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Issue Date: 12 August 2019

CASE NO.: 2017-STA-00090

In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR
OCCUPATIONAL SAFETY AND HEALTH,
Prosecuting Party,

and

GARRETT ASHWORTH,
Complainant,

v.

CAMERON DIRT WORKS,
Respondent.

DECISION AND ORDER
DENYING WHISTLEBLOWER COMPLAINT

This matter arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (the "STAA"), 49 U.S.C. § 31105, and its implementing regulations found at 29 C.F.R. Part 1978. I conducted a hearing in Seattle, Washington on May 21 and 22, 2018. Attorney Erik Laiho represented Cameron Dirt Works ("Respondent"). Attorney Jeannie Gorman represented the Assistant Secretary of Labor for Occupational Safety and Health ("Prosecuting Party" or "OSHA").

At the hearing, the following exhibits were admitted into evidence: OSHA's Exhibits ("CX") 1, 2, and 4 through 12; and Respondent's Exhibits ("RX") 1 through 10. Hearing Transcript ("TR") at 9-10, 67, 207, 228, 230, 234, 489. Prior to the hearing, the parties agreed to stipulations that I approved in an order issued January 23, 2018. The stipulations were marked as Administrative Law Exhibit ("ALJX") 1, which was admitted at the hearing. TR at 15.

OSHA and Respondent filed simultaneous closing briefs on August 6, 2018 ("OSHA Br." and "Resp. Br.," respectively). On August 13, 2018, Respondent filed its Reply Brief ("Resp. Reply"). On August 14, 2018, OSHA filed its Reply Brief ("OSHA Reply"), thereby closing the record.

OSHA alleges that Respondent terminated Complainant after he refused to drive his truck unless the brakes were fixed. As explained below, after a thorough review of the entire record, I find that OSHA has failed to establish by a preponderance of the evidence that Complainant was

terminated or that he was constructively discharged, and his whistleblower complaint is therefore denied.

I. ISSUES IN DISPUTE

The matter presents the following disputed issues[1]:

1. Did Complainant engage in protected activity within the meaning of the STAA on or about January 22, 2014, when he refused to drive a truck with defective brakes?

2. Did Complainant suffer an adverse action on or about January 22, 2014, when he was actually or constructively discharged by Employer, or did he voluntarily quit?

3. Has Complainant shown by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged? 29 C.F.R. § 1978.109(a).

4. If Complainant establishes the elements of his claim by a preponderance of the evidence, then has Respondent established by clear and convincing evidence that it would have taken the same adverse action in the absence of Complainant's protected activity? 29 C.F.R. § 1978.109(b)(1).

5. If Complainant prevails, is he entitled to: 1) Back pay in the amount of $10,046.52, plus interest of $1,206.69 from February 1, 2014, to May 31, 2014, while unemployed; 2) Non-pecuniary damages in the amount of $70,000[2]; and 3) Pecuniary damages in the amount of $2,796.05.[3]

6. Would any back pay award be limited because Complainant would have been laid off in the spring of 2014 regardless?

7. Does Complainant's alleged misconduct toward Respondent after his employment ended preclude a damages award?

8. Is Respondent entitled to damages, attorney fees and costs?

II. STIPULATIONS

The parties agreed to the following stipulated facts:

1. At the time Complainant Garrett Ashworth's employment ended with Respondent, Respondent Cameron Dirt Works was subject to the jurisdiction of the Surface Transportation Assistance Act, 49 U.S.C. § 31105.

[1] The issues in dispute are taken from the Order Following Pre-Hearing Conference. Neither party had an objection to this order at the hearing. TR at 14.
[2] $20,000 in compensatory damages for emotional distress and $50,000 in punitive damages.
[3] Complainant seeks a total of $84,049.26 in damages and back pay.

2. Respondent Cameron Dirt Works is a person within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31105.

3. Respondent Cameron Dirt Works is a commercial motor carrier within the meaning of 49 U.S.C. § 31101.

4. Respondent Cameron Dirt Works is engaged in transporting freight on the highways and maintains a place of business in the vicinity of Graham, WA and/or Tacoma, WA.

5. Steve Cameron is the owner and operator of Respondent Cameron Dirt Works.

6. Respondent Cameron Dirt Works employed Complainant Garrett Ashworth from September 16, 2013, to January 2014.

7. Complainant Garrett Ashworth was assigned and operated Cameron Dirt Works' only Kenworth truck, which was a commercial motor vehicle with a gross weight rating of 10,001 pounds or more.

TR at 14; ALJX 1.

III. FACTUAL FINDINGS

Background Information

Steve Cameron owns Cameron Dirt Works ("CDW" or "Respondent"), which provided transportation of landscaping materials such as gravel or fill dirt. TR at 387; CX 6 at 15. CDW is no longer in the trucking business, no longer has any employees, and has sold most of its trucks. TR at 336. CDW is currently in the excavation business. *Id.* Prior to owning CDW, Mr. Cameron had experience working as a truck driver, equipment operator, and crew supervisor, and worked for a few construction companies. *Id.* at 387-388. In previous positions he managed safety procedures. *Id.* at 388; 447. Desi Austin has been the general manager of CDW since 2002 and is married to Mr. Cameron. *Id.* at 310, 312. Ms. Austin would dispatch trucks, perform payroll and bookkeeping duties, work with supervisors and customers, and answer the phones. *Id.* at 310. She worked primarily out of her home and would dispatch truck drivers via text, phone, or fax. *Id.* at 311, 313; *see* RX 4 at 256-28. During the time period of September 1, 2013, through January 2014, only Ms. Austin and Mr. Cameron served as management at CDW. TR at 310.

While Complainant was in truck driving school in 2013, his driving instructor, Ted Skinner, introduced him to Mr. Cameron. TR at 17. Mr. Cameron hired Complainant in September 2013 before he graduated truck driving school. *Id.* at 18. Complainant testified he did not previously know Mr. Cameron or his wife but he had seen them before when they re-graveled the yard of a place he worked at right after high school. *Id.* at 116. Once hired, he immediately began driving a truck for CDW, in addition to performing any other duties Mr. Cameron needed him to do such as moving equipment, maintenance and repairs, or helping around the shop. *Id.* at 18, 22. He had some prior experience repairing non-commercial vehicles. *Id.* at 118-119. When he worked in the

shop he would clean up, or repair the trucks, although he never repaired the brakes.[4] *Id.* at 118. He enjoyed working in the shop and spent approximately 25 percent of his time working in the shop and the other 75 percent driving. *Id.* at 119. When he first started working for CDW, he had not yet finished truck driving school so he drove with Mr. Skinner in the truck; once he graduated and obtained his commercial driver's license, he no longer needed to drive with Mr. Skinner. *Id.* at 19, 23. Complainant was just 21 years old when he graduated from truck driving school. *Id.* at 75. He admitted that he was young and inexperienced, and Mr. Cameron gave him a chance many companies wouldn't have. *Id.* at 114. Mr. Cameron hired Complainant because he was close to getting his CDL and was "mechanically inclined." *Id.* at 403-404.

For the four months he worked at CDW, Complainant was assigned to the same vehicle, a Kenworth. TR at 32, 34, 325, 407-108. Complainant usually drove from CDW's yard to the Washington Rock Quarry to pick up aggregate. *Id.* at 21. Occasionally, he would be contracted out for the day to another company, such as Salinas Construction. *Id.* at 27-28. Complainant worked on average 30 hours a week and was paid weekly in a "mixture" of cash and check. *Id.* at 22-23; *see* RX 1 at 2-20; CX 2 at 3-5.

Ms. Austin remembered that Complainant had had some performance problems such as not following instructions from job supervisors and being "a little bit sarcastic" with some of his supervisors, but he was never disciplined. TR at 329. Mr. Cameron had a "few" problems with Complainant, such as showing up late a few times, having conflicts with the supervisors, and driving too fast. *Id.* at 413. Complainant also spilled fuel once when filling up his truck. *Id.* at 414; RX 9 at 48.

Safety and Mechanical Issues

a. Complainant's Allegations

During truck driving school, Complainant learned various safety practices and procedures, such as how emergency and service brakes work, and how to "pre-trip" and "post-trip" a vehicle. TR at 115. He performed the pre-trip and post-trip inspections of the vehicles while he worked at CDW. TR at 121. A Driver's Vehicle Inspection Report ("DVIR") is used to record the pre- and post-trip information on a vehicle. *Id.* at 28; RX 3. Complainant never filled out a DVIR while he worked at CDW, nor was he ever instructed to, or told that he could fill out a DVIR if he chose to. TR at 28, 32.

Complainant felt that the truck he drove was not in good working order and had mechanical and safety defects. TR at 33-34. While he did not fill out a report about the defects, he reported the safety issues verbally to Mr. Cameron. *Id.* at 34. He would discuss the issue with Mr. Cameron, and if it was an issue that would prevent the truck from operating, it would be fixed, but if it was an issue that could wait, Complainant stated that it would not be fixed. *Id.* at 35. Complainant and another truck driver, Alex Gordon, would perform any maintenance or repair work that needed to be done. *Id.* at 35-36. Complainant believed that some things they could not fix—for example, they could adjust the brakes but if they were "nonfunctioning" there was nothing that an "adjustment" could accomplish. *Id.* at 37.

[4] Mr. Cameron testified Complainant repaired the brakes, the radiator, and the exhaust on the Kenworth truck. TR at 407-408.

Complainant listed a number of issues that prevented him from operating the truck at times. There would be "problems with electrical," the air compressor would not build air, often the brakes would be frozen for two to four hours, and the transmission would be "inoperable." TR at 39. Only three out of six brakes on Complainant's equipment trailer were operable and the axle beams would bend. *Id.* at 40, 47. Complainant pointed out the bent beams to Mr. Cameron, who commented that it should be fixed, but they "never got around to doing it." *Id.* at 48-49. Nothing happened because of the bent axle beam, but it made Complainant "not want to use it." *Id.* at 48.

The brakes on the truck would not hold the truck safely while stopped on a slight grade. TR at 41. The brake shoes or pads were worn out and the S-cams, which control the brake shoe, were "crammed over and they would not allow the shoe to move," preventing the vehicle from stopping. *Id.* Additionally, the slack adjusters used to adjust the brakes were inoperable so that adjustments could not be made on "maybe two out of the four" on the main parking brake axles. *Id.* He related one incident that occurred in September or October of 2013 where the drop axle broke causing him to pull the truck to the side of the freeway across three lanes of traffic. *Id.* at 42-43. Mr. Cameron told him to drive the truck back to the yard, although Complainant believed it should have been towed back. *Id.* at 43. Complainant ended up driving it back, although he took surface streets instead of the freeway because he did not feel safe driving the truck at a high rate of speed. *Id.* at 43-44. In November or December of 2013, Complainant was working with an acetylene torch at Mr. Cameron's direction and the handle of the torch caught on fire. *Id.* at 45-47. Complainant ran out of the shop because he believed "it was going to blow up." *Id.* at 46.

Complainant also had an issue with the radiator on a dump truck. The radiator bushings were worn out, which would cause fluid to leak. TR at 49. In one instance, the radiator violently shook while Complainant was driving and coolant and antifreeze "started blowing everywhere." *Id.* at 50. He had to pull over and call Mr. Cameron, who fixed the radiator by replacing the hoses, which was the fourth or fifth time they had to replace them. *Id.* at 51. Complainant asserted this was not a permanent fix. *Id.* at 51-52.

Later in the hearing, Complainant recalled a time when he was driving on the Joint Base in Pendleton and could not stop the truck because the brakes did not work. TR at 493-496. He hit a car that was crossing an intersection, but the driver of the car left the scene. He called Mr. Cameron and told him about the incident and that the truck would not stop, and he filed a report with the military police. *Id.* at 494-496. He did not have a copy of the police report. *Id.* at 504-505. Mr. Cameron denied this incident happened. *Id.* at 513.

Complainant also said that Mr. Cameron told the drivers to avoid DOT scales and that if DOT was patrolling, they would be told to return to the yard. TR at 39-40. Complainant asserted this was because the trucks "were not able to pass DOT inspection." *Id.* at 40.

b. Respondent's Refutations

During the period of September 2013 to January 2014, Mr. Cameron managed the trucks and the repairs. TR at 389. All of the drivers would help with minor repairs, and Complainant was the "most involved" in making small repairs at the time. *Id.* at 392-393. Larger repairs were done with J.H. Large. TR at 393; *see* CX 10 at 65-77. One of Mr. Cameron's duties as owner was also to tell new drivers about safety procedures—the pre-trip inspection and various appropriate gear. TR

at 390. Procedures were not written down, although Mr. Cameron would sometimes write tips on the white board such as "please check your tires before you leave every day." *Id.* at 450-451. Mr. Cameron testified that the truck boss, Ted Skinner, would collect DVIRs from truck drivers every afternoon and try to make sure the truckers filled them out, although that has "hard." *Id.* at 391. Mr. Cameron denied instructing drivers to avoid scales. *Id.* at 401. He also denied telling drivers to return to CDW's yard if they believed inspection patrols were occurring.

Ms. Austin testified that CDW had certain practices and procedures for when a truck needed repair. TR at 313-314. If a truck required a small repair that could be done right away, it was done right then. If it was a larger repair or something they would not do in their shop, they would have it repaired by J.H. Large Truck Repair, which would either come out to repair the truck where it was, or would repair the truck in its shop. *Id.* at 314. Mr. Cameron would decide whether a repair could be done in CDW's shop or whether they would call J.H. Large.[5] *Id.* at 350-351. Drivers could tell Mr. Cameron in person or on the phone if a truck needed a repair, and could also note any repairs needed on their pre-trip inspection. The drivers could then write down what repairs were needed on a whiteboard in the office. *Id.* at 315. Ms. Austin did not know if these practices and procedures were written down anywhere. *Id.* at 347-348. Drivers were told of the practice verbally. *Id.* at 348. Ms. Austin and Mr. Cameron claimed that drivers wrote down their pre-trip inspections on DVIRs, which CDW started using generally from 2012 through the end of 2014. TR at 351-352, 401. DVIRs were kept for the required time period of two years. *Id.* at 353. If there were any repairs that were a safety issue, they would be handled before the truck was driven again. *Id.* at 401. If a truck needed repair, Mr. Cameron would ask the driver what needed repair, and determine if it was something they could do onsite or something for which they needed to call J.H. Large. *Id.* at 401-402. Mr. Cameron also inspected the trucks himself every day. *Id.* at 448-449.

