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Issue Date: 11 April 2022

Case No.: 2019-STA-00048

In the Matter of:

ANGELO SCOTT,
Complainant

v.

E.O. HABHEGGER COMPANY,
Respondent

DECISION AND ORDER

This matter arises from the complaint of retaliation by Angelo Scott ("Complainant") against E.O. Habhegger Company ("Respondent" or "EOH") under the Surface Transportation Assistance Act of 1982 ("the Act" or "STAA"), 49 U.S.C. §§ 31105, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. Section 405 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules.

I. PROCEDURAL HISTORY

On June 14, 2017, Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA"). In his complaint, he alleged that Respondent terminated his employment on June 12, 2017 in retaliation for his protected activity. Specifically, Complainant alleged that he had refused to complete paperwork needed to ship fire extinguishers in a manner that he believed to be unsafe and illegal. Complainant also claimed that he reported other safety-related concerns to his supervisors –namely, that alcohol was being stored in the workplace, that a fellow employee was involved in a workplace accident while intoxicated, and that the lighting in Respondent's warehouse was inadequate.

On June 14, 2019, OSHA issued its findings and dismissed his complaint. Complainant appealed OSHA's decision on June 27, 2019 and requested a formal hearing before the Office of Administrative Law Judges ("OALJ"). The undersigned issued a Notice of Hearing and Prehearing Order on July 18, 2019, setting a hearing date for January 6, 2020.[1]

At the hearing, the undersigned admitted CX 1-9 and RX A-RR.[2] (Tr. at 20-22, 28, 35-36, 76, 84.) Complainant testified regarding his employment with Respondent and the events leading

[1] The undersigned issued a subsequent notice of hearing on December 13, 2019 changing the hearing location.

[2] This Order uses the following abbreviations: "CX" refers to Complainant's Exhibits; "RX" refers to Respondent's Exhibits; and "Tr." refers to the transcript of the January 6, 2020 and December 16, 2020 hearing.

to the end of his employment. (Tr. at 52-73.) Complainant also called Vice President Chris Hagman (Tr. at 20-43) and shipping manager David Ramani (Tr. at 43-51) to testify as witnesses in support of his case.

At the conclusion of Complainant's case-in-chief, Respondent moved to dismiss the claim. (Tr. at 78-80.) Respondent argued that Complainant had not established necessary elements of entitlement for relief under the Act. (Tr. at 80.) Specifically, Respondent asserted that Complainant had failed to establish that the Act applied to his complaint. (Tr. at 80-82.)

On October 16, 2020, the undersigned issued an Order Denying Respondent's Motion to Dismiss and scheduled the conclusion of the hearing for December 16, 2020. The December 16, 2020 hearing took place over videoteleconference. Complainant filed a closing brief on February 11, 2021 and Respondent filed its closing brief on March 12, 2021. The matter is now ready for a full decision.

II. ISSUES PRESENTED

Complainant did not have counsel to represent him at the hearing. Because of this, the undersigned carefully explained the elements that Complainant was required to establish in order to be entitled to relief under the Act. (Tr. at 5-7.) Consistent with the undersigned's instruction, the following issues remain for adjudication:

1. Is there coverage under the Act, that is, does the Act apply to Complainant's complaint?
2. Did Complainant engage in protected activity?
3. Did Complainant experience an adverse employment action?
4. Was Complainant's protected activity a contributing factor in the adverse employment action?
5. What relief, if any, is appropriate?

III. EVIDENCE PRESENTED

The prior Order Denying Respondent's Motion to Dismiss issued on October 16, 2020 fully summarized the evidence and testimony presented at the January 6, 2020 hearing. This Decision and Order incorporates that summary. At the continuation of the hearing on December 16, 2020, the parties presented no new evidence, but did offer testimony as summarized below.[3]

Jody Porter

Jody Porter works for EOH. (Tr. at 103.) He has worked for Respondent for twenty-seven years, since 1994. A union carpenter, he attained a bachelor's degree in finance from Temple University in 1995. He attended some law school classes but did not graduate. (Tr. at 104, 121.) Respondent hired him into the shipping department. He became shipping manager and then moved into sales and sales management. He now serves as VP of Sales. (Tr. at 104.) He is one of three

[3] This section only summarizes the testimony presented at the December 16, 2020. It does not represent the undersigned's findings of fact, which are set out below.

partners in the company, together with Chris Hagman and Pete Hojnowski. Ken Hagman, a former partner, passed away in January 2020. (Tr. at 105.)

Porter testified that Respondent owns one 26,000-pound truck along with several box vans that weigh under 10,000 pounds each. (Tr. at 106.) Respondent uses the 26,000-pound truck to ship service station equipment, including fire extinguishers. Fire extinguishers are not hazardous; they come in through UPS from the suppliers and all of Respondent's vans are equipped with one for use as a safety device. Fire extinguishers are only considered hazardous substances if they are transported by air. (Tr. at 107.) Respondent does not transport any fire extinguishers or other equipment by air. (Tr. at 108.)

Complainant is a former employee of Respondent. (Tr. at 105.) He started as a temporary hire in 2016 and became a full-time employee in April 2017. He worked as a warehouse clerk and his job duties included picking orders, packing orders, and putting them on UPS trucks and Respondent's trucks. (Tr. at 106.) Complainant worked full-time for Respondent from April 2017 until June 12, 2017. (Tr. at 109.) Porter testified, "In the beginning [Complainant] was a good worker. He was there all the time, and he was okay. The last week he was very agitated, always arguing with different employees and throwing tantrums and the such, so we had a meeting on [June 12, 2017] to discuss that." (Tr. at 109.)

Respondent never gave Complainant a verbal or written warning. (Tr. at 127.) Only Complainant and Porter attended the June 12 meeting. Chris Hagman did not attend. (Tr. at 110.) Porter asked Complainant why he was so agitated, and Complainant responded that other employees were picking on him, that he disliked the other employees, and that they were not professional. According to Porter, "And I asked him why did he stay, why did he fight so hard to get the job if he hated it so much. And we discussed it for a while and came upon a mutual agreement that we should part ways." Porter claims that he did not fire Complainant. Porter had called the meeting to try to help Complainant "have a better position at Habhegger." (Tr. at 111.) During the meeting on June 12, Complainant only talked about co-workers picking on him and having difficult personalities. Complainant did not raise any other issues. Porter had no reason to terminate him at that meeting. (Tr. at 130.)

After Complainant left Porter's office on June 12, Complainant started sending emails. That same day, Porter responded to Complainant via email, copying other EOH employees. (RX G; Tr. at 113.) In his email, Complainant mentioned the fire extinguishers and said that he had been fired. Porter believes he misinterpreted their conversation; he did not fire him; Complainant quit. In his email, Complainant also informed Porter that a sign was up in the UPS shipping area.[4] Porter checked and took down the sign. In his responsive email (RX G), Porter told Complainant he had taken down the sign and notified everyone that the sign was not "company policy." (Tr. at 114.) Until then, Porter had not seen any sign on the computer about the fire extinguishers. (Tr. 124-25.)

[4] This sign, RX F, advised shipping employees to remove or cover hazardous material designations when shipping fire extinguishers.

