U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 04 April 2016

CASE NO.: 2015-STA-00047

IN THE MATTER OF:

MICHAEL GARRETT
Complainant

v.

BIGFOOT ENERGY SERVICES, LLC
Respondent

APPEARANCES:

Paul O. Taylor, Esq.,
On behalf of Complainant

Robert A. Sherman, Esq.,
On behalf of Respondent

BEFORE:
Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This case arises from a complaint filed by Michael Garrett ("Complainant") against Bigfoot Energy Services, LLC, Robert Sherman, and Douglas Gile ("Respondents") under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended and recodified, 49 U.S.C. § 31105 and implemented by the regulations at 29 C.F.R. § 1978.100 *et. seq.* (2001).

Complainant alleges that he engaged in protected activity when he reported a defective steering system and turn signals to his supervisor on July 15, 2014, July 25, 2014, and August 1, 2014. On August 3, 2014, Complainant was involved in an accident, after which he alleged the accident may not have occurred if the turn signals were functioning. He also sent an e-mail to Robert Sherman, owner of Bigfoot Energy Services, that stated management had been informed of the defective turn signals but did nothing to repair them. Complainant alleges that Respondent retaliated against him by terminating his employment on September 12, 2014, on charges related to the accident and his reporting of the defective turn signals.

On November 12, 2014, Complainant filed his whistleblower complaint. On March 17, 2015, the Secretary of Labor, acting through its agent, the Regional Administrator for the Occupational Safety and Health Administration ("OSHA"), found that there was no reasonable cause to find that Respondent retaliated against Complainant for reporting defects with a vehicle. Complainant made a timely request for a hearing. Following Complainant's timely filed objections to OSHA's initial finding of no violation, the instant case, pursuant to 29 C.F.R. §1978.106, was referred to the undersigned Administrative Law Judge for hearing. Pursuant to 29 C.F.R. § 1978, the undersigned conducted a hearing on the issues raised by Respondent's termination of Complainant in Shreveport, Louisiana on September 17-18, 2015.

At the hearing, the parties were afforded the opportunity to call witnesses and introduce evidence. Complainant testified on his own behalf and called two witnesses: Robert Sherman, an owner and manager of Bigfoot Energy Services, LLC; and Doug Gile, Complainant's immediate supervisor while employed by Respondent. Complainant introduced 4 exhibits (CX-1 to CX 4), which were admitted during the hearing. Respondent introduced 17 exhibits (RX-1 to RX-17), which were also admitted into evidence. The parties also submitted seven joint exhibits, which included the August 3, 2014 accident report and photos, the e-mail from Complainant to Robert Sherman, employment and payroll records of Complainant, and the deposition transcript of insurance adjuster Thomas Moore. (JX-1 to JX-7). The parties were also given the opportunity to submit post-trial briefs.

I. STIPULATED FACTS

The parties stipulated to the following facts:

1. Complainant Michael Garrett resides at 1312 Southview Circle, Center, Texas 75935.

2. Respondent Bigfoot Energy Services, LLC operates 18-wheeler tractor-trailer rigs in interstate commerce. Respondent Bigfoot Energy Services, LLC maintains its principal place of business at 7486 FM 999, Timpson, Texas 75975.

3. Respondent Robert Sherman is a member of Bigfoot Energy Services, LLC and is an individual who participated in the decision to discharge Complainant. Mr. Sherman maintains a business address at 312 W. Sabine Street, Carthage, Texas.

4. Respondent Douglas Gile is a manager at Bigfoot Energy Services, LLC and the individual who discharged Complainant.

5. From about May 22, 2014, to September 12, 2014, Respondent Bigfoot Energy Services, LLC employed Complainant to operate commercial 18-wheeler tractor-trailer rigs having a gross vehicle weight rating of 26,001 pounds or more on the highways in interstate commerce.

6. On September 12, 2014, Respondent discharged Complainant.

7. On or about November 12, 2014, Complainant filed a Complaint with the Assistant Secretary of Labor for Occupational Safety and Health alleging that Respondents had fired him and retaliated against him in violation of 49 U.S.C. §31105.

8. On March 17, 2015, the Secretary of Labor issued preliminary findings and an order pursuant to 49 U.S.C. §31105(b)(2)(A).

9. On April 3, 2015, Complainant filed objections to the Secretary's Preliminary Findings and Order pursuant to 49 U.S.C. §31105(b)(2)(B) and requested a hearing de novo before an administrative law judge of the Department of Labor.

10. United States Department of Labor, Office of Administrative Law Judges has jurisdiction over this proceeding pursuant to 29 C.F.R. §1978.107(b).

11. At approximately 3:45 am on August 3, 2014, while driving his assigned tractor-trailer set on Interstate 20 in Shreveport, Louisiana, Complainant was involved in an accident with a passenger vehicle.

12. On September 5, 2014, Complainant sent an email to Robert Sherman, a copy of which is offered as JX-2.

13. Complainant Michael Garrett admits that the statements in his Complaint filed to initiate this proceeding are accurate.

14. Complainant Michael Garrett admits that the statements in his Rebuttal Letter filed in this proceeding, dated February 6, 2015, are accurate.

15. Complainant Michael Garrett admits that the matters set forth in the State of Louisiana Uniform Motor Vehicle Traffic Crash Report, for the accident which occurred on August 3, 2014, are accurate.

16. Complainant Michael Garrett admits that the matters set forth in his Bigfoot Energy Services Employment Application are accurate, with the exception that the correct address for Bennett Drilling is 1156 Hills Lake Road, Carthage, Texas 75633.

17. Complainant Michael Garrett contends he was not at fault in causing the accident which occurred on or about August 3, 2014.

18. Complainant Michael Garrett admits that Respondent Bigfoot Energy Services informed him while he was employed at Bigfoot Energy Services that the other driver involved in the accident was making a claim against Respondent Bigfoot Energy Services as a result of the accident.

19. Complainant Michael Garrett admits that he knowingly operated Respondent Bigfoot Energy Services's truck with a defective turn signal.

20. Complainant Michael Garrett admits that he knowingly operated an illegal truck namely while working for Respondent Bigfoot Energy Services.

21. Complainant Michael Garrett admits that he knowingly operated Respondent Bigfoot Energy Services's truck in violation of DOT rules while working for Respondent Bigfoot Energy Services.

22. Complainant Michael Garrett admits that he was driving straight ahead in the right hand lane on I-20 in Shreveport, Louisiana when the accident occurred.

23. Complainant Michael Garrett admits that the statements made in his email to Respondent Sherman, dated September 5, 2014, are accurate.

24. Complainant Michael Garrett admits that the statements made in his text message sent to Doug Gile on or about September 14, 2014, are accurate.

25. Complainant Michael Garrett admits the manner in which the accident occurred was that he was driving straight ahead and experienced a sensation similar to a blow out of a tire. Complainant Michael Garrett admits he pulled over to inspect the tires of his vehicle, and observed that he had collided with another vehicle.

26. The parties stipulate to the admissibility of Joint Exhibits identified on the Joint Exhibit List.

II. ISSUES

1. Whether Complainant engaged in protected activity under the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105(a)(1)(A)(i), by filing complaints with the Respondents related to reasonably perceived violations of commercial vehicle safety regulations.

2. Whether Complaint's alleged protected activity was a contributing factor, in whole or in part, in any adverse action taken against him by Respondent, including the September 12, 2014 decision to dismiss Complainant from his employment with Bigfoot Energy Services.

