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Office of Administrative Law Judges
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Issue Date: 17 August 2021

Case No.: 2020-STA-00018

In the Matter of:

TIMOTHY J. BISHOP,
Complainant,

v.

UNITED PARCEL SERVICE,
Respondent,

and

DARYL BRADSHAW,
Respondent.

Appearances:

Paul O. Taylor, Esq.
Peter L. LaVoie, Esq.
Truckers Justice Center
Edina, MN
For the Complainant

Raymond Perez, Esq.
Jackson Lewis P.C.
Atlanta, GA
For the Respondents

Before: Jason A. Golden
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This claim arises under the employee-protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105, and the regulations at 29 C.F.R. Part 1978. Complainant Timothy J. Bishop claims that Respondents United Parcel Service, Inc. (UPS) and Daryl Bradshaw terminated his employment from UPS and refused to hire him back during the

union grievance process in retaliation for filing a claim against UPS with the Occupational Safety and Health Administration (OSHA), the prosecution of that claim, including testifying, and recording waiting time as on-duty time.

I conducted a formal hearing on December 15 and 16, 2020, by video and telephone pursuant to the parties' agreement. The parties and their counsel were present during the hearing. I admitted in evidence Joint Exhibit (JX) 1; Complainant's Exhibits (CX) 3, 5-20, and 22; and Respondents' Exhibits (RX) 1-15. (Transcript (Tr.) 12-13, 61, 117, 176, 264, 275-276, 316, 334). By Order dated December 29, 2020, I admitted in evidence JX 2 and JX 3.[1] During the hearing, I heard sworn testimony from Complainant Timothy Bishop, Andre Murphy, James Bivens, Susan Steininger, Brianna Bishop, John Youngermann, Joseph Brown, Respondent Daryl Bradshaw, and Shannon Stevenson. (*See* Tr.) Complainant filed a closing brief (Br.). Respondent filed a response (Resp.). And, Complainant filed a reply. The evidentiary record closed before Complainant filed his closing brief.[2]

In reaching my decision, unless noted otherwise herein, I have reviewed and considered all testimony and exhibits in evidence and the stipulations and arguments of the parties.

I. PROCEDURAL HISTORY

On July 19, 2019, Complainant filed a complaint with OSHA. On December 5, 2019, the Office of Administrative Law Judges (OALJ) received Complainant's appeal of OSHA's findings and his request for a hearing. On February 12, 2020, OALJ assigned the claim to me for hearing and decision.

II. SURFACE TRANSPORTATION ASSISTANCE ACT

The employee-protection provisions of the STAA prohibit an employer from disciplining, discharging, or otherwise discriminating against an employee because the employee has undertaken certain protected activity. 49 U.S.C. § 31105 states, in pertinent part:

> (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;
>
> * * *

[1] There are multiple versions of JX 2 and JX 3 in the administrative record. The versions admitted in evidence are described in my December 29, 2020 Order on Post-Hearing Evidence.

[2] *See* 29 C.F.R. § 18.90(a) ("The record of a hearing closes when the hearing concludes, unless the judge directs otherwise"); Dec. 29, 2020 Order on Post-Hearing Evidence.

(C) the employee accurately reports hours on duty pursuant to chapter 315 . . . .[3]

The STAA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21).[4] "To prove a STAA violation, the complainant must show by a preponderance of evidence that his safety complaints to his employer were protected activity, that the company took an adverse employment action against him, and that his protected activity was a contributing factor in the adverse action. If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the adverse personnel action, his employer can avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event."[5]

Federal appellate jurisdiction of STAA whistleblower cases rests in the circuit in which the alleged violation occurred or in which the complainant resided on the date of the violation.[6] Because the factual circumstances giving rise to the claim occurred within Missouri, I will apply the decisional law of the United States Court of Appeals for the Eighth Circuit.[7]

III. DISPUTED ELEMENTS OF THE CLAIM AND AFFIRMATIVE DEFENSE

The parties have stipulated to certain protected activity by Complainant and that his termination was an adverse action under the STAA. Whether Complainant's recordation of his waiting time as on duty time on his records of duty status before July 29, 2011, was protected activity under the STAA, and whether Respondents' failure to bring Complainant back to work during the grievance process in 2019 is an adverse action under the STAA remain disputed.