The following day, June 13, 2017, Porter sent a letter via email to Complainant. The letter noted Complainant's status as an employee-at-will and explained that Complainant left of his own volition. (RX B; Tr. at 112.) Complainant sent another email on June 14, 2017. (RX L; Tr. at 114.) On June 19, Porter received a copy of a letter that Complainant sent to OSHA. (RX M; Tr. at 116.) Porter testified that OSHA initiated an investigation that spanned over two years. OSHA ultimately found no validity to Complainant's claims. (Tr. at 117.)

Chris Hagman

Hagman is the President of EOH. (Tr. at 132.) He manages the company's day-to-day operations. He has two partners, Pete Hojnowski and Jody Porter. Complainant started working for Respondent full-time in April 2017. Before that, he worked at Respondent as a temporary employee through an agency. (Tr. at 133.) Complainant filled out his employment application on April 10, 2017. (Tr. at 134.) Respondent hired him as a shipping clerk, with duties that included shipping and receiving shipments from vendors, or shipping to customers, and taking orders, putting equipment away in the stockroom and warehouse. He also helped customers load their vehicles, gave customers their equipment, and loaded Respondent's vehicles. Hagman does not know if any of Respondent's vehicles are over 10,000 pounds gross vehicle weight. (Tr. at 135.)

Respondent does not ship anything by air. They sell most of their equipment within the Philadelphia area. They ship their products to states within driving distance, such as Virginia, Maryland, and Delaware. As far as Hagman knows, fire extinguishers are not hazardous equipment if transported by ground. Respondent receives fire extinguishers via UPS and stores them at their warehouse. (Tr. at 136.)

Hagman received a ten-page document dated June 22, 2017, from OSHA. (RX Z; Tr. at 137-138.) The OSHA letter says that they were notified on June 20, 2017 of an alleged workplace hazard. On June 28, 2017, OSHA sent a letter to Respondent advising that Complainant was alleging retaliatory practices in violation of STAA and OSHA. (RX AA; Tr. at 140.) OSHA conducted two inspections. One they dismissed after Respondent provided information about warehouse lighting, the forklift, and the fire extinguishers. (RX BB; Tr. at 141.) OSHA assigned an investigator. Complainant's second complaint, about retaliatory practices. Respondent sent a letter to the OSHA investigator asserting that they had not terminated Complainant's employment. (RX EE; Tr. at 143.) Hagman was not in the office on June 12, 2017, when Porter met with Complainant. (Tr. at 143.) He did see the letters between Complainant and Porter from June 12 and spoke with Porter about the incident. (RX G, RX H; Tr. at 143.)

Prior to ending his employment with Respondent, Complainant made no complaints to Hagman about masking fire extinguishers or any other safety violations. (Tr. at 144.) Hagman responded to emailed questions from an OSHA investigator and claimed that Respondent had never illegally shipped fire extinguishers (because they never ship fire extinguishers by air). (RX MM; Tr. at 145.) Respondent never advised or instructed employees to ship fire extinguishers illegally. (Tr. at 146.) Respondent received a copy of a letter from OSHA to Complainant dated June 14, 2019 advising Complainant that they were dismissing the complaint. (RX K; Tr. at 146-47.)

IV. FINDINGS OF FACT

In reaching the findings of fact, the undersigned closely evaluated the credibility of all the witnesses who testified. All the witnesses gave consistent and believable testimony. Aside from his dismissal, the events of Complainant's employment with Respondent are not in dispute. The testimony of each witness matched the documentary evidence. The dispute here turns on the meaning each of the individuals attributed to the events. Thus, the undersigned finds the testimony of each witness credible and reliable.

A. Respondent EOH provides and services gas pump equipment for service stations. (Tr. at 61.)

EOH sells most of their equipment within the Philadelphia area. It ships products to states within driving distance of its business locations, such as Virginia, Maryland, and Delaware. (Tr. at 136; *see also* EX MM; Tr. at 145.)

B. Respondent owns only one truck that weighs over 10,000 pounds.

Respondent owns one 26,000-pound truck and several box vans, all of which weigh under 10,000 pounds. (Tr. at 65-67, 106.) EOH uses the 26,000-pound truck to ship service station equipment. (Tr. at 107.)

C. Respondent does not ship any products by air.

Respondent does not ship its products by air. (Tr. at 50 (Ramani), 108 (Porter), 136 (Hagman)).

D. Complainant worked for Respondent as a warehouse assistant, sometimes loading product onto Respondent's trucks for shipping.

Complainant began working at EOH as a temporary worker in the warehouse in 2016. In April 2017, Respondent hired him on as a full-time warehouse assistant. His job duties included picking orders, packing orders, and either giving them to UPS or putting them on Respondent's trucks. (Tr. at 107.) He loaded equipment (such as gas pump dispensers and hoses) onto Respondent's trucks and unloaded empty skids. (Tr. at 66.) Complainant never drove or operated a truck while employed by Respondent. (Tr. at 60, 66.)

E. EOH sells fire extinguishers to its customers.

Among the products EOH supplied to its customer service stations were "class 2 fire extinguishers". (Tr. at 63.) Respondent receives these fire extinguishers from a distributor in large boxes containing four fire extinguishers each. (Tr. at 63.) Complainant would receive these boxes and stock the individual fire extinguishers in the warehouse. (Tr. at 63.) Respondent would then send individual fire extinguishers out to its customers via UPS. (Tr. at 64.)

F. Before shipping the fire extinguishers to customers via UPS, Respondent's employees covered the hazardous material label.

According to Complainant, Respondent's practice was to cover the green hazardous material label on each fire extinguisher and ship them to customers through UPS as a "regular, ordinary, old shipment." (Tr. at 64.) He described this practice as "masking" and asserted that fellow employee Chris Graziola told him it was illegal. (Tr. at 61.)

Shipping manager David Ramani directly supervised Complainant. (Tr. at 48.) He acknowledged that a handmade sign attached to a computer monitor in the workplace directed Respondent's employees to cover the green hazardous material label when shipping fire extinguishers. (CX 4, Tr. 43-44). Ramani admitted that he made the sign on his own volition. (Tr. at 44.) However, he denied that the sign directed employees to ship anything in an illegal or prohibited manner. (Tr. at 44.) Rather, he stated that UPS, the commercial carrier engaged by Respondent to ship the fire extinguishers, preferred the label to be covered. (Tr. at 46, 48-49.) Ramani explained that, in the past, when shipping a package with a green hazardous material label, UPS would hold the shipment and inquire as to the package's contents. (Tr. at 45-49.) This inquiry would result in delays. According to Ramani, UPS informed him that fire extinguishers were safe to ship, and he should cover the green hazardous material label. (Tr. at 46-49.) Ramani testified that the label was only required when shipping packages by air, a practice Respondent did not engage in. (Tr. at 50.) Because Ramani did not contradict Complainant's allegation, the undersigned finds that Employer had a practice of covering the green hazardous material label on the fire extinguishers it shipped.

