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Issue Date: 19 October 2015

CASE NO.: 2014-STA-00065

In the Matter of:

MICHAEL J. PATTON,
Complainant,

v.

UNITED PARCEL SERVICE,
Respondent.

ORDER DENYING SUMMARY DECISION

This is an action under the whistleblower protection provision of the Surface Transportation Assistance Act. *See* 49 U.S.C. § 31105 (2007). Complainant Patton challenges UPS' termination of his employment on October 1, 2009, which was reduced in a grievance procedure to a 90-day suspension without pay. He alleges that UPS disciplined him when he continued to dispute and failed to comply with driving instructions that he contended were unsafe.

UPS moves for summary decision. It argues that, as a matter of law, (1) Patton cannot show that he engaged in protected activity, and (2) that he cannot refute UPS' legitimate, non-discriminatory reason for the discipline it imposed: that Patton refused orders to reduce the number of stops he was making en route.

Complainant is representing himself. He initially stated that he needed additional discovery to respond to the motion, and he filed a motion to compel. I decided the motion to compel as well as UPS' motion for reconsideration and Complainant's motion for sanctions. UPS certified that it complied with the additional discovery requirements that I imposed. Following this, Complainant filed his opposition.

Viewing the evidence in the light most favorable to Patton and considering only those facts that are undisputed, Patton can show enough to defeat the motion. He repeatedly complained that safety considerations required him to make certain equipment inspection stops en route. When UPS instructed him to eliminate certain stops, he stated that this could not be done safely, and he continued to make the stops. UPS imposed discipline based on Complainant's failure and refusal to drive his truck in a manner that he reasonably believed posed a real danger of serious injury or accident that would harm himself or the public, a risk that he communicated to UPS. The motion therefore will be denied.

Undisputed Facts[1]

Patton works for UPS as a union member. Under the collective bargaining agreement, he bid and won a job in 1995 as a feeder driver. Feeder drivers drive tractor-trailers on intercity hauls, as opposed to UPS drivers who drive smaller trucks and deliver individual packages locally. Patton worked a daily 470-mile roundtrip overnight route from Holbrook to Phoenix, Arizona and return. He typically began at Holbrook at 8:00 p.m. and would return to Holbrook at about 7:10 a.m. the next day, though it could be as late as 8:00 or 9:00 a.m. because of snow or a truck breakdown.[2] Road maintenance and construction also could cause delays. Under the collective bargaining agreement, UPS paid Patton overtime for work in excess of 8 hours in a day or 40 hours in a week. That meant Patton generally earned overtime every day he worked, and the later he completed the roundtrip, the more overtime he'd earn.

In the spring of 2009, UPS changed the start time for the Holbrook distribution center workers who unload and sort packages from incoming feeder trucks. Rather than starting at 7:45 a.m., they began to start at 7:00 a.m. If Patton continued to return at about 7:10 a.m., the work force would be on the clock waiting for him for 10 minutes. UPS has a complex method to calculate the time expected for any given truck run; the expected time is referred to as the "allowed" time. For almost 13 years, Patton had consistently been taking 1.5 hours longer than the allowed time for the Holbrook-Phoenix run. Nothing on the record suggests, however, that UPS disciplined or even counseled Patton about the time he was taking for those 13 years.

Soon after UPS began to start its Holbrook workers at 7:00 a.m., the Company initiated steps that it says were aimed at getting Patton to return to Holbrook about 10 minutes earlier – by the workers' new starting time. Supervisor Michael Peterson rode with Patton for his full shift on three successive days, March 30 through April 1, 2009. Peterson wrote daily summaries about these "On the Job Supervision" rides. He noted advising Patton on ways to improve his work. As to time saving, Peterson advised Patton that he should call the Phoenix dispatch office rather than going there personally, and that he should be ready to go by his start time (being in uniform, having bought needed refreshments, and having been to the restroom), rather than doing this after he arrived at 8:00 p.m. After the March 30, 2009 ride, he noted that he had:

> Instructed [Patton] to make one stop en route from Holbrook to Phoenix or Phoenix to Holbrook, which will constitute a break of fifteen minutes, an equipment check, and a restroom visit. This does not prevent him from making a separate check prior to traveling down a grade which makes a separate equipment check necessary.

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[1] I must consider only those material facts on which there is no genuine dispute and must view the evidence in the light most favorable to Patton (as the non-moving party), drawing all reasonable inferences in his favor, and not weighing the evidence or making credibility determinations. *See* Discussion, below. Accordingly, the facts found are for purposes of this motion only.