Two former drivers testified on Respondent's behalf—Brent Clarke and Richard Keller. Brent Clarke currently works as a heavy equipment operator for Tunista Construction. TR at 281-282. He previously worked for CDW as an independent contractor dump truck driver for six or seven months, likely in 2014, but he was unsure of the year. *Id.* at 282-283, 291. He does not recall working with Complainant. *Id.* at 285. Occasionally Mr. Cameron would come out to a site and make repairs. Before he would drive the dump truck, Mr. Clarke would do a walk-around inspection, checking the truck to make sure everything was in working order. *Id.* at 286-287. He would do these pre-trip inspections when he worked at CDW. *Id.* at 287. The driver is responsible for making sure he does not operate a vehicle in an unsafe manner. *Id.* He recalled that CDW had onsite mechanics as well as used J.H. Large as an outside repair service. TR at 284. If he needed repairs done, he would call Ms. Austin and J.H. Large would come do the repair. *Id.* at 285. He recalled a number of repairs that needed to be addressed when he worked for CDW and said they were all fixed right away. *Id.* at 288. He never saw any unsafe conditions or safety issues while he was working for CDW. *Id.* While he worked for CDW he never filled out a DVIR and they were never provided to him. *Id.* at 289. He has worked for other employers as a truck driver and has seen the DVIRs. *Id.* at 290.

Richard Keller worked for CDW as an independent contractor truck driver between 2009 and 2011. TR at 241. He had been a truck driver since 1985 and is currently retired. *Id.* at 240-241. When he worked for CDW, he drove the Kenworth, which was the only Kenworth truck CDW

[5] Complainant did not know at the time he was working for CDW that J.H Large would sometimes perform repairs, apart from J.H. Large working on suspension beams one time. TR at 136-137, 156.

owned at that time. *Id.* at 241-242. Mr. Keller never had any safety problems driving the Kenworth or any problems with the brakes. *Id.* at 242. He would adjust the brakes every other day. To adjust the brakes, he would get under the back axle and tighten a bolt on the slack adjuster. *Id.* at 243. He could tell when the brakes needed adjusting because the truck's brakes do not respond as they should. If the truck needed repairs, he would inform Ms. Austin, who would call a mechanic to fix the truck "immediately" and repairs were addressed properly. *Id.* at 243-245. When he worked for CDW, Mr. Keller would perform safety procedures to make sure the truck was operating properly. TR at 245. However, he never filled out a DVIR at CDW. *Id.* at 247. He did not remember any unsafe conditions while he worked for CDW. *Id.* at 246. He agreed that if a driver felt the truck was unsafe, it is the driver's decision about whether or not to drive it. *Id.* at 247.

Joint Base Lewis-McChord ("JBLM") Helipad Job

a. JBLM Job Generally

At the JBLM site, CDW worked as a contractor for two companies, Alutiiq and Salinas. TR at 327, 392. CDW hauled dirt and concrete onsite. *Id.* at 327. The concrete was for a helicopter pad on the base. At night, drivers would haul concrete from CalPortland in DuPont and take it to the JBLM site. *Id.* at 253, 454. The helicopter pad job went roughly from September 1, 2013, to the end of January 2014. *Id.* at 392. During this time, CDW operated four trucks, three Macks and one Kenworth. TR at 396; *see* RX 2. Complainant hauled at the JBLM cite and according to Mr. Cameron it was a good opportunity for someone with no experience because it only involved hauling onsite. TR at 326, 403. As Mr. Cameron understood it, Complainant would drive to the CalPortland site, load up with concrete, then go a short distance down the road to the base and dump it out in front of a paver. *Id.* at 408-409.

In order to work on the military base, a driver required a RAPIDGate pass, a credential given by the Department of Defense, in order to avoid being inspected each time he entered the base. TR at 120, 328, 409-410. To obtain such a pass, the driver needs to work for a company that is sponsored by the military, and the driver needs to pass a background check. Each pass is specific to the driver and the employer. Complainant had a RAPIDGate pass while he worked for CDW, and the entire time he worked the JBLM/CalPortland job. *Id.* at 119-121, 409-410. In addition, CalPortland had an operator's vehicle inspection report that had to be filled out before trucks could haul on the site. TR at 412-413; RX 7.

b. Incident at CalPortland

The night before his employment with CDW ended Complainant was working the night shift around 1:00am or 2:00am in the morning for Salinas Construction loading concrete out of CalPortland in DuPont. TR at 52, 58. To load concrete at the CalPortland site, a truck driver would drive the truck into a building that has openings on both sides, position the truck under the cone-shaped chute, and park the vehicle. The driver would then get out and stand beside the truck on a platform in order to spray the truck off with a hose because concrete would splatter against the truck. TR at 53-56; *see* RX 5 at 32. While Complainant was hosing down the truck, it began to "roll freely," roughly 50 feet. TR at 56. He put the hose down and ran to the truck, climbed in, and stopped it by applying the foot brake. *Id.* at 57. The parking brake was already engaged, but was not holding the truck in place. *Id.* Applying the foot brake engaged all four axles, not simply the two that are engaged with the parking brake. *Id.* at 57-58.

According to Complainant, the Salinas Construction foreman had witnessed the incident and asked Complainant to move his truck. Complainant and the foreman got under the truck to try and adjust the brakes, but they could not be adjusted or tightened.[6] TR at 59, 130, 132. According to Complainant, the foreman then told Complainant that he would not have the truck on the jobsite because it was a liability and could kill someone. *Id.* at 59. The foreman then signed Complainant out of the job to go home. *Id.* at 59-60. Complainant emptied out whatever concrete was in the truck, and noted that there was a lot of concrete on the ground and that "they were really mad about that." *Id.* at 60. Complainant attempted to call Mr. Cameron, but he did not answer. *Id.* Complainant then drove the truck from DuPont to Graham, Washington, about 20 miles, in the rain, at a little after 2:00 a.m. *Id.* at 61. He described driving back as "scary" and that it made him "nervous." *Id.* He arrived back at the CDW yard close to 3:00 a.m., where he shut off the truck and parked it, chalked the tires with rocks, and turned in his paperwork in the mailbox in front of the office. TR at 61-62, 138. He closed the gate and went home. *Id.* at 63. He did not try to call Mr. Cameron again or Ms. Austin. *Id.* at 140.

Severin Thompson testified for Respondent. Mr. Thompson is a heavy equipment operator and truck driver for Pelland Enterprises and has had his commercial truck driver's license for 13 years. TR at 300-301. He has never worked for CDW but CDW hired his company to drive for them. *Id.* at 301. Mr. Thompson worked on the helicopter pad job at JBLM, hauling concrete from CalPortland. *Id.* at 302. He talked briefly with Complainant at that job, while Complainant was working for CDW. *Id.* at 304. After the incident at CalPortland happened, Complainant told Mr. Thompson that his truck had rolled away out from under the batch plant. He did not actually see the incident. *Id.* at 305. The next time Mr. Thompson saw him was the next night, when he was driving a truck for Harlow Construction. *Id.*

End of Complainant's Employment

a. Complainant's Employment with CDW Ends

Complainant's employment with CDW ended on or about January 22, 2014. TR at 20. Complainant's testimony is that the next day[7] after the concrete incident at CalPortland, Mr. Cameron called him. He was "very frustrated as to why [Complainant] went home" and accused Complainant of signing himself out. *Id.* at 63. Complainant remembered that he told Mr. Cameron what had happened, that he was signed out because the truck was unsafe, and he told Mr. Cameron that he refused to drive the unsafe equipment and would like it fixed before he drove it again. *Id.* Mr. Cameron then told him to not return to his property and that he was fired (using the words "You're fired."). *Id.* During the conversation, Complainant testified he was "extremely angry that time and time again, I was being forced to operate a vehicle that was unsafe." *Id.* at 70. He "refused to keep driving" a truck that put him and others in "jeopardy." *Id.* He said Mr. Cameron was "angry, defensive, hostile, belittling, threatening." *Id.* OSHA's counsel asked Complainant if there was anything he said during the conversation that could have been interpreted as him quitting his job, to which Complainant replied, "No." TR at 75. She then asked Complainant if he said

[6] Complainant also claimed that other people witnessed the incident: Robert Johnsted and Gael Ericson, who were waiting to load up concrete. TR at 133.

[7] Complainant first testified Mr. Cameron called him the next "morning," but later said that he was terminated in the "early afternoon." TR at 63, 69.

anything "that could have been interpreted as you wanting to remain employed," to which Complainant also replied "No." *Id.*

Mr. Cameron asserts that the afternoon following the CalPortland incident, he found the truck parked the wrong way in the CDW yard with trash on the floor and the keys still in the ignition. TR at 415; RX 9 at 47. He went to the yard to meet with one of the J.H. Large mechanics, who was going to work on a different truck. TR at 416. He thought Complainant was at work, but when he got to the yard that day, he realized Complainant was not in the shop or working at the JBLM job. *Id.* at 415-416. Complainant did not answer his phone, so Mr. Cameron called Mr. Skinner, who told him Complainant was at the CalPortland site in a Harlow truck.[8] *Id.* at 416. Mr. Skinner had told Mr. Cameron that Complainant had problems with the truck. *Id.* This was the first time Mr. Cameron learned that Complainant had problems with the brakes on the Kenworth. *Id.* at 463. After speaking with Mr. Skinner, Mr. Cameron and the J.H. Large mechanic got into the truck and inspected the brakes. *Id.* at 416-417. They found that the brakes were "all backed off." *Id.* at 417. Normally, brakes would be tightened and only backed off if you were going to repair them or remove them. He agreed that the truck would not be safe to drive with the brakes in the "backed off" state. TR at 472-473. Mr. Cameron and the mechanic checked the brakes out, "turned the brakes up," and then took it for a test drive, during which the brakes worked fine. *Id.* at 417.

Mr. Cameron called Complainant a second time later that afternoon, "probably" around 5:00p.m., and got ahold of him. TR at 417-418, 419-420. Complainant told him that he quit and that he wanted a better truck with better pay. *Id.* at 418. He said he went to work for Harlow, and then told him a story about how they had met before. Complainant told Mr. Cameron that when Complainant was 16 years old, he and his mom drove by the shop where Mr. Cameron's renter had his pickup truck parked with a "for sale" sign. *Id.* Complainant asked him to sell him the truck on a payment plan. Mr. Cameron told him it was not his truck so he was not able to do that. Complainant told Mr. Cameron that he had a grudge about this incident, and he was going to get Mr. Cameron back for it.[9] *Id.* Complainant was upset, although he did not raise his voice. *Id.* at 420. According to Mr. Cameron, Complainant said Mr. Cameron's equipment was junk and that he was going to have him audited and sabotage his equipment and "make things rough on [Mr. Cameron]." *Id.* at 418. Mr. Cameron asserted that Complainant never asked for repairs to be made, that "we were way past that. He was already in another company's truck hauling on the same job." TR at 418-419. Complainant also wanted Mr. Cameron to give him his last paycheck right then, but Mr. Cameron said he could not—they were paid once a week on Friday at 4:00p.m. *Id.* at 420. Mr. Cameron told Complainant he would have to turn in his timesheet and his RAPIDGate pass since it was a federal ID that Mr. Cameron was responsible for. *Id.* at 421. Complainant told him he would not turn the pass in, and if he did not get his paycheck that night, he was going to make it hard on Mr. Cameron. *Id.* Mr. Cameron denied ever saying "You're fired," elaborating that "I needed him." *Id.* at 487.

[8] Mr. Cameron also testified that other drivers told him that Complainant and Rick from Salinas had tried to figure out what the issues was with the truck. TR at 466.

[9] Complainant did not directly address this alleged incident. He testified that he did not have any business dealings with Mr. Cameron during his employment. TR at 19. He also testified that he had not met Mr. Cameron or Ms. Austin before his employment, only that he had seen them re-gravel the yard of a place he worked at right after high school. *Id.* at 116.

Ms. Austin asserted Complainant quit on January 22, 2014. TR at 329. She knew he quit because "He parked his truck the night before and never came back."

Complainant claimed that he was not paid his last paycheck on time and Mr. Cameron told him he would not be paid because he had been "trash talking his company." TR at 25-26. Complainant admitted he had said negative things about Mr. Cameron to "a lot" of people, and that he had also stated that Ms. Austin was a "drug addict." *Id.* at 151-154. Complainant received his last paycheck after he contacted OSHA. *Id.* at 26. Complainant did not return the rapid pass until he received his last paycheck in February of 2014. *Id.* at 151. He claimed Mr. Cameron never asked him to return it, and that the RAPIDGate pass is unique to each person it is issued to, like a driver's license. *Id.* at 151, 155.

b. Text Message Conversation

A couple days to a week after the end of his employment, Complainant and Mr. Cameron communicated via text message. TR at 64; CX 1. Complainant took a screen shot of the messages and emailed them to OSHA at OSHA's request. TR at 65. Mr. Cameron initiated the text conversation. *Id.* at 421. The text message conversation, as reproduced in the record,[10] consisted of the following (*sic* throughout):

Mr. Cameron:	(1/2) You Didn't turn in a time card or your rapid gate.after you have made comments about unsafe equipment.do to your neglect.i don't want you on my properties
Complainant:	lol see you soon steve i suggest you pay me or it will get worse id hate for you to be audited
Complainant:	I thought we could end on good terms but clearly you dont want that
Complainant:	and before you make comments about me check your employes there playn both sides of the feild bud
Complainant:	especially you only claiming with unemployment that i only worked 140hrs for you something isn't right all im adking is for my last check ill give you your card and thiss will all be done
Complainant:	steve i worked for you and i feel i did a pretty good job and saved you money from the shop i appreciate you giving me a chance in employing me and I will always be grateful for that from you but yes steve your equipment is unsafe and that was the last straw

CX 1. Complainant said he was "frustrated" and responded by "trying anything [he] could do to get [his] last paycheck." TR at 68.

