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Issue Date: 26 September 2017

CASE NO.: 2016-STA-00007

In the Matter of:

T.J. JACOBS,
Complainant,

v.

LIBERTY LOGISTICS, INC.,
Respondent.

DECISION AND ORDER

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA" or the "Act"), 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, and corresponding regulations found at 29 C.F.R. Part 1978.

PROCEDURAL HISTORY

On July 29, 2015, T.J. Jacobs ("Complainant" or "Mr. Jacobs") filed a formal complaint of retaliation with the U.S. Department of Labor ("DOL"), Occupational Safety and Health Administration ("OSHA"), under the Surface Transportation Assistance Act ("STAA"), alleging that his employer, Liberty Logistics, Inc. ("Respondent") terminated his employment in retaliation for reporting safety violations. After conducting an investigation, the Assistant Secretary of Labor issued a final determination letter dated October 26, 2015, dismissing the complaint (ALJX1).[1]

On December 1, 2015, Complainant filed objections to the Secretary's Findings with the Office of Administrative Law Judges ("Office" or "OALJ"); (ALJX 2). On July 20, 2016, I convened a formal hearing in Jacksonville, Florida, at which both parties were afforded a full and fair opportunity to present evidence and argument.[2] At hearing, Respondent's Exhibits ("RX") A, B, C, E, and F, and Complainant's Exhibits ("CX") 3-5, 7-20, 23-52, and 54 were admitted into evidence. One witness, Mr. Jacobs, testified. The record remained open for the

[1] The following references will be used: "Tr." for the official hearing transcript; "CX" for a Complainant Exhibit; "RX" for a Respondent Exhibit; and "ALJX" for an Administrative Law Judge's Exhibit.

[2] The parties, both self-represented litigants, were advised regarding their respective burdens of proof and obligations throughout the proceedings and at the hearing, and willingly consented to continue *pro se*.

submission of additional evidence and of post-hearing briefs. On July 3, 2017, I issued a Post-Hearing Evidentiary Ruling and Order Closing the Record. Therein, I accepted RX H and RX X into the record, and allowed both parties the opportunity to submit supplemental closing briefs. The parties submitted their supplemental briefs on July 21, 2017 and July 31, 2017, respectively. My previous rulings, if not expressly discussed, are nonetheless incorporated herein by reference.

The findings and conclusions that follow are based on a complete review of the record in light of the arguments of the parties, the testimony and evidence submitted, applicable statutory provisions, regulations, and pertinent precedent. Although I do not discuss every exhibit in the record, I have carefully considered all the testimony and exhibits in reaching my decision.

APPLICABLE LAW

The employee protection provisions of the STAA provide, in general, that a covered employer may not take adverse employment action against an employee because the employee: (i) has filed a complaint or testifies about "a violation of a commercial motor vehicle safety or security regulation, standard, or order," 49 U.S.C. § 31105(a)(1)(A); (ii) "refuses to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," 49 U.S.C. § 31105(a)(1)(B)(i); (iii) "refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition," 49 U.S.C. § 31105(a)(1)(B)(ii); or (iv) "accurately reports hours on duty pursuant to chapter 315," 49 U.S.C. § 31105(a)(1)(C), 29 C.F.R. § 1978.102(c)(2). The STAA employee protection provisions were enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles." Congress recognized that employees in the transportation industry are often best able to detect safety violations and, yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting the violations.[3]

The STAA provides that whistleblower complaints shall be governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121(b)(2)(B). *See* 49 U.S.C. § 31105(b)(1). Under the AIR21 standard, complainants must initially prove by a preponderance of the evidence that a protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. A "contributing factor" is "any factor, which alone or in combination with other factors, tends to affect in anyway the outcome of the decision."[4] If a complainant makes this showing, then the burden shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same alleged unfavorable personnel action in the absence of the protected behavior. 49 U.S.C. § 42121(b)(2)(B)(ii).

[3] *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).
[4] *Powers v. Union Pac. R. R. Co.*, ARB No.13-034, ALJ No. 2010-FRS-030, slip op. at 11 (Jan. 6, 2017) (internal citations omitted).

Thus, in order to prevail in this case, Mr. Jacobs must prove: (i) that he engaged in protected activity; (ii) that his employer, Liberty Logistics, Inc., took an adverse employment action against him; and (iii) that the protected activity was a contributing factor in his employer's decision to take the adverse employment action. If Mr. Jacobs satisfies this initial burden by a preponderance of the evidence, Respondent may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action against him even if he had not engaged in protected activity.

ISSUES PRESENTED

- Has Complainant proven by a preponderance of the evidence that he engaged in protected activity?

- Has Complainant proven by a preponderance of the evidence that he suffered an adverse employment action?

- Has Complainant proven by a preponderance of the evidence that his protected activity contributed, in part, to Respondent's decision to take adverse action against him, i.e. was the protected activity a factor which, alone or in connection with other factors, tended to affect in any way the outcome of its decision?

- If Complainant met his burden, can Respondent show by clear and convincing evidence that they would have taken adverse action against Complainant in the absence of protected activity?

- If Respondent does not meet its burden, what are the appropriate compensatory damages, costs and expenses and what further relief, if any, is appropriate?

SUMMARY OF THE EVIDENCE[5]

Complainant's Exhibits:

- CX3: Job posting on Indeed (1 page)
- CX 4: Automated confirmation of application to job posting (1 page)
- CX 5: Bus ticket from Jacksonville, FL to Norcross, GA (1 page)
- CX 7: June 8th Email from Complainant to Julie (Resp. Compliance) complaining of cell phone calls from Dispatch (1 page)
- CX 8: June 15th Email from Complainant to Juanita Owens with "June 15" attachment (1 page)
- CX 9-10: June 15, 2015 Letter addressed from Complainant to Tracy, requesting complete copy of sign-on documents (2 pages)

[5] The summary of the evidence is not intended to be an exhaustive analysis of each exhibit or a verbatim transcript of the hearing but merely to highlight certain relevant portions. The exhibits are generally described by their respective face sheets or as described at hearing. ALJ Exhibits 1-6 were also admitted at the hearing.