G. Complainant raised concerns to management about the way it shipped fire extinguishers.

On June 5, 2017, Complainant refused to ship a case of six fire extinguishers "via UPS Next Day Air"[5] because Chris Graziola, Warehouse Assistant/Driver, had told Complainant the package was not legal. The package was going to Pine Run Construction in Doylestown, Pennsylvania.[6] Complainant refused to cover the label. (RX K.) Complainant raised his concerns about the masking of fire extinguishers to EOH vice president of sales Jody Porter. (Tr. at 53-54, 65.) He claimed to have voiced his concerns with Porter in person on June 5, 2017 and via email on June 10, 2017. (Tr. at 53-54, 56, 65.) The record includes email correspondence from Complainant to Jody Porter and Matt Jordan dated June 10, 2017 in which Complainant referred

[5] Although in his June 12 email (RX F) Complainant asserted that the fire extinguishers were "going ground or next day air", the undersigned has found that Respondent did not ever ship fire extinguishers by air.

[6] Respondent's business is located at 460-462 Penn Street, Lansdowne, PA. (RX A, RX B.) According to Complainant's letter of June 14, 2017, the package he refused to ship was going to Pine Run Construction in Doylestown. (RX K.) The undersigned takes administrative notice that the distance between Lansdowne and Doylestown, PA is just over 36 miles, further confirming the finding that Respondent would not ship the fire extinguishers by air.
See https://www.google.com/maps/dir/Lansdowne,+PA+19050/Doylestown,+Pennsylvania+18901/@40.1246369,-75.5161424,10z/data=!3m1!4b1!4m13!4m12!1m5!1m1!1s0x89c6c166820d3d33:0x614dbee3665cd611!2m2!1d-75.2718507!2d39.9381682!1m5!1m1!1s0x89c6a813fc65777f:0x33be38988a8c48b3!2m2!1d-75.1298939!2d40.3101063?hl=en (last accessed March 25, 2022).

to the shipping of fire extinguishers. He wrote, "Dave Ramani, was mad at me because I didn't cover a UPS package with a dark tape, so you couldn't see the hazardous material symbol on it. He was mad that I would even question his integrity. He said the procedure was the only way UPS would take it." (RX E.)

Complainant again raised concerns about the shipping of the fire extinguishers on June 12, 2017.[7] In an email to Ken Hagman, Complainant wrote, "Specifically, I was instructed to cover up a green hazardous material label; (Green 2.2) on a UPS box, going ground or next day air. … These would be fire extinguishers, which contain chemicals under HAZMAT regulations. …" Complainant advised that he called the UPS HAZMAT department, who told him to call DOT "to make sure they had filed paperwork for shipping hazardous materials, which can be dangerous, especially going on an *airplane*." (Emphasis in original.) He attached photos to the email showing the green sticker and the sign, reading "cover the green label!!". (RX F.)

H. Complainant also raised other concerns to management.

For example, Complainant testified that he first reported a safety violation to Chris Hagman in May 2017. (Tr. at 53.) This report related to a recent workplace accident. Complainant reported that David Ramani had damaged a piece of equipment (a pressure valve) while operating a forklift in the warehouse. (Tr. at 53.) Complainant remarked that Ramani's eyes were "glassy" while he was operating the forklift. (Tr. at 53.) Because of this and because he was aware of alcohol stored in the employee refrigerator, Complainant suspected that Ramani was intoxicated at the time of the accident. (Tr. at 53; *see also* RX E.) Even earlier, on April 19, 2017, Complainant had sent an email to Jody Porter complaining that the shipping manager Matt Jordan was treating Complainant unprofessionally and disrespectfully. (RX E.)

I. Prior to raising his complaints, Respondent had no complaints about Complainant's work performance.

Jody Porter testified,

> In the beginning [Complainant] was a good worker. He was there all the time and he was okay. The last week he was very agitated, always arguing with different employees and throwing tantrums and the such, so we had a meeting on June the 12th to discuss that.

(Tr. at 109.) Respondent never gave Complainant a verbal or written warning. (Tr. at 127.)

J. On June 12, 2017, Porter called Complainant into a meeting; after the meeting, his employment with Respondent ended.

Complainant contends that Porter fired him at that meeting. (Tr. at 54-55.) Only Complainant and Porter attended the meeting on June 12. Chris Hagman did not attend. (Tr. at 110.) Porter testified that he asked Complainant why he was so agitated, and Complainant

[7] Complainant sent this email after he met with Jody Porter, and after his employment with Respondent ended.

responded that other employees were picking on him, that he disliked the other employees, and that they were not professional. According to Porter, "And I asked him why did he stay, why did he fight so hard to get the job if he hated it so much. And we discussed it for a while and came upon a mutual agreement that we should part ways." Porter contends that he did not fire Complainant. Porter called the meeting to try to help Complainant "have a better position at Habhegger." (Tr. at 111.) Porter also testified that during the meeting on June 12, Complainant only talked about co-workers picking on him and having difficult personalities. Complainant did not raise any other issues. (Tr. at 130.)

Complainant documented his understanding of the meeting with Porter in several emails written shortly after the meeting. Complainant wrote to Ken Hagman that same day, "Jody said 'it was better that we parted ways.' I said what do I do now? I have no job. He said he would send a release form and my final paycheck." (RX F.) On June 14, Complainant wrote again to Ken Hagman that Porter had said to him, "you don't fit into the structure of the company." Complainant informed Ken Hagman that Dave Ramani had earlier threatened to fire him for the HAZMAT package. Referring to Porter, Complainant wrote, "He just said it was better we part ways…. He said I understand you're upset, but 'it is what it is'". (RX K.)

Porter, on the other hand, testified that he did not fire Complainant. (Tr. at 130.) His contemporaneous emails set out his perception that Complainant made the decision to leave EOH. (RX B, RX G.) On June 12, Porter wrote,

> You did not feel as if you would fit into this structure. We agreed that we should go our separate ways. You left my office telling me there were no hard feelings. …do you want a job at which you were not happy? I noted in our conversation that you were a conscientious worker that was always on time and did whatever tasks were asked of you but since you were not happy you should move on to a job that you like.

(RX G.) The following day, Porter wrote,

> I said at the expense of your happiness? I said why not cut your losses?... I reminded you there would be no terms as we are At Will employees. We do not have contracts. You are free to leave at will, with no reason. …I replied that I can and will change the business issues, but I can't control your feelings. …At this point you decided to leave our employ.

(RX B.) While Complainant and Porter disagree on the tenor of the conversation, it is undisputed that Complainant's employment relationship with Respondent ended on the morning of June 12, 2017.

K. After his employment ended with Respondent, Complainant continued to email his complaints to Respondent and to others.

Almost as soon as his employment ended, Complainant began sending emails about his perceived mistreatment and his "whistleblowing". He sent a letter to Ken Hagman, advising that

he had complained about the masking of the hazardous material label on the fire extinguishers and advising that he had called UPS and the DOT. He attached photos of the sign and documents obtained from the internet about OSHA's investigations into federal whistleblowers. (RX F.) The following day, beginning at 7:45 a.m., Complainant continued his emails to various persons at Respondent's workplace, raising his complaint about the sign advising shippers to remove the hazardous material label. (RX J, CX 3, CX 4.) In another email, he complained about the damaged pressure valve and the alcohol in the warehouse refrigerator. (RX I.) He sent additional letters to Respondent on June 14 on similar topics. (RX K, RX L.)

L. Complainant filed complaints with OSHA regarding both safety conditions at the warehouse and about his discharge following his "whistleblowing".

See RX M, RX N, RX O, RX P, RX Q, RX R, RX T, RX U, RX W, RX X, RX V.

