U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 January 2019

Case Number: 2017-STA-00070

In the Matter of:

BRIAN BELLMEYER,
Complainant,

v.

LOYCO TRUCKING, LLC and
MARK LOY, an individual,
Respondents.

DECISION AND ORDER DISMISSING THE COMPLAINT

This matter arises under the employee-protection provisions of 49 U.S.C. § 31105 of the Surface Transportation Assistance Act of 1982 ("STAA" or "the Act"), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978. As is relevant here, the STAA, in part, prohibits an employer from discharging an employee because the employee refuses to operate a vehicle because such operation would violate a regulation of the United States related to commercial motor vehicle safety, health, or security or because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety condition. 49 U.S.C. §§ 31105(a)(1)(B)(i) and (ii). The STAA also prohibits an employer from discharging an employee because the employer perceives that the employee has filed or is

about to file a complaint related to a violation of a commercial motor vehicle safety or security regulation, standard or order. 49 U.S.C. § 31105(a)(1)(A)(ii).

Procedural History

On February 16, 2016, Brian Bellmeyer ("Complainant") filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA"), alleging that Mark Loy and Loyco Trucking, LLC (jointly, "Respondent") retaliated against him in violation of the STAA when he was fired after threatening to contact the Department of Transportation ("DOT") and tell them he was being required to drive an unsafe truck.[1] *See* 49 U.S.C. § 31105(a). After investigating, OSHA's Regional Supervisory Investigator dismissed the complaint on July 10, 2017, finding Complainant engaged in activity protected under the Act but that such activity did not contribute to his discharge. By letter dated July 12, 2017, Complainant timely filed objections to the findings and requested a hearing before the Department of Labor's Office of Administrative Law Judges ("OALJ"). The matter was then assigned to the undersigned for hearing.

On February 22, 2018, Respondent filed a *Motion to Dismiss* and a *Memorandum in Support of Motion to Dismiss*, requesting that Complainant's case be dismissed before trial. I declined to do so in an *Order Denying Respondents' Motion for Summary Decision*, issued on March 1, 2018.

I then presided over a hearing on March 28, 2018 in Madison, Wisconsin, at which both parties were self-represented and appeared without legal counsel (Tr. 4-5).[2] Complainant's Exhibits 1-22 were admitted into evidence without objection, (TR at 62). Respondent's Exhibits 1-38 were also admitted into evidence without objection, (TR at 93). Four witnesses, including Complainant, testified. (TR at 9-108).

[1] Complainant also alleged Respondent violated other state and federal laws, to include discrimination, mental abuse, not posting notice of employee rights in the workplace, failing to follow the Family and Medical Leave Act, and wrongful termination, allegations which, even if true, are not within this court's jurisdiction. (Tr. at 5).

[2] I use the following abbreviations in this decision: "TR" for the official hearing transcript, "RX" for the Respondent's exhibits, and "CX" for the Complainant's exhibits.

I have based my decision on all of the evidence admitted, relevant controlling statutory and regulatory authority, and the arguments of the parties. As explained in greater detail below, because I find that Respondent would have fired Complainant in the absence of any protected activity, I dismiss the complaint.

Issues to be Decided

1. Did Complainant engage in protected activity on or before February 16, 2016 when he informed Respondent that the tread depth on the front right tire of Truck 427 was less than 4/32 of an inch?

2. Did Complainant engage in protected activity on February 16, 2016 when he threatened to contact the Department of Transportation and allege Respondent was making him drive an unsafe truck?

3. If so, was Complainant's protected activity a contributing factor in Respondent's decision to fire him?

4. If so, can Respondent show by clear and convincing evidence that it would have fired Complainant in the absence of the protected activity?

5. If not, what relief, if any, is Complainant entitled to?

Summary of the Evidence[3]

Hearing Testimony

Complainant Brian Bellmeyer (TR at 9-61)

Complainant is a truck driver based in Wisconsin who has driven a truck since 2004. Complainant was hired by Respondent on September 14, 2014 and drove as early as September 16, 2014, but he did not sign an employee contract until December 29, 2015. (TR at 10).

Complainant primarily drove Truck 427, which he asserts suffered from a number of safety issues. First, Complainant noticed a problem with the steer tire, which he brought to Respondent's attention. Respondent replaced the faulty steer tire with a used tire from the shed. Complainant believed it was not legal to put a used tire on the front of a semi-trailer truck. Complainant continued to drive the truck because he feared retaliation. (TR at 11).

Complainant also testified to other safety issues with the truck, including a broken fender that was reconnected using only a bungee cord and driven in that condition for a week, (TR at 11), and a faulty steering box that Respondent refused to fix because he did not want to pay $1,200 for the repairs, (TR at 13). Complainant also stated there were issues with the trailer's lights not working properly, (TR at 15-16), rat poison in the cab of the truck, (TR at 46), and a sticking clutch (TR at 47). Complainant admits that the problems with the tire and the trailer's lights were ultimately remedied, but he believes Respondent should have been more diligent in checking for safety issues, and should have responded to problems more quickly once they arose. (TR at 24, 32). Complainant does not have written documentation or photographic evidence of the various safety issues he alleges occurred in the truck. (TR at 35).