Further, the parties dispute whether Complainant's protected activity was a contributing factor in Respondents' adverse personnel actions against him (contributing factor causation). And, they dispute whether Respondents would have taken the same adverse actions against Complainant had he not engaged in protected activity (Respondents' affirmative defense). If I find that Complainant has established contributing factor causation and that Respondents have not proven their affirmative defense by clear and convincing evidence, then I must also address the issue of damages/relief.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Parties' Stipulations and Collateral Estoppel

The parties stipulated as follows:

1. Complainant is an employee as defined in 49 U.S.C. § 31101(2).

[3] 49 U.S.C. § 31105; *see also* 29 C.F.R. § 1978.102.
[4] *Blackie v. D. Pierce Transportation, Inc.*, ARB No. 13-065, ALJ No. 2011-STA-055, PDF at 4 (ARB June 17, 2014).
[5] *Id.*, PDF at 5-6 (internal citations omitted). Whether the employer had knowledge of the protected activity is part of the causation analysis in this test. *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015); *see* Tr. 6.
[6] 29 C.F.R. § 1978.112.
[7] Respondents assert that the law of the Eighth Circuit governs this case. (Resp. at 11). Complainant does not assert otherwise.

2. From May 26, 1992 to June 24, 2011, and from December 1, 2013 to about March 21, 2019, Respondent UPS employed Complainant to operate commercial motor vehicles having a gross vehicle weight rating (GVWR) of 10,001 pounds or more transporting property on the highways in interstate commerce.

3. UPS is a motor carrier operating in interstate commerce and an employer subject to the employee-protection provisions of the STAA. UPS maintains its principal place of business at 55 Glenlake Parkway, NE, Atlanta, Georgia 30328-3474.

4. Respondent Daryl Bradshaw was formerly the business manager at UPS's Earth City facility, but has since retired. Bradshaw at times was Complainant's immediate supervisor during his employment. Bradshaw was involved in an investigation of a truck accident caused by Complainant on March 16, 2019, after Complainant fell asleep at the wheel.

5. Joe Brown is the labor manager at the Earth City facility and was involved in the decision to terminate Complainant for the truck accident Complainant caused on March 16, 2019.

6. Complainant worked for UPS as a "feeder driver" operating tractor-trailer vehicle combinations having a GVWR of 26,001 pounds or more on the highways transporting property in interstate commerce. As a feeder driver, he transported large trailers to and from UPS facilities and between UPS facilities and "meet points" where he exchanged trailers with other UPS feeder drivers.

7. Complainant engaged in protected activity under the STAA when he filed a complaint with OSHA pursuant to 49 U.S.C. § 31105 on July 29, 2011, participated in and testified in OSHA Case No. 7-7080-11-066, and participated in and testified in OALJ Case No. 2013-STA-00004 (*Bishop I*) on June 5, 2013 in St. Louis, Missouri, before Administrative Law Judge Daniel Solomon.

8. On November 15, 2013, Judge Solomon issued a final decision in *Bishop I* determining that Complainant's recordation of his waiting time as on duty time on his records of duty status was protected under 49 U.S.C. § 31105(a)(1)(C) and awarded damages to Complainant in excess of $220,000, attorneys' fees in excess of $70,000, and reinstatement as a commercial vehicle operator with UPS.[8]

9. In *Bishop I*, Judge Solomon directed UPS to post a copy of his decision at all of its work places in the UPS Central Plains District in all places where employee notices are customarily posted. Further, he ordered UPS to "provide a copy of [the] decision, by mail, to all of UPS's present employees in the Central Plains District, and those employees who worked for it in the Central Plains District during the period when [Complainant] was employed there."

10. In *Bishop I*, Judge Solomon also ordered UPS to "expunge all references to Complainant's discharge for engaging in protected activity from its personnel and labor records."

[8] Judge Solomon's Decision and Order issued in *Bishop I* on November 15, 2013, is in evidence as CX 3.

11. Complainant was returned to work as a feeder driver for UPS in accordance with Judge Solomon's order on December 1, 2013.

12. On March 16, 2019, Complainant was involved in an accident while he was operating a tractor-trailer set for UPS on Interstate 55 south of mile marker 23 near Edwardsville, Illinois.

13. Complainant was issued a citation by the Highway Patrol related to his actions for improper lane usage - crossing lane boundary unsafely.

14. On March 21, 2019, UPS took Complainant out of service and notified him by letter that he would be discharged, subject to the contractual grievance process set forth in the collective bargaining agreement between UPS and the International Brotherhood of Teamsters.

15. Complainant, through his union, grieved his discharge notice pursuant to the contractual grievance process. On March 26, 2019, Complainant's grievance was addressed at a local-level meeting of the Teamsters Local 688 and UPS management in St. Louis, Missouri. Complainant was given the option to resign or attempt to have his grievance heard before the Teamster's UPS Missouri Kansas Nebraska Joint Area Grievance Committee (MoKan Panel).

16. On April 15, 2019, Complainant's grievance was brought before the MoKan Panel in Columbia, Missouri, which was comprised of three members of the Teamsters along with three management officials of UPS. The panel was unable to reach a decision regarding Complainant's grievance.

17. On April 30, 2019, Complainant's grievance was heard by the UPS Joint Area Committee. Complainant was not asked to testify in this hearing, and his grievance was denied. This committee issued the final decision to uphold Complainant's discharge.

