



Issue Date: 22 August 2017

Case No.: **2015-STA-00051**

In the Matter of:

KRISTY LAWSON,

Complainant,

v.

KWIK KARGO, INC. TRANSPORT,

KWIK KARGO, INC. TRUCKING and

KENNETH KOTZER

Respondents.

Appearances:

Paul O. Taylor, Esq., Trucker's Justice Center

Jon E. Stanek, Esq., Stanek Law Office

For Complainant,

Justin N. Brunner, Esq., Messerli & Kramer. P.A.

For Respondent,

Before: William S. Colwell

Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case involves a claim under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "Act"), with implementing regulations at 29 C.F.R Part 1978.¹ The STAA prohibits an employer from retaliating against an employee because the employee engaged in protected activity. In addition, the Act prohibits a

¹ The STAA was amended on August 3, 2007 by Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007) and the implementing regulations were amended on August 31, 2010, 75 Fed. Reg. 53544 (Aug. 31, 2010). References in this decision are to the current version of the statute and regulations.

person from disciplining any employee who is perceived to have filed or is about to file a complaint related to a violation of a commercial motor vehicle safety regulation.² Ms. Kristy Lawson ("Complainant") alleges that Kenneth Kotzer and his corporate entities, Kwik Kargo, Inc. Transport and Kwik Kargo, Inc. Trucking ("Respondents"), retaliated against her in violation of the STAA.

STATEMENT OF THE CASE

On February 7, 2015, Complainant filed a timely complaint with the Occupational Safety and Health Administration ("OSHA"). (JX-11). Complainant alleged that Kwik Kargo, Inc. Transport ("Transport") and Kenneth Kotzer disciplined her in retaliation for Mr. Kotzer's perceived belief that Complainant had reported a violation to the Department of Transportation ("DOT"). (JX-11). On February 7, 2015, Complainant filed a complaint with OSHA. On April 8, 2015, OSHA conducted an investigation and then dismissed the complaint. (JX-9). On April 21, 2015, Complainant filed a timely objection and requested a hearing before an administrative law judge. (JX-9).

On February 2, 2016, a formal hearing was held before the undersigned in St. Paul, Minnesota. At the hearing, Kwik Kargo, Inc. Trucking ("Trucking") was added as a Respondent. The record was held open for the testimony of Complainant's ex-husband. Mr. Evert Lawson was requested and expected to be heard for testimony, but he was on a truck route at the time. Thereafter, Mr. Lawson has not been available to testify at any time.

Complainant's attorney, Mr. Paul Taylor made several efforts to contact Mr. Lawson to schedule his testimony. Mr. Taylor sent a subpoena request to the undersigned's office and received the subpoena back on June 10, 2016. They served the subpoena with the statutory witness fee and mileage by regular, certified mail, and also requested a private process server to go to Mr. Lawson's residence to serve the subpoena personally and to exhibit the Court's original signature on the subpoena. The process server indicated that Mr. Lawson was not at the residence, and that the people residing there said he was out on a trucking route. Mr. Taylor called Mr. Lawson indicating that he had served him a subpoena by United States mail and asked him to be available. His response to Mr. Taylor was, "I'm done with Kris. I don't want to be involved." Mr. Taylor told Mr. Lawson

² As amended on August 3, 2007, the STAA was amended to include three other categories of protected activity: (1) accurately reporting hours on duty; (2) cooperating with a safety or security investigation by certain federal entities; and (3) furnishing information to federal entities relating to an accident or incident resulting in injury, death, or property damage. Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007).

that he had no choice because he was under subpoena, at which point he hung up on Mr. Taylor.

On June 21, 2016, the undersigned tried to contact Mr. Lawson during a conference call with all of the parties on the line, including, Mr. Taylor and Mr. Jon Stanek (co-counsel), Ms. Kristy Lawson, and Employer's Counsel, Mr. Justin Brunner. Mr. Lawson did not answer the undersigned's call nor did he return the undersigned's call. The undersigned explained to Mr. Lawson in a voicemail that he is required to testify and this court will go to a federal district court judge and request an order be issued to order him to testify for the hearing if he does not cooperate.

On July 28, 2016, the undersigned held another conference call with the parties to discuss the status of whether Mr. Lawson had been served the subpoena. Mr. Stanek stated his office mailed a subpoena by certified mail to Mr. Lawson's residence. At this household, his parents and brother also live there. Mr. Lawson's brother signed for the certified mail; however he returned the subpoena back to Mr. Taylor and Mr. Stanek's office with a note stating that Mr. Lawson did not live there. Furthermore, Mr. Stanek called Mr. Lawson on July 28, 2016 asking if he was going to make himself available for the hearing. Mr. Lawson asked what hearing and stated he was golfing in San Pedro and hung up the phone. During the conference call the undersigned again attempted to reach Mr. Lawson by phone, and he did not answer.

Ms. Lawson, through her counsel, moved at the conference call hearing on July 28, 2016 that enforcement of the subpoena be sought, and the motion is appropriate. The undersigned filed an Order of Certification with the United States District Court, District Court of Minnesota on October 25, 2016 requesting that the District Court enforce a subpoena issued to Mr. Evert Lawson, compelling him to testify when the hearing is reconvened, or take whatever steps are appropriate which will achieve this goal.

On November 7, 2016, the United States District Court, District Court of Minnesota issued an Order stating that it does not have jurisdiction to enforce the subpoena and even it did, "there is no evidence before the court that subpoena was properly served on Lawson."

Therefore, on November 15, 2016, Complainant elected to close the record. Respondent's post-hearing brief was submitted on January 27, 2017. Complainant's post-hearing brief was submitted on January 31, 2017. At this point, the record in this matter was closed.

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments

made by the parties. Where pertinent, I have made credibility determinations concerning the evidence.

ISSUES

Is Complainant an employee covered by the STAA? Did Complainant engage in protected activity? Did Respondent take an adverse action against Complainant? If so, has Complainant proven by a preponderance of the evidence that her perceived protected activity contributed, in part, to Respondent's decision to take adverse action against her, i.e. was it a factor which, alone or in connection with other factors, tended to affect in any way the outcome of the decision? If so, has Respondent shown by clear and convincing evidence that it would have taken the adverse action even in the absence of the protected activity? If not, what are the appropriate compensatory damages, costs and expenses and what further relief, if any, is appropriate? Is Kenneth Kotzer liable as an individual? Are Trucking and Transport liable as a joint employer?

