U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 24 February 2016

Case No.: 2014-STA-00007

In the Matter of:
CHRISTOPHER MEZERKOR,[1]
Complainant,

v.

E&V SERVICES, INC.,
ANDRIUS DUDAITIS,[2] and
RAMUNE DUDAITIS,
Respondents.

Appearances:
Paul O. Taylor, *Esq*.
Truckers Justice Center
Burnsville, Minnesota
For the Complainant

Brett M. Mancino, *Esq*.
Mancino Co., LPA
Cleveland, Ohio
For the Respondents

Before: John P. Sellers, III
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises from a claim under the employee-protection provisions of § 405 of the Surface Transportation Assistance Act ("STAA") of 1982, 49 U.S.C. § 31105, as amended and re-codified. The implementing regulations appear at Title 29 of the Code of Federal Regulations ("C.F.R.") Part 1978. The STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee regarding pay, terms, or privileges of employment because the employee has undertaken protected activity, including: (1) participating

[1] The revised caption reflects the correct spelling of the Complainant's surname, Mezerkor. (*Complainant's Post-Hearing Brief* at 1 n. 1.)

[2] The Complainant initially brought his complaint against John Doe and Mary Roe because he did not know the names of E&V's employees he alleged might be responsible in this case. (JX 1; TR at 18-19.) At the hearing, counsel for the Complainant requested that I amend the caption to name Andrius Dudaitis and Ramune Dudaitis as Respondents in this case. (TR at 19.)

in proceedings relating to the violation of a commercial motor vehicle safety regulation; or (2) refusing to operate a motor vehicle when doing so would violate these rules.

PROCEDURAL HISTORY

On March 13, 2013, Christopher Mezerkor (the "Complainant") filed a complaint under the STAA alleging that E&V Services, Inc. ("E&V"), Ramune Dudaitis, and Andrius Dudaitis (the "Respondents") discriminated against him and terminated his employment on March 3, 2013, for complaining about commercial-vehicle-safety violations and refusing to drive in violation of those regulations. (JX 1.)[3] Thereafter, the Occupational Safety and Health Administration ("OSHA") of the Department of Labor ("DOL") initiated an investigation. In a letter dated October 29, 2013, OSHA's Regional Supervisory Investigator dismissed the Complainant's complaint after establishing that: (1) the Respondents demonstrated with clear and convincing evidence that they did not terminate the Complainant on account of protected activity; and (2) a preponderance of the evidence supported the Respondents' position that the Complainant's protected activity was not a contributing factor in the adverse employment action. (RX 17 at 2.)

In a letter dated November 5, 2013, the Complainant filed objections to OSHA's findings and requested a hearing before the Office of Administrative Law Judges. (JX 7.) On February 12, 2014, I issued a preliminary order requesting that the parties advise this Office of their availability for a conference call. Pursuant to a joint request of the parties, on May 19, 2014, Chief Administrative Law Judge Steven L. Purcell appointed Administrative Law Judge Joseph E. Kane to serve as a settlement judge in this matter. Judge Kane concluded settlement proceedings on July 8, 2014.

Thereafter, pursuant to a Notice of Hearing and Prehearing Order issued on September 17, 2014, I held a hearing on this claim on November 10, 2014, in Cleveland, Ohio. I afforded both parties a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges.[4] At the hearing, I admitted into the record without objection[5] ALJ 1-3,[6] JX 1-7 and JX 10-11,[7] CX 1-2,[8] and RX 3-

[3] In this Decision and Order, "ALJ" refers to the Administrative Law Judge's exhibits, "JX" refers to the Joint Exhibits, "RX" refers to the Respondents' Exhibits, "CX" refers to the Complainant's exhibits, and "TR" refers to the transcript of the hearing held on November 10, 2104.

[4] 29 C.F.R. Part 18A (2008.)

[5] Counsel for the Complainant clarified that he did not stipulate to the truth of OSHA's investigative findings (RX 17); rather, he only agreed that OSHA's findings demonstrated that the Complainant timely filed a complaint. (TR at 15.) Other than this clarification regarding the RX 17, I admitted all exhibits into the record without objection. (TR at 15-16.)

[6] The record contains the following ALJ Exhibits: the Notice of Hearing and Prehearing Order, dated September 17, 2014 (ALJ 1); the Complainant's prehearing materials, dated October 27, 2014 (ALJ 2); and the Respondents' prehearing materials, also dated October 27, 2014 (ALJ 3.)

[7] The record contains the following Joint Exhibits: The Complainant's OSHA Complaint (JX 1); the Driver's Daily Logs (JX 2); Trip Reports (JX 3); a Scale Ticket (JX 4); the Complainant's trip summaries (JX 5); the Complainant's pay stubs and 2013 tax information from Western Reserve Farm Cooperative, Inc. (JX 6); the Complainant's Objections to the Secretary's Findings (JX 7); E&V's Hours of Service, Rules and Policy (JX 10); and E&V's Alcohol and Drug Abuse Policy (JX 11.)

5, 7-8, 11, and 15-17.[9] (TR at 6-16.) The parties withdrew JX 8-9 and the Respondents withdrew RX 1-2, 6, 9-10, and 12-14. (TR at 8, 12-13.) The following witnesses testified at the hearing: Algis Sirvaitis, Esq., Ramune Dudaitis, Andrius Dudaitis, Christopher Mezerkor, and Rebecca Mezerkor. Both parties filed closing briefs, and the record is now closed.

In reaching a decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the hearing testimony, and parties' arguments. Where applicable, I have determined the credibility of the testimony of record. While I have considered all of the evidence of record, I have only summarized the evidence that is relevant to the issues in this case.

ISSUES[10]

The parties contest the following issues:

1. Whether the Complainant engaged in activities protected under 49 U.S.C. § 31105(a)(1)(A)(i) by filing a complaint related to a violation of 49 C.F.R. § 395.3,[11] which pertains to the maximum driving time for property-carrying vehicles;

2. Whether the Complainant engaged in activities protected under 49 U.S.C. § 31105(a)(1)(B)(i) by refusing to operate a vehicle because doing so would violate the maximum driving time for property-carrying vehicles pursuant to 49 C.F.R. § 395.3;

3. Whether the Complainant has shown that his allegedly protected activities contributed to the Respondents' alleged decision to terminate him;

4. Whether the Respondents have shown by clear and convincing evidence that they would have taken the same adverse action against the Complainant absent his alleged protected activities;

5. Whether the Complainant took reasonable steps to mitigate his damages;

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[8] The record contains the following Complainant's Exhibits: a list of computer generated distance calculations (CX 1); and a list of fuel receipts (CX 2.)

[9] The following Respondents' Exhibits were admitted at the hearing: A Safety Performance History Records Request regarding the Complainant's employment at Western Reserve Farm (RX 3); a Safety Performance History Records Request regarding the Complainant's employment at Hogan (RX 4); a Safety Performance History Records Request regarding the Complainant's employment at Tom Greenauer Development (RX 5); E&V's Driver's Accessorials (RX 7); E&V's Commercial Driver's License Information (RX 8); E&V's Drivers Forms (RX 11); Bills of Lading (RX 15); a letter from Algis Sirvaitis, Esq., to the Complainant, dated March 11, 2013 (RX 16); and the results of OSHA's investigation, dated October 29, 2013 (RX 17.)

[10] The parties do not dispute that E&V is a commercial motor carrier within the meaning of 49 U.S.C. § 31105, it is engaged in transportation of property on highways via commercial motor vehicles that have gross vehicle weight rating of 10,001 pounds or more, and it engages in transportation in interstate commerce.