18. UPS did not bring Complainant back to work prior to completion of the contractual grievance process.

19. At the time of his discharge on March 21, 2019, Complainant was a UPS "Circle of Honor" driver. The Circle of Honor rewards and recognizes UPS Drivers who have outstanding safety records.

(Complainant's Prehearing Statement, § 4; Respondents' Prehearing Statement, § 4; Tr. 7-9; *see* Tr. 224-225).

20. Complainant was an employee covered by the STAA.

21. Respondents are persons covered by the STAA.

22. The termination of Complainant's employment with UPS in March 2019 was an adverse action under the STAA.

23. Complainant timely filed this claim with OSHA.

24. Complainant timely appealed OSHA's findings and requested a hearing before OALJ.

(Tr. 8-10).

The foregoing stipulations are accepted and hereby made findings of this tribunal. Further, consistent with my previous notice to the parties, (Tr. 13), I give preclusive effect under the doctrine of collateral estoppel to Judge Solomon's finding or conclusion that Complainant's recordation of his waiting time as on duty time on his records of duty status before July 29, 2011, was protected activity under the STAA, and I adopt such finding or conclusion as my own.[9]

B. Respondents' Failure to Bring Claimant Back to Work During the Grievance Process is an Adverse Action under the STAA.

Under the STAA, discharging an employee or discriminating against an employee regarding pay, terms, or privileges of employment is an adverse action.[10] Similarly, "refusing to rehire an employee affects 'pay, terms, or privileges of employment.'"[11] Discharging an employee and refusing to rehire him are merely different sides of the same coin. The evidence demonstrates that UPS brings some employees that are terminated back to work during their grievance processes. Respondents did not bring Complainant back to work. I find that Respondents' failure to bring Complainant back to work during his post-termination, union grievance process is an adverse action under the STAA.

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[9] "'Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.'" *Abbs v. Con-Way Freight, Inc.*, ARB No. 08-017, ALJ No. 2007-STA-00037, 2010 WL 3031374, *5 (citing *Montana v. United States*, 440 U.S. 147, 153, citing, inter alia, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)). "Collateral estoppel ''bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim.'" *Id.* (citing *Montana*, 440 U.S. at 153; *SEC v. Quinlan*, 2010 WL 1565473, slip op. at 4 (6th Cir. Apr. 21, 2010) quoting *Taylor v. Sturgell*, 553 U.S. 880 (2008)). "A prior court resolution has preclusive effect when the following four elements are satisfied: (1) the precise issue raised in the present case was raised and actually litigated in the prior proceeding; (2) determination of the issue was necessary to the outcome of the prior proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding." *Id.* (citing *Montana*, 440 U.S. at 153-154; *Parklane* Hosiery, 439 U.S. at 328, 332; *Quinlan*, 2010 WL 1565473, slip op. at 4, citing *Smith v. SEC*, 129 F.3d 356, 362 (6th Cir. 1997) (*en banc*) (quoting *Detroit Police Officers Ass'n v. Young,* 824 F.2d 512, 515 (6th Cir. 1987))). I find that all these elements are satisfied with respect to Judge Solomon's finding or conclusion that Complainant's recordation of his waiting time as on duty time on his records of duty status before July 29, 2011, was protected activity under the STAA. This finding applies to Complainant's claim against UPS.

Bradshaw was not a party to *Bishop I*. I have not determined whether collateral estoppel applies to Complainant's claim against Bradshaw. And, it is unnecessary for me to make such determination or decide anew whether Complainant's recordation of his waiting time as on duty time is protected for the claim against Bradshaw because such a finding would make no difference to the ultimate outcome of this case.

[10] *See* 49 U.S.C. § 31105(a)(1).

[11] *Muzyk v. Carlsward Transportation*, ARB No. 06-149, ALJ No. 2005-STA-060, PDF at 6 (ARB Sept. 28, 2007); *see Jones v. Douglas County Sheriff's Dep't*, 915 F.3d 498, 500 (8th Cir. 2019) (Under Title VII of the Civil Rights Act of 1964, "[a] reinstatement denial is a discrete employment action").

C. Contributing Factor Causation

To prevail, Complainant must demonstrate, "by a preponderance of the evidence, that his protected activity was a contributing factor in the unfavorable personnel action."[12] "'A contributing factor is '*any* factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.' . . .' '[I]t just needs to be a factor;' the 'protected activity need only play some role, and even an '[in]significant' or '[in]substantial role suffices.' '[I]f the ALJ believes that the protected activity and the employer's nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question.'"[13] In making this determination, the judge must, and in this case has, considered "all the relevant, admissible evidence."[14]

According to the Administrative Review Board, "'[t]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.'"[15] However, in satisfying this standard, the Board has held that "an employee need not prove retaliatory animus, or motivation or intent, to prove that this protected activity contributed to the adverse employment action at issue."[16]

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[12] *Palmer v. Canadian Nat'l Ry. Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154, PDF at 30 (ARB Sept. 30, 2016) (*en banc*). "This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action." *Id*., PDF at 53 (quoting *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013)).

