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: 25 September 2017

Case No. 2015-STA-00022

In the Matter of:
The Estate of
DANIEL A. AYRES
Complainant,

v.

WEATHERFORD U.S., L.P.,
Respondent.

Appearances:
Martin S. Hume, *Esq*.
Martin S. Hume Co., L.P.A.
Youngstown, OH
For the Complainant

David A. Campbell, *Esq*.
Vorys, Sater, Seymour and Pease LP
Cleveland, OH
For the Respondent

Before: John P. Sellers, III
Administrative Law Judge

DECISION AND ORDER

This matter arises from a claim under the employee-protection provisions of amended and re-codified Section 405 of the Surface Transportation Assistance Act ("STAA") of 1982, 49 U.S.C. § 31105. The implementing regulations appear at Part 1978 of Title 29 of the Code of Federal Regulations ("CFR"). Section 405 of 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 by 1) participating in proceedings relating to the violation of a commercial motor vehicle safety regulation or 2) refusing to operate a motor vehicle when the operation would violate these rules.

PROCEDURAL HISTORY

On February 15, 2013, Daniel A. Ayres (the "Complainant") filed a complaint under the STAA, alleging that Weatherford U.S. L.P. ("Weatherford" or the "Respondent") discriminated against him and terminated his employment in retaliation for "voicing complaints" to management that drivers, including himself, were being asked to carry loads that were not properly permitted under Department of Transportation regulations. An investigation conducted by the Occupational Safety & Health Administration ("OSHA") of the Department of Labor ("DOL") followed. On November 6, 2014, the OSHA Area Director found no reasonable cause to believe that the Respondent had violated the STAA and implementing regulations. The complaint was dismissed.

The Complainant's request for a formal hearing was received by this Office on December 5, 2014. Pursuant to a Notice of Hearing and Prehearing Order issued February 26, 2015, the undersigned conducted a hearing on this claim on August 26-27, 2015, in Akron, Ohio. The parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges.[1] At the hearing, the following witnesses were examined: Daniel A. Ayres, Terry Crabb, and Lisa Mora. Following the hearing, the parties submitted by deposition the testimony of Lee Hammons, Warren A. Williams, James Nicholson, Dusty Tate, Brian Gould, Brian Pirone, and Richard Hansen.

In reaching a decision, the undersigned has reviewed and considered the entire record, including all exhibits admitted into evidence,[2] the testimony at hearing, and the arguments of the parties. Where applicable, I have made credibility determinations concerning the testimony.

ISSUES

The issues contested by the Complainant and Respondents are as follows:

[1] 29 C.F.R. Part 18A (2015).

[2] At the hearing, the undersigned admitted into evidence the following exhibits: Administrative Law Judge Exhibits ("ALJX") 1-5; Joint Exhibits ("JX") 1-48; Complainant's Exhibits ("CX") 1-5; and Respondent's Exhibits1-4, 6-8, 10. Both parties were granted leave to submit post-hearing evidence depositions.(Tr. 27.) Following the hearing, the undersigned received depositions which are identified, marked, and admitted as follows: the deposition of Lee Hammons (EX 11); the deposition of Warren Williams (EX 12); the deposition of James Nicholson (EX 13); the deposition of Dusty Tate (EX 14); the deposition of Brian Gould (CX 6); the deposition of Brian Pirone (CX 7); and the deposition of Richard Hansen. (CX 8.) On April 20, 2016, this Office received a *Suggestion of Death of Plaintiff Upon the Record* filed by the Respondent. This will be marked and admitted as ALJX 6. On May 3, 2016, I issued an Order Regarding Plaintiff's Status, which is marked and admitted as ALJX 7. On July 18, 2016, the undersigned received a *Motion for Substitution of Parties* from the Complainant's counsel, affirming that the Complainant had passed away on March 30, 2016, and that his surviving spouse, Kimberly Ann Ayres, had been appointed the administrator of his estate. Complainant's counsel requested that Kimberly Ayres, as Administrator of the Estate, be substituted as the complainant for purposes of pursuing her late husband's claim. That motion is marked and admitted as ALJX 8. The motion for substitution of parties is granted and reflected in the caption of this matter.

1. Whether the Complainant engaged in activities protected under Section 31105(a)(1)(B)(i) by refusing to operate a commercial vehicle in violation of commercial motor vehicle safety regulations;
2. Whether the Complainant engaged in activities protected under Section 31105(a)(1)(A)(i) by filing complaints related to violations of commercial motor vehicle safety regulations;
3. Whether the Complainant's protected activities contributed to the Respondent's decision to include him among a list of employees deemed nonessential and laid off as part of a reduction in force ("RIF");
4. Whether the Respondent can show by clear and convincing evidence that it was highly probably it would have taken the same action in the absence of his protected activities;
5. Whether the Complainant took reasonable steps to mitigate his damages; and
6. The relief, if any, to which the Complainant is entitled under the STAA.

FACTUAL BACKGROUND

Hearing Testimony of the Complainant

The Complainant, Daniel A. Ayers, testified that he first became associated with Weatherford in April of 2012. (Tr. 43.) He stated that a friend with whom he formerly worked had been hired by Weatherford, and this friend gave him the name of Terry Crabb. According to the Complainant, he contacted Crabb and then filled out an application to work for Weatherford on April 4, 2012. (Tr. 46-47.) He testified that by talking to Crabb, he had learned that Weatherford was looking for equipment operators in North Dakota. He stated that it was his understanding that the jobs available included "fracking jobs, driving trucks, things like that." (*Id*.) He described the job as setting up and tearing down a "well pad," driving trucks, and operating "different types of equipment." (Tr. 48.) He stated that Weatherford would fly its employees up for a normal work period of three weeks, and then fly them back home for two weeks. He stated that even during the two-week period at home, the employees would still be paid for 40 hours per week. (Tr. 48-49.)

The Complainant stated that his work involved the transportation of hazardous chemicals to the well pad. (Tr. 49.) Therefore, he testified, Weatherford required employees to go through a course of training lasting one-to-two weeks in Denver, Colorado. (Tr. 49-50.) He stated that part of the training course included the "dos and don'ts of DOT so we're in compliance, so basically we don't get ourselves in trouble but we also don't get the company in trouble." (Tr. 50.) He stated that he also received training regarding prohibitions of alcohol and substance abuse, including their use while driving. (Tr. 51.) He testified that, additionally, he was trained on keeping driver's logs. (*Id.*)

According to the Complainant, he also received training on whistleblower protections, as well as Weatherford's policies regarding whistleblowing. (Tr. 52.) He testified that he was taught that if he was asked on the job to do something he thought wrong, he should notify his supervisor first. (*Id*.) Additionally, he testified that he was taught that if he saw something unsafe, he had the authority to "shut down the well until it was corrected." (*Id*.) According to the Complainant, he was taught to first report the safety concern "at the lowest level," meaning his immediate supervisor, and "then you would kind of go up the chain of command." (Tr. 52-53.) He stated that starting low and going up the chain of command was "what they would like you to do though they did stress that you didn't necessarily have to do that in that way." He added, "You could take and you could file with who[m]ever, but they would like a chance to correct the situation first." (Tr. 53.)

The Complainant also testified that the training materials stated that whistleblowers would be protected if they refused to drive in conditions that could cause serious bodily injury. (Tr. 53.) According to the training materials, the Complainant testified, a whistleblower was protected if he filed a complaint with the Federal Motor Carrier Safety Administration, or testified in a proceeding related to a traffic violation, meaning that the Respondent was prohibited from terminating, demoting, reassigning, depriving of seniority, reducing personal leave, or engaging in any other form of discrimination against the whistleblower. (Tr. 53-54.)

The Complainant testified that he completed the driver-training on April 27, 2012, after also watching several training videos on various subjects including DOT compliance and DOT security awareness. (Tr. 54-55.) He also stated that he underwent training on HAZMAT awareness, which included the necessity of being HAZMAT certified. (Tr. 55.) He stated that when he arrived in North Dakota, to work for Weatherford, he did not have HAZMAT certification, which was not a job requirement. (Tr. 56.) He also stated that Weatherford was aware of his lack of HAZMAT certification, because Weatherford had a copy of his license to which the certification would have otherwise been affixed. (*Id*.)

The Complainant also testified to additional training materials which stressed that safety was "every employee's obligation" and that every employee was "empowered to stop work conditions that are unsafe." (Tr. 57.) He testified, however, that he "wouldn't agree" that this philosophy was transferred to the workplace once he arrived in North Dakota. (Tr. 59.) Before arriving in North Dakota, he first went to one of Weatherford's job sites near Marshall, Texas, where, he did not experience any instances of non-compliance with safety rules. (Tr. 59-60).

After three or four weeks in Texas, the Complainant testified that he had a break in which he returned to Youngstown, Ohio, his permanent residence, and then reported to work at Weatherford's job site in Williston, North Dakota. (Tr. 60-61.) He agreed to work there for six weeks rather than the regular three-week rotation. (*Id.*) He testified that he arrived in Williston at the beginning of July 2012. (Tr. 61.) According to the Complainant, his job title was Equipment Operator, which included driving heavy vehicles and setting up the well pad for fracking. (Tr. 64.) He stated that he had a Class A commercial driver's license, which allowed him to drive tractor trailers. (*Id*.)

According to the Complainant, Weatherford's employees were housed in "trailers or [a] hotel, whatever you want to consider it." (Tr. 62.) He stated that those with work to do on a given day would travel to the jobsite in vans, while the others stayed behind. (*Id*.) He stated, though, that in order to avoid sitting, he and a couple of other employees began to "learn more about the equipment." (*Id*.) He explained this to mean that he helped in the maintenance shop and "did stuff on different equipment that [he] felt that [he] needed to become better—have a better knowledge of working." (*Id.*)

He also stated that he and other employees "were supposed to be doing modules." (*Id*.) He testified that he was not previously aware of this aspect of the job. (*Id*.)

The Complainant described it as "a good question" when asked to identify his immediate supervisor on arrival at Williston. (Tr. 64.) He stated that he arrived before his supervisor, Lee Hammons. (Tr. 64-65.) Consequently, he testified, he "fell under, you know, whoever decided to show up that day….." (Tr. 65.) He identified Terry Crabb as the District Manager, and stated that Crabb was there when he arrived. (*Id*.) He testified that Crabb gave approval for the Complainant to work in the shop to gain more familiarity with the equipment. (*Id*.)

According to the Complainant, at the end of July he "went in." (Tr. 63.) He explained this to mean that he would "get a truck, drive the truck out with the equipment." He added, "We would set up in the—at the well pad and do our work." (*Id.*) He stated that "a lot of the times" when he drove a truck, he was required to go downtown "where DOT would be sitting," and kids would be going to school, and he was "being asked to drive a HAZMAT load" despite his lack of certification. (*Id*.) Asked if he was asked more than once to drive a HAZMAT load, he replied that he was, and that the first time was in July before Hammons arrived on the scene. (Tr. 66.)

The Complainant described the HAZMAT chemicals as being stored separately for safety reasons. (Tr. 67.) He stated that there were a limited number of employees with commercial driver's licenses, and that he was approached by a supervisor, whom he described by the nickname "Tater," to move the chemicals from "point A to point B." According to the Complainant, when he informed "Tater" that he was not "tanker endorsed or HAZMAT endorsed," "Tater" responded that it did not matter because he was only being asked to move the materials from one yard to the next. The Complainant testified that he replied by pointing out that, nonetheless, he would be required to travel past the scale house, and that he did not want to lose his license or get Weatherford, as a company, in trouble. (*Id*.) The Complainant testified that "Tater" responded that the scale house was closed at the time, but that he, the Complainant, still refused to transport the materials, citing his lack of HAZMAT certification. (*Id*.) According to the Complainant, "Tater" then got another employee, who he identified as being from Tennessee, to transport the hazardous material, although he was also not HAZMAT certified. (Tr. 67-69.)

According to the Complainant, there were "maybe three at the most" occasions when he was asked to transport HAZMAT chemicals. (Tr. 71.) He stated that Hammons asked him to do so once after Hammons arrived on the scene. (*Id.*) He also recalled that Hammons's assistant supervisor, Steve, asked him to do so. (Tr. 71-72.)

Regarding the time Hammons asked him to transport a HAZMAT load, the Complainant testified that the incident was similar to the one with "Tater," and that he also declined, citing his lack of HAZMAT certification. He testified that someone else was enlisted to transport the materials. (Tr. 72.)

The Complainant testified that he was aware of other drivers asked to drive loads for which they were not qualified. (Tr. 73.) He recalled one employee from Minnesota and another from Texas named "Big D." (*Id*.) He also stated that another of Weatherford's employees, Jeff Pittman, who he knew from previous employment, had talked to him about being asked to drive loads for which he was not certified. (Tr. 74.) He stated that he was aware that Pittman had taken his complaint to Human Resources ("HR"), and that the object of the complaint was Terry Crabb. (*Id.*) According to the Complainant, he spoke to Pittman on the telephone during a period in which Pittman had finished his rotation and returned home, and that Pittman expressed concerned that he would not be called back to work because he had refused to transport loads for which he was not certified. (Tr. 75.) He stated that although Crabb was in the office when he spoke to Pittman, and Pittman expressed an interest in talking to Crabb, Crabb avoided speaking to him by having his assistant tell Pittman that he was not there. (Tr. 75-76.) He testified that Pittman never did return to Williston, although he believed that Pittman was transferred to Vernal, Utah. (Tr. 76.)

According to the Complainant, Weatherford conducted an investigation into Pittman's complaints while he was at Williston, and the Complainant spoke to two HR personnel who were part of the investigatory team. (Tr. 80.) He recalled that the two HR staff members were "Michelle" and "Brannon," and he stated that they travelled from Denver to Williston to conduct their investigation. He stated that they asked him if he knew Pittman, and whether he was there when Pittman had tried to reach Crabb on the telephone. He stated that they also asked him "if Jeff Pittman had ever talked about being asked to do a load, HAZMAT loads and stuff like that." (Tr. 81.) He recalled the meeting as taking place somewhere "between the middle and the end of July." (*Id*.)

The Complainant testified that he knew Crabb was aware that he had spoken to the HR team because he told Crabb. (*Id*.) He testified that he informed Crabb that the HR team had talked to him about Pittman, although he stated that he did not tell Crabb "exactly what they asked." (Tr. 82.)

According to the Complainant, during a morning briefing, Crabb spoke and stated "that if anybody reports any complaints or wrongdoing outside of his office, he would fire them." (Tr. 83.) He stated that there were a couple of teams at the meeting, amounting to approximately 70-100 people. He stated that basically everyone who worked at Williston was at the meeting. (*Id.*)

The Complainant testified that if he had driven the HAZMAT loads for which he was not certified, he would have violated DOT regulations. (*Id*.) He stated that he took his complaints to Hammons, and also to the supervisor nicknamed "Tater." (Tr. 84.) He testified, "I said, you've got your supervisors out here asking us to do things that we know are wrong. We tell them, listen, I'm not certified to do this, and they're giving us grief over it." (*Id*.) He testified that he also spoke about "supervisors being drunk off their butts and driving the vans." (Tr. 85.) He

explained that supervisors would drive to bars downtown at the end of the day, and they would be observed falling out of the van due to drunkenness upon their return. (Tr. 86.) He identified the supervisors observed doing this as Hammons and "Tater," as well as one other person he could not name. (*Id*.) He stated that he expressed the incongruity of employees not being able to use the vans "to go to Wal-Mart to get something to eat," and supervisors "getting drunk and then coming back and stumbling out of the van to sleep it off." (*Id*.)

The Complainant recalled complaining to Crabb that non-supervisory employees were not able to use the van. (Tr. 87.) He recalled being "kind of blunt about it." (*Id*.) He stated that after he told Crabb that supervisors were drunk on their return home at night, Crabb told him that "these are supervisors" and they had a right to use the vans, whereas the non-supervisory employees simply did not. (*Id*.)

The Complainant testified that afterword he spoke to Pittman, who was either in Vernal, Utah, or at his home, and that Pittman gave him the telephone number of Jim Nicholson, who was one of Weatherford's assistant managers in HR located in Houston. (Tr. 88.) The Complainant testified that he first tried to contact Weatherford's Denver HR office, but when they did not respond to his messages he called Nicholson. (*Id.*) He estimated the timing of the telephone call to Nicholson as between August 7-12, 2012. (Tr. 89.) He stated that he spoke to Nicholson for approximately one hour, and then spoke with him again a couple of days later. (Tr. 89.) He testified that he left Williston to return home on August 20, 2012, and continued to have email correspondence with Nicholson. (Tr. 90.)

According to the Complainant, he spoke to Nicholson about being asked to drive trucks for which he was not certified (*Id*.) He stated that he also talked to him about "people driving drunk." (*Id*.) He stated that he also discussed a chemical spill at one of the well pads, which he was concerned was not cleaned up according to regulations. (*Id.*)

The Complainant also testified that sometimes the trucks he was requested to drive lacked the proper state permit. (Tr. 91.) Specifically, he described being detailed to a job in Montana, and the truck he was assigned to drive in North Dakota not having the proper Montana permit. (Tr. 92.) He stated that he complained about this to both Hammons and Crabb. (*Id*.). Asked if they offered him any explanation, the Complainant replied, "They basically—most of the time it was kind of a situation where, oh, they forgot to grab them the night before. They were in the office." (Tr. 93.) The Complainant testified that when he asked to have access to the office where the permits were stored, he was told no. The Complainant acknowledged that the scale house in Montana was "pretty nice about it" when the trucks lacked the necessary permit and "allowed us to get the permit…there at the scale house." (*Id.*)

According to the Complainant, in his conversations with Nicholson, he made clear that he was not trying to get anybody in trouble. (Tr. 94.) He stated that all that he was trying to do was to "get the situation corrected." (*Id*.) He explained that he was trying to avoid being fired for failing to report any safety concerns. (*Id*.) He testified that he felt reporting his concerns was consistent with the training he received. (*Id*.)

On the day that he left to fly back home, August 20, 2012, the Complainant testified that he met with Crabb. (Tr. 95.) According to the Complainant, he advised Crabb that he had requested a transfer "either to go to work …near Youngstown, Ohio, or to work at the Vernal, Utah, shop." (*Id*.) He stated that when Crabb asked why, he explained that he felt his complaints were being ignored and he did not want to get into trouble. He stated that he told Crabb, "you guys are constantly asking us to do things that we know are wrong." (*Id*.) The Complainant testified that he told Crabb that he had made a complaint to HR about the situation, and that HR was "looking into it." (Tr. 95-96.) He stated that Crabb then asked who he had talked to, and that he told him it was James Nicholson, who had stated he would look into the matter. (Tr. 96.)

According to the Complainant, he was then separated from the other employee flying out that day, Dave Bryant, and driven to the airport with Hammons and the safety manager. He testified, "Basically, they didn't want me talking to anybody else. That's—that's what Lee Hammons told me point blank to my face." (*Id.)* He testified that during the drive, he called Nicholson and made a complaint about the treatment he was receiving. (Tr. 97.)

The Complainant testified that he was scheduled to remain home for two weeks and then return the first week in September. (*Id*.) He testified that he was part of a team of 16-20 people on the same rotation. (Tr. 98.) He testified that other team members returned to Williston on schedule, but when he called to ask when he was supposed to return, he was told "we'll get back to you." (*Id.)* According to the Complainant, "I was never gotten back to." (*Id.*)

According to the Complainant, he continued to get paid while he was sat home in Youngstown, Ohio. (Tr. 100.) He stated that the usual practice was that he would receive a telephone call advising him that he had an airplane ticket back to Williston. (Tr. 101.) When he did not receive a telephone call, he testified that he called Nicholson to inquire if HR was still investigating his complaints, and if Nicholson knew whether the Respondent was going to send him back to Williston or transfer him to Vernal, Utah. "Basically," he testified, "I was just trying to find out what my status was." (Tr. 102.)

The Complainant testified that Nicholson told him that they were "looking into" his situation and that he would get back to him when they were finished. (*Id*.) He testified that he then spoke to an attorney and that a letter was sent to the Respondent listing his complaints. (Tr. 103.) He testified that one of his concerns during this period was that, although he was being paid, he was missing out on overtime at the jobsite. (Tr. 105.) He testified that he sent an e-mail to Nicholson on September 20, 2012. (Tr. 107.) In the e-mail, which is part of the record at JX 36, p. 285, he testified that he complained that he was being improperly retaliated against. (Tr. 108.) According to the Complainant, the complaints listed in the email included all those he had previously reported. (Tr. 109.) Asked why he felt that he was being retaliated against, he stated, "Basically because I—I had reported what I felt was wrong, wrong goings on at Weatherford at Williston, and I wasn't being called back even though I felt I was more qualified than most of the people that came back." (Tr. 108-109.)

According to the Complainant, he was in contact with other employees who had rotated back to Williston, and he was told that "they were out on jobs and that they were getting overtime." (Tr. 109.)

The Complainant stated that he received a return email from Nicholson on the same day, September 20, 2012 (JX 36, p. 284), telling him that many employees and supervisors in North Dakota had been interviewed, but offering no information why he had not been called back to work.[3] (Tr. 110.) After hearing nothing further, the Complainant testified that he sent another email to Nicholson on October 5, 2012 (JX 36, p. 284), and received an email back from Nicholson on October 22, 2012. (JX 36, p. 281.) He testified that the email advised him that his last day of employment from a RIF was October 18, 2012. (Tr. 112.) The email further advised him of his group benefits and eligibility under COBRA provisions.

The Complainant testified that he did not believe that he was laid off due to a legitimate reduction in force based upon conversations he had with people with whom he had worked at Williston, telling him "about like 60 [people who] had just got hired on to—to start working there." (Tr. 112-113.) He added, "And I didn't understand if you're laying people off how are you hiring 60 brand new people from local companies." (*Id.*)

According to the Complainant, he successfully applied for unemployment benefits. (Tr. 113.) He stated when he applied for unemployment benefits, he was told by the North Dakota unemployment office that he had been fired for failing to follow instructions.[4] (Tr. 113-114.) The Complainant testified that he surmised that the instruction he failed to follow was Crab's "instruction not to go to HR with any complaints." (Tr. 114.) He stated that during his employment with the Respondent, he had never been subjected to any discipline. (Tr. 114-115.)

Because of the indication that he had been fired rather than laid off, the Complainant testified that he spoke to Warren Williams, Nicholson's supervisor. (Tr. 115.) He stated that when he asked Williams what policy had he violated, Williams replied that "I can't really talk to you about that." (*Id.*) He stated that Williams asked him if he had an attorney, and when the Complaint replied that he did, Williams told him that he could not talk to him because he had an attorney, even to tell him why he was terminated In fact, the Complainant testified, Williams told him that could he could not have any further conversation with him. According to the Complainant, "basically he hung up on me." (Tr. 115-116.)

The Complainant then reviewed the Respondent's "DOT Entry Level Driver's Quiz," which was made part of the record. (Tr. 116-118; JX 32, p. 266.) In his review, he highlighted questions regarding the duty of the driver to refuse to drive a vehicle not meeting Federal Motor Carrier Specifications (Tr. 116) and the prohibition against DOT drivers operating a vehicle under the influence of alcohol. (Tr. 117.) He stated that the latter prohibition was irrespective of whether the DOT drivers were on or off duty, and the supervisors whom he had observed exiting the company van drunk after a night in downtown Williston were all DOT certified CDL drivers.

[3] The email also advised that HR would respond as soon as possible "as we are now facing some realignment of our business in the Dakotas due to our customer base."

[4] A copy of the determination notice issued by the Job Service of North Dakota is found at CX 3 and states, "Employer indicated you failed to follow instructions."

(Tr. 117-118.) He stated that he knew this because he had been told that all supervisors were required to have a commercial driver's license. (Tr. 118.)

The Complainant testified that he did not receive any severance or vacation pay when the Respondent laid him off. (Tr. 125.)

Initially on cross-examination, counsel for the Respondent sought to both impeach the Complainant's credibility and to demonstrate that the Respondent was justified in terminating him based on information acquired after his hiring that demonstrated he had provided false or misleading information to the company during the job-application process. In this regard, counsel for the Respondent had the Complainant address the employment application he filled out with the Respondent. (JX 2.) In that application, he had given his reason for leaving the DHS in Pittsburgh, Pennsylvania, as "Finished." (JX 2, p. 5.) Counsel for the Respondent pointed out that during the Complainant's deposition, he was asked to explain this answer, and the Complainant testified during that deposition that there was an issue regarding his attendance during his wife's pregnancy. (Tr. 132.) Counsel for the Respondent then inquired whether the Complainant had not been discharged from the DHS for conduct unbecoming a federal Air Marshal and falsified date stamping. (Tr. 136.) The Complainant conceded that this was the case. (Tr. 137.) Asked whether the charge of false date stamping was not an allegation that he had, in fact, manipulated evidence, the Complainant replied, "That's what I was accused of, yes." Asked whether the charge of conduct unbecoming an air Marshal involved partaking in behavior in a threatening or intimidating manner, the Complainant replied, "That's what they accused me of, but there was never any proof at all that I did any of that." (Tr. 138.)

Counsel for the Respondent also inquired as to the reason that the Complainant had left Baker Hughes, his employer immediately before the Respondent. The Complainant listed his reason for leaving Baker Hughes on his job application as "New Job with Weatherford." (JX 2, p. 4.) The Complainant insisted that he "quit working" even though he appeared to agree that a letter sent to him by Baker Hughes stated that his employment had been terminated. (Tr. 143.) Later, however, he agreed that when he subsequently applied for a job with JP Jenks, he gave the reason as "[l]aid off, quit." (Tr. 153.) He acknowledged that he was not laid off from Baker Hughes. (Tr. 153.) He explained, however, that he was told that he was in a group "next to be laid off." (Tr. 154.)

When asked about his housing at Williston, the Complainant agreed that the employees' living quarters were referred to as "a man camp." (Tr. 157.) He further agreed that the workforce included approximately 100 equipment operators. He stated that he knew the fracking operations had not been up and running for very long, and agreed that the Respondent was still in the process of trying to get new contracts and new jobs. (*Id*.) He acknowledged that during the period that the Respondent was trying to get new contracts, there was a lot time when he was not out on the well pads or doing any fracking. (*Id*.)

The Complainant agreed that his first day at Williston was July 10, 2012, and that up to July 29, 2012, he had done a total of seven hours of driving. (Tr. 162.) Other than two hours of driving on July 30, 2012, he agreed that his logs did not reflect any further driving. (Tr. 163.) He testified that when he arrived on July 10, 2012, he was early by approximately three weeks,

which the Respondent requested. (Tr. 167.) He stated that after July 30, he was not out doing fracking, but, rather, working in the yard, and in the last week of work he performed security. (*Id.*) He agreed that he worked the yard or was on standby or performed security from July 31, 2012, to August 18, 2012. (Tr. 168.) When counsel for the Respondent described the situation toward the end as "a bunch of equipment operators sitting up there and not much work," the Complainant responded, "Okay." (*Id.*) The Complainant was then asked whether it was fair to state that there was not much fracking work during this time, he replied, "To be honest, there was hardly any fracking for Weatherford." (*Id.*)

Asked which days exactly he was asked to drive outside his certification, the Complainant responded, "I can't tell exactly what day I was asked." (Tr. 169.) He stated that "[e]verything was verbal," and that he did not put anything in writing until his email of September 20, 2012. (Tr. 170.) He agreed that he drove a total of approximately 9 hours during his employment in Williston. (Tr. 171.) Further, he agreed that during this period that the Respondent was "flush with men, but not unfortunately…flush with work," as described by Counsel for the Respondent. (Tr. 172.)

The Complainant further agreed that he never worked with Pittman at Williston. (Tr. 174.) He agreed that during his deposition, he identified the man camp as the object of Pittman's complaints. (Tr. 176.) He stated that "most" of Pittman's complaints were about the man camp. (Tr. 177.) He then testified that "some" of Pitman's complaints were about the man camp being too small. (Tr. 178.) As for complaints about being asked to drive outside his certification, the Complainant stated that "he mentioned that too." (Tr. 179.)

The Complainant agreed that on his last day he complained about problems with the company credit cards being maxed out and complicating the purchase of airline tickets for the employees to fly back home. (Tr. 180.) He stated that he had "no idea" when counsel for the Respondent suggested that Crabb had bought the Complainant's airline ticket on his own card. (Tr. 181.)

Asked whether he surmised at the time he last rotated home that layoffs were coming, given the slowness of the work, the Complainant replied, "I don't know if layoffs were coming or not at that point." (Tr. 182.) He stated that the employees were told that "jobs were picking up, that contracts were being taken care of." (*Id.*) The Complainant denied knowing that the call-backs would be slower due to the work flow. (Tr. 183.)

Counsel for the Respondent then referred to the Declaration of Crabb, stating that on October 19, 2012, Weatherford "terminated Ayers' employment as part of a Williston-wide reduction in force." (EX 1, p. 2.) According to the Declaration, as part of the same RIF, the Respondent terminated four other Equipment II Operators, nine Equipment I Operators, one Equipment Operator III, and one Driver II. (*Id.*) Asked if he understood that Weatherford was trying to find him alternative employment, the Complainant replied that Weatherford never told him that. (Tr. 192.) Asked if he understood that he may have been called back if work picked up at Williston, the Complainant replied that he was not told that he had been laid off, but was told he had been fired. (*Id.*) He testified that if Weatherford had called him back to work, he "[p]robably would have accepted." (Tr. 194.)