[11] 49 C.F.R. § 395.3 prescribes the maximum driving time allowable for property-carrying vehicles.

6. Whether Ramune and Andrius Dudaitis are individually liable under the STAA for their roles in taking adverse action against the Complainant; and

7. Whether the Complainant is entitled to relief under the STAA.

FACTUAL BACKGROUND AND EVIDENCE

E&V Services, Inc. ("E&V") is a small trucking company based in Montville, Ohio ("Montville".) (TR at 42, 45, 48.) Ramune Dudaitis is E&V's owner and dispatcher. (TR at 42, 72.) Mrs. Dudaitis' husband, Andrius Dudaitis, is a truck driver and E&V's safety director. (TR at 42, 72, 140, 294-295.) The Complainant testified that he has been a commercial truck driver since 2011. (TR at 86.) Although, as discussed below, the Complainant provided inconsistent testimony regarding the date he started working for E&V as a truck driver, I find the record reveals he started working there sometime after January 28, 2013. (RX 7; RX 8; RX 11; TR at 169.)

Algis Sirvaitis' Testimony

Algis Sirvaitis testified on behalf of the Respondents. (TR at 31-40.) He is an attorney licensed to practice law in Ohio. (TR at 32.) He is familiar with Mr. and Mrs. Dudaitis because he incorporated E&V. (TR at 33.) He testified that he authored a letter, dated March 11, 2013, addressed to the Complainant on behalf of E&V. (TR at 34, 36; RX 16.) He testified that he wrote the letter because the Respondents wanted to put the Complainant "on notice" and because the Complainant was verbally threatening Mr. and Mrs. Dudaitis. (TR at 35.) Mr. Sirvaitis testified that the letter also notified the Complainant that he, the Complainant, took log books and a fuel card when he left his employment with E&V and he owed E&V money. (TR at 35-36.) Mr. Sirvaitis stated that he thought that the Complainant quit his employment with E&V. (TR at 36.) Before authoring the letter, Mr. Sirvaitis testified that Mrs. Dudaitis discussed her concerns with him and gave him "all of her logs," "photographs" showing the condition of the truck that the Complainant had been driving, and other "things like that," which he "incorporated" into the letter. (TR at 29, 35-36.)

Mr. Sirvaitis testified that, after he wrote and mailed the letter to the Complainant, he represented and testified on behalf of the Respondents during the Department of Labor's investigation. (TR at 37.)

Ramune Dudaitis' Testimony

Ramune Dudaitis testified on behalf of the Respondents. (TR at 41-72, 234-263.) She is the owner of and dispatcher at E&V, which operates four trucks out of her home in Montville. (TR at 42, 45, 234.) She testified that the Complainant previously worked as a truck driver for E&V. (TR at 43.) She agreed that E&V was responsible for dispatching the Complainant and telling him where to pick up his loads. (TR at 43-44.) Mrs. Dudaitis stated that E&V initially

paid the Complainant thirty-six cents per mile and raised his rate to forty cents per mile after his first run. (TR at 45.) According to her, the Complainant asked for the raise. (*Id*.)

Mrs. Dudaitis testified that she thought the Complainant started working for E&V on February 1, 2013. (TR at 237.) She testified that the Complainant completed and signed various pre-employment forms on January 28, 2013, and took a pre-employment drug test on January 29, 2013. (RX 7; RX 8; JX 10; TR at 234-236, 237-239.) According to Mrs. Dudaitis, the Complainant also signed an employment history form (RX 11), indicating that he had previously worked for the following employers: Hogan, H&H, Western Reserve, Comp Dairy Farm, and Tom Greenauer. (TR at 236-237; RX 11.) Mrs. Dudaitis testified that because the Complainant was not allowed to be in a commercial vehicle before taking the pre-employment drug test, she knew that he had driven for E&V in February 2013. (TR at 237.)

According to Mrs. Dudaitis, E&V uses a computer program called PC Miler to calculate mileage, which she agreed is commonly used in the trucking industry. (TR at 46.) According to Mrs. Dudaitis, PC Miler calculated a distance of 703 miles from E&V's office to Cullman, Alabama ("Cullman".) (TR at 48; CX 1.) After she calculated an average driving speed of seventy miles per hour, she estimated that it would take ten hours and sixteen minutes to travel from Montville to Cullman. (*Id.)*

Mrs. Dudaitis thought that she first asked the Complainant to take the March load to Cullman—the load which is the basis of this action—on Thursday or Friday. (TR at 240.) She was in her office and spoke with the Complainant via telephone. (*Id.)* According to her, she asked him if he wanted "to go to Alabama after his restart," to which he responded, "[Y]es, I want to do that." (TR at 241.)

She further testified that she spoke with the Complainant again on March 2, 2013, after he returned to Montville. (TR at 70, 241.) She testified that she gave the Complainant his paycheck and they discussed delivering the March load to Cullman. (TR at 70.) She stated that another driver had already picked up the load and driven it to E&V's yard. (TR at 70-71.) After the Complainant gave her his bills of lading, she stated that she told him, "[W]ell, when you're ready just come — you know, you can go to Alabama." (*Id.)* She provided the following testimony regarding her exchange with the Complainant:

> Q: Okay. And Mr. Me[]zerkor told you he didn't want to take that load?
> A: No.
> Q: Correct?
> JUDGE SELLERS: Wait a minute. No, he didn't want to take it; or, no, he didn't tell you that?
> A: No. He didn't say anything.
> JUDGE SELLERS: Okay.
> Q: The following day, on Sunday, March 3, Mr. Me[]zerkor informed you he wasn't going to take the load, correct?
> A: No.

Q: He didn't tell you that?
A: No.

(*Id.)* Mrs. Dudaitis testified that the Complainant left after she gave him his check, and she was under the impression that he was still planning to complete the delivery to Cullman. (TR at 241-243.) She was asked, "Do you recall Mr. Me[]zerkor saying anything to you about, this run's illegal. I can't do it?" Mrs. Dudaitis replied, "No, he never said it." (TR at 242.) She testified that her husband was not at home during her meeting with the Complainant. (TR at 243.)

Mrs. Dudaitis further testified that the next day, she called the Complainant to ask about his plans and inquire what time he was "going to be okay to drive." (*Id.)* She stated, "And he just said, I'm not driving anymore." (*Id.)* Thereafter, she said she asked him "how come?" and he responded, "I'm not working for you anymore." (*Id.)* She agreed that the Complainant's response surprised her. *(Id.)*

The following morning, Mrs. Dudaitis stated that she awoke to some noise outside her home at approximately 6:00 a.m. (TR at 244.) At approximately 7:15 a.m., she looked outside and saw car tracks in the snow. (*Id.)* She testified that "a couple hours later" she called the Complainant, who told her he was not working. (*Id.)* She reported asking him when he was planning to collect his belongings since he was no longer working, and he responded, "I already got them at 6:00 o'clock this morning." (*Id.)*

When counsel for the Complainant asked when Mrs. Dudaitis expected the Complainant would have been able to leave for Cullman, she responded, "As soon as he was able to drive." (TR at 58.) She explained, "[T]here was no set time to deliver the load." (*Id*.) She also responded, "No" when asked whether the load had to be delivered to Cullman at 8:00 a.m. on March 4. (TR at 242.) Mrs. Dudaitis subsequently reiterated that the load to Cullman "could have been delivered Wednesday, Thursday. There was no appointment set for that." (TR at 258.) When asked whether she expected the Complainant to leave on Sunday, she responded, "After his hours were restarted" and then added, "[E]arly—Monday morning." (TR at 259.)

