U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 April 2014

Case No.: 2014-STA-00009

In the Matter of:

GRANT E. TIMMONS, *pro se*,

Complainant,

v.

CRST DEDICATED SERVICES, INC.,

Respondent.

APPEARANCES: Grant E. Timmons, *pro se*
Complainant

Kevin J. Visser,
Attorney for Respondent

BEFORE: DANA ROSEN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982, 49 U.S.C.A. § 31105 (2007), and its implementing regulations, 29 C.F.R. Part 1978 (2008) ("STAA"). Complainant filed the instant STAA complaint on August 8, 2013, alleging that Respondent had violated the settlement agreement obtained under a prior STAA claim and blacklisted him by providing a negative job reference. On October 31, 2013, OSHA issued its findings, determining that Complainant had not demonstrated that the negative reference prevented him from obtaining employment. The case was appealed to the Office of Administrative Law Judges on November 13, 2013. On February 12, 2014, Respondent's Motion for Summary Decision was denied, holding that, although this Court does not have jurisdiction over Complainant's breach of contract relating to his prior STAA claim, it does have jurisdiction over the blacklisting claim. A formal telephonic hearing took place on February 25, 2014, with open court in Newport News, Virginia, at which time all

parties were afforded a full and fair opportunity to present evidence and testimony under the STAA. At the hearing, Administrative Law Judge Exhibits 1 through 3, Complainant's Exhibit 1, and Respondent's Exhibits A through E were admitted into the record.

STIPULATIONS

1. Respondent is a person within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31101;

2. Respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31105, engaged in transporting products over the nation's highways;

3. Complainant was employed as a commercial motor vehicle driver within the meaning of 49 U.S.C. § 31101;

4. Complainant was employed by CRST Expedited from December 1, 2010 to August 1, 2011, when he left to pursue over-the-road driving. Complainant was employed a second time by CRST Expedited from November 9, 2011 to February 26, 2012, when he left to pursue another driving job. Finally, Complainant was employed by CRST Dedicated Services, Inc. from May 30, 2012 until his employment ended pursuant to a notice of personnel action processed on July 6, 2012;

5. Respondent and Complainant settled a previous STAA complaint without a hearing on March 29, 2013;

6. Complainant filed the instant complaint under the STAA on August 9, 2013, alleging that Respondent had provided a negative reference to a potential employer in retaliation for his prior complaint.

ISSUES[1]

1. Whether Complainant engaged in activity protected under the Act;

2. Whether Respondent was aware of the protected activity;

3. Whether Complainant was subject to an adverse employment action;

4. Whether the protected activity was a contributing factor in the adverse employment action against Complainant;

5. Whether Respondent had a legitimate, non-discriminatory basis for the adverse employment action;

[1] Although the question of jurisdiction continued to be characterized as an issue at the formal hearing, no new evidence was introduced on this issue. Accordingly, the February 12, 2014 order finding jurisdiction over the blacklisting claim but not the breach of contract claim stands as the final determination on this matter.

6. Whether Respondent's basis for the adverse employment action was a pretext for retaliation;

7. Whether Complainant is entitled to damages.

SUMMARY OF THE EVIDENCE

Testimonial Evidence

Complainant

Complainant testified at the February 25, 2014 hearing. (TR 17) Complainant testified that Howell's Motor Freight ("Howell") contacted him following his submission of an online employment application and expressed an interest in hiring him. Complainant told Howell that he left CRST due to a personal conflict and low wages. Complainant informed Howell that he had a good driving record with no felonies and was very flexible. Complainant considered the position with Howell to be a good opportunity because he would be able to return home at least three times a week and the salary was good. (TR 18) Complainant stated that the salary at Howell would have been $400.00 more per week than his current position. The representative from Howell told Complainant that she would run his Drive-A-Check (DAC) report and get back in touch with him afterwards to set up an orientation. Complainant received a telephone call from the Howell representative a few hours later, asking what had really happened when he left CRST. Complainant told her that he would have to call CRST to find out what was going on, because this was the first he had heard about it. (TR 19)

