U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 23 May 2019

Case No.: 2018-STA-00044

In the Matter of

CHARLES R. SMITH, JR.
Complainant

v.

R.J. DAVIS, LLC
Respondent

Appearances: Charles R. Smith, Jr.
Pro Se Complainant

Phillip G. Ray, Esq.
For Respondent

Before: LYSTRA A. HARRIS
Administrative Law Judge

DECISION AND ORDER

This case arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Section 31105 of the Surface Transportation Assistance Act of 1982 ("STAA" or "the Act"), 49 U.S.C. § 31105, and its implementing regulations found at 29 C.F.R. Part 1978 (2013).

Charles R. Smith ("Complainant") alleged that his former employer, R.J. Davis, LLC ("Respondent") terminated his employment in August 19, 2016, after he had threatened to and eventually filed an initial complaint with Occupational Safety and Health Administration ("OSHA"). This initial OSHA complaint was filed on May 10, 2016.

On February 8, 2017, Complainant filed a formal complaint with OSHA, U.S. Department of Labor ("Department of Labor"), alleging Respondent discharged him in violation of the 49 U.S.C. § 31105.

By letter dated January 25, 2018, OSHA issued its notice that it had completed its investigation of the formal complaint and dismissed the claim, determining that Respondent had demonstrated by clear and convincing evidence that Complainant's protected activity was not a contributing factor in the adverse employment action. On February 17, 2018, Complainant timely objected to the OSHA determination and requested a hearing before the Department of Labor Office of Administrative Law Judges ("OALJ"). The matter was assigned to the

undersigned on April 10, 2018. A Notice of Hearing and Pre-Hearing Order was issued on April 25, 2018, initially scheduling a hearing for November 28, 2018.

The hearing was rescheduled pursuant to a Notice of Rescheduling Hearing and Pre-Hearing Order issued on October 23, 2018, and held on February 5, 2019 at the OALJ District Office in Cherry Hill, New Jersey. Complainant was pro se (self-represented), and Respondent was represented by counsel.

Complainant testified on his own behalf. Ed Smith and Tony Eagleton testified on behalf of Respondent. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence, and submit post-hearing argument or briefs. Complainant waived his right to make a closing statement or submit a post-hearing brief. Tr. at 62.[1] Respondent's counsel made a closing statement at hearing. Tr. at 63–66.

At the February 5, 2019 hearing, the following exhibits were admitted in to the record: Complainant's Exhibit ("CX") 1 and Respondent's Exhibits ("RX") 1–5. *See* Tr. at 10, 13.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law. All evidence that has been admitted into evidence has been considered, whether or not specifically cited herein.

I. ISSUES PRESENTED

A. Is there coverage under the STAA, i.e., is Complainant an "employee" and is respondent an "employer" within the meaning of STAA?
B. Was Claimant engaged in protected activity as defined by STAA?
C. Did Respondent know Complainant was engaged in protected activity under STAA?
D. Did Respondent take an adverse employment action against Complainant?
E. Was Complainant's protected activity a contributing factor in the unfavorable personnel action?

II. APPLICABLE STANDARDS

The Employee Protection section of the STAA provides:

§ 31105. Employee protections

(a) PROHIBITIONS—(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—

(A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

[1] "Tr." designates the hearing transcript from the February 5, 2019 hearing.

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

(B) the employee refuses to operate a vehicle because—(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or condition;

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

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

(E) The employee furnishes, or the person perceives the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(2) Under paragraph (1)(B)(ii) of this subsection, an 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. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

49 U.S.C. § 31105(a).

This provision was enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles" because "Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may feel threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations."[2]

STAA whistleblower complaints are governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("Air 21").[3] In order to prevail, Claimant must show that he engaged in a protected

[2] *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

[3] On August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 1536, § 31105, 121 Stat. 266, 464-67 (2007), Congress amended paragraph (b)(1) of 49 U.S.C. § 31105 to make the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b), applicable in the adjudication of STAA whistleblower claims.

activity, he suffered an adverse action, and the protected activity was a contributing factor in the adverse action. If these elements are satisfied, the burden shifts to Respondent to show by clear and convincing evidence that the adverse action would have been taken regardless of the protected activity.[4]

III. FINDINGS OF FACT

a. Exhibits

Complainant's Exhibits

CX 1—A letter sent by Complainant to the undersigned dated November 9, 2018 related to Complainant's request to seek amendment of his complaint.