- CX 11: June 15, 2015 Tracy Ashley response to CX 8-10, forwarded from Juanita Owens, stating that she would provide copies of everything Complainant signed (1 page)
- CX 12: June 16th Email from Complainant to Compliance with "June 15" attachment (1 page)
- CX 13-15: Text document, entitled "Notice of Hostile Work Environment," dated June 16, 2015 (3 pages)
- CX 16: June 17th Email from Complainant to Juanita Owens requesting she utilize the "Pre-Plan" for future assignments (1 page)
- CX 17: June 17th Juanita Owens response to CX16, stating, "When there is no communication it makes this difficult to do" (1 page)
- CX 18: June 17, 2015 automated FMSCA Customer Service email confirming receipt of Complainant's question or request, entitled "Limiting Use of Electronic Device – Sec. 393.80(b) (1 page)
- CX 19-20: June 18, 2015 FMSCA Customer Service email summarizing request and response, referring Complainant to Federal Field Office (2 pages)
- CX 23: June 19, 2015 Email from Complainant to Juanita Owens and Compliance with four attachments, including Rescission Letter (1 page)
- CX 24-25: Complainant's June 19, 2015 Notice of Rescission of Agreements (2 pages)
- CX 26-51: Unsigned Driver Contract Agreement with attachments; unsigned Addenda; unsigned Vehicle Sublease Service Agreement (26 pages)
- CX 52: Unsigned form regarding logbook and refueling requirements (1 page)
- CX 54: June 19, 2015 Vehicle Work Summary (1 page)

Respondent's Exhibits:

- RX A: October 26, 2015 cover letter of OSHA determination (1 page; pp 2-4 not admitted)
- RX B: June 12, 2015 Forward to Nicholas Miller of Email from Juanita Owens to Complainant regarding dispatch (3 pages)
- RX C: June 17, 2015 – June 18, 2015 Email correspondence between Complainant and Juanita Owens (1 page)
- RX E: June 15, 2015 Email from Tracy Ashley to Juanita Owens and Complainant (1 page)
- RX F: Full and Final Settlement between Respondent and Claimant and two payroll printouts (3 pages)
- RX H: OSHA notification to Respondent that a complaint had been filed (6 pages)
- RX X: Respondent's administrative file regarding Complainant's employment with Respondent (149 pages)

Testimony

Complainant – T.J. Jacobs (Tr. at 100-195)[6]

During his hearing testimony, Complainant stated that he submitted his application to work for Respondent on May 8, 2015. Tr. at 173. On May 12th, he said he spoke by telephone with Tracy Ashley and Nicholas Miller, who were employees of Respondent. *Id*. Complainant explained that even before he left Jacksonville, Florida on May 13th, he felt that he was working in a hostile environment. Tr. at 171. He said that he "detected some silliness then when I couldn't get nobody to send me concrete information on what the job really was, outside of what was on the ad, the Indeed ad." *Id*. He detailed:

> I asked Tracy Ashley, the recruiter, I said send me everything. And when she called me back and said everything was good to go, I'm going to let you talk to my manager for a little bit. So, I talked to Nicolas Miller and I told him after he was satisfied that, you know, she couldn't detect no . . . phoniness about me. He said okay, I'll have Tracy send you the travel information. And I said, oh before you go, I said I asked her to send me everything, you know, that's not on the ad that I need to know about, what kind of trucking you all are doing. And he said, okay, I'll have her send it.

Tr. at 171. Ms. Ashley and Mr. Miller told Complainant to be prepared to leave the next morning at 2:30. Tr. at 173. He arrived on the 13th between 11:00 and 11:30 a.m., checked into the hotel, and called Ms. Ashley. *Id*. He took his own transportation to Respondent's headquarters, arriving at about 1:00, as instructed by Ms. Ashley. *Id*. Complainant said he "sat around there for about two hours doing nothing but playing with my fingers or whatever else, and just bored to death." *Id*. He explained that he "had been up all that night, May the 12th, because I didn't get sleep. [Respondent] didn't plan the trip well enough for me to get no sleep. So I was up all night May the 12th, and I was up all day on the 13th, and I never saw any paperwork from [Respondent]. What I did see was the paperwork from the lab tech who was there to do the drug testing at their facility." Tr. at 173-174. Complainant testified that the lab tech arrived around 2:45 or 3:00 and was there approximately 15-20 minutes. Tr. at 174. He explained that there were two employment contracts: one with Complainant's signature and another that was completely blank except for the dates. Tr. at 148. He stated that he did not sign any contracts on May 13th. Tr. at 148. Complainant explained that because he was traveling by bus on May 13th, and because he got to the hotel at 11:00 a.m. and to Respondent's office at 1:00, that "there is no way that we would have went through all of these papers from 1:00 to the time you get off at 5:00. Tr. at 155. When asked if he ever signed the Vehicle Sublease Service Agreement, Complainant said that the signature on the bottom of the last page was not his signature. *Id*. He stated that his signature and initials did appear elsewhere in the document, and that he believed it to not be a copy of the original. Tr. at 155-156. He said that he had not seen

[6] The Complainant was advised on numerous occasions that testimonial evidence would only be taken under oath. *See* Tr. at 19-20, 27-28, 37, 62, 85-86, and 98-99, thus I have considered only such testimonial evidence that was subject to the penalties of perjury in rendering my decision. I note, however, that were I to consider anything stated by the Complainant while not under oath, my decision in this matter would not change.

all four pages of the document before, but every page with his initial on it he had seen. Tr. at 156-157. Complainant further detailed:

> I don't even know if you can call them contracts, I would call them negotiations of contracts. That's what I would call them because they didn't complete, they didn't have the complete terms and that's required in the federal regulations. And so, basically I was coerced into signing those blank documents in order to keep the process moving and to satisfy Tracy. I said, I know where to sign and told her after she came and took them from me at the conference table. I said, I need, if you're going to take them, I need copies of everything I signed just like I signed, just like you're sitting right there. And she refused to do that.

Tr. at 150. Complainant stated that he had never heard of the hiring program called Tenth Street and had never received a link to the contract. Tr. at 151-152.

Complainant said that he reported a number of federal regulations that were being violated by the company. Tr. at 118. Regarding his original complaint to OSHA, Complainant testified that he listed the cell phone usage, discrepancies with dispatch, and "a whole lot of things plus" as adverse actions. Tr. at 139, 140. Complainant also complained to the Federal Motor Carrier Safety Administration on June 17, 2015, because, he alleged, Respondent was not answering his questions. Tr. at 102. Complainant stated:

> They didn't want to hear me complaining about being in violation of any federal regulation. They didn't want to hear nothing about the cell phone usage. They didn't want to hear nothing about the lease deal. Federal regulations, they require certain conduct and they didn't want to comply with the required conduct. They just flat out refused because for one, they were covered because they had twenty documents to back them up and not be held responsible if something should happen. Had I hit somebody on the road and killed somebody on the road with that semi-truck while I was with them, my life would have been over because they got funny paperwork. I couldn't focus on my driving, that kept me fatigued.