CONTENTIONS OF THE PARTIES

Complainant

Complainant contends that Kenneth Kotzer's disclosure of Complainant's affair to her later ex-husband was done in retaliation for her perceived reporting of violations by Trucking and Transport to the DOT. Complainant argues that Kenneth Kotzer's disclosure of Complainant's affair qualifies as an adverse action. Complainant contends that Kenneth Kotzer's "panicky" behavior, caused by the DOT compliance review, establishes a direct connection between a protected activity and Kenneth Kotzer's disclosure of Complainant's affair in violation of the STAA. Complainant contends that she is entitled to reinstatement and back pay, compensatory damages, punitive damages, attorney fees and costs, and abatement of the violation.

Complainant contends that Kenneth Kotzer is liable under the STAA as the employer of Ms. Lawson. Complainant argues that the STAA maintains that a person as defined under the STAA can be an individual.

Complainant contends that Transport and Trucking are liable under the STAA as a joint employer. Complainant argues that the STAA maintains that a person as defined under the STAA can be two or more companies that are sufficiently integrated. Complainant contends that under the sufficiently integrated test Transport and Trucking qualify as a person who is liable under the STAA.

Respondent

Respondent contends that Kenneth Kotzer's disclosure of Complainant's affair to her husband was not done as an adverse action in retaliation for Complainant reporting safety violations to the DOT. Respondent contends that the revealing of the affair was done out of respect for Complainant's ex-husband and to protect Respondent's family. Respondent maintains that the disclosure of the affair does not impose liability under the STAA and does not merit relief or penalties. Respondent contends that Complainant's complaint should be dismissed and no relief should be granted.

Respondent contends that Complainant was not an employee at the time of the protected action. Respondent contends that Kenneth Kotzer as an individual cannot be held liable for violations under the STAA because Mr. Kotzer did not have the ability to hire, transfer, promote, reprimand, or discharge Complainant.

SUMMARY OF THE EVIDENCE

Kathy Kotzer Testimony (TR 25-64); (TR 382-398)

Ms. Kathy Kotzer testified that she is an employee of Kwik Kargo Trucking and is married to Kenneth Kotzer. (TR 26). Ms. Kotzer stated that Kwik Kargo is an interstate motor carrier. (T4 26). She also stated that she helps with the accounting for Kwik Kargo's payroll. (TR 29). Ms. Kotzer testified that she did "10 to 15 to 20" settlements a week for Kwik Kargo Trucking. (TR 31). Ms. Kotzer affirmed that a settlement meant after a driver does a delivery, she would look through "where he bought fuel, make sure numbers are accurate, making sure there's a bill of lading with the receiver signing off that the goods were received so that Kargo, Inc. Trucking may bill its customers." (TR 29). Ms. Kotzer testified that she is not an owner in Kwik Kargo, Inc. and has never received a paycheck from Kwik Kargo, Inc. (TR 36). Ms. Kotzer further testified that there are multiple Kwik Kargo transportation companies, and her husband, Kenny Kotzer, is CEO "over all of the companies." (TR 40). Ms. Kotzer stated that Kenny Kotzer receives his paycheck from Kwik Kargo Trucking, Inc.. (TR 41).

Ms. Kotzer testified that Kristy Lawson worked for Kenneth "Kenny" Kotzer for "about 15 years." (TR 41). Ms. Lawson was a safety supervisor. (TR 52). Ms. Kotzer testified that part of Ms. Lawson's job was to conform Kwik Kargo, Inc. Transport's hiring practices to Department of

Transportation (DOT) regulations. (TR 41). Ms. Lawson's duties included running background checks on candidates, investigating a candidate's past work history, ensuring that a candidate had valid licenses and certifications, monitoring a candidate's traffic violations, and coordinating random drug tests. (TR 41-43). Ms. Lawson also ensured that safety practices were followed by current employees, which included such things as making sure the trucks had the correct plates and coordinating annual DOT inspections. (TR 54).

Ms. Kotzer testified that Kenny Kotzer told Complainant to get out of his office on September 30, 2014. (TR 44). Ms. Kotzer maintains that Complainant quit after that interaction. (TR 49). Ms. Kotzer testified that "a little more than a week" after Ms. Lawson quit her job at Kwik Kargo, Inc. Transport, an officer from the Federal Carrier Safety Administration informed Ms. Kotzer that they planned to audit Kwik Kargo, Inc. Trucking. (TR 47-49, 62). Ms. Kotzer testified that the officer from the Federal Carrier Safety Administration later informed her that they talked to Complainant after informing Ms. Kotzer that they planned to audit Kwik Kargo Inc.

After learning of the upcoming audit, Ms. Kotzer attempted to contact Ms. Lawson and asked her if she "would come and help because she knew all the passwords, the phone numbers – she's got a lot of information that she's done over the years that I didn't have." (TR 45). Ms. Kotzer testified that Complainant said she would not return to the office because of Kenny Kotzer's phone call to Complainant's husband, Evert. (TR 45).

Ms. Kotzer testified that it was "well-known in the office that [Complainant] was having an affair with Michael Skaj." (TR 50). Michael Skaj was a truck driver for Kwik Kargo, Inc. Trucking. (TR 50). Ms. Kotzer stated that Complainant did not try to keep her affair a secret. (TR 60).

Ms. Kotzer further testified that:

Her and Evert were having a lot of trouble. Sometimes she wasn't happy if he was going to be home or didn't want him to be around. She told me at least two times, maybe even three, that she was waiting till she got enough money put together and she was leaving him or she was done with him.

(TR 387). Ms. Kotzer testified that she discovered that Complainant was engaged in illegal activities. Ms. Kotzer testified that she went on Complainant's computer and discovered that she was looking at motor vehicle records for drivers that were not employed by Kwik Kargo, Inc., which is illegal. (TR 392).

Kenneth "Kenny" Kotzer Testimony ("Respondent") (TR 64-139); (TR 343-381)

Mr. Kotzer testified that he is the President and CEO of Kwik Kargo, Inc. Trucking and Kwik Kargo, Inc. Transport. (TR 65-66). Mr. Kotzer testified that he receives a paycheck from Kwik Kargo, Inc. Trucking, but does not receive a paycheck from Kwik Kargo Inc. Transport. (TR 66). Mr. Kotzer stated that his payment from Kwik Kargo Inc. Trucking is compensation for his services provided to Kwik Kargo Inc. Trucking and Kwik Kargo Inc. Transport. (TR 67). Mr. Kotzer further testified that Kwik Kargo Inc. Trucking is "a mother ship company" that "runs all billing – payroll goes through Kwik Kargo, Inc. Trucking." (TR 66, 77). Mr. Kotzer stated that Kwik Kargo Inc. Transport is a "front runner" and the "only thing [Transport] does, it makes a position for a driver to drive that truck." (TR 66). Mr. Kotzer testified that he initially formed Trucking and then applied for a dual company in Transport. (TR 133). Mr. Kotzer testified that he formed Transport, because Trucking had a bad safety rating. (TR 133).