V. LEGAL CONCLUSIONS

A. The Act Applies to Complainant's Complaint

Congress enacted the employee protection provisions of the Act to encourage employees in the transportation industry to report noncompliance with safety regulations governing commercial motor vehicles. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987). Broadly speaking, the Act prohibits a "person" from taking an adverse employment action against an "employee" because that employee engaged in protected activity. *See* 49 U.S.C. § 31105(a). Thus, to prevail a complainant must first establish that the Act applies to his complaint. That is, he must establish that he is an "employee" and that the respondent is both a "person" and "employer" under the Act.

The Act defines an "employee" as a "driver of a commercial motor vehicle, a mechanic, a freight handler, or an individual … who directly affects commercial motor vehicle safety or security in the course of employment." 49 U.S.C. § 31105(j); 49 U.S.C. § 31101(2); 29 C.F.R. § 1978.101(h).

The regulations define a "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any other organized group of individuals." 29 C.F.R. § 1978.101(k). The Act defines an "employer" as a "person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce." 49 U.S.C. § 31101(3); 29 C.F.R. § 1978.101(i).[8]

The term "commercial motor vehicle" is used in the definition of both "employee" and "employer" and is defined as a vehicle "used on the highways in commerce principally to transport passengers or cargo" weighing at least 10,001 pounds; designed to transport more than ten people;

[8] The definitions of "employer" also excludes government entities. 49 U.S.C. § 31101(3)(B); 29 C.F.R. § 1978.101(i).

or used for the transportation of hazardous material. 49 U.S.C. § 31101(1); 29 C.F.R. § 1978.101(e).

After thoroughly reviewing the record, Complainant has established that he is an "employee", and that Respondent is both a "person" and "employer." Therefore, the Act applies to Complainant's complaint.

1. Respondent operates a truck weighing more than 10,001 pounds and uses it in commerce.

Complainant testified that EOH operates a 26,000-pound truck. (Tr. at 65-67.) He explained the company uses this truck to deliver equipment, such as gas pump dispensers and hoses, to area gas stations. Complainant also testified that part of his job responsibilities included loading and unloading this truck. (Tr. at 66.) Jody Porter agreed that Respondent owns one 26,000-pound truck that the company uses to ship equipment to service stations. (Tr. at 106-107.) The 26,000-pound truck meets the statutory definition of a "commercial motor vehicle." The truck weighs more than 10,001 pounds and EOH uses it on the highways in commerce to transport cargo. *See* 49 U.S.C. § 31101(1); 29 C.F.R. § 1978.101(e).

2. Because Complainant's duties include loading and unloading the truck, he is an employee.

Complainant testified to loading and unloading this truck. He said that he was responsible for arranging the shipment of parts and equipment through commercial carriers like UPS and FedEx; receiving and stocking inbound shipments; and "some porter duties." (Tr. at 52, 62.) Complainant also stated that part of his responsibilities as a warehouse assistant included loading equipment (such as gas pump dispensers and hoses) onto the 26,000-pound truck and unloading empty skids. (Tr. at 66.) Chris Hagman testified that Complainant was hired as a shipping clerk, whose duties included shipping and receiving shipments from vendors, or shipping to customers, and taking orders, putting equipment away in the stockroom and warehouse. He also helped customers load their vehicles, gave customers their equipment, and loaded Respondent's vehicles. (Tr. at 135.) Complainant's job duties included freight handling, making his position covered by the Act. *See* 49 U.S.C. § 31105(j); 49 U.S.C. § 31101(2); 29 C.F.R. § 1978.101(h).

3. EOH is an Employer under the Act

With respect to Respondent's status, the record shows EOH is a "person." The definition of "person" is expansive and includes individuals and various business entities. 29 C.F.R. § 1978.101(k). EOH is a corporation operating a commercial business. (Tr. at 61-63; RX A.) Therefore, it is a "person" under the Act. *See, e.g., Osborn v. Cavalier Homes of Alabama, Inc. and Morgan Drive Away, Inc.,* 1989-STA-00010 (Sec'y July 17, 1991) (finding that a corporation is within the meaning of the word "person"). In addition, because the undisputed testimony shows that EOH owns and operates a commercial motor vehicle used in commerce, EOH is also an "employer" within the meaning of the Act. 49 U.S.C. § 31101(3); 29 C.F.R. § 1978.101(i).

B. Complainant Engaged in Protected Activity

The STAA specifically prohibits Employers from discharging, disciplining, or discriminating 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 (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 security condition;
> (C) the employee accurately reports hours on duty pursuant to chapter 315;
> (D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or
> (E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

49 U.S.C. §31105.

In this case, only paragraph (A) could conceivably apply to Complainant. He did not refuse to operate a vehicle; he did not operate vehicles as part of his job with Respondent. His complaint did not involve his reports of hours worked; he was not involved in an investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board[9], and he did not furnish information to any agency relating to an accident or incident resulting in injury, death, or damage to property. A review of the facts of Complainant's assertion and a close reading of the language of the statute show that Complainant's alleged protected activity does not fall within the scope of paragraph (A) of 49 U.S.C. § 31105, either.

Here, Complainant asserts that he informed Respondent about two purported safety violations; first, that Respondent was illegally "masking" hazardous equipment, *i.e.*, fire extinguishers, before shipping them; and second, that David Ramani had damaged a piece of

[9] Complainant did file a complaint with OSHA that led to two investigations – a workplace safety investigation and an investigation into his whistleblower allegations. However, he did not file the complaint until **after** he ceased working for Respondent, so although his complaint could constitute protected activity, it could not have caused his termination.

equipment (a pressure valve) while operating a forklift in the warehouse, and that Complainant suspected Ramani was intoxicated at the time because his eyes were "glassy", and alcohol was stored in the employee refrigerator. (Tr. at 53.)

1. Complainant's Concern About the Sign Constitutes Protected Activity

The record establishes that David Ramani posted a sign advising "COVER THE GREEN LABEL! OR … RE-BOX IT!!" on a computer located in the workplace. (Tr. 44; CX 3, CX 4.) Complainant testified that Respondent often shipped "class 2 fire extinguishers" to its customers. (Tr. at 63.) Respondent receives these fire extinguishers from a distributor in large boxes, each containing four fire extinguishers. (Tr. at 63.) Complainant would receive these boxes and stock the individual fire extinguishers in the warehouse. (Tr. at 63.) Respondent would then ship individual fire extinguishers out to its customers. (Tr. at 64.) Complainant further testified that Respondent's practice was to cover the green hazardous material label on each fire extinguisher and ship them through UPS or FedEx as a "regular, ordinary, old shipment." (Tr. at 64.)

While agreeing with Complainant that he had posted the sign, Ramani denied that the sign directed employees to ship anything in an illegal or prohibited manner. (Tr. at 44.) Rather, he stated that UPS, the commercial carrier engaged by Respondent to ship the fire extinguishers, preferred the label to be covered. (Tr. at 46, 48-49.) Ramani explained that, in the past, when shipping a package with a green hazardous material label, UPS would hold the shipment and inquire as to the package's contents. (Tr. at 45-49.) This inquiry would result in delays. Ramani then intimated that UPS informed him that fire extinguishers were safe to ship and that he should cover the green hazardous material label. (Tr. at 46-49.) Ramani further explained his understanding of the significance of the green hazardous material label. He believed the label was only required when shipping packages by air, a practice Respondent did not engage in. (Tr. at 50.) Hagman confirmed that Respondent does not ship anything by air. They sell most of their equipment within the Philadelphia area. They ship their products to states within driving distance like Virginia, Maryland, and Delaware. As far as Hagman knows, fire extinguishers are not hazardous equipment if transported by ground. Respondent receives fire extinguishers from UPS and stores them at their warehouse. (Tr. at 136.)