Respondent's Exhibits

RX 1—Complainant's appeal of OSHA's dismissal of his matter and his appeal to the Office of Administrative Law Judges.

RX 2—The online filing in May 2016 of Complainant's complaint to OSHA.

RX 3—A handwritten witness statement form completed by Claimant on August 13, 2016.

RX 4—The police reports regarding the accident that occurred on August 13, 2016, along with the key that corresponds with the police report.

RX 5—OSHA's original January 25, 2018 decision.

b. Testimonial Evidence

i. Complainant

Direct Examination

Complainant began working for Respondent around December 13, 2013 as a "yard jockey." Tr. at 14. He described his job duties as a yard jockey as "[m]ov[ing] trailers to and from dock doors." *Id*. Complainant testified that this was a full-time position. Tr. at 14–15.

Complainant worked for Respondent "[u]p until August 19, 2016." Tr. at 15. He testified that on that day, he had a received a call from Ed Smith who told him that he had been terminated. *Id*. Claimant testified that Mr. Smith also told him that Tony Eagleton and he had seen a video of an incident involving Claimant which occurred on August 12, 2016. *Id*. Complainant maintained that Ed Smith was his supervisor. *Id*.

[4] 49 U.S.C. § 42121(b)(2)(B); *Beatty v. Inman Trucking Management, Inc.*, Case No. 13-039 (ARB May 13, 2014).

Complainant said that from August of 2014 until June of 2015, the working conditions of the Robbinsville warehouse where he worked had been fine, but that after that point, truck traffic had been becoming unsafe and dangerous. Tr. at 16.

Complainant felt that Respondent had fired him as retaliation because he had filed a complaint with OSHA. *Id*. He had been threatening to file an OSHA complaint about "[o]vercrowded conditions in the yard." Tr. at 16–17. He had made these threats by inquiring to "[p]eople. Managers at Amazon," as to who was taking care of the flow of traffic in the yard. Tr. at 17. He said that he wanted "somebody of authority to clear up this chaos that was existing." *Id*. Complainant described the "chaos" as up to 300 trailers being in the yard when it only had a capacity for 200 trailers. *Id*. Claimant eventually filed an OSHA complaint online on May 10, 2016. Tr. at 18. He said that nothing happened—"They, you know, they ignored me. I never—I demanded an inspection from OSHA. They never showed." *Id*.

Cross Examination

Complainant testified that in RX-1, he had written that from August 2014 to June 2015, the working conditions at the Robbinsville yard were fine, but from June 2015 to February 2016, the conditions changed. Tr. at 20. He affirmed that it was from June 2015 to February 2016 when he began raising his concerns about overcrowded yard conditions with Amazon. Tr. at 21. Complainant stated that he would raise his concerns "on occasion…on any occasion" and estimated that he raised his concerns "a couple—two to three times a week." *Id*.

Complainant testified that he had not received any discipline prior to his termination in August 2016. Tr. at 21–22.

Complainant affirmed that he did not mention that there were any safety conditions or hazardous conditions in his statement about the August 12, 2016 incident contained within RX-3. Tr. at 24–25. Complainant stated that with respect to RX-4, he had spoken to a police officer, but the police officer had not taken a statement from him. Tr. at 25. Complainant confirmed that in RX-4, the "Apparent Contributing Circumstances" of the incident were "driver inattention" and the "road/environ factors" were "obstruction/debris in road," "improper work zone," and "physical obstructions." Tr. at 26. The report listed only "driver inattention" as a factor in the accident. Tr. at 26–27. Complainant confirmed that the report listed the contributing factor for Vehicle 2 as "none." Tr. at 27.