3. Whether Respondents established by clear and convincing evidence that it would have made the same decision even if Complainant did not engage in the alleged protected activity.

4. Whether Robert Sherman and/or Douglas Gile are individually liable to Complainant.

5. Whether, and to what extent, Claimant is entitled to damages, including punitive damages, and other relief available under the STAA.

6. Whether the decision to dismiss Complainant caused or contributed to Complainant's alleged damages, and if so, the extent, measure, and quantum of those damages.

7. Whether Complainant is entitled to reinstatement to his former job with Respondent.

8. Whether compensatory damages for pain and suffering are appropriate to award Complainant.

9. Whether Complainant is entitled to any back pay for the period of time during which he was unable to work after his termination.

10. Whether Complainant has met his burden of proof with regard to his claim for punitive damages.

III. TESTIMONY

A. Michael Garrett, Complainant

Complainant, Michael Garrett, is a 47-year-old male residing in Center, Texas with his 14-year-old daughter and mother whom he financially supports. After graduating from high school, Complaint attended truck driving school and received his commercial driver's license. Complainant's commercial license authorizes him to operate tanker vehicles, vehicles with hazardous materials, and double or triple trailer sets. (Tr. 122-125).

Prior to working for Respondent, the majority of Complainant's employment was in the oil field, hauling saltwater and oil base fluids to different rigs or for disposal. Complainant never stayed out on the road for one or more days or nights. (Tr. 125-126). Complainant's first job was with Bennett Drilling. He also has worked for Lotus Oilfield Services, Basic Energy Services, Triple F, Nuverra (which is Heckman Oilfield Services), A & Junior Oilfield Services, and Fleetwood Transportation. Complainant stated the reasons he has worked for many different companies was due to low pay, slow work, or being terminated for poor job performance or allegedly questioning company safety violations he witnessed on the job. (Tr. 126-127).

Other than the accident on August 3, 2014, Complainant has never been in any accident in a commercial motor vehicle nor has he received any moving traffic citations in the eight years he has worked as a commercial driver. (Tr. 128).

Complainant applied to Bigfoot after hearing from a friend that Bigfoot was hiring and that the pay was "pretty good." After submitting his application, Complainant was informed he was hired by Robert Sherman. About a week after he was hired, Complainant was assigned to Truck 1387 and operated the same truck, although there were occasions when he operated another truck. (Tr. 128-130).

During his time with Respondent, Complainant testified he attended one safety meeting and was instructed by dispatcher Gina to report truck and equipment defects that need repairs on a notice posted on an accompanying wall rather than noting the defect on the vehicle inspection reports. (Tr. 131-134).

Complainant first noticed a problem with the turn signals of his truck while behind the wheel about two to three weeks before the August 3, 2014 accident. He stated the light "would just be bright and it wouldn't blink." Sometimes it worked, but during the course of the work period, it would quit, and he would have to manually indicate a turn signal. (Tr. 134-135).

After discovering the intermittent turn signal defect, Complainant informed Gile in person, who told him "he'd get it fixed." He allegedly complained of the defect turn signals three times to Gile and also complained "the truck was shaking real bad" before the accident. Gile allegedly told him he did not care about the signal lights, and Complainant continued to drive with intermittent signal lights. Complainant stated the turn signal defect was corrected two weeks after the accident. (Tr. 136-138).

Complainant also complained to Dustin, a Bigfoot employee, about the turn signals a week or two before the accident. Dustin told him he would tell Gile, because "everything went through" him. Complainant also listed the problem on the work orders he submitted to Bigfoot but not in the vehicle inspection reports he kept in bound booklets, one per month, in his truck. (Tr. 140-141).

On August 3, 2014, Complainant testified he drove to Arcadia to pick up "a lot of ten pound brine." While traveling back to the Carthage facility, at about 3:00 a.m., Complainant felt what he thought was a flat tire and tried to exit the Interstate. When he exited the vehicle to check the flat tire, he noticed a car under the truck. Complainant was "totally shocked" had no clue how that had occurred or when the car became lodged under the truck. (Tr. 141-144).

Upon noticing the car lodged under his truck, Complainant helped the driver exit the car. The driver's nose was bleeding but he was coherent. A lady pulled over and informed Complainant and the driver that she had called 911. The other driver asked Complainant what he wanted him to say to the police. Complainant told him "to tell the truth." (Tr. 144).

The police arrived on the scene about 5-10 minutes later. Complainant told the police he was headed west and thought he heard a flat tire. He exited the Interstate to call someone to fix the flat tire. When he got out of the truck, he noticed a car under the truck. (Tr. 146).

While still at the accident scene, Complainant called Bigfoot and spoke to Dustin, the night dispatcher on duty. He told Dustin about the accident and gave him his location. Dustin informed Complainant that he was going to call Doug Gile. Complainant spoke to Gile by phone and was told to meet him at a nearby relay station. (Tr. 147).

Gile and his wife met Complainant at the relay station. Gile asked Complainant about the accident, and Complainant allegedly told him the accident might not have occurred if the signal lights had been fixed. Gile asked Complainant if he told the police about the signal lights.

Complainant told him he did not, since the police did not ask about any mechanical issues. After speaking at the relay station, Complainant and Gile drove back to Carthage, with Gile following behind the truck. Complainant and Gile never spoke about the accident again until the September 2014 safety meeting. (Tr. 148-152).

In his August 14, 2014 post-trip inspection report, Complainant noted "turn signal is not working properly." However, Complainant changed his testimony and stated the turn signals did not get repaired. (Tr. 153-156; CX-2, p. 2).

At the September 2014 safety meeting, Sherman and Gile were present. The meeting lasted 30-45 minutes and was initially led by Janet, a manger. After Janet spoke, Sherman spoke to the employees. Complainant had stood next to Sherman before he got up to speak. Sherman told them that any driver who was involved in an accident, regardless of fault, would be fired. Complainant stated he was respectful during the meeting and did not mutter anything under his breath, though he did feel as though Sherman was blaming the drivers for the accidents, even though management was not properly maintaining the fleet. During the meeting, Sherman informed Complainant that the driver was suing Bigfoot due to the accident. Complainant stated he would not change his story, which had been consistent since the accident. (Tr. 156-160).

After the meeting, Complainant felt Sherman did not know "the real story," because Gile was in charge of everything. As a result, Complainant sent Sherman an e-mail in response to what he viewed as a blaming of the drivers at the safety meeting. He intended the email to "clear up everything," from the problems he had with the truck to Bigfoot's responsibility to maintain the fleet. In the email, Complainant also admits to breaking a DOT regulation. Sherman never responded to the email. (Tr. 161-165; JX-2).

Complainant did not work the week after he sent the email, which was unusual. Bigfoot claimed work was slow and sent drivers home early. Bigfoot told Complainant to call first before coming in to ensure there was work. (Tr. 165).

On September 12, 2014, Complainant called Gile, who informed him during the call that he was fired. Gile told him the order to terminate Complainant came from Sherman and that he did not have a specific reason for the termination. (Tr. 165-166). After he was terminated, Complainant sent a text message to Gile falsely alleging that he had recorded all their conversations in an attempt to have Gile tell the truth. (Tr. 168-169; RX-4).

Complainant was unemployed for about a month after his termination. He began looking for work immediately after his termination. Complainant stated this month was difficult since he supported himself, his daughter, and his mother. It was difficult not to be able to give them what they needed. He also said it was very stressful to provide when he believed he was terminated for no legitimate reason. Complainant and his family had to change their lifestyle and fell behind on their bills during this time. Complainant also stated he was depressed and had trouble breathing and sleeping. (Tr. 169-174).