Tr. at 119. Complainant stated that the paperwork was a result of his complaint. *Id*. He said:

> [The paperwork has] been at the heart of the matter. See, there were two major things going on with this company. The first thing was the excessive texting and messaging and harassment beginning June 8th with that dispatcher, cause she knew I didn't like getting text messages. She's even had other people texting me, brokers, shippers, receivers. I mean, all of these kinds of calls coming in on a day-to-day basis for nothing, because she wanted me to do her job. A lot of times like I said, when you see paper, ain't no address on it. I'd get dispatches with no address. I got to go find a way to find out how to get the load to where it's supposed to be. I got to just find out how to go pick up the load. I got to find out how to go deliver the load, because I don't get the proper information.

Tr. at 120. Complainant disagreed with Respondent's assertion that he was hard to communicate with, stating that "no driver wants to be out of communication with what he's out there for, which is to pick up freight and deliver it." Tr. at 106.

Complainant testified that Respondent never provided him with pre-load plan information that he constantly asked about. Tr. at 105, 132, 144-145, 146. For example, the bill of lading that he picked up on June 4th to take to New Smyrna Beach, Florida, he alleged, did not have an address on it. *Id*. He complained about this, as he felt that it was illegal according to Federal Motor Carrier regulations. *Id*. Complainant stated that it was routine for Respondent to not provide an address, and he complained about this as a violation of safety regulations. *Id*. Complainant testified that Respondent "didn't care because the paperwork allowed them to escape responsibility if I should get in trouble with that truck and not have my paperwork. They could say whatever they wanted to say." Tr. at 121. He stated, "It got to a point where I had to write a letter about it to establish the fact that I'm asking for a means and a method to help improve relations." Tr. at 105-106.

When showed RX B at hearing, Complainant stated that he did not believe he had ever seen it before. Tr. at 133. He explained that RX B appeared to be an actual load being transmitted, and was not the pre-loading information that should be sent to a driver ("pre-plan"). Tr. at 133. Complainant stated that the loads he picked up and delivered for Respondent were assigned via direct dispatch. Tr. at 145. Complainant detailed:

> No pre-planning involved at all. It's a direct dispatch. That's what it is. It's like a police department giving a dispatch to an officer. . . . [A] direct dispatch don't require no pre-planning, you just take the assignment and go.

Tr. at 145. Regarding the procedure for picking up a load, Complainant detailed:

> There ain't no general procedure. . . . You go there and then you check in or whatever they tell you to do, that's what they tell you to do. They may tell you to go down the road two miles from the shipper. They may tell you to go five, ten, fifteen miles somewhere else to get stuff.

Tr. at 147.

Prior to June 8th, Complainant stated that he had made several efforts to communicate with Respondent about how he was being treated, and about not being given copies of the paperwork he had signed. Tr. at 104. He testified that after June 8th, the dispatcher would be nasty to him, but up until June 8th, Respondent had not been nasty. Tr. at 105. He said that the dispatcher "Juanita Owens was the predominant harasser." *Id*. Complainant testified that:

> Most of the time they were calling me and it wasn't about freight at all. They just wanted, I believe the person had a disease about using the cell phone. I mean, she had nothing to do so she just sit around and just texting everybody all the time and re-text and re-text. And they you got them other idiots in that office sending you emails, sometimes three or four at the same time. Now how many times a day can

> a man stop a semi-truck comfortably somewhere safely and read all of that crap? I mean, I've been doing trucking a long time. I've known a lot of truckers. They get on dispatch and that's it. I mean, a driver don't need to get a hundred telephone calls and a hundred text messages to deliver freight. And so that was a form of harassment because they knew I didn't like that.

Tr. at 118.

Complainant testified that he delivered a load on June 8, 2015, in New Smyrna Beach, Florida. Tr. at 100, 134. He said that his complaints began on June 8, 2015, because he did not get paid for the trip, and he felt he was receiving excessive phone calls from dispatch. Tr. at 100, 102. Complainant explained that he received partial payments for some loads, but because he was busy all the time, he was too tired to do audits of Respondent's pay reports. Tr. at 103. Complainant said that the adverse actions also began on June 8th. Tr. at 134. Complainant stated, "I complained on June the 8th, 2015, and that's when they started taking my money. That's when they started being hostile because I'm complaining because they're not giving me copies of the paperwork." Tr. at 100-101. Complainant's June 16th email to Respondent states:

> To Whom It May Concern:
>
> Notice is being given of a Hostile Work Environment, particularly from dispatch/operations, at Liberty Logistics, Inc., and directed towards me for unknown/unreasonable and detestable motivations on the part of dispatch/operations.
>
> For now, no effort will be made to enumerate the conditions that would support and or corroborate the conditions that identify the exact and numerous markers of the conditions of a Hostile Work Environment.
>
> Theses numerous "conditions" began on or about May 14, 2015 at Liberty Logistics Inc. address in Lilburn, and continues virtually on a daily basis since.
>
> The root circumstances of these "conditions" involve dispatch's disregard for FMSCA Regulations, and also State and Local Regulations pertaining to the operation of CMV and the numerous and varied requirements inherent in those regulations.
>
> Safety and Compliance, Liberty Logistics Inc., was notified several weeks ago that apparent disregards of several federal regulations under FMSCA were practiced on a regular and routine basis by dispatch. This effort to seek Safety and Compliance assistance for these conditions were to no avail and fruitless.
>
> In addition, there are administrative defects caused by Liberty Logistics' Recruiter that was involved in my first contact with Liberty Logistic. Notice has already been given to dispatch on 6/15/2016 regarding these defects, via attachment, addressed to the recruiter involved. This recruiter has indicated a

willingness to correct the administrative defects noted in that correspondence given on 6/15/2015.

Further details can be provided at an appropriate time regarding all of the above at your request.

Please understand that this letter is in no way an effort to portray Liberty Logistics in a bad light.

If anything, this letter is intended to address specific factual events that have been prohibited by FMSCA's Regulations, and State and Local Regulations.

These regulations were not of my doing, but yet I am required to follow them, even as motor carriers are required to do likewise.

. . .