[10] The text message from Mr. Cameron indicated it was message 1 of 2, but Complainant never received a second message. TR at 65. Complainant testified that CX 1 represented the complete and accurate text conversation. TR at 65-67. The text message is no longer accessible because the phone is inoperable, even though Complainant has sought professional help in retrieving the information. TR at 66, 128. Ms. Austin stated that there was more to the text message that was sent, and that they had asked the phone company about trying to get the text but were unable to obtain it. TR at 384-385. Respondent objected to the admission of this evidence on the grounds of spoliation, but I overruled the objection, noting that the objection would go to the weight afforded this evidence, not its admissibility. TR at 129. In its closing brief, OSHA also notes that in response to propounded discovery, CDW asserted it had no documentation of communication with Complainant. CX 10 at 41.

Mr. Cameron believed he sent the text "close in time" after their phone conversation. TR at 421-422, 484-485. Complainant had told him that he thought the brakes were unsafe. *Id.* at 424. Mr. Cameron said this was due to Complainant's neglect because there was nothing wrong with the brakes, other than that Complainant did not turn up the brakes or did not set the brakes. *Id.* Mr. Cameron also did not want him coming onto his property after learning that Complainant was upset about Mr. Cameron not paying him right away and that he was "really mad" about the incident where Mr. Cameron would not sell him the pickup truck. *Id.* at 423. The first thing he thought of was someone coming back with a gun. *Id.* Regarding the mention of unemployment, Mr. Cameron understood that Complainant tried to sign up for unemployment but did not have enough hours. *Id.* at 485-486.

Mr. Cameron asserted that Complainant made only one safety complaint during his time with CDW—after he quit he mentioned the brakes were defective. TR at 451-452. However, during his employment he brought up the condition of the truck and need for repairs or adjustments. *Id.* at 452-453. Mr. Cameron differentiated between bringing up the need for repairs and making "safety complaints."

c. Alleged Sabotage

Mr. Cameron alleged that Complainant sabotaged his trucks about a week after the end of his employment. TR at 424-425; *see* RX 8. One truck had the oil drained out of the rear end, and in another, someone had thrown dirt inside the air cleaner down the exhaust pipe, which got sucked into the turbo causing a "considerable amount of damage." *Id.* at 425. Mr. Cameron's neighbor said they saw a red S-10 pickup parked on their road around the night the sabotage happened. *Id.* at 430-431. Complainant drove a red S-10 pickup truck. *Id.* at 144-145. Mr. Cameron called the Pierce County Sheriff, but they said they would need more proof so Mr. Cameron dropped it. *Id.* at 432-433. Complainant denied saying he would sabotage CDW equipment or having anything to do with the incidents. *Id.* at 503, 511.

Complainant's Subsequent employment

c. Harlow Construction

A number of contractors had been working on the JBLM job site, including Harlow Construction. TR at 76. The same day after Complainant had the conversation with Mr. Cameron where he asserts he was terminated, he called Harlow Construction and was able to work for them another two or three days. *Id.* at 75, 497. After the call with Mr. Cameron around 2:00 p.m., Complainant called Linda Hopkins at Harlow Construction, and was working in a truck for them by 5:00pm. *Id.* at 76-77. He said Ms. Hopkins felt sorry for him and was going to try and contact her boss but could not get in touch with him, so she hired him against her boss's will. *Id.* at 142. Complainant denied contacting Harlow Construction about a job before that date. *Id.* at 498. He filled out an application during the night of his first day being employed by Harlow. *Id.* at 498-499. He only worked with Harlow Construction for two or three days, through the end of the week, because he only had four or five months of experience, and Harlow required a minimum of five years' experience.[11] TR at 77, 501. He was an exception for that short period of time because they knew him and his reputation as a driver after working with him on the same jobsite. *Id.* at 77-78.

[11] Ms. Hopkins testified that the Harlow policy required two years' experience. TR at 259-260.

Complainant later worked for Harlow again two or three more times. TR at 499-500. He testified that the other times he was hired by Harlow, the application process was different. The first time, he did not take a urine drug test, but he did the second and the third time he started work for Harlow. *Id.* at 500-501.

Linda Hopkins testified on behalf of Respondent. Ms. Hopkins currently works in dispatch and sales for Harlow Construction, a role she has had for three years. TR at 250-251. Harlow Construction hauls aggregate dirt products from jobsites. *Id.* at 251. Prior to working in dispatch and sales, Ms. Hopkins worked as a truck driver for Harlow. She has worked in the trucking industry since 1985. *Id.* at 252. She is familiar with safety practices and procedures for commercial truck drivers because she filled out DVIR reports every day for years. *Id.* at 253. The DOT requires DVIR reports to be done daily.

Ms. Hopkins first met Complainant when they were both working at the CalPortland/JBLM helicopter pad job. TR at 255. Another driver for CDW told her that Complainant had graduated at the top of his driving class and that CDW hired him to give him an opportunity to learn. *Id.* Ms. Hopkins remembered that Harlow hired Complainant around December or January of 2013-2014, to help finish the job with Salinas. *Id.* at 256. Complainant asked her for a job, so she "put a word in for [Complainant]" and Mark Harlow and the dispatcher at the time, Rick Tripp, hired him.[12] She denied hiring him. *Id.* She believed Complainant had to fill out an application and paperwork, but that he was hired within a few days. *Id.* at 257. He would have had to take a drug test, which usually takes a day but could have taken up to two or three days. *Id.* at 278-279. She denied that someone could call and ask for a job at noon and be in a truck by 5:00pm. *Id.* at 279. When he asked her for a job, she could not remember if he quit or was fired, but he was no longer employed by CDW.[13] TR at 278. She could not recall why he left CDW. *Id.* at 257.

Complainant worked for Harlow until the Salinas job was completed, a total of two or three weeks according to Ms. Hopkins.[14] He only worked for Harlow briefly because Mr. Harlow wanted help with the Salinas job but wanted Complainant to get at least two years' experience, which was Harlow's internal policy. TR at 259-260. Complainant was aware that the job was only for a brief period of time. *Id.* at 259. Complainant worked for Harlow two more times, once for a full March

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[12] Complainant denied that his employment was cleared by others. TR at 502. He understood that Mark Harlow was at his vacation home in Palm Springs and that Rick Tripp was unavailable, so Ms. Hopkins said, "I'm just going to do it. I'm just going to put you in a truck." *Id.*

[13] In its closing brief, Respondent asserts it is "unclear" whether Complainant told Ms. Hopkins he was "looking for work" or was no longer employed. Resp. Br. at 9. At the hearing, I questioned Ms. Hopkins on this point:

> Q: And do you remember when he came to work for Harlow, how it is that he came to get hired there that particular time, that very first time?
> A: I can't remember if he quit or if he got fired, but he was looking for work. And I talked to Mark Harlow, the owner, and the dispatcher at that time, which was Rick Tripp.
> Q: Okay. So he had—he was no longer working for Cameron Dirt Works. He was looking for work. Is that correct?
> A: Yes.

TR at 278.

[14] Complainant denied that he worked for Harlow for a few weeks. TR at 501. He stated that Salinas stopped contracting Harlow's trucks and the job ended. *Id.*

to November season, and once for maybe half a season. *Id.* at 260-262. He quit both times for other opportunities. *Id.* at 262-263. Harlow had a policy of requiring DVIRs, although not every driver would turn them in every day. *Id.* at 270. She could not remember whether Complainant turned DVIRs in daily. She believed Complainant was a good truck driver, although she heard other drivers say he drove to fast and thought he was too young and did not know what he was doing. *Id.* at 270, 272-273.

Ms. Hopkins did not see the truck rolling incident at CalPortland, but Complainant told her about it. TR at 257. She also said that Rick from Salinas talked to her about the incident and told her there were different possibilities for how it could have happened, like not setting the parking brake or the brakes not working properly when the truck rolled out. *Id.* at 258. While he was working for CDW, Complainant had also told Ms. Hopkins that he had a lot of issues with the CDW trucks, with the brakes and turbo, but she never looked at his truck. *Id.* at 275-277.

Ms. Austin believed Complainant was working for Harlow the day after he quit. TR at 330. She learned this from the other two employees working for CDW as well as other truck drivers on the JBLM job. *Id.* at 330-331. In the fall of 2017, Ms. Austin spoke with three truck drivers who worked for Pelland Enterprises at the JBLM site in 2014 about Complainant working for Harlow.[15] *Id.* at 331-332. One driver told her the night he stopped working for CDW, Complainant said he was getting a job with Harlow and he was tired of working for CDW. Two others reported Complainant bragging about working for Harlow the next day and bad-mouthing CDW.

Ms. Austin spoke to Complainant again in February because he had not returned the RAPIDGate pass yet. TR at 334. She "knew he was using it in Harlow's truck," which she felt held her responsible for him because the RAPIDGate was tied to CDW. *Id.* She believed he was using it because the only other way to get on the base was a "lengthy process" of obtaining temporary passes for drivers and companies without RAPIDGate passes, and in order to dump the load within the 20 minutes that it needs to be dumped, he had to use the pass. *Id.* at 360-362. He eventually returned the pass, but Ms. Austin was unsure when. *Id.* at 334-335.

Complainant denied using his CDW RAPIDGate pass when he worked for Harlow. TR at 503. He described a different procedure used by Harlow to get trucks onto the base quickly. *Id.* He said that Rick who worked for Salinas would give a list of the trucks to the Army Corp Engineer, and Complainant would receive a plain sheet of paper with a number on it that was displayed in the windshield. *Id.* This would allow him to pass through the gate without being stopped.

Ms. Austin contended that Complainant would not have continued to work for CDW after the JBLM job because business was slow and they did not have steady work. TR at 335. She estimated he would have been laid off February 1, 2014.

[15] As I noted at the hearing, such testimony is hearsay. TR at 333. Hearsay is allowable in these proceedings as no formal rules of evidence apply. Section 1978.107(d) of the regulations provides: "Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious." 29 C.F.R. § 1978.107(d). While hearsay may be allowed, such evidence will be given lesser weight as it is less probative.

d. Other Employment

After his employment with Harlow ended the first time, he was unemployed for roughly five months. TR at 75. He tried to find work with other contractors on the same job and looked for truck driving jobs on Craigslist. *Id.* at 78, 146-147. The same day he stopped working for CDW, he was offered a job with Janke Trucking, but it was "too far south, almost to Oregon," so he turned it down. *Id.* at 145-146. When he was looking for jobs, when he applied to jobs he followed up on the applications two days per week. *Id.* at 147. Ms. Hopkins from Harlow Construction eventually helped him find a job with another company, Washington State Trucking. *Id.* at 78. He started working for Washington State Trucking in July 2014, and has been continuously employed since. *Id.* at 78-79. He has never been terminated. TR at 80. For other employers, he was always provided DVIRs and always filled them out. *Id.* at 82. Complainant has been employed as a truck driver by Mowatt Trucking since the end of March of 2017. *Id.* at 79.

Post-Employment Encounters with Mr. Cameron

Since his termination, Complainant testified he has had five encounters with Mr. Cameron. According to Ms. Austin, the truck Complainant drives for Mowatt is recognizable on site. TR at 372-373.

First, in around June 2017, Mr. Cameron followed Complainant to a jobsite. TR at 85. When Complainant arrived, he got out of the truck and saw Mr. Cameron sit in his truck about 100 yards behind him on the side of the road for three to five minutes before Mr. Cameron left. *Id.* CDW was not working on the same jobsite and Complainant believed there was no reason why CDW trucks would be there. *Id.* at 85, 148. Complainant told his boss that Mr. Cameron was following him to jobsites, and the incident made Complainant feel nervous and threatened. *Id.* at 86. Complainant also told OSHA, which issued a letter warning Mr. Cameron that such behavior may be considered harassment and grounds for additional retaliation claims and damages. *Id.* at 86, 104; CX 7.

The next encounter occurred at the Washington Rock Quarries. TR at 87. Everyone working at the quarry is on the same radio frequency, and when Complainant identified himself over the radio, Mr. Cameron called him a "pussy" or "fucking pussy" and flipped him off. *Id.* at 88-92. At least five or six other people were listening on the radio. Complainant felt belittled, embarrassed, and threatened. *Id.* at 92.

Maybe a month later, while leaving a gravel pit on Hancock Forestry Management ("Hancock") land, Complainant narrowly avoided a collision with Mr. Cameron. TR at 93-101. The roads leading out of the gravel pit are narrow and trees obscure the views of the road. Hancock procedures require that drivers call out their locations over the radio at certain designated locations. *Id.* at 94, 99. Complainant called out his location as he approached an area where a road formed half an intersection. *Id.* at 94-96. He did not hear anyone else call out over the radio, so after he stopped at the stop sign he began to pull out, at which point Mr. Cameron speeded past him, almost hitting him. *Id.* at 94, 97, 100. This felt "threatening" to Complainant. *Id.* at 101.

About a month after the incident at Hancock, Complainant was driving northeast-bound on a two lane road, and Mr. Cameron was driving a truck toward him in the opposite lane. TR at 101-

103. Mr. Cameron saw Complainant and swerved into his lane, and Complainant swerved onto the shoulder. Complainant felt threatened and referred to this action as "pretty violent." *Id.* at 103.