Complainant's confirmed it was his understanding that Mr. Smith made the decision to terminate him. *Id*. Mr. Smith had informed Complainant that he was terminated. Tr. at 27–28. Complainant did not say anything in response when Mr. Smith notified him that he was terminated. Tr. at 28.

Redirect Examination

As part of his job duties, Complainant would come into work at 6 P.M. and "check in with the outbound operation and the inbound operations for any movements that they had to have

done." Tr. at 29. He said that he specifically would check in with "Amazon. . . John Murdock and—he was inbound operation. And Chris—I don't know his last name. He was in inbound operation, too." *Id.* Complainant stated that, after he would check in with Amazon inbound and outbound operations, "[t]hey would call on a two-way radio for moves to be made: a load out of a door and put an empty in the door." Tr. at 30. Complainant said that he would pull out a load and put an empty in a door by operating a tractor, which was the property of Respondent, with a lift. *Id.*

On August 13, 2016, Complainant was "called on the radio to put an empty trailer in door 151." *Id.* Complainant testified that, when he arrived to work that night, he counted "over or under 100 trailers in the middle of the yard." Tr. at 31. Claimant described what initially occurred after he saw this as follows:

> "All the spots on the fence were filled up and all the doors in the building were filled up. And then I went inside outbound operations and I got John, operations manager—John Serio, I think, I'm not sure—and I told him, do you want to come out and observe this condition? So he came out. And I says to John, I says, the outside carriers, the drivers, they're going to leave the yard because it's too congested. So he came out with two people from safety, took a look, went back inside. Because what was happening was the outside drivers were coming in the yard that wasn't set for—it wasn't—there wasn't room to turn around a trailer, a 53-foot trailer."

Tr. at 30–31. Complainant testified that he made his complaint about the conditions and congestions on that day to John Serio, the night operations manager. Tr. at 31. Complainant stated that after he had come in, observed the conditions, and relayed his concerns to Mr. Serio, "[a]bsolutely nothing" happened. Tr. at 32.

Complainant was involved in an accident on August 13, 2016, which he described as follows:

> "I—well, I was distracted to put—take it—pull an empty to put in door 151. I saw an empty that I needed and I had to access it. So, I pulled it off the fence and I went up to—up along the building. And where I had to—where I had to put this trailer, a Western Express driver had parked not in front of the door—in front of the door, they had to back in—but maybe ten feet behind, you know, away from the door.
>
> As I pulled up, I stopped to see—I was trying to make sure that I had enough room to make the turn around and come back, back to the trailer in the door. As I made the turn, I went past—I went past the tractor. I never touched the tractor. I went past it. And as I turned the trailer—as I made the turn with the trailer on the hook, all of a sudden, I became aware that the trailer was going backwards, but I was too late. In other words, the turn was so sharp that the trailer actually goes backwards if—you know, if you're not prepared for it. And I wasn't prepared. Because there were trailers parked in the middle of the yard, which caused—I

> couldn't avoid it…So I make—I backed the trailer in the door and dropped it. And I got out and looked and I seen—and I observed damage on the [Western Express] tractor. So I went inside and…went inside to tell—I think it was Reggie. And I told him, we've got a problem outside. And he says all right. He called—he had some girl, she was from the Safety Department, she came down. She went outside and looked at it. Meanwhile, the dispatcher for the Western Express driver wanted a police report. And that's when I went outside, the cop had came, and he, you know—and I had assisted him. I says, do you want me to pull the trailer away from the dock, the one I—when I was going backwards, I hit the tractor. He says no, that's all right, I'll look at it, you know. So—and at that point, I was apprehensive, and I don't know why. You know, I'm used to congested areas. And I know when I'm not supposed to move trailers. And I figured if I refused to move a trailer, I'm going to get fired. So, I filled out an accident report."

Tr. at 32–34.