Mrs. Dudaitis testified that once drivers are on the road, she arranges a "back haul" or a "reload." (TR at 254-255.) She agreed that most of E&V's loads are secured through freight brokers, but not all loads have scheduled appointments. (TR at 255-256.) When asked whether the Complainant could have taken a month to take the load to Cullman, she responded, "Nobody takes a load and holds it for a month." (TR at 256.)

Mrs. Dudaitis agreed that Mr. Dudaitis took the load from Cullman to Montville and delivered it on March 5, 2013, the day after he picked it up. (TR at 58-59, 62; JX 2 at 18.) She testified that the delivery was not late. (TR at 60.) She agreed that Mr. Dudaitis delivered the same load that she had originally asked the Complainant to haul. (TR at 58.)

Mrs. Dudaitis testified that she understood the rules governing maximum driving times for drivers and she was aware of the number of miles the Complainant had driven between February 18, 2013, and March 3, 2013. (TR at 63, 68-69; JX 5.) She agreed that PC Miler allows

her to see how many miles a driver has driven. (TR at 69.) Mrs. Dudaitis further testified that E&V takes the Department of Transportation's ("DOT") regulations seriously. (TR at 251.) She said that the DOT had audited E&V twice, most recently in April 2013, and it found no violations. (TR at 257.) Moreover, she testified that E&V has a "good" rating based on the "safety measurement system," which "shows how many inspections, how many violations the company has." (TR at 251-252.) She alleged that she never forced the Complainant or other drivers to falsify log books or violate the hours of service regulations. (TR at 252-253.)

Mrs. Dudaitis testified that the Complainant only turned in his driver's logs from his first week of employment at E&V. (TR at 53, 253.) She alleged that she received the remaining driver's logs from the Department of Labor during its investigation. (TR at 254.)

Andrius Dudaitis' Testimony

Andrius Dudaitis testified on behalf of the Respondents. (TR at 72-84, 263-296.) Mr. Dudaitis testified that he works at E&V as a driver, mechanic, and safety director. (TR at 73, 294.) He did not recall exactly when the Complainant started working for E&V, but he stated that no driver had ever started driving for E&V without first "signing the papers or doing the drug test." (TR at 266.) He agreed that E&V has a policy that fines drivers who violate the hours of service rules, which the Complainant signed on January 28, 2013. (TR at 267-268, JX 10 at 10.)

Mr. Dudaitis testified that he hauled the March load from Montville to Cullman between March 4 and March 5, 2013. (TR at 74, 78-79.) After referencing his driver's log, he testified that he delivered the load to Cullman at 6:00 a.m. on Tuesday, March 5. (TR at 270, 279; JX 2 at 18.) He agreed that he was not the original driver assigned to take the load. (TR at 270.) He stated that he thought the load was "preloaded" on Thursday of the week prior. (TR at 269-270.)

Mr. Dudaitis testified that he was not at home on March 2, 2013. (TR at 268.) He testified that his wife called him at approximately 7:00 p.m. or 8:00 p.m. and told him that the Complainant had quit. (TR at 268-269.) Mr. Dudaitis agreed that he spoke with the Complainant on or around March 3, 2013. (TR at 273.) He clarified that as soon as his wife told him that the Complainant had quit, he called the Complainant. (TR at 274, 284.) When asked whether the conversation was "nice," he responded, "Not really." (TR at 273.) According to Mr. Dudaitis, the Complainant was "complaining about" things that they had agreed on, including pay per mileage and pay per stop. (*Id.)* Furthermore, Mr. Dudaitis stated that the Complainant later left him a voicemail accusing E&V of running him "hard," and working him "illegally," but Mr. Dudaitis stated that he had never "heard of" those complaints before. (TR at 274.) Mr. Dudaitis testified that the Complainant threatened him and his wife after quitting employment with E&V. (TR at 274-275.) When asked why he and his wife gave the Complainant a raise so quickly, Mr. Dudaitis testified that they had "so much money invested in the truck" and did not want the truck to "sit around and wait" until they hired another driver. (TR at 277.)

Christopher Mezerkor's Testimony

The Complainant testified at length regarding his employment at E&V. He stated that he has been a commercial truck driver since 2011. (TR at 86.) He discussed his prior employment as a truck driver, recounting that he had first worked at Predator trucking for one and a half months. (TR at 87-88.) After that, he "went back to Western Reserve," a farm cooperative where he worked as a truck driver, and clarified that he worked there for two years prior to working for Predator trucking. (TR at 88-89.) Subsequently, he testified that he worked at H&H for approximately eight months and then at Hogan Transport for approximately four months. (TR at 89-91.) On cross-examination, the Complainant agreed that he did not list Predator Trucking on his employment application with E&V. (TR at 177-178.)

The Complainant testified that he learned of the job at E&V through Craigslist. (TR at 93.) He recalled that he had a telephone conversation with Mrs. Dudaitis, who subsequently offered him a job. (TR at 93-94.) He stated that the job at E&V appealed to him because it allowed him to be home on the weekends and allowed him to drive west, as opposed to east, which enabled him to accrue more mileage. (*Id.)* At the end of the hearing, he agreed that he "loved" working at E&V, he got to be home every weekend, he had a "nice" job, the trucks were nice, E&V took care of him, and that he was given a raise after his first week of work. (TR at 220.)

The Complainant testified at length regarding when he started working for E&V. He initially alleged that he started working there on or around January 17, 2013. (TR 101.) He then referred to falsification of logs, implying that Mr. Dudaitis took away his earlier logs and told him to "just start all over," as though he "had just started there." (*Id.*) He testified that, to comply with Mr. Dudaitis' request, he did, in fact, change his logs to make it appear as if he had just started working there. (TR at 100-101.) Subsequently, however, he testified that he began working at E&V *after* January 28, 2013, in other words, not on January 17, 2013. (TR at 169.) Thereafter, he testified that he was not sure when he started working for E&V. (TR at 173.) The Complainant argued that Mr. Dudaitis took the logs from his first two weeks of employment at E&V. (TR at 216-217.)

According to the Complainant, E&V initially paid him thirty-six cents per mile, and later increased his pay to forty cents per mile. (TR at 95, 185.) He testified that he told E&V that another company had offered to pay him more than thirty-six cents per mile, but he could not "recall right offhand" which company it was. (TR at 185.) He later testified that company was Freedom Transport. (TR at 201.)

The Complainant identified Mrs. Dudaitis as his only supervisor at E&V. (TR 95.) He testified, however, that he had three to four conversations with Mr. Dudaitis regarding how to complete his driver's logs. (TR at 96.) Furthermore, he alleged that Mrs. Dudaitis told him Mr. Dudaitis could "help" him falsify his driver's logs. (TR at 96-97, 182.) The Complainant testified that the Respondents were "running" him "way over" his hours, which is when he complained, and he stated that he thought that was when E&V "finally" gave him a raise. (TR at 99.)

According to the Complainant, Mr. Dudaitis continued to reassure him that he could falsify his logs. (TR at 99-100.) The Complainant stated that he "kept telling them no, I'm not – I'm not running illegal." (*Id.)*

On cross-examination, the Complainant stated that he did not have the falsified log books with him. (TR at 182.) When asked where they were, he responded: "I'd have to find them," and then added: "I don't know if I have them in my possession or not." (*Id.)* He reiterated that he turned in the logs from his first two weeks of employment at E&V, at which time Mr. Dudaitis instructed him to restart his log book. (TR at 98, 183.)