Complainant testified there were many issues with the trucks he was asked to drive and he often felt they were unsafe, but he never refused to drive because he feared he would be fired. (TR at 14, 48). Complainant did tell Respondent about the various issues with Truck 427, but he

[3] The summary of the evidence is not intended to provide a comprehensive account of all the evidence.

was always told to keep driving, and that the broken parts would be eventually replaced. (TR at 14).

In November of 2014 or 2015, Complainant attended a safety meeting in which he was told that no unauthorized persons are allowed in the trailers because it is considered a confined space under OSHA regulations. (TR at 18). Complainant said that despite this training, Respondent told him that he needed to enter the trailers to clean them, and that he should just turn his back to avoid violating the regulations. (TR at 19).

Complainant admits that there were four or five occasions when he did not come to work, but asserts that on each of those occasions, he had a legitimate reason to miss work. (TR at 12). Complainant stated that he was having personal issues during his period of employment, including that his wife was going through a difficult pregnancy. (TR at 12). Complainant obtained a doctor's note from his wife's physician, asking that Complainant remain within a two hour radius of home in case complications arose. Complainant testified that when he told Respondent of the request, Respondent said, "I don't care." (TR at 13).

On February 15, 2016, Complainant was driving Truck 527, but it was hit while sitting in a parking lot. (TR at 40-41). While that truck was in the shop getting fixed, Respondent asked Complainant to drive Truck 427. (TR at 13). On February 16, 2016, Complainant inspected Truck 427 at around 5:30 a.m. and discovered that it had a bad tire that needed to be replaced and that the clutch was sticking. (TR at 42). At around 6:00 a.m., Complainant called Respondent to tell him about the issues with the truck. Respondent said that he would check it out, and Complainant went home until he heard more. (TR at 43).

Complainant then called the DOT, asking about the alleged safety violations and requesting that they inspect Truck 427. The DOT officer told Complainant to bring the truck to the scale house so that they could inspect it, but Complainant was never able to do so because he was fired later that morning. (TR at 15).

Around 9:00 a.m. that morning, Respondent called Complainant and asked him to meet back at the truck. (TR at 45). Complainant testified he informed Respondent that he had called the DOT to have the truck inspected. (TR at 47). When Complainant and Respondent met up back at the truck, Respondent said he had termination papers that he wanted Complainant to sign. (TR at 48). Complainant believes he was fired for making a safety complaint to DOT, stating that when he was fired, Respondent told him, "[Y]ou called the DOT on me." (TR at 15). However, Complainant also testified that Respondent never told him why he was being fired. (TR at 48, 52).

Respondent believes he made about $21,000.00 working for Respondent in 2015, though he only worked about 40 weeks out of the year. (TR at 50-51). Complainant received unemployment benefits for the time he was not working, even while he was employed by Respondent, and received further unemployment benefits after his termination. (TR at 55-56). Complainant also maintained a second job running a paper route both while he was working for Respondent and throughout his period of unemployment. (TR at 59). On August 28, 2017 Complainant was hired by the Biddick Corporation in Livingston, Wisconsin. He currently works in the warehouse, but he believes he will soon drive trucks for them. (TR at 51). Complainant makes $10.50 per hour at his new position and works 50 hours per week without overtime benefits. (TR at 52). Complainant makes more at the Biddick Corporation than he made working for Respondent. (TR at 52). Complainant is not seeking to be reinstated with Respondent, but he is seeking damages. (TR at 52-53).

<u>Katherine Bellmeyer (TR at 63-75)</u>

Katherine Bellmeyer is Complainant's wife who drove him to work almost every day. (TR at 63). However, she believes that Complainant drove himself to work on the day that he was fired. After he came home, she said that she drove him back to the truck, but when Respondent told Complainant to meet him at the truck stop, he went back out by himself. (TR at 75).

She also stated that after she had a miscarriage, she was in the hospital for more than a month, and she received a doctor's note requesting that Complainant stay home with their two children. (TR at 64).

Mrs. Bellmeyer testified that Complainant sometimes told her about issues he was having with his truck, but she never set foot in the truck or saw any of the alleged safety violations herself. (TR at 71). She stated that on the date of Complainant's discharge from Loyco, Complainant was "talking to [her] the whole time on the cell phone," and he told her that the steering was sticking on the truck. (TR at 72-73). She also recalls Complainant saying that he had called the DOT that morning and asked them to check if the truck was safe to drive. (TR at 73).

<u>Respondent Mark Loy (TR at 76-92; 107-108)</u>

Respondent Loyco Trucking, LLC, owned by Mark Loy, is a truck transportation business based in Lancaster, Wisconsin which transports fertilizer, road salt, precast stone, freight, liquid fertilizers, and water throughout the Midwest. (TR at 87).

Respondent stated that he had numerous reasons for firing Complainant, and said "the biggest one was lack of performance. He did not generate the revenue that I needed to keep the truck on the road." (TR at 76). Respondent also testified that he had spoken with Complainant about his job performance prior to firing him, but he never wrote up an official warning. (TR at 79).