After Complainant filled out the accident report, he testified that he got in touch with Ed Smith. Tr. at 34. Claimant noted that he got in touch with Mr. Smith the day of the accident had occurred. Tr. at 34–35. Claimant stated the following with what occurred after getting in touch with Mr. Smith:

> "[Ed Smith] wanted a copy of the accident report. I said, okay, I'll leave it in….And I says Eddie…I'm not coming in tomorrow, which was Sunday. He says, oh, you're going to leave me stranded? I says, no. I said, Eddie…I'm not coming in tomorrow because it's not going to be the same tomorrow as it is tonight. There's no room. There's no room for error in this place."

Tr. at 34.

Redirect Examination

Complainant testified that he had complained to OSHA because he wanted to improve the safety of the yard "before somebody got hurt or killed." Tr. at 61. He said that he had no idea that the OSHA inspector was not going to go out to the yard, and after the inspector failed to come out, he began investigating into possible alternative avenues. *Id*. He stated that he met with an attorney, but the attorney initially didn't respond to him. *Id*. Complainant said the attorney later filed the OSHA complaint for him but told Complainant that he was not going to represent him. *Id*.

ii. Edward F. Smith[5]

Direct Examination

Mr. Smith is employed by Respondent. Tr. at 39. His job title is site leader. *Id*. Mr. Smith described his job as site leader as follows: "I'm a working supervisor. Scheduling, taking care of payroll sheets, trip sheets. You know, things like that. Hiring, you know, hiring people. And just kind of, you know, schedule overtime and things like that." *Id*. Mr. Smith had been working with Respondent since August of 2013. *Id*. Mr. Smith began his employment with Respondent as a yard jockey. *Id*. Mr. Smith described the job as a yard jockey as follows: "Just moving trailers around the—around the yard, in and out of trailer doors, putting them in the doors, taking them out of the doors, you know." *Id*.

Mr. Smith testified that Complainant began working for Respondent a short time after he did when he was hired in "August." Tr. at 40. Mr. Smith confirmed that Complainant's title was yard jockey and that Complainant worked as a yard jockey throughout the duration of his employment with Respondent. Tr. at 40–41. Mr. Smith described his role with respect to Complainant as follows: "I supervised him. I made a schedule out for him, you know. You know, his payroll sheets. I handed his payroll sheets in, stuff like that." Tr. at 41.

Mr. Smith stated that he became aware of Complainant's accident when Complainant called him on the phone. Tr. at 41–42. He stated that he was surprised and had asked Complainant what happened, noting, "I don't remember exactly what he said, but he hit a tractor-trailer that was parked" Tr. at 42. Mr. Smith said that after the first phone call, he traded a couple phone calls back and forth. *Id*. He stated that after the accident, Amazon had decided against a drug test for Mr. Smith and sent him home. *Id*. Mr. Smith noted that he got pictures from the accident that day. Tr. at 43.

The next morning, Mr. Smith stated that "Jeremy from Safety," who worked for Amazon, showed him a video of the accident. *Id*. Mr. Smith described what he saw in the video as follows:

> "[Complainant] came up alongside of the trailer that he was parked, from behind…he came up, from behind, and he was going to—he was supposed to put the trailer in a door that was in front of the tractor, to the right. And when he came up alongside, it actually looked, on the video, like he was going to hit it, because it was that close. And then, as he started swinging—coming up past the trailer, he swing the trailer out to his left to back it in the door. And when he swung it out to the left, the tail end of the trailer hit the tractor."

Tr. at 44. Mr. Smith expressed that "there was plenty of room in the yard. [Complainant] went about it the wrong way. He probably should have came [sic] in from the opposite direction to take the trailer out of play." *Id*.

[5] Both Claimant and Mr. Smith noted that there was no familial relationship between them. Tr. at 35, 38.