On questioning from the undersigned, the Complainant confirmed that the alleged requests to drive outside his certification occurred "around three times…." (Tr. 196.) He further confirmed the identity of those who asked him as Lee Hammons, his assistant with the first name of Steve, and "Tater."(Tr. 197-198.) He further identified the HR personnel who came from Denver to Williston to speak to him about Pittman as Monica Perez, "Kuk Kim" (whom he identified as the ones conducting the interview), and Michelle Brannon. (Tr. 199.) He reaffirmed that during the meeting, he expressed to the HR staff that he personally had been asked to drive outside of his certification. (Tr. 200.) He testified that the HR representatives did not take notes during the meeting and the meeting was not recorded. He stated that he asked them if he wanted to put something in writing, to which they responded negatively, telling him that "they'll go back and they'll do the report." (*Id*.)

Deposition Testimony of the Complainant 12/23/13

The Complainant's pre-hearing deposition, taken on December 23, 2013, was admitted into evidence. (EX 2.) He testified that following his termination by Weatherford, he obtained employment with JP Jenks, a trucking company, based in Madison, Ohio. (Dep. at 8.) Asked what type of driver he was, the Complainant responded, "I was a frac [sic] and hauler." (*Id*.) He stated that he began his employment with JP Jenks in April of 2013, and worked there "[t]ill September." (*Id*. at 8-9.) He stated that he left JP Jenks around the time he was diagnosed with Stage III rectal cancer. (*Id*. at 9.) He stated that he needed time off from work for daily cancer treatments, and felt that JP Jenks improperly terminated him. According to the Complainant, he was considering a lawsuit against JP Jenks. *(Id.* at 10.) He stated that JP Jenks had discharged him for violating a safety protocol—failing to wear personal protective equipment—which he denied. (*Id*. at 14.) He characterized the reason for his discharge as pretextual. (*Id*. at 14-15.) He testified that he believed that the reason for his discharge was the fact that he informed them of his intention to seek short-term disability. (*Id*. at 11.) He stated that he had not filed a claim under the company's disability plan, but had, rather, filed for unemployment. (*Id*. at 11-12.)

The Complainant testified that he was making approximately $1,000 per week at JP Jenks, which included medical, disability, and retirement benefits. (*Id*. at 13.) In contrast, he stated that he had been averaging $2,000-$3,000 per week while working at Williston for Weatherford. (*Id*. at 13-14.) He testified that he did not have enough information in front of him to compare the two companies' benefits packages. (*Id*. at 14.)

According to the Complainant, at the time of his deposition he was capable of working. (*Id*. at 15.) He added that, under his current treatment plan, "So long as I can be at my doctor's office for five minutes, I'm good to go." (*Id*. at 16.) Asked what he would have foreseen happening if he was still at Williston and diagnosed with cancer, he replied, "I may be receiving treatment there at Williston." (*Id*.) He stated that since his discharge from JP Jenks in September 2013, he had been actively seeking employment using the internet. (*Id*. at 17.) He estimated that he had applied for 30 jobs after he was discharged by JP Jenks. (*Id*. at 18.)

Regarding the time between being laid off by the Respondent and April 2013, when he was hired by JP Jenks, the Complainant stated that he did not recall getting any job offers. (*Id*. at 20.) He testified that he started seeking employment right after he was laid off. (*Id*.) Asked if he

had been placed on any medical restrictions after January 2013, he replied, "No, I don't believe so." (*Id*.) He stated that he currently had no medical restrictions other than needing to go to the doctor once a day. (*Id*. at 20-21.)

The Complainant testified that he had filed an EEO complaint against the DHS, for whom he worked prior to Weatherford as a Federal Air Marshal. (*Id*. at 23.) Asked what his complaint was about, the Complainant replied, "That I was being discriminated against based on my wife's health." (*Id*. at 24.) He clarified that his wife was going through complications and that the DHS "sometimes" denied him time off. (*Id*.) He agreed that he had been discharged from the DHS, and that his complaint was heard through the Merit System Protection Board, which did not find in his favor. (*Id*.) He answered "Yes" when asked if he had "lost your job and lost the complaint." (*Id*. at 25.)

The Complainant then discussed a previous claim of discrimination he had filed against the Justice Department arising out of his job as a corrections officer, prior to becoming an air Marshal. He stated that he dropped the complaint after becoming an Air Marshal. (*Id*. at 28-29.) He also identified previous litigation against U.S. Express, for whom he had driven a truck. He stated that the litigation arose from a dispute regarding his alleged failure to file workers' compensation for a work-related injury. (*Id.* at 32.) He stated that this litigation settled. (*Id*. at 33.)

According to the Complainant, the damages he was seeking in the present matter included reinstatement "either here locally or somewhere within the Weatherford organization." (*Id*. at 37.) He also stated that he was seeking lost past and future wages, as well as punitive damages. (*Id*.) As to the amount of lost wages, he stated that he could not calculate a figure at the time of the deposition. (*Id*. at 38.) Asked about the amount he was seeking for "emotional or financial harm," he replied, "I think we were asking somewhere around [$]600,000 or something like that." (*Id*.) He testified that he was also seeking around $500,000 in punitive damages, in addition to attorney fees. (*Id*. at 38-39.)

Regarding mental harm, the Complainant testified that he had not seen any physician since January 2013 for any type of mental issues. (*Id*. at 39.) He stated that he could not "recall at this time" whether he had ever seen a physician for such issues. (*Id*.) He stated that he "definitely had issues with being down or depressed." (*Id.*) He stated that this emotional state continued even after he was hired by JP Jenks because the job "wasn't even close to what I had at Weatherford." (*Id*. at 40.) He replied "I would think so" when asked if the diagnosis of cancer was not "a much bigger event in your life than the Weatherford issues." (*Id*.) Asked if he had any symptoms to buttress his claim of emotional damage, he stated that he "definitely had issues sleeping," and that his wife did also. (*Id*.) He observed that he had become more irritable, and that his irritability had caused issues with his wife, who felt he was complaining too much. (*Id.*) According to the Complainant, his wife felt that he had complained too much at Williston, and that he should have just refused when asked to do something he did not think proper, but not filed any complaints. (*Id*. at 41.)

The Complainant testified that he had been reluctant to seek any psychiatric care for fear it would come out in any job application and reduce his chances of being hired. (*Id*. at 42-43.) He identified Brian Pirone as his friend at Baker Hughes who gave him Crabb's name. (*Id*. at 45.) He testified that he was attracted to the work at Williston because of the schedule, *i.e*., three weeks of work, followed by two weeks of paid leave at home. (*Id*. at 45-46.)

The Complainant denied knowing anybody else who was laid off from Williston. (*Id*. at 47.) He gave his period of employment with Weatherford as between April 2012 to October 9, 2012. (*Id*.) He described his job as an equipment operator as "sometimes" driving equipment to the well pad, as well as rigging up the equipment to begin fracking. (*Id*. at 49.) He testified that he worked on whatever type of equipment he was asked to work upon, and that part of his job was taking down equipment at the well pad and transporting it to another location. (*Id*.)

Asked about the information provided on his work application, the Complainant acknowledged that he wrote "finished" when asked the reason why he left the DHS. (*Id*. at 50.) He asked how this answer could be an accurate statement of why he left, and he stated, "Because I—there may be some ongoing issues with the DHS, and no matter what, I am finished with them." (*Id*. at 51.) Asked if a more accurate response would have been a statement indicating that he had been discharged, the Complainant replied, "No, not really. I don't look at it that way." (*Id*.) Asked if he believed that he had fully informed Weatherford of his reason for leaving the DHS, he responded, "I believe that if Weatherford had any questions concerning my answer is finished [sic], they could have asked that." (*Id*. at 52.) He added, "I believe that I put the most accurate answer I could at the time, that I was finished working for them. No matter what—anything that happens now or in the future goes on with the DHS, I am finished working for them." (Id. at 53.) He stated that if he was filling out the form at the time of the deposition, he would "probably put the same answer." (*Id*.)

Asked why he had put down that he was involved in a lawsuit as his reason for leaving U.S. Express, as opposed to stating that he had voluntarily resigned or been discharged after filing a workers' compensation claim, the Complainant responded that it "was just what I put down." (*Id*. at 55.) He testified that he still thought the response was accurate. (*Id*.)

The Complainant stated that Weatherford did not ask him any pre-employment questions regarding his work at the DHS. (*Id*.) He stated that he was asked whether there were ongoing issues with U.S. Express, and he testified that he responded affirmatively and volunteered to provide additional information, but was never asked. (*Id*. at 55-56.)

The Complainant testified that before he reported to Williston, he was in Denver for one week of driver training. (*Id.* at 58-59.) He testified he recalled that he "might" have received training in whistleblower protection in the form of "a pamphlet or a booklet about it." (*Id*. at 61.) According to the Complainant, he understood from his training that he was encouraged to complain about any request that he do something outside his training, and that he would not be retaliated against for doing so. (*Id*. at 62.) He stated that the first complaint he filed while working for Weatherford was during his short stint in Texas, before reporting to Williston, when he filed a complainant against a co-worker for threatening another co-worker with a sledgehammer. (*Id*. at 64.) He stated that although he was not the person threatened, he still felt

that the incident needed to be reported "before it got out of hand." (*Id*.) He stated that he felt that the situation was appropriately addressed by the manager. (*Id.* at 64-65.)

The Complainant agreed that when he first arrived at Williston the operation was not fully up and running, so that some of the employees both operated equipment and performed other duties, such as security. (*Id*. at 68.) He stated that he performed security around the office building, normally from six in the evening to midnight. (*Id*. at 69.)

The Complainant identified his supervisor when he first arrived in Williston on July 10, 2012, as Grant Wilson. (*Id*. at 73.) He also indicated that he saw Terry Crabb daily, and that Lee Hammons was his supervisor beginning July 31. (*Id*. at 75.) He stated there were other supervisors/managers as well. (*Id*.) He estimated the work force at approximately 100 equipment operators. (*Id*.)

The Complainant was asked about his involvement with Jeff Pittman. He stated that he was an equipment operator who had filed a complaint that had to do with Crabb's treatment. (*Id*. at 76.) He indicated that Crabb was refusing to take telephone calls from Pittman during the latter's rotation back home. He described Pittman as being "left at home" and wanting to find out when he would be coming back to North Dakota. (*Id*.) He stated that Crabb "supposedly was not answering" Pittman's telephone calls. (*Id*. at 77.) Having previously known Pittman from working together at Baker Hughes, the Complainant stated that in late July, Pittman contacted him repeatedly, complaining of his inability to speak to Crabb. (*Id*. at 78.) According to the Complainant, one time when Pittman called he informed him that he was "looking at Terry Crabb right now." He testified that he witnessed Terry Crabb directing another employee to tell Pittman that he was not in. (*Id*. at 78-79.)

According to the Complainant, when he advised Crabb of Pittman wishing to speak to him, Crabb explained that he was tired of Pittman complaining "about the man camp and the hours of work." (*Id*. at 80.) He explained that later HR visited Williston about Pittman's complaints. He identified the HR personnel as Monica Perez and "Cook-Kim." (*Id*. at 82.) He stated that he was asked if he had witnessed Crabb refusing to take Pittman's telephone calls. (*Id*.) He described their enquiry as essentially asking him what he knew of the situation. (*Id*. at 83.)

According to the Complainant, he learned later, by speaking to Pittman, more about Pittman's complaints. (*Id*.) Asked what he learned from Pittman regarding the nature of his complaints, the Complainant responded, "Basically that he was complaining about the man camps." (*Id*. at 84.) He stated that Pittman viewed the man camps as dirty and small. (*Id*.) Other than the fact he considered Crabb a liar, and was concerned about hours worked, the Complainant stated that he could not recall Pittman relaying any other complaints. (*Id*. at 85.)

The Complainant testified that Crabb later advised him that he was aware that he had spoken to HR about Pittman's complaints. (*Id*. at 86.) He stated that Crabb "kind of let it go after that." (*Id*.)

Regarding the validity of Pittman's complaints, the Complainant stated that the man camp was not for someone "looking for the Ritz." (*Id*. at 90.) He stated that he expressed this to Pittman by telling him he had to "man up." (*Id*. at 91.) He stated that he told Pittman that he had "lived in a lot worse," but he also stated that he felt that Crabb should have picked up the telephone and spoke to Pittman and told him "quit your moaning…and get up here and get back to work." (*Id*.)

The Complainant stated that he believed that his discussion with HR regarding Pittman's complaints played a role in his being laid off. (*Id*. at 92.) Asked to list the other things that played a role, the Complainant first identified the complaint he filed with HR. (*Id*.) Next, he stated that the email he sent to Nicholson, on September 20, 2012, was the first time he put any of his complaints in writing. (*Id*. at 140.) Referring to that email, the Complainant observed that he wrote "even after Pitman's complainant, employees were being asked to carry loads in violation of DOT regulations." Looking at his own language, he stated that Pittman must have earlier complained to him about being asked to carry loads outside of his certification. (*Id*. at 94.) He testified that based on his language in the email, he "would assume" that Pittman had complained about being asked to drive outside his certification. (*Id*. at 123.) He remarked that he had personally been asked to do so "at least two, three times, maybe." (*Id*. at 94-95.) He stated that each time he was asked, and said no, the company got someone else to drive the load. (*Id*. at 95.) According to the Complainant, each time he refused, the supervisor became upset, and threatened to send him home. (*Id*. at 97.) He testified, further, that the people who did drive the loads were not certified, and that he reported this to his supervisors, including Crabb. (*Id*.) Later, however, he conceded that at least some of the drivers were appropriately certified for the loads they were asked to carry after he refused. (*Id*. at 121.)

Still referring to his email of September 20, 2012, the Complainant also identified one of his complaints related to being asked to work security by himself, which he claimed was in violation of Weatherford policy that security details consist of at least two people. (*Id.* at 100-101.) He observed that he also complained that Crabb had threatened to fire anyone he caught calling HR. (*Id*. at 101.) He stated that he heard this only once directly from Crabb, as part of a larger group. (*Id*. at 102.) He also identified one of the issues he complained of in the email as supervisors driving drunk. (*Id*.) Finally, he stated that he complained that pay sheets were being fraudulently altered, but he added that this complaint was taken care of when Weatherford reviewed his pay sheets and made an adjustment. (*Id*. at 102-103.)

Explaining why he felt the need to email Nicholson, the Complainant testified that his attempt to contact Perez and "Cook-Kim" about his own complaints was unsuccessful as they did not return his telephone calls. (*Id*. at 105.) He stated that when he contacted the Houston office, he was told that Nicholson was in charge of the Denver office, and that Nicholson contacted him a couple of days after he left a message. (*Id*.) He testified that Nicholson left the impression that he would be contacted during his rotation home so that his fellow co-workers did not know he was filing a complaint. (*Id*. at 106.) He testified, however, that he never received a telephone call back. (*Id*.) When he again contacted Nicholson, the Complainant testified that Nicholson told him "don't sweat it," and that the Respondent was investigating his allegations. (*Id*. at 107.) He testified that he expressed to Nicholson his apprehension that going back to Williston and working with Crabb would be "an issue" if Crabb found out about his complaints to HR. (*Id*.)

He stated that he and Nicholson then discussed the option of having the Complainant either work out from a location near Youngstown or in Vernal, Utah. (*Id*.)

The Complainant stated that he first learned that he was being laid off from Perez, and that his first response was to ask the status of the investigation into his complaints. (*Id*. at 107-108.) He stated that he felt that it "would have been nice for them to talk to the witnesses that I gave them names for." (*Id*. at 109.)

According to the Complainant, he knew about six equipment operators who were laid off from the Respondent in 2012. (*Id*. at 111.) He stated that he knew that "a couple of them" also had made complaints. (*Id*.) According to the Complainant, he remained in contact with those who were still working at Williston, who expressed surprise at the layoffs and noted that the company had "just hired 60 people from Frac Tech." (*Id*. at 112.)

The Complainant agreed that, assuming Pittman had complained about being asked to drive outside his certification in 2012, Pittman nonetheless remained employed by Weatherford until he left on his own volition toward the end of the year. (*Id*. at 124.) He stated that he understood that, before quitting, Pittman had threatened to sue Weatherford if he was not transferred to Vernal, Utah. (*Id*. at 124-125.) The Complainant agreed that Pittman had not been made part of the RIF. (*Id*. at 125.) He stated that in his view, the difference between his situation and Pittman's was that HR actually investigated Pittman's complaints and talked to witnesses, thus insulating him from retaliatory action. (*Id*. at 126.) He opined that the decision to lay him off was a "Terry Crabb thing," and Crabb made the decision regarding his continued employment with Weatherford. (*Id*.)

The Complainant also revealed he had initiated a wage-and-hour complaint against the Respondent. (*Id*. at 127.) He stated that he filed the complaint in August of 2012 through the North Dakota Department of Labor. He testified that never heard officially what happened to the complaint. (*Id*. at 128-129.) He testified that he did not know if Weatherford was aware that he had filed such a complaint. (*Id*. at 130.)

The Complainant identified Brian Gould as one of Weatherford's employees who was not laid off. (*Id*. at 151.) However, he stated that Gould was no longer working for Weatherford, and stated that Gould had told him that he had made several complaints to supervisors, but was afraid of taking such complaints to HR, and, therefore, left the company rather than being fired. (*Id*. at 152.) The Complainant did concede, however, upon further questioning, that Gould had left the company before the RIF that resulted in his own lay off. (*Id*.)

The Complainant identified Brian McCormick as a co-worker who started with him and was still employed by the Respondent. (*Id*. at 153.) He appeared to agree that McCormick had complained to the Respondent of many of the same issues that he had, although he stated that he was unsure to whom, exactly, McCormick had complained. (*Id*. at 153-155.) He agreed, though, that both McCormick and Pittman brought complaints to management and neither was laid off. (*Id*. at 156.) He added, "All I can say is that I took my complaint to HR, and as far as I know, Brian McCormick did not take his to HR, and I know that Pittman basically gave Weatherford an ultimatum." (*Id*.) Asked if he knew of any other co-workers who had made complaints, the

Complainant identified Rick Hanson, Mack Daniels, Warren Daniels, Brian Gould, Kevin Kelly, Josh Gentos, John Alsmith, Brian Montoya, and "Lee C." (*Id*. at 158-161.)[5]

Hearing Testimony of Terry Crabb

Terry Crabb testified that he had worked for Weatherford for five years, and was still currently employed by the company. (Tr. 216.) He stated that he had been in the oil business for thirty-six to thirty-seven years. (*Id.)* He described the majority of the work he had done as "pressure pumping" and sales. When asked to explain what he meant by pressure pumping, he stated, "Cementing, fracture, nitrogen jobs, CO-2." (*Id.*) He described Weatherford as a company handling "all types of different products and services for the oil and gas industry." (*Id*.)

Crabb stated that he became involved in Weatherford's fracking operation in Williston on January 9, 2012, when he accepted the job as district manager, although he did not arrive on the site until the end of February. (Tr. 217.) He stated that the operation involved providing high-pressure pumping services for customers after the wells had already been drilled. (Tr. 218.) He made clear that Weatherford did not own the wells. (*Id*.) He described the Williston operation as just getting started, and his primary duty as getting the operation up and running. (Tr. 218-219.)

According to Crabb, customers for Weatherford's services in Williston had to be sought out by the sales staff. (Tr. 219.) He testified that Weatherford had competitors offering similar services. (*Id*.) Further, he stated that the man camp was provided by a company named Target Logistics, and that Weatherford's employees shared the man camp with employees of its competitors. (Tr. 219-220.)

Crabb testified that the fracking operations really started operating in May of 2012, and there was only one customer, Baytex. (Tr. 221.) He stated that during the time that the Complainant worked in Williston, from early July until August 2012, Weatherford's operation was "still pretty much hit or miss." He explained that he had jobs on the books with Baytex "but some of those were sliding…." (Tr. 222.) He stated that he agreed with the Complainant that Weatherford had a workforce of approximately 100 employees, which was broken up into fleets, with two crews to a fleet and roughly 15-20 men in a crew. (Tr. 223.) He stated that each crew had an individual supervisor. (*Id*.) He agreed that Lee Hammons was a crew supervisor. (*Id*.)

Asked whether Weatherford was hoping to be a lot busier, Crabb replied affirmatively. (Tr. 223.) He agreed that in July and August business accelerated, and there were "a lot of growing pains." (Tr. 224.) He acknowledged that there were complaints, but he stated that, to his knowledge, no one ever complained of being asked to drive outside of their certification. (*Id*.) Asked if any supervisors relayed complaints of such nature to him, he replied, "Not that I'm aware of." (Tr. 224-225.)

[5] There is a second deposition of the Complainant submitted by Weatherford, along with attached exhibits. (EX 7). This deposition was taken as part of his lawsuit against JP Jenks on October 27, 2014. As it primarily concerns that separate litigation, it will not be summarized; however, it has been fully considered, and where the Complainant's testimony and/or the exhibits, in that deposition are relevant to the issues here, it will be discussed.

Crabb stated that he remembered Pittman, and that he "heard a few things from him" in the nature of occasional complaints. (Tr. 226.) He stated that from "the get-go" Pittman was not satisfied with the man camp arrangements, and that was his "main beef." (Tr. 226.) Asked if Pittman ever raised issues regarding being asked to drive outside of his certification, Crabb replied, "Not that I remember." (*Id*.) Asked if Pittman was trying to "track you down vociferously to get back to Williston," Crabb stated that Pittman called or texted almost on a daily basis and "sometimes well into the night." (*Id*.) He testified that he did not believe that he took all of Pittman's calls, citing the fact that he was "extremely busy." (*Id*.)

Crabb next described an incident in which he received a call from the owner of a facility for whom the Complainant was assigned to perform security. (Tr. 227.) According to Crabb, the company owning the facility called him to report that they had videotape of the Complainant inside the building, rather than outside where Crabb stated that he was supposed to be, "walking and looking through all the desks in our office." (Tr. 228.) Crabb stated that he did not discipline or fire the Complainant over the incident, although he believed that he could have done so. (*Id*.) He stated that he did not even confront the Complainant over the alleged incident because the Complainant was soon to rotate home. (Tr. 229.)

Asked if the Complainant ever came to him with issues or complaints, Crabb replied, "Not to my knowledge." (Tr. 229.) Asked if the Complainant went to "others about you with issues or complaints," Crabb responded, "I did hear that he used that method." (*Id*.) He stated that others never questioned him about allegations the Complainant may have made about being requested to drive outside his certification. (Tr. 229-230.) He stated that he could not recall what issues the Complainant might have been raising, but he agreed that he heard from co-workers that the Complainant was raising issues concerning the man camp. (Tr. 230.) He stated that the Complainant was "[j]ust dissatisfied," and encouraged other employees to "keep continually calling the Houston HR or Denver HR, just to complain about life in general, I guess." (*Id.*).

Regarding the Complainant's last flight home, Crabb testified that because the regional travel card that the Respondent used for booking flights was "maxed out," he used his personal company card to purchase tickets for several employees. (Tr. 230-231.) He testified that the Complainant needed to fly out earlier than the rest because he was involved in litigation. (Tr. 231.)

Asked if he ever encouraged his workers to bring their complaints to him or their other supervisors rather than HR, Crabb replied:

> We did—we did mention that. We tried to instill that everyone go through the chain of command. Unfortunately, I'm old school in an oilfield and that was the way it worked, that you went through your supervisor. If you didn't get satisfaction there, you went to the next person above, eventually to myself. If I couldn't take care of it, then I had to go above me.

(Tr. 231.) Asked if HR ever told him that he could not enforce such a directive, Crabb responded, "Yes, they did." (Tr. 231-232.) He stated that he had never fired anyone for going to HR. (Tr. 232.) He explained that the directive was his way of making sure that he heard the complaints directly, rather than hear about them secondhand from HR. (*Id.)* He stated, though, that he had never heard from HR regarding any complaints from drivers being asked to drive outside of their certification. (*Id*.)

Crabb stated that after the issues regarding the purchase of airplane tickets home, he called the Complainant's crew in and asked to air their grievances. (*Id*.) He stated that the Complainant stated that he was not going to be intimidated and, with a group of supervisors in the room, he was done talking and then left the building. (Tr. 233.) He stated that the purpose of the meeting had been for the crew members to "air what was on their mind, air it out and let's see what we could do—if they thought something needed fixed, see if we could fix it." (*Id*.) He stated that none of the other employees complained that they were being asked to drive outside of their certification. (*Id*.) In fact, he stated that he had never heard of a complaint of that nature during the time he worked as a district manager at Williston. (Tr. 234.)

Crabb described the work level in Williston at the time the Complainant last rotated home as "[v]ery low." (*Id.*) He explained that Weatherford did not have any jobs "in the immediate future." (*Id.*) He agreed that business picked up toward the end of November. (*Id*.)

Asked why the Complainant was not called back in the two weeks after his last deployment to Williston, Crabb stated that he was asked to "trim the staff" because the jobsite was overstaffed and underworked. (*Id*.) He stated that the decision regarding who to lay off was made by calling all the crew supervisors and asking them to list crew members who they deemed "nonessential" and opposed to those they "absolutely could not do without." (Tr. 235.) He stated that the list of nonessential personnel was then forwarded to HR in Denver. He agreed that the Complainant was laid off with a group of fourteen other employees from Williston. (Tr. 236.) He stated that the layoffs were due to business necessity brought about by the loss of contracts and a slow work period. (*Id.*) He stated that prior to laying off the Complainant, there was an attempt by HR to find him a spot at other work locations, beginning with the Youngstown, Ohio, area. (Tr. 237.) He surmised, though, that those efforts "never went into fruition" and that nothing opened up to accommodate the Complainant's transfer. He testified that he was not involved in HR's attempt to find another work location for the Complainant. (*Id*.)

Crabb clarified that discussions with supervisors regarding who was to be retained and who was to be laid off was done on the telephone if the supervisor was not onsite. (Tr. 268.)

Counsel for the Complainant asked Crabb if he had disclosed the incident of the security tape during his deposition in this matter, and Crabb replied no. (Tr. 238.) He agreed that he was asked during deposition if the Complainant had ever been disciplined, but he repeated that the Complainant had not been disciplined because of the alleged incident. (*Id*.) He agreed with counsel for the Complainant that the alleged incident while the Complainant was performing security had absolutely nothing to do with the decision to lay him off. (Tr. 239.)

Crabb admitted that, at one time, he stated that anyone who complained to HR would be fired. (Tr. 239.) He stated that he could not remember when he made the statement to his employees. (*Id*.) He agreed, further, that the Complainant had gone to HR. (Tr. 240.) He stated that he could not recall any conversation with the Complainant, before he returned home the final time, in which the Complainant informed him that he had gone to HR with his complaints. (*Id*.) He stated that he did not recall, either, the Complainant being placed in a separate car to be driven to the airport. (*Id*.) Asked if he remembered asking Hammons and another supervisor to accompany the Complainant to the airport, Crabb replied, "I don't recall that." (Tr. 241.)

Crabb next identified several members of the Complainant's crew—Rick Hanson, Brian Gould, Warren McDaniels, Sean Carl, William Ogee, Nick Jensen, and Mark Spearman—who were not laid off. (Tr. 241-242.) Asked if any of these people had made complaints to HR, he replied, "Not that I know of." (Tr. 243.)

According to Crabb, he was not aware of any discussions he had with HR concerning the Complainant's allegations of misconduct at Williston. (*Id*.) He stated that HR had never spoken to him concerning complaints made by Pittman about being asked to carry loads outside of his certification. (Tr. 244.) He stated that no one ever came to him from HR to investigate whether employees at Williston were being asked to carry loads in violation of DOT regulations. (Tr. 244-245.) Further, he stated that around or after September 20, 2012, no one from HR approached him again to discuss complaints regarding his earlier threat to fire anyone who complained to HR. (Tr. 245.) He replied, "Not that I can recall," when asked whether HR had ever talked to him about complaints concerning supervisory personnel drinking and then driving company vehicles. (Tr. 246.)

Crabb did state that he got a call concerning the Complainant's pay sheets. (*Id*.) He described the reason for the call as a "directive from higher up to—we were not going to be continuing to pay for off-duty time in the man camps." (Tr. 246-247.) He stated that he was aware that the Complainant had complained about his timesheets, and specifically the fact that he had not been paid for 27 hours of overtime. (Tr. 247.) He could not recall, however, when the call came concerning the Complainant's timesheets. (*Id*.)

Crabb then reviewed an email from Nicholson to the Complainant, dated September 20, 2012. (JX 18, p. 51.) In the email, Nicholson advised the Complainant the Respondent had directed its "general manager" to investigate the Complainant's allegations in Williston, and that "[m]any employees and supervisors have been interviewed." Nicholson also stated that he "had discussions in this area with management." Asked if, in light of Nicholson's statement, he was aware of anyone at the Williston job site that had been interviewed as part of the investigation Nicholson described in this email, Crabb replied, "I do not." He stated that he would have expected to know of such investigation, unless those investigated "were told not to share it." (Tr. 249.) He made clear that he had never spoken to either Nicholson or Warren Williams, Nicholson's boss, about the Complainant's employment. (Tr. 251.

Crabb was asked again, and reiterated that no discipline was ever taken against the Complainant during the Complainant's employment. (*Id*.) He stated that he was unaware of any

representation by Weatherford to state unemployment officials that the Complainant was discharged for failing to follow directions. (Tr. 254.)

According to Crabb, Weatherford's operations in Williston ceased "sometime in 2014." Asked if, after September 2012, Weatherford hired employees that had worked for two of its competitors, Cal-Frack and Frack-Tech, Crabb stated that he believed that such was true. (Tr. 251.)