Respondent testified that the issues Complainant told him about "were never presented to [him] in written form of any kind except for the tire." (TR at 77). He said that Complainant "never presented it to me, these defaults he claims the truck had." (TR at 78).

On the morning of February 16, 2016, Complainant was scheduled to drive Truck 427. (TR at 83). However, Respondent received a text from Complainant at about 5:30 a.m. stating that the truck was unsafe to drive. Respondent went out and tested the truck himself, testifying

that he “started [the truck], ran it around the parking lot, [and] parked it back in the space.” (TR at 83). Respondent did not find anything wrong with the truck during this test run. He attempted to call and text Complainant, but could not get in touch with him. (TR at 83). When Complainant called him back, Respondent asked what was wrong with the truck and Complainant said the “clutch pedal is stuck to the floor.” Respondent admitted that the “clutch pedal is a little sticky.” (TR at 84). Respondent said that Complainant then told him, “You are trying to put me into an unsafe truck. I am going to call OSHA. I am going to call DOT.” (TR at 84). After that conversation, Respondent went home and wrote Complainant’s termination letter. (TR at 84).

Respondent testified he wrote the termination letter because Complainant’s job performance had been declining. (TR at 84). Respondent stated, “I have my 1099s from All Seasons for 2014 and 2015 to show that there was almost a $60,000 drop in revenue to the truck when [Complainant] was driving it, compared to when I was driving the truck. That’s pretty significant when you are trying to run a business and pay for a truck.” (TR at 84). Respondent also had problems with Complainant’s responsiveness and work ethic as a driver, stating that “there were numerous times where he did not either answer his phone, or claim he didn’t get the text message from dispatch, or was having a bad day and [would] come home in the middle of the day, or call up and tell me, oh, I’m not making any money doing this.” (TR at 84). Respondent stated that Complainant’s performance issues began in December of 2014, but that he did not learn of the decline in revenue until two-thirds of the way through 2015 when he was doing his bookkeeping. (TR at 86). Respondent testified that he did not fire Complainant earlier because he was busy with other things and “wasn’t paying as close attention as [he] should have to that part of the business.” (TR at 86).

Respondent asserts that Complainant was not an employee, but an independent contractor. (TR at 90). However, Respondent admits that he was responsible for paying Complainant. (TR at 89). Complainant’s portion of the profits from each delivery would go to Respondent, whose accountant would calculate the payroll and send the money to Complainant. (TR at 90).

Respondent estimates that Complainant worked about 45 to 50 weeks in the last full year he worked for Respondent, although sometimes he did not work full weeks. (TR at 91). Respondent estimates that Complainant's gross average weekly wage was between $425 and $435. (TR at 91). Respondent notes, however, that Complainant did receive unemployment benefits for the time when he was employed with Respondent but was not actually working. (TR at 107).

David Neuwohner (TR at 93-106)

Mr. Neuwohner is the safety director for All Seasons Trucking, which leases trucks from Respondent. (TR at 94). He stated that if anything goes wrong with one of the trailers, it should be conveyed to the maintenance manager, Randy Kemp. (TR at 94).

Regarding Complainant's various safety concerns, Mr. Neuwohner testified that none of them constituted actual regulatory violations. For the faulty trailer light, Mr. Neuwohner said the first time he looked at it they were able to unplug it and plug it back in to get it working again, so they released the truck for use. (TR at 94-95). The second time the light stopped working, Mr. Kemp was brought in to fix it. (TR at 95). Mr. Neuwohner also testified that steer tires can be driven on until they are worn down to less than 4/32 of an inch on at least 30% of the whole tire, (TR at 96), and that there is no rule which states you cannot put a used tire on a truck, (TR at 104). He said that he would have done the same thing as Respondent in that situation and used a worn steer tire because he would want to "get as much money out of that tire as [he could]," and because it is actually safer to drive on two comparably worn steer tires than to drive on one tire that is new and another one that is used. (TR at 104).

Mr. Neuwohner also stated that the confined space rules do not apply to their trailers because they are end dump trucks covered in soft roll tarp, which are not considered a confined space. (TR at 96). He said that, because they do not want to cross-contaminate between the products that they haul, there are "plenty of times" when drivers must go into the trailer and clean them. (TR at 98).

Ultimately, Mr. Neuwohner testified that both of Respondent's trucks were well-maintained during the period in question, as far as he knew. (TR at 99). Mr. Neuwohner also said that if Complainant was his driver, he "would have gotten rid of [Complainant] before then," because he turned down loads on numerous occasions. (TR at 100-101).

Documentary Evidence

In Respondent's written Response, he stated that Complainant is his employee, but that all of the loads he hauled were dispatched by All Seasons Trucking, Inc. (RX 2 at 1; CX 10 at 1). Respondent admitted that on the morning of February 16, 2016, Complainant threatened to call the DOT and the Labor Board, but Respondent alleges he never told Complainant why he was terminated later that morning. (RX 2 at 2; CX 10 at 2). After being told that he had been terminated, Complainant again threatened to call DOT, but Respondent asserts that he does not know if Complainant ever actually called the DOT or not. (RX 2 at 2; CX 10 at 2).