[13] *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, 2017 WL 262014, *10 (ARB Jan. 6, 2017) (*en banc*) (internal citations omitted).

[14] With regard to the evidence an administrative law judge is to consider and how to weigh such evidence when determining whether protected activity is a contributing factor, the Administrative Review Board has stated:

> Because the protected activity need only be a "contributing factor" in the adverse action, an ALJ 'should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons.' 'Since in most cases the employer's theory of the facts will be that the protected activity played no role in the adverse action, the ALJ must consider the employer's nonretaliatory reasons, but only to determine whether the protected activity played any role at all.'
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> When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should be aware that, 'in general, employees are likely to be at a severe disadvantage in access to relevant evidence.' Thus, an employee '*may*' meet his burden with circumstantial evidence.' So an ALJ *could* believe, based on evidence that the relevant decision maker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted to* infer a causal connection from decision maker knowledge of the protected activity and reasonable temporal proximity. But, . . . the AL[J] must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

Powers, 2017 WL 262014, at *10 (internal citations omitted).

[15] *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, 2018-0060, ALJ No. 2015-FRS-00052, slip op. at 8 (ARB Nov. 25, 2019) (*en banc*) (quoting *Kuduk v. BNSF Ry. Co*., 768 F.3d 786, 791 (8th Cir. 2014)).

[16] *Rathburn v. The Belt Ry. Co. of Chicago*, ARB No. 16-036, ALJ No. 2014-FRS-035, PDF at 8 (ARB Dec. 8, 2017) (citing *DeFrancesco v. Union R.R. Co*., ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012)); *Riley v. Dakota, Minnesota & E. R.R. Corp*., ARB Nos. 16-010, 16-052, ALJ No. 2014-FRS-044, 2019 WL 4170436,

Unlike the Board, the Eighth Circuit requires a showing of retaliatory or discriminatory animus or motive for a complainant to prevail on his claim at hearing. In *Kuduk,* a case under the Federal Rail Safety Act (FRSA),[17] the court held that "[t]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity."[18] In doing so, it stated:

> Kuduk urges us to apply *Staub* [*v. Proctor Hosp.,* 562 U.S. 411, 131 S. Ct. 1186, 1190 n. 1, 179 L.Ed.2d 144 (2011)] more broadly. Relying on the Third Circuit's decision in *Araujo v. N.J. Transit Rail Ops., Inc.,* Kuduk argues that he 'need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his [protected activity] was a contributing factor to the personnel action.' 708 F.3d 152, 158 (3d Cir. 2013) . . . . Therefore, Kuduk argues, Jaeb's knowledge of the SIRP report, together with Kuduk's testimony that he did not in fact violate one of BNSF's 'eight deadly decisions,' established without more a prima facie case. We disagree.
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> The FRSA provides that a rail carrier may not discharge 'or in any other way *discriminate* against' an employee for engaging in protected activity. 49 U.S.C. § 20109(a). As the Court explained in *Staub,* the essence of this intentional tort is 'discriminatory animus.' 131 S. Ct. at 1193. We agree with the Ninth Circuit that, under the statute's 'contributing factor' causation standard, '[a] prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive.' *Coppinger–Martin v. Solis,* 627 F.3d 745, 750 (9th Cir.2010). . . .
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> In our view, the *Araujo* panel may have improperly relied on *Marano v. Dep't of Justice,* 2 F.3d 1137 (Fed.Cir.1993), for its no-need-to-show-motive conclusion because the court in *Marano* was construing a federal employee whistleblower statute that required only an ultimate showing of causation in fact ('because of'), not discrimination. *Id.* at 1139–41.[19]

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*4 (ARB Jul. 6, 2018) (declining to follow *Kuduk v. BNSF Ry. Co*., 768 F.3d 786, 792 (8th Cir. 2014), which required a complainant to prove intentional retaliation); *see Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019) ("the only proof of discriminatory intent that a plaintiff is required to show is that his or her protected activity was a 'contributing factor' in the resulting adverse employment action"); *but see Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018) ("while a FRSA plaintiff need not show that retaliation was the *sole* motivating factor in the adverse decision, the statutory text requires a showing that retaliation was a motivating factor").

[17] 49 U.S.C. § 20109. Similar to the STAA, the FRSA is governed by the legal burdens of proof set forth under the AIR-21. *Rathburn*, ARB No. 16-036, PDF at 3. Thus, decisions regarding contributing factor causation under the FRSA are equally applicable to contributing factor causation under the STAA.