Complainant was hired by Western Transportation, Inc. on October 4, 2014 and earned $288.00 while employed by Western Transportation. On October 28, 2014, Complainant voluntarily left Western Transportation due to his daughter. Western Transportation wanted Complainant to travel out of town, but Complainant did not have anyone to watch his daughter. (Tr. 174-178; JX-3, p. 1; JX-6, p. 1).

After leaving Western Transportation, Complainant was hired by Heckman Water Resources, also known as Nuverra Environmental Solutions, from October 29-November 15, 2014 and earned $1,642.11. Complainant left Heckman due to his diabetes diagnosis preventing him from performing the physical requirements of the job. On December 4, 2014, Complainant was hired by Omni Energy Services, Corp. as a truck driver and earned $858.00. Complainant quit his job at Omni due to the different nature of the job that made him uncomfortable. He also quit the job, because the hours conflicted with taking care of his daughter. (Tr. 178-184; JX-2, p. 2; JX-6, p. 3).

From January 6-19, 2015, Complainant worked for Triple F Oilfield Services and earned approximately $2,000. Complainant had complained of rats in a trailer he was living in while working for Triple F. Complainant alleged he was fired from Triple F due to his complaints of the living conditions of the trailer. However, he was told he was terminated due to his refusal to do certain tasks. (Tr. 184-186).

Next, Complainant was hired by LATX Operations in Wacomb, Texas to haul saltwater from February 17-March 9, 2015. During his time at LATX, Complainant earned $2,193.35. Complainant was terminated from LATX after he clipped his mother's car with his company truck in the company parking lot. Complainant also admitted to lying on his LATX employment application by stating he was unemployed from June 2014-January 2015. Complainant stated the basis for the misrepresentation on his application was that he was desperate for work. (Tr. 186-190; RX-16).

After LATX, Complainant was hired by H5 Logging from April 29, 2015 until August 2015. While employed by H5 Logging, Complainant earned $10,372.00. Complainant left H5 Logging for a better job. In August 2015, Complainant was hired by B&W Chipping, earning approximately $800-900 per week. (Tr. 190-192; JX-6, p. 6).

On cross examination, Complainant admitted he has two DWI convictions, including one while driving with a suspended license. Complainant also admitted he lied in his email when he alleged he had recorded every phone call or text with the dispatchers and Gile. (Tr. 195-198; JX-4, p. 4; RX-4).

Complainant repeated his prior testimony that he was unsure whether the accident occurred when he was driving straight ahead or when exiting the Interstate. Complainant also stated there was never a time when the blinker was not in operation, claiming he would manually operate the blinker when it was not working. (Tr. 205-210; JX-2).

When asked why he did not mention the defective blinkers to the police at the accident scene, Complainant responded he did not mention it since they did not ask about any mechanical issues or any specific questions about the truck. However, later that day, Complainant told Gile that the blinker defect could have contributed to the accident. Complainant stated the reason he did not tell the police about the blinkers because he was in shock and merely responded to the officer's questions. He further stated the reason he told Gile about the defective blinkers was because he believed Gile was not doing his job. (Tr. 212-216).

Complainant agreed that he did not approach Sherman at the September 2014 safety meeting to discuss the blinkers. He also agreed the meeting was the first time he heard the other driver was making a claim against Bigfoot for the August 2014 accident. Complainant informed Sherman of the defective blinkers by email the following day. (Tr. 230-233; JX-2).

When asked about the lack of notation in the vehicle inspection report, Complainant stated DOT only required a person to list a defect likely to result in accident or breakdown. Complainant stated he did not list the defective blinkers, since he would be able to operate them manually if they failed while driving. Complainant thought he could still perform his job safely. Complainant regretted driving the truck and not going home without work for that day. However, he also said he needed the work to provide for his family. (Tr. 243-244).

Further, Complainant did not list the blinker problem on the vehicle inspection report, because a dispatcher had instructed him to note the problem on the designated form in order for Gile to request a repair. However, Complainant failed to include the defective blinkers in the inspection report marked for defects that need not be corrected for safe operation of the vehicle. (Tr. 245-250).

After he was terminated by Respondent, Complainant spoke with Thomas Moore, an insurance adjuster, about the accident. Complainant told Moore the same account he told the police regarding how the accident occurred. Complainant did not bring up the blinker as a factor in the accident. However, he did admit to telling Moore that he and the other driver could "team up and sue Bigfoot" but that he "didn't have it in" him to do so. Complainant testified that Bigfoot never instructed him to drive a truck that was unsafe. (Tr. 250-255).

Complainant stated he lied on the job application to not look like an unstable person who hopped from job to job. He claimed no company would have hired him if his employment history was listed. Thus, he claimed he was unemployed in order to provide for his family. (Tr. 258-260).

On redirect examination, Complainant agreed that the vehicle inspection reports never indicated the truck was in compliance with safety regulations. (Tr. 264-266; RX-2). Complainant stated he has been stopped by enforcement officers in the past for a random roadside inspection of his truck. Complainant also stated the officers on the scene of the accident did not perform a similar inspection like those conducted in a random roadside inspection. (Tr. 266-268).

B. Robert Sherman, Owner/Manager of Bigfoot Energy Services

Robert Sherman is an owner of Bigfoot Energy Services, an oil and gas field service company that operates trucks and truck-trailer combinations to haul fluid from oil wells to disposal sites. Complainant was an employee who operated a tractor-trailer for Respondent. (Tr. 40-41).

Sherman first received knowledge that Complainant had been involved in accident while operating a Bigfoot Energy Services tractor-trailer early on the morning of August 3, 2014 from Bob Gile. When Sherman received the accident report, he read it but did not question Complainant about the report. The accident report mirrored the same account of the accident given by Complainant to Gile. Sherman did not have any conversations with Complainant about the August 3, 2014 accident until a safety meeting on September 4, 2014. Sherman then stated he did not know how a defective turn signal could relate to the account of the accident as stated on the accident report. (Tr. 41-45; JX-1).

Sherman testified that he did not know if the police officer at the accident performed a thorough investigation or asked Complainant about any mechanical defects, because he was not at the scene on August 3, 2014. However, the accident report does state the tractor-trailer had no visible defects. Further, the accident report states citations for following too closely were given to the driver of the other vehicle involved in the accident. After the August 3, 2014 accident, Sherman stated Complainant was not immediately disciplined. Rather, he "let things play out at that time." Complainant received no warning letter, write-up, or suspension. (Tr. 45-50; JX-1).

At the safety meeting, all drivers, dispatchers, and Gile were present. Sherman testified he was the presiding official over the accident reports at the meeting. Complainant did not raise the fact that he believed Bigfoot was not doing its part in maintaining equipment to him at the meeting. Sherman stated Complainant was mouthing under his breath while he announced there was going to be a zero tolerance accident policy put in place. (Tr. 51-54).

After he received the other driver's insurance demand, no steps were taken towards disciplining Complainant. On September 5, 2014, Sherman received an email from Complainant in which Complainant changed his story about the August 3, 2014 accident. Sherman stated he believed Complainant "was setting us up for a safety claim." He believed Complainant was "going to turn this into a big brand new safety deal and bring all that up…and weave it into the accident for the first time" in an attempt to get damages for his personal injuries in the accident. (Tr. 54-58; JX-2).

