kenedy yard. (Tr. 656). On one occasion Rax and fellow driver McGee worked on a rig for 2½ days straight loading and unloading waste at the same site which in turned caused Rax to have swollen feet. He reported the condition to White, who when informed, merely said, "Oh." (Tr. 659-660).

Rax also described occasions when White would not let his dispatchers permit the drivers to sleep when off job sites or to properly placard their trucks when carrying hazardous material. (Tr. 670). When drivers tried to lay down, the dispatchers would constantly call the drivers. (Tr. 670-76). Further, Rax had a frequent problem with reporting and not having his trailer breaks fixed. (676-77). When on rig sites Rax testified company personnel would not let drivers sleep due to presence of hydrogen sulfite gas that could kill in a matter of seconds. (Tr. 692, 696). In quitting Respondent, Rax lost about $1,480.00 or $1.50 per hour for six months. (Tr. 695)

V. RESPONDENT'S DEFENSE

In defense of the claims asserted by Complainants, White testified that no drivers complained to him about working conditions because he tried to work with drivers and create a friendly atmosphere although he was aware he worked in a state that allowed him to hire or fire at any time without giving a reason for his decision. (Tr. 718, 719). White denied any retaliation against employees and stated he had a good safety record with only two reportable accidents. (Tr. 724-735). White defended Respondent's practice of not keeping logs, saying he kept drivers within a 150-mile radius of their yard and did not have his drivers cross state lines except for a recently created division out of Sweeny that none of Complainant's worked for which he called

the interstate division. (Tr. 737). However, he admitted the divisions were not separately incorporated but functioned as one company. (Tr. 849).

White testified that the hours recorded by the driver include the time it took them to drive from the yard to the various sites and back to the yard, which was recorded as driving hours, with the remaining time recorded as non-driving time spent sleeping in the truck sleepers or working at the site. (Tr. 739). According to White, drivers were not allowed to use Respondent's trucks for personal business, although all of Complainants did so from time to time. (Tr. 740-41). White denied terminating any driver because he complained about working too many hours, and added that Respondent provided areas at the Sweeny and Kenedy yards where drivers could park their trucks and sleep when needed. (Tr. 742).

White testified that drivers were all allowed to rest after they completed jobs or on jobsites by resting in sleepers. Respondent worked their drivers on 14/7 basis. While at work, dispatchers would relay job instructions to the driver asking the drivers if they were rested and ready to go. If a driver replied "No," the dispatcher would tell the driver to let Respondent know when they were ready to go and called the next driver. White denied firing any driver "on the spot" for refusing to accept a job assignment, instead relying upon the driver to let Respondent know when they were out of hours because Respondent allegedly had no way to keep up with the driver's hours.[8] As far as having long waiting times at disposal sites to dump their loads, drivers usually had to wait only one to two hours. According to White, Respondent had no accidents because drivers fell asleep behind the wheel. (Tr. 738-747).

White denied telling drivers to lie on their time sheets, which were provided by the state, but admitted never terminating an employee for overbilling or double charging for hours worked. (Tr. 748-49). White asserted drivers rested between jobs or while waiting to dump loads when they pull off to the side of the road. (Tr. 750). White testified he generally followed a system of progressive discipline involving oral and two to three written warnings before termination for failing to show up on time, not answering a cell phone which drivers kept in their trucks, reckless driving on highways and at job sites, and not wearing PPE (Tr. 751-52), as mentioned above in Section III.A.C. Pierce and Cooks ran late on jobs and would turn off their cell phones and not answer calls on the weekends while Carethers was late on multiple occasions with no way to reach him by phone. As for the other drivers who quit, Lilly had an attendance problem like those who were terminated for not showing up on multiple occasions. (Tr.753, 754). White had no problems with Williams, Goins, or Rax.

Concerning working conditions at the Kenedy yard, White testified he had at one time received potable water at that yard supplied by the City of Kenedy which White discontinued when the city wanted to charge him a substantial sum to upgrade the water line to his facility. White then looked at drilling a well and found it would cost $200,000 to $300,000 and then decided on using frack tank with a new liner which was replaced by a new frack tank and new

[8] Despite White's claim of being unable to keep track of a drivers hours, White admitted a dispatch system that was connected to a GPS system that had two screens which allowed dispatch to monitor truck movements and location. (Tr. 754). Further, White acknowledged Respondent had an obligation to maintain hours worked by employees, which they did, and in fact could be discovered by use of GPS. (Tr. 754-56, 875).

liner with water delivered to it by Respondent's drivers, which was used by drivers to shower with. White testified that water was chlorinated and fit to shower. (Tr. 769-75).