The Complainant acknowledged that he kept some of his logs from E&V. (TR at 182, 190; JX 2 at 17.) He testified that he usually completed his logs contemporaneously with his activities. (TR at 192.) He could not recall, however, when he completed the log for March 2, 2013, and that it might have been after he left E&V. (*Id.)* Toward the end of the hearing, he stated that he "probably" filled the log out once he returned home. (TR at 226.) He testified that all of his logs from February 25, 2013 until March 2, 2013 were accurate. (TR at 105, 112, 132-134, 136; JX 2.) Furthermore, he opined that none of the logs demonstrated a violation of the hours of service regulations. (TR at 183-184.) Even though the Complainant alleged E&V wanted him to falsify his logs, on cross-examination he testified that he wanted to be reinstated by E&V because he "loved" his job. (TR at 200.)

After referencing his logs from February 25, 2013 until March 2, 2013 (JX 2), the Complainant testified he had: (1) 8.25 hours of driving time and 1.25 hours of on-duty, non-driving time on February 25, 2013 (TR at 131); (2) 8.5 hours of driving time and one hour of non-driving time on February 26, 2013 (TR at 116-118, 131-132); (3) 10.75 hours of driving time and 1.25 hours of on-duty, non-driving time on February 27, 2013 (TR at 132); (4) eight hours of driving time and 1.25 hours of on-duty, non-driving time on February 28, 2013 (TR at 134); (5) 9.5 hours of driving time and one hour of on-duty, non-driving time on March 1, 2013 (TR at 136); and (6) eleven hours of driving time and 1.5 hours of on-duty, non-driving time on March 2, 2013 (TR at 138.)

The Complainant testified that when he was traveling from Troy, Illinois to Montville, he had the following telephone discussion with Mrs. Dudaitis regarding possibly taking a load to Cullman:

> Q: Tell me what Mrs. Dudaitis said to you and what you said to her?
> A: She wanted me to leave for Alabama on Monday, Cullman, Alabama, on Sunday.
> Q: She told you this before you were unloaded?
> A: Yes.
> Q: Okay. And at that point did you believe you had an issue with your hours of service that would prevent you from driving?
> A: Yes.
> Q: Okay. What did you tell her? And I'm talking just while you're still—you believed somewhere around Troy, Illinois?
> A: I told her it couldn't be done.

Q: Okay. So when did she tell you the load loaded?
A: Saturday, when I got back. She said the trailer was ready.
Q: Okay. Did she tell you when the load had to be in Cullman, Alabama?
A: Monday morning, at 8:00 o'clock, 8:00 a.m.
Q: And you told her you couldn't do it?
A: Yes, sir.
Q: And while you're still out around Troy, Illinois, what did she say in reply to you, if anything, when you told her you couldn't do it?
A: She said I had no choice.
Q: Did you tell her why you couldn't do it?
A: I was—I would be violating my hours.
Q: You told her that?
A: Yes, sir.
Q: Okay. How did that discussion end? I'm talking the telephonic discussion from Troy, Illinois.
A: She said I wasn't going to get paid unless I took the load.
Q: Okay. On March 2, 2013, did you have any discussion with Mrs. Dudaitis when you returned to Montville, Ohio?
A: I did.
Q: Okay. Where were you when you had this discussion?
A: At her house, at the terminal where I parked the truck.

(TR at 138-140.) He testified he had the following conversation with Mrs. Dudaitis once he returned to E&V's terminal in Montville:

Q: Okay. All right. And tell me what you said to Mrs. Dudaitis when you returned to the terminal on March 2, 2013.
A: That I couldn't take the load on Sunday.
Q: Well, did—who initiated the discussion?
A: Ramune.
Q: Okay. What did she say to you?
A: That the load was ready to leave Sunday afternoon at 12:30.
Q: Okay. And what did you say?
A: That I couldn't do it.
Q: Did you give a reason why you couldn't do it?
A: Out of hours.
Q: Okay. What did you mean by out of hours?
A: I worked all week. I drove all week. I knew I was close. I didn't add up all my hours, but I knew I was close.
Q: Okay.
A: It's at least—it's at least 12 to 14 hours down to Cullman, Alabama. Then they wanted me to drive to Dallas, Texas, be there Tuesday morning and be back here Wednesday.
Q: I don't want to know what they wanted—wanted you to do. I want to know what you were told to do.
A: Drive to Cullman, Alabama, be there by 8:00 o'clock Monday morning.

(TR at 140-141.) The Complainant further testified that he was scheduled to go to Dallas, Texas, at 8:00 a.m. on Tuesday morning. (TR at 141.) He reiterated that when he told Mrs. Dudaitis that he could not take the load, she responded that he "had no choice." (*Id.)* He testified that after he responded, "I do have a choice," Mrs. Dudaitis told him to clean out the truck. (TR at 141-142.)

The Complainant testified that, following this encounter, he interpreted Mrs. Dudaitis' statement as meaning that he had been fired. (TR at 142.) He testified that his conversation with Mrs. Dudaitis ended when she told him that Mr. Dudaitis could "help" him with his logs. (TR at 147.) The Complainant stated that he responded by saying he wanted to "run legally," not "illegal[ly]." (*Id.*) The Complainant further testified that Mrs. Dudaitis called him at 11:30 a.m. on Sunday to ask him whether he was planning to take the load. (TR at 143-144.) He again said he told her he was "out of hours," meaning he had driven almost seventy hours. (TR at 144.) He explained he had already accrued 62.5 on-duty hours that week, and he approximated that it would take him twelve to fourteen hours to drive to Cullman. (TR at 145-146.)

At the end of the hearing, the Complainant again described the conversation he had with Mrs. Dudaitis on March 2, stating that after he arrived at E&V's headquarters and collected his paycheck, he had a conversation with Mr. and Mrs. Dudaitis that lasted between ten and fifteen minutes. (TR at 224-225.) He stated that he believed that he spoke with Mr. Dudaitis about how to falsify his logs so he could "leave the next day." (TR at 225.) The Complainant testified he cleaned out his truck at approximately 6:30 p.m. or 6:45 p.m. on Saturday, March 2, after Mrs. Dudaitis gave him his check. (TR at 143, 196, 226.) He could not recall whether he returned to collect his items from his truck on Sunday, March 3. (TR at 202.)

On cross-examination, the Complainant testified that Mrs. Dudaitis told him that the load to Cullman needed to be delivered by 8:00 a.m. on Monday, and the load to Dallas, Texas, needed to be delivered by 8:00 a.m. on Tuesday. (TR at 188-189.) When asked, "Now, you know that that load that you're talking about, there was no set delivery time. It didn't have to be there at 8:00 a.m., right?" the Complainant responded, "They were all set deliveries." (TR at 189.) When asked whether the bills of lading showed "a set time for delivery or pickup," the Complainant said he did not know. (TR at 204; RX 15.) Later, on redirect examination, the Complainant clarified that, in his experience, "[m]ost of the time" bills of lading included appointments for loads. (TR at 212.) He agreed that there were times when a carrier would tell him to deliver a load by a certain time, but the receiver had not set a delivery appointment. (*Id.)* On re-cross examination, the Complainant admitted that he had originally agreed to take the load to Cullman. (TR at 223.)

Rebecca Mezerkor's Testimony

Rebecca Mezerkor testified on behalf of the Complainant. (TR at 227-233.) She is married to the Complainant. (TR at 228.) She testified that the Complainant was "pretty upset" the day he was fired. (*Id.)* She discussed how her husband's unemployment caused financial strain on her family. (TR at 228-229.) On cross-examination, she stated the Complainant came home and said he was no longer working for E&V on a Saturday, "exactly one week" before her wedding. (TR at 230.)