[2] At his deposition, Patton testified that he was regularly back at Holbrook by 7:10 a.m. In opposition to summary decision, he states that it was "on or before 0715." As he wrote "on or before," not "at" 0715, I conclude that he is not attempting to refute his deposition testimony and that he regularly returned to Holbrook at 7:10 a.m. After returning the tractor-trailer to Holbrook, Patton had to perform an after-trip inspection; he might have had other duties and might remain on the clock as late as 7:45 a.m.

UPS brief, Ex. B. In a memo on December 4, 2009, Peterson clarified the sentence about making separate equipment checks. C.Ex. 5. He wrote:

> When I rode with Mike Patton on 3/30/09, he made stops to do equipment checks at two locations prior to downgrades. I asked him why he made these stops at these locations . . .. He said they were necessary to check his equipment prior to traveling down the grades.

Id.

Peterson noted after the second ride (March 31, 2009) that Patton "has committed to completing his day (punching out) between 6:45 and 7:00; and letting me know what reasons this doesn't happen if it doesn't." Patton later explained, however, that this assumed a perfect run with no delays.

After the third ride, Peterson wrote:

> The past three nights, [Patton] has demonstrated that he can run his run in under an hour overallowed, which is down from over an hour and a half overallowed. He has also demonstrated that he can run his run with 25 min. or less of idle time, which is down from an average of 33 min. of idle time. Our expectation is that [Patton] will maintain and/or improve these numbers.

UPS brief, Ex. B.

As Patton concedes, Peterson "shaved . . . 15 minutes off his run" by having Patton take his breaks differently, one break in each direction of travel. UPS brief, Ex. A at 68:17-25; 78:4-79:20. Peterson's directive did not reduce Patton's total break time; rather, Patton would save time overall by taking all of his break time in just two breaks per day. *Id.* at 105:6-106:3. That's because, whenever he stopped driving for a break, he had to do other activities, such as safety checks. So if he took several shorter breaks rather than two longer breaks, he'd also have to do these other activities several times rather than twice per day. Peterson's directive is consistent with the collective bargaining agreement, which allows two 15-minute breaks per day. *Id.* at 108:9-24. Patton admits that UPS never told him that he could not stop to do a safety inspection (or use a restroom) if he felt he needed to. *Id.* at 109:17-110:2. But as I recite below, it was Patton's making more than two stops per roundtrip run that led to his termination, though at least some of the stops were for safety checks or using a restroom.

In particular, despite Peterson's instructions, Patton continued to make on average seven stops on each roundtrip. *Id*. at 113:3-12. He didn't consider any portion of the stops to be break time. If he stopped en route, such as to use a restroom, he didn't count that toward his personal break time; he remained on the clock. *Id.* at 115:24-116:10. Consistent with this, he took two 15-minute breaks in addition to the stops; he combined them into a 30-minute break while he was in Phoenix. *Id.* at 115:9-23. Patton testified to daily driving routines as follow:

Outbound, he did a pre-trip inspection. He took his first stop 90 miles out of Holbrook to use the bathroom. UPS brief, Ex. A at 117:1-23. This took about 12-13 minutes. *Id.* Until Peterson drove with him, Patton did not do a safety check at this location; he began doing a check there on Peterson's instruction. *Id*. at 121:19-122:13. But as recited above, Peterson's instruction was that on a single stop such as this, Patton should take his 15-minute break as well as use the restroom and do a safety check. Patton did not do this.

Patton's second outbound stop was just 14 miles north of the first stop. *Id.* at 118:8-119:8. It took 4-5 minutes. *Id.* at 119:9-12. Patton stopped for fatigue and a safety check; he did the safety check because UPS trained him to do it before the upcoming 6 percent grade; Patton did not contend that a law or regulation required the stop.[3] *Id.* at 118:8-119:23; 121:6-18; 122:22-123:14; 168:11-14; 169:4-16; 171:20-172:15. During the stop, he checked the same items as he'd checked before leaving Holbrook, having driven only 104 miles since then. *Id.* at 123:18-24. There was no restroom at this location. That means that Patton could not have combined a restroom break with the safety check at the beginning of this 6 percent downgrade: He had to do the safety check and use a restroom at two separate locations.

The record does not contain details on the third outbound stop.