Mr. Kotzer testified that Kwik Kargo Inc. Trucking and Transport combined own 45 trucks. He stated that there are three dispatchers, Mr. Kotzer, Christina Kotzer, and Brent Johnson. (TR 69). Mr. Kotzer further testified that in 2014 he employed and paid 24 truck drivers, and annual gross revenue for 2014 was \$5,652,149. (TR 86). Mr. Kotzer testified that the drivers work for Transport, but Trucking pays their salaries. (TR 117).

Mr. Kotzer stated that Ms. Lawson was Safety Director for Trucking and Transport. (TR 70). Mr. Kotzer testified that Ms. Lawson had worked for him for 15 and a half years, but had not been a good employee. (TR 80). Mr. Kotzer testified that he kept an incompetent employee on his payroll, because it's "hard to find anybody to show up for work anymore." (TR 65).

Mr. Kotzer testified that on September 29, 2014, a driver for Kwik Kargo Inc. left a truck in Indiana. Kwik Kargo's headquarters are located in Clear Lake, Minnesota. (TR 65). Mr. Kotzer had asked Ms. Lawson to handle the problem with the driver on September 28, 2014. (TR 74). Mr. Kotzer stated that Complainant had assured him she had the problem under control. Mr. Kotzer testified that Complainant had lied to him. (TR 118). Mr. Kotzer maintained that:

She did not tell me the day before. If she had done that, I could have cleaned this mess up. After I found out what he did and going by what she told me, everything was worked out, the next morning, here my truck is sitting at a truck stop in Indiana

and no load was picked up. I had a customer yelling at me and I was very upset.

(TR 118). Mr. Kotzer told Ms. Lawson on September 30, 2014 to "get the 'f' out" of his office, because Complainant had lied to him. (TR 74). Mr. Kotzer stated that it is common practice for him to "holler at [his] employees and 'f'-bomb them." (TR 78). He further testified that he had been called "the 'f' bomb" since he "was a child," and he does not "know how to speak any different." (TR 78). Mr. Kotzer testified that all of his employees use "the 'f' bomb" on a regular basis in the office. (TR 78).

Mr. Kotzer testified that after he told Complainant to "get the 'f' out" of his office, Ms. Lawson "went into her office and grabbed her stuff and then went down the hall to exit the door, when I confronted her that, '[i]f you're quitting and go out that door, I'll take it as a quit.'" (TR 79). Ms. Lawson walked out the door, and Mr. Kotzer testified that he took that action as Ms. Lawson quitting. (TR 80).

Mr. Kotzer testified that he called Complainant on October 6, 2014 at 8:31 a.m. and he spoke to Complainant over the telephone when she called him back on October 8, 2014. Mr. Kotzer stated that he asked Ms. Lawson to come back to work or at the very least "participate and train somebody else, you know, to do the job." (TR 84). Mr. Kotzer testified that he was desperately trying to get her to come back and he thought she would eventually come back. (TR 120). Mr. Kotzer testified that there was no one who could replace Complainant. (TR 121).

Mr. Kotzer stated that he had been through 10 to 12 compliance reviews in the past with the DOT. (TR 85). On October 9, 2014, Mr. Kotzer testified that he became aware that DOT had "contacted Kwik Kargo and was going to perform a compliance review" on November 18, 2014. (TR 85, 115). Mr. Kotzer testified that when he learned the DOT would be conducting a compliance review, he became "panicky." (TR 107). Mr. Kotzer further testified that he became "panicky" because truck drivers had falsified log reports, multiple drivers had violated DOT's 14-hour rule³, and multiple drivers had falsified reports of duty status, which needed to be cleaned up before DOT conducted a compliance review. (TR 107-110). Mr. Kotzer stated that these violations left him liable to fines and getting shut down by DOT. (TR 134). Mr. Kotzer testified that he asked the DOT whether a "disgruntled employee" or Complainant had triggered the compliance review. (TR 113). Mr. Kotzer testified that he has a contact at the DOT that told him that "it was a routine inspection; it had nothing to do with [Complainant]." (TR 113). Mr. Kotzer stated that he believed his

³ DOT's 14-hour rule states that a driver must be given a 10 hour break for every 14 hours driven.

contact at the DOT, because they usually "don't like to tell. They're usually honest, but they were very forward in saying that it was no complaint, it was just a routine audit." (TR 128).

Mr. Kotzer stated that "on or around October 9, 2014," Mr. Kotzer called Evert Lawson, Complainant's husband. (TR 88). Mr. Kotzer testified that he told Mr. Lawson that "his wife was having an affair with Mike Skaj." (TR 89-90). Mr. Kotzer also testified that he "could have" mentioned Randy Slater, a truck driver for Kwik Kargo Inc. (TR 91). However, Mr. Kotzer maintains that he only stated that Complainant slept with "one guy." (TR 121). Mr. Kotzer testified that he had known Complainant had been having an affair with Mike Skaj for at least "several weeks" before he made the phone call to Complainant's husband. (TR 90). Mr. Kotzer testified that he had asked Complainant to tell her husband about the affair before he called Complainant's husband, but could not recall the exact date. (TR 92, 122). Mr. Kotzer testified that he called Complainant's husband after learning that the DOT compliance review would be taking place at Kwik Kargo, Inc. (TR 92). On October 15, 2014, Mr. Kotzer further testified that he called Mr. Lawson a second time and said:

Hey, Evert, this is Kenny. Can you call me back? I guess there's some misconception and there's some denial. I have some telephone numbers and I've got some witnesses here, that if you want the proof, umm, these people are lying to you, they're not telling you the truth. She has been with Mike Skaj for several months. And when she went to Iowa, supposedly with a girlfriend, told you, she did not go. She went to stay with Mike Skaj. She's been riding in a truck with him instead of looking for a job.