A month or two before the hearing, Complainant was driving past a gas station where Mr. Cameron was putting gas in his truck. TR at 103-104. As Complainant looked over, Mr. Cameron used a rude gesture. Complainant found it "ridiculous" because he has been "deal[ing] with this for the last two years," and "at what point does it just stop."

Complainant also related an incident that happened around February of 2018. TR at 105-111. Complainant had his disassembled truck on his employer's rented property and was in the shop with about five other people when someone told him that there was a silver car parked out front and someone was taking pictures. The cab of Complainant's truck was outside the shop, and when he rolled up the bay door, he observed Mr. Cameron sitting in the passenger seat of a truck and his wife, Desi Austin, taking pictures of the cab. When she saw Complainant, Ms. Austin walked back to the truck and then drove away. Complainant felt "threatened" by the incident.

Because of these encounters, Complainant feels that he has to look over his shoulder, he avoids certain places because he knows Mr. Cameron frequents them, and he carries a gun with him wherever he goes. TR at 111-112. He obtained the gun and a conceal carry weapons permit in part because he felt threatened and worried about Mr. Cameron showing up at his house. *Id.* at 86-87. Complainant was unsure exactly when he obtained the gun, but estimated it was a year to a year a half before the hearing in May 2018. *Id.*

After Complainant's employment ended, Mr. Cameron saw him "in passing." TR at 436. He denied following Complainant from Graham to Tacoma, stating that he was working on a job in Tacoma with a school district. *Id.* at 436-437. He has worked for the school district for six years and works "multiple school jobs every day." *Id.* at 436. He did not notice Complainant until he saw his truck in a parking lot. *Id.* Mr. Cameron denied swerving his truck into Complainant's lane, stalking him, or saying anything negative about Complainant over the CB radio. *Id.* at 437-440. He would not use vulgar language over the radio because the owner of the Washington Rock Quarry is his friend and is very religious. *Id.* at 438. He has probably driven by Complainant, but he "completely ignore[s] him." TR at 440. He no longer hauls out of Washington Rock Quarry because he does not want to be accused of retaliation or harassment. *Id.* at 444. He asserted that Complainant's allegations negatively affected his business. *Id.* at 445. Mr. Cameron also described how he had "probably" heard Complainant talking about him over the CB in the Washington Rock Quarry—about how he was suing him, would "gain profit off him," and how his trucks were "junk." *Id.* at 442. Mr. Cameron also said that another truck driver from a different company had told him that Complainant was suing him, that OSHA was backing him, and that he was going to ruin Mr. Cameron. *Id.* at 442-443.

Ms. Austin testified that she sometimes sees Complainant around town as Graham is a small town, but did not intentionally go somewhere she knew Complainant would be. TR at 337. When she took pictures of his truck, she did not think Complainant was around. *Id.* at 338-340. She took pictures of the truck that was "in pieces" getting repaired to show that "a truck is a truck, and it doesn't matter what age the truck is." *Id.* at 339. It was basically the same as the truck Complainant drove for CDW. Ms. Austin had heard he had problems with the truck since he started working with Mowatt. *Id.* at 370-371.

OSHA Investigation and Findings

Complainant filed his OSHA complaint on February 11, 2014. CX 6 at 14. Tobias Kammer testified regarding the OSHA investigation at the hearing. Mr. Kammer works for OSHA as the Assistant Regional Administrator for the Whistleblower Protection Program, Region 10. TR at 160. He has worked for OSHA for eight and half years, and has served in his current role for roughly a year and a half, previously serving as the Regional Supervisory Investigator and as an Investigator for Region 10. *Id.* at 160-161. He reviews approximately 100 to 150 whistleblower cases each year. *Id.* at 160. Prior to working for OSHA, Mr. Kammer was a private practice attorney. *Id.* at 186.

Mr. Kammer supervised the underlying investigation and interviewed Desi Austin as a witness in this matter.[16] TR at 152, 205; CX 5 at 12-13. He also sent a number of letters and drafted OSHA's findings. OSHA investigators interviewed Complainant and Desi Austin, but no one else from Respondent because they "could not get any additional cooperation from the Respondent for interviews." TR at 163. Respondent also did not respond to the compliant. *Id.* at 163-164. OSHA determined that reasonable cause exited to believe that Respondent terminated Complainant's employment because he refused to drive equipment until it was fixed, in violation of the STAA. TR at 171; CX 6.

In a letter dated December 14, 2016, OSHA informed Respondent that the initial phase of the investigation was complete, that it found reasonable cause to believe that a violation of STAA occurred, and that Respondent had ten business days to submit rebuttal information. CX 4. This letter was signed by Dave Baker, Assistant Regional Administrator of Region X. In this letter, OSHA noted that Respondent was served notice of the complaint on March 18, 2014, based on a telephone conversation Respondent had with the OSHA investigator. *Id.* at 8. The letter noted that settlement was discussed but that the parties were unable to agree on terms. *Id.* The letter also noted that OSHA made a number of attempts to contact Respondent to obtain a written response to the complaint—via a letter dated June 6, 2014, a letter dated September 12, 2014, and a letter dated November 18, 2014. *Id.* The June 6, 2014, letter was returned by UPS noting that "the received refused delivery." The September 12, 2014, letter was faxed. The November 18, 2014, letter was sent via UPS, the U.S. Postal Service, and via email. OSHA noted that UPS records showed it was delivered, and on December 17, 2014, the post office returned the regular mail as "return to sender." *Id.* The December 14, 2016 letter was sent to 24423 Orting Kapowsin Highway East, Graham, Washington, but Ms. Austin stated that CDW did not receive mail at this address. TR at 322; CX 4 at 7. It was a farm where her daughter was boarding horses and a rental property.

On June 19, 2017, Mr. Kammer interviewed Ms. Austin. CX 5. Mr. Kammer prepared a memo on the interview immediately after the conversation.[17] TR at 206. During her interview with Mr. Kammer, Ms. Austin alleged that Complainant was angry with Mr. Cameron and CDW because years earlier Mr. Cameron refused to enter an arrangement with Complainant whereby Mr. Cameron

[16] The original investigator, Diane Rebollo, was on leave for an extended period and left the agency around December 2016. Mr. Kammer became involved in this matter since he was her supervisor and the new investigator assigned was new to the agency. TR at 197-200.

[17] Although Mr. Kammer warned Ms. Austin that it was important that she told the truth and that she could subject herself to perjury charges if she intentionally provided false information during a federal investigation, Ms. Austin was not under oath. CX 5 at 12; TR at 207-208. Ms. Austin did not have the opportunity to review the memo. TR at 205. Additionally, the memo does not contain at least one detail that was included in OSHA's findings—that Respondent alleged Complainant sabotaged its trucks. *See* CX 6 at 15.

would finance a truck and Complainant would pay him for it in installments. CX 5 at 13. She asserted that while the brakes were misaligned on the truck, it was Complainant's fault for adjusting them, which he should not have done.[18] *Id.* She distinguished brakes being out of alignment from brakes needing repair, and stated that Complainant "backed off his brakes" before jumping out of the truck, which allowed it to roll away. She also asserted that Complainant did not want to work for CDW, that he had another job with Harlow Construction, and that he quit via text message.[19] *Id.* Ms. Austin also stated that Mr. Cameron would likely not want to talk to Mr. Kammer because he does not handle this type of thing well. *Id.* Ms. Austin admitted at the hearing that she probably said this as Mr. Cameron would not want to talk to an OSHA investigator without an attorney. TR at 379. However, according to Mr. Kammer's notes, Respondent had an attorney but wanted to proceed without the attorney to save money. CX 5 at 12. Mr. Kammer checked with the attorney before he spoke with Ms. Austin.

On July 24, 2017, OSHA sent a letter to 1928 109th St., Tacoma, Washington, which Ms. Austin stated is CDW's commercial property.[20] TR at 323; CX 6 at 14. In the letter, Mr. Kammer noted that the findings outlined in a May 8, 2017 letter were retracted due to concerns that Respondent may not have received either the December 14, 2016 letter or the March 24, 2017 letter outlining the relevant evidence. CX 6 at 14. OSHA sent another copy of the December 14, 2016 letter on June 8, 2017. The July 24, 2017 letter indicated that OSHA considered the evidence provided by Ms. Austin during her interview, but found that there was reasonable cause to believe that Respondent violated STAA. *Id.* The preliminary order included back wages, compensatory damages in the amount of $10,000, and punitive damages in the amount of $20,000. *Id.* at 16.

Between July 26, 2017, and August 5, 2017, a process server attempted four times to serve OSHA's findings and preliminary order at Ms. Austin and Mr. Cameron's home address, 9505 237th St., Graham, Washington. CX 6 at 18. There was no answer the first three times and the last time, the process server noted a woman told him to get off the property and not come back. *Id.* Ms. Austin admitted to saying this, explaining that she was scared by the process server. TR at 324-325.

Mr. Cameron said he talked to two people with OSHA about this case. TR at 433. The first person worked for the Early Resolution Division. *Id.* He spoke with her in 2014. Mr. Cameron remembered that she said he would be "fined" $1,800 and asked if he would agree to that. *Id.* He said no, that he was not paying $1,800 because Complainant had quit and that "right is right, wrong is wrong." She also said that she had gone over the case and there "wasn't a lot there," and that she had "talked to her supervisor and that [Mr. Cameron] wouldn't hear anything else about it again." *Id.* at 433, 460. Mr. Cameron believed he then spoke with Mr. Kammer in the spring of 2017. *Id.* at 434. Mr. Cameron remembered that Mr. Kammer called him and told him that he had been assigned to the case. *Id.* at 435. Mr. Cameron stated that the case was "years ago" and that it had been resolved through early resolution. Mr. Kammer allegedly stated that "that didn't matter" and that the "state" was going to come after Mr. Cameron vigorously, as would Mr. Kammer personally. Mr. Cameron asserted these were Mr. Kammer's "exact words." Mr. Cameron was "pretty shocked

[18] Ms. Austin denied saying this. She asserted she said that Complainant should not have been backing the brakes off, he should have "turned them up appropriately." TR at 378.
[19] Ms. Austin also denied saying this, saying only that she referred to the text conversation between Complainant and Mr. Cameron that followed their phone conversation. TR at 378.
[20] In this letter, OSHA also refers to a March 24, 2017 letter that is not in the record. CX 6 at 14.

that a state employee would feel that they had enough authority in their position and comfortable enough in their position to act like that." *Id.*

Mr. Kammer denied ever speaking to Mr. Cameron in this case. TR at 227, 490. He denied that he would ever represent himself as an attorney for OSHA. He has a law degree and was a practicing attorney previously, but is not an attorney for OSHA. He denied ever telling Mr. Cameron that he personally would come after him and described any such communication as "utterly inappropriate." *Id.* at 490-491.

August 25, 2017 Letter and Further Damages Calculations

On August 25, 2017, Mr. Kammer sent an additional letter to Respondent, via its attorney. CX 7 at 19; TR at 189. He included OSHA's findings "after several unsuccessful attempts" at hand delivery. He noted that the address given by Ms. Austin, 1928 109th St., Tacoma, Washington, was a "vacant lot" according to the process server. He stated that OSHA had determined their most current address to be 9505 237th St., Graham, Washington, and recounted the process server's unsuccessful attempts at service. Mr. Kammer also noted that on August 14, 2017, Complainant informed OSHA that Mr. Cameron had followed him from Graham, Washington to his job site, and that when he arrived, Mr. Cameron parked outside of the job site for several minutes. At the hearing, Mr. Kammer testified that Complainant sounded very agitated, alarmed and scared. TR at 188. In the August 25 letter Mr. Kammer stated, "Please be aware that the actions alleged by [Complainant] may be considered harassment and ground for additional retaliations claims and damages." CX 7 at 19.

Mr. Kammer calculated damages OSHA believed Complainant is owed. TR at 175; *see* CX 8.[21] He calculated back pay, starting from February 1, 2014, to May 31, 2014. TR at 178. He used February 1, 2014, as the starting date because this was the first week during which Complainant was unemployed at least two days. *Id.* The back pay calculation ended with May 31, 2014, because Complainant obtained a higher-paying job. *Id.* at 179. The hourly rate of $15 per hour was based on Complainant's pay stubs. *Id.* Mr. Kammer assumed Complainant worked five days a week for 8 hours a day, based on Complainant's testimony and his pay stubs. *Id.* at 210-211. However, he agreed that Complainant's hours varied. TR at 225; RX 1 at 2-20. Complainant had some actual earnings during the week of April 5, 2014, which were subtracted from that week's calculated back pay. TR at 179-180. Total, pre-interest back pay was calculated to be $10,046.52. CX 8 at 20, 23. He did not recall Complainant saying anything about turning down job opportunities. TR at 225-226. Mr. Kammer then calculated the amount of interest due on the back wages using IRS interest rates, which brought the total back pay owed to $11,253.21. CX 8 at 20, 23.

Complainant also took three loans from his mother, in the amount of $500, $1,500, and $500. TR at 183. Mr. Kammer thought Complainant's mother provided copies of these checks, but he was not sure. *Id.* at 213. Mr. Kammer calculated the interest rate on these loans, which resulted in a total of $2,796.05. CX 8 at 21, 23.

Mr. Kammer then calculated "non-pecuniary" damages owed to Complainant, which included damages for suffering and emotional distress and punitive damages. CX 8 at 22. He

[21] The document Mr. Kammer created to calculate damages owed was created after the investigation was closed, likely on January 12, 2018. TR at 209-210.

assessed $20,000 for suffering and emotional distress because Complainant "expressed a serious concern for his safety and health" and concerns about his family. TR at 184. According to Ms. Kammer, Complainant altered his daily habits, experienced humiliation and fear, and was embarrassed about borrowing money from his parents. *Id.* In his worksheet, he listed the following incidents, which were according to Complainant's reports: Complainant drives to another town for groceries to avoid Respondent; Respondent calls Complainant vulgar names and gives him the middle finger at shared worksite; Respondent "stalks" Complainant to job site and parks out front for several minutes; and Complainant had to borrow money from his mom to pay rent. CX 8 at 22; TR at 217-220. He based the $20,000 figure on his investigation manual and analogous cases, in consultation with the Solicitor's Office. *Id.* at 185.