Liberty Logistics dispatch personnel doesn't even come close to being described as "professional," and would easily qualify as a total failure in regards to accuracy with every dispatch, and timely assistance when needed.

In no way am I describing every dispatcher as a total failure at Liberty Logistics. Just the ones I've dealt with since 5/15/2015.

As I have the time, I will compile a Load Summary Report, which will specifically identify certain failures rooted at dispatch.

This persistent failure by dispatch to send accurate information out the door the during the very first attempt causes numerous destinations to the wrong address for either pickup, or a delivery. Even yet, lack of accurate BOL information for either or both shipper and consignee ends up having driver do the work of dispatcher and broker while trying to operate a CMV under hazardous conditions upon the highway while in motion.

Worst yet, dispatch apparently has mistakenly assumed that it is the driver's responsibility to correct defects in the dispatch information while operating a CMV. This is unbelievable and a far cry from trucking operations customs. It is not customary for the driver to do everyone's job involved in the dispatch of information.

Since beginning with Liberty Logistics, I have accomplished 11,645 loaded and empty miles safely, on time, and without incident from coast to coast. Much of it accomplished by way of extremely poor dispatch information given to me.

> As of 6/15/2015, dispatch has continued to disregard the regulations as mentioned above. HOS Rules are repeatedly ignored. Pickup and delivery times most often do not fall within legal limits that a CMV can travel by the rules.
>
> To the best of my knowledge, it is not the driver's responsibility to correct failures caused by dispatch.
>
> Accuracy with each and every dispatch is solely the responsibility of the personnel handling the request for freight services. This job should never ever become the job of anyone else, but should solely rest on the performance of the administrative personnel involved.
>
> I will follow-up this letter as I have the time available to do so.
>
> For now, this ends my Notice of Hostile Work Environment.
>
> Sincerely,
>
> T J Jacobs

CX 12-15. Complainant stated that Respondent did not answer his emails regarding his complaints. *Id*.

Regarding CX 3, Complainant explained that it is an email from him to Respondent on June 17th, 2015. Tr. at 161. The email reads as follows:

> This is a notice to you, Mrs. Owens, that I will not tolerate any further imbecilic and stupidness from you. If you fail to discontinue the outrageous and despicable insults, I will take further action of any and all kind to deal with you without limitations. It is apparent that you need medical attention for the ignorant stuff insider your head. Check your phone directory and seek professional assistance with whatever is in you besides stupidity and your lack of proper understanding. You are an extremely poor excuse for a human being. And it would have been better for you to have suffocated in the womb and never allowed to be upon the earth, but beneath underground somewhere out of the way of everyone including other nut types, which apparently resemble yourself. This is not a joke. This is your last warning from me.

Tr. at 161-162. Complainant stated that "one hundred percent of the truck drivers talk like this," and that he wrote this email "at 11:53 p.m., tired and wore out probably been drove 600 miles that day." Tr. at 163. He said that he "wasn't in no mood to put up with no crap out of nobody," and that he "may write a hundred thousand more paragraphs like this in [his] lifetime before [he's] done, when stupid people show up in front of [him]." Tr. at 163. Complainant explained that his email was prompted because he was "already agitated because the recruiter has continued to dodge [him] about the questions of them unsigned contracts and them blank contracts." Tr. at 164. He was unsure whether the recruiter and his dispatcher, Ms. Owens, were

two different people, but he stated that his recruiter was named Tracy Ashley. Tr. at 164-165. He did not know of Tracy Ashley ever being a dispatcher for him. Tr. at 165. He stated he had two dispatchers, and "the first one was Tia and she had to get run off early because she was abusing [his] cell phone too." Tr. at 165. After reviewing a document listing his dispatcher information, Complainant stated that "whoever wrote this down here underneath my name, printed name, I never saw that before until just now." Tr. at 167. Complainant further stated that:

> I've seen evidence where they have been photocopying and shifting dates around and shifting my name around and so you can't believe nothing out of these people unless you see the originals. And then you need the metadata.

Tr. at 168.

Complainant sent a document entitled Notice of Rescission of Agreements that he sent to Respondent via email dated June 19, 2015 at 8:32 a.m. This document reads as follows:

> To Whom It May Concern:
>
> In accordance with the Laws of Georgia, any and all Agreements between and by T J Jacobs and Liberty Logistics Inc. are hereby RESCINDED, with the exception for Payment of Driver Services, Expenses, Costs, Fees, and Services Rendered thru 6/19/2015, which are currently due and Payable immediately upon return of Truck # 125863, Trailer 642512, and associated Equipment/Tools assigned to the truck.
>
> The Effective Date of Rescission shall by 5/14/2015, for cause attributable to the negligent and willful mis-representations by Ms. Tracy Ashley, Recruiter for Liberty Logistics Inc., on or about 5/12/2015 thru 5/15/2015, wherein the Recruiter brought blank documents for T J Jacobs to sign, and in doing so, asked for copies and was denied copies of the blank documents.
>
> As mentioned in previously sent email to Mr. Tracy Ashley, any and all alterations, changes, and insertions of any kind whatsoever to the blank documents, shall be deemed a Malicious Forgery, and prosecuted to the full extent of the law.
>
> Free assent is required for Modifications, Amendments, and changes to written agreements of any and all kinds.
>
> Payment of Driver Services, Expenses, Costs, Fees, and Services Rendered thru 6/19/2015, which is currently due and Payable immediately upon return of Truck # 125863, Trailer 642512, and associated Equipment/Tools assigned to the truck.
>
> A Photographic Recording of the above truck, trailer, and equipment/tools have been established, dated 6/19/2015.