JX-7; (TR 92-93). Mr. Kotzer stated that he told Evert "out of respect" and not out of revenge. Mr. Kotzer testified that he called Evert, because he was initially calling him to look for Ms. Lawson. (TR 356). Mr. Kotzer testified that once he had Evert on the phone, he decided that he should tell him because no one else "has a pair of balls to tell you." (TR 356). Mr. Kotzer stated that he was especially motivated to tell Evert about the affair, because Ms. Lawson had said to Mr. Kotzer, "Well, he milked me for 14 years. Being he's working down in Texas, I'll just keep milking his checks." (TR 358). Mr. Kotzer testified that his other motivation for telling Evert about the affair is, because he didn't want him "to flip out" and come "to our office with a shotgun and take it out on Kwik Kargo or my family because we hid this." (TR 359).

After contacting Complainant's husband, Mr. Kotzer left a voicemail for Complainant. (JX-8; TR 96). Mr. Kotzer affirmed that on the voicemail he said:

I did not say all that. Somebody has made up a bunch of stuff. I did not tell Evert about Randy Slater. I did not say nothing other than saying that you are living with Mike Skaj when he's not around. Other than that, I did not say nothing, other than stuff we found on the computer with Johnson Trucking, and you forwarded an e-mail from the insurance company to Evert. Stuff that is illegal should be prosecuted. We wanted you in the offices to talk about this, because however you want to clean it up, well, we'll clean it up the hard way.

(JX-8: TR 97). Mr. Kotzer testified that he did not remember leaving the voicemail from Joint Exhibit 8 on Complainant's phone. (TR 97). Mr. Kotzer stated that he said "we'll clean it up the hard way" in reference to the threat that he would "call the authorities" if Complainant did not come back to the office. (TR 100). Mr. Kotzer testified that he never called the authorities. (TR 100). Mr. Kotzer further testified that Ms. Lawson had engaged in unlawful activities, because she was getting motor vehicle records for drivers other than our company, which is illegal. (TR 344). Mr. Kotzer testified that he talked with his insurance agent about Ms. Lawson's activities, and the agent "didn't think she was worth bothering with." (TR 348).

Mr. Kotzer heard a recording of his testimony from November 4, 2014, at a hearing concerning unemployment benefits for Complainant. (CX-1); (TR 102-111). At the unemployment hearing, Mr. Kotzer testified that after Complainant quit "of course, here comes a federal agent, comes in the office and looks at everything." (CX-1); (TR 105). Mr. Kotzer testified that he directed his employee, Brian Dingmann, a truck driver, and "asked him to call Kristy and explain that we've been together all these years, we do not need to fling mud on each other." (CX-1); (TR 135). Mr. Kotzer testified that "[Complainant] likes to play John Wayne and run the show" and that "like always, [Complainant] was trying to cover her butt." (CX-1); (TR 105). Mr. Kotzer stated that Complainant had "put us in a 'pickle.'" (CX-1); (TR 136). However, Mr. Kotzer testified that his testimony from the unemployment hearing concerning "flinging mud" was not in reference to Complainant calling the DOT, because he did not believe she had called the DOT. (TR 136).

Kristine "Kristy" Marie Lawson Testimony ("Complainant") (TR 140-337)

Complainant testified that she was hired by Kwik Kargo, Inc. in 1999. (TR 154). She was Safety Director at Kwik Kargo, Inc. for fifteen and a half years. (TR 156). Mr. Kotzer's testimony concerning her job description as Safety Director for Kwik Kargo, Inc. was correct, but not exhaustive. (TR 141). She did "a little bit of everything" for Trucking and Transport. (TR 143). Trucking had one truck registered to it, and Transport had 25 to 30 trucks registered to it. Kwik Kargo, Inc. rents the trucks; the trucks that they rent are owned by Clear Lake Enterprises. (TR 159).

Complainant testified that she oversaw DOT qualification for Trucking and Transport's truck drivers. (TR 148). DOT qualification is a "file on any driver that you have working for you that has to have specific information in it to be in compliance with the DOT and federal guidelines." (TR 148). Complainant stated that this file needed to contain:

Driver application, a release form that a driver has to sign so you can do the background checks from their previous employers. They also have to sign a release form if you plan on doing what is called a "pre-employment screening process," which is a report that you can get from the DOT listing any violations they have had in the past three years

Also, you have to have them sign a verification or an authorization to send them in for drug and alcohol testing. They have to agree to that You also have to have an hours of service verification sheet, which would detail any hours they had worked in the prior seven days to starting work with the company to ensure that they stay - - they are within the federal guidelines of hours of service regulations.

(TR 148-149). Complainant testified that Kwik Kargo, Inc. is required to conduct and maintain background checks on their truck drivers. (TR 150). Kenny Kotzer was her immediate supervisor for anything she did concerning driver safety. (TR 151).

Complainant testified that Evert Lawson was her second husband. (TR 161). She filed a separation agreement with Evert Lawson on September 10, 2014. (TR 161). In the last three years of marriage with Evert Lawson, she spent three weeks with him, and the last time she had seen him was February 2014. (TR 162). Complainant and her husband were apart for so long, because Evert Lawson worked as a truck driver in Texas. (TR 164). In September of 2014, she was still trying to save her

marriage and was discussing the "possibility of me coming down to Texas for a week when the finances permitted for us to just sit down and discuss where we were at and if it was worth saving." (TR 165).

Complainant testified that she started her romantic affair with Michael Skaj in September of 2013. (TR 164). During this time period she was not engaging in sexual relations with her husband. (TR 251). She started her affair with Michael Skaj because:

I was frustrated, I was lonely. My husband was very distant the last couple years we were married. He was jumping from job to job. He was - - again, he was laid back, quiet, he didn't talk to me, I couldn't - - we weren't communicating, and I was having a small issue with depression at that point and Michael helped. He was a good friend that helped me when I needed it.

(TR 166). However, Complainant testified that in September of 2013, she was "staying away from Mike. I had to limit my contact with Michael Skaj, so that I could try to concentrate more on my marriage." (TR 165).

Complainant stated that she was open about her affair and that she knew Kenny Kotzer knew of her affair with Michael Skaj. (TR 166). Complainant testified that Kenny Kotzer had told her about "two to three" months before she quit that she should tell her husband about her affair. (TR 167). That was the only time she talked about her affair with Kenny Kotzer. (TR 167).

Complainant testified that on September 29, 2014, she was dealing with a situation with a truck driver who was supposed to pick up a load in Georgia. (TR 173). On September 30, 2014, the truck driver called and had a heated discussion with Kenny Kotzer:

the gist of it was that the driver . . . [was] supposed to pick up the load then apparently - - I believe that's when the driver told him that he had brought the truck up to Indiana. And Kenney was angry, of course, because the truck didn't pick up the load. He lost the revenue off the load, put on miles without any load on, so he wasn't making any money on it.