Crabb clarified that the RIF was not based on seniority. (Tr. 257.) He agreed that deciding whom to lay off involved discretion. (Tr. 257.) He denied that he was "the ultimate person that recommended" that the Complainant not be retained. (*Id*.) Rather, he stated that all he did was add the Complainant's name, once it was given to him by the Complainant's supervisors, to the list to be sent to HR in Denver of those determined to be subject to layoffs. (*Id*.) He denied any role in the selection process, identifying the decision-makers as the crew supervisors. (Tr. 253.) However, asked if was "fair to say that ultimately you determined who to leave home," Crabb responded, "At that point, yes, sir." (Tr. 258-259.) Crabb was then asked, "And, in fact, you were the same person who had said maybe a week or so before that anybody that complains to HR is going to get fired. Correct?" (Tr. 259.) Crabb replied, "Perhaps." (*Id*.)

Crabb stated that he did not know the date that the Complainant was placed on the list to be laid off. (Tr. 268.) Asked if the decision was made by the date he was scheduled to redeploy to the jobsite in September, after spending two weeks at home, Crabb replied, "To my knowledge, that was made down the road." (Tr. 269.) Asked why the Complainant had not received a call to return with the rest of the team when they redeployed in September, Crabb replied that he had "made the decision through my bosses in Denver to leave some people at home." (*Id*.) He stated that the Complainant and the other people left at home had not been laid off, but were being paid the minimum while at home "because we didn't have the work for them." (*Id*.) Asked therefore if he could agree with counsel that the Complainant had not been laid off until after he sent the email dated September 20, 2012, to Nicholson, setting forth all of "the alleged violations, Crabb replied, "I guess so, yes, sir." (Tr. 269-270.)

Crabb testified that there were drivers at Williston who were certified to carry hazardous materials, although he could not recall how many. (Tr. 259.) He stated that, to his knowledge, these were the only drivers who transported such materials. (Tr. 259-260.)

Crabb further identified "Tater" as Dusty Tate, and stated that he was one of the supervisors to choose who stayed and who was laid off. (Tr. 263.) He also suggested that the supervisor named Steve was Steve Van Hattem. He clarified that Tate, Van Hattem, and Hammons were among those who he consulted to determine who should be laid off. He described his input as telling them that it "was their choice to make on who they deemed essential [and] who…were put on the list [to be laid off]." (*Id*.) According to Crabb, "that's merely all I did, was put them on the list and send them to HR." (*Id*.) Asked if his testimony was that he did not have any input as to who was put on the list to be laid off, he replied, "Pretty much, yes, sir." (Tr. 263-264.) He added, "I didn't influence any decisions." (Tr. 264.)

Asked what complaints he was aware of before the layoffs, Crabb testified that he was aware of complaints about conditions at the man camp and flights being scheduled last minute. (*Id*.) Asked if he heard any complaints about drivers being requested to drive materials outside their certification, he testified, "I don't recall hearing it." (*Id*.) Similarly, he denied hearing any complaints about drunk supervisors operating vans, or the lack of permits for trucks cross state borders. (Tr. 264-265.)

Asked what he meant when he described himself as "old school," he replied, "Well, we—we handled—tried to handle things in-house before you had to bring HR into it, tried to, you know, go up the chain of command try to take care of it before there was an issue that was required of going in front of HR. In the old days it was—you settled it behind the frack tanks." (Tr. 265.) Asked to describe people that are "new school," he replied, "It's a touchy-feely oilfield. They go straight up to HR, I believe, now, is what they're taught." (Tr. 266.) He stated that he had learned his lesson, however, and it was "not you grandpa's oilfield anymore." (*Id*.)

Crabb testified that Hammons was the Complainant's immediate supervisor, and therefore would have been one of those to decide whether to retain or layoff the Complainant. (*Id*.) He added, "There could have been another person. I can't remember exactly who he was paired with. But Steven Van Hattem was more or less senior service supervisor or field sup. [*Sic*.] So he had input in it too. And Dusty worked with all groups—or Tater, as you called him." (*Id*.)

Finally, Crabb was asked whether, during the time he was seeking input from Hammons, Tate, and Van Hatten, any of them opined that the Complainant was a complainer, Crabb replied, "It may have come up. I don't recall specifics at this time." (Tr. 270.) When asked to clarify his response, and specifically to state whether any of the three might have felt that the Complainant was "new school" and a complainer, Crabb stated, "I may have heard that, yes, sir. Probably did hear it." (*Id*.)

Deposition of Terry Crabb 1/29/14

Crabb was deposed before the hearing on January 29, 2014. (JX 23.) He testified that he was the district manager of the Williston area, which had close to a 350-400 mile radius. (*Id*. at 11.) As the district manager, he stated that he reported directly to Mark Cox, the general manager of Alaska and the Rockies, in the Denver office. (*Id*.) He stated that the people who reported directly to him were operations supervisors, numbering from three to eight. (*Id*. at 12.) He described his present position with Weatherford as "Area Tech Sales Rep 3." (*Id*. at 13.) He approximated his start date in this new position as December of 2012. (*Id*.) He stated that he had the option to go back to sales, which he felt like he wanted to do, and therefore took advantage of the option. (*Id*. at 14.)

Crabb testified that equipment operators reported directly to the operations supervisors. (*Id*. at 14.) He identified the Complainant as an equipment operator, hired at the rate of $19.00 per hour with the opportunity for a "daily retention bonus." (*Id*. at 16.) He could not remember the amount of the "daily retention bonus." (*Id*.) According to Crabb, he talked to Complainant on the telephone before offering him employment. (*Id*.)

Crabb testified that he had not been personally trained in federal motor-carrier safety regulations, or compliance with rules regarding hazardous materials. (*Id*. at 18.) He agreed, however, that hazardous materials were present at the Williston site, and he acknowledged that anyone transporting those materials had to have certain qualifications and permits. (*Id*.) He acknowledged that the purpose of the rules was to reduce the risk to public safety. (*Id*. at 19.) He further indicated that he understood that a commercial driver's license, like the one possessed by the Complainant, did not automatically allow one to drive all types of trucks and loads, and that special permits were needed to carry certain types of hazardous materials. (*Id*. at 20.)

Crabb denied being aware that the Complainant had made complaints about being asked to carry loads outside of his certification while working at Williston. (*Id*. at 29.) Similarly, he denied being aware of any complaints made by the Complainant regarding being asked to transport hazardous materials in violation of DOT regulations. (*Id*.)

Crabb acknowledged that Jeff Pittman was an employee at Williston. (*Id*. at 29-30.) He stated that he was unaware of any complaints made by Pitman concerning being asked to carry loads "that were not properly permitted." (*Id*. at 30.) Asked if there was a time that Pittman was not actively working and trying to get in touch with him, he replied, "I don't know." (*Id*. at 30.) Asked if he ever told his assistant to tell Pittman, when he called, that he was not there, Crabb responded, "I don't recall that." (*Id*.) Asked if he was aware that Pittman had made a complaint to HR about him not being called back to work, he replied, "Not that I'm aware of." (*Id*.) Crabb also denied knowing that the Complainant had "participated as a witness" on behalf of Pittman's HR complaint. (*Id*. at 31.) He stated that the only contact he had with HR about Pittman was an email or a telephone call regarding how to utilize Pittman and whether he was needed in Vernal, Utah. (*Id*.)

Crabb denied knowing anything about Weatherford's employees being asked to carry loads in violation of DOT regulations. (*Id*.) Asked if he recalled a meeting in which he had threatened to fire anyone who was caught contacting HR, Crabb stated, "I may have said something like that in error." He added: "I did call human resources in Denver to confirm that that was something that was told, that they could call anytime, so we never made that—or I never made that statement again." (*Id*. at 32.) Asked if he made the statement in August of 2012, Crabb replied, "I don't know. It could have been." (*Id*.)

Asked why the Complainant was not called back to work in September 2012 after he rotated back home, Crabb replied, "We were in the process of determining final crews, and we had lost quite a bit of work. Our contracts fell through. And I had too many personnel on at that time, so I left some people at home." (*Id*. at 34.) He stated that he "[w]ent through with the service supervisors essential people for their crews to run the equipment." (*Id*.) He testified that he was "not sure" if he recollected the Complainant making a complaint about a number of issues before leaving Williston. (*Id*.) He also stated that he did not have any recollection of the Complainant being transported to the airport in a separate vehicle when he left Williston for the last time. He stated, "I don't know if that is the case." (*Id*. at 35.)

According to Crabb, he eventually learned of the Complainant's issues regarding his pay, but he was uncertain when he learned of them. (*Id*.) Referencing the other complaints in the

Complainant's email of September 20, 2012, Crabb denied ever being made aware of the Complainant's issues regarding being posted to security alone. (*Id*. at 36.) He indicated that he was aware of the grounds for the complaint regarding his threat to fire anyone caught contacting HR. (*Id*.) Asked if he knew how HR had "got wind of the allegation that you made that statement," he replied, "Not really. I thought I had called them to confirm if I had that right." (*Id*.) He stated that no one in HR had ever asked him about the Complainant's allegation that supervisory personnel were drunk while driving company vehicles. (*Id*. at 35-36.)

Crabb also denied being aware that the Complainant had filed a claim for unemployment compensation benefits after he was laid off. (*Id*. at 37.) He stated that he was unaware of the Complainant being subjected to any disciplinary action during his employment with the Respondent. (*Id*.) He denied, therefore, knowing why North Dakota Job Services had indicated that the Complainant was terminated for failure to follow instructions. (*Id*. at 38.)

In reference to Nicholson's email to the Complainant, dated September 20, 2012, advising that employees and supervisors were being interviewed to investigate the Complainant's complaints, Crabb testified that he did not know personally of any employees or supervisors who were interviewed by HR. (*Id*. at 39.) He testified that he "would think" he would have known of any investigation into the Complainant's allegations. (*Id*.)

Asked to describe his role in the process of selecting who would be laid off, Crabb replied, "Well, during our—as I said before, we had lost some valuable contracts. We were overstaffed at that point went through a process with service supervisors as to who was—somebody they could not do without on their frac [sic] crews…." He described how he then "put the list of names down given by the service supervisor and sent that to HR, or human resources, in Denver." (*Id*. at 40.) He agreed that a total of fifteen employees were laid off, although he stated that he did not know the dates on which they were laid off. (Id. at 41.) Asked if it was not true that most of the fifteen were not laid off until November 2012, Crabb replied, "I don't know. I don't recall when the official date was." (*Id.* at 41.) He stated that he did not "recall" if anyone had been laid off before the Complainant. (*Id*. at 42.) He did agree that certain members of the Complainant's team were called back to work. Asked if any of those called back had filed any complaints with HR, Crabb replied, "I'm not aware." (*Id*.)

Asked if he knew why the Complainant was not called back in September 2012, Crabb replied that "none of the other supervisors had a place for him on their crew." (*Id*.at 46.) Asked if it was because he filed an HR complaint, Crabbed answered, "No." (*Id*.)

Crabb agreed that Weatherford had brought in new employees since August of 2012, although he did not know the precise time frame. (*Id*. at 49.) He further agreed that employees were brought in from other competing fracking companies, "Cal-Frac" and "Frac Tech." (*Id*.) According to Crabb, he did not know the exact time frame when the hires were made. (*Id*. at 50.) Asked if he knew of any reason why Weatherford would not have contacted the Complainant to offer him renewed employment, Crabb replied, "I do not." (*Id*. at 51.)

Crabb testified that during his employment at Williston, the only issue he was aware of that the Complainant had raised with HR was regarding his timesheets, which was resolved. (*Id*.

at 52-53.) He stated that until litigation arose on the issue, he was unaware of any allegation that the Complainant was asked to drive outside of his certification. (*Id*. at 52.) Likewise, he denied being aware of the Complainant being involved in the complaints of other employees. (*Id*.) He stated that when the layoff list was put together, he became involved in discussions with HR about the possibility of the Complainant being transferred to another work location. (*Id*. at 53.)

Crabb acknowledged that he was aware that at the time Weatherford was "trying to do a start-up" in the Youngstown, Ohio area. (*Id*. at 54.) He stated, however, that he was not involved in any attempt to relocate the Complainant to the Youngstown area "other than referring it to HR, or human resources, to see if other districts might need him." (*Id*.)

Hearing Testimony of Lisa Mora

The Respondent presented as a witness Lisa Mora, who identified herself as the company's "Western U.S. HR Manager." (Tr. 272.) She stated that she moved into this position on April 1, 2015, and, prior to that, she was the company's "Rockies Area HR Manager." (*Id*.) She stated that she was located in Texas at the time of the Complainant's employment with the Respondent. (*Id*.) Consequently, she testified, she was not involved in the RIF in Williston that resulted in the Complainant layoff, nor did she receive any e-mails from the Complainant. (*Id*.)

Mora verified that Weatherford did not have any more fracking operations in Williston after late March of 2014. (*Id*.)

Asked if it came to Weatherford's attention that an employee had made false statements on a job application, that would be grounds for discharge, Mora replied affirmatively. (Tr. 273.) She stated that such a policy was in effect in 2012. (*Id*.) She clarified that if an employee was determined to have made false statements on a job application, they would be subject to discipline up to discharge. (Tr. 273-274.)

On cross-examination, Mora stated that "falsification is falsification," but indicated that "[i]t could be due to the circumstances." (Tr. 274.) She indicated that the severity of the falsification would be a factor in any discipline. (*Id*.) Asked if she was aware of any of Weatherford's employees having "been investigated as to their resumes," Mora replied, "Not to my knowledge." (Tr. 275.) She stated that the Complainant's job application could be reviewed, but had not been at the time of the hearing. (*Id*.) She clarified that at the time of her testimony, the company had not determined whether the Complainant could be discharged based on any claim of falsity arising from his job application. (*Id*.) Asked whether she was prepared to state that there was anything in the Complainant's job application that was false, she replied, "I haven't thoroughly reviewed his job application." (Tr. 276.) She was then asked whether it was true that, as of the date of her testimony, Weatherford did not have grounds to discharge the Complainant based on his job application, and she responded, "Correct." (*Id*.)

Counsel for the Complainant stated that, despite a request for documents, he had never seen any documents relating to an investigation regarding the concerns the Complainant express in his e-mail to HR dated September 20, 2012. Mora was asked whether she had seen any documents related to the investigation, or was aware of their existence. (*Id*.) She responded:

"No, I'm not. Everything that was requested in discovery was provided." (Tr. 277.) Counsel for the Complainant then asked her whether, as a "human resources professional," she found it "unusual that someone would make significant allegation of misconduct and there be no record of it," and she replied, "It could be considered unusual, yes." (*Id*.)

On re-direct examination, Mora stated that she did not become involved in discovery of the present case until very recently. (*Id*.) She explained that she became involved when the need for a hearing arose. (*Id*.)

Asked by the undersigned if in her experience, she had ever had HR people go onsite to investigate complaints, Mora replied, "Yes." (Tr. 277-278.) Asked if the results of such an onsite investigation would be usually set forth in writing, she replied, "Yes." (Tr. 278.)

Deposition of Warren Williams 1/27/14

Warren Williams testified that he had been the Human Resources manager for Weatherford for fifteen years. (EX 12, dep. at 6.) He testified that Weatherford had approximately 65,000 employees, both domestically and internationally. (*Id*. at 9.) He stated that the Respondent does have a location in Ohio, with approximately fifty or fewer employees. (*Id*. at 9-10.) Asked about the nature of the Ohio operation, he stated that he had only been involved with a surface-logging enterprise. (*Id*. at 10.)

Williams testified that he was not involved hiring the Complainant. (*Id*. at 12.) He stated that he first became aware of the Complainant when the Complainant called him on a date he could not recall. (*Id*.) He stated that the Complainant relayed to him concerns about the operations in Williston. (*Id*.) He described them as "some general safety concerns" and "some issues he had with the manager there at the location." (*Id*. at 13.) He recalled that he informed the Complainant that he would "pass that information on to Mr. Nicholson, who was the region HR manager for that area." (*Id*.)

Williams stated that when they spoke, the Complainant was an employee, but he was not on active duty. (*Id*. at 15.) Williams confirmed that, when he was hired, the Complainant received $19.00 per hour. (*Id*. at 16-17.)

Although he did not deny being copied on the email from the Complainant, dated September 20, 2012, Williams denied having read the email. (*Id*. at 27.) He stated that he did not personally investigate why the Complainant had not been sent back to work. (*Id*. at 27-28.) Asked if he had ever directed anybody to investigate the allegations or issues raised in the email, he stated that he had referred it to Nicholson. (*Id*. at 28.) He stated that he was unaware of any allegation of misconduct against the Complainant at any time during his employment. (*Id*.) He denied that Weatherford had any policy of placing an employee who reports misconduct on either suspension or inactive status while the employee's allegations are being investigated. (*Id*. at 29.) However, he acknowledged that there were "occasions where we put somebody on suspension while something was being investigated." (*Id*.) He added, though, that he did not recall whether the employees suspended were the ones making the allegation or the ones being investigated. (*Id*.)

Williams stated that he had never investigated whether Crabb took any action against Pittman, specifically with regard to whether he was asked to carry loads outside of his certification, or that he was avoiding his telephone calls. (*Id*. at 30.) He stated that he did not have any specific information whether Nicholson looked into the issue. (*Id*.) He stated, further, that he did not ever investigate whether any employees in the North Dakota facilities were asked to drive outside of their certification, nor was he aware of any investigation conducted by others. (*Id*. at 31.) Similarly, he stated that he did not personally conduct any investigation into the Complainant's allegation that he was improperly asked to work security by himself, nor was he aware of any investigation conducted by others. (*Id*.) Likewise, he stated that he did not personally investigate the Complainant's claim that Crabb had threatened to fire anyone who went over his head to HR, nor was he aware of any one else who had looked into the matter. (*Id*. at 32.) Finally, he gave the same answer to the allegation that the Respondent's supervisory personnel were drinking and driving company vehicles, stating that he did not investigate the matter personally and was not aware of anyone who had. (*Id*.)

Asked concerning Nicholson's response to the September 20, 2012, email from the Complainant, advising him that his allegations were being investigated and employees and supervisors interviewed, Williams stated that he did not know how many employees and supervisors were interviewed. (*Id*. at 33.) He stated that he did not know if a final investigation was done. (*Id*. at 34.) He testified that it was the company's usual practice, when complaint came through Human Resources, to "get with the operations management and the DOT or safety group to look into" the complaint. (*Id*. at 38.) Told that discovery had produced no reports of any investigation into the issues raised by the Complainant, Williams stated that he did not know if any such documents existed. (*Id*.)

Williams was then cited to the October 5, 2012, email from the Complainant to Nicholson, in which he stated he was trying to find out when he would be assigned to come back to work. (*Id*. at 34.) He stated that he was unaware of any such communication. (*Id*. at 35.) He denied having any personal involvement in deciding the Complainant's employment status following that email. (*Id*.) He stated that he never told the Complainant that he had been terminated. (*Id*.) Asked if anyone with Weatherford had informed the Nebraska Job Services that the Complainant had failed to follow instructions, Williams replied that he was "not familiar with that." (*Id*. at 36.) Later, he testified that Weatherford used an unemployment service to respond to unemployment claims, and identified the company used by Weatherford as TALX. (*Id*. at 44.) He identified Nicholson "or part of his team" as the person or persons responsible for giving TALX information to respond to the Complainant's unemployment claim. (*Id*.)

Williams testified that it was his understanding that the Complainant was let go due to a RIF. (*Id*. at 39.) He stated that he did not personally investigate whether there was a RIF. (*Id.*) He stated that Weatherford did have a policy of granting severance to employees who were laid off—which was normally "a minimum of two weeks and then one week for every years, up to a maximum of nine years, or nine weeks." (*Id*.) He stated that he was unaware of whether the Complainant received severance pay. (*Id*.)

Williams testified that he did not know if Weatherford advertised to hire commercial truck drivers from October through September 2012. (*Id*. at 44.)

Deposition of James Nicholson 1/27/14

James Nicholson testified that he had a conversation with the Complainant in August of 2012, and he recalled that, at the time, work was slow in Williston due to lost contracts. (EX 13, dep. at 8-9.) He stated that people who had rotated back home were asked to stay at home longer than normal or work fewer hours. (*Id*. at 9.) He testified that he did not know who else was on the Complainant's crew. (*Id*. at 11.)

Asked if he looked into the matters that the Complainant charged in his subsequent September 20, 2012, email, Nicholson replied that he contacted the regional headquarters in Denver "to try and find Mr. Ayres some answers." (*Id*. at 12.) He identified the people he talked to as Monica Perez and "Cook-Kim," the latter of whom, he stated, was new to fracking operations. (*Id*.) Asked if he recollected whether there was any investigation into the specific allegation that Crabb was avoiding telephone calls from Pittman in retaliation for reporting that he was being asked to carry loads outside his certification, Nicholson replied, "No." (*Id*. at 13.) He stated that he did not recall that drivers in Willison were being asked to drive outside of their certification, but he added that he would have spoken to the head of safety in Denver. (*Id*.) He testified, though, that he could not recall what the head of safety might have told him. (*Id*.)

Asked if he ever talked personally with any employee to determine whether they were asked to carry loads outside their certification, Nicholson replied, "No, that is not my areas of expertise, and all I did was pass on information to the appropriate people." (*Id*. at 14.) Asked whether hazardous materials were being carried on the Williston premises, Nicholson denied knowing. (*Id*.) Regarding Nicholson's stated concern that he was being asked to perform security assignments alone, outside of Weatherford's safety policies, Nicholson testified that he passed this information along to "the head of safety out of Denver," but he received no response. (*Id*.)

With respect to the Complainant's allegation that Crabb had threatened to fire anyone he caught calling HR, Nicholson stated that he looked into it by contacting Michelle Brannon and Monica Perez. (*Id*. at 15.) He stated that he did not "believe" that he ever spoke to Crabb personally about the issue. (*Id*.) Asked regarding the result of the investigation into this issue, Nicholson stated that he was told that "Brannon actually went to North Dakota and held investigations, but I never received anything back." (*Id*.) He stated, however, that Crabb was disciplined, having been moved "from his role of operations in the fracking ground into a sales position." He added: "He didn't have anyone reporting to him directly." (*Id*. at 15-16.) Asked if he knew when this occurred, Nicholson replied, "Not the time frame. It was around this time frame, but I don't know when." (*Id*. at 16.)

According to Nicholson, he had the Complainant's allegation about not being paid for overtime investigated, and Brannon "made the trip to North Dakota to get with Susie Herrara and see what she could find out about the time sheet." (*Id*.) Asked if he knew whether there was any merit to this allegation, Nicholson replied, "Not that was sent back to me, no." (*Id. at* 16.)

Asked if it was not true that the Complainant was not sent back to Williston so that the company could look into his allegations, Nicholson replied, "That I don't know. I know Mr.

Ayres was sitting at home longer that his normal rotation, because there was other factors involved with that as well. He wasn't the only one." (*Id.* at 16-17.)

Nicholson was then asked regarding the email he sent back to the Complainant advising him of the investigations into his complaints. (*Id*. at 17-18.) He stated that the email was sent on the same day as the email from the Complainant listing his complaints—September 20, 2012. (*Id*. at 18.) In that email, he stated that "[m]any employees and supervisors have been interviewed" and that he, Nicholson, "had discussions in this area with management." (*Id*. at 17.) Nicholson agreed that this language indicated that an investigation into the Complainant's complaints had been instigated prior to September 20, 2012. (*Id*. at 18.) He described a realignment of the Willison operation during this period, in which there contracts were lost, including a particularly big one that the company expected to receive. (*Id.* at 18.) Nonetheless, he stated that there were still equipment operator IIs operating at Williston. (*Id*.) He stated that there were "multiple crews at multiple locations." (*Id*.)

Nicholson was then asked regarding the email he sent to the Complainant on October 22, 2012, advising him that his "last day of employment from the reduction of force was Friday, October 19th." (*Id*. at 19.) He stated that he was "passing on communication" from the Denver office. (*Id*.) He identified the persons who gave him this information as Brannon and Mark Cox. (*Id.* at 20.) He stated that neither of these two told him why the Complainant had been selected for the RIF, although they did advise him that there were 15-20 people "on the cut back." (*Id*.) He stated that they did not inform him how the 15-20 people were selected to be laid off. (*Id*.) Asked if Crabb was still the manager in Williston, he replied, "I can't answer that for sure, but I'm 90 percent positive that no, he was not, not in October." (*Id*.) He explained that Crabb had been "moved to a new position" after Cox did an investigation. (*Id*.)

Asked if he knew of any allegation that the Complainant engaged in misconduct during his employment that would have justified discharge, Nicholson replied, "Not to my knowledge." (*Id*. at 21.) Shown the document from North Dakota Job Service advising the Complainant that Weatherford had indicated that the Complainant failed to follow instructions, Nicholson stated that he was unaware of any allegation of misconduct Weatherford had against the Complainant. (*Id*. at 22.) Asked if he knew who may have provided the job service with such information, Nicholson replied that unemployment claims went through the Houston office. (*Id*. at 23.)

Nicholson testified that the Complainant received severance pay amounting to two-week's salary. (*Id*. at 26-27.) He stated that he did not know if any of the other employees laid off at the same time as the Complainant were offered reemployment at Weatherford. (*Id*. at 28.) He stated that the original plan was to "try to move these people to some fracking jobs in Colorado or Utah, but those contracts didn't come through." (*Id*. at 29.) Asked if he knew the "decision makers in terms of who should be subjected to the reduction force," Nicholson replied, "The operations group, Mark Cox." (*Id*.) Asked if he knew whether people with less seniority than the Complainant were hired back by the company, Nicholson replied, "I'm not aware, don't know." (*Id*.)

Asked if the reason why Crabb was moved to another position was his threat to fire employees who he caught calling HR, Nicholson replied, "Not to my knowledge." (Tr. 29-30.)

He stated that, to his knowledge, the reason was a lack of work that caused people to be moved around.[6] (*Id*. at 30.)

Asked if he recalled having a one-hour conversation with the Complainant on August 13, 2012, in which he voiced his complaints, and specifically that of being asked to drive outside his certification, Nicholson replied "absolutely." (*Id*. at 31.) Nicholson stated that he recalled the incident in which the Complainant was taken to the airport in Williston in a separate vehicle, and that he was told that the reason was that they could all not fit in the shuttle bus. (*Id*. at 31-32.)

According to Nicholson, he did not have any conversation with the Complainant about the possibility of working for Weatherford at another location, including Youngstown, Ohio. (*Id*. at 32.)

Deposition of Lee Hammons 9/25/15

Lee Hammons testified that he was employed by Weatherford for seven or eight months, after being hired as a service supervisor. (EX 11, dep. at 4-5.) He stated that the Complainant reported to him at Williston, and that he, in turn, reported to Crabb. (*Id*. at 5.) He stated that six to seven supervisors reported to Crabb. (*Id*.)

Hammons said he supervised only one crew. (*Id*. at 6.) He recalled that on one occasion he requested that the Complainant drive a frack truck, and that the Complainant told him that he only had a Class B CDL classification, which did not allow him to do so. Asked what happened then, Hammons replied, "I said, 'Okay.' So I went upstairs, and we pulled his file and, sure enough, he only had a Class B CDL." (*Id*. at 6-7.) He added, "Class B, he was eligible to drive a crane, which I had somebody else on, so I swapped the two, put the other guy on the pump, put him on the crane, and then he came back and told me that he's never driven a crane before, and he cannot drive that." (*Id.* at 7.) Consequently, Hammons testified, he put the Complainant "in the crew van and put somebody else on the crane." (*Id*.) He denied threatening to fire the Complainant over the incident, and stated that the issue of his license certification never came up again. He stated, "I had several guys that had flat Bs, so it wasn't nothing unusual." (*Id*.) He denied having any knowledge of any other incident with any other employees involving the limits of the Complainant's license certification. (*Id*. at 8.)

Asked how the Complainant was as an employee, Hammons replied, "He didn't have a very good work ethic at all." (*Id.*) Asked to explain, he stated, "You would ask him to help rig up or do things, and he would refuse, said he wasn't hired for that, he was hired to drive." (*Id*.) He stated that there were a few other equipment operators who took the same position. However, he added, "But, typically, yes, you are hired to drive, but you're also hired to put rigs up, rigs down, and participate with the crew." (*Id*. at 9.) He explained that during this period the company was overstaffed at Williston and, therefore, was trying to find extra work for underused

[6] Nicholson's testimony on this point would appear to contradict his earlier testimony, in which, as previously summarized, he stated that Crabb was disciplined as a result of his threatening to fire employees who he caught calling HR. (Dep. at 14-15.) He was specifically asked what "the discipline" was that Crabb received, and Nicholson responded, "He was moved from his role of operations in the fracking group into a sales position. He didn't have anyone reporting to him directly." (*Id*. at 15-16.)

equipment operators. (*Id*.) He explained, "We were trying to find little small things for everybody to do to keep everybody busy, so we weren't standing around." (*Id*.)

Hammons stated that the Complainant was also "confrontational with other employees." (*Id*.) He stated that the Complainant "would just start arguments and different things with other employees," and was talked to several times about this behavior. (*Id*.) He also recalled the Complainant not liking the security job in the yard at night. (*Id.* at 10.)