Porter testified that after he received Complainant's email about the sign, he checked the UPS shipping area and took down the sign. In his responsive email (RX G), Porter told Complainant he had taken down the sign and notified everyone that the sign was not "company policy". (Tr. at 114.) Until that point, Porter had not seen the sign on the computer about the fire extinguishers. (Tr. 124-25.)

Complainant's concern about the sign in the shipping area does not constitute protected activity under the STAA. Ramani credibly explained that the green hazardous equipment tag is only necessary if fire extinguishers are shipped by air. Hagman confirmed that Respondent does not ship any equipment by air; they only service customers within driving distance of the Philadelphia area. The evidence of record establishes that on the day Complainant refused to cover the green label, the fire extinguishers were being delivered to Doylestown, PA, 36 miles from EOH's warehouse. Complainant presented no evidence that contradicts the testimony of Ramani or Hagman.

Title 49 of the C.F.R. does include commercial motor vehicle regulations pertaining to the transportation of fire extinguishers. Those regulations, however, specifically apply only when fire extinguishers are transported by air.

> 49 C.F.R. § 173.309(d) Fire extinguishers.
> Limited quantities: Fire extinguishers otherwise conforming to paragraph (a), (b), or (c) of this section and are charged with a limited quantity of compressed gas to not more than 1660 kPa (241 psig) at 21 °C (70 °F) are **excepted from shipping papers (except when offered for transportation by aircraft or vessel)**, **labeling (except when offered for transportation by aircraft)**, placarding, the specification packaging requirements of this subchapter, and are eligible for the exceptions provided in § 173.156 when offered for transportation in accordance with this paragraph (d). Limited quantity shipments conforming to this paragraph are not subject to parts 174 and 177 of this subchapter when transported by highway or rail. In addition, limited quantity packages of fire extinguishers are subject to the following conditions, as applicable:

(Emphasis added.) The regulation clearly states that fire extinguishers only need hazardous materials warnings when they are to be shipped by air. The record establishes that Respondent did not ship fire extinguishers by air, and that the package from which Complainant refused to remove the label was only traveling 36 miles, so clearly would not be traveling by air.

Nevertheless, Complainant's *belief* that covering the hazardous material label on the fire extinguishers before giving them to UPS to ship constituted a "violation of a commercial motor vehicle safety or security regulation, standard, or order" was reasonable. In *Sylvester v. Parexel*, 2011 DOL Ad. Rev. Bd. LEXIS 47, 2011 WL 2165854, at *11-14 (ARB May 25, 2011) the Board held that a complainant need only show that they reasonably believed they were complaining about a safety hazard. The reasonable belief standard applies in STAA cases. *See Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-00006 (ARB Jan. 10, 2018) (*en banc). See also, Doyle v. Rich Transp., Inc.*, 1994 WL 897345 (DOL Off.Adm.App.), Case No. 93-STA-17, Sec'y. Dec. and Order Apr. 1, 1994, slip op. at 4; *cf. Yellow Freight Sys. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (employee protected where complaint based upon possible safety violation). Where the complainant in an STAA action makes complaints to his supervisor "relating to" alleged violations of Department of Transportation ("DOT") regulations, these complaints constitute protected activity under the STAA. A complaint is protected under the STAA even if the alleged violation complained about ultimately is determined to be meritless. *Allen v. Revco D.S., Inc.*, 91-STA-9 (Sec'y Sept. 24, 1991), slip op. at 6, n.3.

However, the employee "must at least be acting on a reasonable belief regarding the existence of an actual or potential violation." *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011). The belief must be both subjectively and objectively reasonable.[10] The "subjective" component of the reasonable belief test is satisfied

[10] See *Sylvester*, slip op. at 14, 22 ("[R]equiring a complainant to prove or approximate the specific elements of a securities law violation contradicts the statute's requirement that an employee have a reasonable belief of a

by showing that the employee actually believed that the conduct he complained of constituted a violation of relevant law. *See, e.g., Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 3 (ARB Sept. 30, 2011). Objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009). Whether a belief is reasonable is a case-by-case determination. *See Gilbert v. Bauer Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-00022, slip op. at 5 (ARB Nov. 28, 2012).

In this case, Complainant has shown that he *subjectively* believed that Respondent was violating a safety regulation by removing or masking the hazardous material signs on fire extinguishers before shipping them via UPS to its customers. He complained about the practice to his immediate supervisor, Dave Ramani, and then in writing to Porter. (RX E.) There is nothing in the record to suggest that Complainant did not raise the issue of the masking of the hazardous material sign in good faith.

However, this belief must also be *objectively* reasonable, *i.e.*, that a reasonable person with the same training and experience as Complainant would believe that the complained of circumstance is true. *Harp*, 558 F.3d at 723. The record does not include information about Complainant's educational level or experience, other than that he had been working at his position as a shipping clerk since sometime before April 2017. However, Complainant testified that at least one other employee at EOH believed this practice of covering the labels was a safety violation (Chris Graziola). Respondent did not rebut this testimony. Complainant was told to cover up the labels, so presumably the fire extinguishers arrived at EOH's facility with hazardous labels on them. A reasonable person in his position would believe shipping fire extinguishers through the mail is dangerous or illegal as the fire extinguishers contain pressurized gas and come with a hazardous material label on them.[11] As noted above, an employee does not need to know the specific regulation about which they are complaining. They only need to be acting on a reasonable belief that a violation exists. *Dick,* ARB No. 10-036, slip op. at 6.

Where the complainant in an STAA action makes complaints to his supervisor "relating to" alleged violations of DOT regulations, these complaints constitute protected activity under the STAA. A complaint is protected under the STAA even if the alleged violation complained about ultimately is determined to be meritless. *Allen,* 91-STA-9 (Sec'y Sept. 24, 1991), slip op. at 6, n.3. As discussed above, a review of the DOT regulations regarding the shipping of fire extinguishers reveals that, indeed, Complainant's concern about the practice of removing the hazardous material sign on the fire extinguishers was meritless. The regulations for fire extinguishers clearly provide that the hazardous material designation only applies when fire extinguishers are being shipped by air. *See* 49 C.F.R. § 173.309(d). Respondent does not ship anything to its customers by air. (Tr. at 50 (Ramani), 108 (Porter), 136 (Hagman)).

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violation of the enumerated statutes.") The "reasonable belief" standard, therefore, involves both subjective and objective elements. *Sylvester*, slip op. at 14-15.

[11] Complainant also claimed to have contacted UPS about the suspected violation and his contact at UPS took him seriously and referred him to the DOT. He further claimed that DOT referred him to the OSHA Whistleblower investigators. (*See* RX K.)