(TR 173). Complainant further testified that Kenny Kotzer:

After a little while out in the break room, he came back into the office. He - I believe he finished the

conversation with the driver, was not quite as loud at that point, hung up the phone with the driver, turned to me and said that the driver had told him that he had told me he wanted money on his card to cover a bus ticket home or he wouldn't take the load. He asked me, "Did he say that to you?" I said, "No," and I started to explain. I got about to the point of "he told me," and at that point Kenny stopped me and said, "I don't want any 'f'ing' explanations" - - he did not use "f," he used the full word - - " I want an "f'ing" yes or no answer."

(TR 173). Complainant testified that she then said, "No." (TR 173). At that point, Mr. Kotzer told her to "get the 'f' out of my office." (TR 173). Complainant testified that she "got up from that desk, went to my other desk, grabbed my tote, grabbed my purse, grabbed my personal things and walked out." (TR 175). She walked out, because "I was told to. I thought I was fired." (TR 175). As she was walking out, Mr. Kotzer told Complainant that "if I walked out the door, it's a quit." (TR 176). She walked out the door, because for 15 years "I loved my job, but my boss was hard to deal with. I think I had dealt with enough, and when he went to that extent and screamed that loud at me, I don't think anybody should have to deal with that." (TR 176).

Complainant testified that on October 6, 2014, Mr. Kotzer left a voicemail on her phone requesting that she call him. (TR 177). On October 8, 2014, she received a call from a truck driver, Brian Dingmann." (TR 178). Mr. Dingmann told her "that Kenny wanted me to contact him, and that we had worked together for too long to let it end this way." (TR 178).

Complainant testified that she then called Mr. Kotzer, and he told her "that they could really use my help if I would be willing to come up and discuss the possibility of coming in and either going back to work or, if I couldn't go back to work, help train someone to do my job." (TR 179). She told Mr. Kotzer she was out of town, but upon her return to Minnesota she "would be willing to come and discuss the possibility." (TR 180).

Complainant testified that as of October 8, 2014, she still cared about her husband and wanted to save her marriage. (TR 180). Her marriage had been strained by her husband's inability to hold a job and his desire for her to move to Texas. (TR 295). She did not want to move to Texas because all of her friends and family were in Minnesota. (TR 180). Her husband "seemed like he was genuinely at least trying to hang on to the job he had and was willing to work on some things. So I had already had one failed marriage, I really didn't want another, so I was going to try to make it

work." (TR 182). Complainant stated that her husband called her on October 9, 2014:

He contacted me and he informed me that he had just received a call from Mr. Kotzer, and that Mr. Kotzer had called and told him that I called DOT in on them, that he would see my ass thrown in jail, and that I was having affairs with three different drivers, naming specifically, Michael Skaj, Randy Slater and another unnamed driver, and he thought he should know about it.

(TR 182). Complainant testified that the phone call made her angry and upset because:

Well, one, it made me sound like I was some kind of a slut running around with all these drivers apparently, that did not - - yes, I was seeing one of them, but not three. As Kenny said, we had a long-standing - - I mean, we worked together for 15 and a half years. I was upset that he would stoop to that level, because he thought I did something that I didn't.

(TR 183). Complainant testified that the phone call from her husband was the first time that she had heard about the DOT investigation. (TR 184). After the phone call from her husband, she received a text from Rick Kotzer, Kenny Kotzer's brother and a truck driver for Trucking, that said, "Stop whatever you're doing and call me." (TR 184). She called Rick Kotzer, and he asked her if she called DOT. Complainant told Rick Kotzer that she did not call DOT, and Rick Kotzer replied, "I didn't think so." (TR 185). After she received the phone call from Rick Kotzer she texted Ms. Kotzer, "I did not call DOT. If you want to know why they are coming in call me." (TR 186). Complainant believed she was being accused of contacting DOT because of the phone call from her husband and "the implication from Rick was there." (TR 186).

Complainant stated that she is not claiming that she left her office because Mr. Kotzer thought she had called the DOT on that day that he told her to "get the 'f' out of the office." (TR 213). Complainant also confirmed that she signed a Request for Admission in front of Notary Public, stating that she is not claiming that protected activity contributed to the loss of her full-time job on September 30, 2014. (JT 10.; TR 213).

Complainant testified that on October 15, 2014, Ms. Kotzer called Complainant and left a voicemail. (TR 186). The voicemail left by

Ms. Kotzer was to ask if Complainant would come in and help. (TR 187). She called Ms. Kotzer back and told her:

after the phone call Kenny had made to my husband, that I didn't feel I could come into the office. She then asked me . . . what I was told was said, and I told her at that time that Kenny had called my husband and told him that I was having an affair with Mike Skaj, Randy Slater and another driver, and because I had called DOT in on him, and he'd see my ass thrown in jail, and I did not feel comfortable coming back into that office after.

(TR 188). Complainant further testified that Ms. Kotzer said that, "she understood my feelings, but that they could really use my help." Within an hour of her phone call with Ms. Kotzer, Kenny Kotzer called Complainant and left a message stating:

I did not say all that. Somebody has made up a bunch of stuff. I did not tell Evert about Randy Slater. I did not say anything other than saying that you are living with Mike Skaj when he's not around. Other than that, I did not say anything other than stuff that we found on the computer with Johnson Trucking, and you forwarded e-mail from the insurance company to Evert. Stuff that's illegal should be prosecuted. We wanted you in the office to talk about this because however you want to clean it up, well, we'll clean it up the hard way.

(TR 189). Complainant testified that she had depression and anxiety for six months before Mr. Kotzer's phone call, but Mr. Kotzer's phone call sent her into a major depression. (TR 276, 289). The major depression, caused by Mr. Kotzer's phone call, was not normal behavior for her:

Normally up until then I would have - - I would have recurring depression, but nothing severe. I would get the lower dosage of medication and take that, and that would usually suffice until the few minor issues I was dealing with would ease up and then I was able to back off. But when something like this happened, it caused the depression to spiral out of control.

(TR 289). Complainant testified that she was "without a job at the time, a job I liked - - I liked working in trucking, I liked working with the drivers."