[18] *Kuduk*, 768 F.3d at 791 (citing *Consol. Rail Corp. v. U.S. Dep't of Labor*, 567 Fed. Appx. 334, 338-339 (6th Cir. 2014)).

[19] *Id*. at 790-791, n. 4 (internal footnotes omitted).

Despite the arguable inconsistency in this quoted language regarding the need to demonstrate retaliatory motive or animus,[20] in *Blackorby v. BNSF Ry. Co.*,[21] the Eighth Circuit clarified that discriminatory animus is required:

> Blackorby and the United States (as *amicus curiae*) both urge this Court to follow Araujo v. New Jersey Transit Rail Operations, Inc., 708 F.3d 152 (3d Cir. 2013). In Araujo, the Third Circuit considered whether an employee's injury report was a contributing factor to his discipline. The court noted that 'the term 'contributing factor' is a term of art that has been elaborated upon in the context of other whistleblower statutes.' The court stated that a contributing factor is 'any factor which, alone or in connection with other factors, tends to affect in any way the outcome of [the employer's] decision. . . . The court further noted that, in the context of other whistleblower statutes employing the contributing-factor standard, 'an employee '*need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.''
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> The Third Circuit extended this interpretation of the contributing-factor standard to the FRSA's employee-protections provision.
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> According to the Araujo court, this reduced burden meant—consistent with whistleblower statutes using the contributing-factor standard—that 'an employee need not ascribe motive to the employer.'
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> We find Kuduk controlling. The court reasoned from the general language of the statute that the 'essence' of the FRSA's employee-protections provision is 'discriminatory animus.' And, in a footnote, the court expressly rejected the Araujo conclusion which Blackorby now urges this panel to adopt.[22]

Complainant may prove contributory factor causation with circumstantial evidence. "Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work

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[20] *See Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1169 (9th Cir. 2019) ("BNSF cites this language from the *Kuduk* decision to argue that the FRSA requires proof of discriminatory animus, separate from and beyond the statutorily required evidence that the plaintiff's protected conduct was a contributing factor in the adverse employment action. But as *Tamosaitis* and *Coppinger-Martin* have shown, we have already rejected that premise as inconsistent with the FRSA's articulation of each party's required evidentiary burden. In fact, in *Kuduk*, the Eighth Circuit relied on our *Coppinger-Martin* decision and acknowledged that plaintiff need not provide 'conclusive[ ]' proof of the employer's animus to establish the plaintiff's prima facie case").

[21] 849 F.3d 716 (8th Cir. 2017).

[22] *Id*. at 720-722 (internal citations omitted).

pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence."[23]

Complainant argues that no inference should be drawn from the weak temporal proximity between Complainant's protected activities and the adverse actions taken against him. UPS had motive to retaliate against him because it had to change its policy and practices regarding its drivers recording their time based on the decision in *Bishop I*, which undoubtedly cost UPS money. UPS had animus against STAA protected activity as evidenced by its firing of driver John Youngermann and prior firings of Complainant, and as evidenced by UPS's failure to post the decisions from *Bishop I* and Youngermann's claim as required. UPS subjected Complainant to disparate treatment. And, UPS's reasons for terminating and not rehiring Complainant are pretextual and not worthy of credence. (Br. 30-34). Respondents primarily focus on the weak temporal relationship between Complainant's protected activity and his termination, and the absence of discrimination against Complainant for over 5 years before his termination. (*See* Resp.)

1. Lack of a Temporal Proximity Sufficient to Infer Causation

The Board has stated that:

> Determining what, if any, logical inference may be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science but requires a "fact-intensive" analysis. It involves more than determining the length of the temporal gap and comparing it to other cases. Previous case law can be used as a guideline to determine some general parameters of strong and weak temporal relationships, but context matters. Before granting summary decision on the issue of causation, the ALJ must evaluate the temporal proximity evidence presented by the complainant on the record as a whole, including the nature of the protected activity and the evolution of the unfavorable personnel action.[24]

And, the Eighth Circuit has held that temporal proximity without more is insufficient to establish a prima facie case of retaliation.[25]

Here, more than 5 years passed from Complainant's last protected activity (the prosecution of his claim before Judge Solomon that resulted in a final decision on November 15, 2013), and his termination on March 21, 2019. Respondents argue that this lapse of time between Complainant's protected activities and the adverse actions taken against him are insufficient to create an inference of causation between the two. I agree.

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[23] *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, PDF at 13 (ARB June 24, 2011).
[24] *Brucker v. BNSF Ry. Co.*, ARB No. 14-071, ALJ No. 2013-FRS-070, 2016 WL 4184206, *8 (ARB July 29, 2016) (quoting or citing *Franchini v. Argonne Nat'l Lab*., ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept. 26, 2012)).
[25] *Kuduk*, 768 F.3d at 792.