After Mr. Smith reviewed the video of the accident involving Complainant, he informed his supervisor, Tony Eagleton, about the incident. Tr. at 44–45. Mr. Smith sent Mr. Eagleton pictures of the accident. Tr. at 45. Mr. Eagleton either came down "that same day or the next day," and then they "went inside to discuss it with Jeremy from Safety." *Id*. Mr. Smith said that they "[b]riefly discussed what happened. And because of the severity of the accident and the openness of the yard at the time, [Jeremy] said he was looking at dismissing [Complainant]." *Id*.

Mr. Smith testified that after the discussion with Jeremy from Safety, Jeremy told Mr. Smith and Mr. Eagleton about the severity of the accident and said "we're going to have to get rid of him." Tr. at 47. Mr. Smith said that after the conversation with Jeremy, he and Mr. Eagleton had a discussion. *Id*. Mr. Smith stated that Mr. Eagleton told Mr. Smith to get rid of Complainant because Amazon had told them to get rid of him. *Id*. Mr. Smith had told Complainant that he would have to be let go because of the severity of the accident. *Id*. Mr. Smith noted that Complainant had said very little in response to this and did not remember exactly what Complainant had said. *Id*.

As for the relationship between Respondent and Amazon, Mr. Smith averred that Respondent is a third-party contractor contracted to move the trailers on Amazon's yards. Tr. at 45–46. Mr. Smith testified that Respondent stationed employees on those yards. Tr. at 46. Mr. Smith stated that he was unaware Complainant had actually filed an OSHA complaint prior to his termination. Tr. at 47.

Cross-Examination

Mr. Smith testified that on the day of the accident, the yard "was clear. Not that many trailers on that particular day, so there was a lot of room. Not many outside drivers in the yard at that particular time." Tr. at 48. Mr. Smith said that on multiple occasions, Complainant had said that he was going to file an OSHA complaint. *Id*. He stated that Complainant had said that he was going to file the complaint about the conditions in the yard, and that he heard about this on "[n]umerous occasions before the accident over a period of six months to a year." *Id*.

Mr. Smith described the involvement Amazon had in assigning jobs to Respondent's employees as follows:

> "Well, we all—we have scanners in our trucks about the size of a cell phone, and they would punch that information into a computer and have a movement come up on the screen…Somebody from Amazon. Somebody inside, in Amazon, would punch that move up on the screen. And the particular move would be like take a trailer from spot 381 and put it in door 141, or take a trailer out from 141 and put it in a particular spot, 89 or something."

Tr. at 49. Mr. Smith said that Amazon had no involvement in hiring or scheduling truck drivers for Respondent. Tr. at 49–50.

Mr. Smith testified that Jeremy from Safety had indicated to him that Complainant had to go after the event of August 13, 2016. Tr. at 50.

Redirect Examination

Mr. Smith testified that he had never told Mr. Eagleton that Complainant had made threats of going to OSHA. *Id*. He said that his understanding was that Complainant had intended to go to OSHA "[b]ecause of the number of trailers in the yard." *Id*.

iii. Tony W. Eagleton

Direct Examination

Mr. Eagleton's current employer is respondent. Tr. at 52. He is the regional manager. *Id*. He testified that his responsibilities as regional manager are as follows:

> "Basically, I staff four or five facilities, Amazon facilities at that time. I do a lot of hiring of the site managers. I also assist with some of the scheduling and some of their hiring practices, and the operational duties and that type of thing, I'll fill in there. That's what I do."

Tr. at 52. Mr. Eagleton was hired in June of 2016. *Id*. He was hired as a regional manager and had the same duties when he was hired as he did as of the day of the hearing. Tr. at 52–53. Mr. Eagleton described his primary region as follows: "I handled the Jersey, Pennsylvania, Maryland, some of the PA facilities. All of the—the New Jersey facilities were underneath me. Robbinsville was underneath me at that time." Tr. at 53. At the time, Amazon was Respondent's only client in New Jersey, and Amazon had three sites staffed by Respondent. *Id*.

Mr. Eagleton described Respondent's relationship with Amazon as that of a third party vendor: "We provide a yard management system, we provide trucks, we hire employees to manage their yards, their day-to-day operation." *Id*. Mr. Eagleton said that Respondent's office is in "York Have, Pennsylvania. Near the Harrisburg area." *Id*.