White asserted he never received any driver complaints about being worked excessive hours. White admitted that he trained and put Wasson in charge of the Kenedy facility as a truck pusher responsible for keeping a close eye on all drivers making sure they stayed awake and were going to their assigned jobs on time. (Tr. 821). White testified drivers were supposed to call the dispatcher when they got to a rig, were loaded and left a job site for disposal, and when they finished and left the disposal site. However some drivers did not call in as required, requiring Wasson to chase them down "all the time." (Tr. 822). In response to a leading question, White testified he instructed drivers that if drivers told him they were not going to show up as scheduled he would replace them just for that job. (Tr. 823, 824). Drivers complained about not working more not less hours. (Tr. 825). White further testified he never rejected a time sheet. (Tr. 826). Further, a dispatcher was instructed to wake up a driver only when the driver did not call when he completed unloading. (Tr. 835).

As far as truck maintenance was concerned, White testified he made sure the trucks used by the drivers were safe to drive. (Tr. 828). Concerning placarding of trucks, White testified that oilfield waste products going to disposal did not need to be placarded. (Tr. 829). When drivers turned in maintenance requests, White took care of those requests timely. However, on occasion when those requests were left in the trucks and not timely received, White would take care of the condition when the driver was off duty. White denied instructing drivers to lie to DPS officers and only jokingly told them they sleep when they were dead. (Tr. 831). White denied forced dispatch. (Tr. 832). Concerning " pin locks" used on hoses, White testified new hoses came with four such pins. However, once every three to four months he would buy 300 pins and make them available to the drivers, some of whom refused to use them. (Tr. 833).

White admitted that when drivers submitted time sheets showing on duty and driving time bills for, such as Goins, who on one occasion billed for 161 hours, they were paid for these hours. In turn, White billed his customers at $95.00 per hour for such time, making it profitable for Respondent to let his driver work these hours without question unless it appeared the driver was padding his hours in which case the driver was called in and questioned about his hours and after which Respondent checked his time on GPS. (Tr. 866-875).

In support of White's testimony Respondent called driver Randy Roberts. He denied being worked to exhaustion while claiming he rested or slept on a job from six to eight hours, spending up to 15 to 20 hours without doing any work. (Tr. 906-907). Roberts testified that Respondent never forced him to take a dispatch if he told Wasson or White he was too tired to do it. (Tr. 908,909). Roberts testified he used the shower at Kenedy without any problems. (Tr. 916).

VI. DISCUSSION

A. Credibility

In deciding the issues presented, I have considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See *Frady v. Tennessee Valley Authority*, Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971). As the court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe ... Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner, and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

In this case, I find the testimony of Complainants to be straight forward, generally consistent, and credible as opposed to White's testimony which was not supported and was inconsistent with the objective evidence of record. Specifically, I find White told drivers and instructed supervisor Wasson and Williams, who trained the drivers, that if stopped by law enforcement to lie to them and state they were oilfield exempt from keeping logs and rather were required under the short-haul rule to use only a time sheet and that the driver's time card had been punched at Respondent's nearest facility to where they were stopped.[9] In addition, Wasson did not testify in this proceeding and further Respondent cited no precedent to show it was exempt from keeping logs and, in fact, its competitors kept such logs.

[9] Complainant Lilly was stopped on two occasions by law enforcement and lied to them as instructed.

Moreover Respondent's drivers (Williams, Carethers, Goins, Lilly, and Rax) admitted they violated the 70-hour rule. Contrary to White's assertion about running a safe and compliant company, the FMCSA internet website showed Respondent's vehicles being placed out of service 18 times, or 27.3% of the time as opposed to a national average of 20.72%, with its drivers being placed out of service 7.4% as opposed to a national average of 5.51% with a hazmat out-of-service rating of 100%. Also contrary to White's denial of forced dispatch or complaints from drivers about being worked excessive hours, Complainant Carethers testified that because he was forced to work excessive hours, he suffered stress related problems requiring him to seek emergency room treatment and that he complained to White and Sasson about such treatment without effect. Cooks, Pierce, Goins, Lilly, McGee and Rax also complained to White and/or Sasson, also without effect.