> Penske, 1656 Cross Pointe Way, Duluth GA 30097, Ph. 770-814-7374, shall be utilized to provide a vehicle inspection of this Penske Truck and Trailer, on 6/19/2015, and said inspection shall be valid and final as to the condition of the equipment therewith.
>
> Having given Notice in prior email to owner/president of Liberty Logistics Inc. of a Hostile Environment at Liberty Logistics Inc., the scheduled and undated stop for truck 125863 to stop at Liberty Logistics Inc., 4149 Arcadia Industrial Cir SW, would serve no worthwhile purpose, but to aggravate and encourage further adverse effects and enhance the Hostile Conditions already advised in prior emails to Liberty Logistics.
>
> Automatic Deposits of Payments Authorization for and to T J Jacobs is included in this NOTICE OF RESCISSION.
>
> Sincerely,
>
> T J Jacobs

CX 23-25. Regarding this document, Complainant testified:

> The liability for that truck and being responsible for that truck and me wanting that paperwork to see if I need to get anymore insurance on that truck or what. And I wanted that paperwork. So I wasn't get it, I just rescinded, because I knew that the new paperwork supersedes that if I want to apply that, which I do apply. And so that contract, that contract said in my rescission letter don't mention that blank contract. It does not mention the one unsigned. Georgia law said that contract is still there because based on the understanding of the people who had it. And my understanding was that my truck was mine because I signed a $250,000 promissory note for it. And until Liberty released those papers, gave me a release for those documents, you know, the truck should have never left my hands. I didn't get no release for the $250,000 promissory note. I didn't get no release from them sublease agreements for the equipment. You see, the equipment was one lease, the promissory note was another thing and then the operating agreement. So, there's basically three agreements which I rescind because they wouldn't get back with me. And they, I believe, this is a standard routine practice they do to cheat drivers into receiving negotiable instruments so they can go their bank and borrow off of it, off of them $250,000 promissory note. I think that's what's going on.

Tr. at 122; *see* CX 23-25.

Complainant explained that on June 19th at about 7:45 in the evening, he went to Penske to get an inspection of the truck, which he also called a conditional report. Tr. at 104. He explained that it is routine to have inspections on the truck after a certain number of miles, and

he was approaching the mileage point where an inspection was required. He had previously taken the truck to three or four other Penske's for routine repairs. Tr. at 183, 185. Complainant only took the truck in once for inspection and condition report, and that was on July 19th. Tr. at 185. When asked his reasoning for bringing the truck in, Complainant explained:

> If I'm the subleasor, I own that truck. I can do whatever I want to do with it. That's why I done it, for one, that I had the power and the authority to do it given by the 49 C.F.R. Code of Federal Regulations. I had that authority. I was also considered under those regulations as an operator. And it's all in the federal regulation. I mean, you may have to read them things 40 years before you quite fully understand it, but . . . I'm trying to tell you that I own that truck, even though they wrote this here silly paperwork in such a way that they can lease it back to themselves and still control it and run that truck and ruin that driver of it. That doesn't mean that I did not own that truck by federal regulations. The Federal Motor Carrier Safety Administration, they define who I was in that sublease agreement, and that arrangement caused the federal people to identify me as the owner of the vehicle. So, when I got to Penske, I didn't have no signed paperwork to argue with Penske when they told me to get off their lot. Had I had signed paperwork, I would have argued with Penske and I was calling the customer and I said, hey, I own it, I've done subleased this truck. That gives you some rights. That gives you an express warranty.

Tr. at 188-189. Complainant said he also took the truck to Penske because the brakes were wobbling, and the engine was not gauging the fuel properly. Tr. at 189-190. Complainant further explained that:

> What I was trying to do was to be a nice guy, get close enough back to Lilburn, Georgia and hopefully find a way to work with these people to get the blank piece of contract that I had worked out with them. But no, they jumped the gun on me and told Penske I was leaving. Had Penske to take the keys from me, told me to get off the lot by 10:00 that night on the 19th. And so, I already know that it's after business hours on the 19th, that Friday. I know nobody's going to want to be coming out there that evening to talk with me about straightening out all of them blank paperwork, so I'm thinking by Monday morning, somebody going to come up into Penske to meet me, is what was in my head, until I was told to get off of that lot. I mean, I had blank paperwork there with me that could have been filled out. But I wanted to feel comfortable and have Penske in the middle of it because they are listed and they ain't in the lease. And so, by all right, they should have some say so over how subleases are done to the equipment.

Tr. at 191.

Complainant testified that Respondent lied to Penske Trucking and told them he was leaving. Tr. at 101. Complainant stated that because he was the sub-lessor of the truck, Respondent took the truck from him without due process. *Id*. Complainant stated that, "Bill at Penske is the shop manager. He's the one that told me, get your stuff out of the truck and bring

me your keys. And I go home at 10:00. You need to have your stuff out of there and gone by then." Tr. at 104. Complainant said that Respondent never told him that he was fired. Tr. at 106. He was unsure who hired Bill from Penske, or whether he was an employee of Respondent. Tr. at 194. He said that "People out there had ways of getting things done without using words that kill themselves, that kick them in the chin. I mean, it's just normal that . . . they don't want to be above the law. They look to be beyond the law." *Id*. Complainant also objected to Respondent "designating [his] rescission letter as a resignation letter." Tr. at 138.

Complainant stated that he is not looking to be reinstated with Respondent. Tr. at 106. While he was working for them, he said that he was supposed to have been making 95 cents a mile, but Respondent changed it to 90 cents a mile. Tr. at 106-107. The amount Complainant was to be paid was not listed in his contract, but Complainant stated, "it was my perfect understanding that on 5/14 they told me we ain't going to pay you 95 cents, we're going to pay you 90 cents a mile." Tr. at 108. He testified that "when I started doing the audits, it wasn't arriving at nowhere near 90 cents a mile nor 95 cents a mile. They were just stealing all along the way." Tr. at 107. He stated that how much he was paid varied on every load, because Respondent was "topping the mileage, pretending like the mileage that they reported on the pay statement were the actual mileage when the odometer on the truck and my log book provides the actual mileage between points." Tr. at 108. Complainant testified that he had never seen the Full and Final Settlement included in and disclosed pre-hearing as RX F. Tr. at 180. Since June 19, 2015, Complainant has been doing "a lot of little odd jobs," but "nothing serious because [he's] been having to produce a lot of paperwork." Tr. at 108.

Respondent

Although provided the opportunity, the Respondent in this matter did not present testimonial evidence in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the record before me, I find that Respondent is a covered employer, as Respondent is engaged in business affecting commerce between States or between a State and a place outside thereof who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it. I further find that Complainant was a driver of a commercial motor vehicle as defined by the Act.

Because the parties in this matter are self-represented entities lacking legal expertise, I note that I have analyzed the parties' filings "with a degree of adjudicative latitude." *Hyman v. KD Resources, Inc., et al*., ARB No. 09-076, ALJ No. 2009-SOX-20, slip.op.at 8 (ARB March 28, 2010) (*citing Ubinger v. CAE Int'l*, ARB No. 07-083, ALJ No. 2007-SOX-36, slip op.at 6 (ARB Aug. 27, 2008)).