Sherman believed Complainant had "felt threatened" due to the safety meeting and was trying to keep his job. Sherman also stated Complainant "would have had a decent chance of staying employed" had he not changed his story and done his job well. (Tr. 58-60).

Sherman confirmed his signature on Respondent's statement of position to OSHA, dated January 26, 2015, in which the document states Complainant was terminated primarily based on the inconsistencies between his statements made to law enforcement at the scene of the accident and his later statements blaming an alleged blinker problem for the accident. In particular,

Complainant did not have anything to back up his new story. Without any support for his new account of the accident, Complainant was dismissed. (Tr. 61-64).

Due to the decline in the oil industry market, Complainant would likely not have received a pay increase had he continued working for Respondent. Sherman testified his company had no across-the-board pay increased since September 2014. (Tr. 64).

The July 26, 2014 vehicle inspection report for Truck 1387 stated the pigtail, an electrical cord that activates going from the tractor back to the trailer, needed repair. However, Respondent does not have any vehicle inspection reports for Truck 1387 after August 5, 2014 due to its policy of discarding the reports after ninety days. The July 26, 2014 vehicle inspection report was submitted to OSHA and was not discarded like the other inspection reports. Sherman also stated he knew of Complainant's STAA claim at the time he submitted the inspection report to OSHA. (Tr. 65-68; RX-2).

Sherman further testified that more than one driver operates the same truck and that the other driver of the truck reported that Complainant's email contradicted the inspection reports, which did not help his case. Further, any statements Complainant made to the insurance adjuster came after he was terminated had no effect in Respondent's decision to terminate Complainant. (Tr. 68-71).

On cross examination, Sherman stated he first learned of Complainant's accident that same day and called the insurance company to put them on notice. A week after the accident, he learned of the insurance claim by the other driver. After receiving notice of the other driver's claim, Sherman spoke with the insurance company and discussed how the other driver was cited and was deemed at fault. (Tr. 71-73).

Sherman further stated the purpose of the September 2014 safety meeting was to discuss a number of recent accidents and a new no tolerance policy for accidents. Sherman conducted the portion of the meeting relating to accidents, and Complainant stood next to him at the meeting. While the general reaction to the new policy was somewhat negative,[1] Complainant "mumbled under his breath" and "didn't like it either." Sherman was available to talk to any employee both before and after the meeting. However, Complainant did not say anything to him about his accident. (Tr. 73-75).

Sherman received Complainant's email a day or two after the safety meeting, and upon reading it, was the first time he had heard anything about the trucker's defective blinkers. After reading the email, Sherman pulled the vehicle inspection reports to see if there was any notation about the blinkers, but there was not. Based on the lack of support for his new account, Sherman decided to terminate Complainant. (Tr. 75).

[1] Mr. Sherman testified the "general reaction at the safety meeting was, you know, there was some hemming and hawing and, you know, one or two drivers did not like a zero tolerance on accidents." (Tr. 74).

Sherman stated the decision to terminate Complainant was a joint decision between him and Gile. He also stated safety meetings generally occur once a month. (Tr. 76-77). He also stated Bigfoot does not have a fixed policy regarding the hiring of drivers who have had DWIs in the past. (Tr. 273).

C. Douglas Gile, Complainant's Supervisor

Douglas Gile is an employee of Respondent whose immediate supervisor is Robert Sherman. On August 3, 2014, Gile received a phone call from Complainant notifying him that his truck had been in an accident in Shreveport. Gile drove directly to Shreveport after talking to Complainant. In Shreveport, Gile met Complainant at the relay station, or truck stop. Gile asked Complainant if he and the other driver were okay and if the truck was badly damaged. Complainant told him the other driver received the citation. Gile offered to drive the truck back to Carthage, but Complainant told him "he was good." Gile and Complainant also walked around the truck to check it and take pictures of it. (Tr. 80-82).

Gile conveyed what Complainant told him at the relay station to Sherman on August 3, 2014. Gile reiterated that safety meetings occurred once a month and that Complainant did not attend the other safety meetings because he was likely off on those days. (Tr. 84-85).

Gile became aware of Complainant's email to Sherman on September 5, 2014 or the following day, when Sherman told him about it. On the day Complainant was fired, there were three other drivers who witnessed Complainant get fired. After Gile informed Complainant he was terminated, Gile stated "he kind of got mad" and said "he was going to sue." Gile also stated Complainant did not ask why he was fired. (Tr. 85-88; JX-2).

On September 19, 2014, Gile spoke with Thomas Moore, an insurance adjuster for Riskcom Claims Management, about Complainant's accident. During their conversation, Gile did not mention Complainant's allegations of a defective turn signal. (Tr. 88-89).

When he examined the inspection reports, Gile stated he was not sure why there were no inspection reports after August 5, 2014 for Complainant's truck. He also stated inspection reports are kept at the Carthage, Texas facility for ninety days before being sent to the main office in Arcadia, Texas. (Tr. 89-93; RX-2).

The Carthage office did not have a shop onsite. Rather, four or five people came to the site to repair trucks. Generally, Gile became aware of any problems with a truck or trailer by inspecting a driver's inspection report. Then, Gile would call an outside vendor to schedule a repair. For repairs to hoses or fittings, drivers would submit another form that was "non-DOT for trucks." (Tr. 93-94; CX-2, p. 1).

Gile could only recall two other accidents during the summer of 2014. Both accidents were caused by a tree that fell across the road. Gile also stated he never saw the accident report for Complainant's accident. However, Thomas Moore stated Gile told him Complainant had told him a different story than what was listed on the police report. (Tr. 94-95).

On cross examination, Gile recalled asking Complainant on August 3, 2014 how the accident happened. Complainant told him he felt like he had a flat tire and pulled over. When he pulled the truck over to the side of the road, there was a car under the trailer. Gile also stated Complainant never told him any other account of the story until Sherman received Complainant's email. (Tr. 97-98).

Gile confirmed Respondent's policy that all drivers are required to complete a driver vehicle inspection report before and after a shift as required by DOT. Also, a driver is required to take his pre-trip driver vehicle inspection report with him while on the road. A driver must further kept inspection reports for seven days prior and seven days after. If there is a problem with a truck before a driver goes out for a shift, the company's policy is either to fix the problem or shut the truck down. Gile testified that generally there were 2-3 extra trucks in the yard. (Tr. 102-104; RX-17).

Gile stated Complainant's truck did have a blinker problem and front end problem at some time in July, but those problems were remedied promptly. (Tr. 104). On August 3, 2014, Gile followed Complainant from Shreveport back to the Carthage facility. Gile did not notice any blinker problems while following Complainant. Also, the issues of the August 3, 2014 accident or defective blinkers were not brought to Respondent's attention at the safety meeting. (Tr. 107-108).

After Complainant was terminated, Gile received a text message from Complainant on September 14, 2014, stating he had recorded phone calls with dispatchers and other employees. (Tr. 108-109; RX-4).

Gile also stated a truck driver with a car under the trailer would notice and feel something. Specifically, the car would create a drag on the truck, and the headlights would be noticeable. Gile also stated it is common for headlights and blinkers to go out on a truck. However, Complainant never complained of any problems with his truck. Gile stated Complainant was a "good driver." (Tr. 110-111; JX-3).

On redirect examination, Gile stated that after Complainant's truck was repaired in July, there were still problems with the turn signals. Gile sent the truck back for repairs immediately upon noticing the unrepaired turn signals. (Tr. 111-115; RX-3).