In a written statement from Mr. Neuwohner, he states that Complainant's "overall driver performance was average at best and his home issues would be a constant burden to the productivity of the truck and our business." (RX 10 at 1; CX 22 at 1). He went on to state that Complainant "was never happy with either truck he drove and was constantly finding excuses" to not drive. (RX 10 at 1; CX 22 at 1). Mr. Neuwohner states that he would not rehire Complainant and said that Complainant's "personal issues affected his job performance." (RX 10 at 1; CX 22 at 1).

Andy Kemp, the Dispatcher at All Seasons, also issued a written statement asserting that Complainant had reliability issues, stating,

> On many occasions I had [Complainant] set up on loads and he was either late or unable to do them [altogether]. He was very limited on the amount of loads we could offer him. He did not want to stay in the truck overnight or pull flatbed. We were willing to train him on flatbed but he was not interested.

(RX 11 at 1).

Mr. Kemp states that on June 9, 2015, Complainant "turned down work so he could work on his swimming pool." (RX 11 at 1). Mr. Kemp further states, "Multiple times I had tried calling and texting [Complainant] with work to do and he did not answer or reply. He had many reasons and excuses ranging from having no signal to being in jail." (RX 11 at 1). Mr. Kemp ultimately said that Complainant "was not a driver that was easy to work with. Issues with trust, reliability, and attitude were constant problems." (RX 11 at 1).

In the UI Claim Investigation—Employer Statement, Respondent also stated that he was unhappy with Complainant's performance because Complainant did not turn in copies of his driver's logs, fuel mileage reports, load sheet reports, and maintenance reports, although he was told on more than one occasion that he had to submit these logs and reports. (RX 28 at 2; CX 9 at 2).

Respondent submitted his 1099s showing how much money he made from All Seasons between 2013 and 2016. In 2013, Respondent's income from All Seasons was $134,123.88. (RX 20 at 1). In 2014, Respondent's income from All Seasons was $143,371.74. (RX 20 at 2). In 2015, however, Respondent's income had fallen to $87,332.76. (RX 20 at 3).

In the employee contract between Complainant and Respondent, it states that "the driver is responsible...to inform [Respondent] of any needed repairs or maintenance." (RX 3 at 1; CX 12 at 1). However, the employment contract also states that "refusal[] of a load will result in termination, unless just cause can be given." (RX 3 at 1; CX 12 at 1).

Legal Framework

The STAA's whistleblower protection provisions provide, in pertinent part, that a covered employer "may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment," because the employee engaged in certain protected activities. 49 U.S.C. § 31105(a)(1).

In order to succeed under the applicable legal framework, Complainant must establish by a preponderance of the evidence that: (1) he engaged in activity protected under the STAA; (2) Respondent knew of the protected activity; (3) Respondent took an adverse employment action against him; and (4) his protected activity was a contributing factor in that adverse action.[4] If Complainant fails to prove any one of these elements, the entire complaint fails.[5] *See, e.g.*, *Coryell v. Ark. Energy Servs., LLC*, ARB No. 12-033, ALJ No. 2010-STA-042, slip op. at 4 (Apr. 25, 2013). If Complainant establishes these four elements, Respondent will be liable for damages unless it can demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity. 29 C.F.R § 1978.109(b).

As is relevant here, the STAA protects employees from retaliation for filing a complaint related to operation of an unsafe motor vehicle. 49 U.S.C. § 31105(a)(1)(B)(i) and (ii). An employee is also protected under the STAA if the employer perceives that the employee is about to file a complaint or begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation. 49 U.S.C. § 31105(a)(1)(A)(ii). Filing a complaint includes writing or speaking orally with an employer or a government agency. 29 C.F.R. § 1978.102(b)(1).

Essential Findings of Fact

Complainant hauled fertilizer and salt for Respondent from September 14, 2014 to February 16, 2016 driving trucks owned by Respondent and leased to All Seasons Trucking, who handled the dispatches. Over the course of his employment, Complainant reported to Respondent what he believed to be safety violations in the trucks he was asked to drive. However, Complainant never actually refused to drive any of the trucks because of these concerns. Complainant did decline to drive on numerous occasions for other non-safety or

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[4] Although I list the knowledge requirement as a separate element, I note the ARB has repeatedly reiterated that there are only three essential elements to a whistleblower case – protected activity, adverse action and causation, and that the final decision-maker's "knowledge" and "animus" are only factors to consider in the causation analysis. *See, e.g., Hamilton v. CSX Transportation, Inc*., ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013). *See also Coates v. Grand Trunk Western Railroad Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015) (knowledge is not a separate element but instead forms part of the causation analysis).

[5] While a self-represented Complainant may be held to a lesser standard than that of legal counsel in procedural matters, the burden of proving the elements necessary to sustain a claim of discrimination is no less. *See Flener v. H.K. Cupp Inc*., 90-STA-00042 (Oct. 10, 1991).

security reasons, including his wife's health issues, preplanned appointments, and sometimes just because he was having a bad day and did not feel like driving. Because Complainant turned down work, Respondent's revenue declined significantly because he could not immediately get another driver to deliver the loads.