But the STAA does not require that Complainant raise an issue about an actual safety violation. The STAA only requires that Complainant's concern is both subjectively and objectively reasonable. Nothing in the record suggests that anyone advised Complainant that the hazardous material sign only applied if the fire extinguishers were being shipped by air, or that Complainant knew that Respondent does not ship anything to its customers by air. Moreover, it is reasonable to expect that in a modern logistics platform like UPS any item has the potential to be shipped by air. According to Complainant, when he refused to cover the hazardous material sign on the fire extinguisher package, his supervisor Ramani reacted in anger, but did not explain why the hazardous material symbol was not necessary. "Dave Ramani, was mad at me because I didn't cover a UPS package with a dark tape, so you couldn't see the hazardous material symbol on it. He was mad that I would even question his integrity. He said the procedure was the only way UPS would take it." (RX E.) Ramani did not contradict Complainant's description of their dispute. (Tr. 48-50.) The sign Ramani posted did not explain that the hazardous material sign was not necessary for products shipped over land, rather than by air. (RX F.) Under these circumstances, a person with Complainant's knowledge and experience would have reasonably assumed the existence of a violation.

Complainant made his complaint to Respondent's management about the sign on the computer before his employment ended,[12] and that complaint was objectively and subjectively reasonable. Thus Complainant engaged in protected activity when he refused to remove the hazardous material sign from the fire extinguishers before giving them to UPS for shipping, and then complained about Ramani posting a sign telling employees to cover the hazardous material sign.

2. Complainant's Concern About Ramani's Possible Intoxication while Driving a Forklift Does Not Constitute Protected Activity

Assuming Complainant is correct, and Ramani operated a forklift in the warehouse while intoxicated, and that Complainant reported the incident to a supervisor, that incident would not constitute protected activity under the STAA because it did not relate to a violation of a motor vehicle safety regulation. As discussed above, the STAA protects employees who make a complaint or begin a proceeding related to a violation–or suspected violation–of a commercial motor vehicle safety or security regulation, standard, or order. Commercial motor vehicle means "a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo…" with "a gross vehicle weight rating or gross vehicle weight of at least

[12] Porter testified that Complainant did not raise the issue of the sign on the computer until **after** his conversation with Porter that resulted in his employment ending. He cited to Complainant's email about the sign that he sent on June 12, after Complainant left Respondent's worksite. (RX G; Tr. at 113-114.) However, a review of Complainant's June 10 email to Porter shows that he did indeed raise the issue of the covering up of the hazard tags on the fire extinguishers in that email, before Porter and Complainant met on June 12. (RX E.) Further, Respondent does not dispute that Complainant refused to cover the hazard sign on a package, and that this refusal resulted in an argument with Ramani, and in Ramani's decision to post instructions in the shipping area telling employees to cover the hazard signs. Thus, the protected activity occurred before any adverse employment action.

10,001 pounds…." 49 U.S.C. § 31101(1). *See also Harrison v. Roadway Express, Inc.* , ARB No. 00 048, ALJ No. 1999 STA 37 (ARB Dec. 31, 2002).

In this case, Complainant asserts that he raised a complaint about Ramani's operation of a forklift, which is not a vehicle used on highways, or a vehicle that weighs at least 10,001 pounds. Thus, Complainant's concern about the operation of the forklift does not fall within the protections of the STAA.[13]

C. Complainant Experienced an Adverse Employment Action

Complainant's employment at Respondent ended after his meeting with Porter on June 12, 2017. The parties dispute whether Respondent fired Complainant or whether Complainant quit following the meeting. Porter testified that he called the meeting on June 12 to try to help Complainant "have a better position at Habhegger." (Tr. at 111.) He said that he called the meeting because in the week preceding their meeting Complainant "was very agitated, always arguing with different employees and throwing tantrums and the such, so we had a meeting on June the 12th to discuss that." (Tr. at 109.) Porter testified that he asked Complainant why he was so agitated, and Complainant said that other employees were picking on him, that he disliked the other employees, and that they were not professional. Porter continued, "And I asked him why did he stay, why did he fight so hard to get the job if he hated it so much. And we discussed it for a while and came upon a mutual agreement that we should part ways." (Tr. at 111.) In his email to Ken Hagman on June 12, Complainant wrote that Porter suggested that he and the company "part ways." (RX F.) Porter's response to Complainant's June 12 email recounted more of the conversation.

> You …told me that you did not see a future here. …You did not feel as if you would fit into this structure. We agreed that we should go our separate ways. …I understand that you may be upset that you have no job, but do you want a job at which you are not happy? I noted in our conversation that you were a conscientious worker that was always on time and did whatever tasks were asked of you but since you were not happy you should move on to a job that you like." (RX G.)

Under the STAA, any discharge by an employer constitutes an adverse action. *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-00019 (ARB Sept. 30, 2010), citing *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-00026 (ARB Oct. 31, 2007). In *Minne*, the ARB held that, unless an employee explicitly resigns, when an employer decides to interpret an employee's actions as a voluntary quit, the employer has decided to discharge the employee. Here, there is no evidence that Complainant explicitly resigned. In fact, in his email of June 12, he writes "[m]y employment … came to an abrupt end this morning. …I said what do I do now? I have no job. …." (RX F.) Later in the same email he writes "[a]fter I was released…" His wording in the email strongly suggests that he did not explicitly resign from his position, but rather understood that Respondent had discharged him. Thus, when Porter met with Complainant

[13] At the outset of the hearing, the undersigned explained to Complainant that this is "a court of limited jurisdiction, which means that I can only consider things that involve a claim regarding the Surface Transportation Assistance Act. If you have other claims regarding other employment discrimination, other unemployment issues, I can't decide them. I can only decide the Surface Transportation Assistance Act claim." (Tr. at 5.)

and "suggested" he would happier working somewhere else, Porter terminated Complainant's employment, an adverse action under the STAA.

D. Complainant's Protected Activity was a Contributing Factor in the Adverse Employment Action

In its brief, Respondent maintains that EOH did not terminate Claimant, rather he voluntarily resigned. (Respondent's Brief at 2.) Respondent claims that there was no adverse employment action and that any alleged protected activity could not have contributed to the decision to take adverse employment action. To the contrary, Complainant alleges that Respondent terminated his employment after receiving Complainant's June 10, 2017 email. (Tr. at 54.) Complainant sent an email to Jody Porter and Matt Jordan. The email includes a litany of complaints including improper treatment by Matt Jordan over a time sheet, his report of his manager driving over a pressure valve with a forklift, not being addressed by his proper name, an issue about theft, and finally "Dave Ramani, was mad at me because I didn't cover a UPS package with dark tape, so you couldn't see the hazardous material symbol on it. He was mad that I would even question his integrity. He said the procedure was the only way UPS would take it." (RX E.)

As explained above, the undersigned has concluded that this complaint, and his previous altercation with Ramani about covering up the hazardous material symbol, constitutes protected activity under the Act. The undersigned has also found that Complainant suffered an adverse action on June 12, 2017, when after meeting with Porter, he no longer had a job at EOH. Therefore, the undersigned must now determine whether Complainant's protected activity contributed to Respondent's decision to terminate his employment.