APPLICABLE LAW

Surface Transportation Assistance Act

The STAA prohibits discharge, discipline, or discrimination against an employee who refuses to operate a commercial motor vehicle with a gross weight rating in excess of 10,000 pounds in violation of Federal Rules or Regulations because of apprehension of serious injury due to unsafe conditions or health matters. 49 U.S.C. § 31105; 29 C.F.R. § 1978.100(a.) On August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 1536, § 31105, 121 Stat. 266, 464-67 (2007), Congress amended paragraph (b)(1) of 49 U.S.C. § 31105 to make applicable in the adjudication of STAA whistleblower claims 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".)

In order to prevail on his claim under the STAA, the Complainant must demonstrate by a preponderance of the evidence that: (1) he engaged in protected activity under the STAA; (2) the Respondents were aware of the protected activity; (3) he experienced some form of adverse action; and (4) the protected activity was a "contributing factor" to the adverse action that he suffered. 29 C.F.R. § 1978.109(a); *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. 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*, ARB No. 09-092, slip op. at 6.

If the Complainant meets his burden, the Respondents may avoid liability if they demonstrate "by clear and convincing evidence" that they "would have taken the same adverse action in the absence of any protected activity or the perception thereof." 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(b.) "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Williams*, ARB No. 09-092, slip op. at 6, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, slip op. at 14 (ARB Jan. 31, 2006.)

The Administrative Review Board ("ARB") has recently considered whether the respondent's evidence of legitimate, non-retaliatory reasons for its action may be weighed against the complainant's causation evidence in determining whether the complainant has met his or her burden of proving by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action at issue. *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014.) A split panel of the ARB ruled, *inter alia*, that an Administrative Law Judge may not weigh a respondent's evidence of a legitimate, non-retaliatory reason for an adverse action when determining whether the complainant has met his or her burden of proving contributing factor causation by a preponderance of the evidence.

More recently, however, in *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB Mar. 20, 2015) (en banc), the ARB affirmed, but clarified, the *Fordham* decision, stating:

> While, as *Fordham* explains, the legal arguments advanced by a respondent in support of proving the statutory affirmative defense are different from defending against a complainant's proof of contributing factor causation, there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation *as long as the evidence is relevant to that element of proof*. 29 C.F.R. § 18.401.

Powers, slip op. at 23. The ARB in *Powers* said the *Fordham* majority "properly acknowledged that 'an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well the credibility of the complainant's causation evidence.'" *Powers,* slip op. at 23 (quoting *Fordham*, slip op. at 24.)

Reading the ARB's decisions in *Powers* and *Fordham* together, therefore, it appears that the Board has settled on the view that there is no inherent limitation on evidence that a factfinder can evaluate when determining whether the Complainant's protected activity was a contributing factor in the alleged adverse action, provided only that the evidence is relevant to that element of proof.

49 C.F.R. § 395.3

The Complainant alleges that the Respondents violated 49 C.F.R. § 395.3, which prescribes the maximum driving time allowable for property-carrying vehicles.[12] Effective December 16, 2014, the Federal Motor Carrier Safety Administration ("FMCSA") suspended the requirements regarding the restart of a driver's sixty- or seventy-hour limit that drivers were required to comply with beginning July 1, 2013. 79 Fed. Reg. 76241 (Dec. 22, 2014.) The provisions were replaced with the previous restart provisions in effect on June 30, 2013. The restart provisions in effect on June 30, 2013 allowed drivers to restart their sixty- or seventy-hour calculation by taking at least thirty-four consecutive hours off duty, without any additional limitations.[13]

[12] 49 C.F.R. 395.3 provides: "(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, regardless of the number of motor carriers using the driver's services, 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-hour 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. (ii) Rest breaks. Except for drivers who qualify for either of the short-haul exceptions in Sec. 395.1(e)(1) or (2), driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes. (b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after--(1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week."

[13] The restart provisions in effect on June 30, 2013 provided as follows: "(c) (1) Through June 30, 2013, any period of 7 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours. After June 30, 2013, any period of 7 consecutive days may end with the beginning of an off-duty period of 34 or more

DISCUSSION

1. Credibility Determinations

I have based the following conclusions of law on my analysis of the entire record, the parties' arguments, and applicable regulations, statutes, and case law. 29 C.F.R. §§ 18.57, 1978.107. An administrative law judge is entitled to weigh the evidence, draw inferences from it, and assess the credibility of witnesses. *See Germann v. Calmat Co.*, ARB No. 99-114, slip op. at 8 (ARB Aug. 1, 2002); 29 C.F.R. § 18.29.

The sharp conflict between the testimonies of the witnesses at the hearing requires that I address their credibility. On crucial testimony, Mr. Dudaitis and Mrs. Dudaitis offered completely different testimony than that of the Complainant. The degree of conflict is disturbing, because all witnesses swore under oath; if one side is telling the truth, the other is not, thus violating that oath. When I evaluate whether witnesses are credible, I have considered their demeanor while testifying and their statements in light of the other evidence of record.

Almost all of the Complainant's case rests upon his testimony. However, after observing his demeanor and statements while testifying, and comparing them to the demeanor and testimony of Respondents' witnesses, I find no reason to accept the Complainant's testimony over that of the Respondent's witnesses. In this regard, I note that the Complainant's testimony was marred by inconsistency on many pertinent factual issues, none of which were incidental and some of which were critical to the narrative of events he postulated. These issues included, but were not limited to: (1) his start date and rate of pay at E&V; (2) his allegation that the Respondents encouraged him to falsify his logs; (3) his employment history; and, finally, and most critically, (4) the conversations he had with Mrs. Dudaitis, and allegedly Mr. Dudaitis, regarding the delivery to Cullman.

First, the Complainant could not provide consistent testimony regarding what would seem a relatively straightforward fact: his start date at E&V. As previously summarized, he initially alleged that he started working for the company "around January 18, 17, 18, somewhere around in there." (TR 100-101.) The fact is not merely incidental, because he then alleged that Mr. Dudaitis talked him into changing his logs during the first week of February in order to make it appear as if he had just started working there. (*Id*.) As stated by the Complainant, "He started me all over, because he had me falsifying my logs." (TR. 99.)

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consecutive hours that includes two periods from 1 a.m. to 5 a.m. (2) Through June 30, 2013, any period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours. After June 30, 2013, any period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1 a.m. to 5 a.m. (d) A driver may not take an off-duty period allowed by paragraph (c) of this section to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days--or, in the case of drivers in Alaska, 70 hours in 7 consecutive days or 80 hours in 8 consecutive days--until 168 or more consecutive hours have passed since the beginning of the last such off-duty period. When a driver takes more than one off-duty period of 34 or more consecutive hours within a period of 168 consecutive hours, he or she must indicate in the Remarks section of the record of duty status which such off-duty period is being used to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days--or, in the case of drivers in Alaska, 70 hours in 7 consecutive days or 80 hours in 8 consecutive days."

The Complainant later agreed on cross-examination, however, that he could not have begun working with E&V until after the results of his drug screening were obtained. (TR 168.) He was then confronted with the form from the drug screening test, which was dated January 28, 2013, and was forced to concede that he did not begin work for E&V until *after* January 28, 2013. (TR 168-169.) Subsequently, he stated that he was not sure when he started working for the company. (TR at 173.) Asked whether his earlier testimony about starting with E&V in the middle of January 2013 was completely wrong, the Complainant appeared evasive, alleging that Mr. Dudaitis took his "first two weeks' logs." (TR at 169, 216.)