At about 5:30 a.m. on February 16, 2016, Complainant arrived at work and was scheduled to drive Truck 427. However, after inspecting the truck, he had trouble with the clutch and believed the steering tire was too worn to drive. Complainant tried to call Respondent but got no answer so he sent a text to Respondent at about 6:00 a.m. that the vehicle was unsafe to drive, and returned home. Respondent called and asked, "What is wrong with the truck?" Complainant responded, "The clutch pedal is stuck. The tires treads are bad." Respondent said, "I am at the truck and it is safe to drive." Complainant responded, "No it's not. You are trying to put me in an unsafe truck. I am going to call DOT (Department of Transportation) and the state labor board," or words to that effect. Respondent replied, "Well, you got to do what you got to do." Respondent then hung up and drove Truck 427 home to feed his cattle. Respondent then called the dispatcher and told them not to dispatch any trucks to Complainant, because "I'm going to fire him."

Complainant called the DOT scale house in Dickeyville, Wisconsin at about 7:30 a.m. and told them, "My boss is trying to put me in an unsafe truck, can I have it inspected?" or words to that effect. DOT told Complainant they could not come to the work site but said he could bring the truck to the scale house for inspection. Complainant asked how he could drive an unsafe truck on the road and was informed by the scale house personnel that he had permission to do so. Complainant never made it to the scale house because Respondent had already decided to terminate Complainant's employment and called Complainant to meet him at the work site at 9:00 a.m., where Respondent told Complainant he was fired. Respondent did not give Complainant a reason why. While Complainant told Respondent he believed the truck was unsafe to operate, he never actually refused to drive Truck 427 on February 16, 2016 and was willing to drive the truck to the scale house for inspection.

No front tire that is in use on a commercial motor vehicle may have a thread groove pattern depth of less than 4/32 of an inch or 2/32 of an inch on the other tires. 49 C.F.R. § 393.75. On February 16, 2016, the groove pattern on the right front tire on Truck 427 was 4/32 of an inch, with spots at 3/32. There is no evidence the tread groove patterns on the other tires on Truck 427 were below 4/32 of an inch on February 16, 2016.

Respondent did not learn of the reduction in revenue caused by Complainant's decision to decline dispatches until August or September 2015. Respondent did not terminate Complainant at that time because "he (Respondent) was busy." Respondent's decision to terminate Complainant's employment on February 16, 2016 came the day after Complainant's most recent dispatch declination, and Respondent saw Complainant's threat to call the DOT scale house as the act of a disloyal and unproductive employee.

Complainant made about $21,000 in 2015 from driving trucks, averaging about $425-$435 per week. He also earned about $580 per month delivering papers, a job he retained after February 16, 2016 until November 2017. Complainant has offered no credible evidence to support emotional distress damages and he is not seeking reinstatement. Complainant was hired by the Biddick Corporation on August 8, 2017, where he is earning more than he was at Loyco.

Conclusions of Law

Employee Status

Respondent alleges that Complainant is not covered under the STAA because he is an independent contractor rather than a traditional employee. The STAA states that "'employee' means a driver of a commercial vehicle (including an independent contractor when personally operating a commercial motor vehicle)." 49 U.S.C. § 31105(j). Because Complainant was a driver of a commercial motor vehicle for Respondent during all times relevant to this proceeding, it does not matter if he is labeled as an employee or an independent contractor. Either way, he is a covered "employee" under the Act.

Protected Activity

Refusal to Operate. The STAA protects an employee who refuses to operate a vehicle because he has a reasonable apprehension of serious injury to the employee from the vehicle's hazardous safety condition. *See* 49 U.S.C. § 31105(a)(1)(B)(ii). In other words, not only must Complainant have refused to operate Truck 427 on February 16, 2016, Complainant must also have subjectively believed that operating it would cause serious injury to himself or the public and that such belief was objectively reasonable. While Complainant did raise safety concerns about Truck 427 to Respondent on the morning of February 16, 2016, he never actually refused to operate it. Instead, Complainant brought the deficiencies to Respondent's attention so that he could fix them. But Respondent drove the truck himself that morning and informed Complainant that it was safe to drive. Even then, all Complainant told Respondent was, "You want me to drive an unsafe truck." However, he never refused to operate it and, in fact, was willing to drive it to the scale house for inspection. Accordingly, as Complainant never refused to operate Truck 427 on February 16, 2016, this provision of the STAA is inapplicable. Even if Complainant's conduct the morning of February 16, 2016 constitutes a refusal to operate, the fact he was willing to drive the truck to the scale house inspection means he could not have honestly believed driving it would result in serious bodily injury to himself or the public. While one tire had some spots that were less than 4/32 of an inch, there is no evidence that driving on that one tire would cause or likely result in serious injury. Even if Complainant subjectively believed operation of truck 427 would or could cause serious injury, given only one tire had tread groove pattern depths barely less than the regulations allowed, and then only in spots, such belief was not objectively reasonable.