Before leaving Phoenix for the return, Patton did a safety check. UPS brief, Ex. A at 129:3-4. He made his first stop after about 90 miles, which was at the top of another 6 percent downgrade; it was again for a safety check. *Id.* at 129:5-17. UPS trained him to stop there. *Id*. at 129:18-25. The stop took about 4 minutes. *Id.* at 130:14-15.

The next stop was a restroom stop about 10 miles later, at the bottom of the grade; Patton did a safety check before resuming the trip. *Id.* at 131:18-132:3. Patton explained that the safety check was necessary because this was a public facility and someone could have "touched" the truck. *Id.* at 132:22-133:5. This stop took about 7-8 minutes. *Id.* at 133:6-11.

The last stop on the return trip was one Patton added after his rides with Peterson. *Id.* at 133:20-134:8. He added it because almost all rest areas after that had been closed and there would be no restroom before the end of his run at Holbrook. *Id.* at 134:18-25.

Patton estimated that his en route safety checks on average together revealed safety problems about twice yearly. UPS Br. Ex. A at 131:6-16.

Questioned about his failure to take two en route 15-minute breaks as directed (rather than making stops en route and still taking a 30-minute break at Phoenix), Patton testified that he should be able to stop to use bathrooms without it counting against his leave time. *Id.* at 138:16-139:11. He admitted that the collective bargaining agreement does not provide for bathroom breaks other than the two 15-minute breaks. *Id.* at 139:12-14. He also stated that he needs to use

[3] Patton attached to his opposition excerpts from the "Arizona Commercial Driver License Manual." C.Ex. 4. Generally, the manual provides advice to drivers on what they should know and keep in mind while driving commercial vehicles. Section 2.1.6 is entitled, "Inspection during a Trip." *Id.* at 4.3. The only relevant language states that drivers should regularly inspect tires. Absent signs of "trouble," nothing about this suggests any legal or regulatory requirement that Patton make the stops that UPS wanted him to cease.

a bathroom only every two hours and that the trip from Holbrook to Phoenix takes about 4 hours and 15 minutes. *Id.* at 139:15-140:10. He conceded that one bathroom stop in each direction is enough. *Id.* at 140:11-18. Of course, this would not add up if there were any delays en route.

Yet Patton disputed UPS' view that he need not make more than one stop in each direction. Patton is the senior driver on this route, which requires night driving, steep mountain grades, hills and curves, snow and ice, high winds going across I-40, and animals . . . [on a] 12 hour route." C.Ex. 6 (Decl. of Bandin) at 6.1. He has been a safe driver for 30 years and, relying on his UPS training, has never had an accident at UPS. UPS Br. Ex. A at 168:11-169:3.

He contends that UPS' requirements, had he complied with them, would have eliminated three stops for safety inspections. *Id*. at 141:7-19; 157:10-13. He believes these stops are necessary based on the training UPS gave him plus comments Peterson made about the safety stops. *Id.* at 157:18-158:6. Patton also bases his opinion on his own experience of what's required for safety while hauling 80,000 pounds. *Id.* at 169:4-16. As he explained, the visual pre-trip brake inspection cannot show whether the brakes are out of alignment or dragging. On the road, he must stop to do a "tire bump" to feel for excessive heat coming off the brakes or for leaking grease. For these reasons – even after UPS suspended him without pay for making the stops – Patton continued making one of the safety stops he had been told to cease. *Id.* at 167:16-168:8.

As Patton was not complying with UPS' directives, on April 29, 2009, UPS counseled him on making excessive stops en route. UPS brief, Ex. D. His supervisor instructed him about this again on May 12, 2009. *Id.* On May 20, 2009 after another meeting, UPS gave Patton a written warning for failure to follow supervisory instructions "regarding the taking of a single fifteen (15) minute break." *Id.*

UPS administered more supervisory instruction on September 3, 9, 10, 14, and 15, 2009. It issued a second written warning on September 17, 2009. *Id.* This was for failure "to follow supervisory instruction regarding unscheduled stops." *Id.* Supervisor Peterson told Patton's shop steward that the excessive stops were two safety stops and a bathroom stop. C.Ex. 6 at 6.4. The steward who met with Peterson and Patton disputed this, saying that the stops are at the beginning of a 6 percent downgrade that is posted to check brakes. *Id*. Peterson stated that he did not know of the signs posted to check brakes. *Id.* The steward also disputed another stop because it was mandated as part of Arizona DOT traffic control in a construction area. *Id*.[4]

A second shop steward sat in another meeting with Peterson and Patton in September 2009. C.Ex. 7. Discussing Patton's "excessive" stops, Peterson cited the downgrade with the sign to check brakes as one of the unnecessary stops. *Id.* When the shop steward questioned him further, Peterson admitted that he personally would make the stop even if there was no sign because it was the start of a downgrade. *Id.* Thus, while UPS never expressly told Patton that he could not stop for safety inspections, UPS Ex. A at 109:14-110:2, the stops that he was required to cease included stops for safety checks of the brakes before a long downgrade.