To prevail on his STAA claim, Complainant must show that his protected activity contributed to the adverse action. 49 U.S.C. §§ 31105(a); *see also Formella v. U.S. Dep't of Labor*, 628 F.3d 381 (7th Cir. 2010); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013). 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." *Araujo*, at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011)). The Board has remarked that it is "not a demanding standard." *Rudolph v. Nat'l RR Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-00015, at 16 (ARB Mar. 29, 2013). Accordingly, Complainant need not prove that his protected activity was the only, or the most significant, reason for the adverse employment action. Indeed, the contributing factor need not even be a "significant, motivating, substantial or predominant" factor; rather it need only play "some" role. *Palmer v. Canadian Nat'l Ry*, ARB No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 53, n.218 (Sept. 30, 2016). However, the Board has also explained that a simple but-for-cause analysis is not sufficient. *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 18-059, -060, ALJ No. 2015-FRS-00052, at 10-11 (ARB Nov. 25, 2019) (rejecting the "inextricably intertwined" approach); *Klinger v. BNSF Ry. Co.*, ARB No. 19-0013; ALJ No. 2016-FRS-00062 (ARB Mar. 18, 2021). Rather, an administrative law judge must also determine if a complainant's protected activity is a proximate cause of the adverse action, not merely an initiating event. *Thorstenson,* slip op. at 10.

Here, the record shows that Porter decided to terminate Complainant's employment during the pair's June 12, 2017 meeting. Porter stated that the purpose of the meeting, at least initially, was to "help" Complainant "have a better position at Habhegger." (Tr. at 111.) During the

meeting, Complainant plainly stated many work-related complaints. His complaints were numerous, ranging from interpersonal conflicts with fellow employees to concerns about masking the shipments of fire extinguishers in accordance with Ramani's direction. That is, at the June 12, 2017 meeting, Complainant expressed various complaints and concerns to Porter, some of which constituted protected activity under the Act. At the conclusion of this meeting, Porter terminated Complainant's employment. Prior to the meeting, Porter considered Complainant to be a "good employee." (Tr. at 109.) Porter also stated that Complainant was a "conscientious worker that was always on time and did whatever tasks were asked." (RX G.) Complainant had never been disciplined or otherwise reprimanded by Respondent during his employment at EOH. (Tr. at 127.)

Based on these facts, it is clear to the undersigned that the reasons Porter decided to meet with Complainant and the reasons that he decided terminate Complainant's employment related to the complaints that he raised prior to the meeting. These were the same complaints that Porter and Complainant discussed during the meeting. At some point, either before the meeting or during, Porter decided to fire Complainant. The evidence in the record, as detailed above, demonstrates that Porter was motivated to end Complainant's employment because of his complaints. Had Porter decided to do so for some other reason –such as poor job performance– he would have done it prior to the meeting or would have explicitly stated his reasons. One of the complaints (but not the only complaint) leading Porter to meet with Complainant and discussed at the meeting was Complainant's concern relating to shipping fire extinguishers. Complainant's concern relating to shipping fire extinguishers contributed to Porter's decision to meet with Complainant and was discussed at the meeting. Accordingly, the undersigned concludes that Complainant's protected activity cannot be separated from Porter's decision to fire Complainant. *See Palmer, supra*. Complainant's protected activity was a factor (even if not the only factor) in Porter's decision to terminate his employment.

Furthermore, while accepting that Complainant's protected activity may not have been the sole cause of Respondent's decision to terminated Complainant's employment, the undersigned concludes that it was sufficiently related to Respondent's decision to be the legally cognizable cause (or proximate cause). In establishing a causal connection between an adverse employment action and protected activity, the Board has recognized that complainants are severely disadvantaged because they do not have access to all relevant evidence. *See, e.g.*, *Powers v. Union Pac. RR Co.*, ARB No. 13-034, ALJ No. 2010-FRS-00030, slip op. at 10 (ARB Jan. 6, 2017). Because of this disadvantage, an administrative law judge may rely on circumstantial evidence. *Id.*

Several factors support a finding that Complainant's protected activity was the proximate cause of Respondent's decision to terminate his employment. First, Respondent (and Porter specifically) was clearly aware of Complainant's protected activity prior to the June 12, 2017 meeting. Complainant first raised his concerns relating the shipping of fire extinguishers on June 5, 2017. (Tr. at 53-54, 65.) Days later, on June 10, 2017, Complainant again expressed these same concerns to Respondent (and Porter) in an email. (RX E.) Then, at the meeting, Complainant raised these concerns again before being terminated. (Tr. at 54-55, 111, 130; *see also* RX F.) An employer's prior knowledge is an important part of the causation analysis. *See, e.g.*, *Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-00006, slip op. at 14, n.34 (ARB Jan. 10, 2018); *see also Moon v. Transp. Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987). Here, Respondent

knew of Complainant's protected activity before terminating him. This factor supports a finding that Complainant's protected activity contributed to Porter's decision to fire him.

The undersigned also finds that the temporal proximity between each of these event supports a strong inference of causation. *See, e.g.*, *Bruker v. BNSF Ry. Co.*, ARB No. 14-071, ALJ No. 2013-FRS-00070 (ARB Jul. 29, 2016); *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007). Porter arranged the meeting that culminated in Complainant's termination just one week after Complainant first raised concerns about how Respondent was shipping fire extinguishers and two days after Complainant included these same concerns in an email to EOH management. The very close temporal proximity of these events, mere days, gives rise to an inference of a causal nexus. *See, e.g.*, *Pattenaude v. Tri-Am Transp., LLC*, ARB No. 15-007, ALJ No. 2013-STA-00037; *Bruker v. BNSF Ry. Co.*, ARB No. 14-071, ALJ No. 2013-FRS-00070 (ARB Jul. 29, 2016). The record contains no evidence of an intervening or superseding event that could detract from the probative value of this inference. *See Hukman v. U.S. Airways, Inc.*, ARB No. 18-0048, ALJ No. 2015-AIR-00003 (ARB Jan. 16, 2020) (explaining that context affects the probative value of an inference based on temporal proximity); *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-00019, slip op. at 6 (ARB Apr. 28, 2006) (noting that an intervening event vitiates such an inference). Thus, the temporal proximity of Complainant's protected activity and the June 12, 2017 meeting and termination strongly supports a finding of causation.

The discussion between Complainant and Porter of June 12, 2017 led to Complainant's termination. The record shows that Porter had multiple reasons to arrange this meeting and to terminate Complainant. One of these reasons was Complainant's protected activity. Thus, Complainant's protected activity contributed to Respondent's decision to take an adverse employment action. *See Palmer.* And, for the reasons discussed above, the record shows that Complainant's protected activity was sufficiently related to Respondent's decision to terminate his employment to allow the undersigned to conclude that Complainant's protected activity was the proximate cause of his termination. In reaching this conclusion, the undersigned notes that no one single factor is determinative. Rather, after considering all the evidence in the record and the argument advanced by the parties, the undersigned finds that there is a sufficient nexus between Complainant's protected activity and Respondent's decision to terminate Complainant's employment.[14] Therefore, the undersigned concludes that Complainant's protected activity was the proximate cause of Respondent's decision to take adverse employment action. *See Thorstenson*, slip op. at 10-11 (citing *Koziara v. BNSF Ry. Co.*, 840 F.3d 873).