The Complainant's testimony conflicts with that of Mrs. Dudaitis, who testified that she thought the Complainant started working for E&V on February 1, 2013. (TR at 237.) In support of her assertion, she explained that E&V requires all of its new hires to complete pre-employment paperwork. She testified that the Complainant completed and signed the following forms on January 28, 2013: (1) *Driver Accessorials* (RX 7), which explains how drivers should report accidents, among other things; (2) *Commercial Driver's License* (RX 8), which explains that drivers need to follow certain rules and regulations; and the (3) *Hours of Service Rules and Policies* (JX 10), which contains driving rules and regulations and sample driver's logs. (TR at 234-236, 238-239.) She stated that the Complainant took a pre-employment drug test on January 29, 2013, and she knew he did not work for E&V in January 2013 because E&V would not have allowed the Complainant to be in a commercial vehicle prior to taking a drug test. (TR at 237.) Mr. Dudaitis' testimony corroborates Mrs. Dudaitis' statements regarding E&V's policies. Mr. Dudaitis testified that he did not recall exactly when the Complainant started working for E&V, but he said no driver has ever started without first "signing the papers or doing the drug test." (TR at 266.) Furthermore, he agreed that E&V's policy is to fine drivers who violate the hours of service rules, which the Complainant signed on January 28, 2013. (TR at 267-268, JX 10 at 10.)

The evidence of record shows the Complainant signed all of E&V's pre-employment forms on January 28, 2013. (RX 3; RX 4; RX 5; RX 7; RX 8; RX 11; JX 10; JX 11.) Other than his testimony, the Complainant did not put forth any evidence to establish that he worked for E&V for two weeks in January 2013.

In addition to his inability to identify when he started working for E&V, the Complainant provided inconsistent testimony regarding his rate of pay. He alleged E&V increased his pay in his "second or third week" of employment. (TR at 95-96.) Moreover, he implied that the timing of his raise was coincident with his falsification of his logs, at the request of Mr. Dudaitis, to demonstrate a later start date, stating, "And I think that's when they finally they gave me a raise." (TR 98.) However, on cross-examination, he said he received his first pay increase (from thirty-six cents to forty cents per mile) after his first week of employment. (TR at 185.) Moreover, he appeared to agree with the Respondents' counsel that the impetus of the raise was not his agreeing to falsify documents, but, rather, his telling E&V that he was contemplating an offer from another employer at a higher rate. (*Id*.)

Regarding the falsification of travel logs, the Complainant testified that both Mr. and Mrs. Dudaitis encouraged him to falsify his logs. As noted, his testimony that pressure was put on him to falsify a start date later than January 17, 2013, was marked by inconsistency and what

appeared to be an ultimate retraction after confronted with documentary evidence regarding the date of his drug test. On a broader level, the Complainant alleged that Mrs. Dudaitis told him Mr. Dudaitis would "help" him falsify his logs. (TR at 96.) The Complainant also alleged that Mr. Dudaitis was "running" him "way over" his hours and had him "falsifying" his logs. (TR at 99-100, 182.)

Despite his accusations, however, the Complainant testified that the following logs were accurate: February 25, 2013 (TR at 105, 132; JX 2 at 12), February 26, 2013 (TR at 112, 132; JX 2 at 13), February 27, 2013 (TR at 132; JX 2 at 14); February 28, 2013 (TR at 132-133: JX 2 at 15); March 1, 2013 (TR at 134); and March 2, 2013 (TR at 136.) In addition, when asked whether any of the logs in JX 2 demonstrated a violation of the hours of service regulations, the Complainant responded, "No, they don't." (TR at 183-184.)

Furthermore, the Complainant did not submit into evidence the logs that he claims he falsified; in fact, he testified that he does not even know where to find them. (TR at 182.)

> Q. All right. You're a careful person, too, right?
> A. I am.
> Q. You keep track of records very well, right?
> A. Somewhat.
> Q. All right. And in this case, in fact, you kept some of your logbooks. And rather than turn them over to E&V Services, you turned them over to your attorney, right?
> A. The last logs I had, when I got into it with E&V, with Ramune, arguing on the phone, that—I sent everything to him with a fuel card.
> Q. All right. So you kept your log books, right?
> A. They were my stuff, yes.
> Q. All right. These falsified log books, you don't have those with you; do you?
> A. No, I don't.
> Q. You knew you were going to file a complaint with the Department of Labor but did you get rid of those falsified log books? Did you burn them, trash them? What did you do with them?
> A. I'd have to find them.
> JUDGE SELLERS: Say that again.
> A. I would have to find them.
> JUDGE SELLERS: You would have to find them in the sense that they were in your possession or—
> A.I don't know if I have them in my possession or not.
> JUDGE SELLERS: Who else's possession would it be if you had to find them?
> A. I wasn't sure what log book I had sent to Paul Taylor or not, if there was any other log books. But I know the first two weeks that

> he had—he took my log books and told me to start over, like I just started there.
> Q. Okay. And you don't have those either?
> A. No. I received two paychecks from him. He holds four weeks. I was there six weeks.
> Q. Now, let me ask you this. You are—your complaint in this case, in this hearing, is for hours of service, correct? That you feel that you were forced to violate the hours of service regulations, right?
> A. There was a few weeks that he would talk to me and wanted to violate hours of service.
> Q. All right. You went through—in Joint Exhibit 2, those are your *Driver's Daily Logs*, correct, in addition to other logs. But your *Driver's Daily Logs* are in there, right?
> A. Correct.
> Q. And none of those demonstrate any violation of the hours of service regulations, correct?
> A. No, they don't.

(TR at 183-184.)

Because it is consistent with the logs of record, I find credible Mrs. Dudaitis' testimony that she does not force drivers to falsify logs or violate the hours of service regulations. (TR at 252-253; JX 2.) Furthermore, I find noteworthy Mrs. Dudaitis' testimony that DOT has audited E&V twice, most recently in April 2013, and found no violations. (TR at 252, 257.)

Various other factors have caused me to conclude that the Complainant is not credible, or at least not any more credible that Mrs. Dudaitis such that his word should be taken over hers. Mrs. Dudaitis testified that the Complainant took some of his log books with him when he left E&V. (TR at 53, 253; JX 2 at 17.) The Complainant does not dispute her accusation. (TR at 182, 190; JX 2 at 17.) Furthermore, on his application for employment with E&V, he failed to list Predator Trucking as one of his former employers, even though he testified he previously worked there. (TR at 87-88, 177-178.)

The Complainant's testimony regarding the events leading up to his alleged termination is also difficult to accept over the Respondents' testimony. The Complainant testified he had a conversation with Mr. and Mrs. Dudaitis at E&V's headquarters on March 2, and that he spoke with Mr. Dudaitis about how to falsify his logs. (TR at 224-225.) Conversely, Mrs. Dudaitis testified that her husband was not at home during her encounter with the Complainant on that day. (TR at 243.) Similarly, Mr. Dudaitis testified that he was not at home on March 2, 2013; rather, he was in Erie, Pennsylvania on a private matter (TR at 268-269, 283.) I am inclined to credit Mr. Dudaitis' testimony regarding his whereabouts due to the illicit nature of his reason for being out of town, which he seemed genuinely reluctant to confess to. (TR at 280-281.) Even if the Complainant did not intend to be untruthful concerning whether Mr. Dudaitis was present during the conversation on March 2, his inability to recall details regarding the day the Respondents allegedly fired him makes his testimony less reliable.