Mr. Kammer calculated punitive damages at $50,000, again using his manual and analogous cases to set the amount. TR at 187, 190. He assessed punitive damages for "several reasons," including that driving a truck without properly functioning brakes puts people's safety and well-being in danger, and that Complainant was concerned about Mr. Cameron following him. *Id.* at 187-188. Mr. Kammer noted that one element he considers is whether the respondent is aware that the conduct was inappropriate or against the law. He noted that he sent a letter to Mr. Cameron warning him about his behavior, and believed that a number of the incidents Complainant described happened after he sent this letter. *Id.* at 188. He cited Complainant's reports of being followed, intimidated, and threatened. TR at 188-189, 192-194; *see also* CX 9 at 24-25. He also considered that Complainant had been humiliated, and then when he was fired he was economically vulnerable because he did not have much experience and could not find a job easily. TR at 188. Mr. Kammer also noted that Complainant was specifically told to avoid the scales. *Id.* The $50,000 figure was an amended figure. Mr. Kammer learned most of the factors that contributed to this amount being assessed after the initial findings. *Id.* at 190-191.

Respondent's Response

Ms. Austin compiled the electronic records she had regarding Complainant's employment, but the paper components of his personnel file were destroyed in late 2016. TR at 321; *see* RX 1. She asserted she did not know that this matter was proceeding at that time. TR at 322.

On September 22, 2017, CDW sent a letter to Complainant offering him reinstatement, but noted that his status as a dump truck driver would be in lay-off due to lack of work. CX 12. CDW employed no dump truck drivers at that time, and they did not have an anticipated recall date, but would contact Complainant if a driver position became available. *Id.* Mr. Cameron explained that they offered Complainant reinstatement in 2017 because they were trying to comply with OSHA's order. TR at 475-480; CX 12.

IV. ANALYSIS AND CONCLUSIONS OF LAW

To prevail in a STAA whistleblower complaint, the complainant must prove by a preponderance of the evidence that he or she engaged in protected activity, suffered an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C.A. § 31105(b)(1) (adopting the legal burdens of proof at 49 U.S.C.A. § 42121(b)(2)(B)(iii)); 29 C.F.R. § 1978.109; *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024, slip op. at 5 (ARB Apr. 25, 2013); *Blackie v. Smith Transp.*, Inc., ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 8 (ARB Nov. 29, 2012). If a complainant meets this

burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. 49 U.S.C.A. § 42121(b)(2)(B)(iii), (iv); *Tablas*, ARB No. 11- 050, slip op. at 6; *Blackie*, ARB No. 11-054, slip op. at 8.

The STAA provides that an employer may not "discharge," "discipline," or "discriminate against an employee regarding pay, terms, or privileges of employment," because of an employee's protected activity. 49 U.S.C.A. § 31105(a)(1); 29 C.F.R. § 1978.102(a). Employment termination constitutes an adverse action under the STAA. *Id.*; *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-071, slip op. at 6, n.15 (ARB May 18, 2017).

A. Procedural and Due Process Argument

Respondent argues that this matter should be dismissed before I even consider the merits because it has been prejudiced in its ability to present evidence and witnesses due to the passage of time and OSHA's failure to comply with statutory and regulatory timeframes. Resp. Br. at 11. OSHA did not respond to this argument in its Reply, but the parties previously briefed the issue in the context of Respondent's Motion to Dismiss, filed on December 28, 2017.[22]

Respondent's Motion was denied on February 6, 2018. The statute and regulations governing this matter establish a 60-day time period for the investigation of a whistleblower complaint and the issuance of OSHA's findings. *See* 49 U.S.C. § 31105(b)(2)(A); 29 C.F.R. § 1978.105(a). As stated in the order denying Respondent's Motion, courts have interpreted the statutory and regulatory timeframes for OSHA's investigation as being directory in nature rather than mandatory, jurisdictional deadlines. *See* Order Denying Motion to Dismiss, *Ass't Sec'y and Ashworth v. Cameron Dirt Works*, 2017-STA-00090, at 3-4 (February 6, 2018). I also found that the delay in OSHA's issuance of its findings was not inordinate, and that any delay did not prejudice Respondent. *Id.* at 4. OSHA also promptly notified Respondent in March 2014 of the complaint, and it was therefore on notice that evidence should have been preserved. Respondent has not provided any new arguments or evidence to persuade me that my prior ruling was in error. For the reasons explained in the Order Denying Motion to Dismiss issued on February 6, 2018, Respondent's argument that this matter should be dismissed prior to consideration of the merits is denied.

B. Credibility Determinations

In deciding this matter, the administrative law judge ("ALJ") is entitled to weigh the evidence, draw inferences from it, and assess the credibility of witnesses. 29 C.F.R. § 18.12; *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-15, slip op. at 8 (ARB Aug. 1, 2002). In weighing the testimony of witnesses, the ALJ may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Ass't Sec'y & Mailloux v. R & B Transportation, LLC*, ARB No. 07-084, ALJ No. 2006-STA-12, slip op. at 9 (ARB June 16, 2009); *Safley v. Stannards, Inc.*, ARB No. 05-113, ALJ

[22] Respondent "incorporate[d] by reference the facts, law, and argument" of this Motion in its closing brief. Resp. Br. at 11, n.4.

No. 2003-STA-54, slip op. at 6, n.3 (ARB Sept. 30, 2005); *see also Pattenaude v. Tri-Am Transport, LLC*, ARB No. 15-007, ALJ No. 2013-STA-37, slip op. at 17-18 (ARB Jan. 12, 2017). An ALJ is not bound to believe or disbelieve the entirely of a witness' testimony, but may choose to believe only certain portions of the testimony. *Underwriters Labs. Inc. v. N.L.R.B.*, 147 F.3d 1048, 1053-54 (9th Cir. 1998). The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness." *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008, slip op. at 10 (ARB July 2, 2009).

As discussed below, I find that many of the witnesses in this proceedings had credibility issues, which makes it difficult to determine what actually happened. It is impossible to know with certainty what occurred in this case. Statements by the various witnesses are credited or discredited for the reasons discussed below, and I have determined the most likely course of events.

1. Complainant

Respondent notes that Complainant has a pecuniary interest in this matter, and argues that he is not credible. Resp. Br. at 13. Respondent argues that Complainant testified he was an "exception" to multiple rules, and that his claims are contrary to those of other witnesses. Resp. Reply at 5-7. Respondent also argues that Complainant's testimony regarding how he entered the base with a plain sheet of paper with a number on it is incredible. *Id.* at 8. OSHA argues that Complainant's account is detailed and more credible than Respondent's version of events. OSHA Reply at 3-10.

Complainant's account of events is generally detailed, as noted by OSHA, but in certain respects it is inconsistent with other parts of the record in a manner that cannot be reconciled. Complainant related detailed accounts of the alleged harassing incidents he endured, although his timeline was a bit vague at times. For example, he repeatedly placed events "about a month" after the previous event. He also was unsure of exactly when he purchased his gun, at first estimating it was near January 2017, although he contended it was at least in part due to the harassment he was experiencing from Respondent and January 2017 was six months before the first incident in June 2017. TR at 86. His account at the hearing and his account to OSHA investigators was generally consistent—for example, he mentioned to OSHA the incident where his truck did not properly stop at an intersection and hit a car on the military base. CX 4 at 9. He also told Mr. Kammer about the alleged harassment incidents that he related at the hearing. CX 9 at 24-25.

However, in other respects, his account of events is not consistent with other witnesses' testimony and common sense. For example, Ms. Hopkins testified clearly regarding Harlow's hiring policies and definitively stated that someone could not be hired in the afternoon and in a truck by the early evening. TR at 278-279. Complainant testified that he did not take a drug test and that he filled out an application during the night of the first day of employment. TR at 498-501. But, Complainant offered no convincing or persuasive explanation for why Harlow would dispense with the drug test requirement in hiring him the first time, or why Ms. Hopkins' account differed from his. Complainant did not explain why Harlow would deviate from its normal hiring practices, which it adhered to when it hired him two more times. OSHA did not submit any evidence or corroborating testimony that could have added credibility to Complainant's account. OSHA also did not press Ms. Hopkins on her testimony at the hearing. Complainant merely stated that Harlow made an exception to its requirement that drivers have two years' experience because Harlow knew him and was aware of his skills as a driver. TR at 77-78. However, Ms. Hopkins testified that while

she thought he was a good driver, other drivers thought he drove too fast and was too young and inexperienced. TR at 270, 272-273. Ms. Hopkins also testified that she did not hire Complainant but merely put in a good word for Complainant, and that Mark Hopkins and the dispatcher, Rick Tripp, hired him. TR at 256-257. Complainant claimed that Ms. Hopkins, who was a truck driver not a dispatcher or management, hired him against her boss's will. TR at 142, 502. Again, Complainant's account is not only inconsistent with Ms. Hopkins', but neither he nor OSHA provided an explanation or reason why Ms. Hopkins would testify differently, and there was no evidence submitted to corroborate or support Complainant's story in any way. While a Complainant's uncorroborated testimony can be credited,[23] I do not find it plausible, and there is no indication in the record to support, that Ms. Hopkins, as a driver, decided on her own to put Complainant in a Harlow truck in a matter of hours, disregarding the requirement to have him drug tested, and without the approval of her boss.

Additionally, Complainant's claims about the lack of repairs done at CDW is inconsistent with other truck drivers' testimony. According to Mr. Clarke and Mr. Keller, repairs were made at CDW immediately. TR at 243-245, 288. Mr. Clarke testified that when he worked for CDW, J.H. Large would come perform repairs that needed to be made. TR at 284-285. As discussed below, I find no reason to question the veracity or credibility of those truck drivers. Further, Respondent produced in discovery a number of receipts for work and parts from J.H. Large that demonstrate they used them consistently, contrary to Complainant's testimony that he only knew of them being called once. *See* CX 10 at 65-77. Complainant was also an inexperienced truck driver at the time, and his testimony regarding the condition of the trucks may not be entirely credible. While Complainant was "mechanically inclined" according to Mr. Cameron, he was not aware that J.H. Large regularly performed repairs on the trucks. TR at 136-137, 404. Whether Complainant's contrary testimony is due to his inexperience, lack of knowledge about CDW's operations, or some other reason, his testimony about the condition of the trucks and the lack of responsiveness of Mr. Cameron and Ms. Austin is not consistent with the other truck drivers' testimony and I do not credit it.

I also find Complainant's contention that he could get onto the military base with just a plain sheet of paper with a number on it while working for Harlow to be not credible. TR at 503. It does not make sense that if other drivers required a DOD-approved credential to enter the base without being stopped, that Harlow drivers were somehow exempt from this process. Further, that the RAPIDGate passes were tied to an individual and an employer suggests that Rick from Salinas could not simply give a list of trucks to the military to pass into the base, without some sort of consideration of the individual driving the truck. Additionally, Ms. Austin testified that there were other ways to get onto the base quickly without a RAPIDGate pass, but that the process for approval was "lengthy." TR at 360-362. Given the security concerns on military bases, I find Ms. Austin's testimony more credible on this point than Complainant's.

Other contentions of Complainant's lacks support in the record, specifically that he was involved in an accident on a military base. *See* TR at 493-496, 504-505. It would be expected that if he called the military police there would be a police report or some other record about the accident, yet none was submitted into the record. Similarly, Complainant testified that there were people who witnessed the incident at CalPortland where his trucked rolled, but OSHA offered no other witness

[23] *Pattenaude*, ARB No. 15-007, slip op. at 17-18 (complainant's uncorroborated testimony is not necessarily less credible than testimony by corroborated supervisors' testimony).

testimony about the incident, despite Complainant's testimony that other people present observed the incident. OSHA's failure to introduce neutral, independent evidence that could have bolstered or supported Complainant's version of events when there is no explanation why such evidence could not be produced, in combination with the other factors that weigh against his credibility, makes it difficult to afford Complainant's testimony significant weight. He also did not address or deny evidence of motive or bias against Respondent, such as the story Mr. Cameron and Ms. Austin told about Complainant being angry about Mr. Cameron's refusal to sell him a pickup truck. Complainant also claimed that Mr. Cameron never requested that he return the RAPIDGate pass, but this testimony appears to purposefully obfuscate the issue. It is clear from the text message that Mr. Cameron wanted it returned and the record demonstrates Complainant withheld the pass until he received his last paycheck. TR at 151; CX 1.

Additionally, Complainant clearly has hostility toward Respondent. He admits to badmouthing them to numerous people and calling Ms. Austin a drug addict. TR at 151-154. Other, albeit less reliable, evidence supports Complainant's hostility toward Respondent. Ms. Austin testified that she spoke with truck drivers who heard Complainant bad-mouthing CDW. TR at 331-332. Complainant's responses in the text conversation with Mr. Cameron also display a degree of hostility toward Mr. Cameron.[24] Further, as noted by Respondent, Complainant stands to gain a large amount of money if it is found that Respondent violated STAA. While I find this factor less weighty than the inconsistencies between his testimony and the other evidence in the record, it tends to weigh against affording significant weight to his testimony where inconsistent or poorly explained.

Overall, I will afford Complainant's testimony moderate weight. While I find him marginally more credible than Mr. Cameron, where his testimony lacks support in the record or is not plausible given the entirety of the record, it will not be credited.