Complainant called CRST and spoke with someone who he found to be hostile, who informed him that she would check into it and get back in touch with him. (TR 19-20) When Complainant spoke to the Howell representative again, he was told that they did not know if they could do anything with him, because the report stated that he did not meet CRST's standards and that could mean anything. Complainant then felt compelled to explain that he had been terminated from CRST, filed a lawsuit against them, and won a judgment. Complainant told Howell that CRST had breached the agreement not to give a negative reference. Complainant felt that, absent the negative job reference, he would not have had to explain the circumstances of his leaving CRST. (TR 20) Complainant noted that, following the negative reference, the tone of his communications with the Howell representative completely changed and she began avoiding his calls. (TR 39)

Complainant testified that he was not able to obtain employment prior to settling the first STAA claim against Respondent. (TR 21-22) Complainant stated that he applied to the job at Howell towards the end of July 2013. The Howell position included a salary of $1,000.00 per week. (TR 22) Complainant was told that, had he not been terminated from CRST, he would probably have gotten the job with Howell. (TR 22-23) Complainant had been told that he would make $1,000.00 per week working for CRST, but had never earned that much with them, instead averaging $200.00 per week. (TR 23)

Complainant testified that, although the settlement agreement includes specific references to his DAC report, his understanding was that no negative references whatsoever would be given. Complainant agreed that there was no problem with his DAC report. (TR 27) Complainant testified that, between July 2012 and July 2013, he made some inquiries with other companies, but was primarily focused on getting his job back with CRST. Complainant agreed that there had been a large and chronic shortage of qualified over-the-road truck drivers for the past several years. (TR 30) Complainant stated that the gap in trucking employment following his termination from CRST had made it difficult to find a new job, because other employers did not want to hire him or would have required a refresher course. (TR 34) Complainant expressed his belief that Respondent had affirmatively prevented him from gaining other employment prior to the instant alleged blacklisting, but did not have evidence supporting that belief. (TR 36) Complainant applied for approximately eight jobs between July 2012 and July 2013. (TR 45) Complainant has worked at Celadon Trucking from November 27, 2013 to the time of the hearing and continuing. (TR 42) Complainant currently earns about $700.00 per week, engaging in regional driving from Texas to Illinois. (TR 42-43) Complainant has two days off per month. (TR 43) Complainant estimated that he applied for five or seven driving jobs after being rejected by Howell but before getting a job with Celadon. (TR 44)

Complainant stated that the person he spoke with at CRST Human Resources was not familiar with the circumstances of his previous STAA complaint or the settlement. (TR 32) Complainant was told that Kim Merta, Complainant's former dispatcher, had provided the negative information that was disclosed in the reference. (TR 33) Complainant did not meet or interact with Ms. Matt or Ms. Gardner prior to the negative reference being issued to Howell. (TR 37)

Angie Stastny

Angie Stastny is the Director for Human Resources at CRST and has worked at CRST for nine years. (TR 47) Ms. Stastny explained that CRST International is the parent company for seven operating companies, including CRST Expedited and CRST Dedicated. (TR 48) CRST Expedited has approximately 1,600 trucks with two drivers per truck. (TR 49) CRST Dedicated has approximately 500 trucks and 1,000 drivers. Ms. Stastny estimated that turnover of drivers at CRST Expedited was about 150-175% and somewhat lower than that at CRST Dedicated, which she characterized as normal for the industry. (TR 50) Ms. Stastny stated that CRST Human Resources is not involved in driver hiring or retention. (TR 51) Ms. Stastny testified that CRST Expedited regularly uses DAC reports and CRST Dedicated has recently begun doing so. Ms. Stastny explained that CRST Dedicated became its own wholly formed operating company within the preceding five years and had not started to use DAC reports until after July of 2013. (TR 54-55) As of late August 2013, CRST Dedicated's practice on providing employment verification was to provide dates of employment, position, title, type of tractor-trailer used, DOT preventable accidents, and drug or alcohol offenses. (TR 58) CRST Dedicated provides this information to TenStreet, a third-party verification provider and application tracking system. (TR 59) Information from the CRST termination sheets would be automatically pulled into the TenStreet system. (TR 87)