Respondents cite to decisions from the Eighth Circuit and federal courts within the Eighth Circuit that have found less than 5 years to be an insufficient amount of time to create an inference of causation. (*See* Resp. 11-12). In a decision under the FRSA, I recently found that periods of 4-plus months and almost a year and a half were insufficient to create an inference of causation.[26] Of course, such determinations are factual specific and made on a case-by-case basis. Based on the facts of this case, I find a reasonable inference that Complainant's protected activity had anything to do with his termination in 2019 or Respondents' refusal to rehire him thereafter cannot be drawn from the 5-plus years between the protected activities and the adverse actions. Complainant may still prove his claim with other evidence, but the length of time between the protected activities and the adverse actions does not assist him. Indeed, the long length of time between protected activities and adverse actions weighs against a finding contributing factor causation.

2. Lack of Discrimination or Retaliation Between Complainant's Return to Work in December 2013 and His Termination in March 2019.

Additionally, whether analyzed in the temporal proximity context or separately, there was a complete absence of evidence of discrimination or harassment against Complainant from the time he returned to work at UPS on December 1, 2013, until his discharge on March 21, 2019. Complainant did not present testimony or other evidence that he was treated differently during this 5-plus years than other employees who had not engaged in protected activity. He did not present testimony or other evidence that he was treated differently during this 5-plus years than when he worked for UPS before his termination in 2011. He did not present testimony that he was harassed, shunned, ignored, or otherwise treated poorly during this time frame.

Instead, he was involved in multiple motor vehicle accidents while driving for UPS from his return to work in December 2013 through 2018.[27] Complainant does not allege and there is

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[26] *See Halcomb v. CSX Transportation*, 2019-FRS-00036, PDF at 13 (Sept. 2, 2020) ("CSX cites to various decisions from the Seventh Circuit finding that three and four months in between protected activity and an adverse action is too long to establish causation").

[27] Complainant was involved in motor vehicle accidents while driving for UPS on December 1, 2015, and September 21, 2017. (Tr. 139-141, 144-147). According to RX 9, UPS determined these accidents to be "unavoidable" by Complainant. (RX 9, at 6-7). Based on the date of "9/25/2017" on the bottom of pages 6 and 7 of RX 9, it appears that these pages were printed on September 25, 2017.

Nonetheless, CX 22 shows that the December 1, 2015 accident was "under investigation." CX 22 lists the March 16, 2019 accident, so presumably, CX 22 was current as of at least March 16, 2019, which is subsequent to the printing of RX 9. Further, CX 14 indicates that on December 3, 2015, UPS gave a "warning" to Complainant for an accident. Based on RX 9, CX 14, and CX 22, I assume this purported warning relates to Complainant's December 1, 2015 accident. CX 14 lists Complainant's March 2019 discharge, so presumably, CX 14 was current as of March 2019.

Notwithstanding the foregoing, Complainant testified that UPS did not take any adverse action against him for the December 1, 2015, and September 21, 2017 accidents. (Tr. 153). There was no testimony corroborating that UPS gave Complainant a warning for the December 1, 2015 accident. And, Complainant testified that he would not expect UPS to take action against him for an accident from 2015 that was still under investigation. (Tr. 153). The records are not consistent regarding whether UPS determined the December 1, 2015 accident to be unavoidable or still under investigation as early as September 25, 2017. Based on this inconsistency, Complainant's testimony that no adverse action was taken against him as a result of the December 1, 2015 accident and that he would not expect any action to be taken against him for an accident still under investigation, and the absence of any testimony that Complainant was actually given a warning for the December 1, 2015 accident, I do not credit the accuracy of CX 14. I find that UPS found the December 1, 2015 accident to be unavoidable and did not give Complainant a warning for such accident.

no evidence that UPS treated those accidents differently than required by UPS's union agreement. And, Complainant does not allege and there is no evidence that UPS treated Complainant differently while handling those accidents or making employment decisions related to those accidents because of his protected activity. Additionally, the evidence shows that UPS gave Complainant a "Circle of Honor" award for 25 years of safe driving.[28] Based on the foregoing and the record, I conclude that Respondents did not discriminate against Complainant from the time he returned to work at UPS on December 1, 2013, until his discharge on March 21, 2019.[29] This finding weighs against the presence of contributing factor causation.

3. UPS's Failure to Comply with Judge Solomon's Decision and Order as Possible Evidence of Intentional Retaliation

Multiple witnesses testified that they worked in UPS's Central Plains District at the end of 2013 or in early 2014, or while Complainant worked for UPS in that District prior to 2013, and they did not receive a copy of Judge Solomon's decision in the mail. (Tr. 76, 93-94, 210; *see* Tr. 183, 360-361 (lack of recollection)). Multiple witnesses also testified that they had occasion to observe places where employee notices are customarily posted at locations within UPS's Central Plains District at the end of 2013 or in early 2014, and did not see a copy of Judge Solomon's decision posted in such places. (Tr. 32-34, 75-76, 92-93, 106-107, 122, 179-182, 209-210, 247). Joseph Brown testified that in November 2013, UPS's Central Plains District encompassed Missouri, Iowa, Arkansas, and Kansas. (Tr. 243).