2. Steve Cameron

OSHA argues that Respondent's contentions are "unsupported, inconsistent, and illogical." OSHA Reply at 1. OSHA contends that Mr. Cameron was evasive and inconsistent in his testimony, that his testimony lacked detail, and that his testimony was not supported by the record. OSHA Reply at 3-4, 10. It argues that Respondent's version of events is "preposterous" and "makes no logical sense." *Id.* at 7-9. OSHA also described Mr. Cameron's testimony regarding Mr. Kammer as "bizarre," accusing him of "threatening and unprofessional behavior and extortion." *Id.* at 3-4. OSHA also points to the contradictory evidence regarding the use of DVIRs at CDW, characterizing Mr. Cameron and Ms. Austin's testimony as "attempt[ing] to present [CDW] as a credible, compliant employer," despite evidence to the contrary from CDW's own witnesses. *Id.* at 4. OSHA also describes Ms. Austin's testimony regarding the RAPIDGate pass as "incredible" and "rooted not in fact or evidence but in supposition." *Id.* at 6. Finally, OSHA argues that Respondent's proffered evidence is inconsistent, focusing on Complainant's alleged performance problems and alleged sabotage. *Id.* at 7-9.

[24] The fact that only a portion of the text message from Mr. Cameron was produced does not impact either parties' credibility. Complainant testified as to his efforts to retrieve the whole message, and Respondent did not produce the message either. While obviously the text message would have been more useful and have been more compelling were the entire message provided, I do not find that it implicates any witnesses' credibility.

Like Complainant, there were a number of factors that weigh both in favor of Mr. Cameron's credibility and against it. OSHA claims that Complainant's credibility should be credited because it is detailed. However, I note that Mr. Cameron's testimony was also detailed on a number of points. For example, the story he related regarding Complainant being angry that Mr. Cameron refused to sell him a pickup truck was very detailed. *See* TR at 418 (testifying to the details of the pickup truck incident). He was also detailed regarding his conversation with Complainant when Complainant's employment ended, although he seemed unsure of the timing of the text message conversation. Additionally, Mr. Cameron's story was consistent with what Ms. Austin told Mr. Kammer during the investigation.

I also found Mr. Cameron's explanation for why he went to the same jobsite as Complainant in Tacoma to be convincing. He testified that he worked for the school district for years and did not see Complainant when he left Graham. TR at 436-437. He also had a detailed explanation for why he would not use profanity over the radio at Washington Rock Quarry. TR at 438. While I simply cannot tell from this record whether some of the incidents happened, Graham, Washington was described as a small town, and I find it entirely plausible that Mr. Cameron and Complainant, who are both in the same industry, would occasionally see each other. Whether Complainant is truly being harassed or instead feels threatened when he merely happens to be in the same area as Mr. Cameron is unclear.

The most serious detractor to Mr. Cameron's credibility is his testimony about talking with Mr. Kammer. *See* TR at 434-435. His claim that he spoke with Mr. Kammer is directly contracted by the OSHA investigator, whom I find credible and entitled to significant weight regarding the facts with which he is personally knowledgeable. Mr. Cameron's claim that Mr. Kammer said he was going to come after Mr. Cameron personally, in those exact words, is unbelievable. Not only is Mr. Kammer an OSHA investigator, whose role at the investigation stage is neutral, but Mr. Kammer has extensive experience with OSHA. TR at 160-161. I find it incredible that an investigator with as many years' experience as Mr. Kammer would make such a statement. I can only conclude that either Mr. Cameron is severely mistaken in who he spoke to in the spring of 2017, or he fabricated the incident. Either way, it detracts seriously from Mr. Cameron's credibility and the weight I afford his testimony.

Additionally, Mr. Cameron and Ms. Austin claimed that drivers were told to fill out DVIRs. TR at 391, 351-352. However, Mr. Clarke and Mr. Keller, in addition to Complainant, testified that they were never given DVIRs to fill out while working for CDW. TR at 28, 32, 289, 247. Given that I credit Mr. Clarke and Mr. Keller, and that they were Respondent's own witnesses, I find that Mr. Cameron and Ms. Austin were not being truthful when they testified that drivers were always given DVIRs to fill out. Respondent did not produce any completed DVIRs, and there is no reason to disbelieve Mr. Clarke and Mr. Keller.

Mr. Cameron also displayed hostility to both OSHA and Complainant. He did not appear to take Complainant's complaint or OSHA's investigation seriously, and claimed that by filing a Complainant with OSHA, Complainant has "escalated" the matter "a hundred times." TR at 144. He and Ms. Austin appeared to be evasive with the service of process and, as noted above, I found Mr. Cameron's testimony that he was threatened by Mr. Kammer to be not credible. Additionally, Ms. Austin told Mr. Kammer that Mr. Cameron would not want to speak with him because he does not handle this type of thing well, which she affirmed at the hearing. CX 5 at 13, TR at 379. Mr. Cameron also stated that he does not go to Washington Rock Quarry anymore because he does not

"want to be a part of what the state's[25] got going on here with these false accusations any longer." TR at 444. Additionally, it is clear that the parties in this case did not like each other, and that hostility negatively affected both sides' credibility. Mr. Cameron also appeared evasive at times during the hearing, for example when he testified that he did not know what happened at CalPortland because he was not there despite being asked repeatedly what he *believed* happened. TR at 465-467.

Overall, I find Mr. Cameron minimally credible and slightly less credible than Complainant, especially given his incredible claims about Mr. Kammer threatening him personally and his assertion that CDW drivers always used DVIRs. However, where his testimony is supported in the record and Complainant's is not, I will credit it over Complainant's, given Complainant's only moderate credibility.

3. Desi Austin

I find Ms. Austin has similar credibility issues as her husband, although less serious in degree. First, in favor of her credibility is that she was detailed in her testimony regarding the main events in question, and her testimony was consistent both with her husband's testimony and with her statements to Mr. Kammer during the investigation.

However, Ms. Austin also claimed that the drivers always used DVIRs, which I do not find credible given the other testimony and the record in this matter. She was also evasive at times, for example when she testified that she was not sure if CDW's safety policies were in writing. TR at 347-348. She was the general manager for CDW and handled the payroll and paperwork. TR at 310, 312. If anyone were to know whether CDW policies were written down, it would be her.

I do not find OSHA's argument that Ms. Austin's RAPIDGate pass was "incredible" and "rooted . . . in supposition" to be a persuasive reason to find her less credible. She testified that based on her knowledge, she believed that Complainant was using his RAPIDGate pass for Harlow. While she framed it as "knowing" that he used it rather than "believing" that he did, I find the difference in testimony understandable. I also find that her reason to take pictures of Complainant's truck in support of CDW's case does not make much sense—it is not clear why the state of Complainant's current truck would have any bearing on this matter. Regardless, I do not find that she was taking pictures of the truck to be evidence of harassment as I found her explanation that she did not know Complainant was present to be plausible. Complainant was not outside with his truck, and only opened the garage and came outside later. TR at 107-109. Similarly to Mr. Cameron, I credit her testimony that Graham is a small town and that they occasionally see Complainant in passing. TR at 337.

Despite some credibility issues, I find Ms. Austin moderately credible and will afford her testimony moderate weight, on par with Complainant.

4. Tobias Kammer

Respondent argues that Mr. Kammer did not personally witness any of the alleged events forming the basis of Complainant's claims. Resp. Br. at 12. It is true that Mr. Kammer did not

[25] Presumably meaning OSHA, a federal agency.

personally witness the underlying facts of this case. His role is that of an independent investigator, and now as a witness for OSHA. He has many years of experience, and I find him credible in what he did have personable knowledge about, such as whether he spoke with Mr. Cameron or not. I believed his testimony, which was consistent with what was documented in his reports prepared close in time to his observations. I also found no reason to disbelieve his account or find that he had any bias against Mr. Cameron or Ms. Austin. Overall, I give his testimony significant weight, with the caveat that his findings or conclusions are not entitled to any weight as this matter proceeds de novo.

5. Other witnesses

a. Linda Hopkins

I found Ms. Hopkins to be a credible witness, although at times a bit vague in her timelines. She also admitted in response to multiple questions that she could not remember since events had happened so long ago. *See, e.g*, TR at 257, 260, 262-263. She does not appear to be biased against Complainant, considering that she put a good word in for Complainant at Harlow and helped him find a job even after he stopped working for Harlow the first time. TR at 78, 256. There is no indication in the record and OSHA offers no argument for why Ms. Hopkins would not testify accurately regarding Harlow's general hiring policies or the specific circumstances surrounding Complainant's hiring.[26] She was clear and non-evasive in her answers, and I afford her testimony significant weight. Where her testimony contradicts Complainant's, I find Ms. Hopkins to be more credible as she has personal knowledge of Harlow's hiring practices, and there were no obvious indicators of bias or reasons to discount her testimony.

b. Brent Clarke, Richard Keller, and Severin Thompson

I found both Mr. Clarke and Mr. Keller to be credible witnesses and found no reasons to question their testimony regarding their experiences working for CDW. They formerly worked for CDW, and although they may have contact with Mr. Cameron and Ms. Austin, I do not find this detracts from their credibility. Overall, their testimony is entitled to significant weight.

I also found Mr. Thompson to be a credible witness, although his testimony had no significant impact on the issues to be decided in this case.

C. Summary of Findings

As previously mentioned, the credibility issues of multiple witnesses and the shortcomings in the documentary evidence makes determining the facts underlying this matter difficult. It is OSHA's burden in this case to establish the elements of the case by a preponderance of the evidence. As explained below, I find that OSHA established that Complainant engaged in protected activity when he complained about the brakes and refused to drive the truck. However, I also find that OSHA has failed to establish that Complainant was subject to an adverse action. Accordingly, I need not address the contribution prong, Respondent's affirmative defense, or damages. I also find that Respondent is not entitled to any damages, attorney's fees, or costs.

[26] In fact, OSHA largely ignores Ms. Hopkins' testimony in its closing briefing.

D. Protected Activity

Under the STAA, an employee can engage in protected activity in a number of ways. *See* 49 U.S.C. § 31105(a). The STAA protects employees who file complaints related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. 49 U.S.C. § 31105(a)(1)(A). The STAA also protects two types of work refusals: Section 31105(a)(B)(i) protects employees who refuse to operate a vehicle because such operation would violate a United States regulation related to commercial motor vehicle safety, health, or security; and Section 31105(a)(B)(ii) protects employees who refuse to operate a vehicle where the employee has a reasonable apprehension of serious injury to herself or the public because of the vehicle's hazardous safety or security condition. 49 U.S.C. § 31105((a)(B)(i), (ii).

OSHA argues that throughout his employment at CDW Complainant made a number of safety complaints about the condition of his truck. OSHA Br. at 10. OSHA contends that "[a]fter months of these complaints," and after the brakes failed at CalPortland, Complainant engaged in protected activity when he refused to drive CDW's truck unless the brakes were fixed. *Id.*, citing 49 U.S.C. § 31105(a)(l)(B). OSHA cites U.S. Department of Transportation ("DOT") standards that require each commercial motor vehicle to have brakes "adequate to stop and hold the vehicle," 49 C.F.R. § 393.40(a), as well as a number of "specific standards applicable to service, parking, and emergency brake systems."[27] *Id.* at 8. Only the refusal to drive was listed as an issue for hearing during the pre-hearing conference call. *See* Order Following Pre-Hearing Conference, *Ass't Sec'y and Ashworth v. Cameron Dirt Works*, 2017-STA-00090, ¶ C (May 11, 2018). However, OSHA also argues that he engaged in protected activity when he made verbal safety complaints to Mr. Cameron about the brakes, at the same time that he refused to drive.[28] OSHA Br. at 10.

Respondent contends that Complainant claims only one instance of protected activity, when he refused to drive a truck with defective brakes. Resp. Br. at 13. Respondent argues that Complainant is the only driver to claim he made a complaint about defective brakes, asked for a repair, and that the repair was denied. *Id.* Respondent contends that Complainant did not tell anyone from CDW management about defective brakes until after he quit. *Id.* He then did not ask for his truck to be repaired. Respondent also argues that Complainant did not refuse to drive his truck, stating that he admitted he drove the truck the night before he quit even though he claimed it was unsafe. *Id.* at 14. Further, Respondent argues, even if Complainant had complained about the brakes and refused to drive while he was employed by CDW, any repair would have been fixed promptly, as demonstrated by the testimony of former CDW drivers. *Id.*

In its Reply Brief, Respondent also argues that OSHA presented no credible evidence that the CalPortland incident was caused by unsafe brakes. Resp. Reply at 8. Respondent speculates that

[27] Citing 49 C.F.R. §§ 393.40(b), (c), (d), (e), and (f), 393.41, 393.42, 393.43, 393.47, 393.48.

[28] Any earlier alleged complaints Complainant may have made—the "months of complaints" referenced by OSHA—are not at issue. These complaints were not included as alleged protected activity during the OSHA investigation and were not included as at issue in the pre-hearing order. OSHA cannot argue for the first time in its post-hearing brief that "each of [Complainant's] oral safety complaints constitute protected activity." *See* OSHA Br. at 11. However, even if OSHA could assert this claim at such a late time, the only evidence it provides is Complainant's testimony regarding these issues, which I find overall insufficient to prove by a preponderance of the evidence that his complaints were objectively and subjectively reasonable.