[4] All trucks were required to pull off and wait until a pace car led them through the construction site. *Id.*

Finally, UPS terminated the employment by letter of September 22, 2009, for failure "to follow supervisory instruction regarding unscheduled stops." UPS Br. Ex. D. UPS sent a second letter to the same effect on October 1, 2009. *Id.* After a grievance process, the termination was reduced to a 90-day suspension without pay.

UPS' records show that no driver has completed the relevant run in the allowed time, yet none other than Patton has been disciplined.[5]

Discussion

On summary decision, I must determine, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matter officially noticed, if there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. § 18.72. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying the same rule in cases under FED.R.CIV.P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present specific facts showing that there is a genuine issue for trial. *Celotex Corp v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue for trial exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

Because the facts allegedly giving rise to this claim occurred in 2009, a question arises about the applicable controlling regulations. Congress amended the Surface Transportation Assistance Act in 2007, in the light of the 9/11 Commission Report. The amendment extends the statute to security concerns (as well as safety concerns) and allows for awards of punitive damages up to $250,000. It makes other changes. There is no question that the current statute, as amended in 2007, was in effect at the time of the events relevant here and is controlling.

But following the statutory amendment, the Department of Labor did not amend its implementing regulations until it published an interim final rule on August 31, 2010, *see* 75 FED. REG. 53544, and a final rule on July 27, 2012, *see* 77 FED. REG. 44121. The prior regulations, in effect at the time UPS terminated Patton's employment, were published on November 25, 1988, *see* 53 FED. REG. 47676. They long pre-exist the 2007 amendments to the statute.

The regulations published in 2010 make substantive changes aimed at implementing the 2007 statutory amendment and, to the extent consistent with the statute, bringing it into alignment with other whistleblower statutes. For example, the 1988 regulations were consistent with an analysis similar to that employed in retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. *See Calmat Co. v. U.S. Dep't. of Labor,* 364 F.3d 1117, 1122 (9th Cir. 2004). But the 2010 and 2012 regulations establish a considerably different analysis, in which an

[5] This still leaves the possibility that a driver might exceed the allowed time yet complete the trip back to Holbrook by 7:00 a.m. For example, a driver who was overallowed by 30 minutes would arrive at Holbrook well before 7:00 a.m. As this is summary decision, however, I draw all reasonable inferences in Patton's favor as the non-moving party.

employer is liable if a complainant can show that his protected activity was a contributing factor to the employer's adverse action. *See* 29 C.F.R. § 1978.109(a). Once liability is established, the employer may avoid relief only if it shows by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity. *Id*. at § 1978.109(b).

On the other hand, the new regulations make some changes that are procedural. For example, while hearings under the 1988 regulations applied our general procedural rules as well as our rules of evidence codified at 29 C.F.R. Part 18, the new regulations do not; they apply only our general procedural rules in 29 C.F.R. Part 18, subpart A, not the rules of evidence in subpart B. *Compare* 29 C.F.R. § 1978.106(a) (1988) *with* 29 C.F.R. § 1978.107(a) (2012). The earlier regulations referred to the person who filed a whistleblower complaint as a "Prosecuting Party"; the new regulations use the term "Complainant."

The applicability of regulations published after the events at issue turns on whether the new rule is substantive or procedural. *See Landgraf v. USI Film Products*, 511 U.S. 244, 275 (1994). The rule cannot be applied retroactively if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." 511 U.S. at 269. New procedural rules, however, generally apply to a pending case unless the parties have earlier acted in reliance on the old rule prior to the enactment of the new rule. 511 U.S. at 275 n. 29. But even if a new rule concerns substantive rights, it may be applied retroactively if it is only "clarifying" existing law. *See Johnson v. Siemens Building Technologies, Inc*., ARB No. 08-032 (Mar. 13, 2011) (holding Dodd-Frank amendment of Sarbanes-Oxley whistleblower provision only clarified the earlier act and therefore could be applied retroactively).