About to File a Complaint. The STAA also protects an employee if the employer perceives that the employee is about to file a complaint or begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation. 49 U.S.C. § 31105(a)(1)(A)(ii). Filing a complaint includes writing or speaking orally with an employer or a government agency. 29 C.F.R. § 1978.102(b)(1).

For a complaint to be protected under the STAA, the complaint must "relate" to a violation of a safety standard, but a specific standard need not be expressly cited in the complaint. 49 U.S.C. § 31105(a)(1)(A)(i); *see also Ulrich v. Swift Transportation Corp.*, No. 11-016, ALJ No. 2010-STA-00041, slip op. at 4 (ARB Mar. 27, 2012). Furthermore, "a complainant must show that he reasonably believed he was complaining about the existence of a safety violation." *Id.,* slip op. at 4. It need not be true that the complaint concerned an *actual* violation of the regulations. *Elbert v. True Value Co.*, No. 07-031, ALJ No. 2005-STA-036, slip op. at 3 n.5 (ARB Nov. 24, 2010). Additionally, the fact that reporting safety issues is part of a truck driver's duties does not prevent such reports from being protected activity. *Warren v. Custom Organics*, No. 10-092, ALJ No. 2009-STA-30 (ARB Feb. 29, 2012).

An employee's internal complaint to management conveying his reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under § 31105(a)(1)(A). *Calhoun v. U.S. Dep't of Labor*, 576 F.3d 201, 212 (4th Cir. 2009) (holding that internal complaints to company management, whether written or oral, suffice to satisfy the complaint requirement of 49 U.S.C. § 31105(a)(1)(A)(i)); *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (holding that "[a] construction of the STAA that covers only complaints filed with courts or government agencies would narrow the mechanisms to achieve these policy goals, leaving unprotected employees who in good faith assert safety concerns to their employers, or who indicate an unwillingness to engage in such violations.") An employee's raising of a concern, either formally or informally, that is related to commercial motor vehicle safety standards constitutes protected activity. *Assistant Secretary and Freeze v. Consolidated Freightways*, Case No. 99-030 (ARB 1999).

Here, although Complainant never made a formal written complaint to either Respondent or the DOT, he did make informal oral complaints to both, and made such complaints to Respondent on numerous occasions. Finally, he did call the DOT scale house and tell them that his boss was trying to get him to drive an unsafe truck, and asked if they could inspect it. I find these complaints reflected an honest belief that, on occasion, the truck(s) he was asked to drive were not compliant with applicable motor vehicle safety regulations. Therefore, I find that he engaged in protected activity as defined under the Act.

Violate a Regulation. Finally, the STAA prohibits an employer from discharging an employee because the employee refuses to operate a vehicle because such operation would violate a regulation of the United States related to commercial motor vehicle safety, health, or security. 49 U.S.C. § 31105(a)(1)(B)(i). The regulations at 49 C.F.R. § 393.75 provide that "No front tire that is in use on a commercial motor vehicle may have a thread groove pattern depth of less than 4/32 of an inch or 2/32 of an inch on other tires." Notwithstanding testimony that steer tires can be driven until they are worn down to less than 4/32 of an inch on at least 30% of the tire, the regulation itself appears to provide it is a violation if any tread groove depth of the front tire is less than 4/32 of an inch.

On February 16, 2016, the groove pattern on the right front tire on Truck 427 was 4/32 of an inch, with spots at 3/32. Given that at least one front tire had spots where the thread depth was less than 4/32 of an inch, operation of the truck would be a violation of a regulation of the United States, albeit a violation malum prohibitum.[6] In other words, Complainant engaged in activity protected under the Act when he informed Respondent the morning of February 16, 2016 that spots on one of the front tires on Truck 427 were less than 4/32 of an inch.

Adverse Employment Action

The STAA specifies that an employee's discharge constitutes adverse action. *See* 49 U.S.C. § 31105(a); 29 C.F.R. § 1978.102. It is undisputed that Complainant was terminated by Respondent on February 16, 2016. Furthermore, Complainant's termination letter is included in the record before me. (RX 25; CX 11). Accordingly, I find that Respondent took an adverse employment action against Complainant when it discharged him on February 16, 2016.

[6] Malum Prohibitum is a Latin term meaning "wrong due to being prohibited." It is used to describe something that is wrong because it is expressly forbidden by law but not inherently evil.

Protected Activity as a Contributing Factor in Adverse Action

A contributing factor is "any factor, which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, 09-092, slip op. at 5 (ARB Jan. 31, 2011). The complainant may satisfy this "rather light burden by showing that [his] protected activities tended to affect [his] termination in at least some way, whether or not they were a primary or even a significant cause of the termination." *Deltek, Inc. v. Admin. Rev. Bd.*, 649 Fed. App'x 320, 329 (4th Cir. 2016) (*quoting Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014)) (internal quotation marks omitted).