Prior to the accident, Mr. Eagleton had not known nor met the Complainant. *Id*. Mr. Eagleton described how he had learned about the accident as follows:

> "I got a call from Ed Smith, explaining that there was an accident on the yard and, you know, being the protocol that I always have, the first thing I asked, was anybody seriously hurt? No. Was there property damage? Yes. So we started walking through the accident. And I said, what happened, give me some details. He explained it to me. And I said, well, I'm not in the area now, but I will be there tomorrow. But let's—I need to talk to somebody as soon as possible so I can try to get this thing going to help our situation."

Tr. at 53–54. Mr. Eagleton described what had happened next after his phone call with Mr. Smith as follows:

> "[Mr. Smith] explained to me that he had some pictures and that he talked to somebody in Safety, a gentleman by the name of Jeremy, and it looks like we were at fault. It looks like we hit a parked vehicle. And you need to come in here as soon as possible. So I drove down there the following day or the next day. It was within 48 hours I got there. And then I went up, met Jeremy and Ed in the main office, in the lobby. Jeremy met me, and he explained the situation after looking at the pictures. It was definitely an at-fault. You know, there was nothing I could say because the yard was clear at the time. And he told me that this gentleman was no longer on the yard. And with me being the third party vendor, it's their operation, their rule. So, you know, it was their dictation that he no longer drive underneath Amazon. Had I had another facility, we could have worked something out, but the only customer I had at the time was Amazon. So, we had to let him go at that time."

Tr. at 55.

Mr. Eagleton testified that he terminated Complainant by Amazon's request. *Id*. He stated that as a third party vendor, he worked by Amazon's rules. *Id*.

Mr. Eagleton said that he was not aware of the Complainant making any threats of contacting OSHA, nor was he aware of Complainant actually filing an OSHA complaint. Tr. at 56. Mr. Eagleton had not spoken to the Complainant. *Id*. He had learned of Complainant's OSHA complaint for the first time "two months back" from the date of the hearing. *Id*.

Mr. Eagleton testified that had received a directive from Jeremy from Safety at Amazon that Complainant "was no longer eligible to drive for an Amazon facility because of the accident. It was considered a preventable accident." Tr. at 58.

Mr. Eagleton described his involvement in the decision to terminate Complainant as follows:

> "I was—like you said, I got the information, I gathered the information, and I looked at it. I made the assessment that it was an at-fault, we were the cause of the accident. But then this was also presented through Amazon safety. The decision was made, but I would have rendered the same decision."

Tr. at 59. After the decision, Mr. Eagleton said that asked Mr. Smith to communicate his decision to Claimant. *Id*. He then reported it through the main office and did a report about it. *Id*.

IV. CONCLUSIONS OF LAW

a. Is There Coverage Under the STAA?

The parties have not disputed issues of coverage in this matter. Nonetheless, an analysis in this case is necessary.

The STAA applies to any "person"[6] in a position to discharge, discipline or discriminate against an "employee." 49 U.S.C.A. § 31105(a)(1). An "employee" is any "driver of a commercial motor vehicle…who in the course of his employment directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier..." 49 U.S.C.A. § 31105(j).

Although "commercial motor vehicle" is not further defined in these regulations, Title 49 defines "commercial motor vehicle" as a "vehicle used on the highways to transport…property, if the vehicle—A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater,…or D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103." 49 U.S.C.A. § 31132(1).

The preponderant evidence, including the testimony of Complainant and Mr. Smith, supports a finding that Complainant worked for Employer.[7] Complainant operated a tractor trailer owned by and registered in Respondent's name.[8] Complainant, however, has failed to establish evidence that he was a driver of a "commercial motor vehicle" in order to qualify as an "employee" as defined under the STAA. The tractor trailer that Complainant was operating at the time of the August 13, 2016 accident was a 2002 white Ottowa Model 50. RX 4. The weight of the vehicle was designated as having a commercial vehicle weight of "≤ 10,000 lbs" in the police report from August 13, 2016. *Id*. No parties offer any evidence rebutting the weight this fact or that speaks to Complainant otherwise driving vehicles that weigh at least 10,001 pounds in his employment. Thus, Complainant's complaint is not covered under the STAA.