Hammons agreed that he was involved in the decision not to bring the Complainant back to work. (*Id*.) Asked who else was involved, he replied, "It was several others, Terry Crabb[], Marcus Moore, which was our operations manager. There was, I think, a discussion on who did what, who was going to work, who wasn't going to work, and he just was put on the list as one of the ones to not return." (*Id*.) He added, "We picked the members of the crew that we thought were going to be able to participate and get jobs done like they needed to be done." (*Id*. at 10-11.) Asked specifically why the Complainant was not considered to among those, Hammons replied, "He just wasn't fitting in. Like I said, he had a bad work ethic." (*Id*. at 11.) He clarified, "We asked him to do stuff he didn't want to do, and he was just—all them issues with the other employees, so he was picked to go." (*Id*.)

Asked if the Complainant was ever disciplined during his time at Williston, Hammons stated that he "honestly could not answer," but added that "[w]e talked to him verbally several times about conflict." (*Id*. at 12.) He stated that he personally never issued any formal discipline against the Complainant. (*Id*. at 12-13.) Challenged as to why not, given his testimony that Complainant had improperly confronted his co-workers, Hammons explained, "That was about the time when the oil field was becoming a nicer, friendlier oil field; that's when the disciplinary actions actually started coming into play right about the same time. In the original oil fields, we did not do that; they talked to you a few times; if it wasn't working out, we sent you down the road." (*Id.* at 13.)

Hammons agreed that the Complainant would have been in violation of DOT regulations if he operated outside his license certification, and he had a right to tell Hammons that he was not going to drive a piece of equipment for which he was not certified. (*Id*. at 14.) He denied, though, that his doing so was one of the reasons why he found the Complainant uncooperative. (*Id*.)

Hammons stated that he had 48 people in his crew. (*Id*.) He remembered the name Brian Gould, stating that it sounded familiar. (*Id*.) He stated that he could not recall any incident involving a discussion with Gould and the iron used for bands on trucks. (*Id*. at 15-16.) He further denied recalling Crabb stating in a meeting that any employee who complained directly to HR would be fired. (*Id*. at 16.) He stated, "The only thing I can tell you is that we had a meeting, and he did talk about calls being made to HR, but I don't recall him ever saying that if we find out you're making the calls, that we are going to let you go. I don't remember that part of it." (*Id*. at 17.) He stated that such a threat, if made, would have been "flat out unethical." (*Id*.)

Hammons testified that he had "no idea" whether the Complainant had made any complaints to HR. (*Id*.)

According to Hammons, the "final incident" occurred when the Complainant "had an issue with another operator…that caused a fight…." (*Id*.) He stated he "and the safety guy loaded [the Complainant] in the truck and took him to the airport." (*Id*. at 17-18.) He clarified that the Complainant and the other operator "got into a major conflict verbally" and the Complainant started "threatening to kick his butt and everybody else's butt around…." (*Id*. at 18.) He stated that "at that point we were already going to send [the Complainant] home." (*Id*.)

According to Hammons, the decision made among the supervisors regarding whom to lay off was made before, not after, the incident which led to the Complainant being driven to the airport. (*Id*. at 19.) He stated that the Complainant was told that he wasn't coming back when he was put in the truck to be driven to the airport. (*Id*. at 20.) Asked who conveyed the message, Hammons replied, "I believe Terry Crabb[], actually." (*Id*.) He stated, "In fact, Terry came out and decided to go put him on the plane and tell him he's not coming back." (*Id*.) Later, though, he testified, "And I believe Steven Van Hattern [sic] is the one that actually really told him." (*Id*. at 21.) It was Hammons's' understanding that the Complainant had been fired at that point. (*Id*.) He explained, "That's usually what it mean, when you get put on a plane and told you're not coming back, usually you're terminated right there." (*Id*.)

Hammons remembered that Gould, Warren McDaniel ("Big D"), and Mark Bierman all got called back to work. (*Id*. at 22-23.) He stated that he was unaware at any time that he worked for Weatherford that the Complainant had filed complaints with HR. (*Id*. at 25.)

Hammons agreed again that the decision not to bring back the Complainant was made before, and was not affected by, the incident which led to his being driven to the airport. (*Id*. at 28.) He described the incident as a near physical confrontation between the Complainant and another employee, and that the Complainant threatened other individuals. (*Id*. at 29.) He stated that he did not know the subject matter of the original conflict. (*Id*.)

Deposition of Dusty Tate 10/1/15

Dusty Tate testified that during the Complainant's employment at Weatherford he was "an equipment operator, also known as a "groundman." (EX 14, dep. at 5.) He testified that he drove "frac [sic] pumps, cranes, line trucks." (*Id*. at 6.) He added, "I didn't drive any chemical transports, because I didn't have a haz-mat [sic]." (*Id*.)

Asked if he ever directed the Complainant to "drive or operate any trucks or machinery that would be covered by a CDL license," Tate replied, "No, sir." (*Id*.) He denied that he ever directed the Complainant in any of his duties. (*Id*.) He also denied being asked by any of his supervisors to operate outside his license certification. (*Id*.) He added, "If you didn't have a classification, they would tell you that's fine. They had a big influx of guys who did. They would say okay and go to the next gentleman." (*Id*.) Tate was not aware of any equipment operator at Weatherford being asked to drive outside of their license certification. (*Id*. at 7.)

Tate testified that his direct supervisor was Bill Moores. (*Id*. at 8.) He stated that Moores had the title of "frac treater." (*Id*.) He described a "frac treater" as someone in charge of the entire crew, whose job it was to assign duties like a site foreman. (*Id*.) Asked if he worked

under Crabb, Tate replied, "He was our district manager, that is correct." (*Id*.) He stated that he did not work under Lee Hammons. (*Id*.)

Tate stated that when he worked for Weatherford, the men worked in crews assigned to various jobs. (*Id*. at 9.) In 2012, he testified, the crews usually stuck together. (*Id*.) He stated, "Crews stay with crews." (*Id*.) Although he stated that the Complainant's name sounded familiar, Tate stated that he could not "place a face to him." (*Id*. at 10.) He explained that the Complainant was not on his crew, and therefore he would not be a person that he worked with on a regular basis. (*Id*.) He stated that he was not aware of the Complainant ever being asked to take an assignment in violation of DOT regulations. (*Id*.) He clarified that he would not know whether it happened since they were not on the same crew. (*Id*.) Asked if he knew anything about why the Complainant ceased working for Weatherford, he stated, "I have no idea." (*Id*. at 11.)

Tate denied knowing an employee named Brian Gould. (*Id*.) He stated that he, Tate, was no longer associated with the company. (*Id*.)

Deposition of Richard Hansen 11/24/15

Richard Hansen testified that he was employed at Weatherford between April 2012 and February 2015. (CX 8, dep. at 6.) He stated that he knew the Complainant, who was with his group during training in Marshall, Texas. (*Id*. at 8.) Hansen stated that he was hired as an equipment operator to run frack equipment, and that his primary responsibilities were "on the hydration, the blender," and that at the end of the frack, he was called "the second chair" and assisted the treater and the engineer. (*Id*.) He described himself as has having a DOT license with "a HazMat and double, triple certification and tanker certification."

Asked if he was aware of occasions in which Weatherford employees were asked to drive "without proper Department of Labor [sic] certifications or licenses," Hansen responded: "I don't know so much as not being licensed—having a commercial driver's license, but we were certainly asked to drive equipment that wasn't certified. They didn't either have licenses or they didn't have caps on the axles, or we had no paperwork or trip permission or anything. And early on, in the first year that was consistent." (*Id*. at 10.) He explained that the company "had an ex-army airborne gunship pilot," and that "the approach was that we weren't going to be working…if we weren't going to get it out there." (*Id*.) He stated that most of the equipment was brand new but the company "didn't have the proper documentation." (*Id*.) He clarified that he was referring to "DOT requirements" that the equipment be "properly licensed, properly certified, properly checked out, all the paperwork in the books." (*Id*.)

Hansen stated that "most of the time, they couldn't even get the trip permits prior to when the frack operation would take place," and yet equipment operators were asked to drive. (*Id*. at 11.) He added: "You certainly had the right to turn it down, but there was pressure to get the equipment out there. And we all understood we weren't going to frack if we didn't get the equipment out."

Asked if he ever observed the work performance of the Complainant, Hansen replied, "Yes, because I trained with him…and he was ultimately assigned to my crew…." (*Id*.) Asked to describe the Complainant's "work ethic," he responded:

> He always was on time. He was prompt, and even additionally, the only day Dan and I had to stay later after most people went back to man camp—and we did all of our online training for additional courses to take place. I know, for example, I finished all my online courses that were supposed to take a year and five week in the first five-day week I was up there, and I believe [the Complainant] did the same thing.

(*Id*. at 11-12.)

According to Hansen, the Complainant "never refused any opportunity to do extra work. He worked with our crew very well. He was pleasant, and he was a team player." (*Id*. at 12.)

Hansen acknowledged that "[t]he company was having trouble getting contracted work." (*Id*.) Consequently, he testified, the crew was given other jobs, such as equipment maintenance or cleaning. (*Id*.) He indicated that some employees did not engage themselves in other work, but the Complainant "was not one of those." (*Id*. at 12-13.) He described the Complainant as someone who would volunteer to do extra work. (*Id*. at 13.)

According to Hansen, Dusty Tate or "Tater" was a "kind of supervisor in training" because "they were going to start another frack crew and Dusty was going to be one of the trainers and supervisors on that crew." (*Id*. at 14.) He described Lee Hammons as the senior supervisor of the green crew, to which he belonged. (*Id*. at 16.)

Hansen stated that he kept working beyond "August 26th or thereabouts," which was described to him as the Complainant's last day of work. (*Id*.) Asked if there was still work for employees in the same job category as the Complainant, Hansen replied, "Absolutely. It was slowly starting to pick up. So, you know, from when we first started in late May, early June operationally up in North Dakota, you know, there was just more increased opportunity as the company started to get either—try to get contracts or get temporary opportunities with other companies who were requesting frack." (*Id*. at 17.) He stated that he personally stayed with Weatherford at Williston until "roughly May of 2014." (*Id*.) Asked if there continued to be many people in the Complainant's job category for the entire period of time, Hansen replied, "Absolutely." (*Id*.)

Hansen agreed, though, that it was true that a lot of the contacts Weatherford was expecting in Williston did not come through. (*Id*. at 23.) Regarding the RIF that was allegedly the cause of the Complainant's layoff, Hansen commented: "And I can offer an opinion, they just—they didn't go through any methodology to reduce them—because you had no rhyme or reason who they let go." (*Id*. at 24-25.) He further observed that the company "hired people at the same time." (*Id*. at 25.) He conceded, though, that equipment operators lost their jobs, and he understood that this included more than the Complainant. (*Id*. at 26.) He also agreed that he

was "[a]bsolutely not" involved in the decision making process that led to men being laid off. (*Id*. at 27.) He remarked, "In my humble opinion, there was no decision making process." (*Id*.)

Hansen was then asked to express what he actually knew about the decision-making process. (*Id*.) He responded:

> All I know is they let people go who might not have had a driver's license if they promised to train and send them to school. They got rid of certain people they had pointed out and fingered that they wanted to get rid of, and at the same time, they were hiring people.

(*Id*.) Asked who the company was hiring, he stated, "They were bringing equipment operators on at the same time filling vacancies after they laid people off. There were new hires that came on after they had your, quote, reduction in force." (*Id*.) Hansen conceded, though, that the business was subject to ups and downs, and he had been the subject of a RIF subsequent to his employment with Weatherford. (*Id*. at 28-29.) He agreed that he did not know the details of how the RIF was decided, and did not know if work performance and CDLs were part of the review process. (*Id*. at 30.) Nonetheless, Hansen insisted that "it was clear that they targeted individuals." (*Id*.) Asked to explain, he stated:

> I have 40 plus years of business experience. I can tell what they were doing. I can tell how disorganized they were up in Willison, how incompetent the management was, and that they had no clue what they were doing, and did whatever they decided to do when they wanted to do it. That's the way they ran it.

(*Id*.)

Asked why, given his testimony that the Complainant did everything asked of him, the company would have targeted the Complainant, Hansen replied, "I don't know." (*Id*. at 31.) He made reference to the incident that led to the Complainant being escorted to the airport, but admitted that he did not know what was said at the meeting or about the Complainant being involved in a confrontation. (*Id*. at 31-32.) Asked if knew of a verbal fight that led to his separation from a coworker, he replied, "Unaware of that." (*Id*. at 32.) He did state that he was aware that the Complainant had "filed or had some HR issues," having been told by the Complainant. (*Id*. at 35.) He explained that he did not know what those issues were, as the Complainant never told him the specifics of his complaints. (*Id*. at 37.) He stated, though, "I think [the Complainant] had complained about DOT, that there were too many complaints, and I'm sure [the Complainant] had complained about those because he was concerned about driving equipment illegally." (*Id*.) Subsequently, though, he added, "I know he called HR. I do not know any of the specifics. It could have been pay. It could have been a lot of issues. I do not know." (*Id*. at 38.)

Hansen further conceded that he never personally witnessed the basis of any of the Complainant's complaints, and that everything he knew about them was from the Complainant himself. (*Id*. at 39.) He added, though, that equipment operators were "complaining all the time

in supervisory and general meetings about trip permits and driving equipment that wasn't properly certified to be driving—driven on the road." (*Id*.) He stated that he was actually at such meetings. (*Id*. at 40.) He estimated the number of complaining equipment operators at between five and ten. (*Id*.)

Hansen further conceded that the company was new and trying to correct the various issues that were being discussed. (*Id*.)

Hansen stated that other co-workers did not return to work at the same time as the Complainant, but he stated he was unaware why. (*Id*. at 41.) He stated that he continued to work constantly through 2012, and that there was "a shortage of drivers." (*Id*. at 42.) He stated that several drivers had HazMat certifications like himself, but not all, and they "needed HazMat." (*Id*. at 42-43.) He acknowledged that he did not know whether the Complainant was certified to carry hazardous materials, stating that he did not know "what endorsements he actually had or didn't have…." (*Id*. at 43.)

Hansen stated he was working on the crew when the Complainant was asked to do security. (*Id*. at 44.)

Deposition of Brian Gould 12/3/15

Brian Gould testified that he worked for Weatherford in Williston for approximately ten months as a line boss. (CX 6, dep. at 6.) He described the line boss as the person who took "care of all the iron." (*Id*.) He described a number of uses for iron, and stated that all the different pieces had "to be inspected basically twice a year," as well as pressure-tested. (*Id*.) He stated that he did such inspection and testing, and also made sure that everything was "hooked up right to the wellhead." (*Id*.)

Gould testified that the Complainant was a "good friend" of his. (*Id*.) He stated that they were on the same crew. (*Id*.) Asked to describe the Complainant's job performance, he replied:

> He worked like everybody did. Well, not like everybody did; but he was one of the few that actually would work, you know, swing—swing a hammer, so—
>
> Basically he would just get out and help. He wouldn't be sitting in the data van or anything like that. He'd actually get out and help, you know, carry pipe, carry iron, you know, help. You know, hook up and everything, and—oh yeah, he was a good worker.

(*Id*. at 7.) Asked about the Complainant's work ethic, he replied that he was a hard worker and "pretty much the first one in the dining hall and pretty much the first one of the last one to usually leave the yard." (*Id*.)

Asked if he had safety concerns during his employment at Weatherford, Gould responded, "Yeah, that's why I left." (*Id*.) Asked to state his concerns, Gould recounted an

incident in which he noticed that inspection on the "bands" on the iron truck were out of date, which he described as unsafe given the extreme cold weather. He recalled that when he told his supervisor about it, he was still told to drive the truck, and when he refused "somebody that didn't even have a license" was told to drive the truck. (*Id*. at 8.) He stated, "And it was really unsafe. It was totally unethical, man." (*Id*. at 9.) He stated that after that incident "there was a lot of things going on." (*Id*.) He stated that employees were told "not to put in complaints with HR or our jobs would be terminated and all this stuff." (*Id*.) According to Gould, he did not return from the next rotation home, stating that he did not want to come back. He testified, "It's a dangerous enough job up there in North Dakota, and then to add, you know, inexperienced drivers on the road with no license or credentials to boot with just—it was over the top. I couldn't flipping believe it, really." (*Id*.)

Gould identified his immediate supervisor as Hammons. (*Id*.) He testified that he also spoke to Crabb when Hammons was out of town. (*Id*.) He identified Crabb as the one "that told me to basically get in the fucking truck and drive it or you won't have a job." He added, "And I told him, well, I'd rather not drive it then." (*Id*. at 9-10.) Asked if driving the truck under those circumstances would have violated DOT regulations, Gould responded, "Well, of course." (*Id*. at 10.) He then described the risks of driving a truck in cold weather when the "bands" had not been adequately tested. (*Id*. at 10-11.)

Asked if he was aware of the Complainant's concerns that he was being asked to drive loads outside his license certification, Gould responded:

> Oh, yeah; Dan, he didn't like—you know. But at the same time, everybody felt entrapped, you know. It was like either you did this or you lose your job. And then, you know, you can't go and call HR. You're definitely losing your job. And you know, with us, with families at home relying on us, you know, and being away, you know, we want to try to get home and get back safe, you know. Get to work and do our things and go, but, you know, a lot of people were just really uncomfortable. It made the work conditions harsh, you know.

(*Id*. at 11.)

Asked about the meeting in which he was told not to contact HR, Gould stated that was with "a lot of the supervisors," with Crabb leading the meeting. (*Id*.) He stated that employees were brought into the "maintenance stay down at the east end," and that a lot of them were "complaining about, you know, the work conditions and things like that." (*Id*. at 12.) According to Gould, Crabb came in and told them that if he heard of anybody calling HR, "your ass is going to be gone…." (*Id*.) He stated that the employees were asked who the troublemakers in the crew were and the Complainant's name "was always brought up." (*Id*.) He stated that when he was called in, Crabb was in the room with a "big, heavy-set guy," whom he identified as another supervisor, as well as Hammons. He stated that Crabb did most of the questioning. (*Id*. at 13.) Asked in what context the Complainant's name came up, Gould responded:

> Well, they asked me—I know you sit with Dan and you guys talk and stuff like that. I said, yeah, I mean, we went through orientation and everything together. We got to know each other. He's like, well, we've been having a lot of complaints about him. I said, really? I said, why? And they're like, well, he's complaining about this and that, safety concerns. I said, well, what's wrong with that? I mean, he has every right to have concerns about safety, you know. And—well, we're hearing that he's causing trouble and everything like that. And I said, well, you know, it is probably just rumor and hearsay, so—you know, I haven't heard him say anything negative other than, you know, just the safety concerns I've already brought up, you know.

(*Id*. at 14-15.) He added:

> People driving chemical out on the highway without, you know, proper documentations, and you know, not the proper weight tickets, and, you know, just things like that, permits and stuff that land us in jail, and they're not going to help us get out. You know, so it was things like that that really worried all of us.

(*Id*. at 15.)

According to Gould, this meeting took place during the first of the week, and then during the rest of the week employees were brought in for individual meetings. (*Id*. at 16.) He stated, "And then, all of a sudden after that, people were getting shipped out, getting laid off, you know." (*Id*.)

According to Gould, during the meeting before people were shipped out, Hammons and Crabb told him that the Complainant was going to be terminated. (*Id*. at 18.)

Gould stated that he later rotated back to Williston to work in September. (*Id*. at 20.) He agreed that he was brought back to work despite having earlier voiced his complaints to Hammons and Crabb. (*Id*.) He added, though, that he had not complained directly to HR. (*Id*.)

Gould agreed that he separated from Weatherford in January of 2013. (*Id*. at 21.) He acknowledged that he never personally witnessed the Complainant being asked to do anything unsafe. (*Id*. at 28-29.) He agreed that he heard about such incidents from the Complainant. "I just heard about it like at dinner when we would sit there and he would be like, I couldn't believe it, you know?" (*Id*. at 29.) Asked if he was aware that, on the final day that he was at work in Williston, the Complainant had an altercation with a co-worker, Gould replied, "I think I heard something about it." (*Id*.) He stated that he just remembered "something about" the Complaint getting into an argument with a supervisor, and the "supervisor like totally cussed him out or something." (*Id*. at 30.)

Gould was then asked if he saw the Complainant on his last day of work, getting into the truck to take off. (*Id*.) He stated that he had seen him with all of his stuff packed, and that the Complainant advised him that he was being sent home. (*Id*.) He stated that not everyone was being sent home, and those that were appeared to be on "some stupid supervisor's hit list…." (*Id*. at 30-31.) He added that "everybody saw through it," because the Complainant's name had come up during the meeting and then "pretty soon he's on a bus going home…." He stated, "Put two and two together, you know?" (*Id*. at 31.) He testified that he did not remember "anything like" the Complainant telling him that he was going home to tend to a lawsuit against a different employer. (*Id*.) Asked if remembered the Complainant being engaged in an altercation just before he headed home, Gould said that he recalled that because the Complainant was talking about it on the way back to the man camp. *(Id.* at 32.)

Gould agreed that the Complainant was assigned to security due to a lack of work. (*Id*. at 33.) He recalled that the Complainant complained about the need to have a two-man security detail pursuant to Weatherford's rules. (*Id*.)

According to Gould, after the meeting with Hammons, Crabb, and the other supervisor, the Complainant was "adamantly talking" about the fact that he had gone to HR in the crew van, and was "trying to really basically everybody in the crew van to get ahold of HR." (*Id*.) Asked if he was aware that the Complainant had, in fact, previously contacted HR, Gould replied, "Yeah. Lee [Hammons] said something about it and Terry Crabb said something about it. And they were—they also mentioned something that he's a troublemaker because he's suing some other kind of oil company." (Id. at 36.) He reiterated, however, that he, Gould, had never complained directly to HR because he had "a brand new baby at home and another daughter…and a wife…." (*Id*.) He stated that he would "speak his mind," but that he was not going to complain. He clarified that he would go to supervisors, but not call anybody else. (*Id*. at 36-37.) He added that "it seemed…like anybody whose name came across HR, they were calling up in the office and letting them go." He added, "I mean, it was retarded. It really was. It was crazy." (*Id*. at 37.)

Deposition of Brian Pirone 12/1/15

Brain Pirone testified that he started working at Weatherford in October of 2011, and he worked there for a little over a year. (CX 7, dep. at 7.) According to Pirone, he worked as a mechanic at "Willington [sic], North Dakota." (*Id*.) He stated that he had known the Complainant, prior to his employment at Weatherford, having first met him when the two worked for a previous employer, Baker Hughes. (*Id*. at 8.) Pirone stated that he informed the Complainant that Weatherford was hiring. (*Id*. at 8-9.) He stated that in North Dakota, the two of them never worked together, since he was a mechanic, but they worked for the company at the same time. (*Id*. at 9.)

Pirone testified that he knew that the Complainant had a CDL and drove a truck. (*Id*.) Asked if he had an opportunity to observe the Complainant's "work ethic," he testified that the two had worked "side-by side" in Texas during training, he instructed the Claimant on how "to rebuild pumps and tear piston rings and stuff apart." (*Id*.) He stated that when he worked with

the Complainant under these circumstances, the Complainant "seemed to do okay," explaining that he was just learning at the time, but that he "caught on real quick." (*Id*. at 10.)

Asked if he was aware that drivers were being asked to drive outside their certification during the period that he was working at Weatherford, Pirone replied, "I was never told that by a, per se, supervisor or a boss. It's just—I mean, you hear talk about it. Like they would to get trucks from point A to point B, and they wouldn't have a permit for them. And then you'd go the shop the next morning, they're there, so—" (*Id*.)

Pirone testified that he never heard directly from Crabb that complaints should not be made to HR, but he did hear hearsay on the subject. (*Id*. at 10-11.)

Stressing that he did not work directly with the Complainant, Pirone stated that "everybody was talking" about the end of the Complainant's employment. (*Id*. at 11.) According to Pirone, he was told that the Complainant had been "fired." (*Id*.) He stated that he was told that the Complainant had been in an interview, it had become "heated," and the Complainant told his questioners that they were not going to "strong arm him into saying something that wasn't true." (*Id*. at 12.) He stated that he was told that the situation then "escalated and fingers were being pointed and voices got raised and they escorted him off the premises and to the airport." (*Id*.) He conceded, though, that he really did not know what transpired during the meeting, and his information was all based on hearsay. (*Id*. at 15.)

According to Pirone, his employment with Weatherford at Willison ended in October or November of 2013. (*Id*. at 16.) He stated that when he was Willison, he and the Complainant did not work much together at first, but "then we moved to the new building and we s[aw] everybody constantly." (*Id*.) He stated that the Complainant applied to work with the mechanics because work was slow, and that he worked with the mechanics for approximately three weeks. (*Id*. at 16-17.) He stated the company then "got more well sites," and the Complainant rotated back to his normal crew. He stated that the period that the Complainant worked with the mechanics was "probably the first couple weeks he was there." (*Id*. at 17.)

Pirone stated that during the early weeks that the Complainant was assisting with the mechanics, he would have also been driving. (*Id*.) He explained that the Complainant would work with the mechanics unless those in charge of operations needed him to drive, in which case he would leave to drive because that was his primary job. (*Id*.) He stated that he never saw the Complainant work security, but he stated that he was familiar with employees working security. He explained that due to the cold weather, the company had to leave "stuff running" even when the site was closed, and therefore it was necessary to have "two or three guys" on the site at all times "to make sure nothing catches on fire and stuff." (*Id*. at 18.)

According to Pirone, he and the Complainant would have discussions every "couple days maybe," but he also noted that he might not see him for a couple of weeks. (*Id*.)

APPLICABLE LAW

The Surface Transportation Assistance Act provides for employee protection from discrimination because the employee has engaged in protected activity while employed by an individual, partnership, association, corporation or other business entity, including a group of persons, which is engaged in interstate commerce. 29 C.F.R. § 1978.100(a).

On August 3, 2007, President Bush signed "The Implementing Recommendations of the 9/11 Commission Act of 2007," designated as Public Law No: 110-053, 121 Stat. 266. This law significantly amended the STAA employee protection provision, broadening the definition of protected activity, harmonizing the legal burdens of proof with the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") model, and providing for punitive damages up to $250,000, among other changes.

DISCUSSION

As noted, the STAA incorporates the burden-of-proof provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, commonly known as "AIR-21." [7] Recently, the Administrative Review Board, in *Palmer v. Canadian Nation Railway, Illinois Central Railroad Company*, ARB Case No. 2014-FRS-154 (September 30, 2016), clarified the proper analysis under AIR-21's burden-of-proof provisions. The Board outlined a two-step analysis.

> The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.
>
> The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

[7] The 9/11 Commission Act amended paragraph (b)(1) of 49 U.S.C. 31105 to state that STAA whistleblower complaints will be governed by the legal burdens of proof set forth in AIR21 at 49 U.S.C. 42121(b).

(*Id.* at 52.) Although the excerpted analysis assumes that the employee engaged in protected activity, it should be pointed out that the Board also clarified, in a footnote, that "[t]he complainant must also of course prove that he engaged in protected activity and that the respondent took an adverse action against him." (*Id*. at n. 215.)

EVIDENTIARY MATTERS/CREDIBILITY ISSUES

1. Character Evidence

A fair reading of the hearing evidence is that part of Weatherford's strategy was to portray the Complainant as an employee who engaged in multiple lawsuits against former employers, thus suggesting it was part of his character to sue for damages and/or reinstatement from those for whom he formerly worked. At the hearing, counsel for Weatherford referred to "a litany of other disputes that [the Complainant] has had with employers," and described him as "essentially a plaintiff's attorney himself." (Tr. at 17.) Indeed, this strategy continues in Weatherford's post-hearing brief, in which the Complainant is described as "having been through litigation on multiple occasions against employers," and an "experienced plaintiff." (Resp. P.-Hg. Bf. at 25.)

In urging the admissibility of the Complainant's history of litigation against other employers, counsel for Weatherford argued at the hearing that it was admissible to show that the Complainant sent an email to Nicholson on September 20, 2012, outlining his complaints against the company, to "set up a lawsuit…." (Tr. at 17.) Counsel also argued that the evidence of previous litigation demonstrated that the Claimant had made false statements on his employment application to Weatherford, misstating his reasons for leaving his former employers. (Tr. at 17-18.) However, asked by the undersigned whether the alleged misstatements in his employment application concerned directly whether he had been involved in previous litigation, counsel made the following remarks:

> No. He was actually truthful on that litigation. So those—those documents aren't going to go toward those. There are other issues as to—that are related that will go to the misstatements on the employment application. The lawsuits are more to the fact of this is his fifth lawsuit since 2009. This is about the tenth dispute he's had with an employer. He's been in court over and over again. And it just goes to…add background to when he's sending an e-mail [on] September 20, why we believe he was doing it.

(Tr. at 18.)

STAA administrative hearings are conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings codified at subpart A of part 18 of title 29. See 29 C.F.R. § 1978.107(a). The Rules of Evidence for Administrative Hearings before this Office are contained in Subpart B, not A. The regulations, moreover, specifically provide that the "[f]ormal rules of evidence will not apply, but rules or principles designed to assure production of the most

probative evidence will be applied." *Id*. at (d). The administrative law judge is specifically empowered to "exclude evidence that is immaterial, irrelevant, or unduly repetitious." (*Id.*)

As I understand Weatherford's stated reason for introducing evidence of the Complainant's history of litigation against other employers, it is to suggest that he was someone who looked for ways to sue his employer, and that, after he returned home and did not get called back to work, he sent the September 20, 2012, e-mail to Nicholson to pave the way for another lawsuit against Weatherford. Although not expressly stated, the clear implication is that the Complainant was not beyond making false accusations in order to have grounds to file another lawsuit.