Complainant may have forgot to set the parking brake and then fabricated his claims by deliberately "backing off" the brakes of the truck. *Id.*

1. Legal Standard under 49 U.S.C. § 31105(a)(1)(A)

Complaints related to a violation of a commercial motor vehicle safety or security regulation, standard, or order are protected activity under the STAA. 49 U.S.C. § 31105(a)(1)(A). Internal complaints are protected, and a complaint may be oral, informal, or unofficial, but must be communicated to management. *Irwin v. Nashville Plywood Inc.*, ARB No. 16-033, ALJ No. 2014-STA-61, slip op. at 8-9 (ARB Sept. 27, 2017); *Ulrich v. Swift Transp. Corp.*, ARB No. 11-016, ALJ No. 2010-STA-041, slip op. at 4 (ARB Mar. 27, 2012); *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ 2008-STA-052, slip op. at 7 (ARB Jan. 31, 2011). A complaint need not explicitly mention a commercial motor vehicle safety standard to be protected, as long as the complaint "relates to" safety concerns. *Ulrich*, slip op. at 4; *Nix v. Nehi-RC Bottling Co., Inc.*, 84-STA-1, slip op. at 4 (Sec'y July 13, 1984). The employee also "need not prove an actual violation." *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011). However, in order to be protected, the employee's belief of an actual or potential violation must be both objectively and subjectively reasonable. *Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-6, slip op. at 10 (ARB Jan. 10, 2018). The employee's belief is subjectively reasonable if the employee "actually believed that the conduct he complained of constituted a violation of relevant law." *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 7 (ARB Nov. 28, 2012). The "objective" component "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Id.*; *Garrett v. Bigfoot Energy Servs., LLC*, ARB No. 16-057, ALJ No. 2015-STA-047, slip op. at 7 (ARB May 14, 2018).

2. Legal Standard under 49 U.S.C. § 31105(a)(1)(B)(i) and 49 U.S.C. § 31105(a)(1)(B)(ii)

The STAA's work refusal clause protects two categories of work refusal. Section 31105(a)(1)(B)(i) protects an employee when "the employee 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.A. § 31105(a)(1)(B)(i). The ARB has held that Section 31105(a)(1)(B)(i) includes refusals to operate a vehicle where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he or she refuses to operate the vehicle. *Ass't Sec'y and Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-61, slip op. at 9 (ARB Sept. 30, 2011)[29]; *see also Klosterman v. E.J. Davies, Inc.*, ARB No. 12-035, ALJ No. 2007-STA-019, slip op. at 6 (ARB Jan. 9, 2013); *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010- STA-022, slip op. at 7 (ARB Nov. 28, 2012).

[29] The ARB's decision in *Bailey* was reversed by the Eleventh Circuit Court of Appeals in *Koch Foods Inc. v. Secretary, U.S. Dept. of Labor*, 712 F.3d 476 (11th Cir. 2013), but in its remand order, the ARB noted that while the Eleventh Circuit's decision was the law of the case, "the Eleventh Circuit's opinion is at odds with the Second Circuit's opinion in *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d. 1195 (2nd Cir. 1993) . . . upon which we had relied, in part, in reaching our decision in this case." *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No. 14-041, ALJ No. 2008-STA-61, slip op. at 3, n. 6 (ARB May 30, 2014). In at least one later decision, the ARB has applied the "reasonable belief" standard under Section 31105(a)(1)(B)(i). *See Sinkfield v. Marten Transp., Ltd.*, ARB No. 16-037, ALJ No. 2015-STA-35, slip op. at 7-8 (ARB Jan. 17, 2018). As this matter does not arise out of the Eleventh Circuit, the ARB's interpretation of Section 31105(a)(1)(B)(i) as articulated in *Baily* is controlling.

Section 31105(a)(1)(B)(ii) protects an employee who refuses to drive because of a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition, and requires a showing that the employee "sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." 49 U.S.C.A. § 31105(a)(1)(B)(ii), (a)(2); 29 C.F.R. § 1978.102(c)(1)(ii). "[A]n employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury or serious impairment to health." 49 U.S.C.A. § 31105(a)(2); 29 C.F.R. § 1978.102(f).

For a refusal to drive to be protected under the STAA, the complainant must demonstrate a subjectively and objectively reasonable belief of a violation. *Mauldin v. G & K Servs.,* ARB No. 16-059, ALJ No. 2015-STA-054, slip op. at 8 (ARB June 25, 2018).

3. Analysis

Initially, Respondent's argument that Complainant did not actually refuse to drive the truck because he drove it back to the CDW yard the night of the CalPortland incident is without merit. OSHA is not arguing that he refused to drive it that night, but that he refused to drive it after he returned it to the yard. That he drove it back the night before does not negate a later refusal to drive the truck. The evidence indicates that Complainant refused to drive the truck the next day in conjunction with quitting because he had another job (see discussion below). He did not show up to work to drive the truck and told Mr. Cameron that he refused to drive the truck.

I also find that Complainant complained to Mr. Cameron regarding the brakes. Complainant testified that he told Mr. Cameron on the phone that the brakes were unsafe. TR at 63. Mr. Cameron asserted that Complainant mentioned unsafe brakes, and it is evident from the text messages that unsafe equipment had been mentioned. CX 1; TR at 424, 451-452. Respondent asserts that Complainant did not complain about the brakes being unsafe until after he quit, but it appears that it was during the same phone call. That he refused to drive and complained about the brakes at the same time that he quit does not negate that he engaged in protected activity.

OSHA did not offer much evidence to establish that Complainant had an objectively and subjectively reasonable belief that that brakes on the Kenworth truck violated a safety regulation or law, or that he had a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition. *See* OSHA Br. at 10-11. However, Complainant testified how the truck rolled at CalPortland, and how he had to jump into the truck to get it to stop. TR at 57-58. There were multiple reports of Complainant repeating the story about how the truck rolled, which leads me to conclude that it most likely actually happened. TR at 305 (Complainant told Mr. Thompson about the incident); at 416 (Mr. Skinner told Mr. Cameron Complainant had problems with the brakes); at 257 (Complainant told Ms. Hopkins about the incident). Complainant also testified that he was nervous to drive the truck the night of the CalPortland incident and that he was sent home by the foreman because it was not safe to be on the jobsite. TR at 59, 61-62, 138. Additionally, Mr. Cameron agreed that the truck would not be safe to drive with the brakes in the "backed off" state. TR at 472-473. Complainant testified that he tried to fix the brakes at the CalPortland cite but could not. TR at 59, 130, 132. Mr. Cameron stated that when he looked at the brakes the next morning with the J.H. Large mechanic, they simply tightened the brakes and they worked fine. TR at 417. Mr. Keller, who previously drove the Kenworth, testified that he adjusted

the brakes every other day and never had any problems with the brakes. TR at 242. Mr. Cameron also testified that there was nothing wrong with the brakes, it was only due to Complainant's "neglect" that the brakes were "backed off." TR at 424. Mr. Keller's testimony lends credence to Mr. Cameron's claim that Complainant should have been adjusting the brakes, but ultimately what is clear is that the brakes were not in a safe condition the morning after the CalPortland incident. Respondent's contention that Complainant may have purposefully failed to adjust the brakes is speculation, and there is insufficient evidence to conclude that Complainant was at fault. While not overwhelming, I find that this evidence is sufficient to establish that Complainant had both a subjectively and objectively reasonable belief that operating the truck would have violated a regulation, standard or order of the United States related to commercial motor vehicle safety or health.

Regarding Section 31105(a)(1)(B)(ii), Complainant needs to demonstrate that his refusal to drive the truck was based on a reasonable apprehension of serious injury to himself or the public, and *that he sought, and was unable to obtain, a correction of the unsafe condition*. 49 U.S.C.A. § 31105(a)(1)(B)(ii), (a)(2) (emphasis added). Whether a complainant was reasonably apprehensive that driving a vehicle could result in possible injury to herself or the public must focus on the information available to the complainant at the time of the refusal. *Kennedy v. Advanced Student Transp.*, ARB No. 09-145, ALJ No. 2009-STA-49, slip op. at 7 (ARB Apr. 28, 2011). The reasonable belief test also requires that Complainant demonstrate he actually had an apprehension of serious injury to himself or others at the time of her refusal. *See, e.g.*, *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6, slip op. at 27-28 (ARB July 14, 2000).

For protected activity under Section 31105(a)(1)(B)(ii), Complainant's case fails at the second prong—he has not demonstrated that he sought correction of the issue with the brakes and was unable to obtain a correction of the condition. Mr. Cameron testified that after he heard from Mr. Skinner that Complainant had a problem with the truck, he and the mechanic from J.H. Large looked at the brakes at the Kenworth and were able to adjust them so that they were properly working. TR at 417. While Mr. Cameron's credibility is not stellar, Complainant offered no evidence to the contrary that he sought such a correction and was unable to obtain it, other than his testimony that he was terminated, which I do not credit, as discussed below. Therefore, he did not engage in protected activity under Section 31105(a)(1)(B)(ii).

4. Conclusion

Complainant has shown by a preponderance of the evidence that he engaged in protected activity when he complained about the brakes and when he refused to drive the truck because its operation would violate a regulation, standard or order of the United States related to commercial motor vehicle safety or health. *See* 49 U.S.C. § 31105(a)(1)(A), (B)(i). However, he did not demonstrate that he engaged in protected activity under 49 U.S.C. § 31105(a)(B)(ii), because he did not demonstrate that he sought and was unable to obtain a correction of the problem.

E. Adverse Action

OSHA argues that CDW terminated Complainant. OSHA Br. at 13. Alternatively, OSHA argues that CDW constructively discharged Complainant by "refus[ing] to fix his unsafe truck."[30] *Id.* OSHA argues that Complainant "testified in detail" regarding the events following his return to the CDW yard following the CalPortland incident.[31] OSHA Br. at 13. OSHA also argues that Mr. Cameron's statement that he did not want Complainant on his property "is consistent with a termination" where a fired employee may be upset, since if he had quit, "there would be no reason for CDW to ban him." *Id.*, at 16. Additionally, OSHA cites CDW's letter dated September 22, 2017, that offers "reinstatement" as evidence that he was fired. *Id.*

Respondent argues Complainant did not suffer an adverse action because he voluntarily quit his employment. Resp. Br. at 15. Respondent argues that Complainant already had a job lined up with Harlow before he quit working for Respondent, citing Ms. Hopkins' testimony. *Id.* Respondent also cites Ms. Austin's testimony that drivers told her Complainant was going to quit CDW on the night of the CalPortland incident and was going to work for Harlow. *Id.* at 16. Respondent argues that Complainant "manifested his intention to quit" by leaving his truck parked the wrong way in CDW's yard, with the keys in the ignition and trash on the floor. *Id.* at 17.

While I found Complainant more credible than Mr. Cameron, it was only marginally so. Overall, after a review of the record, I find that OSHA has not established by a preponderance of the evidence that Complainant was fired, and find that it is more likely than not that he quit his employment with CDW. A number of factors lead me to reach this conclusion.

First, Ms. Hopkins' testimony regarding the hiring practices at Harlow cannot be ignored. As discussed above related to Complainant's credibility, Ms. Hopkins testified that in order to be hired by Harlow, drivers need to pass a drug test which can take one to two days. TR at 278-279. She testified that someone would not be able to inquire about a job and start work later that day. TR at 279. She testified that Mark Harlow and Rick Tripp, the dispatcher, were responsible for hiring Complainant, not her. TR at 256. This makes sense, as Ms. Hopkins was only a driver at the time, not a dispatcher. OSHA put forward no evidence or theory as to why Ms. Hopkins would not testify truthfully, and I credit her account over Complainant's account, which was that Ms. Hopkins went against the wishes of her boss and hired Complainant without him passing a drug test. Complainant also testified that Harlow made an exception for him to finish out the JBLM job because the drivers knew him. TR at 77-78. However, while Ms. Hopkins thought Complainant was a good driver, other drivers considered him too young and inexperienced and thought that he drove too fast. TR at 272-273; *see also* TR at 413. Ms. Hopkins testified that Complainant had quit or was fired and was therefore "looking for work" when he contacted her about a job. TR at 278. While this testimony suggests that he called her after his employment ended, I find that it could also be interpreted as Complainant "looking for work" in order to quit CDW. Ultimately, it is unclear

[30] In its statement of facts, OSHA refers to the alleged instances of harassment after Complainant's employment ended as "Retaliation." OSHA Br. at 6. However, OSHA does not argue that these instances constituted adverse actions, instead citing only his alleged termination or, in the alternative, his constructive discharge. *See* OSHA Br. at 11. Because these alleged acts of "retaliation" were not listed as adverse actions in the OSHA findings, the pre-hearing order, or in OSHA's brief, I need not address whether such actions could be "adverse actions" under the STAA.

[31] OSHA also argues that the OSHA investigator "found credible evidence to support the fact of [Complainant's] termination." OSHA Br. at 13, citing TR at 174. This is a de novo hearing; what the OSHA investigator found credible is not entitled to any weight.

when exactly Complainant sought work with Harlow, but given that it must have taken at least a day to hire Complainant at Harlow, the logical conclusion is that Complainant was seeking employment elsewhere before his employment ended with CDW. This in turn supports a finding that he quit his employment, rather than being fired. Further, Complainant's unconvincing testimony that was contrary to Ms. Hopkins' regarding his hiring at Harlow undercuts his overall credibility related to the end of his employment with CDW.

Second, although far from unequivocal, other evidence suggests that Complainant quit and was not fired. That Complainant left the truck dirty tends to show that he did not anticipate coming back to work for CDW. Further, his statement in the text message that the unsafe equipment was the "last straw" also supports the inference that he quit. CX 1. He may have quit because he was genuinely fed-up with the state of the truck, but this does not mean he was subject to an adverse action.

Third, Mr. Cameron testified that he "needed" Complainant, and that Complainant told him that he wanted to drive a better truck with better pay. TR at 487. Mr. Cameron also stated that when he spoke to Complainant he did not ask for repairs to be made because "we were way past that" as Complainant was already working for Harlow. TR at 416, 418-419. While Mr. Cameron's testimony is not without credibility issues, this evidence suggests that Complainant quit rather than was fired.

Less compelling, but supportive of finding that Complainant quit, is the hearsay evidence that Complainant said he was going to work for Harlow before quitting. Ms. Austin testified that other truck drivers told her Complainant was talking about working for Harlow the night before his employment with CDW ended. TR at 331-332. Complainant also testified that although he did not say anything during the telephone conversation with Mr. Cameron that could have been interpreted as him quitting his job, he also did not say anything that could have been interpreted as wanting to remain employed. TR at 75. The second portion undercuts his testimony that he refused to drive until the brakes were fixed; such a statement would indicate that he wished to remain employed, he just had concerns about the brakes.