D. Deposition Testimony of Thomas Moore, Insurance Adjuster (JX-7)

Thomas Moore is an insurance adjuster licensed in Texas and Louisiana. Mr. Moore was the insurance adjuster for the claim involving the August 3, 2014 accident. Moore worked for RISCOM Claims Management based in Shreveport, Louisiana and handled the appraisal and injury work for RISCOM. (JX-7, pp. 6-8).

Regarding the insurance claim involving Complainant, Moore stated he was retained by RISCOM to get a copy of the police report, resolve any property damage exposures, and investigate liability. If Complainant was liable for any property damage or injuries, then Moore was to resolve these claims. (JX-7, pp. 8-10).

Upon receipt of the claim, Moore first contacted Bigfoot and spoke with Gile. Moore visited the Carthage facility and inspected and took photos of the truck and trailer. After his inspection, Moore next attempted to contact Complainant in order to get a statement from him regarding the accident. Moore called Complainant numerous times, but he never received a return call. (JX-7, pp. 10-11).

Moore also had Complainant's residential address and decided to visit his residence. Upon his arrival at about 6:00 p.m., Moore noticed lights from within the residence and vehicles in the driveway. When Moore knocked on the front door, he saw all the lights go out, and a man came to the door who informed Moore that Michael Garrett did not live there. Moore left and drove a mile up the street. He stopped at a gas station and called Complainant again. Complainant answered, and Moore explained to him why he was trying to contact him. Complainant advised him the address on file was his correct address. Complainant directed Moore to contact Bigfoot for any information he needed. When Moore told Complainant he needed a statement from him, Complainant "attempted to go into a conversation about what occurred from an employment situation." Complainant also acknowledged he was home and refused to give a recorded statement. (JX-7, pp. 11-13).

Moore initially felt the other driver had caused the accident when he ran his car under Complainant's truck based on the police report. However, other facts listed on the police report did not "add up" to Moore. Specifically, Complainant's statements that he believed he had a flat tire and that he was exiting the Interstate were questionable to Moore. Upon investigation, Moore found the statement that Complainant had a flat tire and pulled over to check the tire to be false. Moore also was opined it was possible that Complainant had run over the vehicle. (JX-7, pp. 14-19).

When Complainant agreed to give a statement regarding the accident, Moore stated Complainant's story changed. Initially, Complainant mentioned a flat tire but was unsure where the driver came from. When asked about his statement to Gile, Complainant could recall what he told him and began to recant his account of the accident as stated on the police report. Complainant also could not give a precise location of the accident, nor could he state how the other driver's vehicle was able to end up under the truck facing southbound. When Moore pressed him for answers to these questions, Complainant became combative and began ranting about the malfunctions of his truck that Respondent had failed to correct. (JX-7, pp. 22-31).

Moore was also concerned by Complainant's statements regarding the defective turn signals. Specifically, Complainant hinted that the accident was caused by his inability to warn the driver he was merging lanes due to a defective turn signal. However, Complainant did not want to discuss the issue further, uttering that it was "an unsafe situation." (JX-7, pp. 36-38).

Moore received a call from Complainant the day after speaking with him. During the call, Complainant informed Moore that he was going to file a complaint with OSHA and apologized for his actions because he "did not trust Bigfoot." Complainant also stated he was not going to accept responsibility of the accident and mentioned contacting the other driver to persuade the driver to file an insurance claim against Bigfoot together. (JX-7, pp. 39-42).

Moore stated that Complainant's inconsistent statements resulted in Bigfoot accepting liability, since the inconsistent statements affected Complainant's credibility. (JX-7, pp. 55-56).

On cross examination, Moore admitted the police report was not very thorough and that it is possible the officers conducted a brief interview of Complainant. Moore also admitted he did not take notes of his conversation with Complainant but did summarize the conversation later on. (JX-7, pp. 56-61).

Moore inspected the truck on September 19, 2014 at the Carthage facility and visually observed the turn signals. Moore stated he did not attempt to operate the turn signals, because he was unaware that the turn signal had a defect. During the inspection, Moore also briefly spoke to Gile, who informed Moore that Complainant's story had changed. However, Moore was not interested in speaking with Gile, since he was not a party or witness to the accident. (JX-7, pp. 67-74).

Moore stated Complainant's email to Sherman contradicted the accident report in that the email included information about the defective turn signal as well as Complainant taking full responsibility for the accident. The information in the email opened Respondent up to liability and caused Moore to start addressing the other driver's damages instead of merely contesting liability. (JX-7, pp. 83-85).

On redirect examination, Moore stated he does not know whether the turn signal was actually defective. He also stated Complainant was able to back up his initial statement and only started to waver when pressed about the physical damage not lining up with his statement and the police report. Based on the physical damage to both vehicles, Moore opined that Complainant was in the right lane at the time of the accident, contrary to Complainant's statement saying he was in the left lane at the time of the accident. (JX-7, pp. 96-108).

E. Email Sent to Richard Sherman by Complainant on September 5, 2014 with Subject: "Michael Garrett Accident"

The email sent by Complainant to Sherman shortly before Complainant's termination was referenced and discussed throughout the testimony. The email was provided by the parties in JX-2 and copied *verbatim* below:

-----Original Message-----
From: michaelgarrett338@yahoo.com
To: robert@robertshermanlaw.com
Sent: Fri, Sep 5, 2014 12:52 PM PDT
Subject: Michael Garret Accident

> The purpose of the letter is to clear up any speculation or assumptions to what happened on the night of the accident. The letter will also reflect what could have and what should have been done before the accident. First of all, I take full

responsibility for operating a truck that was clearly a DOT violation. The signal lights didn't work, which Management had been informed about it several times. I knew operating a BigRig without signal lights was asking for trouble, thats why I continued to bring it to managements attention every chance I got. It wasn't until two weeks after the accident that the lights got repaired. It took two months, three trips to the shop and an accident for a fuse to be found to be the issue for the signal lights. So again, I take full responsibility for driving an illegal truck. Now on the night of the accident, I was traveling on I-20 in the right hand lane,headed to Texas @ approximately 45 to 55mph in a light rain. I heard what i thought was a flat,so I started looking for an exit. Once I spotted an exit coming up,I started my signal manually with my left hand. While at the same time trying to exit with right hand and make sure i was clear to move over. I was able to move over and exit, but the result was traumatizing. In my opinion, we all have a responsibility! Management has a responsibility to make sure they do everything within their power to maintain the fleet and the drivers has an equal responsibility to operate the rigs and be safe while doing so.

Thanks Michael Garrett

IV. THE PARTIES' CONTENTIONS

A. Complainant

Complainant contends that he engaged in STAA-protected activity when he reported to his supervisor Doug Gile that the turn signals on his truck where defective and when he submitted work orders indicating the turn signals did not work properly. Complainant also contends he engaged in STAA-protected activity when he filed a complaint via email to Richard Sherman, alleging the truck "was clearly a DOT violation." Complainant further alleges these complaints were related to reasonably perceived violations of safety regulations. As a result of these complaints, Respondent retaliated against him by terminating him on September 12, 2014. Sherman reacted to Complainant's email with hostility and used the email as a basis for termination, while using Complainant's alleged inconsistencies in his account of the account as a pretext for retaliation. (Comp. Post-Tr. Br., pp. 18-21).