(TR 194). After the phone call from Mr. Kotzer to her husband, her husband stopped sending her money. (TR 195). Without her job and without the support of her husband, she lost her house, because she “[c]ouldn’t pay the rent” and was removed from her home. (TR 196). She was not technically evicted, but she was given a choice by her landlord to vacate her house or she would be evicted, so Complainant vacated her house. (TR 278). She had no income and had to delay treatment for her depression because she:

couldn’t afford to pay my bills the way it was. I was struggling to make sure everything was covered prior to that date, and afterwards I had no income, my husband had cut back on what he was helping me with, and so I did not have money to buy the medications or pay the medical bills.

(TR 324). Complainant testified that she had to move in with her sister and then when her car broke down she couldn’t afford to fix it, and was without a vehicle. (TR 196). After the phone call from Mr. Kotzer to her husband:

my husband got almost demanding. Rather than me coming to visit, he wanted me to move to Texas permanently and live with him. He didn’t want to hear anything about my family being here, my grandchildren and my kids - - I’m his wife, I should be there with him. His attitude changed tremendously and he got belligerent. He got very argumentative. It wasn’t anymore, “Let’s discuss this,” it’s “You will do this.”

(TR 194). Complainant testified that Evert began to have medical problems and did not tell Complainant about them. (TR 302). She stated that

[Evert] was not explaining to me what the problem was, and he was withdrawn and wouldn’t communicate with me. He would just - - when he was home, he would be in his - - in our home office on the computer. And when he was away, he wouldn’t talk to me about it.

(TR 302). Complainant testified that after Evert began to reduce their communication, Evert became “more and more insistent that I move to Texas. I told him I wouldn’t, and in August of 2015 he went on dating sites and started looking for different companionship there.” (TR 300-302).

Complainant further testified that Mr. Kotzer caused her marriage to have “broken to the point of no return after that, so I filed my divorce

papers.” (TR 197). Complainant stated she is still in financial distress. (TR 197).

Complainant testified that after she received the phone call from Mr. Kotzer, her depression worsened and she saw a doctor on February 20, 2015, to treat her worsening depression. (TR 199). Her doctor diagnosed her with “anxiety and depression primary.” (JX-13); (TR 199). The doctor raised her prescription for the drug Bupropion, an antidepressant, from 75 milligrams to 150 milligrams as a result of her visit. (JX-13); (TR 200). She was also prescribed 20 milligrams of Citalopram to treat her anxiety. (TR 200).

Complainant stated that the February 20, 2015 doctor visit did not solve her medical problems. (TR 193). After “many months of trying to fight everything, the depression and anxiety got to a point where I just couldn’t – even with the medication I was already on, it was just more than I could handle.” (TR 192-193). Her depression and anxiety worsened, and she also began to have “a hard time sleeping at night. I was rarely getting more than 2 to 3 hours.” Her insomnia was a result of the depression and the anxiety. “The anxiety – it’s hard to shut your mind and body down. When the anxieties go up, it’s hard to – you get jittery. There are actually times when I would have anxiety attacks where I would have to – I’d start hyperventilating so I’d have to try to calm myself down.” (TR 203). To deal with her worsening depression, anxiety, and insomnia, she saw Dr. Dakoji on April 8, 2015. (TR 193). Dr. Dakoji doubled her prescription for Citalopram and doubled her prescription for Bupropion to treat her depression and anxiety. Dr. Dakoji prescribed her 100 milligrams of Trazodone to treat her insomnia. (JX-14); (TR-203).

Complainant testified that she saw another doctor on April 22, 2015. (TR 204). Her prescription for Bupropion and Trazodone stayed the same, but her prescription for Citalopram was doubled to 40 milligrams to treat her increasing anxiety. (TR 204).

Complainant testified that she also saw a behavioral psychotherapist, Lauren Forest, for a few sessions to treat her depression. (TR 286). Ms. Forest taught her helpful strategies for how to manage her anxiety and deal with the problems in her life. (TR 287).

Complainant filed a claim with OSHA and on April 21, 2015, OSHA rejected her claim. (TR 275). Complainant testified that Transport’s drivers were in compliance with DOT regulations 99.05% of the time, which she testified was a good ratio. (TR 240). In addition, Complainant testified that as a result of the DOT Compliance review, there was no safety downgrade or rating change for Transport. (TR 235).

Brent C. Johnson Testimony (338-341)

Brent C. Johnson testified that he worked with Kristy Lawson in 2014. (TR 339). Ms. Lawson told Kenny Kotzer in front of Mr. Johnson that:

she'd been seeing Mike. And on one occasion she did say that, you know, she had been seeing him and she was - - they were talking about Evert and the fact that she was going to, you know, keep, I don't know if you'd say, milking him, I guess, or to keep collecting his check while she was still seeing him, rather than, you know, telling him about it.

(TR 340). Mr. Johnson testified that outside of that conversation Ms. Lawson did not discuss her relationship with Evert to anyone else. (TR 341).

DISCUSSION AND ANALYSIS

The employee protection provisions of the STAA prohibit covered employers from discharging or otherwise retaliating against employees because of their participation in protected activity. 49 U.S.C. § 31105; 29 C.F.R. § 1978.102. Specifically, STAA prohibits retaliation against employees who have filed a complaint or participated in a proceeding related to the violation of commercial motor vehicle safety or security regulations, and STAA also protects employees who are believed to be engaged in such activity. 49 U.S.C. § 31105(a)(1)(A); 29 C.F.R. § 1978.102(b), (e). Similarly, the Act protects employees who refuse to operate a vehicle either because operation of the vehicle would violate motor vehicle safety regulations or because they have a reasonable apprehension of serious injury to themselves or others due to the vehicle's hazardous condition. 49 U.S.C. § 31105(a)(1)(B); 29 C.F.R. § 1978.102(c)(1).