Credibility

In reaching my decision in this matter, I have thoughtfully considered and evaluated the rationality and consistency of the testimony at hearing 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 I have 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 is that quality in a witness which renders his or her evidence worthy of belief. *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971). As the Seventh Circuit Court of Appeals has 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." *Id*. 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 Constr. 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, I have observed the behavior, bearing, manner and appearance of the witness from which impressions were garnered of his demeanor, 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.

In the present matter, Complainant's burden of persuasion rests principally upon his testimony. I found Complainant's testimony at times to be evasive, inconsistent, and unpersuasive concerning the significant factual issues in this case. Specifically, there are inconsistencies and contradictions in his testimony when compared to documentary evidence that detract from Complainant's overall credibility. A discussion of the most significant discrepancies and the resulting factual findings follows in the sections below.

Protected Activity

Complainant asserts that he engaged in multiple instances of protected activity, including complaining about excessive cell phone calls from dispatch via email to Respondent on June 8, 2015; repeatedly complaining about not receiving copies of his signed employment contract, most recently via email to Respondent on June 15, 2015; reporting a hostile work environment via email to Respondent on June 16, 2015; and reporting excessive cell phone calls and texts to the Federal Motor Carrier Safety Administration ("FMSCA") via online complaint on June 17, 2015. *See* CX 7, 9-10, 12-13, 20.

As stated above, the STAA prohibits covered employers from taking adverse employment action in retaliation for an employee's protected activity. Protected activity includes filing a complaint or testifying about "a violation of a commercial motor vehicle safety or security regulation, standard, or order." 49 U.S.C. § 31105(a)(1)(A). Under § 31105(a)(1)(A), a complainant is not required to prove a reasonable apprehension of injury, an actual violation or that the complaint has merit.[7] I find that Complainant engaged in protected activity when he filed an online complaint with the FMSCA regarding Respondent's required use

[7] *Pittman v. Goggin Truck Line, Inc.*, 1996-STA-25 (ARB Sept. 23, 1997); *Lajoie v. Environmental Management Systems, Inc., 1990-STA-31 (Sec'y Oct. 27, 1992); Barr v. ACW Truck Lines, Inc., 1991-STA-42 (Sec'y Apr. 22, 1992); Yellow Freight Systems, Inc. v. Martin, 954 F.2d 353 (6th Cir. 1992).*

of cell phones "even while the driver is on the drive line grid" on June 17, 2015. *See* CX 20. Furthermore, I credit Complainant's testimony and documentary evidence regarding his internal complaints to Respondent regarding excessive phone calls from dispatch, most notably Complainant's June 8th email at CX 7, and find these complaints to constitute additional instances protected activity.[8] I also note the complaint contained in Complainant's June 16th email, stating that hours of services rules "are repeatedly ignored" and "pickup and delivery times most often do not fall within legal limits that a CMV can travel by the rules." *See* CX 15. I find this to be a third instance of Complainant's protected activity.[9]

I do not, however, find that Complainant's grievances regarding acquiring copies of his signed employment contract constitute protected activity under the STAA. An employee's complaint must be "related" to a safety or security violation to be protected. 49 U.S.C. § 31105(a)(1)(A). Preponderant evidence does not suggest that Complainant's issues surrounding his employment contracts bore any relation to a safety or security violation on the part of Respondent. Complainant's testified that he was "complaining because [Respondent was] not giving [him] copies of the paperwork." Tr. at 100-101. Indeed, Complainant's June 15th email makes no mention of a safety complaint, and instead focuses on the issue of Complainant not having received "complete information regarding the opportunity with Liberty" and copies of "every blank piece of paper that I signed and initialed." *See* CX 9. While Complainant may have taken valid issue with Respondent's business practices, I do not find that communicating this aversion constitutes STAA-protected activity.

Adverse Employment Action

Having established that he engaged in protected activity, Complainant must also prove that he was the subject of an adverse action taken by Respondent. Complainant argues that, by instructing Penske to take his truck, Respondent constructively discharged Complainant. Tr. at 101. Complainant also alleges that he suffered adverse employment action when Respondent failed to pay him for freight services; did not answer his emails; and gave him a lease that did not

[8] I note that an employee's internal complaint to superiors conveying his reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under § 31105(a)(1)(A). *Dutkiewicz v. Clean Harbors Envtl. Servs.*, Case No. 97-STA-090 (Sec'y Aug. 8, 1997, slip op. at 3-4) (citing *Stiles v. J.B. Hunt Transp., Inc.*, Case No. 92-STA-34 (Sec'y Sept 24, 1993, slip op. at 3-4)); *see also Moravec v. HC & M Transportation, Inc.*, 1990-STA-44 (Sec'y July 11, 1991); *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. June 10, 1998) ("A construction of the STAA that covers only complaints filed with courts or government agencies would narrow the mechanisms to achieve these policy goals, leaving unprotected employees who in good faith assert safety concerns to their employers, or who indicate an unwillingness to engage in such violations.").

[9] I do not find that the remaining complaints contained in Complainant's June 16th email entitled "Notice of a Hostile Work Environment" constitute protected activity. While internal complaints to an employer may constitute protected activity under the STAA, such internal communications must be sufficient to give notice that a safety complaint is being filed and thus that the activity is protected. *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12 (1st Cir. June 10, 1998). Complainant's email specifically declines to "identify the exact and numerous markers of the conditions of a Hostile Work Environment," and instead discusses "administrative defects caused by Liberty Logistics' Recruiter;" "a persistent failure by dispatch to send accurate information out the door the [sic] during the very first attempt causes numerous destinations to the wrong address for either pickup, and or delivery;" and "defects in the dispatch information." While Complainant cites dispatch's "disregard for FMSCA Regulations, and also State and Local Regulations pertaining to the operation of CMV," I do not find these generalized statements to be sufficiently definite to put Respondent on notice that Complainant was engaging in protected activity.

comply with federal regulations. Tr. at 100-102. I find that Complainant has failed to prove by a preponderance of the evidence that he suffered an adverse employment action. I will address Complainant's allegations of adverse action in turn below.

The STAA prohibits an employer from taking adverse action against an employee in retaliation for the employee engaging in protected activity. 49 U.S.C. § 31105(a)(1). Adverse action includes discharging or otherwise retaliating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in protected activity. 29 C.F.R. § 1978.102(a). Adverse action may also include intimidating, threatening, restraining, coercing, blacklisting, disciplining, harassing, suspending, or demoting an employee. 29 C.F.R. § 1978.102(b). Complainant's bears the burden of establishing by a preponderance of the evidence that Respondent took at adverse action against him. 29 C.F.R. § 1978.109(a).