Complainant contends he has established the contributing factor element because of direct and circumstantial evidence, including 1) temporal proximity: the retaliation came on the heels of reporting the defect to Doug Gile; 2) Sherman expressed hostility toward him at the September 2014 safety meeting; 3) he has discredited Respondent's stated, non-discriminatory reasons for his termination; and 4) Respondent's self-serving testimony of its safety record or non-retaliation policies are irrelevant to whether Complainant's protected activities contributed to his discharge. Respondent has not met its affirmative defense of clear and convincing evidence that it would have taken the same action absent the protected activity because Complainant's email is "inextricably intertwined" with his inconsistent statements as the reason for his termination. (Comp. Post-Tr. Br., pp. 22-29).

Regarding Complainant's harms and losses, he has an estimated $24,000 in lost earnings with interest. He also requests reinstatement to his former position with the same pay, benefits, and other terms of employment that he would have had if his employment had continued as well as the expungement of all references to his discharge from his personnel records. Also, the termination has been financially and emotionally disruptive, and therefore seeks compensatory damages for emotional distress in the amount of $50,000. Complainant also seeks payment of legal expenses, and he seeks punitive damages of at least $10,000. (Comp. Post-Tr. Br., pp. 32-38).

B. Respondent

Respondent contends that it did not retaliate against Complainant for reporting any defects to his truck's turn signals. Instead, it dismissed Complainant for changing his account about how the August 2014 accident occurred. Complainant admitted that he was responsible in causing the accident. Undisputed objective evidence supports Respondent's non-discriminatory reason for terminating Complainant and that his allegation that the turn signals were defective was false. Contrary to Complainant's testimony, Respondent reviewed inspection reports as well as the accident report for support of Complainant's allegations blaming the turn signals for the accident. Nothing in the reports reinforces his claims. Respondent further asserts it has shown that it would have taken the same employment action absent the protected activity. (Resp. Post-Tr. Br., pp. 22-26).

Even if Complainant were to prove an STAA claim, which Respondent denies he did, Complainant has failed to prove recoverable damages. Respondent contends that Complainant is not entitled to reinstatement nor has not shown by a preponderance of the evidence that the termination caused the harm of emotional distress allegedly suffered by Complainant due to a loss of income, and thus compensatory damages are not warranted. Regarding back pay, Respondent contends that Complainant showed no ability to hold a job both prior to being hired by Respondent and after he was terminated by Respondent. Also, Respondent contends Complainant's earnings during the period in question should be doubled to show Complainant was actually earning approximately the same amount as he was with Respondent. Complainant is also not entitled to punitive damages because Respondent's conduct was motivated solely by its desire to prevent reoccurring rules violations and thus falls short of the reckless or callous disregard standard set forth in *Smith v. Wade*, 461 U.S. 30, 51 (1983). (additional citations omitted). Finally, Respondent contends Sherman and Gile are not personally liable, as there is nothing malicious or unreasonable about their conduct to terminate Complainant that warrants holding them personally liable. (Resp. Post-Tr. Br., pp. 26-29).

V. DISCUSSION

A. Credibility

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

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

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

442 F.2d at 52.

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

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

After observing his demeanor while testifying and considering what he had to say versus the demeanor and testimony of Respondents' witnesses, I find no reason to credit Complainant's testimony. Rather, I find Complainant to be an incredible witness, who failed to definitely answer questions as to what lane he was traveling in and the exact location of the accident. In addition, Complainant stated he failed to mention the defective turn signals to the police at the accident scene because he merely responded to their questions. (Tr. 148-152; 205-210). Complainant would have me believe that Respondents left him no choice but to drive an unsafe truck with defective blinkers despite a lack of evidence to support this assertion and contrary testimony showing Respondent's policy of performing repairs and Gile's testimony that he did

not notice any turn signal defective while following Complainant back to the Carthage facility on the day of the accident. (Tr. 104-108, 131-135).

I also find Claimant's testimony to be incredible due to his misrepresentation on a job application with LATX as well as his false statements made to Gile and Moore. Specifically, Complainant claimed he was unemployed during the period of time he was actually employed by Respondent on his employment application with LATX. Complainant stated he lied on his application in order to avoid the appearance of an unstable person who could not keep a steady job. (Tr. 258-260). Complainant also lied in a text message to Gile, alleging he had recorded conversations with dispatchers and threatened to use those recordings to testify for the other driver. (Tr. 195-198; RX-4). Further, Complainant initially lied to Moore, telling him he was not Michael Garrett, and later became combative towards Moore when questioned about his inconsistent statements regarding the cause of the accident. (JX-7, pp. 11-13, 22-31).

Complainant's testimony is also inconsistent on one or more key points with the record as well as almost every other witness with whom I find no basis to discredit. Simply put, the credible evidence does not show Claimant refusing to drive because he felt unsafe. Rather, the credible evidence shows Complainant did not include any turn signal defects in the section of the inspection report reserved for defects that need not be corrected in order for the safe operation of the vehicle. (RX-2, pp. 13, 18, 19, 22). In addition, Complainant stated he was never unable to operate the turn signals at any time and could still operate the defective turn signals manually while driving. Complainant further stated he thought he could perform his job in a safe manner and only regretted driving his truck after the accident. (Tr. 243-244).

On the other hand, I find the testimony of Sherman, Gile, and Moore to be straight forward, generally consistent, and credible, as opposed to Complainant's testimony which was not supported or consistent with the objective evidence of record. Specifically, I find Sherman and Gile never told their employees to drive an unsafe truck or commit any other unlawful activity. I also find the zero tolerance accident policy was implemented to deter accidents by all drivers and was not solely directed at Complainant. In addition, Moore sought out to interview Complainant on his own accord in order to resolve the irregularities in the police report and the damage to the other vehicle. Sherman and Gile had no influence over Moore, who was acting in the interests of both Complainant and Respondents.

B. The Statutory Protection

The employee protection provisions of the STAA provide, in pertinent part:

> (a) Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –
>
> (A)
>
> (i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a

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

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

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

C. Burden of Proof

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

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams, supra* at 6. The complainant can succeed by "providing either direct or indirect proof of contribution." *Id*. "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." *Id*. If direct evidence is not produced, the complainant must "proceed indirectly, or inferentially, by proving by a preponderance of the evidence that

retaliation was the true reason for terminating" the complainant's employment. *Id*. "One type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." *Id*. (*citing Riess v. Nucor Corporation-Vulcraft-Texas, Inc.*, Case No. 2008-STA-11 at 3 (ARB Nov. 30, 2011)). If the complainant proves pretext, an ALJ may infer that the protected activity contributed to the termination, but he is not compelled to do so. *Williams, supra* at 6.

If the complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. *Williams, supra* at 6 (citing 49 U.S.C. § 4212(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Id*. (citing *Brune v. Horizon Air Indus., Inc.*, Case No. 2002-AIR-8 at 14 (ARB Jan. 31, 2006).

D. The Protected Activity

An employee engages in STAA-protected activity where he files a complaint or begins a proceeding "related to a violation of a motor vehicle safety regulation, standard, or order." 49 U.S.C. § 31105(a)(1)(A)(i). Internal complaints to management are protected activity under the whistleblower provision of the STAA. *Williams, supra* at 6. A complaint need not expressly cite the specific motor vehicle standard allegedly violated, but the complaint must "relate" to a violation of a commercial motor vehicle safety standard. *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, ALJ No. 2010-STA-41 at 4 (ARB Mar. 27, 2012). An internal complaint must be communicated to management, but it may be oral, informal or unofficial. *Id*. A complainant must show that he reasonably believed he was complaining about the existence of a safety violation. *Id*. This standard requires the complainant to prove that a person with his expertise and knowledge would have a "reasonable belief" that there was a violation of a commercial vehicle safety regulation. *Calhoun v. United Parcel Serv*., ARB No. 04-108, ALJ No. 2002-STA-31 at 11 (ARB Sept. 14, 2007). Moreover, a complainant is protected even if the alleged violation complained about is proved ultimately to be meritless. *Allen v. Revco D.S., Inc.*, 1991-STA-00009 slip op. at 6, n. 3 (Sec'y Sept. 24, 1991). However, once an employer adequately addresses a safety concern, an employee's continued complaints may be unreasonable and, therefore, unprotected under the STAA. *Patey v. Sinclaire Oil Corp*., ARB No. 96-174, ALJ No. 1996-STA-00020 (ALJ Aug. 2, 1996).