In July of 2013, CRST also provided an employee's reason for leaving to TenStreet. At that time, the CRST Safety Department in Birmingham, Alabama was responsible for responding to TenStreet inquiries. (TR 62) Ms. Stastny confirmed that the employment verification provided to TenStreet on August 1, 2013 contained the reasons for Complainant's termination, was consistent with the company's records, and was truthful. (TR 63) Effective August 20, 2013, CRST Dedicated and CRST Malone changed their practice to discontinue providing reasons for leaving, conforming to the wider CRST International practice. (TR 64) Ms. Stastny testified that Complainant's situation was a factor in deciding to stop providing reasons for termination. (TR 67) Prior to August of 2013, Ms. Stastny had not been aware that CRST Dedicated was providing reasons for leaving to TenStreet. (TR 68) Ms. Stastny testified that she believed Complainant's settlement agreement only prevented Respondent from disclosing negative information on his DAC report, not by other means. (TR 73) Ms. Stastny stated that CRST was obligated to tell the truth, including listing the true reason for his termination. (TR 77) CRST changed its policy to no longer disclose reasons for leaving the company on August 20, 2013. (TR 79) Ms. Stastny testified that she did not know of Complainant's settlement agreement with Respondent until August of 2013. (TR 80)

Kristy Gardner

Kristy Gardner works in the Safety Department at CRST Malone. Ms. Gardner performs employment verification, processes drivers out of orientation, and works with truck changes and advertising. (TR 87) Ms. Gardner created the employment verification for Complainant, but did not learn of any problem until September of 2013. Although she did not specifically remember processing Complainant's employment verification, Ms. Gardner testified that the practice on August 1, 2013 was to provide the dates of employment, reason for leaving, whether the driver was terminated, whether the driver was eligible for rehire, any drug or alcohol information, and any accidents. (TR 88) Ms. Gardner explained that there are two kinds of TenStreet verifications: Provide A Response, wherein CRST employees type up the report, and Authorize A Response, which releases a prepared report without any additional input from CRST. (TR 89-90) Ms. Gardner testified that Complainant's August 1, 2013 report was an Authorize A Response type, which released the report that had already been prepared by TenStreet based on CRST's internal records. (TR 90) Ms. Gardner estimated that she would prepare about fifty to sixty employment verifications per day. (TR 93)

Sandy Matt

Sandy Matt is a Human Resource Specialist who has been working for CRST for twenty-four years, including in the Safety and Human Resources Departments. (TR 99) Ms. Matt performs services related to unemployment proceedings, job verifications, and clerical duties. Ms. Matt receives the termination forms from dispatchers and feeds them into the DAC Services system. (TR 100-01) Ms. Matt testified that, when an employer requests an employment verification from CRST, she will check TenStreet to see if the information has been uploaded into its system, then either release the information or enter it herself if it has not been automatically pulled into TenStreet. (TR 104)

Ms. Matt stated she spoke with Complainant when he called about the negative reference given to Howell. Ms. Matt verified the information that had been given to Howell. Complainant informed her that he had been through a lawsuit with CRST and that a lawyer was supposed to have changed that information. Ms. Matt had not heard about the suit or been told to change the record before this call. (TR 105) Ms. Matt testified she believed Complainant and, without communicating with anyone else at CRST, changed his employment report to remove the negative information. (TR 106) Ms. Matt testified that she was later called into the office to speak with Ms. Stastny and was told to change Complainant's record back to reflect the negative information, although Ms. Matt stated she could not remember when this conversation took place. (TR 107) Ms. Matt did not know whether the negative information was disclosed to any other potential employers. (TR 108)

Documentary Evidence

Xchange Report #2960557

Complainant submitted an Xchange report dated August 1, 2013. The report stated that it was prepared by Kristy Gardner. The report indicated that Complainant was terminated from employment with CRST because he did not meet company standards. The report stated that Complainant was ineligible for rehire and directed the requestor to contact CRST for more information. (CX 1)