Complainant's primary allegation of adverse action is that he was constructively discharged by Respondent on June 19th when its alleged agent, Bill from Penske, took his truck. A constructive discharge occurs when "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign . . . Furthermore, it is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable conditions." *Shoup v. Kloeppfer Concrete*, ALJ No. 95-STA-33, slip op. at 3 (Sec'y Jan. 11, 1996) (quoting *Hollis v. Double DD Truck Lines, Inc.*, ALJ No. 84-STA-13, slip op. at 8-9 (Sec'y Mar. 18, 1985)). An employee who resigns from employment without coercion has not been subjected to an adverse employment action within the meaning of STAA's whistleblower provision. *Hoffman v. NOCO Energy Corp.*, ARB Nos. 15-070, 16-009, ALJ No. 2014-STA-55 (ARB June 30, 2017). The question before me is therefore whether Complainant voluntarily quit or was fired by Respondent on June 19th.

Complainant's argument relies primarily on his testimony at hearing, as supported by the June 19th Notice of Rescission presented at CX 23-25. Regarding this document, Complainant testified in relevant part:

> The liability for that truck and being responsible for that truck and me wanting that paperwork to see if I need to get anymore insurance on that truck or what. And I wanted that paperwork. So I wasn't get it, I just rescinded, because I knew that the new paperwork supersedes that if I want to apply that, which I do apply. And so that contract, that contract said in my rescission letter don't mention that blank contract. It does not mention the one unsigned. Georgia law said that contract is still there because based on the understanding of the people who had it. And my understanding was that my truck was mine because I signed a $250,000 promissory note for it. And until Liberty released those papers, gave me a release for those documents, you know, the truck should have never left my hands. . . . So, there's basically three agreements which I rescind because they wouldn't get back with me.

Tr. at 122. At hearing, Complainant stated that he went to Penske on June 19th to get a routine inspection of the truck. Tr. at 104. When asked his reasoning for bringing the truck in,

Complainant explained: "If I'm the subleasor, I own that truck. I can do whatever I want to do with it. That's why I done it, for one, that I had the power and the authority to do it given by the 49 C.F.R. Code of Federal Regulations." Tr. at 188. Complainant also said he took the truck to Penske because the brakes were wobbling, and the engine was not gauging the fuel properly. Tr. at 189-190. Complainant further explained, as quoted above, that:

> What I was trying to do was to be a nice guy, get close enough back to Lilburn, Georgia and hopefully find a way to work with these people to get the blank piece of contract that I had worked out with them. But no, they jumped the gun on me and told Penske I was leaving. Had Penske to take the keys from me, told me to get off the lot by 10:00 that night on the 19th. And so, I already know that it's after business hours on the 19th, that Friday. I know nobody's going to want to be coming out there that evening to talk with me about straightening out all of them blank paperwork, so I'm thinking by Monday morning, somebody going to come up into Penske to meet me, is what was in my head, until I was told to get off of that lot. I mean, I had blank paperwork there with me that could have been filled out. But I wanted to feel comfortable and have Penske in the middle of it because they are listed and they ain't in the lease. And so, by all right, they should have some say so over how subleases are done to the equipment.

Tr. at 191. Complainant alleged that Respondent lied to Penske Trucking and told them he was leaving. Tr. at 101. Complainant stated that, "Bill at Penske is the shop manager. He's the one that told me, get your stuff out of the truck and bring me your keys. And I go home at 10:00. You need to have your stuff out of there and gone by then." Tr. at 104. Complainant testified that Respondent never told him that he was fired. Tr. at 106. He further testified that he was unsure who hired Bill from Penske, or whether he was an employee of Respondent. Tr. at 194. He said that "People out there had ways of getting things done without using words that kill themselves, that kick them in the chin. I mean, it's just normal that . . . they don't want to be above the law. They look to be beyond the law." *Id*. Complainant objected to Respondent "designating [his] rescission letter as a resignation letter." Tr. at 138.

I find significant inconsistencies between the Complainant's testimony and his June 19th Notice of Rescission. Specifically, I note the following passages in Complainant's Notice of Rescission:

> In accordance with the Laws of Georgia, ***any and all Agreements between and by T J Jacobs and Liberty Logistics Inc. are hereby RESCINDED***, with the exception for Payment of Driver Services, Expenses, Costs, Fees, and Services Rendered thru 6/19/2015, ***which are currently due and Payable immediately upon return of Truck*** # 125863, Trailer 642512, and associated Equipment/Tools assigned to the truck.
>
> . . .
>
> Payment of Driver Services, Expenses, Costs, Fees, and Services Rendered thru 6/19/2015, ***which is currently due and Payable immediately upon return of***

> ***Truck*** # 125863, Trailer 642512, and associated Equipment/Tools assigned to the truck.
>
> . . .
>
> ***Penske*** … ***shall be utilized to provide a vehicle inspection of this Penske Truck and Trailer, on 6/19/2015, and said inspection shall be valid and final as to the condition of the equipment therewith***.
>
> Having given Notice in prior email to owner/president of Liberty Logistics Inc. of a Hostile Environment at Liberty Logistics Inc., ***the scheduled and undated stop for truck 125863 to stop at Liberty Logistics Inc***. … ***would serve no worthwhile purpose***, but to aggravate and encourage further adverse effects and enhance the Hostile Conditions already advised in prior emails to Liberty Logistics.

CX 24-25 (emphasis added). Complainant's letter clearly states that "any and all Agreements" between Complainant and Respondent are rescinded, with the listed exceptions of those relating to his payment. Complainant repeatedly states that he is to be paid "upon the return of" his truck, trailer and associated equipment and tools, and states that the vehicle inspection to take place on June 19th at Penske would be the "valid and final" inspection. Finally, Complainant explains that the scheduled stop at Liberty Logistics noted in his previous email would "serve no worthwhile purpose."

The plain language of Complainant's letter directly contradicts Complainant testimony at hearing, including that he only rescinded three agreements and did not rescind another blank, unsigned contract; that he only went to Penske for a routine inspection; and that he was intending to continue on to Lilburn from Penske to meet with Respondent. *See* Tr. at 104, 122, 191. The evidence of record shows that Respondent offered to provide the requested documents to the Complainant by routing Complainant back through the Georgia office (RX E), but that Complainant refused in writing (CX 24-25), which is in plain contradiction with his testimony quoted above at Tr. 191. In light of these inconsistencies, I do not find that Complainant's testimony regarding why he took his truck to Penske meets the test of plausibility required of credible testimony. *See Indiana Metal Products v. NLRB*, 442 F.2d 46, 51, 52 (7th Cir. 1971). To the extent that Complainant's testimony is inconsistent with and uncorroborated by the documentary evidence, I decline to consider his testimony credible.