For all of the abovementioned reasons, I am not persuaded by the Complainant's account of the events at issue in this case. Therefore, I give his testimony little probative weight.

2. Protected Activity

The Complainant alleged that he engaged in protected activities when he (1) filed complaints with the Respondents stating that his dispatches violated the hours of service regulation; and (2) refused to take the load to Cullman. At the evidentiary hearing stage before an administrative law judge, the Complainant "is required to *prove* the four *prima facie* elements by a preponderance of the evidence … and not merely *allege* circumstances sufficient to establish the four elements." *Fordham*, ARB No. 12-061, slip op. at 19-20 (emphasis in original); *see also Bechtel v. Administrative Review Bd., U.S. Dep't of Labor,* 710 F.3d 443 (2d Cir. 2013); *Accord Brune*, ARB No. 04-037, slip op. at 12-14; *Peck v. Safe Air Int'l*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 8-9 (ARB Jan. 30, 2004.)

a. Filing an Internal Complaint

The Complainant first alleged that he engaged in protected activity under 49 U.S.C. § 31105(a)(1)(A)(i) when he complained to the Respondents that the dispatch to Cullman violated 49 C.F.R. § 395.3. An employee engages in STAA-protected activity when 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 v. Domino's Pizza*, Case No. 2008-STA-52, 6 (ARB Jan. 31, 2011).) A complaint need not expressly cite the specific motor vehicle standard allegedly violated, but it 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*.)

The Complainant's account of the conversation he had with Mrs. Dudaitis regarding the load to Cullman is markedly different from Mrs. Dudaitis' account. According to the Complainant, he spoke with Mrs. Dudaitis over the phone when he was traveling from Troy, Illinois to Montville. (TR at 138.) He alleged that after she asked him to take the load to Cullman, he told her "it couldn't be done" because he "would be violating" his "hours." (TR at 139.) According to the Complainant, she responded that he "had no choice." (*Id.*) He also said Mrs. Dudaitis told him he "wasn't going to get paid" unless he took the load. (TR at 140.) Once he returned to Montville, he said he again told Mrs. Dudaitis that he "couldn't take the load on Sunday" because he was "[o]ut of hours." (TR at 140-141.)

In contrast, Mrs. Dudaitis testified she first asked the Complainant if he wanted to take the load to Cullman on Thursday or Friday. (TR at 240.) She was in her office and spoke with the Complainant via telephone. (*Id.)* She said she asked him if he wanted "to go to Alabama after his restart," and he responded, "[Y]es, I want to do that." (TR at 241.) Mrs. Dudaitis testified that when she spoke with the Complainant again on March 2, 2013, after he returned to Montville, the Complainant never said he did not want to take the load to Cullman. (TR at 70-71,

241.) Furthermore, when asked, "Do you recall Mr. Me[]zerkor saying anything to you about, this run's illegal. I can't do it?" Mrs. Dudaitis said, "No, he never said it." (TR at 242.)

As discussed above, I have found that the Complainant was not a particularly credible witness. His testimony is too inconsistent to be relied upon. Other than his testimony, the Complainant has not provided any evidence that he told Mrs. Dudaitis that taking the load from Montville to Cullman would have violated the hours of service regulation. The Complainant even admitted that he had originally agreed to take the load to Cullman, but did not explain why he changed his mind. (TR at 223.) Moreover, the evidence of record suggests that the delivery to Cullman was not time-sensitive. Mrs. Dudaitis repeatedly testified that the load did not need to be delivered on a specific day or time. (TR at 58, 60, 242, 258.) She stated that it could have been delivered on "Wednesday, Thursday. There was no appointment set for that." (TR at 258.) On more than one occasion, she said she expected the Complainant to take the load "[a]fter his hours were restarted." (TR at 241, 259.) Mr. Dudaitis ultimately delivered the load to Cullman on March 5, 2013, and Mrs. Dudaitis testified it was not delivered late. (TR at 58-59, 60, 62, 74, 78-79, 270, 279; JX 2 at 18.) Although the Complainant testified that all deliveries were "set deliveries," the record reflects that while some of the bills of lading include mandatory delivery dates, the majority of them do not. (TR at 189; RX 15.) I find Mrs. Dudaitis to be credible and I have no reason to doubt her testimony.

For the various reasons previously outlined, I have not given probative weight to the Complainant's testimony because it is unreliable and inconsistent. Absent any other probative evidence, I find that the Complainant has not shown by a preponderance of the evidence that he told Mrs. Dudaitis that the dispatch from Montville to Cullman would have violated the hours of service regulation. Assigning greater credibility to Mrs. Dudaitis than the Complainant, I find that the evidence supports the Respondents' assertion that the Complainant never told them that the dispatch from Montville to Cullman would have violated the hours of service regulation. Put differently, the Complainant has not shown by the preponderance of the evidence that he made an internal complaint.

b. Refusing to Drive

Second, the Complainant alleged that he engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i) when he refused to drive the load from Montville to Cullman. Refusing to drive when the contemplated run would cause a driver to violate the federal hours of service regulation, 49 C.F.R. § 395.3, is a protected activity. *Paquin v. J.B. Hunt Transport, Inc.,* 93 STA 44 (Sec'y July 19, 1994.)

Once again, the Complainant's testimony differed considerably from that of Mr. and Mrs. Dudaitis. The Complainant testified that he spoke with Mrs. Dudaitis while he was driving from Troy, Illinois to Montville, and that she said she wanted him to leave for Cullman on Monday. (TR at 138.) He then testified that the load needed to be delivered at 8:00 a.m. on Monday. (TR at 139.) When he told Mrs. Dudaitis that he could not take the load, he testified that she responded that he "had no choice," to which he replied, "I do have a choice." (TR at 140-142.) The Complainant alleged that Mrs. Dudaitis then told him to clean out his truck. (TR at 141-142.) Following this encounter, the Complainant said he interpreted Mrs. Dudaitis'

statement as meaning she had fired him. (TR at 142.) Later at the hearing, the Complainant alleged that after he arrived at E&V's headquarters and collected his paycheck, he had a ten-to-fifteen minute conversation with Mr. and Mrs. Dudaitis. (TR at 224-225.) After collecting his paycheck, the Complainant cleaned out his truck at approximately 6:30 p.m. or 6:45 p.m. on Saturday, March 2. (TR at 143, 196.)