Although the formal rules of evidence are made expressly inapplicable by the regulations, nonetheless I find them informative as the formal rules were developed to reflect "rules or principles designed to assure production of the most probative evidence," which the regulations to state should be applied. Prior lawsuits are prior acts, and both Fed. R. Evid. 404(b) and the DOL's analogous Rules of Evidence, 29 C.F.R. § 18.404 (a), generally prohibit the use of "other crimes, wrongs, or acts" for the purpose of showing character, or a propensity to behave a certain way. The general exception is that prior acts may be used to prove motive, intent, or plan, but only if the probative value of the prior acts outweighs the prejudicial effect. As noted by one court, "The charge of litigiousness is a serious one, likely to result in undue prejudice against the party charged, unless the previous claims made by the party are shown to have been fraudulent." *Outley v. City of New York,* 837 F.2d 587, 592 (2d Cir. 1988).

I find that the probative value of the lawsuits the Complainant brought against former employers cannot be used for the purpose of showing that the Complainant was a person with a character trait of contriving to bring lawsuits against employers. I make no such broad inference from this evidence.

One legal action bears separate discussion, however, as it pertains to fraudulent behavior and, thus, the Complainant's credibility: the legal action that led to the Complainant's removal as a federal Air Marshal.

During cross-examination, Counsel for Weatherford asked the Complainant if it was not true that he had been discharged from the DHS for conduct unbecoming a federal Marshal and falsified date stamping. (Tr. 136.) The Complainant conceded that this was the case. (Tr. 137.) In fact, the Complainant even agreed that the charge of false date stamping was tantamount to a charge that he had manipulated evidence. (Tr. 138.)

As noted, the regulations provide that the formal rules of evidence do not apply to STAA hearings. Even if they did, however, the DOL's own evidence rules provide that an administrative law judge may, in his or discretion, allow specific instances of conduct to be inquired into on cross-examination, if probative or truthfulness or untruthfulness. 29 C.F.R. § 18.608(2)(b). Certainly, finding that the Complainant falsified date stamps on documents involved in agency proceedings, leading to him being removed from his position, is probative of the Complainant's untruthfulness, and I so find. I find that the use of this conduct (falsifying a date stamp to manipulate evidence) to impeach the Complainant's credibility, by inquiring about

it on cross-examination, was a legitimate use of a specific instance of conduct to attack the Complainant's credibility.

It should be noted that, during the same line of questioning, the Complainant was asked about the charge of conduct unbecoming a Federal Air Marshal, and specifically about allegations that he engaged in threatening behavior. The Complainant responded by suggesting that this charge was not proven. He stated that the "judge in the case took and stated that I was not there" and found that his conduct did not constitute a threat. (Tr. 138.) He also stated that the "what they accused me of, there was never any proof at all that I did any of that." (*Id*.)

Weatherford submitted a copy of the decision by the United States Court of Appeals for the Federal Circuit in *Ayres v. and Security*, Case No. 2008-3009 (June 9, 2008), in which the Court upheld the final decision of the Merit Systems Protection Board that sustained the Complainant's removal. (EX 7, dep. of Ayres dated 10/27/14, attached exhibit B.) Specifically, the Court upheld the determination of the MSPR administrative law judge that the Department of Homeland Security ("DHS") had sustained two charges against the Complainant: 1) that he engaged in conduct unbecoming a Federal Air Marshall based upon a series of incidents involving threatening and intimidating behavior, and 2) that he falsified date stamps on documents pertaining to his proposed removal.

In other words, contrary to the Complainant's testimony at the hearing, which seemed to imply that he had been exonerated of the charge of conduct unbecoming a federal Air Marshal, the MSPR administrative law judge found that the agency had sustained this charge.

Although it is debatable whether the formal rules of evidence would allow the use of extrinsic evidence such as the Federal Circuit's decision to impeach the Complainant, as noted the formal rules of evidence do not apply here. I find that Federal Circuit's decision is relevant and material to impeach the Complainant's testimony by demonstrating its falsity. Whatever prejudicial value it may have is more than outweighed by its probative value in correcting the record after the Complainant volunteered that the DHS never proved its charge of conduct unbecoming a federal air marshal. It did.

Furthermore, as this case involves a hearing before an administrative law judge, the fact that the Complainant was determined to have falsified date stamps on documents pertinent to a hearing before an administrative law judge deserves greater attention. More so than other character evidence, it reflects directly on the Complainant's veracity, as it shows fraudulent behavior. Also, it is noteworthy that the charge of falsifying date stamps, which the Complainant admitted was tantamount to manipulating evidence, arose in a case not unlike this one, in which the Complainant had raised as an affirmative defense that the DHS was attempting to remove him, not for its stated reasons, but in retaliation for his filing an EEO complaint. (EX 7, dep. of Ayres dated 10/27/14, attached exhibit B.) Clearly, the fact that the Complainant falsely date-stamped documents in a prior case in which he charged retaliatory dismissal has direct bearing on the present one, in which so much of the Complainant's case depends on his own testimony.

I also note that even in cases in which the formal rules of evidence apply, evidence of a prior lawsuit may be admitted if the suit was relevant, similar, close enough in time, and its probative value exceeds any unfair prejudice. *See Duckworth v. Ford*, 83 F.23d 999, 1002 (8th Cir. 1996). Some courts do not admit evidence of prior suits absent some element of fraud. *See McDonough v. City of Quincy*, 452 F.3d 8, 20 (1st Cir. 2006). The MSPB administrative law judge's finding that the Complainant engaged in false date stamping of documents is tantamount to a finding of fraud, perhaps not in filing of the lawsuit, but with respect to some of the evidence. While I have found that it would be prejudicial to draw any inference that he is "litigious" from merely the multitude of lawsuits he has brought against former employers, I find that the lawsuit involving the DHS is sufficiently relevant, similar, and close enough in time that the finding of the administrative law judge that the Complainant engaged in false date stamping may be used against him here to assess his credibility and his character for truthfulness.

2. Credibility Determinations

a. <u>The Complainant</u>

Given that the Complainant was found by an administrative law judge to have falsified date stamps in a hearing in which he raised the defense of retaliatory dismissal, my assessment of his credibility is naturally guarded. This is not a good track record when one asks to be believed on the strength of his word in another case of retaliatory dismissal. As noted, his testimony regarding the outcome of the Merit System Protection Board hearing mischaracterized the finding of the administrative law judge, suggesting that he had been exonerated, which was not true. Even if this was the result of a bad memory, or poor understanding of the outcome of the legal proceeding, as opposed to a deliberate attempt to obfuscate, it certainly raises issues as to his credibility as a historian. As will be discussed, parts of his testimony at the hearing appear to have undergone a transformation from his pre-hearing deposition testimony, in a way that strengthened his case.

The ARB has recently issued a decision which bears some discussion given its similarities to the present one, and the Board's statements regarding witness credibility. In *Pattenaude v. Tri-Am Transport, LLC*, ARB No. 15-007 (ARB Jan. 12, 2017), a truck driver, alleged that prior to his suspension and termination he had made several complaints to supervisors regarding mechanical problems with the trucks he worked with, as well as supervisors driving trucks without hazardous materials licenses. The complainant listed several other complaints, *Pattenaude*, *supra*, at n. 79, but ultimately both the administrative law judge and the Board focused on his refusal to operate a vehicle he considered unsafe (due to low tire pressure) as protected activity. The administrative law judge further found that, due to the temporal proximity between this particular complaint and his termination (less than two weeks), the complainant had met his burden of demonstrating by a preponderance of the evidence that his protected activity was a contributing factor in his determination. (*Id*. at 13.)

In determining that the respondent had carried its burden of proving that it would have suspended and terminated the complainant in the absence of any STAA-protected activity, the administrative law judge, as one of its reasons, cited the supervisors' testimony that the issue of the deflated truck tire was a routine aspect of the job and therefore the incident was relatively

insignificant and would have not given rise to a retaliatory animus. *Id*. at 16-17.) Moreover, the administrative law judge generally found that the supervisors' corroborating testimony was more credible that the complainant's uncorroborated testimony. (*Id*. at 17, n. 96.) As stated by the Board, "the ALJ repeatedly credited the 'corroborated' evidence of Tri-Am's supervisors, Wilson and Bowers, over Pattenaude's solitary evidence." (*Id*.)

Although noting that it generally accorded "special weight to an ALJ's demeanor-based credibility determinations," the Board observed that the administrative law judge's credibility determinations were not so much "grounded in demeanor" but that Pattenaude's testimony was uncorroborated. According to the Board, this mechanical preference for corroborated testimony resulted in "dubious credibility findings." The Board then explained:

> There are many factors that factfinders consider when determining witness credibility including the relationship a witness has with party litigants, the witness' motivations, inconsistencies in testimony, a witness'[s] self-serving testimony, and bias. Just because the employer can produced two supervisors to testify similarly does not necessarily mean that the testimony is more credible than a complainant's uncorroborated testimony. The ALJ below failed to recognize that employers have the evidentiary advantage—they can draft the documents supporting their actions; they employ the witnesses who participated in an adverse action; and they possess the records that could document whether similar adverse actions have been taken in other cases. For employees, on the other hand, supportive witness testimony is much harder to come by. Complainant-employees can of course subpoena employee witnesses, but those employees may be reluctant to testify against their employer for fear of retaliation themselves. Credibility findings based on corroborated supervisor testimony do not always amount to error. But the ALJ's findings below are particularly suspect because he relied so heavily on the simplistic notion that the corroborated testimony of two supervisors is more indicative of truth than the uncorroborated evidence of the complainant without addressing any other factors or evidence that might reflect on credibility.

(*Id*., slip op. at 17-18.)

Because of the Complainant's history of falsifying date stamps, I have considerable misgivings about taking the Complainant at his word. It is possible that the Board will disagree with me, or find my consideration of the impeachment evidence proffered by Weatherford flawed or misguided. Nonetheless, because of these misgivings, I find it reasonable to seek some corroboration for his testimony, more so than with a complainant without such a history. My reading of *Pattenaude* is that the Board specifically disapproved of "the simplistic notion that the corroborated testimony of two supervisors is more indicative of truth than the uncorroborated evidence of the complainant without addressing any other factors or evidence that might reflect

on credibility." (*Id*. at 18.) I expressly disavow this notion. All things being equal, I do not consider a complainant's evidence necessarily in need of corroboration.

Here, however, things are not equal, as the Complainant has a history of falsifying documents, which the other witnesses do not.

Another aspect of *Pattenaude* is informative, which is the Board's encouragement of administrative law judge's decision to include "'findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented in the record.'" (*Id*., at 10, citing *Bobreski v. J. Givoo Consultants, Inc.*, ARB No.13-001, slip. Op. at 13 (ARB Aug. 29, 2014); *see also* 29 C.F.R. § 18.57(b). The Board remarked that it was difficult for it, as an appellate body, "to review decisions with few express findings of fact." (*Id*., n. 68.) As stated by the Board, "We urge ALJs to include a section explicitly identifying material findings of fact that lay out their view of what happened, rather than simply repeating the testimony of witnesses." (*Id*.)

I shall endeavor to follow the Board's urgings, and will set forth, where appropriate, specific findings of fact and the extent to which credibility determinations factored into my finding.

b. Terry Crabb

Weighing this testimony, I note that I did not find Crabb to be a particularly credible witness, either. His answers were often phrased not in denials, but in his inability to recall—an inability that struck me sometimes as being deliberately evasive. I found him frankly honest, however, when he acknowledged that he threatened employees who went to HR first with their complaints. He was also honest when he admitted he was "old school" and perhaps more comfortable in an oil field where things were, as he put it, "settled…behind the frack tanks." Although Crabb stated that he accepted that this was no longer the case, my sense was that he viewed the old ways with more than a twinge of nostalgia.

I also find strange Crabb's testimony regarding the consequences of his threat to fire anyone who went over his head to HR. Apparently this got him into hot water, but the evidence is conflicting as to how hot. At one point, Nicholson clearly testified that Crabb was disciplined for having made this threat, with the result that he was moved "from his role of operations in the fracking ground into a sales position." He added: "He didn't have anyone reporting to him directly." (EX 13, dep. at 15-16.) Crabb, however, did not seem to recall ever being disciplined for his threat, and indicated that his move to another position was entirely his own decision. On deposition, he described his present position with Weatherford as "Area Tech Sales Rep 3." (JX 23, dep. at 13.) He approximated his start date in this new position as December of 2012. (*Id*.) He stated that he had the option to go back to sales, which he felt like he wanted to do, and therefore took advantage of the option. (*Id*. at 14.)

3. Other Witnesses

The only other witness to appear before me at the hearing was Lisa Mora, Weatherford's "Western U.S. HR Manager." (Tr. 272.) I found her to be very credible, particularly when answering questions about whether it was unusual for Weatherford's HR department to have kept no records of its onsite investigation into the Pittman affair. It was clear from her demeanor and facial expression that she found this truly odd.

The other witnesses did not testify in front of me. Rather, they were deposed after the hearing. Therefore, any credibility determination I might make would not be "grounded in demeanor," to use the Board's expression. Therefore, I will only assess their credibility in my factual findings to follow.

WHETHER THE COMPLAINANT ENGAGED IN PROTECTED ACTIVITY

Weatherford disputes that the Complainant actually engaged in protected activity. As noted, the Board made clear in *Palmer* that the Complainant has the initial burden to demonstrate that he engaged in protected activity.

In his post-hearing brief, counsel for the Complainant argues that his client "clearly engaged in protected conduct under the STAA" by engaging in the following activities: 1) personally refusing to drive loads for which he was not certified; 2) participating in an HR investigation into allegations of another employee, Jeff Pittman, that he had not been called back to work for also refusing to drive loads outside of his certification; 3) reporting to supervisors that employees were being asked by supervisors to drive outside of their certification; 4) reporting violations of laws relating to the transportation of hazardous materials; and 5) reporting to supervisors that Weatherford personnel were driving and drinking. (Comp. P.-Hg. Bf. at 9-10.)

Weatherford, in its post-hearing brief, argues that the Complainant failed to demonstrate by a preponderance of the evidence that he engaged in any of the activities he alleged. Pointing out the lack of any contemporaneous written documentation to support his claims, or firsthand witnesses to such complaints at the time they were made, and the contrary testimony of its witnesses, Weatherford generally assails the credibility of the Complainant and argues that he is simply not worthy of belief. Resp. P.-hg. Bf. at 23-32. As noted, Weatherford seeks to portray the Complainant as a serial plaintiff with a propensity to sue every employer who he had ever fired him.

Given the several instances of alleged protected activity, the undersigned will discuss each instance in turn and determine whether the Complainant demonstrated by a preponderance of the evidence that he engaged in such activity. It is clearly the Complainant's burden to do so.

1. Refusal to Operate

The Act expressly prohibits any employer from retaliating against an employee who has undertaken progressive activity by refusing to operate a motor vehicle when the operation would violate the provisions of the STAA. 49 U.S. C. §31105(a)(1)(A)-(B).

The Complainant testified that there were "maybe three at the most" occasions when he was asked to transport HAZMAT chemicals outside of his certification and refused. (Tr. 71; *see also* Tr. 196.) He identified Lee Hammons, Dusty Tate ("Tater"), and Steve Van Hattem as those who asked him to drive outside his certification. (Tr. 71-72, 197-198, 263.) The Complainant was asked when he was asked to drive outside of his certification, but replied that he could not state exactly which day he was asked, explaining that he did not put anything in writing until his September 20, 2012, email to Nicholson. (Tr. 170.) He further agreed that during his entire period of employment at Williston, or from approximately July to the end of September, he drove four times for approximately nine hours of total driving time. (Tr. 163, 171.)

In its post-hearing brief, Weatherford argues that "the preponderance of the evidence introduced at the hearing and the post-hearing depositions demonstrates that no supervisor asked Complainant to violate DOT regulations by driving equipment outside of Complainant's CDL license." In the next sentence, however, Weatherford concedes that "on one occasion, Complainant's supervisor reassigned the task of operating a frac [sic] pump to another Equipment Operator when he learned that Complainant's CDL did not permit Complainant to operate a frac [sic] pump to avoid committing any DOT violations." (Respondent's P. Hg. Bf. at 30.)

What Weatherford's argument fails to acknowledge, however, is that the supervisor involved, Hammons, testified that the reason that he reassigned to task to another frack pump operator is that the Complainant first refused, citing his lack of certification. (EX 11, dep. at 6-7.) While Hammons denied threatening to fire the Complainant over the incident, and stated that the issue of his license certification never came up again, the fact remains that Hammons did, in fact, corroborate the Complainant's testimony by agreeing that on at least one occasion he refused to drive outside of his certification when asked.

Dusty Tate, however, testified that he never asked the Complainant to drive outside of his certification, directly contradicting the Complainant. (EX 14, dep. at 6.) In fact, Tate denied ever supervising the Complainant. (*Id.)* Tate testified that equipment operators were not asked to drive outside of their certification. However, based on Tate's testimony, it appears that it was not unusual for supervisors at Williston, at least during start up, to not know before asking an equipment operator to drive a particular load whether that driver was certified to do so. Rather, it appears that the practice was to ask the driver first to drive the load, and to then find out from the response whether the driver had the proper certification—or would even raise the issue. Tate explained, "If you didn't have a classification, they would tell you that's fine. They had a big influx of guys who did. They would say okay and go the next gentleman." (*Id*., dep. at 6-7.) One consequence of such a practice—asking drivers to drive hazardous materials

without knowing whether they were certified or not—is that it put the onus on the driver to refuse the assignment if it was outside of his or her certification.

There is no testimony or written statement from Van Hattem of record. Therefore it is not known how he might have responded to the allegation that he asked the Complainant to drive outside of his certification. The conflict between the testimony of Tate and the Complainant need not be resolved, because it is clear from Hammons testimony that on at least one occasion the Complainant was asked, and refused, to drive outside of his certification.

Under the Act, such refusal constitutes protected activity. 49 U.S. C. §31105(a)(1)(A)-(B). *See Maverick Transp., LLC v. U.S. Dep't of Labor, Administrative Review Board*, 739 F.3d 1149, 1156 (8th Cir. 2014) (refusal to drive truck based upon fluid leak in power steering box that violates federal safety regulation constituted protected activity.) Indeed, the Board in *Pattenaude* held that his refusal to operate constituted protected activity as a matter of law. *Pattenaude, supra*, slip op. at 12, n. 78.

I find therefore that the Complainant engaged in protected activity when on one proven occasion, Hammons asked him to drive a vehicle for which he lacked proper certification, and the Complainant refused on that basis.

2. Filing Complaints

The STAA also protects an employee from retaliation for filing a complaint relating to the violation of a commercial motor vehicle safety regulation. 49 U.S. C. §31105(a)(1)(A)-(B).

a. Verbal Complaints

According to the Complainant, he complained numerous times on numerous occasions to numerous people. Some of his complaints did not involve DOT violations but violations of company policy, such as the number of people on security detail, or other safety regulations not ostensibly involved in commercial motor safety, such as a chemical spill at one of the well pads, or complaints of a general nature, such as non-supervisory personnel not being allowed to use the company van. However, in his hearing and deposition testimony, he alleged that he complained to his supervisors and/or HR about the following: 1) equipment operators being asked to drive outside their certification; 2) supervisors driving company vehicles while drunk; and 3) vehicle operators being asked to drive without the proper state permits.

i. Verbal Complaints About Being Asked to Drive Outside of his Certification

With respect to his alleged complaints about being asked to drive outside his certification, the Complainant testified that he took his complaints to Hammons and Tate. (Tr. 84.) He testified, "I said, you've got your supervisors out here asking us to do things that we know are wrong. We tell them, listen, I'm not certified to do this, and they're giving us grief over it." (*Id*.)

As noted, Hammons acknowledged the one incident in which he asked the Complainant to drive a load outside of his certification. (EX 11, dep. at 6-7.) He denied threatening to fire the Complainant over the incident, and stated that the issue of his license certification never came up again. He stated, "I had several guys that had flat Bs, so it wasn't nothing unusual." (*Id*.) He denied having any knowledge of any other incident with any other employees involving the Complainant being asked to drive outside of his license certification. (*Id*. at 8.) He was not asked specifically whether the Complainant came to him with such complaints apart from the one incident of refusal, which he acknowledged.

According to Tate, he was not aware of any equipment operator at Weatherford being asked to drive outside of their license certification. (EX 14, dep. at 7.) Earlier, however, he had testified, "If you didn't have a classification, they would tell you that's fine. They had a big influx of guys who did. They would say okay and go to the next gentleman." (*Id*. at 6.) The latter statement clearly contradicts the former. Perhaps Tate meant that he was not aware of any equipment operator being pressed to drive outside of his certification. Tate did testify that he never asked the Complainant to drive outside of his certification and he denied that he ever supervised the Complainant. (*Id*.) He was not asked specifically if the Complainant ever complained to him about such a practice among other supervisors.

Hansen testified that he was aware that the Complainant had filed complaints, but he was not sure of the exact nature of the complaints. (CX 8, dep. at 37.) He testified, "I know he called HR. I do not know any of the specifics. It could have been pay. It could have been a lot of issues. I do not know." (*Id*. at 38.) He further acknowledged that everything he knew about the Complainant's grievances was from the Complainant himself. (*Id*. at 39.) He added, though, that equipment operators were "complaining all the time in supervisory and general meetings about trip permits and driving equipment that wasn't properly certified to be driving—driven on the road." (*Id*.) He stated that he personally attended such meetings and therefore would have witnessed such complaints. (*Id*. at 40.) He estimated the number of complaining equipment operators at between five and ten. (*Id*.) He did not testify, however, to any specific incident in which he witnessed the Complainant verbalizing a complaint to supervisors.

Like Hansen, Gould, did not testify that he personally observed the Complainant complaining to a supervisor about being asked to drive outside of his certification. He did testify, however, regarding a meeting he had, in which, he claimed, the Complainant's name came up as a complainer and troublemaker. Asked in what context the Complainant's name came up, Gould responded:

> Well, they asked me—I know you sit with Dan and you guys talk and stuff like that. I said, yeah, I mean, we went through orientation and everything together. We got to know each other. He's like, well, we've been having a lot of complaints about him. I said, really? I said, why? And they're like, well, he's complaining about this and that, safety concerns. I said, well, what's wrong with that? I mean, he has every right to have concerns about safety, you know. And—well, we're hearing that he's causing trouble and everything like that. And I said, well, you know, it is

> probably just rumor and hearsay, so—you know, I haven't heard him say anything negative other than, you know, just the safety concerns I've already brought up, you know.

(CX 6, dep. at 14-15.) He added:

> People driving chemicals out on the highway without, you know, proper documentations, and you know, not the proper weight tickets, and, you know, just things like that, permits and stuff that land us in jail, and they're not going to help us get out. You know, so it was things like that that really worried all of us.

(*Id*. at 15.)

Asked if he was aware of the Complainant's concerns that he was being asked to drive loads outside his license certification, Gould responded:

> Oh, yeah; Dan, he didn't like—you know. But at the same time, everybody felt entrapped, you know. It was like either you did this or you lose your job. And then, you know, you can't go and call HR. You're definitely losing your job. And you know, with us, with families at home relying on us, you know, and being away, you know, we want to try to get home and get back safe, you know. Get to work and do our things and go, but, you know, a lot of people were just really uncomfortable. It made the work conditions harsh, you know.

(*Id*. at 11.)

Weighing Gould's testimony, I did not observe his demeanor while testifying at deposition, so I cannot make any credibility determination on that basis. Again, he did not testify to witnessing firsthand the Complainant making any complaints directly to his supervisors about being asked to drive outside of his certification. His recollection of the meeting in which the Complainant's name came up as a troublemaker and complainer, even if taken at face value, does not provide any hard evidence of the Complainant making such specific complainants to supervisors. Rather, the most his testimony establishes is that Crabb was aware of the Complainant complaining about "this and that, safety concerns." Although Gould then offered examples of the safety concerns circulating among the camp, including "[p]eople driving chemicals out on the highway, without, you know, proper documentations," he does not state that he ever saw the Complainant verbalizing these complaints directly to management.

Pirone was asked if he was aware that drivers were being asked to drive outside their certification during the period that he was working at Weatherford. Pirone replied, "I was never told that by a, per se, supervisor or a boss. It's just—I mean, you hear talk about it. Like they would to get trucks from point A to point B, and they wouldn't have a permit for them. And then

you'd go the shop the next morning, they're there, so—" (CX 7, dep. at 10.) Again, Pirone's testimony does not offer any concrete evidence of the Complainant making verbal complaints to management about being asked to drive outside of his certification.

In sum, there is conflicting testimony regarding whether the Complainant ever complained directly to management regarding being asked to drive outside of his certification. It is clear that drivers were asked to do so—the testimony of Tate confirms this. I have no doubt that the Complainant was asked on at least one occasion to do so by Hammons. It would appear, also, that this practice was common enough that it became a subject of discussion among certain employees, including the Complainant, who were concerned with safety and not losing their license.

Whether the Complainant actually verbalized complaints to Hammons and Tate regarding this practice, however, is another matter. The evidence that he did is not compelling. The Complainant said he did; Hammons said he did not; Tate was never asked, but denied ever supervising the Complainant or remembering his face. As noted, I have misgivings regarding the credibility of the Complainant. I did not have occasion to observe the demeanor of either Hammons or Tate. None of the Complainant's co-workers testified to any occasion in which they had an opportunity to personally witness the Complainant stand up in a meeting or confront a supervisor face-to-face with this specific complaint.

In sum, I find that drivers at Williston were sometimes asked to drive outside of their certification, and that such was a safety concern among certain employees who feared losing their license. However, I also find that there is insufficient evidence to persuasively establish that the Complainant, although aware of this practice and unhappy with it, presented his concerns in the form of a verbal complaint directly to any of his supervisors on any particular occasion. Again, the only direct evidence of the Complainant personally complaining of this practice to his supervisors is his own testimony. If this was an ordinary employee with no track record of falsity, and no other reason to question his veracity, I would accept such uncorroborated testimony. In the Complainant's case, given his history of falsity, I am less than completely convinced that it happened in the manner he described.

ii. The Pittman Investigation

The Complainant also testified that when HR came to Williston to investigate the situation involving Pittman, the HR representatives asked him "if Jeff Pittman had ever talked about being asked to do a load, HAZMAT loads and stuff like that." (Tr. 81.) He recalled the meeting as taking place somewhere "between the middle and the end of July." (*Id*.) He identified the HR personnel who came from Denver to Williston to speak to him about Pittman as Monica Perez, "Kuk Kim" (whom he identified as the ones conducting the interview), and Michelle Brannon. (Tr. 199.) Upon questioning from the undersigned, he testified that during this meeting, he expressed to the HR staff that he personally had been asked to drive outside of his certification. (Tr. 200.) According to the Complainant, the HR representatives neither took notes during the meeting nor recorded it. He stated that he asked them if he wanted to put something in writing, to which they responded negatively, telling him that "they'll go back and they'll do the report." (*Id*.)

Oddly, the record does not contain any testimony or written statements from HR personnel who attended this meeting as to what the parties discussed. It was the position of Weatherford that no written records of the meeting exist. (Tr. 276-277.) It is hard to imagine that an HR team sent out to the worksite in Williston to conduct an investigation into a personnel matter, who interviewed at least one witness, would not have created any written record of the matter. Weatherford's position that no such records exist invites, at best, skepticism; at worst, suspicion. Noteworthy, Lisa Mora, who identified herself as the company's "Western U.S. HR Manager" (though not at the time of the Pittman investigation), was asked by Counsel for the Complainant if, as a "human resources professional," she found it "unusual that someone would make significant allegation of misconduct and there be no record of it." (*Id*.) She replied, "It could be considered unusual, yes." (*Id*.) Asked by the undersigned if in her experience she had ever had HR people go onsite to investigate complaints, Mora replied, "Yes." (Tr. 277-278.) Asked if the results of such an onsite investigation would be normally set forth in writing, she replied, "Yes." (Tr. 278.)

In sum, I find difficult to accept the unexplained lack of any written record of HR's visit to Williston and the interview that took place with the Complainant. Again, however, the only evidence of what took place during the interview rests on the Complainant's testimony. Thus, once again, I am being asked to credit the uncorroborated testimony of an individual who was determined to have previously manipulated evidence in front of an administrative law judge.

There is other reason to doubt the Complainant's testimony, moreover. When he was deposed before the hearing, the Complainant was asked about the Pittman investigation. It is a fair reading of his testimony to conclude that the crux of HR's inquiry concerned the relationship between Pittman and Crabb, and the latter's refusal to take telephone calls from the former. The Complainant stated that he was asked if he had witnessed Crabb refusing to take Pittman's telephone calls. (EX 2, dep. at 82.) He described their enquiry as essentially asking him what he knew of the situation. (*Id*. at 83.) According to the Complainant, he only learned later - i.e., after the onsite investigation, by speaking to Pittman - more about Pittman's complaints. (*Id*.) Asked what he learned from Pittman regarding the nature of his complaints, the Complainant responded, "Basically that he was complaining about the man camps." (*Id*. at 84.) He stated that Pittman viewed the man camps as dirty and small. (*Id*.) Significantly, other than the fact he considered Crabb a liar, and was concerned about hours worked, the Complainant stated that he could not recall Pittman relaying any other complaints when they spoke. (*Id*. at 85.)

Interestingly, it was only after the Complainant was asked to review the email he later sent to Nicholson on September 20, 2012, that he raised the possibility that Pittman's complaints may have included the charge that he was asked to drive outside of his certification. (*Id*. at 140.) He observed that he wrote on that date that "even after Pitman's complainant, employees were being asked to carry loads in violation of DOT regulations." He stated that based on this language, Pittman must have earlier complained to him about being asked to carry loads outside of his certification. (*Id*. at 94.) Later, he testified that based on this language, he "would assume" that Pittman had complained about being asked to drive outside his certification. (*Id*. at 123.)