There is no direct evidence that Respondent used the safety complaints or call to DOT as a consideration in his decision to fire Complainant, except for Complainant's statement that Respondent told him, "[Y]ou called the DOT on me" when he presented Complainant with the termination papers. (TR at 15). However, Respondent denies ever saying this, (RX 2 at 2; CX 10 at 2), and Complainant contradicted his own testimony when he later said that he never got an answer for why he was fired. (TR at 48, 52). Additionally, Respondent admitted that he knew about the truck's declining revenue at the end of 2015, but his only explanation for why he chose to wait until February 2016 to fire Complainant was that he "wasn't paying as close attention as [he] should have to that part of the business." (TR at 86).

Therefore, the only credible evidence of causation between the protected activity and the termination is the short time period between Complainant's safety complaints about Truck 427 and threat to notify DOT on the morning of February 16, 2016, and Respondent's decision to fire him later that same morning.

"Temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation." *Feldman*, 752 F.3d at 348; *see also Sharkey v. JP Morgan Chase & Co.*, 660 Fed. App'x 65, 67 (2d Cir. 2016) (noting that a "temporal proximity" of less than a month between the protected activity and the unfavorable personnel action could support a prima facie inference that the protected activity was a contributing factor) (*citing Zann Kwan v. Andalex Grp., LLC*, 737 F.3d 834, 845 (2d Cir.

2013)). Although I believe Complainant's termination was a business decision based on the fact that Complaint was not bringing in enough revenue to justify keeping him on, the close temporal proximity between Complainant's 7:30 a.m. DOT scale house call on February 16, 2016 and his firing 45 minutes later at 9 a.m. on February 16, 2016 is sufficient to establish an inference that the protected activity was at least a contributing factor, however slight. Therefore, I find that Complainant has established that his protected activity was a contributing factor in his termination.

<u>Respondent Would have Taken the Same Adverse Action in the Absence of Any Protected Activity</u>

Even if Complainant's protected activity was a contributing factor in his termination, he cannot prevail on his retaliation claim because I also find that Respondent would have terminated him in the absence of any protected activity. If a complainant meets his burden of proof, a respondent may still prevail if it shows by clear and convincing evidence that it would have taken the same adverse personnel action in the absence of the protected activity. *Palmer v. Canadian Nat'l Ry.*, No. 16-035, 2016 WL 5868560 at *31, 36 (ARB Sept. 30, 2016) (reissued Jan. 4, 2017). Clear and convincing evidence requires that "the ALJ believe that it is 'highly probable' that the employer would have taken the same adverse action in the absence of the protected activity. . . . It is not enough for the [respondent] to show that it *could* have taken the same action; it must show that it *would* have." *Id.* at *31, 33 (*citing Speegle v. Stone & Webster Constr. Inc.*, No. 13-074, 2014 WL 1758321 at *6-7 (ARB April 25, 2014)) (emphasis in original).

Respondent fired Complainant because of declining revenue from the truck and because Complainant was an unreliable driver, both of which still would have existed if Complainant had never engaged in his protected activity. (TR at 76, 84). Respondent's testimony is corroborated both by Mr. Neuwohner's testimony and the written statement from Mr. Kemp. Mr. Neuwohner stated at hearing that if Complainant was his driver, he "would have gotten rid of [Complainant] before then," because he turned down loads on numerous occasions. (TR at 100-101). Mr. Neuwohner also issued a written statement that Complainant's "overall driver performance was

average at best and his home issues would be a constant burden to the productivity of the truck and our business." (RX 10 at 1; CX 22 at 1).

Further, Mr. Kemp issued a written statement that Complainant was often late to pick up loads or refused to take them altogether. He said that Complainant often did not reply to calls or texts with work assignments, and his excuses ranged from "having no signal to being in jail." (RX 11 at 1). Mr. Kemp concluded that Complainant "was not a driver that was easy to work with. Issues with trust, reliability, and attitude were constant problems." (RX 11 at 1).

Respondent also stated that he was unhappy with Complainant's performance because Complainant did not turn in copies of his driver's logs and reports, although he was told on more than one occasion that he had to submit them. (RX 28 at 2; CX 9 at 2).

It appears that the biggest issue Respondent had with Complainant was that he often turned down work or did not respond to work assignments at all, leading to significantly reduced revenue for Respondent's trucks. Because Complainant stated that he never refused to drive a truck because of his perceived safety concerns, (TR at 14, 48), all of his absences must have arisen for reasons besides his protected activity. Again, I find that Respondent ultimately fired Complainant for the declining revenue on the truck and for his repeated refusal to take loads, which Complainant himself admits was not because of any safety concerns. (TR at 14, 48). I therefore find that Respondent would have terminated Complainant even if he never made a safety complaint to Respondent or the DOT scale house or complained about the tire groove depth or other vehicle deficiencies.