B. The Statutory Protection

The employee protection provisions of the STAA provide, 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)
>
> (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 regulation**, standard, or order, or has testified or will testify in such a proceeding; or
>
> (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

49 U.S.C. § 31105(a). Thus, under the employee protection provisions of the STAA, it is unlawful for an employer to impose an adverse action on an employee because the employee has complained or raised concerns about possible violations of DOT regulations.[10] 49 U.S.C. § 31105(a)(1)(A). *See e.g., Reemsnyder v. Mayflower Transit, Inc.*, Case No. 1993-STA-4 @ 6-7 (Sec'y Dec. and Ord. On Recon. May 19, 1994).

[10] Respondent has argued that Complainants are not covered to the whistleblower protections afforded by the STAA because although it runs an interstate operation, Complainants were intrastate drivers, and the STAA does not apply to intrastate drivers and potential state law violations. Even if Respondent's argument were true, which it is not, protection under the STAA is afforded to drivers who complaint of **a commercial motor vehicle safety regulation,** whether the alleged violation arises in state or federal motor safety laws. *See Chapman v. Heartland Express of Iowa*, ARB No. 02-030, ALJ No. 2001-STA-35, slip op. at fn. 9 (ARB Sept. 9, 2003) (correcting the ALJ to note that STAA "protection extends beyond just complaints relating to federal motor vehicle safety regulations.").

The purpose of the STAA is to promote safety on the highways. As noted by the Senate Commerce Committee which reported out the legislation, "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (Daily ed. December 7, 1982). The Secretary has recognized that "an employee's **safety** complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective action immediately and limits the necessity of enforcement through formal proceedings." (Emphasis added). *Davis v. H.R. Hill, Inc.*, Case No. 1986-STA-18 at 2 (Sec'y Mar. 19, 1987).

C. Burden of Proof

Respondent contends that this case is subject to the three-step burden shifting framework as established in *McDonnell Douglas Corp. v.. Green*, 411 U.S. 7 92, 802-804 (1973). However, in 2007, Congress amended the STAA's burden of proof standard as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). Under the amendment, STAA whistleblower complaints are governed by the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b)(AIR 21). Under the AIR 21 standard, complainants must show by a "preponderance of evidence" that a protected activity is a "contributing factor" to the adverse action described in the complaint. 49 U.S.C. § 42121(b)(2)(B)(i); see also 75 Fed. Reg. 53545, 53550. The employer can overcome that showing only if it demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545, 53550; 49 U.S.C. § 42121(b)(2)(B)(i). *White v. Action Expediting, Inc.,* ARB No. 13-015, ALJ No.2011-STA-11 (ARB June 6, 2014); *Clarke v. Navajo Express, Inc.*, Case No. 2009-STA-18 at 4 (ARB June 29, 2011) (citing *Williams v. Domino's Pizza*, Case No. 2008-STA-52 at 6 (ARB Jan. 31, 2011)).

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams, supra* at 6. The complainant can succeed by "providing either direct or indirect proof of contribution." *Id.* "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." *Id.* If direct evidence is not produced, the complainant must "proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating" the complainant's employment. *Id.* "One type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." *Id.* (*citing Riess v. Nucor Corporation-Vulcraft-Texas, Inc.*, Case No. 2008-STA-11 at 3 (ARB Nov. 30, 2011)). If the complainant proves pretext, an ALJ may infer that the protected activity contributed to the termination, but he is not compelled to do so. *Williams, supra* at 6.

If the complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. *Williams, supra* at 6 (citing 49 U.S.C. § 4212(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be

proved is highly probable or reasonably certain.'" *Id*. (citing *Brune v. Horizon Air Indus., Inc.*, Case No. 2002-AIR-8 at 14 (ARB Jan. 31, 2006). Thus, Complainants need not satisfy the former *McDonell-Douglas* burden shifting analysis as argued by Respondent. *Blackie v. D. Pierce Transportation, Inc.*, ARB No.13-065 (ARB June 17, 2014); *White v. Action Expediting, Inc.* ARB No.132-015 (ARB June 6, 2014).