The new analytical framework applicable to STAA claims to determine liability imposes a lesser burden on complainants and a greater burden on respondents. Complainants' showing of a contributing factor is substantially less demanding than the showing required under the formerly applicable rule in Title VII retaliation cases. Requiring a respondent to establish what is essentially an affirmative defense by clear and convincing evidence is a greater burden than the preponderance of the evidence standard under Title VII. I therefore will not apply retroactively these substantive changes in the regulations to this case.

On the other hand, I will apply the new procedural regulations and refer to Mr. Patton as "Complainant." I also will not apply formal rules of evidence.

I turn now to the parties' contentions.

The employee protection provision of the Surface Transportation Assistance Act "was enacted to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles." *Brock v. Roadway Express, Inc.,* 481 U.S. 252, 257 (1987). "Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations." *Id.*

The Act provides in relevant part that an employer may not discharge, discipline, or discriminate against an employee because:

- The employee "has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding"; or

- the employee refused to operate a vehicle because

    1. "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

    2. "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition."

49 U.S.C. § 31105(a)(1). With respect to the last of these, "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." 49 U.S.C. § 31105(a)(2).

I. Patton Has Raised a Genuine Issue Concerning His Engagement in Protected Activity.

A complainant's "proof of unlawful retaliation is established using the same framework used to prove discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2." *Calmat Co. v. U.S. Dep't. of Labor,* 364 F.3d 1117, 1122 (9th Cir. 2004). This requires adapting the test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973),[6] to the STAA. *Id.* It means that a complainant

> Has the initial burden of establishing a prima facie case by raising an inference that protected activity was likely the reason for the adverse employment action. Once the [complainant] has established a prima facie case, the burden of production shifts to the [respondent] to articulate a legitimate, non-retaliatory reason for the adverse employment decision. If the [respondent] advances reasons to rebut the inference of retaliation, the [complainant] bears the ultimate burden of demonstrating by a preponderance of the evidence that the reasons articulated were pretext for retaliation.

Calmat, supra, 364 F.3d at 1122 (citations omitted).

[6] The Court has further developed the test in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); and *Raytheon v. Hernandez*, 540 U.S. 44 (2003).

Establishment of a *prima facie* case requires a complainant to show: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of an adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of the employer. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). Some decisions identify the employer's knowledge of the protected activity as a separate element; others analyze it as necessary to the causal link.[7]

By challenging Complainant's showing that he engaged in protected activity, Respondent here is asserting that Complainant is unable to make out a *prima facie* case. If this is correct, Respondent will prevail without articulating a legitimate reason for the termination or advancing reasons to rebut retaliation; I will not reach the issue of pretext. But here, Patton raises a genuine issue of material fact as to both types of protected activity: complaining about unlawful practices and refusal to drive because of a reasonable apprehension of serious injury.

Complaint of violation. The statute protects employees who complain about activity they reasonably believe violates "a commercial motor vehicle safety or security regulation, standard, or order."

> It is well-established that "[a]s long as the complaint raises safety concerns, the layman who usually will be filing it cannot be expected to cite standards or rules like a trained lawyer. The statute requires only that the complaint 'relate' to a violation of a commercial motor vehicle safety standard."

Maddin v. Transam Trucking, Inc., ARB No. 13-031, slip op. at 5, (Nov. 24, 2014), citing *Nix v. Nehi-RC Bottling Co., Inc.*, No. 1984-STA-001, slip op. at 4 (Sec'y July 13, 1984). A complainant need not prove an actual violation of a vehicle safety regulation. *Yellow Freight System, Inc. v. Martin*, 954. F.2d 353, 356-57 (6th Cir. 1992); *see also Lajoie v. Environmental Management Systems, Inc.*, 1990-STA- 00031 (Sec'y Oct. 27, 1992). A complaint to the employer is sufficient; the complainant need not have complained to a government agency. *See Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (case below 95-STA-34) (DOL Secretary's policy to protect internal complaints "eminently reasonable") (citing cases); *Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993).[8]

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[7] As the Administrative Review Board more recently described the analysis: "A complainant meets this burden by initially showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in protected activity under the statute of which the employer was aware, that the complainant suffered adverse employment action and that a nexus existed between the protected activity and the adverse action." *Jenkins*, slip op. at 16-17. Once a complainant meets his initial burden of establishing a *prima facie* case, the burden then shifts to the employer to simply produce evidence or articulate that it took adverse action for a legitimate, non-discriminatory reason (a burden of production, as opposed to a burden of proof). When the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, non-discriminatory reason, the rebuttable presumption created by the complainant's *prima facie* showing "drops from the case." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Schlagel*, slip op. at 5 n.1; *Jenkins*, slip op. at 18. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)." *Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007).