Summary

I find Respondent has established by clear and convincing evidence that it would have terminated Complainant based on his frequent job declinations. It was a reasonable reaction in response to the fact that Complainant was not bringing in enough money to justify keeping him on. In regard to Respondent's clear and convincing evidence burden, my role is not to question whether Mark Loy's decision to fire Brian Bellmeyer was wise or based on sufficient 'cause'

under Loyco personnel policies, but only whether all the evidence taken as a whole makes it highly probable that Mark Loy and Loyco Trucking, LLC would have fired Brian Bellmeyer absent the protected activity.[7]

The decision to fire Complainant as a driver was reasonable given the significant revenue drop with Complainant's trucks. Where a business only gets paid for the loads it delivers, an employee who picks and chooses the days he works knows that decision will impact a company's bottom line. That is what happened here. Respondent gave Complainant sufficient opportunity but he continued to decline loads for personal reasons. In other words, the decision to terminate Complainant as a driver for Loyco was a business decision. Whether this court would have made the same decision is not the issue as "federal courts do not sit as a super-personnel department that re-examines" employment decision. *Kuduk v. BNSF Ry. Co.,* 768 F.3d 786, 792 (8th Cir. 2014). Here, the decision to fire Complainant would have happened regardless of the protected activity.

Order

Complainant has demonstrated by a preponderance of the evidence that he engaged in protected activity, that he experienced an adverse action, and his engagement in the protected activity contributed to the adverse action. However, Respondent demonstrated by clear and convincing evidence that it would have taken the adverse action despite Complainant's engagement in the protected activity. Respondent is therefore not liable under the STAA. Accordingly, IT IS ORDERED that the complaint filed by Brian Bellmeyer with the Occupational Safety and Health Administration on February 16, 2016 is hereby DISMISSED.[8]

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[7] The STAA does not forbid unfair employment actions; it forbids retaliatory ones. *See, e.g., Toy Collins v., American Red Cross* No. 11-3345 (7th Cir. Mar. 8, 2013); *Brown v. Advocate S. Suburban Hosp*., 700 F.3d 1101, 1106 (7th Cir. 2012).

[8] In the event an appellate court determines I erred in finding that Respondent has proven by clear and convincing evidence that it would have taken the same adverse action in the absence of Complainant's protected activity, I make the following indicative ruling on damages. 29 C.F.R. § 18.94.

In response to the Court's questions, Complainant specifically declined reinstatement on the record at the March 28, 2018 hearing. (Tr. 53-54). This is understandable given the apparent animosity that exists between Complainant and Respondent and that Complainant now earns more in his current job than he did while working for Respondent.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

Although the ARB generally finds that "a complainant cannot waive reinstatement until the employer makes a bona fide, unconditional offer of reinstatement," it has approved such waivers in circumstances similar to the facts presented here, where a complainant testifies during a hearing that he is not interested in returning to employment with the respondent. *See, e.g.*, *Young v. Park City Transp.*, ARB No. 11-048, ALJ No. 2010-STA-065 (ARB Aug. 29, 2012). I would find that Complainant's unequivocal hearing testimony that he does not wish to be reinstated constitutes a knowing and voluntary waiver. Accordingly, I would find liability for back pay only, which would begin from the date of termination through the date of new employment on August 8, 2017.

In this case, Complainant testified he received about $21,000 in 2015 working for Respondent, or $403.85/week. Complainant was terminated on February 16, 2016 and next employed on August 8, 2017, or 77 weeks. However, Complainant has a duty to mitigate damages by exercising reasonable diligence in seeking and maintaining a substantially equivalent position, but the burden is on the employer to establish a failure to do so. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-05, pdf at 12 (ARB Dec. 30, 2002). A substantially equivalent position is one in which the "promotional opportunities, compensation, job duties, working conditions, and status" are the same. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 7 (ARB Mar. 31, 2005). Upon questioning about what steps he took to find employment after being terminated from Loyco, Complainant testified he applied to the Cheesecake Factory and Premier Coop. (Tr. At 60). The Cheesecake Factory is restaurant chain and not a trucking company. It is unclear whether the job opportunity with Premier Coop was as a truck driver as the closest Premier Coop to Complainant's residence appears to be a convenience store. Regardless, Complainant did not get a response from either business and there is no indication he followed up. Complainant did apply to some other nonspecific positions, but again testified he did not receive a response and did not follow up. Complainant testified he supported himself with his unemployment insurance and paper route until being hired by Biddick on August 28, 2017. In other words, the evidence demonstrates that Complainant made little effort to find a truck driver position after being fired from Loyco on February 16, 2016.

On the record before me, I would find Complainant's attempts to mitigate damages sufficient through 8 weeks after his discharge. Accordingly, if it is determined on appeal that I erred in finding Respondent has proven by clear and convincing evidence that he would have fired Complainant even if he had not contacted the DOL scale house, I would award Complainant a total of $3,230.80 in back pay, plus interest ($403.85 x 12). Interest on back pay would be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621, and would be compounded daily. Back pay would not be offset by the amount of any unemployment insurance received by Complainant in this case. *See, e.g., NLRB v. Gullet Gin Co*., 340 U.S. 361 (1951); *Dutkiewicz v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 97-090, ALJ No. 1995-STA-034, pdf at 8 (ARB Aug. 8, 1997) (stating that unemployment compensation "is not deducted from the amount of back pay owed"). Finally, I would find no basis to award emotional distress or punitive damages.

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

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

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

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law

Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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

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

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

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

Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).