D. The Protected Activity: Internal Complaints

An employee engages in STAA-protected activity where he files a complaint or begins a proceeding "related to a violation of a motor vehicle safety regulation, standard, or order." 49 U.S.C. § 31105(a)(1)(A)(i). Internal complaints to management are protected activity under the whistleblower provision of the STAA. *Williams, supra* at 6. A complaint need not expressly cite the specific motor vehicle standard allegedly violated, but the complaint must "relate" to a violation of a commercial motor vehicle safety standard. *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, ALJ No. 2010-STA-41 at 4 (ARB Mar. 27, 2012). An internal complaint must be communicated to management, but it may be oral, informal or unofficial. *Id*. A complainant must show that he reasonably believed he was complaining about the existence of a safety violation. *Id*. This standard requires the complainant to prove that a person with his expertise and knowledge would have a "reasonable belief" that there was a violation of a commercial vehicle safety regulation. *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-31 at 11 (ARB Sept. 14, 2007).

Complainant Carethers contends he complained to White and Wasson about being directed to work excessive hours in violation of the 70-hour rule which caused him to seek medical help for stress-related problems. He also contends that he was instructed by White that if stopped by police to lie and, in essence, to claim a short-haul exception of 12-hour shifts to avoid keeping logs. Complainants Cooks and Pierce complained to Wasson and White about excessive hours of work, and both Complainants were also instructed to lie to police if stopped to claim oilfield and short-haul exemptions. I find such complaints to be protected activity. In like manner, I find (1) Complainant Goins' protest to Wasson about being forced to work excessive hours; (2) Complainant Lilly's protest of excessive hours to White in which he asked for less work or light duty; (3) Complainant Rax's protest about working excessive hours for 2½ days straight; and (4) Complainant's Goins' complaint to Sasson about being required to work excessive hours to be protected activities. Regarding Williams' February 14, 2014 e-mail to White about a lack of proper direction at rig sites and his subsequent communication to Sohrt about poor hiring and training of new drivers by Respondent, I find such comments were a general advisory intended to aid Respondent's future management decisions and did not constitute protect activity complaints.

Regarding the issue of whether driver complaints of shower conditions at the Kenedy yard constituted protected activity, I find that under the circumstances of this this case, wherein Respondent employed forced dispatch of drivers and required them to work on many occasions excessive hours in violation of the 70-hour rule and not allowing drivers such as Goins to use truck stop showers, to be reasonable complaints related to driver safety and as such to constitute protected activity. Concerning other driver complaints related to the safety of their trucks the record does not contain sufficient information to show their concerns were objectively and

reasonably related to safety and, if so, were ignored by White. While White did make some effort to address the shower condition, he did not do so on a consistent basis, which in turn subjected his drivers to showering on occasion with unclean water.

E. Respondent's Adverse Action

The STAA states that an employer may not "discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because of his/her protected activity." 49 U.S.C. § 31105(a)(1). In *Long v. Roadway Express, Inc.*, Case No. 1988-STA-31 (Sec'y Sep. 15, 1989), the Secretary held any employment action by an employer which is unfavorable to the employee's compensation, terms, conditions, or privileges of employment constitutes an adverse action. Thus, regardless of the employer's motivation, proof that such a step or action was taken is sufficient to meet the employee's burden of establishing that the employer took adverse action against the employee. *Id*. In a case tried fully on the merits, the relevant inquiry is whether the complainant "established, by a preponderance of the evidence" that the employer subjected him to adverse action in retaliation for protected activity. *Walters v. Exel North American Road Transport*, Case No. 2002-STA-3 at 2 (ARB Dec. 10, 2004).

In August 2010 the Secretary of Labor issued new implementing regulations under the STAA that define the scope of discipline or discrimination actionable under the STAA's whistleblower protections. 29 C.F.R. § 1978.102. Those regulations make it a violation for an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]" 29 C.F.R. §§ 1978.102(b), (c). The Administrative Review Board (ARB) has recognized that the regulations broaden prior interpretations of what constitutes an adverse action under the STAA. *Strohl v. YRC, Inc*., ARB No. 10-116, ALJ No. 2010-STA-35 (ARB Aug. 12, 2011).

In this case, there is no question that the terminations of Carethers, Cooks, and Pierce constituted adverse action. In like manner, Respondent's constructive discharge of Goins, Lilly, and Rax, i.e., requiring them to work excessive hours in violation of the 70-hour rule, also constituted adverse action.