STAA provides that whistleblower complaints shall be governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). 49 U.S.C. § 42121(b) (2011); 49 U.S.C. § 31105(b)(1). AIR 21 prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must initially make a *prima facie* showing by a "preponderance of the evidence" that a protected activity was a "contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(i), *see also*, 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010) ("It is the Secretary's position that the complainant [in a STAA case] must prove by a 'preponderance of the evidence' that his or her protected activity . . . contributed to the adverse action at issue."); *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, ALJ Nos. 2008-STA-012, 2008-STA-041, slip op. at 8 (ARB Sept. 15, 2011). Thereafter, a

respondent can only rebut a complainant's case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant's protected action. See *Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB April 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)); see also *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of the evidence that he engaged in protected activity, Respondent knew of the protected activity, Complainant suffered an unfavorable personnel action,⁴ and the protected activity was a contributing factor in the unfavorable decision, provided that the Complainant is not entitled to relief if the Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

Consequently, in order to meet her burden of proving a claim under STAA, Ms. Lawson must prove by a preponderance of the evidence that: (1) she engaged in protected activity, (2) Respondent knew of the protected activity, (3) she suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable personnel action.⁵ See *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007). A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, at 6 (ARB Feb. 29, 2012).⁶ If Complainant satisfies her *prima facie* case by a

⁴ An adverse employment action must actually affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l Railroad Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009). See also *Simpson United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008); *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

⁵ Although I list the knowledge requirement as a separate element, I note the ARB has reiterated that there are only three essential elements of an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker's "knowledge" and "animus" are only factors to consider in the causation analysis. See *Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013).

⁶ In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3rd Cir. 2013), the court held that the employee "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination, not the sole or even predominant cause." In addition, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed.Cir.1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by

“preponderance of the evidence,” the burden shifts to Respondent to demonstrate by “clear and convincing evidence” that it would have terminated Complainant even absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii); *see also* 75 Fed. Reg. at 53,550; *Salata*, ARB Nos. 08-101, 09-104, slip op. at 9. For the reasons discussed below, I find that Complainant has not established that she engaged in protected activity. Also, I find that there is insufficient evidence to find that Employer believed Complainant had engaged in protected activity. Accordingly, I find Respondent has not violated the STAA.

I. *Prima Facie Case*

a. *Protected Activity*

In order to determine whether Complainant has met her burden under the first element of the STAA claim, it is important to first determine whether Complainant was an employee during the time of the alleged protected activity. In her original complaint to OSHA in this matter, Complainant asserted that Respondents harassed her on October 9, 2014 and on October 13, 2014 in violation of the employee protection provisions of the STAA, of 1982, and its implementing regulations. 49 U.S.C. § 31105; 29 C.F.R. Part 1978. (JX 11).

As stated above, the STAA protects employees who engage in STAA-protected activity. 49 U.S.C. § 31105(a)(1)(A)(ii). Under the STAA regulations, 29 C.F.R. § 1978.101(h)(3), the term “employee” is defined as “an individual formerly performing the work [for employer].”⁷ Complainant was a Safety Director when Respondent employed her. (Tr. 219-220). On September 30, 2014, Complainant affirmed that as of September 30, 2014, Kwik Kargo Inc., no longer employed her. (JX 10, 11; TR 176). Mr. Kotzer

Federal Circuit); *see also Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (“A prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive.”); *Menendez v Halliburton, Inc.*, ARB Nos. 09-002,-003; ALJ No. 2007-SOX-005 (ARB Sept. 13, 2011), at 31-32; *Kuduk v. BNSF Railway Company*, 768 F. 3d 786 (8th Cir. Oct. 7, 2014)(“[a] prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive. But the contributing factor the employee must prove is intentional retaliation prompted by the employee engaging in protected activity”).

⁷ *See also*, *Connecticut Power and Light v. Sec’y of the Dpt. of Labor*, “a former employee fell within the scope of the term “employee” because the alleged discrimination arose out of the employment relationship.” ((2nd Cir. 1996) John Delcore, No. 89-ERA-38 (April 18, 1995) (Dep’t of Labor) (Final Review) (“Decision & Order”)).

testified that after he told Complainant to “get the ‘f’ out” of his office, Complainant “went into her office and grabbed her stuff and then went down the hall to exit the door.” (TR 80). Mr. Kotzer stated that he took that action as Complainant quitting. (*Id.*). Furthermore, Ms. Kotzer testified that Kenny Kotzer told Complainant to get out of his office on September 30, 2014. (TR 44). Ms. Kotzer maintains that Complainant quit after that interaction. (TR 49). Ms. Kotzer testified that she attempted to contact Complainant and asked her if she “would come and help” after Complainant was no longer working with Respondent. (TR 45).

Complainant testified that after she was no longer employed by Respondent, on October 6, 2014, Mr. Kotzer left a voicemail on her phone requesting that she call him, as well another truck driver called on behalf of Respondent stating, “we had worked together for too long to let it end this way.” (TR 177-178). Complainant further stated that she then called Mr. Kotzer, and he told her that “that they could really use my help if I would be willing to come up and discuss the possibility of coming in and either going back to work or, if I couldn’t go back to work, help train someone to do my job.” (TR 179). She told Mr. Kotzer she was out of town, but upon her return to Minnesota she “would be willing to come and discuss the possibility.” (TR 180). Complainant has again affirmed that Respondent did not employ her as of October 6, 2014. Therefore, as of September 30, 2014, Complainant was no longer considered Respondent’s employee; however, under the STAA regulations and based on Complainant and Respondent’s testimony, Complainant is considered a former employee.

Thus, Complainant, as a former employee, must first demonstrate that she engaged in activity protected by the STAA. The Act protects employees in the following five scenarios:

(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 or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the [employer] 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;

(B) the employee refuses to operate a vehicle because—

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation. 49 U.S.C. § 31105(a)(1). Subparagraphs (A) and (B) protect activity that is substantially similar to activity protected by the prior version of the statute codified at

49 U.S.C. § 31105(a)(1), subparagraphs (A) and (B) (2006). The amended statute protects three additional categories of activity described at Subparagraphs (C), (D), and (E). *Sacco v. Hamden Logistics, Inc.*, ALJ No. 2008-STA-43 (Nov. 17, 2008) (citing Pub.L. 110-53, Title XV, § 1536, 121 Stat. 464 (Aug. 3, 2007)). Complainant does not allege that she refused to drive a truck at any time. Therefore, subparagraph (B) is inapplicable. Complainant does not make any allegations with respect to accurately reporting hours; therefore, subparagraph (C) is also inapplicable. Additionally, Complainant does not present any evidence of a pending safety or security investigation or any factual basis for finding that Respondents perceived that Complainant was about to testify in any proceeding; therefore, subparagraph (D) is not applicable. Although Complainant speculates that Mr. Kotzer "perceived" that she contacted federal regulators, she does not identify the basis for this suspicion, nor does she present evidence that she in fact contacted or intended to furnish information to any of the agencies listed in subparagraph (E), nor is there evidence that an accident or injury occurred which resulted in injury or death to any individual or damage to property in connection with motor vehicle transportation. Therefore, subparagraph (E) is also inapplicable.