In sum, when he was deposed before the hearing, the Complainant remembered the Pittman investigation as primarily about conditions in the man camp and Crabb's refusal to talk to Pittman on the telephone, with the Complainant not even sure if and when he learned of any complaints from Pittman about driving outside of his certification. At the hearing, however, the Complainant definitely recalled complaining to the HR personnel at the time of the onsite investigation about being asked to drive outside of his certification. Indeed, based on his hearing testimony, one could easily infer that Pittman's primary complaint was being asked to drive outside of his certification, and that this, not the conditions of the man camp, was the focus of the HR investigation. The transformation in emphasis and tone serves the Complainant's case of retaliatory dismissal, but begs the question why his testimony seems to have changed.

Although I strongly question Weatherford's inability to produce any written record of the HR investigation into the Pittman matter, it is not Weatherford's burden to disprove that the Complainant engaged in protected activity. Rather it is the Complainant's burden, and I do not find his testimony sufficiently credible or consistent on this issue to sustain his burden.

Therefore, I find that: 1) there was an onsite investigation into matters involving Jeff Pittman that occurred in July 2012; 2) the precise matters that were investigated are not detailed anywhere; 3) Pittman had diverse complaints, including conditions at the man camp and Crabb's failure to return his calls; 4) the Complainant was interviewed by HR personnel as a result of that investigation; 5) there is no record of the interview, which is unusual considering the usual practices of Weatherford's HR department; 6) the Complainant gave testimony in a prehearing deposition that indicated that Pittman's complaints were largely about conditions about the man camp and the failure of Crabb to return his telephone calls; 7) during his prehearing deposition, the Complainant seemed not to recall that the HR investigation concerned complaints about drivers being asked to drive outside their certification, and only stated that he "would assume" that such a complaint was raised after reviewing his September 20, 2012 email; 8) subsequently during the hearing the Complainant gave testimony suggesting that the complaint about drivers being asked to drive outside their certification was a significant part of the investigation; and 9) based on misgivings regarding the Complainant's credibility, his shifting testimony, and the absence of any written record kept by the employer of the investigation (of which I am highly skeptical), the record fails to persuasively establish exactly what was discussed, and which complaints were raised, during the HR investigation.

iii. Miscellaneous Verbal Complaints

The Complainant testified that he also complained to Hammons and Tate about "supervisors being drunk off their butts and driving the vans." (Tr. 85.) The Complainant also stated that he spoke to Crabb about supervisors being drunk on their return home at night. (Tr. 97.) Tate and Hammons were not asked directly during their depositions whether they recalled speaking to the Complainant about supervisors driving company vehicles while drunk. Crabb flatly denied hearing any complaints about drunk supervisors operating vans. (Tr. 264-265)

According to the Complainant, he further complained to Hammons and Crabb about driving trucks without proper state permits. (*Id*.) Hammons was not asked about this particular complaint. Crabb, however, denied ever hearing such a complaint. (Tr. 264-265.)

Hansen testified that equipment operators were "complaining all the time in supervisory and general meetings about trip permits and driving equipment that wasn't properly certified to be driving—driven on the road." (CX 8, dep. at 39.) According to Hansen, he was present at such meetings. (*Id*. at 40.) He estimated the number of complaining equipment operators at between five and ten, but he did not identify the Complainant specifically. (*Id*.)

Weighing this evidence, I find it conflicting and lacking in particulars. As for the complaints that the Complainant alleged he made about supervisors driving drunk, there is no time frame. The conversations are not recalled with a great deal of detail. Crabb denied any such conversation. It does appear that the subject of the lack of state permits did come up often at the workplace, with several equipment operators being unhappy about the situation. It appears likely that the Complainant would have been among them, but again the evidence of him complaining directly to management depends solely on his own testimony, which I have reason to suspect.

iv. Verbal and Written Complaints to Nicholson/HR

The Complainant testified that he also made verbal complaints to Nicholson during a telephone call that occurred between August 7-12, 2012. (Tr. 89.) According to the Complainant, he spoke to Nicholson for approximately one hour, and then spoke with him again a couple of days later. (Tr. 89.) According to the Complainant, he spoke to Nicholson about being asked to drive trucks for which he was not certified, "trucks that weren't permitted," and "people driving drunk." (Tr. 90.) He stated that he also discussed a chemical spill at one of the well pads, which he was concerned was not cleaned up according to regulations. (*Id.*)

Nicholson did not testify at the hearing, but he was deposed and his deposition made part of the record. (EX 13.) When asked if he had any conversations with the Complainant prior to September 20, 2012, Nicholson responded, "Oh, there were so many conversations, I don't know the time frame or when the dates started. I'm sorry." (*Id*., dep. at 11.) Nicholson was told about an alleged conversation with the Complainant on or about August 13, 2012, lasting an hour, in which the Complainant "voiced his complaints, specifically including his complaints about him and other drivers being asked to drive in violation of DOT regulations." (*Id*., dep. at 31.) Nicholson was asked if he recollected having this conversation with the Complainant, and he replied, "Oh, absolutely, yes." (*Id*.) He also recalled conversing with the Complainant "about a shuttle bus." (*Id*. at 32.)

Based on the Complainant's and Nicholson's testimony, I find that there was a telephone discussion on or about August 13, 2012, in which the Complainant voiced his complaints. According to the Complainant, these included being asked to drive outside his certification. Nicholson did not verify the specific complaints that were discussed.

The Complainant did, however, subsequently send an email to Nicholson, dated September 20, 2012, which is of record, and the authenticity of which is not disputed. (DX 36.) In that email, the Complainant asked to be advised of his status after not being called back to work. He stated that he had made "repeated calls to various HR personnel, but other than being told that my allegations are being investigated, no one has indicated what present employment

status is or when I can expect to receive an assignment." He then stated that "[a]mong the items he had reported" was seeing Crabb avoid taking telephone calls from Pittman, who, he stated, had previously complained about being asked to carry loads outside his certification, so it "appear[ed] that Mr. Crabb was retaliating against him for reporting this to HR." He also stated that he had previously advised Nicholson that "even after Pittman's complaint employees were still being asked to carry loads in violation of this to HR." He stated that he had reported to Nicholson Crabb's threat to fire anyone he caught calling HR, and he also advised Nicholson that "supervisory personnel were drinking and driving company vehicles."

I find, therefore, that this email clearly documents that the Complainant had, by September 20, 2012, made known to management his complaints regarding drivers being asked to drive outside of their certification and supervisory personnel driving company vehicles while drunk, as well as his sense that Crabb was retaliating against him for taking his complaints to HR. I find that this clearly constitutes protected activity.

WHETHER WEATHERFORD KNEW OF THE COMPLAINANT'S PROTECTED ACTIVITY

The Complainant must demonstrate that Weatherford was aware of his protected activities, such that they contributed to his termination. Clearly, Hammons was aware of the Complainant's refusal to drive, since it occurred in his presence. This appears to have occurred in July, as the Complainant does not appear to have done much, if any, driving after July. (Tr. 163-172.) Likewise, Nicholson would have been aware of the Complainant's grievances because of the telephone calls on August 13, 2012 and August 20, 2012. Finally, it is clear that by September 20, 2012, Weatherford was made aware of his list of grievances outlined in the email that he sent to Nicholson.

WHETHER THE COMPLAINANT SUFFERED AN ADVERSE JOB ACTION

The parties do not appear to dispute that if the Complainant was not brought back and terminated on October 19, 2012, due to his protected activity, then he suffered an adverse job action.

Neither party, however, fully addresses whether the Complainant suffered an earlier adverse job action when his name was added to the list of non-essential people to be included in the RIF. The evidence surrounding the composition of this list is somewhat murky, as is most of this case.

Regarding the decision of whom to lay off, Crabb stated that he was asked to "trim the staff" because the job site was overstaffed and underworked. (Tr. 234.) According to Crabb, he then asked crew supervisors to decide which employees were "nonessential" as opposed to those they "absolutely could not do without." (Tr. 235.) He stated that the list of nonessential personnel was then forwarded to HR in Denver, and that the Complainant was one of a group of other employees from Williston. (Tr. 236.)

Crabb did not testify as to when, exactly he was asked to pare down the workforce, or when he asked the supervisors to put together a list of nonessential personnel. In fact, he testified that he could not remember the date or time frame. (Tr. 268.) However, he was asked directly at the close of his testimony if the Complainant had already been placed on the RIF-list when he was not called back in September of 2012 pursuant to his usual two-week rotation. Crabb replied:

> To my knowledge, that was made down the road. We left a lot of people home and paid them their two weeks, like they would be—or paid them for the weeks off, just like the initial rotation, three weeks on, two weeks off. And we paid them 40 hours for the two weeks they were at home.

(Tr. 269.) Asked if the Complainant had been told that he had been laid off during the period he was sitting at home in early September, Crabb replied:

> He was not laid off, neither were the other people who were at home. We were just paying them. We were retaining them. But we were only paying them the minimum, the 40 hours per week, because we didn't have the work for them.

(*Id*.)

Hammons, however, made clear that, at least according to his memory, the list of employees deemed non-essential was put together *before* August 20, 2012. Hammons did not state when the list was put together, but he clearly testified that the decision was made before the Complainant's last day of work on August 20, 2012.

> Q. Let me ask this question about these discussions about who's to be brought back and who's not to be brought back. Do you remember what time frame those discussions took place; when did you discuss that with anybody else?
> A. It was in one of rotations, we all got together and had a meeting, and we were told to pick our primary personnel and the ones that we didn't think were going to make it. So we did that. The following week we brought the list in, and we went from there.
> Q. Was that before or after Mr. Ayres left North Dakota on the occasion you referred to?
> A. That was actually right before. It was just a couple days later, that incident happened, that we put him on the plane.

(EX 11, dep. at 19.)

It would appear, therefore, that the decision to put the Complainant on the list of non-essential employees occurred the week before August 20, 2012. As previously discussed,

Hammons testified that the Complainant's conduct on August 20, 2012, caused him to be fired, but at the same time he stated that the decision not to bring the Complainant back to work was made before August 20, 2012, as a result of the RIF, with the altercation merely being "the final incident." (*Id*. at 20.) He clarified that, prior to August 20, 2012, he had reviewed his crew and talked to Crabb concerning who should be subject to the RIF. (*Id*. at 28.) He stated that even if the verbal altercation had not occurred, the Complainant was going to be laid off because he was considered non-essential. (*Id*.)

The only way that the testimony of Crabb and Hammonds make sense is if the list that Hammons testified that he put together before August 20, 2012, was simply the list of people who would not be called back according to their regular rotation during the beginning of September 2012. Crabb's testimony indicates that the appearance of an employee's name on the list did not mean that they were laid off, but meant only that they would not receive a call back for the next rotation back to Williston as they would normally. As Crabb made clear, the employees on the list were still considered to be retained by the company at the minimum 40 hours per week—in effect, paying them to sit at home while there was no work. Only afterward, based on Crabb's description of the process, were people actually laid off.

It appears from Nicholson's testimony that during the middle of September, up until September 20, 2012, there was an HR investigation into the complaints that the Complainant had raised. (EX 13, dep. at 19.) In an email dated September 20, 2012, Nicholson informed the Complainant that the investigation was ongoing, but he also stated that the company was "also facing some realignment of our business in the Dakotas due to our customer base." (JX 18.) This would suggest that by this time, Weatheford was considering actually implementing its RIF, rather than continuing to pay people for staying at home. Nicholson was asked specifically what he meant by a "realignment of business," and Nicholson explained, "Loss of contracts and loss of a big contract that we thought we were going to get." (EX 13, dep. at 18.)

Nicholson then explained the email that he sent to the Complainant on October 22, 2012, advising him that his last day of employment had been October 19. (*Id*.) Asked about the origin of this communication, Nicholson testified that it was "feedback I got from the Denver Office, and all I was doing was passing on the communication." (*Id*. at 19.) He identified the people in the Denver Officer who passed on the information as Michelle Brannon and Mark Cox. (*Id*. at 20.) Nicholson then testified:

> Q. And did they tell you why Mr. Ayres had been selected for reduction in force?
> A. No. They told me there was a list that had been developed, and there was 15, if I recall, 15, maybe 20 people on the cut-back.
> Q. Okay. And did they tell you anything about how they selected which people would be cut back?
> A. No, they didn't.
> Q. Okay. At that time was Terry Crabb still the manager in Williston?
> A. I can't answer that for sure, but I'm, 90 percent positive that no, he was not, not in October.

> Q. Okay.
> A. He was moved to a new position after Marc Cox, the general manager—I think I called him area manager earlier, but he's the general manager of operations, after he did an investigation.

(*Id.* at 21.)

Adding Nicholson's testimony to that of Crabb and Hammonds, it appears to confirm the fact that, while the Complainant's name may have been placed on the prospective RIF-list of employees deemed non-essential before August 20, 2012, no formal action was taken on the list until the middle of October 2012.

The question becomes, then, whether the Complainant suffered an adverse job action just by having his name put on the list of non-essential personnel sometime in the days before August 20, 2012. One could argue that simply because his name was on the list, no adverse action occurred until he was actually laid off, as he was still being paid while he was sitting at home through October 19. However, this argument elides the fact that those placed on the non-essential list were paid only the minimum 40-hours per week during this period, and had no opportunity to work overtime. Thus, being placed on this list and not being called back after the usual two-week rotation at home deprived the Complainant of any opportunity to earn additional income.

The STAA's whistleblower protection provisions and statutes require the Complainant to prove retaliatory "discipline" or "discrimination" regarding "pay, terms, or privileges of employment," and, thus, the Board has long required complainants to prove a "tangible employment action," namely one that resulted in a significant change in employment status, such as firing or failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *See, e.g., Calhoun v.United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 7-12 (ARB Nov. 27,2002) (holding that an employer's instructions, monitoring practices, break restrictions, and written criticism did not constitute adverse actions); *Jenkins v. U.S. Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 20-21 (ARB Feb. 28, 2003) (deciding under environmental whistleblower statutes that employment evaluation without material disadvantage (i.e., reduced pay increase), removal from an assignment, and transfer to another section with no change in performance standards, title, grade, or pay were not actionable).

Here, I find that the Complaint suffered an adverse job action not only when he was formerly terminated on October 19, 2012, but also earlier, when, as a consequence of being placed on the list of non-essential personnel, he was kept at home rather than brought back per his usual rotation in early September. The Complainant testified that he normally earned overtime every week that he was on the job site. (Tr. 104.) For example, he testified that in one two-week period, he earned 61 hours of overtime, in another 83, and in another 67. (Tr. 104-105.) Even if the work had slowed down during this period, and such excessive overtime was no longer available, he still lost the opportunity to vie for whatever overtime work existed, and thus was deprived of a privilege of employment.

In sum, I find that the Complainant suffered an adverse job action not only on October 19, 2012, when his employment was formally terminated, but also earlier, when he was at home rather than report back to Williston in accordance with his usual rotation.

WHETHER THE COMPLAINANT'S PROTECTED ACTIVITY PLAYED A ROLE IN HIS TERMINATION

To summarize, I have found that the Complainant has proven that he engaged in protected activity by:

1) Refusing to operate a vehicle for which he lacked certification in July 2012;
2) Discussing his complaints with Nicholson on the telephone on August 13, 2012, which included his protected activity; and
3) Submitting his complaints in writing to HR via email on September 20, 2012.

As made clear by the Board in *Palmer*, *supra*, the first step of analysis in a case of retaliatory dismissal under the STAA "involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action?" *Palmer, supra,* at 52. The Board also made clear that on this question, the Complainant has the burden of proof to persuade the administrative law judge "based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action."

The ARB has described a contributing factor as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30, 2008). A complainant can succeed by providing either direct or indirect proof of contribution. (*Id.*) Direct evidence is evidence that conclusively links the protected activity and the adverse action. (*Id.*) at 4-5. Alternatively, the complainant may provide circumstantial evidence by proving by a preponderance of the evidence that retaliation was the true reason for terminating his or her employment. For example, the complainant may show that the respondent's proffered reason for termination was not the true reason, but instead "pretext." *Riess v. Nucor Corp.,* ARB 08-137, 2008-STA-011, slip op. at 6 (ARB Nov. 30, 2010). If the complainant proves pretext, it may be inferred that his or her protected activity contributed to the termination. (*Id.*)

Under the first approach, the Complainant must produce evidence that directly links his protected activities and termination. The ARB has described direct evidence as "smoking gun" evidence that "conclusively links the protected activity and the adverse action and does not rely on inference." *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011).

I find that this case does not involve "smoking gun evidence" *per se*. There is no evidence, for example, that anyone overheard Crabb or Hammonds state they got rid of the

Complainant because he refused to drive hazardous materials without certification, or stuck his nose into the afterhours drinking and driving habits of his supervisors.

There is, however, an abundance of circumstantial evidence involving animus, temporal proximity, and pretext. These will be discussed in turn.

1. Animus

Proof of *animus* towards protected activity may be sufficient to demonstrate discriminatory motive. *See Sievers, supra,* slip op. at 27. "[R]idicule, openly hostile actions or threatening statements," may serve as circumstantial evidence of retaliation. *Timmons v. Mattingly Testing Services,* l995-ERA-00040 (ARB June 21, 1996.)

As discussed, Crabb admitted to making a threat to fire anyone who went over his head to HR. (Tr. 239.) He agreed that he made the statement in a meeting of employees. (*Id.*) However, he did not recall the date. (*Id.*) He stated that it was his attempt to "instill that everyone should go through the chain of command," and that he was "old school," meaning that he believed that complaints should be brought to supervisors before HR was brought into the picture. According to Crabb, he wanted any complaints to go through his supervisors, and then to him, so he could be given the opportunity to deal with the issue. (Tr. 231.) He further explained that he made the threat out of frustration because he had received emails from the HR department asking him "what's going on now" about certain matters that had not been brought to his attention first. (Tr. 232.)

Two of the deponents who were at the meeting testified about the threat. Hammons testified that he was at the meeting and recalled that Crabb brought up "calls being made to HR," but he claimed that he did not recall Crabb "saying that if we find out you're making the calls, that were going to let you go." He stated that such a threat would be "flat out unethical" and a violation of Weatherford's policies.

Gould, however, testified that he heard the threat loud and clear. He described the meeting as follows: "We're out there, and we all got called in and had a meeting and, you know, there were a lot of people complaining about, you know, the work conditions and things like that. Well, [Crabb] came up—if I hear anybody, you know, calling HR, your ass is going to be gone, just consider your job terminated. You know, it was a threat, basically."

Gould also testified that following that meeting, there were a series of meetings in which employees were brought in separately. (*Id*. at 13.) He testified that Crabb, Hammons, and another individual were present, but Crabb did most of the questioning. (*Id*.) According to Gould, during the conversation, he was asked who the troublemaker was who was "calling HR or complaining and whining and stuff like that…" (*Id.*) He stated that during that meeting he was asked specifically about the Complainant and was told that "we've been having a lot of complaints about him." (*Id*.) Gould testified that he expressed surprise and asked why. He testified, "And they're like, well, he's complaining about this and that, safety concerns." Gould stated that he then defended the right of employees to raise safety concerns that risked losing their professional license. (*Id*.)

Furthermore, according to Gould, both Hammons and Crabb told him during the meeting that the Complainant was "going to get terminated." (*Id.* at 18.) Asked if anyone in management told him that the Complainant had contacted HR, Gould testified, "Yeah. Lee said something about it and Crabb said something about it. And they were—they also mentioned something that he's a trouble because he's suing some other kind of oil company." (*Id.* at 36.)

Gould testified that the separate meeting with Crabb, Hammons, and a third individual occurred during the same week as the group meeting in which Crabb had made his threat. (*Id.* at 16.) He stated that after the meeting, "all of a sudden after that, people were getting shipped out, getting laid off, you know." (*Id.*)

As the Board observed in *Pattenaude*, many factors are to be considered when weighing witness credibility, including the relationship a witness has with party litigants…" (*Pattenaude, supra*, at 17.) Counsel for Weatherford, on cross-examination, inquired about Gould's relationship to the Complainant, asking him if it was not fair to say that, working together, they had become good friends. (*Id.* at 23.) Gould replied that they had "[t]otally" become friends. He stated that after the Complainant did not come back to work, the two spoke "once or twice…about everything that happened and stuff like that," but he did not recall the exact conversation. (Tr. 33.)

As Gould testified by deposition, I do not have any grounds to disbelieve him based on his demeanor. His testimony was not significantly impeached or discredited. I do not assume that because he and the Complainant became friends working together and had one or two conversations on the telephone after the Complainant left Williston for the final time that he and the Complainant colluded on their testimony. Even Crabb does not deny threatening to fire anyone who went to HR without first raising the issue through the chain of command, meaning the employee's immediate supervisor and then Crabb himself. As Crabb described himself as "old school," I do not doubt that when he made the threat, he put it rather bluntly. I do not give weight to Hammons's testimony that he was at the meeting and never heard such a threat. I believe this testimony was untruthful.

I also believe Gould's testimony that, in the follow-up meeting, both Hammons and Crabb asked questions about the Complainant. According to Gould, the group and individual meetings were either the week of, or the week before, August 20, 2013. By that time, the Complainant had refused to operate a vehicle for which he did not have certification, participated in an HR investigation involving Pittman, and spoken to Nicholson on August 13, 2012. From Gould's testimony, it appears that Hammons and Crabb were aware that the Complainant was involved in a lawsuit with a previous employer. Therefore, it strikes me as plausible that they would have begun to view him as a troublemaker.

I find, therefore, that there is definitely evidence that both Hammons and Crabb had an animus toward employees who took their complaints to HR without first consulting them. Crabb explained that the source of his threat was his desire not to be blindsided by complaints he had not heard about first. His implication was that it was not the act of complaining which he was hostile to, but, rather, complaining directly to HR.

Regarding this explanation of his animus toward anyone complaining to HR, I note that there is evidence that even when employees brought their complaints directly to Hammons or Crabb they experienced a hostile reaction,[8] thus suggesting that the animus behind his threat was not as proscribed as Crabb claimed. Furthermore, the AIR-21 analysis does not require that an employee show that the protected activity was the motivating factor for the adverse job action, only that it was contributing factor. Thus, if the complaints the Complainant took to HR included those that constituted protected activity under the STAA, then the animus would have been directed, in part, to the protected activity. Put differently, the protected activity would have been a contributory factor in triggering the animus which led to the adverse job action.

2. Temporal Proximity

The use of temporal proximity as circumstantial evidence to establish retaliatory intent was well established prior to the Board's decision in *Palme*r, *supra.* Even though well established, temporal proximity was never considered dispositive of the issue. The ARB held that although an inference of causation based on temporal proximity could be decisive, it was not dispositive, as the complainant was still required to prove each element of a *prima facie* claim by a preponderance of the evidence. *Spelson v. United Express Systems,* ARB No. 09-063, ALJ No. 2008-STA-39 (ARB Feb, 23, 2011). Further, the Board had held that an inference of causation may be negated by intervening events. *Johnson v. Rocket City Drywall*, ARB No. 05-131; ALJ No. 2005-STA-24 (ARB Jan. 31, 2007). For example, where a complainant violated the respondent's safety rules on the day of his termination, the ARB held that the intervening safety-rule violation had negated the inference of causation raised by temporal proximity. *Id*

In *Palmer*, the Board revisited the issue of temporal proximity as part of its general reworking of the AIR 21 analysis—which is to say, jettisoning the concept of a *prima facie* case. The language is worth quoting at length.

> Moreover, as we have repeatedly emphasized, an employee *may* meet her burden with circumstantial evidence. One reason circumstantial evidence is so important is that, general, employees are likely to be at a severe disadvantage in access to relevant evidence. When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should thus be aware of this differential access to evidence. Key, though, is that the ALJ must make a factual determination and must be persuaded—in other words, must believe—that it is more likely than not that the employee's protected activity played some role in the adverse action. So, for example, even though we reject any notion of a per se knowledge/timing rule, an ALJ *could* believe, based on evidence that the relevant decisionmaker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted to* infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity. But, before the ALJ can conclude that the employee prevails at step one, the ALJ must *believe* that it is more likely than not

[8] Gould testified that when he told Crabb of a safety concern, he was told "basically get in the fucking truck and drive it or you won't have a job." (CX 6, dep. at 9-10.)

> that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

(*Palmer*, supra, slip. op. at 56) (footnotes omitted).

The *Pattenaude* case, discussed earlier, is also informative on this issue. In *Pattenaude*, the administrative law judge treated a period of two weeks—in other words, a much shorter period than the two-month period alleged by the Complainant here—as sufficient to raise an inference of causality as a matter of law.

> In affirming the ALJ's conclusion on contributing-factor causation, the majority simply sweeps this conflict under the rug by noting that "the close temporal proximity in this case is alone sufficient to establish the contributing factor element." But just because the temporal proximity is "sufficient" to establish contributing-factor causation doesn't mean that, in this case, temporal proximity did in fact establish contributing-factor causation in the mind of the factfinder. The factfinder has to determine whether the protected activity actually contributed in some way to the termination and can use the "close temporal proximity" as evidence in making that determination. From "close temporal proximity," the factfinder may infer a causal connection between the protected activity and the adverse action. But the factfinder also has to consider all the other relevant evidence. Temporal proximity, in other words, *can* be enough, but if it is, the ALJ must state explicitly that it *is* enough *on the facts of the specific case*. Thus, while I agree that the ALJ would be permitted to find for Pattenaude based solely on temporal proximity, the ALJ had to explain why, not simply recite an incantation that "temporal proximity . . . is indirect evidence of a causal connection." In particular, he had to explain why he believed that Pattenaude's protected activity was a contributing factor in his termination notwithstanding all the other evidence Tri-Am introduced to show that Pattenaude's protected activity had, in Tri-Am's words, "nothing to do with" the termination.

(*Pattenaude*, *supra*, at 24) (footnotes omitted).

In the Complainant's view, what clearly precipitated his removal from Williston was his going to HR with his complaints, contrary to Crabb's threat to fire those who did, and Crabb finding out about it. In support of this argument, the Complainant points to the temporal proximity between his complaints and his loss of job. As argued by the Complainant in his brief:

> In the present case, Ayres specifically told his District Manager, Terry Crabb, about his complaints to human resources on August 20, 2012. He was immediately sent home and escorted to the airport separately from other employees. Two weeks later, he was not brought back to work with his crew. On September 20, 2012, Ayres made his written report of improper conduct by Weatherford. The termination of his employment, less than a month later[,] is sufficiently close in time to create an inference of unlawful retaliation and a causal link between the protected conduct and his discharge from employment.

(Comp. P.-Hg. Bf. at 15.)

The evidence develops the following chronology:

1) The Complainant arrives at Williston on July 12, 2012.
2) Sometime during the remainder of July, the Complainant refuses to drive outside his certification on one proven occasion when asked to do so by Hammons.
3) The Complainant speaks to the HR team investigating the Pittman matter sometime in July.
4) On August 13, 2012, the Complainant first speaks to Nicholson at HR.
5) Approximately one week before August 20, 2012, Crabb directs supervisors to put together a list of non-essential personal for the purpose of reducing the work force.
6) Approximately one week before August 20, 2012, the Complainant is placed on the list of employees deemed nonessential.
7) Approximately one week before August 20, 2012, at a group meeting, Crabb threatens to fire any employee who contacts HR.
8) At a separate meeting with Gould a few days before August 20, 2012, according to Gould, both Hammons and Crabb describe the Complainant as a troublemaker, indicate they are aware that he has possibly spoken to HR, and seek more information on his activities.
9) At a meeting with supervisors on August 20, 2012, the Complainant claims that he told Crabb directly that he had spoken with HR, requested a transfer to Vernal, Utah, or Youngstown, Ohio, and then was involved in some sort of altercation—at the same meeting with a supervisor, according to the Complainant—or after the meeting with a co-worker, according to Hammonds.
10) On August 20, 2012, following the above altercation, the Complainant is escorted off the premises.
11) The Complainant is not called back to work on September 5, 2012, for his usual rotation, along with 14 other employees on the non-essential list, but remains on payroll, being paid for a minimum 40

hours per week. According to Crabb, efforts are made by Weatherford to find the Complainant continued employment in Vernal, Utah, or Youngstown, Ohio.

12) During the month of September, Weatherford HR makes a purported effort to investigate the Complainant's safety concerns, although neither Crabb, Hammonds, nor anyone else testifies that they were part of that investigation.
13) Sometime in October 2012, Crabb is moved to a sales position - after an investigation by Marc Cox - as a form of discipline, according to Nicholson, or voluntarily as part of a career move, according to Crabb.
14) Sometime in October 2012, the decision is made by Denver Office to formally lay off those on the non-essential list who have not been called back to work.
15) On October 22, 2012, the Complainant is advised that October 19, 2012, had been his last day of employment.

As can be seen on the above timeline, the Complainant's protected activity of refusing to drive outside of his activity occurred sometime between July 12, 2012, and July 31, 2012. Moreover, it appears that he had his first discussion with Nicholson on August 13, 2012. Sometime around August 13, or the same week, a list of non-essential personnel was put together and the Complainant was included on the list. Later that week, Crabb told his employees that anyone who goes to HR over his head will be fired. According to Gould, in another meeting that occurred before August 20, 2012, both Hammons and Crabb "said something" which indicated that they were aware that the Complainant had been in contact with HR, along with mentioning that he was a "troublemaker" and involved in litigation against a former employer. (Gould dep. at 36.) This would strongly indicate that both Crabb and Hammonds knew of the Complainant's contact with HR before August 20, his last day at work.