April 2013 Agreement and Release

Respondent provided the settlement "Agreement and Release" between Complainant and Respondent, signed in April 2013. The parties agreed to settle Complainant's OSHA complaint for a sum of money and release of liability. The Agreement included a non-disparagement clause which stated that:

> [t]he parties agree that they will not at any time, directly or indirectly, either orally, in writing, or through any other medium, disparage, defame, impugn, or otherwise attempt to damage or assail the reputation, integrity, or professionalism of employer or any of its affiliates, officers, employees, or agents, or of Employee. Employer agrees that it will not provide any derogatory information regarding Employee's employment with Employer for his Drive-A-Check ("DAC") report and/or will amend the information provided to remove any derogatory references.

(RX A)

Requests for Employment Verification

Respondent submitted a list of requests for Complainant's employment verifications. The Report listed requests for Complainant's record made by Howell on July 20, 2013 and July 31, 2013. Requests were also made by Melton Truck Lines on July 17, 2012 and June 21, 2013. A request was made by Prime Inc. on March 22, 2012. (RX B)

Request/Response Reports

Xchange Report #2939459 listed Complainant's dates of employment as December 2010 to August 2011, when Complainant left to work for Prime. Xchange Reports #2939462 and #2811428 stated that Complainant was an over the road driver with CRST from November 2011 to February 2012 and left to go to Prime. Xchange Report #1554339 listed employment dates of November 2011 to February 2012 and stated that Complainant left for better pay. Xchange Report #1810172 listed dates of employment of November 2011 to February 2012 without any additional comment. Xchange Reports #2939461 and #2811247 stated that Complainant was employed by CRST as an over the road driver from May 2012 to June 2012, at which time Complainant's employment was terminated. Those reports also stated that rehire would be subject to review. (RX C)

When combined, Respondent's Exhibits B and C yield the following information regarding TenStreet generated employment verifications for Complainant:

Requestor	Date	Request #	Comments
Prime Inc.	3/22/12	1554339	Listed employment dates of November 2011 to February 2012 and stated that Complainant left for better pay.
Melton Truck Lines	7/17/12	1810172	Listed dates of employment of November 2011 to February 2012 as an over the road driver.
Howell	7/20/13	2939462	Complainant was an over the road driver with CRST from November 2011 to February 2012 and left to go to prime.
Howell	7/20/13	2939461	Complainant was employed by CRST as an over the road driver from May 2012 to June 2012, at which time Complainant's employment was terminated. Rehire would be subject to review.
Howell	7/31/13	2939459	Listed Complainant's dates of employment

			as December 2010 to August 2011, when Complainant left to go to Prime. Rehire would be subject to review.
Melton Truck Lines	8/21/13	2811247	Complainant was employed by CRST as an over the road driver from May 2012 to June 2012, at which time Complainant's employment was terminated. Rehire would be subject to review.
Melton Truck Lines	8/21/13	2811248	Complainant was an over the road driver with CRST from November 2011 to February 2012.

Complainant's Personnel Record

Complainant's personnel record included dates of employment of December 1, 2010 to August 1, 2011, when Complainant left for another over the road driving position. Complainant was again employed from November 9, 2011 to February 26, 2012 and from May 30, 2012 to June 30, 2012. The Notice of Personnel Action related to the June 30, 2012 termination stated that Complainant did not meet company standards and was ineligible for rehire. (RX D)

Complainant's DAC Report

Complainant's DAC report, dated February 19, 2014, states that Complainant was employed by CRST Expedited from December 2010 to August 2011. The report states that Complainant resigned and would be subject to review prior to rehiring. Complainant's work record was categorized as satisfactory. A second entry from CRST Expedited included employment dates of November 2011 to February 2012 with the same comments. Entries by other trucking companies were also listed, but none were for periods of employment after Complainant's June/July 2012 termination or are otherwise relevant to this matter. (RX E)

DISCUSSION

In order to prevail on a STAA complaint, a complainant must make a *prima facie* case of discrimination by showing that: (1) he engaged in protected activity, (2) the employer was aware of his activity, (3) he was subject to adverse employment action, and (4) there was a causal link

between his protected activity and the adverse action of his employer. *See Clean Harbors Envtl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Moon v. Transp. Drivers*, 836 F.2d 226, 229 (6th Cir. 1987); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987). In this case, Respondent has challenged whether Complainant has made a sufficient showing that Respondent blacklisted Complainant by providing a negative job reference.