Further, Brown testified that he attempted to confirm whether Judge Solomon's decision was mailed to employees or posted, but could not. (Tr. 244-247). UPS presented no evidence that it complied with Judge Solomon's decision by mailing a copy of the decision to any employee or by posting the decision in places where employee notices are customarily posted at locations within its Central Plains District. Thus, I find that UPS failed to comply with Judge Solomon's decision by failing to mail a copy of the decision to its employees as required, and by failing to post copies of the decision in places where employee notices are customarily posted at locations within UPS's Central Plains District.

CX 14 is a UPS record regarding Complainant that was generated by UPS's labor department. (Tr. 307). It states, in part: NAME: Bishop, Timothy; DATE: 6/28/11; CENTER: Earth City Feeder; TYPE: Discharge; REASON: Dishonesty; DETAILS: N/A; NOTES: Brought back to work 2014. This reference refers to UPS's termination of Complainant for the protected activity found by Judge Solomon. (*See* CX 3; CX 14). As of at least the time it discharged Complainant in 2019, UPS had not expunged this reference to Complainant's discharge for engaging in protected activity in 2011 from its personnel and labor records as ordered by Judge Solomon. (*See* CX 14).

CX 22 shows an additional "unavoidable" accident on August 10, 2018. The type of accident is described as "other." (CX 22; *see* Tr. 273).

[28] Complainant testified that he did not have any avoidable accidents between December 29, 2003, and March 16, 2019. (Tr. 147).

[29] I would have made the same finding even without consideration of the unavoidable accidents and Complainant's Circle of Honor award based solely on the lack of evidence of discrimination.

Brown loosely explained that he interprets the expungement requirement in Judge Solomon's decision as prohibiting UPS from using the record of Complainant's 2011 termination in any future employment decisions. Although he acknowledged that his answer is limited by his lack of experience, Brown believes that if a situation had to be expunged from the record, UPS would still want to keep track of any grievance filed by an employee. (Tr. 310, 343). Merely not using a labor record of Complainant's 2011 termination constitutes neither actual nor substantial compliance with Judge Solomon's decision. I find that UPS failed to comply with Judge Solomon's decision by not timely removing the reference to Complainant's discharge for engaging in protected activity in 2011 from CX 14.

UPS attempts to mitigate its failures by arguing that other drivers knew about the results of Complainant's prior STAA case without UPS posting Judge Solomon's decision. And, neither Complainant nor his counsel ever raised UPS's failures to comply with Judge Solomon's decision until the current litigation. (Resp. at 12, n. 5). But, other drivers' knowledge of the results of Complainant's STAA case did not eliminate or lessen UPS's obligation to comply with Judge Solomon's order. And, it was not the duty of Complainant or his counsel to raise UPS's noncompliance with Judge Solomon's order with UPS. UPS's attempt to mitigate its culpability rather than take responsibility for its failures is unmoving.

In my Order on Respondent's Motion for Summary Decision issued on November 4, 2020, I noted that:

> I have considered the alleged facts that UPS likely had to change its business practices, increasing its costs, as a result of Judge Solomon's Decision and Order in Bishop I, and that UPS failed to comply with Judge Solomon's Decision by not mailing copies of the Decision to its employees, not posting copies of the Decision, and not redacting information from Bishop's personnel records. These are types of implications for employers that they may not like. I infer that UPS did not appreciate such implications and that such implications provided UPS with animus towards Bishop and a motive to take adverse action against him.[30]

However, in considering a motion for summary decision, a judge must view the evidence, along with all reasonable inferences, in the light most favorable to the nonmoving party.[31] That is not required after the hearing when a judge has to weigh the evidence and make findings of fact.

I could infer from UPS's failure to comply with Judge Solomon's decision that it harbored continuing animus and hostility towards Complainant for his protected activity all the way through his discharge and grievance process in 2019. However, I could just as easily infer that UPS's failure to comply with Judge Solomon's decision was the result of indifference towards Complainant, Complainant's rights, Judge Solomon's decision, and the STAA.[32]

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[30] Nov. 4, 2020 Order.

[31] *Perez v. Citigroup, Inc.*, ARB No. 2017-0031, ALJ No. 2015-SOX-00014, slip op. at 4 (ARB Sept. 30, 2019); *Saporito v. Central Locating Services, LTD*, ARB No. 05-004, ALJ No. 2001-CAA-13, 2006 WL 535427, *3 (ARB Feb. 28, 2006) (*citing Friday v. Northwest Airlines, Inc.*, ARB No. 03-132, ALJ Nos. 03-AIR-19, 2003-AIR-20, slip op. at 3 (ARB July 29, 2005)).