Complainant contends he filed multiple oral complaints with Gile prior to his August 3, 2014 accident, alleging the turn signals on his truck were defective. He also alleges he submitted work orders to Bigfoot indicating the turn signals on his truck needed repair. Complainant argues that Respondent Gile acknowledged the truck's defective turn signals but did nothing to fix the signals. On August 3, 2014, Complainant contends he again complained to Gile, stating the accident might not have occurred if the signal lights were fixed. After the accident, on September 5, 2014, Complainant sent Sherman an email again alleging the signal lights were defective and that management had done nothing to repair them.

In support of his contention that he reported reasonably perceived violations of commercial safety regulations, Complainant points to 49 C.F.R. § 392.7, which states in part that "[n]o commercial motor vehicle shall be driven unless the driver is satisfied that the following parts are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed: …lighting devices and reflectors," and 49 C.F.R. § 393.9, which states "[a]ll lamps…shall be capable of being operational at all times." Complainant also cites 49 C.F.R. § 393.11, which requires operational turn signal on commercial vehicles.[2]

I find Complainant's alleged complaints of the defective turn signals are unreasonable under the circumstances and do not constitute protected activity. While the Complainant's initial right to raise safety issues are protected by the STAA, Respondents are correct, however, that complaints made by an employee after a safety issue has been adequately addressed may no longer be protected activity. In this case, the Respondent admittedly made repairs to the truck as requested by the drivers. However, given Complainant's incredible testimony, there is no evidence in the record to support his contention that he made several oral complaints to Gile prior to the repairs in order to establish Complainant engaged in protected activity.

The repair invoice dated July 23, 2014 supports Gile's testimony that the truck did have a blinker problem and front end problem at some time in July, but those problems were remedied promptly. (RX-3; Tr. 104). Also, the vehicle inspection report dated July 26, 2014 completed by driver Goodman confirm Gile's testimony that sent the truck back for repairs immediately upon noticing the unrepaired turn signals. (Tr. 111-115; RX-2, p. 1).

Further, the vehicle inspection reports dated after July 26, 2014 support Respondent's contention that Complainant presented no evidence of a reasonably perceived safety violation. A review of the driver vehicle inspection reports show that both Complainant and the other drivers of the tractor trailer rig did not note any turn signal problems. (RX-2). Specifically, the inspection reports dated August 2-3, 2014 show no sign of any turn signal defect. (RX-2, pp. 21-24). In fact, the only vehicle inspection report which shows Complainant complain of a turn signal defect after July 26, 2014 was completed by Complainant on August 14, 2014. I find this inspection report carries little weight, as its origin is unknown, and it conflicts with his testimony that he did not list the blinker problem on the vehicle inspection report, because a dispatcher had instructed him to only note the problem on the designated repair form. (Tr. 245-247).

While Complainant contends he engaged in protected activity due to his reasonably belief that he was complaining about the violation of safety regulations pertaining to operational parts and accessories of his truck, the undersigned disagrees with Complainant that at the very least it was reasonable for him to assume that his truck was in violation of federal safety regulations requiring operational signal lights. Complainant's vehicle inspection reports show that he did not mark the truck's turn signals as defective, and Complainant testified he did not think the manual operation of the turn signals constituted a safety violation. (Tr. 255).

[2] Complainant also cites 49 C.F.R. § 396.3(a)(1), 49 C.F.R. § 396.7, 49 C.F.R. § 393.39(a), and 49 C.F.R. § 392.2 as well as Louisiana state regulations regarding the proper use of a vehicle in support of his argument that he reported reasonably perceived violations of commercial safety regulations to Respondent.

Regarding Complainant's allegations that he again complained about the defective turn signals to Gile after the accident on August 3, 2014, I discredit Complaint's testimony that he told Gile the accident would not have happened if the truck's turn signals had been repaired and credit Gile's testimony that Complainant never told him any other account of the story until Sherman received Complainant's email. (Tr. 97-98). In like manner, I find the email sent by Complainant to Sherman is not a reasonable complaint related to driver safety based on the circumstances of this case. As such, it does not constitute protected activity. Such comments were a general advisory nature that was intended to "clear up any speculation" and to aid Respondent's future management decisions. (JX-2). The undersigned is also of the opinion that Complainant sent the email to Sherman as an attempt shift responsibility for the accident on the Respondents in order to save his job.

In sum, there were no safety problems that were not immediately addressed by Respondents. Hence, it must be concluded that Complainant's alleged complaints were unreasonable under the circumstances. Since the record does not contain sufficient information to show his concerns were reasonably and objectively related to safety, Complainant has not established he engaged in protected activity.

E. Respondent's Adverse Action

Assuming *arguendo* that Complainant established he engaged in protected activity, adverse action and contributing factor will be analyzed.

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

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

In this case, there is no question that the termination of Complainant constituted adverse action. In addition, the parties do not seriously dispute that the Respondents had knowledge of Complainant's complaints about the truck's turn signals, nor do they dispute that Complainant's termination constitutes an adverse action under the STAA.

F. Contributing Factor

Next, Complainant failed to show by a preponderance of evidence that his protected activity contributed to his termination in accordance with 49 U.S.C. §31105(b). A complainant can prove that his protected activity was a contributing factor either through direct or indirect evidence of a discriminatory motive. *Williams v Domino Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan 31, 2011). "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." *Id*. In the absence of direct evidence, complainant can raise an inference of a discriminatory motive by "proving by a preponderance of the evidence that retaliation" was a contributory reason for terminating his employment. *Id*. For example, complainant may "discredit the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." *Id; Riess,* ARB 08-137, slip op. at 6. If the complainant proves pretext, the court "may infer that the protected activity contributed to the termination," although it is not compelled to do so. *Williams,* ARB 09-092, slip op. at 5.

An inference of causation may be raised if the adverse action is close in time to the protected activity. While not dispositive, the closer the temporal proximity is, the stronger the inference of a causal connection. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-30 (ARB Feb. 29, 2012); *see e.g., Bergeron v. Aulenback Transportation, Inc.*, 91-STA-38, slip op. at 3 (Sec'y June 4, 1992) (concluding that an inference was raised when the discharge immediately followed the protected activity); *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991) (finding a causal connection where the employee was fired immediately after bringing the lawsuit). For example, temporal proximity alone "will not support an inference in the face of compelling evidence that [Respondent] encouraged safety complaints". *Moon v. Transp. Drivers, Inc*., 836 F.2d 226, 229-30 (6th Cir. 1987) (finding no causal link between protected activity and the adverse employment action where the record showed that Respondent periodically held sessions, during which complainant and other drivers were invited to air their safety concerns, and complainant testified that he felt free to call his superior to complain about vehicle problems); *see also Robinson v. Northwest Airlines, Inc*., ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005); *Riess v. Nucor Corp. Vulcraft-Texas, Inc.*, ARB No. 08-137, 2008-STA-11 (ARB Nov. 30, 2010). Further, 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).