[8] The new regulations include coverage for complaints to employers. 29 C.F.R. §§ 1978.101(g) (2012), 1978.102(b)(1). This applies here because it merely clarifies the regulatory regime by stating expressly what the

Here, Patton admitted at his deposition that UPS never told him that he could not make a safety stop and that he made the safety stops based on his training and experience, not because they were mandated by law or regulation. But he also testified that he told Peterson that at least one of the downgrades was posted with a sign requiring truckers to check their brakes. In addition, he and his union steward reported that Patton was required to stop daily during a lengthy, ongoing construction project at the time UPS was scrutinizing his performance. He had to wait at this Arizona Department of Transportation site as several trucks lined up for about 20 minutes, until a pace car would lead them all through the construction.

Though Patton might not have understood that traffic control signs on highways and directions from Arizona state construction workers to be legally mandated. But I find both come within the statute as standards and orders that regulate commercial vehicles. These are state orders with which commercial drivers must comply. Patton offered evidence that he complained to a supervisor that he must make these stops despite UPS' direction limiting how many stops he made.

Patton also admitted that UPS never told him that he could not make safety or bathroom stops. But that concession is insufficient. It remains that UPS disciplined Patton when he made the safety and bathroom stops. The result would be different if, when Patton said he had to make the stops because of an upcoming downgrade or because all the roadside rest stops ahead were closed and he needed to use a restroom, UPS took no disciplinary action. That, however, was not what happened.[9] There is no requirement that an STAA complainant show that the employer expressly told her that it would retaliate if she engaged in protected activity; evidence can be inferential or circumstantial as it is here.

Refusal to drive. Complainant did not allege an outright refusal to drive. Rather, he offers evidence that he refused to drive consistent with UPS' directives that he take only one stop in each direction. Driving or operating a truck in violation of an employer's order to operate it in a particular manner "falls within the ambit of the 'refusal to operate' clause of the STAA [when the refusal is on account of] the risk of serious injury that STAA is designed to avoid." *Maddin, supra*, citing *Beverdige v. Waste Stream Environmental*, ARB No. 97-137, slip op at 3 (Dec. 23, 1997) (employee drove overweight truck only by correcting the perceived illegality by off-loading). Thus, "certain refusals or insubordinate acts arising out of the complainant's employment as a truck driver may be covered under the 'refusal to operate' clause even where the activity does not strictly constitute a refusal to operate the vehicle. *Maddin*, slip op. at 5.

Viewed in a light favorable to Complainant, the evidence shows that, though Peterson initially acknowledged that Patton might have to make safety stops in addition to the one stop he was to make in each direction, UPS thereafter criticized Patton for making those safety stops (as well as other stops) and ultimately terminated the employment, citing Patton's refusal to comply with

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case law had consistently held when the regulation was silent. Nonetheless, the result is the same based solely on the case law that pre-exists the current regulation.

[9] It appears that some of the stops might not have been necessary for safety or restroom breaks on every trip. But many were necessary for safety reasons.

UPS' directives. In the conversations with Peterson, both Patton and his union stewards expressly stated that Patton was continuing to make certain stops because it was hazardous to approach a miles-long 6 percent downgrade without a brake inspection. Patton continued to operate the truck, but did so inconsistent with UPS' directive because he perceived a real danger of serious accident or injury if the brakes failed. He explained that the pre-trip inspection was not an adequate substitute because it was necessary to inspect whether the brakes were throwing off too much heat or if grease was leaking. This is a protected refusal to operate within the meaning of the statute. The fact that Patton's conduct was insubordinate – at least with respect to the continued safety stops – does not rebut his protected status; on the contrary, it is the insubordination in the name of safety that that is the protected refusal to operate.[10]

In all, Patton has raised a genuine issue as to both statutory bases for protected activity.

II. Patton Has Raised a Genuine Issue Concerning UPS' Articulated Reason for the Discipline.

UPS claims that Patton was terminated because he repeatedly failed to follow instructions. It articulates this as a legitimate, non-retaliatory reason for the termination.