Complainants must show by a preponderance of evidence that their protected activity contributed to their terminations. 49 U.S.C. § 31105(b). Complainants assert they met that burden. In that regard, the Board noted that Complainant need only show that protected activity was a contributing factor in the discharge, i.e., any factor which alone or in combination with other factors, tends to affect in any way the outcome of the adverse personnel decision. Thus, for example, a complainant may prevail by proving that Respondent's reason while true is only one of the reasons for its conduct while another contributing factor is the complainant's protected activity. Complainants may succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence. Once the complainant has proven his protected activity was a contributing factor, the respondent may still avoid liability by proving by clear and convincing evidence it would have taken the same adverse action. In any event, to meet this burden, the employer must show its factual assertion is highly probable or reasonably certain.

Adverse action closely following protected activity "is itself evidence of an illicit motive." *Donovan v. Stafford Const. Co*., 732 F.2d 954, 960 (D.C. Cir. 1984). The timing and abruptness of a discharge are persuasive evidence of an employer's motivation. *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983), citing *NLRB v. Advanced Business Forms Corp*., 474 F.2d 457, 465 (2d Cir. 1973). See *NLRB v. RainWare, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

Knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. *Bartlik v. TVA*, Case No. 1988-ERA-15 at 4 n.1 (Sec'y Apr. 7, 1993), aff'd, 73 F.3d 100 (6th Cir. 1996). However, "[C]onstructive knowledge of Complainant's protected activities on the part of one with ultimate responsibility for personnel action may support an inference of retaliatory intent." *Frazier v. Merit Systems Protection Board*, 672 F.2d 150, 166 (D.C. Cir. 1982). The Board has noted that while "knowledge of the protected activity can be shown by circumstantial evidence, that evidence must show that an employee of Respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge of the protected activity." *Bartlik v. TVA, supra*.

In the terminations of Carethers, Cooks, and Pierce, all three showed (1) they engaged in protected activity (protest of excessive hours of work in violation of the 70-hour rule) with White telling said employees to lie to law enforcement if stopped and claim a short-haul exemption to which they were not entitled, (2) adverse action (termination), and (3) contributing factor (temporal proximity of protected activity to adverse action showing illicit motivation as a factor in discharge) with White claiming but failing to show as clear and convincing evidence Carethers conduct in frequently reporting to work late, not contacting Respondent when returning home after an assignment and not providing White with documents proving admission to hospital which Carethers credibly denied. Regarding Cooks and Pierce's terminations, White claimed both drivers refused work which they credibly denied and refused to follow an instruction to show up for work at 7 a.m. when both drivers were instructed by a pipeline supervisor at the prison job site not to come until 8 a.m. when they would be admitted and were in fact admitted to the job site. Further, disputing White's claim is his action in not following policy of progressive discipline (one verbal warning and two write-ups prior to termination) when terminating Pierce, Cooks, or Carethers, with Carethers and Pierce receiving one written warning prior to discharge. (RX-3, 4, 5, 6; Tr. 751-52; 896-99).

F. Constructive Discharges

Complainants Goins, Lilly, Rax, and Williams contend they were constructively discharged or quit because of intolerable working conditions. A constructive discharge occurs where "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Held v. Gulf Oil Co.,* 684 F.2d 427, 434 (6th Cir. 1982); *NLRB v. Haberman Construction Co.,* 641 F.2d 351 (5th Cir. 1981); *Cartwright Hardware Co. v. NLRB,* 600 F.2d 268 (10th Cir. 1979). "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." *Hollis v. Double DD Truck Lines, Inc.*, Case No. 1984-STA-13 at 8-9 (Sec'y March 18, 1985).

In the context of a Title VII claim, the Supreme Court has found that a complainant "must show that the abusive working environment became so intolerable that their resignation qualified as a fitting response" to establish a constructive discharge claim. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004). The Court noted that a constructive discharge included "employer-sanctioned adverse action officially changing [the complainant's] employment status or situation" including a humiliating demotion, extreme pay cut or transfer to a position with unbearable working conditions. *Id*.

The presence of aggravating factors are required for a finding of constructive discharge and adverse consequences such as demotion, failure to promote, and failure to provide equal pay for equal work were generally insufficient to substantiate a finding of constructive discharge. *Earwood v. D.T.X. Corp.*, Case No. 1988-STA-21 at 3 (Sec'y March 8, 1991). In *Earwood*, the Secretary held that based on the totality of the circumstances the complainant was constructively discharged where there was "pervasive coercion to violate Department of Transportation regulations." *Id*. at 4.