Even as this complaint fails on a jurisdictional level, the undersigned will still address the other elements of the complaint, *infra*, assuming arguendo that Complainant's complaint is covered under the STAA.

b. Did Complainant Engage in Protected Activity under the STAA?

Under 49 U.S.C. § 31105(a)(1)(A), an employee is engaged in protected activity if he or she has filed a complaint or begun a proceeding in violation of a commercial motor vehicle safety regulation, standard, or order. There is no dispute that Complainant filed an initial OSHA complaint on May 10, 2016. Filing an OSHA complaint constitutes protected activity. Thus, the undersigned finds that Complainant was engaged in protected activity under the STAA.

---

[6] The term "person" is defined with respect to what it does not include, with the two entities excluded from the definition of "person" being (i) the United States Postal Service and (ii) the Department of Defense. 49 U.S.C. § 114(u)(6)(A). Corporations are within the STAA definition of "person." 49 U.S.C. app § 2301(4). *Osborn v. Cavalier Homes of Alabama, Inc. and Morgan Drive Away, Inc.*, 89-STA-10 (Sec'y July 17, 1991).

[7] Both Claimant and Mr. Smith offered unrebutted testimony that Claimant had worked for Employer. *See* Tr. at 14–15, 40.

[8] *See* RX 4 (Respondent is designated at the owner of the tractor trailer involved in the incident of August 13, 2016).

c. Was Respondent Aware of Complainant's Protected Activity?

To prevail under the STAA, Complainant must also establish that Respondent was aware of Complainant's protected activity.

In this matter, Complainant's protected activity was filing his formal complaint to OSHA.[9] Mr. Smith had testified that he was aware that Complainant had been threatening to go to OSHA, but that he was unaware that Complainant had actually filed an OSHA complaint. Tr. at 47–48. Additionally, while Mr. Smith was Complainant's working supervisor and informed Complainant of his termination,[10] the preponderant evidence shows that Mr. Smith was not involved in the ultimate decision to terminate Complainant, but only in the communication of that decision.

Complainant testified that it was his understanding that it had been Mr. Smith who had made the decision to terminate him, as Mr. Smith was the one to notify him of his termination. Tr. at 27–28. Complainant, however, provided no substantive proof as to that fact, and Mr. Smith and Mr. Eagleton provided compelling evidence otherwise that it was Mr. Eagleton, influenced by a directive from Jeremy from Safety at Amazon, who made the decision to terminate Complainant, with Mr. Smith just being the party to communicate the termination to Complainant as Complainant's supervisor. Tr. at 47, 55, 58–59. While Mr. Smith was aware of Complainant's threats to go to OSHA, he was not the party who directed the discharge of Complainant, so Mr. Smith would not be considered a "person" who discharged an "employee" for perceiving the employee was about to file a complaint under 49 U.S.C. § 31105(a)(1)(A)(ii).

Mr. Eagleton testified that he ultimately made the decision to let Complainant go, after Amazon came to the same conclusion. Tr. at 55. Mr. Eagleton, however, averred that he had no knowledge of Complainant's threats to file an OSHA complaint, and was not aware of the complaint itself until two months before the hearing.[11] *Id*. Mr. Eagleton further testified that he had not even known nor known of Complainant until Complainant instituted the current matter at issue before the OALJ. Tr. at 53. Further, Complainant offered no evidence that Mr. Eagleton