This leaves subparagraph (A), (ii) the [employer] 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.

Here, Complainant is not claiming that Mr. Kotzer thought she had called DOT on the day that he told Complainant "to get the 'f' out," on September 30, 2014. (TR 213). Moreover, Complainant is not claiming that she engaged in protected activity. (JT 10; TR 213). Complainant affirmed through her testimony that she is not claiming that she left her office on September 30, 2014, engaging in protected activity, because Mr. Kotzer thought she had called the DOT on that day that he told her to "get the 'f' out of the office." (TR 213). Complainant also confirmed that she signed a Request for Admission in front of Notary Public, stating that she is not claiming that protected activity contributed to the loss of her full-time job on September 30, 2014. (JT 10.; TR 213).

However, Complainant does contend that Respondents harassed her on October 9, 2014 in violation of the employee protection provisions of the STAA, "when the [employer] 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)(1)(A)(ii). (JX 11). Complainant stated that her husband called her on October 9, 2014 stating that Mr. Kotzer contacted him and told him that Complainant called DOT in on them, that he would

see my ass thrown in jail, and that I was having affairs with three different drivers, naming specifically, Michael Skaj, Randy Slater and another unnamed driver, and he thought he should know about it. (TR 182).

Complainant further testified that the phone call from her husband was the first time that she had heard about the DOT investigation. (TR 184). Complainant received further information about the DOT investigation when Rick Kotzer, Kenny Kotzer's brother called her and asked her if she contacted DOT. (TR 184). Complainant stated that she told Rick Kotzer that she did not call DOT. (TR 185). Thereafter, Complainant called Mrs. Kotzer to tell her that she did not call DOT. (TR 186). At this point, Complainant believed she was being accused of contacting DOT because of the phone call from her husband and "the implication from Rick was there." (TR 186).

Mr. Kotzer testified that on October 9, 2014, he became aware that DOT had "contacted Kwik Kargo and was going to perform a compliance review" on November 18, 2014. (TR 85, 115). Mr. Kotzer further testified that when he learned the DOT would be conducting a compliance review, he

became "panicky" because truck drivers had falsified log reports, multiple. Mr. Kotzer confirmed that he asked the DOT whether a "disgruntled employee" or Complainant had triggered the compliance review. (TR 113). Mr. Kotzer testified that he has a contact at the DOT that told him that "it was a routine inspection; it had nothing to do with [Complainant]." (TR 113). Mr. Kotzer stated that he believed his contact at the DOT, because they usually "don't like to tell. They're usually honest, but they were very forward in saying that it was no complaint, it was just a routine audit." (TR 128). He also stated that he "knew [Kristy] didn't turn us in." (TR 91).

Mr. Kotzer confirmed that "on or around October 9, 2014," he called Mr. Lawson, Complainant's husband. (TR 88). He stated that he called Mr. Lawson, because he was initially calling him to look for Ms. Lawson. (TR 356). Mr. Kotzer stated that he had previously asked Complainant to tell her husband about the affair before he called Complainant's husband, but could not recall the exact date. (TR 92, 122). Mr. Kotzer testified that once he had Mr. Lawson on the phone, he decided that he should tell him about Complainant's affair because no one else "has a pair of balls to tell you." (TR 356). Mr. Kotzer stated he told Mr. Lawson that "his wife was having an affair with Mike Skaj." (TR 89-90). Mr. Kotzer stated that he told Mr. Lawson "out of respect" and not out of revenge. (TR 122). Mr. Kotzer stated that his motivation for telling Mr. Lawson about the affair was because he didn't want him "to flip out" and come "to our office with a shotgun and take it out on Kwik Kargo or my family because we hid this." (TR 359).

After review, I must determine whether a protected activity is at issue in this case. The alleged protected activity in this case is whether Mr. Kotzer perceived that Complainant contacted the DOT, complaining about safety violations, and triggering a compliance review, thereby calling Complainant's husband about her affairs. Mr. Kotzer did testify that he asked the DOT whether a "disgruntled employee" or Complainant had triggered the compliance review. (TR 113). However, Mr. Kotzer stated that his reason for calling Complainant's husband was not due to the DOT investigation but because he was initially looking for Complainant. Mr. Kotzer further stated that he decided to tell Complainant's husband about her affairs "'out of respect' and not out of revenge." (TR 122).

However, Complainant contends that Respondent called Complainant's husband and told him that Complainant called DOT for alleged violations by Respondent and that he would "throw [Complainant's] ass in jail." Yet, without the testimony of Complainant's husband, the undersigned cannot confirm that Respondent told Complainant's husband about the DOT investigation and threatened Complainant with jail time. (TR 88-95). With regard to Complainant's testimony concerning threats of jail time,

Respondent did admit that he told Complainant's husband that "illegal actions should be prosecuted." (TR 88-95). Complainant also testified that Mr. Kotzer's brother called Complainant, asking whether she had contacted the DOT; yet, similar to above, without the testimony of Mr. Kotzer's brother, the undersigned cannot confirm that Respondent's brother called Complainant about the DOT investigation.

As discussed above, if an employee has been perceived to have filed a complaint or participated in a proceeding related to the violation of commercial motor vehicle safety or security regulations, their perceived activity is a protected activity. Here, Complainant's submissions fail to provide evidence to corroborate that she had been perceived to have filed a complaint. The ARB has stated that Complainant's who provide "vague [evidence that] fails to point to specific conduct" cannot be considered to have met their burden in proving by a preponderance of the evidence that he or she engaged in protected activity. *Menefee v. Tandem Transport Corp.* Case No. 2008-STA-00055 (ARB April 30, 2010).

Therefore, the undersigned finds that when considering the credibility of the available testimony and evidence as a whole, the Complainant has not met her burden by proving by a preponderance of the evidence that she engaged in protected activity or that Respondent perceived she engaged in protected activity.

Conclusion

For the reasons discussed above, I find that Complainant has failed to establish her prima facie case. The evidence does not establish that Complainant engaged in STAA-protected activity under 49 U.S.C. § 31105(a)(1)(A)(ii). In other words, Complainant has not proven by a preponderance of the evidence that she engaged in protected activity or that Respondent perceived she engaged in protected activity.

ORDER

The complaint for whistleblower protection under the Surface Transportation Assistance Act filed by Kristy Lawson, with the Occupational Safety and Health Administration on February 7, 2015, is hereby DENIED.

WSC/LDG

WILLIAM S. COLWELL

Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing

address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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

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

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

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.