E. Same Action Defense

If a complainant establishes each element of his claim, an employer may, nonetheless, avoid liability under the Act if it can demonstrate, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the complainant's protected activity. 29 C.F.R. § 1978.109(b). This is essentially a hypothetical analysis –the administrative law judge

[14] Respondent argues that it did not take any adverse employment action against Complainant. Because of this, Respondent did not earnestly address the element of causation. While Respondent does not bear any burden to refute the element of causation, by not addressing this element, Respondent has not emphasized any facts in the record that might negate or diminish the probative value of the circumstantial evidence supporting the finding that it terminated Complainant because he engaged in protected activity.

may determine, in the absence of protected activity, would the employer have taken the same adverse employment action? *Palmer*, ARB No. 16-035, at 52 (ARB Sept. 30, 2016).

"Clear" evidence refers to a situation in which the Respondent has "presented evidence of unambiguous explanations for the adverse action in question." *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-00006 slip op. at 11 (ARB Apr. 25, 2014). "Convincing" evidence demonstrates a proposed fact is "highly probable." *Id.* Taken together, clear and convincing evidence is evidence that shows "the thing to be proved is highly probable or reasonably certain." *See, e.g., DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-00009, slip op. at 8 (ARB Sept. 30, 2015); *see also Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1568 (11th Cir. 1997) (explaining that "[f]or Respondents, this is a tough standard, and not by accident").

Respondent has not presented argument to support a finding that it would have terminated Complainant absent any protected activity. Despite this deficiency, the record does include some evidence that suggests that Respondent may have had other reasons to terminate Complainant that warrants discussion. As noted above, Porter had multiple reasons to convene the meeting with Complainant which led to his termination. Other than Complainant's protected activity, it appears clear that Porter also wanted to discuss Complainant's relationships with his co-workers and, more broadly, Complainant's job satisfaction. Perhaps it is possible that Porter would have fired Complainant for one of these reasons. However, Respondent has not presented (and the record does not include) evidence which clearly and unambiguously shows that it would have terminated Complainant for one of these other reasons. *See DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-00009, slip op. at 8 (ARB Sept. 30, 2015); *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-00006 slip op. at 11 (ARB Apr. 25, 2014). Accordingly, the undersigned concludes that Respondent has not established, by clear and convincing evidence, that it would have terminated Complainant's employment on June 12, 2017 absent his protected activity.

F. Remedy

As a successful litigant, Complainant is entitled to an order requiring Respondent EOH to reinstate him "to [his] former position with the same pay and terms and privileges of employment." 49 U.S.C.A § 31105(b)(3)(A)(ii). *See Palmer v. Triple R Trucking,* ARB No. 03-109, ALJ No. 2003-STA-28 (ARB Aug. 31, 2005), citing *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 02-STA-30, slip op. at 4 (Mar. 31, 2005) (reinstatement under the STAA is an automatic remedy designed to re-establish the employment relationship) and *Palmer v. Western Truck Manpower*, ALJ No. 85-STA-6, slip op. at 19 (Sec'y Jan. 16, 1987) (an order of reinstatement is not discretionary).

The statute provides that the company shall "reinstate the complainant to the former position with the same pay and terms and privileges of employment" as he or she held before the retaliatory action. 49 U.S.C.A § 31105(b)(3)(A)(ii). The implementing regulation provides that the ALJ's "decision and order concerning whether the reinstatement of a discharged employee is appropriate shall be effective immediately upon receipt of the decision" by the company. 29 C.F.R. § 1978.109(b).

Complainant presented no evidence that would suggest that he would not be amenable to reinstatement. Porter testified that prior to the incidents leading to Complainant's discharge, he had been a good employee. (Tr. at 109.) Immediate reinstatement also avoids a possible windfall to Complainant as "back pay continues to accrue during the pendency of remanded issues such as the calculation of back pay and related benefits." *Dickey v. W. Side Transp., Inc.*, ARB Nos. 06-150, 06-151, ALJ Nos. 2006-STA-26 and 27 (ARB May 29, 2008)

The statute also entitles Complainant to "compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 49 U.S.C.A § 31105(b) (3)(A)(iii). In this case, Complainant appeared without representation, and presented no evidence that he incurred any costs or damages other than a general request for backpay. Thus, Respondent is responsible to pay backpay with interest from June 12, 2017, the date of the discriminatory discharge, until Respondent tenders a reinstatement offer.[15] *Nelson v. Walker Freight Lines, Inc.*, 87-STA-24 (Sec'y Jan. 15, 1988), slip op. at 6 n.3; *Earwood v. D.T.X. Corp*., 88-STA-21 (Sec'y Mar. 8, 1991), slip op. at 10.

Neither party presented evidence on damages, or mitigation of damages. Thus, the undersigned will hold the record open for thirty days for the parties to offer written evidence relevant to Complainant's damages. This documentation must include the following:

1. Date of reinstatement;
2. Complainant's hourly wage at the time of his discharge and any subsequent increases in pay to which he would have been entitled;[16]
3. Any interim earnings Complainant has had since June 12, 2017 that would mitigate his backpay damages;[17] and
4. Any other special damages sustained by Complainant because of the discrimination.

VI. CONCLUSION AND ORDER

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[15] An administrative law judge must determine both pre- and post-judgment interest on the back pay award. *See Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 99-STA-34, slip op. at 9 (ARB Dec. 29, 2000). The appropriate interest rate on awards under the Act is the rate charged for underpayment of federal taxes. *See* 26 U.S.C.A. § 6621(a)(2); *Drew v. Alpine, Inc.*, ARB Nos. 02-044, 02-079, ALJ No. 2001-STA-47, slip op. at 4 (ARB June 30, 2003).

[16] A complainant shall proffer evidence to support the back pay award and other damages. *See Kennedy v. Advanced Student Transportation*, ARB No. 09-145, ALJ No. 2009-STA-49 (ARB Apr. 28, 2011). Complainant may be entitled to other damages such as out of pocket health care costs due to loss of coverage, 401(k) contributions, fringe benefits, vacation pay, bonuses, sick pay, as well as pain and suffering. *See Michaud v. BSP Transport, Inc.*, ARB No. 97-113, ALJ No. 95-STA-29 (ARB Oct. 9, 1997).

[17] The employer has the burden of showing that a complainant failed to make reasonable efforts to mitigate damages. *Polwesky v. B & L Lines, Inc.*, 90-STA-21 (Sec'y May 29, 1991) (*citing Carrero v. N.Y. Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989) and *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614 (6th Cir. 1983)). *See also Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000) (holding that respondents have the burden of proving by a preponderance of the evidence that the employee did not exercise reasonable diligence in finding other suitable employment.)

Based on the foregoing, Complainant's request for relief under the STAA, 49 U.S.C. § 2305, and the regulations promulgated thereunder at 29 C.F.R. Part 1978 is **GRANTED**. Respondent is directed to reinstate Complainant. To determine Respondent's obligation for backpay[18] and further damages, Respondent and Complainant are to provide written evidence **within thirty days** of this Decision.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill-District Office

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.

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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 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).

The preliminary order of reinstatement is effective immediately upon receipt of the

[18] Under the STAA, Respondent will continue to owe backpay with interest from June 12, 2017 until Respondent makes a bona fide offer of reinstatement

decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.
Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

If you file your appeal online, no paper copies need be filed with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

Filing Your Appeal by Mail
Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.