The STAA provides a cause of action on behalf of an employee when his former employer blacklists him for having engaged in protected activity. *Ramirez v. Frito-Lay, Inc.*, ARB No. 06-025, ALJ No. 2005-STA-037, slip op. at 5 (ARB Nov. 30, 2006); *Murphy v. Atlas Motor Coaches, Inc.*, ARB No. 05-055, ALJ No. 2004-STA-036, slip op. at 5 (ARB July 31, 2006). The ARB has stated that "[b]lacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment." *Murphy*, slip op. at 5.

Protected Activity & Respondent's Awareness

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The protected activity includes filing a complaint or beginning a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order." 49 U.S.C.A. § 31105(a)(1)(A). Complainant thus engaged in protected activity when he filed his STAA complaint of August 8, 2012. Respondent was clearly aware of this protected activity.

Adverse Action

The Board has held that blacklisting may serve as the adverse action in a STAA claim. *See Beatty v. Inman Trucking Management, Inc.*, ARB No. 11-021, ALJ Nos. 2008-STA-20 and 21 (ARB June 28, 2012), *Murphy v. Atlas Motor Coaches, Inc.*, ARB No. 05-055, ALJ No. 2004-STA-036 (ARB July 31, 2006). Blacklisting is "'quintessential discrimination,'" that is often "'insidious and invidious [and not] easily discerned.'" *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056, 02-059; ALJ No. 2001-ALJ-018, slip op. at 9 (ARB Nov. 28, 2003) (internal quotations omitted)). The Board has said that "blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment." *Id.* at 5. Therefore, to prevail, Complainant must prove that Respondent disseminated damaging information about him that would or could prevent him from finding employment.

In this case, Complainant has introduced the TenStreet employment reference dated August 1, 2013, which was provided to Howell. (CX 1) The reference indicated that Complainant had been terminated from his employment with Respondent because he did not meet the company's standards. It also stated that he was ineligible for rehire. Complainant credibly testified that the Howell representative had indicated that Complainant would be hired, but received a telephone call questioning the reasons for his leaving Respondent's employment after Howell obtained the employment reference. Complainant testified that the tone of his communications with the Howell representative significantly changed for the worse following

the employment reference. The content of the employment reference is plainly disparaging and is of the quality that would prevent a reasonable employer from extending an offer of employment. Based on Complainant's credible testimony and the contents of the August 1, 2013 employment reference, Complainant has presented clear evidence that the negative information released by Respondent prevented him from gaining employment with Howell and so constitutes blacklisting.

Causal Connection

For Complainant to prevail in his claim, he must show that his protected activity was a contributing factor in the blacklisting Respondent undertook against him. 49 U.S.C.A. § 31105. "Animus can be evidence of retaliation, but it is not required to prove retaliation. Causation is established, with or without evidence of retaliatory animus, if the protected activity contributed to the adverse action." *Beatty*, slip op. at 7-8. In the instant case, Respondent argues that it did not intentionally disclose negative information about Complainant, but merely released the termination information in accordance with its practice at the time, which has since been altered to avoid disclosing the reason for an employee's departure.

The ARB relies on the interpretation of "contributing factor" specified by the court of appeals in *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). *See Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024 (Apr. 25, 2013). In *Marano*, the court of appeals interpreted "contributing factor" in the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 5 U.S.C. § 1221(e) (1), to mean "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." 2 F.3d at 1140. "*Any* weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the 'contributing factor' test." *Id*. The federal courts have consistently applied this definition of "contributing factor." *See, e.g., Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008); *Kewley v. U.S. Dep't of Health & Human Svcs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998). In proving contributing factor, a complainant can show "either direct or circumstantial evidence" of contribution. *Smith v. Duke Energy Carolinas LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 7 (ARB June 20, 2012).