On the other hand, Hammonds testified at follows:

> Q. At any point in time, were you made aware Mr. Ayres had filed complaints with human resources; did you ever know that while you worked there?
> A. No, I did not. The first time I heard of anything was just a few weeks back, when I found out what was going on.
> Q. Did anybody from Weatherford ever come out to your work site or call you on the phone to ask you about any allegations that Mr. Ayres might have made about the conduct of what was going on at Weatherford?
> A. No.

(EX 11, dep. at 26.) Similarly, Crabb testified that he could not remember ever having a conversation that referenced the Complainant reaching out to HR. (Tr. 261.) He stated that he was not aware of talking to anyone in Weatherford management about any allegation that Mr. Ayres had made about misconduct at the Williston facilities. (Tr. 243.)

It is impossible to reconcile Gould's testimony that both Hammonds and Crabb expressed awareness that the Complainant had contacted HR during the meetings in August, with the testimony of Hammonds and Crabb that they never became aware of the fact until the matter arose in litigation. Accordingly, I must make a credibility determination. I observed Crabb's demeanor during the hearing and was not particularly impressed by answers in which he could not recall certain details that seemed to warrant remembrance. At times, such answers struck me as deliberately evasive. I also find troublesome his testimony that he moved to a sales position on his own volition, whereas Nicholson's testimony clearly indicates that it was the result of a disciplinary action by Marc Cox following an investigation.

On the other hand, I never did observe the demeanor of Gould and Hammons, as they both testified by deposition. With respect to Hammons's credibility, I have already rejected his testimony that he did not hear Crabb's threat to fire anyone who went to HR. If he was at the meeting, and he indicated that he was, I believe he would have heard the threat, which Crabb admitted making. If he thought the threat was "flat-out unethical," as he testified on deposition, then I find it likely that he would have remembered Crabb making it, and, therefore, I question his testimony that he did not hear such a threat. His credibility suffered a blow on this issue. Also, his testimony that the Complainant engaged in a fight with a co-worker after the meeting on August 20, 2012, as opposed to losing his temper at a supervisor during the meeting, does not ring true. He did not provide any details as to why the Complainant would have left the meeting with his supervisors and then get into a random altercation with a co-worker. There was no documentation of such an altercation. Moreover, it appears that the word of mouth that spread through the man camp was that the Complainant had gotten into an argument with a supervisor, not a co-worker. Although word of mouth is not particularly strong evidence, it seems that if the Complainant had gotten into a fight with a co-worker, there would be no reason for the word to spread that he had gotten into a fight with a supervisor.

Accordingly, I find that the evidence supports that 1) the Complainant engaged in protected activity by refusing to drive outside his certification sometime between July 12, 2012, and July 31, 2012; 2) he had spoken to HR about his complaints, including safety concerns, by August 13, 2012; 3) within a week of his conversation on August 13, 2012, his name was placed on a list of non-essential personnel; 4) around the same time as the Complainant's telephone call to HR on August 13, 2012, Crabb admitted that he threatened to fire anyone who went to HR over his head; 5) during this same period both Crabb and Hammonds evinced an awareness that the Complainant had spoken to HR and viewed him as a troublemaker; 6) on August 20, 2012, the Complainant was escorted off the premises, but not fired, after a verbal altercation, which was most likely with a supervisor, not a fellow employee; and 7) thereafter, the Complainant was not brought back on his regular two-week rotation and subsequently informed that he was terminated after an alleged investigation into his complaints for which there is no proof that anyone was ever contacted.

Based on this chronology, I find that temporal proximity supports a causal connection between the Respondent's adverse job action and the Complainant's protected activity.

3. Pretext

The ARB has also held that another type of circumstantial evidence under the STAA is that which "discredits the respondent's proffered reasons for the termination, demonstrating instead they were pretext for retaliation." *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011). According to the Board, "If the complainant proves pretext, [the fact finder] may infer that his protected activity contributed to his termination, although [the fact finder is] not compelled to do so." *Id.*

According to Weatherford, the Complainant was terminated because the company was undergoing a RIF due to a lack of work. (Resp. P.-Hg. Bf. at 35.) Weatherford argues that the record shows that five other equipment operators were laid off in late 2012, dispelling the notion that the Complainant was singled out. (*Id.*)

As noted by Weatherford, Hammons was the main source of information regarding who was subject to the RIF. (*Id.* at 36.) Hammons did not testify that the decision to include the Complainant on the RIF-list was based on lack of seniority, job description, or redundancies in the workforce. Rather, he testified that the Complainant was selected after he had a discussion with Crabb and Marcus Moore, the operations manager, regarding "who did what, who was going to work, and who wasn't going to work…. " (EX 11, dep. at 10.) He stated that "we picked the members of the crew that we thought were going to be able to participate and get jobs done like they needed to be done." (*Id.* at 10-11.)

Asked why, specifically, he picked the Complainant for inclusion on the list, Hammons testified that the Complainant did not have "a very good work ethic at all." Asked to explain, he replied that when asked "to help rig up or do things," the Complainant would refuse on the ground that he was not hired to do such work—in other words, he was hired to drive. (*Id.*) According to Hammons, equipment operators, though hired to drive, were also hired to "put rigs up, rigs down, and participate with the crew." He stated that due to overstaffing, the company was trying to find extra work for equipment operators. In his words, "We were trying to find little small things for everybody to do to keep everybody busy, so we weren't standing around." (*Id.* at 9.) Asked if there were any other problems with the Complainant, Hammons replied that he was "confrontational," meaning that he "would just start arguments and different things with other employees." He stated that the Complainant was spoken to about this several times, but it remained an issue. (*Id.*)

Asked if there were any other problems with the Complainant, Hammons replied, "No. I mean, we got him doing the night security job at the yard, and he didn't like that, so he complained about that. But other than that, that's really it." (*Id.* at 11.)[9]

[9]As noted, Crabb maintained that he was not involved in the decision to place the Complainant on the list of non-essential personnel. (Tr. 258.) He offered an explanation for "non-essential" that was different from Hammons's. He testified that he thought essential personnel were those capable of operating a variety of equipment "so you could…get them out there and run any piece of equipment during the job. (Tr. 262.) He stated that he did not "believe" that the Complainant had such experience, but was, rather, "very limited on what he actually ran…" He indicated, though, that he was just repeating the opinion of others. (*Id.*) Crabb also referred to the incident regarding the time the Complainant was allegedly caught on videotape rummaging through desks while on security, which he stated was grounds for dismissal. (Tr. 227-228.) He agreed, though, that the Complainant was never

Significantly, Hammons's description of the Complainant as lacking a good work ethic, not fitting in, and being confrontational is contrary to the picture painted by three co-workers: Hansen, Gould, and Pirone. Hansen testified that he had observed the Claimant's work performance because he trained him and because the Complainant was ultimately assigned to his crew. (CX 8, dep. at 11.) Asked to describe the Complainant's "work ethic," he responded:

> He always was on time. He was prompt, and even additionally, the only day Dan and I had to stay later after most people went back to man camp—and we did all of our online training for additional courses to take place. A I know, for example, I finished all my online courses that were supposed to take a year and five week in the first five-day week I was up there, and I believe [the Complainant] did the same thing.

(*Id*. at 11-12.) Similarly, Gould described the Complainant favorably as a worker:

> He worked like everybody did. Well, not like everybody did; but he was one of the few that actually would work, you know, swing—swing a hammer, so—
>
> Basically he would just get out and help. He wouldn't be sitting in the data van or anything like that. He'd actually get out and help, you know, carry pipe, carry iron, you know, help. You know, hook up and everything, and—oh yeah, he was a good worker.

(CX 6 dep. at 7.) Asked about the Complainant's work ethic, he replied that he was a hard worker and "pretty much the first one in the dining hall and pretty much the first one of the last one to usually leave the yard." (*Id*.) Pirone stated that during the early weeks, the Complainant was not part of his crew, but stated that he willingly assisted the mechanics when not driving. (CX7, dep. at 9-11, 16-17.)

Asked why, given his testimony that the Complainant did everything they asked of him, the company would have targeted the Complainant, Hansen replied, "I don't know." (*Id*. at 31.) He made reference to the incident that led to the Complainant being escorted to the airport, but admitted that he did not know what was said at the meeting, or have any knowledge about the Complainant being involved in a confrontation. (*Id*. at 31-32.) Asked if knew of a verbal fight that led to the Complainant being separated from a coworker, he replied, "Unaware of that." (*Id*. at 32.) The Complainant told him he had "filed or had some HR issues." (*Id*. at 35.) However, he explained that he did not know the specifics of those issues. (*Id*. at 36-37.) He stated, though, "I think [the Complainant] had complained about DOT, that there was too many complaints, and I'm sure [the Complainant] had complained about those because he was concerned about driving equipment illegally." (*Id*.) Subsequently, though, he added, "I know he called HR. I do not know any of the specifics. It could have been pay. It could have been a lot of issues. I do not know." (*Id*. at 38.)

---

disciplined as a result of the alleged incident, and did not play any party in his termination. (Tr. 256.) He also agreed that there was never any discipline against the Complainant while he worked at Williston. (Tr. 249.)

The picture painted by Hansen, Gould, and Pirone of the Complainant as an enthusiastic worker, who was willing to assist others, is difficult to reconcile with the picture painted by Hammons, who described the Claimant as a man with a poor work ethic, who did not fit in, and who was confrontational with others and nearly got into a fight his last day on the job. It is almost as if they were describing two different people.

Perhaps not, though. As previously noted, the Respondent introduced at hearing the decision of the United States Court of Appeals for the Federal Circuit affirming the decision of the Merit System Protection Board, in which an administrative law judge found that the DHS had sustained the charge of conduct unbecoming a Federal Air Marshal against the Complainant. The specific conduct was that the Complainant engaged in in an intimidating and threatening manner on five separate occasions. (EX 7, dep. of Ayres dated 10/27/14, attached exhibit B.) Some of these occasions involved threatening and intimating behavior directed toward personnel in charge of his son's school, accompanied by words to the effect that, as an Air Marshal, he carried a gun, while others involved a dispute over work schedule, threatening a police officer and prematurely leaving the scene of a traffic stop, and demanding that the police take care of his ticket for a seatbelt violation. (*Id*.) At the hearing, the Complainant asserted that the "judge in the case took and stated that I was not there" and found that his conduct did not constitute a threat. (Tr. 138.) He also stated that the "what they accused me of, there was never any proof at all that I did any of that." (*Id*.) This, however, is simply not true, at least according to the evidence of record. According to the decision of the Federal Circuit Court of Appeals, the administrative law judge sustained the charge of conduct unbecoming a Federal Air Marshal after the Complainant failed to appear for a scheduled hearing. (EX 7, dep. of Ayres dated 10/27/14, attached exhibit B.) According to the Court, the administrative law judge found that the evidence submitted by the DHS established that the Complainant had committed the misconduct alleged in the agency's charges against him. The Federal Circuit Court of appeals affirmed this determination. (*Id*.)

As noted earlier, character evidence is generally disapproved of under the formal rules of evidence, but this case is not controlled by the formal rules of evidence. Still, although the formal rules of evidence do not apply, "rules or principles designed to assure production of the most probative evidence will be applied." See 29 C.F.R. § 1978.107(d). The Rules of Evidence for Administrative Hearings before this Office are contained in Subpart B are therefore not expressly applicable *per se*, but still provide some guidance to the extent they codify principles designed to assure "the most probative evidence will be applied." In this regard, I have already noted that this Office's Rules of Evidence, like the Federal Rules of Evidence, generally disfavor the use of character evidence to prove conforming conduct. 29 C.F.R 18.403(a) specifically states that evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Moreover, the Board has in the past relied on 29 C.F.R. 18.404(b) to affirm an administrative law judge's decision to give no weight to evidence of an employer's misconduct in an entirely different case. *See Etchason v. Carry Companies of Illinois, Inc.*, 92-STA-12 (Mar. 20, 1995.)

I find, therefore, that however tempting it might be to do so, the Complainant's past history of threatening and intimidating behavior, as found by the Merit System Protection Board, cannot be used as a basis to infer that he engaged in similar behavior in Williston, and thus

support Hammons's testimony that he was confrontational with co-workers. To do so, I find, would be too prejudicial, and run contrary to the dominant view, embodied by the Federal Rules of Evidence, as well as the DOL's own rules, that the prejudice of using character evidence, or prior bad acts, to show action in conformity therewith, outweighs its probative value.

Otherwise, there is very little evidence to support Hammons's assertion that the Complainant was a bad worker. Weatherford did not present any testimony or affidavits from co-workers who have been involved in any altercations with the Complainant or thought he demonstrated a poor work ethic. Both Hammons and Crabb testified that no formal disciplinary action was ever taken against him, and there is no evidence of any negative performance reviews. Although Hammons sought to portray the Complainant as one who fancied himself solely a driver and was unwilling to shoulder other responsibilities, or lend a helping hand, testimony of his co-workers and those who observed him on the job site directly contradicts this characterization.

Of note, Crabb, who had made the threat to fire anyone who went to HR above his head, attempted to distance himself from the decision to include the Complainant on the RIF-list. When asked why the Complainant was not called back in two weeks after his last deployment to Williston, Crabb stated that he had been asked to "trim the staff" because the job site was overstaffed and underworked. (Tr. 234.) He stated that the decision regarding who to lay off was made by calling all the crew supervisors and asking them to list crew members who they deemed "nonessential" and opposed to those they "absolutely could not do without." (Tr. 235.) He asserted that the decision was delegated to Tate, Van Hattem, and Hammons. (Tr. 263) According to Crabb, he told these three that it "was their choice to make on who they deemed essential [and] who…were put on the list [to be laid off]." (*Id*.) Asked if his testimony was that he did not have any input as to who was put on the list to be laid off, he replied, "Pretty much, yes, sir." (Tr. 263-264.) He added, "I didn't influence any decisions." (Tr. 264.)

Crabb's testimony that he was largely not involved in the decision to lay off the Complainant does not square with Hammons's testimony. Hammons agreed that he was involved in the decision not to bring the Complainant back to work. (EX 11, dep. at 10.) But when asked who else was involved, he replied, "It was several others," and the first person he mentioned was Crabb, followed by Marcus Moore, the operations manager. He added: "There was, I think, a discussion on who did what, who was going to work, who wasn't going to work, and he just was put on the list as one of the ones to not return." (*Id*.) Tate, another person who Crabb identified as putting together the list of those to be laid off, disclaimed that he supervised the Complainant at all. (EX 14, dep. at 10.) Indeed, he was barely able to remember the Complainant, remarking that his name sounded familiar, although he could not "place a face to him." (*Id*.) According to Tate, the Complainant was not on his crew, and, therefore, they did not work together regularly. Asked if he knew anything about why the Complainant ceased working for Weatherford, he stated, "I have no idea." (*Id*. at 11.)

In sum, I do not take Crabb's testimony - that he was "pretty much" not involved in the decision to put the Complainant on the RIF-list - at face value. Rather, I find that he was involved, to some extent, in the discussion and selection process. Hammons and Marcus Moore, the operations manager, were also involved.

Significantly, although Hammons indicated that the Complainant's work ethic and confrontational behavior caused him to be put on the RIF-list, Crabb indicated that their might have been another factor. As summarized previously, Crabb indicated that the fact that the Complainant was known to be a complainer probably did affect the decision to include him on the RIF-list. In response to the question whether, during the time he was seeking input from Hammons, Tate, and Van Hatten on who to place on the RIF-list, any of them expressed the opinion that the Complainant was a complainer, Crabb replied, "It may have come up. I don't recall specifics at this time." (Tr. 270.) Pressed by the undersigned to clarify his response, and asked specifically whether any of the three might have felt that the Complainant was "new school" and a complainer, Crabb stated, "I may have heard that, yes, sir. Probably did hear it." (*Id*.)

In his brief, the Complainant challenges Weatherford's claim that he was laid off due to a lack of work, arguing that such layoffs are typically based on seniority. In contrast, the Complainant argues that he was the victim of a reduction that was based on the discretion of supervisors, which allowed for retaliatory animus to play a part. (Comp. P.-Hg. Bf. at 13.) The Complainant identified the testimony of his co-workers to support this this view. Gould testified that those selected out appeared to be on "some stupid supervisor's hit list…." (CX 6, dep. at 30-31.) He added that "everybody saw through it," because the Complainant's name had come up during the meeting and then "pretty soon he's on a bus going home…." He stated, "Put two and two together, you know?" (*Id*. at 31.)

Hansen also gave his perspective of the RIF, stating that there was "no rhyme or reason who they let go." (CX 8, dep. at 24-25.) He further observed that the company "hired people at the same time." (*Id*. at 25.) Although he admitted that he was "[a]bsolutely not" involved in the decision making process that led to men being laid off, he nonetheless remarked, "In my humble opinion, there was no decision making process." (*Id*. at 27.) Hansen was then asked what he knew about the decision-making process. (*Id*.) He replied:

> All I know is they let people go who might not have had a driver's license if they promised to train and send them to school. They got rid of certain people they had pointed out and fingered that they wanted to get rid of, and at the same time, they were hiring people.

(*Id*.) Asked who he remembered the company hiring during this period, he stated, "They were bringing equipment operators on at the same time filling vacancies after they laid people off. There were new hires that came on after they had your, quote, RIF." (*Id*.)

Even though he appeared to challenge the business necessity of the RIF, Hansen acknowledged that the business was subject to its ups and downs, and he had been the subject of a RIF subsequent to his employment with Weatherford. (*Id*. at 28-29.) Furthermore, he agreed that he did not know the details of how the RIF was decided at Williston, and did not know if work performance and CDLs were part of the review process. (*Id*. at 30.) Nonetheless, Hansen insisted that "it was clear that they targeted individuals." (*Id*.) Asked to explain, he stated:

> I have 40 plus years of business experience. I can tell what they were doing. I can tell how disorganized they were up in Willison, how incompetent the management was, and that they had no clue what they were doing, and did whatever they decided to do when they wanted to do it. That's the way they ran it.

(*Id*.)

Weighing this evidence, I note first that the Complainant need not succeed in challenging the validity of the RIF itself to make the argument that his inclusion based on a poor work ethic and confrontational behavior was pretextual. It is possible for Weatherford to justify the business necessity of reducing its work force and yet still have used the RIF as a pretext for terminating the Complainant because of his protected activity. With this in mind, I find that there is strong evidence to support the conclusion that the reason given for the Complainant being put on the RIF list - his lack of worth ethic and confrontational attitude—was pretextual in nature. Specifically, I find that Hammons's testimony portraying the Complainant as a malingerer when he was not driving was outweighed by the testimony of his co-workers that he had a good work attitude and was willing to shoulder responsibilities other than driving. Other than Hammons's testimony, I find no evidence that he was confrontational with other employees.[10] Hammons's testimony is unsupported by any other evidence, such as performance appraisals, written reports, or disciplinary action, to show that the Complainant engaged in such misconduct.

4. Countervailing Circumstantial Evidence

Weatherford, it should be noted, argued in its brief that any attempt to establish a causal link between the Complainant's protected activity and its decision to put him on the RIF-list is refuted by the evidence of other employees who complained and were not selected for the RIF-list. In this regard, Weatherford cites to the testimony of Gould, who worked on the same crew as the Complainant and was not chosen for the RIF despite the fact that he had voiced safety complaints and, on at least one occasion, refused to drive a truck that he considered unsafe. (Resp. P.-Hg. Bf. at 36-37.) Weatherford also cited Pittman's case, which prompted an onsite HR investigation, and was not discharged by Weatherford. (*Id*.)

Weighing this argument, I note that it does have some merit, and cannot be dismissed out of hand. Gould's testimony can be read both ways, however. He testified that he refused to drive a truck that had iron bands that were six months out of date. (CX 6, dep. at 8.) He stated that to have done so would have violated DOT regulations. (*Id*. at 10.) He testified that when he went to talk to Crabb about his safety concerns, Crabb told him "to basically get in the fucking truck and drive it or you won't have a job." (*Id*. at 9-10.) According to Gould, he told Crabb that he would still "rather not" drive the truck, which he considered so unsafe as to be life threatening. (*Id*. at 10.) Asked if knew that the Complainant had been asked to drive loads which were not permitted, Gould's answer is revealing:

[1010] I have already rejected Hammons's testimony that the confrontation that the Complainant became involved in on his final day of work, August 20, 2012, involved a co-worker rather than a heated dispute that arose with a supervisor.

> Oh, yeah, Dan, he didn't like—you know. But at the same time, everybody felt entrapped, you know. I was like either you do this or you lose your job. And then, you know, you can't go and call HR. You're definitely losing your job. And, you know, with us, with families at home relying on us, you know, and being away, you know, we want to try to get home and get back safe, you know. Go to work and do our thing and go, but, you know, a lot of people were just really uncomfortable. It made the work conditions really harsh, you know.

(*Id.* at 11.) On cross-examination, counsel for Weatherford attempted to find a silver lining to this testimony, noting that, despite his refusal to drive and safety complaints, he was brought back to Williston pursuant to his usual rotation.

> Q. And they let you come back, right? You actually went back after those complaints; and after they talked to you about no complaints to HR, you went back to Williston?
> A. Yes. And—but I didn't complain—
> Q. But—
> A. –to HR.
> Q. What's that now?
> A. I didn't complain to HR.

(*Id*. at 20.)

Gould was then asked if he recalled any other incidents, besides the one with the truck and the out-of-date bands, and he replied:

> Yeah. There was iron, and they had—the only other one—they had somebody drive a chemical truck to one of like—somewhere down by the yard or something. And they didn't even have a HazMat endorsement or nothing. So that was like—and at the time, I didn't have mine just yet, you know, so I couldn't take it.
> But they were pretty much pushing everybody—anybody and anyone with a CDL just to drive it whether or not they had a HazMat endorsement or not.

(*Id*. at 26.)

In sum, Gould's testimony can be read as providing support for Weatherford's position that one could refuse to drive and complain about safety violations and still not lose one's job at Williston. On the other hand, his testimony can also be read as providing support for the proposition that employees were under tremendous pressure to overlook DOT safety regulations and were threatened with losing their jobs if they did not. Gould, also, is not a convincing comparison because, as he pointed out, going to HR with complaints appeared to be the red line that Crabb had drawn, and he never stepped over that line.

Pittman's case provides a better argument for Weatheford, as he went to HR with his complaints and actually triggered an onsite HR investigation. As discussed previously, the evidence is not definitive on the nature of Pittman's complaints that triggered the investigation—whether they were mostly about conditions at the man camp, or safety, or a combination of both. As discussed, Pittman apparently had been not called back to his regular rotation after the investigation, and was endeavoring to get in touch with Crabb, with Crabb fending him off. Eventually, Pittman found work at the Vernal, Utah, worksite, but did not return to Williston.

Pittman's treatment, like that of Gould, is a double-edged sword. Weatherford correctly demonstrates that an employee could complain to HR and still maintain employment with the company. Conversely, however, one could argue that it is also evidence that if one complained to HR they would no longer be working with Crabb at Williston.

5. Conclusion

As noted previously, the Board in *Palmer* outlined a two-step analysis for AIR-21 cases. The first step was to place the burden on the complainant to show by a preponderance of the evidence that it is more likely than not than his protected activity was a contributing factor in the employer's adverse action. *Palmer, supra*, at 52. Although I have viewed the Complainant's testimony with a very critical eye based on his past history of falsity, I have found that he engaged in protected activity by refusing to drive outside of his certification on at least the one occasion, which Hammons corroborated. Moreover, I have found that he engaged in protected activity when discussing his complaints with Nicholson on the phone on August 13, 2012, and then via email on September 22, 2012. Moreover, I have found that suffered an adverse job action sometime in the week before August 20, 2012, when he was included on a list of nonessential personnel to be subject to a RIF, meaning that he would not be called back for his usual rotation on September 5, 2012, with the rest of his crew, but would stay at home and earn his base salary, with no opportunity for overtime. Finally, I have found that the Complainant suffered another adverse action when, on October 19, 2012, he was formally terminated as a result of his inclusion on the RIF-list.

I have found, further, that there is strong circumstantial evidence that the Complainant's protected activity played a contributory role in his inclusion on the RIF-list. First, there was the animus that Crabb admittedly displayed toward anyone who went to HR and the testimony from Gould that he expressed an awareness that the Complainant had done so. Second, the temporal proximity of the Complainant's telephone call to Nicholson on August 13, 2012, and his inclusion on the list of nonessential personal sometime before August 20, 2012, his last day on the job. Third, testimony of three of his co-workers disputes Hammons's reason for including the Complainant on the list of nonessential personnel—a poor work ethic and a confrontational attitude, suggesting that it was pretextual. Finally, Crabb's acknowledgment that the Complainant's reputation as a complainer may have entered into the discussion of whether to place him on the list.

Based on the circumstantial evidence in this case, as well as my credibility determinations, I find it more likely than not that Crabb's protected activity contributed to Weatherford's actions against him. As noted by the Board in *Palmer,* there is no need for the

Complainant's activity to have played a primary role in the adverse job action. *Palmer*, *supra* at 53. Rather, it is sufficient for the Complainant's protected activity to have played any role.[11] Therefore, even if the Complainant complained to HR about other issues which did not fall under the category of protected activity—e.g., conditions at the man camp, pay issues, etc.—and even if he complained more about these non-protected activities than his protected activities, he would still meet his burden if the complaints regarding protected activity were part of the reason he was deemed nonessential and placed on the RIF list. I find that he has presented sufficient circumstantial evidence to sustain this burden.

WHETHER THE RESPONDENT WOULD HAVE TAKEN THE SAME ACTION REGARDLESS OF THE COMPLAINANT'S PROTECTED ACTIVITY

The second determination outlined by the Board in *Palmer* was quoted previously, but will be repeated here:

> The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

(*Id.*)

In its brief, Weatherford argues that it has presented clear and convincing evidence that it would have taken the same adverse action against the Complainant in any event, regardless of his protected activity. Specifically, Weatherford argues that it experienced a significant lack of work during July and August 2012, obligating it to reduce its workforce. As stated by Weatherford, "This evidence simply does not permit a finding that Weatherford would not have significantly reduced its workforce had Complainant not engaged in protected activity. Such a conclusion is nonsensical." (Resp. P.-Hg. Bf. at 37-38.)

In response to this argument, I note again that the Complainant need not prove that the RIF was pretextual. I agree with Weatherford's argument that the evidence is not such that I could find that it did not need to reduce its workforce. There is abundance of evidence that the company hired too many employees for the amount of work that existed in July and August.

[11] The Board's language is particularly instructive: "We have said it many a time before, but we cannot say it enough: "A contributing factor 'is *any* factor, which alone or in combination with other factors, tends to affect in *any* way the outcome of the decision.'" We want to emphasize how low the standard is for the employee to met, how "broad and forgiving" it is. "Any" factor really means *any* factor. It need not be "significant, motivating, substantial or predominant"—it just needs to be a factor. The protected activity need only play some role, and even an "[in]significant" or "[in]substantial role suffices. (*Palmer*, cited in the text, at 53.)

However, that the company had a legitimate reason for undergoing a RIF does not, by itself, mean that it did not use the RIF to retaliate against the Complainant.

In support of its argument that the Complainant was the victim of a necessary RIF rather than as retaliation for his protected activity, Weatherford argues that the Complainant was "selected for the reduction-in-force by Hammons because he was nonessential as shown by his various performance issues." (*Id*. at 38.) Earlier, Weatherford had identified what it described as the Complainant's "multiple performance issues." (*Id*. at 32.) Essentially, those identified were: 1) refusal to perform "non-driver work assignments;" 2) a confrontational attitude toward other employees which led to his starting arguments with other employees; and 3) an altercation with a co-worker on his last day of work. (*Id*. at 32-33.)

Weighing this list of "multiple performance issues," I note that the last one, the altercation on August 20, 2012, is the only one which is discussed at length in the record. Arguably, whether or not the Complainant got into a verbal altercation that threatened to become physical could be construed as grounds for discharge, regardless of whether it was with a superintendent or a coworker. Indeed, Hammons testified that he thought that the Complainant had been fired on that day. (EX 11, dep. at 21.) Crabb made clear, however, that he was not. (Tr. 269.)

Furthermore, it is clear from Hammons's testimony that the decision that the Complainant was nonessential and placed on the RIF list occurred *before*, not after, the incident on August 20, 2012. (EX 11, dep. at 19.) Therefore, the fact that the incident occurred could not be used as reason for putting the Complainant on the RIF list, because, according to Hammons, he already was.

I have previously discussed Hammons's testimony that the Complainant had a poor work ethic when discussing pretext. Hammons's description of the Complainant as only wanting to drive and not being willing to help with other tasks was refuted by his co-workers, who testified the opposite. Similarly, Hammons testimony that the Complainant was confrontational was not borne out by the testimony of Hansen, Pirone, or Gould. Weatherford did not present any evidence, other than the testimony of Hammons, that the Complainant was argumentative with his fellow workers. Moreover, Weatherford did not present the testimony or affidavit of any co-worker who was involved in any verbal or physical confrontation with the Complainant. As noted previously, Weatherford did not present any contemporaneous records of the Complainant being disciplined for any rules violation during his entire time at Williston.