The National Labor Relations Board has held that assigning a truck driver fewer loads, according him less seniority and assigning him older, less road-worthy trucks amounts to a constructive discharge. *Interstate Equipment Co. and Teamsters Local 135*, 172 NLRB 145(1968), 1968-2 CCH NLRB 20,084. In *Scerbo v. Consolidated Edison Co. of New York, Inc.*, Case No. 1989-CAA-2 (Sec'y Nov. 13, 1992), the Secretary found adverse action where a complainant was transferred from a relatively mobile, outdoor job to a constrained, isolated warehouse position, and as a result also lost overtime opportunities.

In *Mandreger v. The Detroit Edison Co*., Case No. 1988-ERA-17 (Sec'y Mar. 30, 1994), the Secretary found adverse action where the complainant was referred to the Employee Assistance Program, and as a result of the referral, a psychologist found that the complainant suffered from a mental disorder, the complainant was not permitted to return to work at the nuclear power plant where he had been employed, and after his sick leave and vacation days ran out, he was eventually placed in a position in which there was less opportunity to earn overtime pay and less opportunity for advancement.

Rax quit because he was concerned about excessive driving hours in violation of DOT rules combined with instructions from Respondent to lie to law enforcement about alleged compliance with short-haul rules which could cause him to lose his license. In addition, he was concerned about working 2½ days straight loading and unloading oilfield waste which caused his feet to swell, and White ignored him when informed. Rax was also concerned about dispatchers constantly calling him which prevented him from sleeping and caused him to fall asleep at the wheel and experience near accidents on occasion. Also, White would not allow him and other drivers to properly placard their trucks when carrying hazardous materials.

Goins quit on June 27, 2014 due to Respondent requiring him to work excessive hours. This had an adverse impact on his health as he required emergency room treatment and was prevented from being home with his wife who was having health problems. From June 14, 2012 to May 29, 2014, Goins worked more than 100 hours on 40 occasions. In addition, he quit

because White, Wasson,[11] and Sohrt refused to listen to his complaints about excessive work hours which forced him to use the Kenedy shower which used unclean water on occasion. In fact, Wasson told Goins on one occasion not to use truck stop showers even though he was covered in mud and had not taken a shower in four to five days.

In Lilly's case, he, like Goins, was required to work excessive hours (100 or more per week). When he approached White about working less (light work), White told him there was no such work at Respondent.

These conditions constituted a hostile work environment that was arguably so difficult or unpleasant that a reasonable person in the position of Goins, Lillly, and Rax would have felt compelled to resign. Therefore, I find Goins, Lilly, and Rax have proven by a preponderance of the evidence that they were constructively discharged by Respondent.

However, I find that Complainant Williams' departure was not the result of constructive discharge, as he departed for reasons not involving protected activity. Woods resigned because of a disagreement with management over the people hired to do the job as well as other reasons. While his reasoning may have been related to safety itself, his complaints about personnel decisions by Respondent were not protected activity under the STAA.

VII. REMEDY

In cases such as this, where Respondent has unlawfully terminated employees in violation of the STAA, the appropriate remedy involves a make-whole remedy which includes an order of back pay wherein the discharged worker is made whole for lost wages due to his/her termination. Back pay runs from the date of the discriminatory discharge to the date or reinstatement or the date the employee receives an offer or reinstatement or the date the employee acquires substantially equivalent employment. *Ass't Sec'y & Bryant v. Mendenhall Acquistion Corp.,* ARB No.04-014, ALJ No.2003 No.2003-STA-36 (ARB June 30, 2005); *Polgarv. Florida Stage Lines,* 94 –STA-46 (ARB March 31, 1996); *Nelson v. Walker Freight Lines, Inc.,* 87-STA-24 (Sec'y Jan 15, 1988).

In this case, the evidence shows that only two discharged workers, Pierce and Cooks, experienced a loss of pay. Pierce lost two weeks of wages and Cooks lost six months of wages. In determining the proper wage, I find that Pierce could lawfully work up to 70 hours per week which at $17.00 per hour equals $1,445.00 (40 hours at the straight time rate of $17.00 and 30 hours at time and a half) while Cooks at $18.00 could lawfully make up to $1,530.00 per week. Thus, Pierce is entitled to two weeks of wages or $2,890.00 plus interest, and Cooks is entitled to 26 weeks of wages, or $39,780.00 plus interest. Interest is to be calculated in accord with the rate charged for the underpayment of federal taxes pursuant to 26 U.S.C. § 6621.