Although there is no direct evidence as to how Complainant's termination information was entered into the computer system and ultimately populated into TenStreet's database, Complainant has produced evidence sufficient to show that his prior whistleblower complaint was a contributing factor in the blacklisting. Complainant testified that he was informed that the disparaging comments were provided by his former dispatcher. Ms. Matt is a Human Resources Specialist at CRST. Ms. Matt confirmed that such information is provided by dispatchers. Ms. Matt learned of the settlement agreement and removed the disparaging information from Complainant's file. Ms. Stastny is the Director for Human Resources at CRST. When Ms. Stastny was informed that the information had been deleted, she required Ms. Matt, her subordinate, to change the record back to reflect the disparaging comment. Ms. Stastny emphasized in her testimony that Respondent was obligated to disclose the truth about Complainant's termination. Ms. Stastny further reiterated her belief that the settlement agreement only prohibited Respondent from disparaging Complainant in his DAC report. Ms.

Stastny testified that she first learned that CRST Dedicated was including the reason for termination on employment verifications after Complainant called CRST regarding the employment verification.

When taken as a whole, the testimony of Respondent's witnesses indicates a desire to disseminate disparaging information about Complainant. It is highly unusual that a seasoned human resources professional such as Ms. Matt would unilaterally undertake to change an employee's personnel records based solely on one telephone call or that a company of Respondent's size would not have a mechanism in place to flag a former employee who has entered into a contract agreeing not to reapply for employment. Based on the evidence, I find little credibility in Ms. Stastny's testimony that, although she had previously been unaware that CRST Dedicated was disclosing the reason for termination, she nonetheless insisted that the information be added back to Complainant's record, only to change the entire CRST policy a mere twenty days later. Ms. Stastny's insistence that the negative information be returned to Complainant's employment verification indicates an active desire to disseminate damaging information about Complainant. The reasonable inference from these facts is that the information was disclosed in retaliation for Complainant's prior whistleblower activity and that Respondent believed it could make the disclosure so long as the DAC report did not contain disparaging information. Complainant has thus demonstrated by a preponderance of the evidence that Respondent blacklisted him in retaliation for his prior STAA complaint.

Respondent's Rebuttal

A respondent may rebut the complainant's *prima facie* case by demonstrating that the adverse action was motivated by legitimate, nondiscriminatory reasons. An employer attempting to rebut a *prima facie* case of discrimination must produce evidence that the adverse action was taken for a legitimate, nondiscriminatory reason, but "need not persuade the court that it was actually motivated by those reasons." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The burden then shifts back to the complainant to establish that the proffered reason was pretextual and the protected activity was the true basis for the adverse action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 402, 406-408 (1993). The ultimate burden of persuasion that the respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Center*, 509 U.S. at 502; *Poll v. Vyhnalek Trucking*, 96-STA-35, slip op. at 5 (Jun. 28, 2002).

In this case, Respondent has failed to introduce evidence that would indicate that it had a legitimate, nondiscriminatory reason for including damaging information in Complainant's employment verification report. None of Respondent's witnesses testified as to why the negative information was provided to TenStreet, nor did Respondent adequately explain why Ms. Stastny, the Director of Human Resources, insisted that the information remain in Complainant's report. On this record, Respondent has failed to rebut Complainant's *prima facie* case of blacklisting.

Damages

Where a respondent is found to have violated the STAA, the statute and regulations provide several remedies for the affected employee. The statute and regulations generally

provide that a respondent must "take affirmative action to abate the violation." 49 U.S.C. § 31105(b)(3)(A)(i); *see also,* 29 C.F.R. § 1978.109(d)(1). The available remedies include: (1) reinstatement of the employee to his former position; (2) payment of compensatory damages, including back-pay and compensation for "any special damages sustained as a result of the discrimination" and, (3) payment of punitive damages. 49 U.S.C. §§ 31105(b)(3)(A), (b)(3)(C); 29 C.F.R. § 1978.109(d)(1).