As Board in *Palmer* made clear, Weatherboard's burden is to demonstrate by clear and convincing evidence that it is not just probable, but "highly probable" that the company would have terminated the Complainant regardless of his protected activity. Significantly, Weatherford did not offer any other non-retaliatory reasons for placing the Complainant on the nonessential list, which led to him staying home when he normally would have rotated back to Williston with the rest of his crew on September 5, 2012. Also, Nicholson testified that when Weatherford subsequently laid off employees because of the downturn in work, those laid off were on the RIF-list.

For all these reasons, I find that Weatherford failed to demonstrate, by clear and convincing evidence, that it was highly probable that the Complainant would still have been placed on the RIF-list and sat home, earning a base salary, for several weeks before being terminated on October 19, 2012 as part of a RIF if he had never run afoul of Crabb by going to HR with complaints, which included those protected by the STAA.

OTHER DEFENSES

Weatherford raised additional defenses. First, it argues that the undersigned should find that the Complainant's present action is collaterally estopped because of summary judgment granted to Weatherford in a separate lawsuit filed by the Complainant against it. *See Daniel Ayres v. Weatherford U.S., L.P.*, Case No. 4:13cv00600. The suit was originally brought in state court, but subsequently removed to federal district court. The complaint is of record (JX 22), and sets forth essentially the same allegations as are set forth here, but seeks relief under the Ohio Whistleblower Statute, O.R.C. § 4113.52.

Weatherford raised essentially the same argument in a post-hearing trial motion to dismiss, dated November 11, 2015. By my Order dated January 29, 2016, I addressed this argument and for reasons set forth at length in my Order, I found that it did not have merit. Rather than repeat that analysis, and make a long decision longer, I incorporate it here and refer the reader to the Order itself.

Weatherford also argues that the Complainant "provided a work history to Weatherford that is riddled with factual errors." (Resp. P.-hg. Bf. at 39.) Therefore, Weatherford argues, "the after-acquired evidence doctrine should cut-off Complainant's damages as of the date of his deposition in the JP Jenks litigation on October 27, 2014, as Weatherford first learned of Complainant's false employment application during the JP Jenks litigation." (*Id*.)

In support of this argument, Weatherford cites to *McKennon v. Nashville Banner Publ'g Co,* 513 U.S. 352 (1995), and asserts that, in *McKennon*, the Court limited an employee's remedies for discrimination when the employer could show that the employee would have been terminated anyway due to wrongful conduct of which it later became aware. (*Id.; Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1168). Weatherford acknowledges, however, that when "'an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.'" (Resp. P.-Hg. Bf. at 39, quoting *McKennon* at 362.) To meet this first test, Weatherford argues that it is "undisputed that Weatherford's policies prohibit the falsification of company document, including employment-related documents," and that a "false work history is grounds for discharge under Weatherford's policies."

As support for its argument that Weatherford would have terminated the Complainant based on the information he gave on his employment application, Weatherford cites to the testimony of Mora. Mora testified that if an employee had falsified an employment, that would be grounds for a discharge. (Tr. 273.) She stated that such a policy was in effect in 2012. (*Id.)* On cross-examination, however, she testified that the policy was not absolute, as it was subject to

the circumstances and the severity of the falsification. (Tr. 274.) She agreed that if somebody listed the reason for leaving a job as "finished," that may or may not be falsification. (*Id*.) She testified that she was not personally aware of anyone being investigated regarding resumes or job-application forms. (Tr. 275.) Significantly, she testified that she had not reviewed the Complainant's job application. (*Id*.) She was then asked, "And so up to today Weatherford hasn't considered whether or not discharge would be appropriate for anything that he or may not have done as it relates to his job application. Is that correct?" Mora replied, "That's correct." (*Id*.)

There is no evidence that Weatherford had reviewed the Complainant's employment-application forms and determined that the Complainant "in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon*, *supra*, at 362. At best, at the time of the hearing, it remained only a possibility. The record does not support the assertion that the Complainant would "in fact" have been terminated based upon his employment history as stated in his application form. The argument that Weatherford makes, that it would have terminated the Complainant had it known more fully about the reasons he left his former employment, is just that and nothing more, an argument.

REMEDIES

Regarding remedies under the STAA, the Board has stated:

> A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. §31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc*., 90-STA-44, slip op. at 10 (Sec'y Jan. 6, 1992). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (Dec. 30, 2002), citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418-421 (1975). Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e et seq. (West 1988). *Fuhr v. School Dist. of City of Hazel Park*, 364 F.3d 753, 760 (6th Cir. 2004). *See, e.g., Polgar v. Florida Stage Lines*, ARB No. 97-056, ALJ No. 94-STA-46, slip op. at 3 (ARB Mar. 31, 1997).
>
> Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. P*olewsky v. B&L Lines, Inc.*, 90-STA-21, slip op. at 5 (Sec'y May 29, 1991). While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported

> by evidence; they need not be rendered with "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc*., ARB No. 97-005, ALJ No. 95-STA-43, slip op. at 14 n.12 (ARB May 30, 1997), citing *Pettway v. Am. Cast Iron Pipe Co., Inc*., 494 F.2d 211, 260-61 (5th Cir. 1974).

(*Ass't Sec'y & Bryant v Mendenhall Acquisition Corp*., ARB No. 04-014, ALJ No. 2003-STA-36, (ARB June 30, 2005)).

1. Back Pay

As noted, there is no fixed method for calculating back pay. In his brief, the Complainant did not propose any method of calculation or state a monetary amount. Indeed, the Complainant's brief is bereft of any specific dollar figure that the Complainant seeks. As Weatherford acknowledges in its brief, the evidence of record establishes that the Complainant worked for it from April 23, 2012, through October 19, 2012, for a total of 25 weeks, with total earnings of $30,441.82. (Emp. P.-Hg. Bf. at 41.) This amounts to an average weekly wage of $1,217.67 per week. (*Id*.) Weatherford employs the average weekly wage as a measure of back pay when calculating its potential liability. I find this to be a reasonable method, particularly given the lack of any other detailed information regarding the Complainant's earnings.

As stated by the Board in *Hobson v. Combined Transport, Inc*., ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008), "[b]ack pay liability ends when the employer makes a bona fide, unconditional offer of reinstatement or, in very limited circumstances, when the employee rejects a bona fide offer, not when the employee obtains comparable employment." In this case, there was never any offer of reinstatement.

Other earnings reduce liability for back pay. (*Id*.) In this regard, the Complainant testified that in the remaining months of 2012, he earned a total of $6,734.35 from a company called Silver Line. (Tr. 154.) Therefore, his back pay for October 19, 2012, through a December 31, 2012, a total of $12,176.70, would be reduced by $6,734.35, resulting in a total amount of back pay for 2012 of $5,442.45.

The Complainant testified that he had earnings from Silver Line in 2013 of $16,020.26. (Tr. 155.) This confirmed by Employer's Exhibit 10, which is the 1099-Misc 2-13 form, which shows the same amount in earnings. In addition, the Complainant worked for JP Jenks in 2013, earning approximately $1,000 per week, according to his testimony. (Tr. 146.) When asked if the benefits were comparable, he replied, "I guess, yes." (Tr. 146-147.) He stated that he was hired by JP Jenks in April of 2013. (*Id*.) Further, he testified that his employment ended in September of 2013. (Tr. 121.) Weatherford, in its brief, calculates that based on this testimony the Complainant earned $1,000 for approximately 26 weeks, for a total of $26,000, from JP Jenks in 2013. (Emp. P.-Hg. Bf. at 42.) Thus, Weatherford calculates that the Complainant had combined other earnings in 2013 of $42,020.26. (*Id*.)

Of note, however, the Complainant's 2013 joint tax form shows only $22,813.56 in wages, tips, and compensation, with no other income. (JX 44.) The Complainant testified that

this amount reflected his own individual earnings, and that it included his earnings from *both* Silver Line and JP Jenks in 2013. If this is true, the Complainant had only $6,793.30 in income from JP Jenks in 2013.

Obviously, Weatherford's calculation that the Complainant worked for JP Jenks for 26 weeks at $1,000 per hour for a total of $26,000 in earnings for 2013 cannot be squared with his 1040 in 2013. Unfortunately, the record does not contain a W-2 or 1099-Misc form for his 2013 earnings from JP Jenks. Without further documentation, the undersigned is left only with the Complainant's tax form, and his own testimony. Although he testified at the hearing that he worked for JP Jenks from April to September 2013, earning approximately $1000 per week, he never testified that he worked regularly, for a full 26 weeks, as assumed by Weatherford in its brief. However, during his deposition on October 27, 2014, taken as part of his lawsuit against JP Jenks, the Complainant testified that his job with JP Jenks was a full-time job, and he was also required to work some weekends. (EX 7, dep. at 71.) If this is true, and the Complainant earned $1,000 per week working full-time from April until September 2013, it seems as if Weatherford is correct, and that he should have earned approximately $26,000 during 2013, which would have put his combined income from Silver Line and JP Jenks at approximately $42,020.26, not $22,813.56, as reported on the Complainant's 1040 in 2013.

In other words, either the Complainant failed to report all of his income in 2013 on his 1040, or his testimony that he worked full-time for JP Jenks from April through September 2013, earning $1,000 a week, is wrong. As the Complainant's testimony at the hearing and upon deposition was under oath, I find more credible his testimony than the 2013 tax return. I find, therefore, that in 2013, he had approximately $42,020.26 in other earnings. Accordingly, the Complainant's lost wages for 2013 would be $21,298.58, as calculated by Weatherford.

Weatherford further argues that after September 2013, the Complainant is not entitled to any further compensation for lost wages because he was terminated "for failing to wear the proper uniform on duty." (Emp. P.-Hg. Bf. at 41.) In other words, Weatherford argues that the Complainant breached his duty to mitigate damages by engaging in action which caused him to be terminated from subsequent employment. In support of this proposition, Weatherford cites two cases, *Patterson v. P.H.P. Healthcare Corp*., 90 F.3d 927 (5th Cir. 1996), cert. denied 117 S.Ct. 767 (1997) *Dreger v. Mid-America Club*, No. 95 C 4490, 1998 U.S. Dist. LEXIS 2536 (N.D. Ill. March 5. 1998).

Significantly, in *Patterson*, the Court emphasized that the employee "presented no evidence disputing the reasons given for his termination." (*Patterson, supra*, at 937.) In the present case, the Complainant disputed that the grounds for his termination. Specifically, the Complainant testified on deposition that he was wearing his personal protective uniform ("PPE"). (EX 10, dep. at 14.) During the hearing, he was asked how his diagnosis of colorectal cancer related to his termination from JP Jenks. (Tr. 121.) The Complainant responded as follows: "Well, after notifying them that I had cancer, I was fired. And when I asked why, they refused to give me a reason. And then when I filed for unemployment, they told the unemployment office that they had fired me because I had threatened to file an OSHA complaint and that I refused to wear my PPE." (Tr. 121-122.) Asked directly if he had engaged in "that conduct," meaning not wearing his PPE, the Complainant responded, "No." (Tr. 122.)

As can be seen, the Complainant clearly disputed the stated grounds for his termination from JP Jenks, asserting that he did not engage in any misconduct by failing to wear proper safety equipment. Therefore, this case is distinguishable from *Patterson*. As I have no way of determining the factual issue of why the Complainant was terminated from JP Jenks, I make no assumption that there was just cause for his dismissal from the company based on misconduct. I find, therefore, that the Complainant's termination from JP Jenks did not cut off his damages in this case, as argued by Weatheford.

Weatherford also argued that the Complainant's lost wages should "be cut off in April of 2014 when Complainant became disabled." (Emp. P.-Hg. Bf. at 42.) The Complainant testified that he was first diagnosed with colorectal cancer in early September of 2013. (*Id*. At 72-74.) Asked about his health at the time of the hearing, he responded, "I'm alive," and testified that his cancer was presently at Stage 4. (Tr. 38-39.) He stated that his medical condition impacted his ability to work, because most employers were looking for people to work Monday through Friday, whereas he needed time off for his chemotherapy treatments. (Tr. 39.) He clarified that as of April 2014, he had been receiving SSDI disability benefits. (*Id*.) He further clarified that ever since he went on disability in April 2014, he had not worked other than his present employment at Silver Line. (Tr. 40.)

Weatherford did not cite any authority for its argument that the Complainant's lost wages should be cut off when he filed for SSDI benefits. (Emp. P.-Hg. Bf. at 42.) The undersigned's own research has not found much precedent on this topic. However, in an early STAA case, the Secretary took the position that only earnings, and not disability benefits, should be offset against lost wages. Discussing "[u]nemployment compensation, welfare and disability benefits and similar assistance," the Secretary stated:

> As found by the ALJ, R.D. and O. II at 15; *see* R. D.and O. I at 10, benefits received from other sources during the period following Moyer's wrongful discharge, as opposed to earnings from alternative interim employment, *see Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177 (1941), may not diminish Yellow Freight's liability for back pay. *Rasimas*, 714 F.2d at 627-28; *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 83 (3d Cir. 1983); *Palmer v. Western Truck Manpower, Inc.*, Case No. 85-STA-16, Sec. Dec., June 26, 1990, slip op. at 9-10, *citing Hufstetler v. Roadway Express, Inc.*, Case No. 85-STA-8, Aug. 21, 1986, slip op. at 59, *aff'd sub nom. Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987); *see generally Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1112-13 (8th Cir. 1994)(discussing view held by majority of Federal appellate courts, as represented in *Craig* and *Rasimas*, that unemployment benefits should not, as a matter of law, be deducted from back pay awards in discrimination cases). I therefore reject Yellow Freight's arguments to the contrary.

(*Moyer v. Yellow Freight System, Inc.*, 89-STA-7, 6 (Sec'y Aug. 21, 1995)). I find, therefore, that the disability benefits the Complainant received beginning March of 2014 did not toll his lost wages and they are not deductible from his back pay award.

Although Weatherford does not make this specific argument in its brief, there is evidence that after he started to receive SSDI benefits, the Complainant no longer searched for work in earnest for a period of time. The Complainant was deposed on October 27, 2014, as part of his lawsuit against JP Jenks. (EX 7.) He testified that he had not worked since being let go by JP Jenks in September of 2013, despite looking for work and applying for jobs. (*Id*., dep. At 10-13.) He estimated that he had had five-to-ten telephone interviews, but no in-person interviews. (*Id*. At 16-17.) He stated that the most recent contact he had with any potential employer was in either March or April 2014. (*Id*. at 18.) The Complainant was then asked as follows:

> Q. So you *haven't* done any—You haven't sent out any resumes or put in any applications to any employer since March or April of [2014]?
> A. Correct.
> Q. So, you haven't done any job search work in about six months?
> A. Correct.
> Q. Why not?
> A. I am on disability.

(EX 7, dep. At. 18-19.)

At the hearing, the Complainant agreed that he had testified in his October 2014 deposition that his job search had stopped after he was placed on disability. (Tr. 150.) He added, however, that he was also working part-time while on disability. (Tr. 151.) Asked by the undersigned to clarify his hearing and deposition testimony on this issue, and specifically whether he stopped looking for work at some point, he testified:

> Well, I'm not sure for sure if you would—I didn't—I believe that I didn't put in for like five jobs a week or anything like that. If I saw something that I think that might have been able to work with my disability, then I would contact them. Like I know I contacted AIM over in Girard, Ohio. I contacted them several times. And I asked them, you know—I told them my situation. And I contacted them not too long ago, in fact, and told them my situation, and asked, you know, if you can work around my chemo schedule, I'd like to come work for you.

(Tr. 192-193.) He added, "Right now I'm trying to find something that work around my treatment schedule." (*Id*. at 203.) He further stated:

> Disability has a process that I'm allowed to work up to so much. After that I can't work anymore or I have to come off disability. So what I'm trying to do is if I can find something that allows me

> to work around my chemo thing, then ultimately I'd like to get off disability and go back to work. But I'm having a hard time finding a company that can work around my schedule. I mean, I can't ask somebody to bend over backwards for me.

(*Id.*) Later, however, on cross-examination, he stated that he could go back and perform his previous rotation at Williston, which was three weeks on the job and two weeks off. (Tr. 206.) The Complainant testified that he was, in fact, currently employed. He added that he had gone back to work at Silver Line, and drove a tractor trailer for approximately one month. (Tr. 35-36.) He stated that he drove from Ohio to New Jersey and back. (Tr. 38.) According to the Complainant, his work was "closer to part time" due to medical appointments. (*Id.*)

Weighing this testimony, it obviously lacks specifics. However, I take the Complainant at his word that, as he stated during his October 2014 deposition, after he started receiving SSDI benefits in April 2014, he went for a six-month period where he did not look for a job. He was asked specifically if he had done "any" job search in six months (April 2014 to October 2014), and he replied," Correct."

Normally, in order to show that the Complainant had failed to mitigate damages, Weatherford would be required to demonstrate not only that the Complainant did not conduct a job search, but also that substantially comparable work was available. However, the Board has held that where an employee admits to not job searching, the need to show the availability of comparable work is obviated. As stated by the Board,

> A wrongfully terminated employee is entitled to back pay for the period after the termination of employment. 49 U.S.C.A. § 31105(b)(3) (2004). The employee has a duty to exercise reasonable diligence to attempt to mitigate damages. *Griffith v. Atl. Inland Carrier*, ARB No. 04-010, ALJ No. 02-STA-034, slip op. at 70 (ARB Feb. 20, 2004). However, the employer bears the burden of proving that the employee failed to mitigate. *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1101 (3d Cir. 1995). The employer can satisfy its burden by establishing that "substantially equivalent positions were available [to the complainant] and he failed to use reasonable diligence in attempting to secure such a position." *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 98- 169, ALJ No. 90-ERA-30, slip op. at 50 (ARB Feb. 9, 2001). A "substantially equivalent position" provides the same promotional opportunities, compensation, job duties, working conditions, and status. *Id.*
>
> In this case, substantial evidence supports the ALJ's conclusion that Roberts made no effort to seek employment until June 2002. Roberts admitted as much, explaining that he was working on his OSHA complaint rather than looking for work. TR at 67-70. We therefore reject Roberts's contention that he is entitled to back pay

> for the period preceding June 3. Moreover, therefore, M-D did not need to prove the availability of substantially equivalent positions between September 19, 2001 and June 3, 2002. After that, Roberts applied to four companies but was able to obtain only a part-time, on-call position as a driver. *Id.* at 92-95. At that point, M-D had the burden of showing that Roberts was not diligently seeking full-time work by demonstrating the availability of jobs substantially equivalent to the one Roberts had and showing that he made no effort to obtain them. *Johnson v. Roadway Express, Inc.*, ARB No. 01-13, ALJ No. 99-STA-5, slip op. at 4 (ARB Dec. 30, 2002); *see Weaver V. Casa Gallardo, Inc.*, 922 F.2d 1515, 1527 (11th Cir. 1991).

(*Roberts v. Marshall Durbin Co*., ARB Nos. 03-071, 03-095, ALJ No. 02-STA-35 (ARB Aug. 6, 2004)).

Based on the Board's reasoning in *Roberts*, I find that the Complainant is not entitled to lost wages for the six-month period after April 2014, in which he admitted that he did not look for a job.

As for the rest of 2014, the Complainant indicated that from the date of his termination from JP Jenks in September 2013 until April 2014, he was engaged in a job search. Moreover, after October 2014, there is no evidence that the Complainant failed to mitigate damages. His hearing testimony suggested that at some point he began looking for part-time trucking jobs, but the record does not establish when he stopped not looking and began job-searching again. As it is Weatherford's burden to show a failure to mitigate, I find that the only period in which the Complainant was not entitled to damages was the six-month period in 2014, which he testified that he did not seek "any" employment.

As for earnings in 2014, the Complainant's 1040 joint tax return from 2014 shows business income of $14,899. (JX 45.) During the hearing, counsel for Weatherford stated that he was "really confused" by these reported earnings in light of the Complainant's testimony that "once you got disability insurance you stopped applying." (Tr. 155.) The Complainant replied that he "worked right around three months" in 2014. (*Id*.) When asked what three months he worked, he replied, "Well, once I was on disability, I think I worked about three months when I was on disability." (*Id.*) Asked if he worked full-time, the Complainant replied, ""Well, not necessarily. I was still doing—I still had to be let off for chemo treatments and stuff like that." (*Id*.)

Again, I must somehow reconcile the Complainant's inconsistent testimony. He earlier testified upon deposition that that he did not seek any employment for a six-month period in 2014, beginning in April when he began to receive SSDI benefits, but then at the hearing testified that he worked for three months in 2014 after he was found to be disabled. The only way this can be reconciled is to include that he worked in October, November, and December of 2014. In any case, he had earnings of $14,899.

In 2014, therefore, the Complainant is entitled to only six months of lost wages, or $31,659.42 (26 X 1,217.67). From $31,659.42 is deducted $14,899 in earnings. This amounts to lost wages of $16,760.42.

As for 2015, the Complainant testified at the hearing on August 26, 2015, that he had worked for "Silver Line, probably maybe a month." He estimated his earning as "three or four thousand bucks at the most." (Tr. 155.) He stated that he normally drove from Ohio to New Jersey and back." (Tr. 38.) According to the Complainant, he performed such work "closer to part time" due to his need to attend to his medical condition, including chemotherapy. (Tr. at 38-39.)

August 26, 2015 was the 35th week of the year. Using the average weekly wage of $1,217.67 per week at Williston, the Complainant would have earned $42,618.45 by the end of the 35th week. I find, therefore, that he had lost wages of $38,618.45 for 2015 until the date of the hearing ($42,618.45-$4,000).

As for the remainder of 2015, I have considered an award of front pay, which is a projection of the Complainant's likely earnings from Weatherford but for his retaliatory dismissal. However, given the Complainant's medical condition—and the fact that he passed away soon after the hearing, in March of 2016—I consider it overly speculative to predict the Complainant's economic fortunes for the remainder of 2015 and 2016. Although the Complainant gave little clue to his ill-health and was believable when he claimed to be able to continue to work around his chemotherapy, the fact that he succumbed in a relatively short period of time after the hearing renders it impossible to predict how long it would have been before he voluntarily withdrew from the workforce due to his health.

In sum, I find that the Complainant was entitled to lost wages totaling $82,119.00 for 2012, 2013, 2014, and 2015.

2. Mental Distress

When adequately shown, a complainant may also be entitled to compensation for mental harm caused by the employer's retaliatory conduct. As stated by the Board:

> An employer who violates the STAA may be held liable to the employee for compensatory damages for mental or emotional distress. 49 U.S.C.A § 31105(b)(3)(A)(iii); *Jackson v. Butler & Co.* ARB Nos. 03-116, 144, ALJ No. 2003-STA-026, slip op. at 009 (ARB Aug. 31, 2004). Compensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 33 (ARB Feb. 9, 2001) (citations omitted).
>
> Emotional distress is not presumed; it must be proven. *Moder v. Village of Jackson, Wis.*, ARB Nos. 01-095, 02-039, ALJ No. 00-WPC-005, slip op. at 10 (ARB June 30, 2003). "Awards generally require that a plaintiff demonstrate both

> (1) objective manifestation of distress, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress." *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993-SWD-001, slip op. at 17 (ARB July 30, 1999) To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Gutierrez v. Univ. of Cal*., ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 9 (ARB Nov. 13, 2002).

(*Simon v. Sancken Trucking Co*., ARB No. 06-039, -088, ALJ No. 2005-STA-40 (ARB Nov. 30, 2007)).

Although it is the complainant's burden to prove compensatory damages, that burden may be accomplished by the complainant's uncontradicted testimony, when found to be persuasive. For example, in *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004), the ARB affirmed the ALJ's award of $4,000 for emotional distress based on the testimony of the Complainant and his wife, even though that testimony was not supported by evidence of professional counseling or other medical evidence, where the testimony was unrefuted by the respondent.

The Complainant's deposition testimony regarding the emotional harm he allegedly suffered has been previously summarized. According to the Complainant, he had not visited any physician since January 2013 for any type of mental issues. He stated that he could not "recall at this time" whether he had ever seen a physician for such issues. (*Id*.) Nonetheless, he insisted that he "definitely had issues with being down or depressed." (*Id.*) He recalled that this emotional state continued even after he was hired by JP Jenks because the job "wasn't even close to what I had at Weatherford." (*Id*. at 40.) When asked if the diagnosis of cancer was "a much bigger event in your life than the Weatherford issues," he replied, "I would think so." (*Id*.) Asked if he had any symptoms to buttress his claim of emotional damage, he stated that he "definitely had issues sleeping," as did his wife. (*Id*.) He believed that he had become more irritable, and that his irritability had caused issues with his wife, who felt he was complaining too much. (*Id.*) The Complainant testified that he had been reluctant to seek any psychiatric care for fear it would come out in a job application and reduce his chances of being hired. (*Id*. at 42-43.)

While I found the Complainant's testimony credible on this issue, it is not extensive, and after a complete review of the record, I find that the evidence of emotional harm, or mental anguish or upset, is insufficient to support anything more than a nominal damages. While, clearly, his termination caused him mental distress, the Complainant simply did not present evidence with the specificity required to justify more than a nominal damage award. There was, for example, no evidence of extreme stress, depression, loss of self-esteem, excessive fatigue, or a nervous breakdown. Furthermore, there was no evidence of physical manifestations of stress. While one does not wish any of these things on anyone, physical manifestations of severe emotional harm are often present. Without them, there is inadequate evidence of specific discernible injury to the Complainant's emotional state.

Clearly, though, the Complainant did suffer some emotional harm, mental anguish, and distress. He reported sleeplessness and marital strain. Consequently, I find that the Complainant is entitled to $10,000 in nominal damages for mental distress.

3. Punitive Damages

In the amendments effective August 2007, the STAA provides that "relief in any action under subsection (b) may include punitive damages in an amount not to exceed $250,000." 49 U.S.C.A. § 31105(a)(3)(C). Punitive damages are to punish unlawful conduct and to deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001). Punitive damages are appropriate for cases involving "reckless or callous disregard for the [complainant's] rights, as well as intentional violations of federal law . . . ." *Smith v. Wade*, 461 U.S. 30, 51 (1983), *quoted in Ferguson*, ARB No. 10-075, PDF at 8-9. The Administrative Review Board further requires that an administrative law judge weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, PDF at 8.

In its brief, the Complainant makes no express request for punitive damages. (Comp. P.-Hg. Bf. at 22.) However, the Complainant argued that the record "makes clear that Weatherford did not take [the Complainant's] complaints seriously." (*Id.* at 17.) The Complainant further argued that "Weatherford's investigation of [the Complainant's] allegations was so poor as to be almost non-existent. [The Complainant] was never questioned in connection with the investigation….Terry Crabb stated that he did not know of any employees being interviewed…. While Nicholson told [the Complainant] that his complaint was being investigated, there is no documentation that any such investigation ever occurred." (*Id*.)

Based on what he perceived as a lack of real investigation into his complaints, the Complainant asserted that "Weatherford did not want to know the truth; it simply wanted to get rid of the employee who blew the whistle on illegal activities." (*Id*. at 18.) The Complainant further contended that "Weatherford's manner of treatment of [the Complainant] was not an isolated incident but rather was part of a course of conduct and manner of conducting business." *Id*. Citing Gould's deposition testimony, the Complainant argued that "[r]etaliation against employee who complained was a pattern of behavior by Crabb as well as his express policy." (*Id*. at 19.)

I find these arguments in favor of an award of punitive damages, for the most part, compelling. Based on the Complainant's testimony and that of his co-workers, it appears that the culture at Williston while the Complainant worked there was rife with disgruntled workers who feared that if they took their safety concerns too far up the chain of command—i.e., above Crabb's head—they would face dismissal. Crabb did not deny that he threatened as much. The threat took place at a meeting of workers, not just in an isolated conversation. Nicholson gave conflicting testimony whether Crabb was ever disciplined for making the threat—Crabb denied

that he was punished, although he acknowledged that he had been spoken to. There is no evidence that Weatherford, after learning of the threat, ever took steps to undo its impact or assure its workers that they would not be punished for taking their concerns to HR. To the contrary, I agree with the Complainant that although Weatherford claimed to have investigated the Complainant's allegations, there is little evidence in the record that such an investigation was ever conducted. None of the supervisors claimed to have been contacted by HR, not even Crabb. If there was an investigation, nothing seems to have been investigated. Indeed, I question the existence of the investigation as much as I question the non-existence of any written report from the Pittman investigation. The Weatherford HR department seemed strangely unable to document any investigation into anything.

I have surveyed the award of punitive damages in other STAA cases, but it would be disingenuous to suggest that one case is like another. Each case presents its own unique circumstances. The immediate act of retaliation in this case, I believe, was driven more by Crabb's character and animus toward those that went to HR than any company policy, which, on paper at least, favored employee safety. To the extent that Crabb is no longer involved in the day-to-day operations at Williston, as he assumed a sales position, presumably the chances of the treatment the Complainant received being repeated will be reduced. Still, I find that an award of $25,000 in punitive damages is appropriate. I hope that it will inspire Weatherford's HR department to do a better job of investigating employee safety concerns in the future and protect employees from retaliatory action.

ATTORNEY FEES AND COSTS

The Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C.A. § 31105(a)(3)(B). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted twenty (20) days from the date of this Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and the entire record, I enter the following Order:

1. Weatherford will pay the Complainant $82,119.00 in back pay, with both pre- and post-judgment interest.

2. Weatherford will pay the Complainant $10,000 for emotional harm.

3. Weatherford will pay the Complainant $25,000 in punitive damages.

4. Counsel for the Complainant shall have twenty (20) days from the date of the Decision and Order within which to file a fully supported application for fees, costs and

expenses. Thereafter, Weatherford shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto

SO ORDERED.

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.

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

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

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