---

[9] While the "filed a complaint" language of STAA 31105(a)(1)(A) can also protect from discrimination a complainant who makes an "internal complaint" to "any supervisory personnel," this complaint must be a "communication of a violation of a commercial motor vehicle regulation." *See e.g.*, *Harrison v. Roadway Express, Inc.*, ARB No. 00 048, ALJ No. 1999 STA 37 (ARB Dec. 31, 2002) ('red tagging,' or filling out a tag and affixing it to defective trailer so that 'others' could be made aware of safety concerns, trailers did not constitute a filing of a complaint under the Act because it was not a communication to a supervisor concerning commercial motor vehicle safety). Complainant has not provided evidence that any of his complaints to his supervisor, Mr. Smith, were communications of violations of any commercial motor vehicle regulations. Rather, the evidence shows that the communications to Mr. Smith or Amazon managers were more general concerns about the yard being crowded and unsafe rather than any specific violation. As such, the internal complaints that Mr. Smith made to any supervisory personnel did not rise to the level where they would be considered protected activity, and Complainant's formal OSHA complaint is the only relevant protected activity to consider with respect to the awareness issue.

[10] Tr. at 15.

[11] This was further substantiated by Mr. Smith's testimony that Mr. Smith had never told Mr. Eagleton about Complainant's threats of going to OSHA. Tr. at 50.

was aware of the OSHA complaint or threats to file an OSHA complaint. Complainant has also offered no substantial proof that anyone from Amazon was aware of such complaint or threat, either. Complainant's only testimony about his discussion with managers at Amazon was that he would make inquiries as to who was taking care of the flow of the traffic in the yard.[12] Tr. at 17. This inquiry, as Complainant testified to it, appears to have been more general in nature, rather than addressing any issues specifically that would tie into protected activity on the part of Complainant. Thus, Complainant has failed to demonstrate that Respondent was aware of Complainant's protected activity.

d. Did Respondents Take Adverse Action Against Complainant?

Termination is considered an adverse action under the STAA. It is undisputed that Complainant was terminated by Respondent. Therefore, the undersigned finds that Respondent took an adverse action against complainant.

e. Was Complainant's Protected Activity a Contributing Factor?

A complainant may prove his protected activity was a contributing factor either directly,―through smoking gun evidence, that conclusively links the protected activity and the adverse action and does not rely upon inference‖ or may proceed―indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating [complainant's] employment. *Williams v. Domino's Pizza*, ARB No. 09-02, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011); *Clarke v. Navajo Express, Inc*. ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011).

To prevail under this element, Complainant must prove by a preponderance of the evidence that there is a causal connection between his STAA protected activities and adverse personnel actions. Specifically, Complainant must prove that his threats to file an OSHA complaint or his filing of an OSHA complaint on May 10, 2016 were contributing factors in the termination of his employment relationship with Respondent.

A "contributing factor" has been defined as "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action. *Marano v. U.S. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993); *Beatty v. Inman Trucking Management, Inc.*, ARB Nos. 2008-STA-20 and 21 (ARB May 13, 2014). Based on this definition, the determination of contributing factor has two components: knowledge and causation. In other words, Respondent must have been aware of the protected activity (knowledge) and then taken adverse personnel action, in part, due to that knowledge.

The undersigned has found, *supra*, that Complainant failed to demonstrate that Respondent had any knowledge of his protected activity. Therefore, the knowledge prong of contributing factor cannot be met, and thus, Complainant has failed to establish that his protected activity was a contributing factor to Respondent's adverse action.

[12] Complainant also generally stated that he had raised his concerns about the change in conditions in the yard "with Amazon" but did not provide specific details with respect to this or to whom at Amazon he expressed these concerns. *See* Tr. 20–21.

V. CONCLUSION

For the reasons discussed above, Complainant has failed to establish that his claim falls under the provisions of the STAA. Additionally, even assuming arguendo that it did fall under the provisions of the STAA, Complainant has failed to establish that Respondent was aware of him engaging in protected activity or that it was a contributing factor to Respondent's adverse action. Thus, Complainant has failed to both establish his claim jurisdictionally and on the merits.

VI. ORDER

Complainant's complaint under STAA is **DISMISSED**.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

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).