In contrast to the Complainant's testimony, Mrs. Dudaitis alleged that when she first asked the Complainant whether he wanted to take the load to Cullman after his restart, he responded, "[Y]es, I want to do that." (TR at 241.) She explained that if the Complainant had said that he did not want to do the run, she "would have assigned another driver." (*Id.)* On March 2, 2013, after he returned to Montville, she gave the Complainant his paycheck and told him, "[W]ell, when you're ready just come—you know, you can go to Alabama." (TR at 70, 240-241.) She testified that the Complainant never said he did not want to take the load. (TR at 71.) When the Complainant left, she testified, she was under the impression that he was still planning to complete the delivery to Cullman. (TR at 241-243.) According to her, she called the Complainant the next day to inquire when he was "going to be okay to drive." (TR at 243.) She stated that he responded, "I'm not driving anymore." (*Id.*) When she asked him why, he responded, "I'm not working for you anymore." (*Id.*) She agreed that the Complainant's response surprised her. (*Id*.) The next morning she testified she called the Complainant again, and he told her that he was not working. (TR at 244.) She asked him when he was planning to collect his belongings, and he responded, "I already got [them] at 6:00 o'clock this morning." (*Id.)*

Mr. Dudaitis' testimony corroborates that of Mrs. Dudaitis. Mr. Dudaitis testified that he was not at home on March 2, 2013, but his wife called him at approximately 7:00 p.m. or 8:00 p.m. and told him that the Complainant had quit. (TR at 268-269.) He stated that as soon as his wife told him the Complainant had quit, he called the Complainant. (TR at 274, 284.) Mr. Dudaitis stated that the Complainant later left him a voicemail accusing E&V of running him "hard," and working him "illegally." (TR at 274.) Mr. Dudaitis testified that he had never "heard of" those complaints before. (*Id.)*

Simply put, the preponderance of the evidence does not show that the Complainant refused to drive because doing so would exceed his allowable hours. Other than the Complainant's testimony, which I have found questionable due to its many inconsistencies on several key points, no other evidence exists to establish that the Respondents ordered or otherwise expected the Complainant to violate the hours of service regulations by insisting that he deliver the load to Cullman at 8:00 a.m. on Monday. Mrs. Dudaitis testified, credibly, that she understood the rules governing maximum driving times for drivers and that she was aware of the number of miles the Complainant had driven between February 18, 2013, and March 3, 2013. (TR at 63, 68-69; JX 5.) After the Complainant originally agreed to take the load to Cullman, Mrs. Dudaitis testified that she expected him to start the drive after he took the requisite number of off-duty hours. (TR at 241, 252, 259.) Her testimony is consistent with E&V's good safety record. (TR at 252, 257.) Weighing the conflicting testimony in this case, I find the Complainant's testimony no more credible that the testimony of Mrs. Dudaitis - that the Complainant originally agreed to take the load to Cullman, later changed his mind, and then quit employment with E&V. Moreover, I note that the Complainant's history of working for trucking companies for very short periods is not inconsistent with his brief period of employment at E&V.

Similarly, I do not find the Complainant's allegation that the Respondents further required him to deliver a load from Cullman, to Dallas, Texas, by 8:00 a.m. on Tuesday, March 5, more credible that the contrary testimony of Mrs. Dudaitis. (TR at 141, 189.) Mrs. Dudaitis explained that she did not dispatch or attempt to dispatch the Complainant on a load from Cullman to Texas on March 2, 2013; rather, she clarified that the Complainant took a load to Texas during his first week of employment at E&V. (TR at 50-51; CX 1 at 2.) The record reflects that from February 4, 2013 until February 5, 2013, the Complainant drove from Cullman to zip code 75119. (CX 1 at 2.) Mrs. Dudaitis testified that zip code 75119 "was in Texas." (TR at 50.)

In sum, I find the Complainant has not shown by a preponderance of the evidence that he refused to drive because doing so would have caused him to violate the federal hours-of-service regulation. All he has provided in support of his position is his own testimony, which I have found to be inconstant on several key points and thus not particularly persuasive in general. Admittedly, issues that turn on the credibility of witnesses are difficult to assess and rest on the trier-of-fact's subjective impression; however, here it is the Complainant who clearly has the burden of proof. And in that light, I found Mrs. Dudaitis' testimony, which was not marred by inconsistency in any particulars, the more credible, and certainly not any less credible than that of the Complainant. She testified that the Respondents asked the Complainant whether he wanted to take the load to Cullman once he was eligible to drive again, and that they did not force him to do so in violation of 49 C.F.R. § 395.3. Furthermore, I find credible the testimony of Mr. and Mrs. Dudaitis, who allege the load to Cullman did not need to be delivered at a specific date or time. The Complainant has not demonstrated that he engaged in protected activity when he refused to take the load to Cullman.

Having failed to establish by a preponderance of the evidence that he engaged in protected activity, I find the Complainant has not carried his burden of presenting a *prima facie* case of retaliation.

3. Adverse Employment Action

Even assuming, *arguendo*, that the Complainant engaged in protected activity, he further failed to show by the weight of the evidence that the Respondents took adverse action against him. The Complainant alleged that after he told Mrs. Dudaitis he could not take the load to Cullman, she responded that he "had no choice." (TR at 141.) He said she told him to clean out his truck when he told her, "I do have a choice." (TR at 141-142.) In contrast, Mrs. Dudaitis' account of the conversation is much different. She testified she was under the impression that the Complainant was planning to take the load to Cullman. According to her, it was not until she called to see what time he was "going to be okay to drive" that he responded, "I'm not driving anymore." (TR at 243.) She asked him why, and he allegedly responded, "I'm not working for you anymore." (*Id.*) She agreed that his response was surprising. (*Id.*) Mr. Dudaitis testified that his wife called him at approximately 7:00 p.m. or 8:00 p.m. that day and told him the Complainant had quit. (TR at 268-269.) Mrs. Dudaitis testified that if the Complainant had refused to drive, she would have assigned another driver to take the load. (TR at 241.) In fact, that is precisely what she did when the Complainant refused to take the load; she had Mr. Dudaitis deliver the load on March 5, 2013. (TR at 73-64.)

Again, the sequence of events reported by Mr. and Mrs. Dudaitis differs markedly from that of the Complainant. Again, therefore, the resolution of this issue turns on the credibility of the witnesses. For various reasons previously discussed, I have found the Complainant's testimony inconsistent on several key points and therefore do not find his testimony particularly persuasive in general. On the other hand, no such inconsistencies marred the testimony of Mrs. Dudaitis, and on the whole I found her to be a credible witness, and certainly at least as credible as the Complainant. Therefore, I do not give more weight to the Complainant's allegation that he suffered an adverse job action than I do to the Respondents' assertion that he voluntarily quit his employment with E&V when he told Mrs. Dudaitis he was no longer driving. Even assuming, *arguendo*, that I had no discernable means of judging credibility, meaning that the Complainant's testimony had not been inconsistent, I still could not conclude that the Complainant's version of the events was any more credible than that of the Respondents. *See Cook v. Kidimula International, Inc.*, 95-STA-44 (Sec'y Mar. 12, 1996) (the Secretary approved the ALJ's decision to find the Complainant had not shown an adverse action by a preponderance of the evidence where the only relevant evidence was the conflicting testimony of the complainant and the respondent's owner and no evidence existed to corroborate either person's testimony.) The Complainant, as noted, has the burden of establishing adverse action by a preponderance of the evidence. *See Williams*, ARB No. 09-092, slip op. at 6 (citing *Williams v. American Airlines, Inc.*, ARB 09-018, 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010); *Fordham*, ARB No. 12-061, slip op. at 19-20; *Peters v. Renner Trucking & Excavating*, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009.) Absent any other probative evidence supporting the Complainant's allegation, I find that the Complainant has not shown by a preponderance of the evidence that the Respondents told him to clean out his truck or discharged him in any other manner.

CONCLUSION

Having failed to establish that he engaged in protected activity or that he suffered from adverse action, the Complainant has not established his *prima facie* case. Moreover, because he has not established that he engaged in protected activity, he therefore cannot establish that his alleged protected activity was a contributing factor to the alleged adverse action that he suffered. The Complainant has failed to establish that the Respondents violated the STAA. Therefore, his request for relief is denied.

ORDER

IT IS HEREBY ORDERED that Christopher Mezerkor's claim for unlawful discrimination under the STAA is **DISMISSED.**

Digitally signed by John P. Sellers III
DN: CN=John P. Sellers III, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

JOHN P. SELLERS, III
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.

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve

the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a.)

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.
Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b.) Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b.)