OSHA argues that the statement "I don't want you on my properties" is evidence that Complainant was fired, and OSHA argues that there is no reason to ban someone from the property who voluntarily quits. OSHA Br. at 14. However, I find there are plausible reasons for Mr. Cameron to make this statement, and that it is not unequivocal evidence of Complainant's termination. Mr. Cameron testified that he did not want Complainant on his property because Complainant was upset about his last paycheck and the incident with the pickup truck that occurred years before. TR at 423. In its closing brief, OSHA characterized numerous parts of Respondent's version of events as "preposterous,"[32] including Respondent's story about the pickup truck. OSHA

[32] OSHA focused its argument on only two of Respondent's claims: its contention that Complainant had performance problems and its contention that he sabotaged CDW's trucks. I do not find either of these claims to have an impact on Respondent's credibility. It is entirely plausible that CDW did not document performance problems that appeared minor; CDW does not appear to have a rigorous policy of documentation—it did not even have written policies or procedures. Second, while there may have been damage to Respondent's trucks, Respondent's contention that Complainant was responsible is speculation. However, I do not find that it negatively affects Mr. Cameron's or Ms. Austin's testimony. Additionally, OSHA's contention that it is a "recent transparent fabrication" because Ms. Austin did not mention the sabotage when she spoke with OSHA is incorrect. While it does not appear in Mr. Kammer's memo, the incident does appear in OSHA's findings. *See* CX 6 at 15 (OSHA's findings issued July 24, 2017), CX 5 (Mr.

Reply at 7-8. While it seems strange that someone would hold a grudge for such a reason, Mr. Cameron and Ms. Austin's stories were detailed, and it was consistent with what she told Mr. Kammer during the investigation phase of this matter. Further, Complainant did not directly address Mr. Cameron's and Ms. Austin's testimony that he held a grudge against Mr. Cameron for his refusal to sell Complainant a truck. He only indirectly contradicted it through his testimony that he had not met Ms. Austin or Mr. Cameron before he was employed. His failure to address this detailed and contradictory information contributed to the failure of proof.

Another explanation is that Complainant bad-mouthed Mr. Cameron's equipment when he quit and was threatening to get him in trouble if he did not give him his last paycheck. Such statements and threats would be grounds to not want a former employee on his property. Additionally, both Mr. Cameron and Complainant testified that the telephone conversation was heated. TR at 70, 420. I find all of these explanations, especially the hostility between Complainant and Mr. Cameron during the call, to be plausible reasons why Mr. Cameron would not want Complainant on his property any longer.[33]

OSHA's argument that Respondent offered Complainant "reinstatement," thereby indicating that it fired Complainant is quickly disposed of. Complying with OSHA's order that reinstatement should be implemented immediately does not imply that Complainant was fired. Although perhaps misguided as it appears Respondent no longer employs truck drivers, attempting to comply and ensure that any back wages award would be tolled is not evidence of an adverse action.

Conversely, certain evidence in the record supports a finding that Complainant did not quit. For example, some of Respondent's statements suggest that they may have interpreted Complainant's actions as quitting rather than Complainant having actually quit (e.g., Ms. Austin's testimony that she knew he quit because he parked his truck and never came back).[34] Additionally, it is difficult to understand why Complainant would have quit working for CDW when he knew that his job with Harlow would only be temporary. TR at 259.

However, I find that on balance, OSHA has not demonstrated by a preponderance of the evidence that Complainant was fired. There is simply insufficient evidence to make that finding, and the scales tip, albeit slightly, in favor of the conclusion that he voluntarily quit. The overall credibility issues with many of the main players in this matter, and the lack of neutral, independent evidence to either support or contradict various witnesses' version of events, made it difficult in this case to determine what actually happened. To be clear, I do not find Mr. Cameron generally credible; if the determination were based on his testimony alone the finding may be different. However, on the particular material issue of whether Complainant quit or was terminated, the

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Kammer's notes). Therefore, she must have related her suspicions to Mr. Kammer. If anything, this calls into question the reliability of Mr. Kammer's memorandum.

[33] Additionally, I note that only half of Mr. Cameron's text message is reproduced in the record. I admitted the text message over Respondent's objections, noting that such an objection would go toward the weight afforded this evidence, not its admissibility. Without knowing the content of the rest of the text message, I find it would be inappropriate to interpret Mr. Cameron's statement as unequivocal evidence of termination.

[34] This should not be construed as a finding that Respondent interpreted Complainant's actions as quitting. I am merely observing that the evidence in this matter is extremely equivocal and could be interpreted a number of ways. However, as stated above, the burden of proof was on OSHA as the prosecuting party and it has not demonstrated that Respondent subjected Complainant to an adverse action by a preponderance of the evidence—either by directly terminating Complainant's employment or by interpreting his actions as him quitting without him actually resigning.

weight of the evidence supports Mr. Cameron's version of events rather than Complainant's. As stated, it is not compelling, but considering all of the evidence, I cannot find by a preponderance of the evidence that Mr. Cameron terminated Complainant.

Alternatively, OSHA argues that Complainant was constructively discharged.[35] A constructive discharge occurs when the employer has created "working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign." *Beatty v. Celadon Trucking*, ARB Nos. 15-085, 15-086, ALJ No. 2015-STA-010, slip op. at 7 (ARB Dec. 8, 2017) (citation omitted); *see also Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-049, slip op. at 10 (ARB Feb. 28, 2011) (formulating the question of constructive discharge as whether employer created working conditions . . . so difficult or unpleasant that a reasonable person in the employee's shoes would have found continued employment intolerable and would have been compelled to resign). The standard for evaluating constructive discharge is objective: "the question is whether 'a reasonable person' would find the conditions intolerable, and the subjective beliefs of the employee (and employer) are irrelevant." *Loftus v. Horizon Lines, Inc.*, ARB No. 16-082, ALJ No. 2014-SPA-004, slip op. at 7 (ARB May 24, 2018). A complainant can also demonstrate constructive discharge by showing that an "employer acts in a manner so as to have communicated to a reasonable employee that [he] will be terminated, and the . . . employee resigns . . . ." *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002, slip op. at 13 (ARB Mar. 30, 2016) vacated on other grounds sub nom, *Dietz v. Cypress Semiconductor Corp.*, 711 F. App'x 478 (10th Cir. 2017). Somewhat differently, if an employee has not actually resigned but the employer interprets an employee's actions as a resignation, the employer "has in fact decided to discharge that employee." *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-019, slip op. at 6 (ARB Sept. 30, 2010), citing *Minne v. Star Air Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 14 (ARB Oct. 31, 2007).

OSHA has not demonstrated that Complainant was subject to working conditions so intolerable that a reasonable person would feel forced to resign. Complainant's testimony was that the brakes were not working, that he sought a correction, and that he was fired. Putting aside that I did not find Complainant sought a correction of the condition, and that he testified he was fired no that he resigned, Complainant did not testify as to how conditions at CDW could have led a reasonable person to believe that resigning was the only option. Mr. Clarke and Mr. Keller testified that Ms. Austin and Mr. Cameron were responsive to any needed repairs and that all requested repairs were made immediately. It is only Complainant's testimony that supports a finding that the Kenworth had repeated mechanical and safety issues. However, I only afforded Complainant's testimony moderate weight where not supported elsewhere in the record and this testimony alone would not support a finding that a reasonable person would find conditions so intolerable as to force him to resign. *See, e.g*, *Barrett v. E-Smart Technologies, Inc.*, ARB Nos. 11-088, 12-013, ALJ No. 2010-SOX-31, slip op. at 6-7 (ARB Apr. 25, 2013) (several incidents including removal of job duties and failure to reinstate salary alone would not be sufficient to find constructive discharge, but taken together with failure to pay complainant demonstrate a "wider pattern of aggravating factors" which satisfy the constructive discharge standard); *Loftus v. Horizon Lines, Inc.*, ARB No. 16-082, ALJ No.

[35] Respondent argues that OSHA's allegation of constructive discharge must be "disregarded" as it argues alternative facts, not merely alternative legal relief. Resp. Reply at 3. Respondent also argues that "constructive discharge" was never discussed at the hearing and no evidence was produced concerning this theory, and that the argument cannot be advanced for the first time in the post-hearing brief. *Id.* at 4. However, the issue was listed as at issue in the Pre-Hearing order, and I find that while arguing alternative facts is awkward, OSHA is entitled to make the argument.

2014-SPA-4, slip op. at 7-9 (ARB May 24, 2018) (employee constructively discharged where he was demoted and new duties were so difficult and demanding a reasonable person would have felt compelled to resign); *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2, slip op. at 23-26 (ARB Feb. 29, 2000) (workplace harassment caused anxiety and depression and employer would not accommodate employee's conditions, as well as singled him out for enforcement of sick leave policies).

Overall, what this case comes down to is a failure of proof. It is OSHA's burden as the prosecuting party to prove by a preponderance of the evidence that Complainant was subject to an adverse action. On the record before me, OSHA has failed in that burden, and I find that it is more likely that Complainant voluntarily quit his employment. OSHA has also failed to establish that Complainant was subject to a constructive discharge. Therefore, because Complainant has not shown by a preponderance of the evidence he was subject to an adverse action, his whistleblower claim fails.

F. Respondent's Request for Damages and Attorney's Fees and Costs

In its closing brief, Respondent requests damages "that are ongoing, including, but not limited to, costs and attorney's fees and any damages available under the Equal Access to Justice Act." Resp. Br. at 20. Respondent provides no argument or citation to authority in support of this request. OSHA did not respond to this request in its reply brief.

Respondent did not cite any authority to support its request for "ongoing" damages apart from attorney's fees and costs, and I am aware of none. Accordingly, this request is denied. Further, the STAA only provides for an attorney's fees and costs to be awarded to a successful complainant, not against an unsuccessful complainant. *See* 49 U.S.C.A. § 31105(b)(3)(B); 29 C.F.R. § 1978.109(d)(1)-(2).

However, the Equal Access to Justice Act ("EAJA"), 5 U.S.C.A. § 504(a)(1), provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

An "adversary adjudication" is "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise." 5 U.S.C.A. § 504(b)(1)(C). The adjudication provisions of the Administrative Procedure Act, 5 U.S.C. § 554, apply to an "adjudication required by statute to be determined on the record after an opportunity for an agency hearing . . . ." 5 U.S.C. § 554(a). The STAA requires that if a party objects to OSHA's finding, it may "request a hearing on the record." 49 U.S.C.A. § 31105(b)(2)(B). The regulations require that proceedings be conducted on the record and in accordance with the rules of practice and procedure

before the Office of Administrative law Judges, found at 29 C.F.R. Part 18, Subpart A.[36] 29 C.F.R. § 1978.107(a)-(b). However, the U.S. Department of Labor's regulations at 29 C.F.R. Part 16 regarding the application of EAJA do not list proceedings under the STAA, or any other whistleblower protection provision, as one of the types of administrative proceedings subject to EAJA.[37] 29 C.F.R. § 16.104.

Under EAJA, the party seeking the award of fees and expenses must submit an application to the agency showing that the party is a prevailing party and is eligible to receive an award, in addition to specific information such as the itemized amount sought. 5 U.S.C.A. § 504(a)(2). The party must also allege that the position of the agency was not substantially justified. *Id.* The Department of Labor's regulations similarly require various specific information to be included in the application for costs under EAJA. *See* 29 C.F.R. §§ 16.201–203. An application may be filed "whenever the applicant has prevailed in the proceeding," but if review is sought, the "consideration of an award of fees and expenses shall be stayed pending final disposition of the underlying controversy." 29 C.F.R. § 16.204(a)-(b). The regulations require that an EAJA application "shall be filed with the adjudicative officer and served on all parties to the proceeding in the same manner as other pleadings in the proceeding." 29 C.F.R. § 16.301. The agency may then file an answer to the application. 29 C.F.R. § 16.302.

First, Respondent has failed to comply with the application requirements under the statute and the Department of Labor's regulations. Second, Respondent has not shown that EAJA applies to this proceeding and, further, has made no showing that OSHA's position was not substantially justified. As explained above, I found this matter to be a close case that turned on credibility of witnesses, which was lacking for both of the primary witnesses. Therefore, the request for fees and costs under EAJA is denied.

ORDER

1. Complainant engaged in protected activity under 49 U.S.C. § 31105(a)(1)(A) and 49 U.S.C.A. § 31105(a)(1)(B)(i). Complainant did not engage in protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(ii).

2. Complainant voluntarily quit his position and therefore did not suffer an adverse action when his employment ended on or about January 22, 2014.

3. Complainant's request for relief is denied.

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[36] The OALJ rules provide that "[u]less the governing statute, regulation, or executive order prescribes a different procedure, proceedings follow the Administrative Procedure Act, 5 U.S.C. 551 through 559." 29 C.F.R. § 18.10(b).
[37] The purpose of the Department of Labor rules found at 29 C.F.R. Part 16 are to describe the parties eligible for awards, the proceedings that are covered under EAJA, how to apply for awards, and the standards under which awards will be granted. 29 C.F.R. § 16.101. The proceedings listed as adversarial adjudications covered by EAJA are: hearings conducted by the Occupational Safety and Health Review Commission; hearings conducted by the Federal Mine Safety and Health Review Commission; specific proceedings initiated by the Wage and Hour Division, Employment Standards Administration; Office of Federal Contract Compliance Programs, Employment Standards Administration hearings; fund termination under the Civil Rights Center; various Employment and Training Administration proceedings; petitions for modification of a mandatory safety standard under the Mine Safety and Health Act; and exemptions, tolerances and variances under the Occupational Safety and Health Act. 29 C.F.R. § 16.104(a)(1)-(7).

4. Respondent's request for relief in the form of damages and attorney's fees and costs is denied.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

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

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).