In the instant case, Complainant credibly testified that he was being seriously considered for employment by Howell Motor Freight prior to Howell's receipt of the negative job reference on August 1, 2013. Complainant testified that the position with Howell would have paid $1,000.00 per week. Complainant was unable to find alternate employment until November 27, 2013, when he began his current job with Celadon Trucking. Complainant credibly testified that he was actively seeking employment during the period between August and November of 2013. On these facts, Complainant has adequately proved that he suffered a loss of approximately seventeen weeks of employment at $1,000.00 per week. I find Complainant's testimony regarding the wages at Howell credible, given his current wage of $700.00 per week. Respondent has introduced no contrary evidence. Complainant is accordingly entitled to $17,000.00 in compensatory damages for lost wages as a result of Respondent's blacklisting activity.

Pre- and Post-Judgment Interest on Back Pay

The STAA expressly provides that a successful complainant is entitled to interest on an award of back pay. 49 U.S.C. § 31105(b)(3)(A)(iii); 29 C.F.R. § 1978.109(d)(1). Payment of interest on a back pay amount is mandatory in a discrimination case in order to make the complainant whole. *Assistant Sec'y of Labor & Cotes v. Double R. Trucking, Inc.,* ARB No. 99-061, ALJ No. 1998-STA-34, slip op. at 34 (ARB July 16, 1999). This includes pre- judgment interest on any accrued back pay, as well as post-judgment interest for the period between the issuance of the decision and the payment of the award. *Assistant Sec'y of Labor & Bryant v. Mendenhall Acquisition Corp*., ARB No. 04-014, ALJ No. 2003- STA-36**,** slip op. at 7, 8 (ARB June 30, 2005)). Interest is calculated using the rate that is charged for underpayment of federal taxes, pursuant to 26 U.S.C. § 6621(a)(2). *Id.; see also,* 26 U.S.C. § 6621(a)(2) and (b)(3) (the applicable interest rate is the sum of the Federal short-term rate determined by the Secretary in accordance with 26 U.S.C. § 1274(d) plus 3 percentage points, rounded to the nearest full percent). The applicable interest rates are posted on the website of the Internal Revenue Service.[2] Interest is calculated on a quarterly basis. *Bryant*, slip op. at 10.

Because, as found above, Complainant is entitled to a back pay award for the period of August 1, 2013 to November 27, 2013, Complainant is entitled to payment of both pre- and post-judgment interest at the applicable IRS rate, compounded and calculated as set forth above.

Other Damages

Complainant has not itemized any other special damages, nor has he sought an award of punitive damages, and I find no basis for an award of punitive damages on the facts before me.

[2] http://www.irs.gov/app/picklist/list/federalrates.html

Because Complainant is unrepresented and there are no allowable costs, no attorney fees or costs are awarded.

CONCLUSION AND RECOMMENDED ORDER

Based on the foregoing findings of fact, conclusions of law, and all evidence of record, I find that Complainant has established that Respondent blacklisted him in violation of the STAA. Respondent has failed to rebut Complainant's *prima facie* case. Accordingly, it is hereby **ORDERED**:

1. Respondent shall pay Complainant $17,000.00 in compensatory damages, together with pre- and post-judgment interest, as calculated pursuant to 26 U.S.C.§ 6621(a)(2); and

2. Respondent shall purge Complainant's employment file of any reference to his protected activity and discharge and amend its records to show Complainant has a satisfactory work and safety record as related to the subject of this complaint.

SO ORDERED.

Digitally signed by Dana A. Rosen
DN: CN=Dana A. Rosen,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Newport News, S=VA, C=US
Location: Newport News VA

DANA ROSEN
Administrative Law Judge

DR/JRS/jcb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the

findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

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

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

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

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. § 1982.110(a).

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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (b).