Moreover, I do not find that Complainant's documentary evidence meets his burden of proving he suffered an adverse action. The plain language of Complainant's Notice of Rescission indicates that he intended to rescind "any and all Agreements" between himself and Respondent. *See* CX 24-25. The plain meaning of "any and all Agreements" would include all agreements that defined Complainant's employment with Respondent. Complainant presented no evidence to indicate that Bill from Penske was an agent of the Respondent, or that Respondent informed Bill from Penske that Complainant had been terminated. In fact, the Penske Vehicle Work Summary dated June 19th states that the cause for the vehicle inspection was that the "Customer states driver is leaving," and includes a note to "perform vehicle inspection (includes brakes, tires, chassis, engine and drive train where applicable, etc.) prior to

departure." CX 54. I further find no credible evidence of record to suggest that Complainant was coerced into sending the Notice of Rescission, going to Penske for inspection, or leaving his truck with Penske. As such, I find that Complainant was not terminated, constructively or otherwise, but instead voluntarily resigned his position with Respondent via his June 19th Notice of Rescission.

Complainant's remaining allegations of adverse action include failure to make payment for freight services, lack of response to emails, and providing a lease that allegedly did not comply with federal regulations. Tr. at 100-102. I do not find that preponderant evidence supports that Respondent took these actions as Complainant alleges. First, I find Complainant's hearing testimony regarding the alleged non-payment for his services to be unpersuasive, inconsistent, and unsupported by documentary evidence. Regarding the purported non-payment for his services, Complainant testified that while he was working for Respondent, he was supposed to have been making 95 cents a mile, but Respondent changed it to 90 cents a mile. Tr. at 106-107. He said the amount Complainant was to be paid was not listed in his contract, but Complainant stated, "it was my perfect understanding that on 5/14 they told me we ain't going to pay you 95 cents, we're going to pay you 90 cents a mile." Tr. at 108. He testified that "when I started doing the audits, it wasn't arriving at nowhere near 90 cents a mile nor 95 cents a mile. They were just stealing all along the way." Tr. at 107. He stated that how much he was paid varied on every load, because Respondent was "topping the mileage, pretending like the mileage that they reported on the pay statement were the actual mileage when the odometer on the truck and my log book provides the actual mileage between points." Tr. at 108. Complainant further testified that he delivered a load on June 8, 2015, in New Smyrna Beach, Florida, and that he did not get paid for the trip. Tr. at 100, 102. Complainant explained that he received partial payments for some loads, but because he was busy all the time, he was too tired to do audits of Respondent's pay reports. Tr. at 103. Complainant said that these adverse actions also began on June 8th. Tr. at 134. Complainant stated, "I complained on June the 8th, 2015 and that's when they started taking my money. That's when they started being hostile because I'm complaining because they're not giving me copies of the paperwork." Tr. at 100-101. I do not find this testimony to be credible. Complainant failed to present documentary evidence in support of his contentions of non-payment, despite being given additional opportunity post-hearing to do so. Without additional credible evidence, I find that preponderant evidence does not support Complainant's allegation that Respondent failed to pay him for his services.

Similarly, I decline to credit Complainant's testimony that he suffered an adverse action by nature of Respondent's lack of response to emails and a lease that was non-compliant with federal regulations. The record reflects that Respondent did attempt to communicate with Complainant, and offered to Complainant to provide a copy of his contract by mail or in person. *See* CX 11; RX B; RX E (stating "I have absolutely no issue with providing you copies of everything that you have signed"). Apart from his disagreement with Respondent's business practices, Complainant's testimony was unclear and inconsistent as to how the vehicle lease was non-compliant with relevant federal regulations. Furthermore, even if I were to credit Complainant's testimony, I do not find that these actions by Respondent would rise to the level of adverse action. In determining whether alleged conduct is an unfavorable personnel action, the action must be "materially adverse," meaning that it "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53 (2006); *Melton v. Yellow*

Transportation, Inc., ARB No. 06-052, ALJ No. 2005-STA-00002 (ARB Sept. 30, 2008). "Adverse actions" therefore refer to unfavorable actions that are "more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Williams v. American Airlines, Inc*., ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010). Assuming *arguendo* that Respondent did not respond to Complainant's emails or that his vehicle lease was violating a pertinent federal regulation, Complainant has not presented me with credible evidence or argument to show how these actions were materially adverse to his interests.

Finally, while not specifically alleged by Complainant as an adverse action, I have also considered whether preponderant evidence supports that Complainant suffered from a hostile work environment, in light of his June 16th letter entitled Notice of Hostile Work Environment. *See* CX 12-15. Complainant's testimony on this topic was inconsistent and unclear, to an extent that I decline to find his testimony credible. The documentary evidence in support of his claim of a hostile work environment also falls well short of meeting Complainant's burden. While Complainant's email states that "numerous 'conditions' began on or about May 14, 2015 . . . and [continue] virtually on a daily basis since," his email explicitly declines to "enumerate the conditions that would support or corroborate the conditions that identify the exact and numerous markers of the conditions of a Hostile Work Environment," and simply states that "the root circumstances of these 'conditions' involve dispatch's disregard for FMSCA Regulations, and also State and Local Regulations pertaining to the operation of CMV and the numerous and varied requirements inherent in those regulations." *See id*. Without additional credible evidence to support or delineate these vague allegations, I do not find Complainant's email to be sufficient evidence to prove that Complainant suffered an adverse action in the form of a hostile work environment.

Based on the foregoing, I do not find that Complainant has proven by a preponderance of the evidence that he suffered an adverse employment action.

CONCLUSION

Complainant has demonstrated by a preponderance of the evidence that he engaged in protected activity. He has failed, however, to demonstrate by a preponderance of the evidence that he experienced an adverse action. Complainant has therefore failed to demonstrate by a preponderance of the evidence a prima facie case under the STAA.

ORDER

Accordingly, it is hereby ORDERED that the Complainant's complaint against Respondent is hereby DISMISSED.

SO ORDERED.

CARRIE BLAND
Administrative Law Judge

Washington, D.C.

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

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

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

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).