In accord with *Dickey v. West Side Transport, Inc.,* ARB Nos.06-150, 06-151 (ARB May 2008). Respondent will offer all six unlawfully terminated employees (Christopher Carethers,

[11] Respondent listed Roy Wasson on as its supervisor and truck pusher and witness. Wasson however did not testify. Wasson ran the Kenedy yard for Respondent. (Tr. 654, 655).

Lawrence Cooks, Isaac Goins, Dedrick Lilly, Billy Rae Pierce, and Timothy Rax) reinstatement to their former positions without loss of lawful terms or conditions of employment. There is no evidence to indicate their reinstatement would be impossible or impractical.

Regarding lawful terms of employment, Respondent shall require and drivers shall use driver logs as required by the DOT and shall not require its drivers to work hours in excess of those set forth in 49 C.F.R. § 395.3. The Federal Motor Carrier Safety Administration has published "Hours of Services Logbook Examples," April 2014 edition, as a guide.[12] (See also CX 2, p. 40.[13]). Respondent is directed to Example #33: Oilfield – Well Waiting Time for guidance on how to have its drivers properly log entries in accordance with the Oilfield Exemption.

Complainants do not seek compensatory damages but request punitive damages of $250,000.00 each ($1.75 million total) for Respondent's callous disregard of their rights under STAA. (Compl. Post-Hrg. Br., p. 11). In this case, I find that an assessment of $250,000.00 each is excessive but that $100,000.00 total (approximately $16,666.67 per complainant) is appropriate to ensure compliance with the STAA and to dissuade Respondent from directing its drivers to lie to law enforcement. *Youngermann v. United Parcel Service, Inc.*, ARB Case No. 11-056, ALJ No. 2010-STA-47 (ARB Feb. 27, 2013).

VIII. ORDER

Based upon the foregoing analysis of the record, I hereby enter the following order:

1. Respondent shall immediately reinstate Complainants Christopher Carethers, Lawrence Cooks, Isaac Goins, Dedrick Lilly, Billy Ray Pierce, and Timothy Rax to their former positions without loss of their lawful terms or conditions of employment.

2. Respondent shall pay Complainant Billy Ray Pierce $2,890.00 in back pay plus interest in accord with the rate charged for the underpayment of federal taxes pursuant to 26 U.S.C. § 6621.

3. Respondent shall pay Complainant Lawrence Cooks $39,780.00 in back pay plus interest in accord with the rate charged for the underpayment of federal taxes pursuant to 26 U.S.C. § 6621.

4. Respondent shall require, and truck drivers shall use, driver logs as indicated in fn. 12 and 13 below as required by the FMCSA and shall not require its drivers to work hours in excess of those set forth in 49.C.F.R. § 395.3.

[12] *Hours of Service Logbook Examples*, Federal Motor Carrier Safety Administration, Apr. 2014 ed., *available at*: http://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/2014_HOS_Logbook_Examples_508.pdf. (last visited Mar. 31, 2015).

[13] *Hours of Service Logbook Examples*, Federal Motor Carrier Safety Administration, Jan. 2013 ed., *available at*: http://atu1027.org/main/attachments/article/3/logbook_examples.pdf (last visited Mar. 31, 2015).

5. Respondent shall pay $100,000.00 in punitive damages (approximately $16,666.67 per complainant) to insure compliance with the STAA and dissuade Respondent from directing its drivers to lie to law enforcement.

6. Respondent shall expunge from the employment records of Complainants Christopher Carethers, Lawrence Cooks, Isaac Goins, Dedrick Lilly, Billy Ray Pierce, and Timothy Rax all disciplinary action taken against them relating to their protected activity as set forth in this decision and will not take any action in the future against these individuals or against Complainant Thomas Williams because of their protected activity in testifying against Respondent in this proceeding.[14]

7. Respondent shall conspicuously post notice of this decision.

8. Complainants' counsel has thirty (30) days from the date of this decision to submit an application for attorney fees.

SO ORDERED this 6th day of April, 2015, at Covington, Louisiana.

Digitally signed by Clement Kennington
DN: CN=Clement Kennington, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

CLEMENT J. KENNINGTON
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) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

[14] While I find Williams did not engage in protected activity related to his termination, I find that his action in testifying against Respondent is to be protected under the STAA.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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. § 1980.110(a). Your Petition should identify the legal 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. § 1980.110(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 the Associate Solicitor, Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

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

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

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

If 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. §§ 1980.109(e) and 1980.110(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. § 1980.110(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. § 1980.109(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. § 1980.110(b).