The argument fails at the outset, for UPS' directive to Patton under the circumstances was not legitimate under the Act. UPS criticized and then disciplined Patton for failing to follow its directives to operate his operate his truck in conditions about which Patton told UPS of a reasonable apprehension that neglecting the stops meant driving with the vehicle in a condition that presented a real risk of serious injury or accident. The discipline and the directive cannot be squared with 49 U.S.C. § 31105(a)(1)(A) or (B). It violates the STAA and is not a legitimate reason. Patton offers evidence that at least some of the stops he complained about and insisted on making were required to avoid serious injury or accident if the brakes were not functioning adequately. At least insofar as UPS imposed discipline in part based on Patton's continuing to make those stops, it has failed to state a legitimate reason for the discipline.

Moreover, Patton shows that few, if any, other drivers completed runs within the allowed time, yet others were not disciplined. UPS states that its only reason for disciplining Patton was that he kept making disapproved stops, not because he took too long to do his run. The argument is spurious.

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[10] *Calhoun v. U.S. Dep't of Labor*, 576 F.3d 201, 209 (4th Cir. 2009), cited by UPS, is not to the contrary. There, the question concerning the driver's refusal to drive as directed related to two particular days, June 26 and July 10, 2010. On those days, taking additional time despite UPS' orders, the driver completed his pre-trip inspection to his satisfaction. The applicable rule required the driver to complete a pre-trip inspection to his "satisfaction." The court found the question of whether this was protective activity to be a close one but did not reach it. 576 F.3d at 209. Instead, the court found Calhoun's claim failed as to those dates for other reasons. 576 F.3d at 209-10.

UPS also argues that the refusal to operate clause cannot apply because Patton's refusal was not based on his truck's "hazardous safety condition." The argument is without merit. A vehicle weighing 80,000 pounds approaching a miles-long 6 percent downgrade is a vehicle in a hazardous condition. The vehicle's movement and control are as much part of its condition as are the function of its parts. The circumstances here are an example of hazards Congress meant the STAA to address.

Drawing every reasonable inference in Complainant's favor as the non-moving party, I conclude that, if Patton returned each morning to Holbrook by 7:00 a.m., UPS would not have taken any of the steps that eventually led to the termination. That is why Peterson instructed Patton about more than which stops to make; he also instructed Patton on items such as dressing in his uniform and obtaining refreshments before arriving at work. Peterson rode on three consecutive days with Patton, not to identify which stops Patton should make, but to figure out how to shave 15 minutes off the roundtrip. UPS' interest was in how long the trip took and in whether Patton got back to Holbrook by 7:00 a.m., when the distribution staff was starting the morning shift. Indeed, UPS' primary interest seemed to be in shortening the trip; otherwise, UPS could have had Patton back at 7:00 a.m. simply by having him start his shift 15 minutes earlier. Then it would not have been necessary to reduce his run time. But UPS chose an approach that would shorten Patton's work hours. The result was the dispute about which and how many stops were necessary.

The fact that UPS didn't discipline other similarly situated workers who were overallowed when those workers did not assert safety issues – and yet disciplined Complainant when he was overallowed but made safety complaints – suggests that UPS' stated reason for the discipline is pretextual. I am not concluding that, after a hearing, I would find pretext. But I may not weigh the evidence or make credibility determinations on summary decision. Rather, I may accept as fact only what Patton does not offer evidence to dispute, viewing the evidence in the light most favorable to him, drawing every reasonable inference in his favor.

In addition, it appears that Peterson conceded to one of Patton's union stewards that he too (*i.e.*, Peterson) would stop and check his brakes before a miles-long 6 percent downgrade but that UPS was going to discipline Patton for doing this anyway. C.Ex. 7. This also suggests pretext. Again, I must accept this for purposes of the motion; I could reach a different conclusion after hearing and weighing testimony and credibility.

Motivation generally cannot be determined on summary judgment. *See Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1315 (9th Cir. 1989); *Allen v. Scribner*, 812 F.2d 426, 436 (9th Cir.

1987). This is an example of that general observation. Patton has raised a genuine issue on this question.

Conclusion and Order

For the foregoing reasons, UPS' motion for summary decision is DENIED.

SO ORDERED.

Digitally signed by STEVEN BERLIN
DN: CN=STEVEN BERLIN, OU=ADMIN LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

STEVEN B. BERLIN
Administrative Law Judge