After examining all the evidence, the undersigned concludes that Complainant failed to demonstrate by a preponderance of the evidence that his safety complaints were a factor Respondent weighed in making the decision to terminate his employment or that Respondent's reasons for his termination are merely pretext. In addition, intervening events vitiate the inference created by the close temporal proximity between his protected activity in July and August 2014 and his termination in September 2014.

First, Complainant did not present any direct evidence to conclusively link his termination to his safety complaints made to Gile. Complainant attempts to use Sherman's testimony regarding the September 5, 2014 email to show his complaint to Sherman was the principle factor in terminating Complainant. (Comp. Post-Tr. Br., pp. 22-24). However, Sherman stated Complainant's inconsistent statements and new account of how the accident occurred as well as his poor job performance were the reasons for his termination, not any complaints regarding the safety of his truck. (Tr. 62-66).

Both Gile and Sherman testified that Complainant was not terminated because he complained about his truck's turn signals. The sole focus of the discussion was Complainant's inconsistent account of how the accident occurred. (Tr. 58-60; 83-85). Gile and Sherman were concerned that Complainant's inconsistent statements would open Respondent up to liability to the other driver's insurance claim. (JX-7, pp. 55-56, 83-85). Sherman also testified that there was no support for Complainant's new account of the accident in the police report or the vehicle inspection reports. (Tr. 75). Moore's testimony reinforces the testimony of Sherman and Gile. Moore stated that Complainant's new account did not correlate to the damage of the vehicles. When Moore pressed Complainant to offer an explanation on his inconsistent statements, Complainant became combative and mentioned the possibility of aligning with the other driver involved in the accident to sue Respondent. (JX-7, pp. 14-19, 22-31, 36-38). Therefore, no direct evidence links his termination to his safety complaints.

Second, Complainant relies on indirect evidence in an attempt to raise an inference of a discriminatory motive and to demonstrate Respondent's proffered reasons for the termination are merely pretext. Specifically, Complainant argues the close proximity of his complaints in July and August 2014 to his firing in September 2014 creates an inference that his protected activity contributed to his termination. In addition, Complainant argues Respondent's reasons for his termination are merely pretext. (Comp. Post-Tr. Br., pp. 24-26).

Regarding Complainant's temporal proximity argument, I find Complainant is not entitled to an inference that his complaints to Gile contributed to his termination based on the timeframe of events. Complaint made oral complaints to Gile in July and August 2014 and was terminated in September 2014, a period of less than two months. However, any inference that Complainant may be entitled to is quashed by intervening events between his oral complaints to Gile and his termination in September 2014. Between his complaints to Gile and his termination, Complainant was involved in an accident on August 3, 2014. When asked by law enforcement officials how the accident occurred, Complainant's explanation was that "he was driving straight ahead and thought he had a flat tire so he pulled over to check his tires." When he exited the vehicle to check his tires, he noticed a car under the truck. (Tr. 141-144; JX-1, p. 2). Complainant did not mention the defective turn signals, because he stated he merely responded to the police officer's questions. (Tr. 212-216).

However, Complainant's account of the accident soon changed. After leaving the accident scene, Complainant met Gile at a nearby relay station and told him the accident might not have occurred if the signal lights had been fixed. (Tr. 148-152). However, Gile testified Complainant told him the same story he had told the police at the accident scene. (Tr. 97).

At the safety meeting, Complainant learned for the first time that the other driver was making an insurance claim against Respondent as a result of the accident. (Tr. 232). After the safety meeting where Sherman instituted a zero tolerance accident policy, Complainant sent Sherman an email in which he alleges the signal lights did not work at the time of the accident and admits he violated a DOT regulation. (Tr. 161-165; JX-2). Prior to receiving the email, Sherman did not question Complainant about the accident, because the report mirrored Complainant's original statements. (Tr. 41-42). However, after receiving Complainant's email, Sherman began to question how a defective turn signal could relate to the account of the accident stated in the police report. (Tr. 43-45). Sherman reviewed Complainant's inspection reports but could not find any notation regarding malfunctioning turn signals. (Tr. 75). This new account also concerned Sherman, since Respondent could potentially be liable for the other driver's insurance claim based on Complainant's new account. (Tr. 58-60).

At the hearing, Complainant testified he was unsure whether the accident occurred when he was driving straight ahead or when he exited the Interstate. (Tr. 205-210). However, this testimony conflicts with the police report, in which Complainant stated he was driving straight ahead at the time of the accident. (JX-1, p. 2). This also conflicts with Moore's testimony. Moore stated he found Complainant's statement that he had a flat tire and pulled over to check his tires to be false. (JX-7, pp. 14-19). Moore also stated Complainant told him he was unsure where the other driver was on the road, how the other driver was able to end up under his truck, and the approximate location of the accident. Moore also stated Complainant recanted his account of the accident as stated on the police report when asked about his statements to Gile on August 3, 2014. (JX-7, pp. 22-31). Complainant's inconsistent statements and lack of credibility ultimately resulted in Bigfoot accepting liability for the other driver's damages. (JX-7, pp. 39-42). Therefore, I find Complainant changing his account of the accident constituted an intervening event that destroys any inference that his safety complaints to Gile contributed to his termination.

Regarding Complainant's argument that Respondent's motives in terminating Complainant are merely pretext, I find that Complainant failed to show by a preponderance of the evidence that Respondent's reasons for termination is unworthy of credence. Complainant was fired for a legitimate, non-discriminatory reason- telling a new story of how the August 3 accident occurred compared what he told the police at the accident scene and what was listed in his vehicle inspection reports. This new account of the accident made Respondent liable to the other driver, who the police had cited for the accident.

Further, Complainant acknowledged that there was never a time when the turn signals did not work. (Tr. 205-210). When the turn signals did not work automatically, Complainant was still able to manually manipulate them to work. (Tr. 135-136). Further, Complainant testified he had another Bigfoot employee confirm that the turn signals work when he manually manipulated them in his truck. (Tr. 210).

Prior to the August 3, 2014 accident, Complainant believed he could still perform his job safely with defective blinkers. Complainant did not list the defective blinkers in his inspection report, because he thought he would be able to operate them manually if they failed to work while driving. Complainant also did not note the turn signal defects in his inspection report, because he claimed DOT only required a person to list a defect that was likely to cause an accident or breakdown. (RX-2, pp. 13, 18, 19, 22).

Therefore, Complainant is unable to prove, through direct or circumstantial evidence, that his complaints to Gile were a factor, either alone or in combination with other factors, in the decision to terminate Complainant.

VI. CONCLUSION

The undersigned takes into account all of the evidence, but remains of the opinion that Respondent terminated Complainant due to his inconsistent accounts of how the accident occurred. Nothing in the record shows that Respondent ordered Complainant to (1) exclude the problems with the turn signals in his inspection report, (2) lie to any enforcement officer if stopped for an inspection of the truck, or (3) force him to drive the truck even if he believed the truck was unsafe.

Accordingly, the undersigned finds that Complainant has failed to produce sufficient evidence to demonstrate by a preponderance of the evidence that he engaged in protected activity or that Respondent's decision to terminate him was motivated, at least in part, by a discriminatory purpose. Therefore, I find he has not met his burden under the STAA and dismiss the instant charges as lacking merit.

SO ORDERED this 4th day of April, 2016, at Covington, Louisiana.

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

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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).