[32] The term "indifference" is defined as: "1 : the quality, state, or fact of being indifferent" and "2 a : absence of compulsion to or toward one thing or another." https://www.merriam-webster.com/dictionary/indifference. The term

Based merely on the locations in which UPS operates,[33] it is obvious that UPS is a large corporation with many employees. And, I infer that there would have been a cost to UPS to mail copies of Judge Solomon's decision to its employees. However, the amounts of such cost and UPS's gross revenues and profits/losses are not in evidence. Thus, it is impossible to quantify the negative consequences for UPS by having to mail copies of Judge Solomon's decision to its employees without speculation. And, such cost adds nothing to my analysis of whether UPS's failure to comply with Judge Solomon's decision was the result of animus and hostility or mere indifference.

When considering the lack of any testimony or other evidence that UPS discriminated against Complainant from the time he returned to work at UPS on December 1, 2013, until his discharge on March 21, 2019, I find it more likely than not that UPS's failure to comply with Judge Solomon's decision was the result of indifference, and not animus or hostility towards Complainant for his protected activity. Thus, UPS's failure to comply with Judge Solomon's decision does not assist Complainant in proving that UPS held animus or hostility towards him on account of his protected activity.

This does not excuse UPS's failures. The failures were in disregard of Complainant's rights, the STAA, and the authority of Judge Solomon, OALJ, and the United States Department of Labor. And, UPS's attempts to excuse its failures only make its disregard flagrant and callous. Were it in my power to compel UPS to fully comply with Judge Solomon's order and sanction it for failing to comply with his order, I would. However, the authority to compel compliance with Judge Solomon's order is reserved to the district court.[34]

I did consider whether UPS used CX 14 against Complainant during the grievance process. Brown testified that he did not consider any prior accidents or discipline in his decision to terminate Complainant because Complainant's other accidents occurred more than 9 months before the March 16, 2019 accident or were unavoidable. (Tr. 297-298, 306, 307-310, 343). Brown further testified that although CX 14 was in his records, he did not present it to the MoKan Panel. And, although it was in Complainant's package, Brown does not know whether Complainant presented CX 14 to the MoKan Panel. (Tr. 242-243). I credit this testimony by Brown. There is no evidence that UPS used CX 14 against Complainant in the grievance process.

I also considered UPS's failure to post the decision in driver John Youngermann's STAA claim against UPS. Youngermann testified that the most recent time that UPS attempted to discharge him was on April 15, 2009. (Tr. 210-211). UPS attempted to terminate him for refusing to pull a trailer that he felt was unsafe and illegal. (Tr. 211). Youngermann brought a STAA claim against UPS and won. According to Youngermann, the decision required UPS to

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"indifferent" is defined in part as "1 a : marked by a lack of interest, enthusiasm, or concern for something," "b : marked by no special liking for or dislike of something," "5 a : of no importance or value one way or the other," and "b : of no importance or value one way or the other." https://www.merriam-webster.com/dictionary/indifferent.

[33] *See* Tr. 33 (Complainant testified that in 2013, he visited UPS centers in locations in Missouri, Kansas, and Illinois); Tr. 92 (Oklahoma and Texas); Tr. 243 (Iowa and Arkansas); Tr. 304 (The UPS Joint Area Committee hears cases out of the entire central region: Colorado, Kansas, North Dakota, South Dakota, Missouri, Minnesota, Iowa, Michigan, Ohio, and Wisconsin, part of Kentucky, and Indiana).

[34] 29 C.F.R. § 1978.113.

post the decision for 90 days. Youngermann and UPS feeder driver Andre Murphy testified that they never saw a copy of the decision posted at UPS. (Tr. 76, 223-224). UPS feeder driver Sue Steininger testified that she did not recall seeing a decision in *John Youngermann v. UPS* posted at a UPS facility. (Tr. 183). I credit the foregoing testimony by Youngermann, Murphy, and Steininger. I find that UPS was required to post a copy of the decision in Youngermann's case against it and did not. Such failure is further evidence of UPS's flagrant and callous indifference, but does not persuade me that UPS had any hostility or animosity towards Complainant or his protected activities.

4. Respondent's Knowledge of Complainant's Protected Activity; and No Retaliatory Motive or Animus

Brown testified that he, Bradshaw, and division manager Todd Hyden were involved in the decision to terminate Complainant in 2019, and the decision not to bring him back to work at UPS during his grievance process. (Tr. 236, 287-288, 295, 334-335, 339-344). Bradshaw testified that he involved Brown and Hyden in the decision to terminate Complainant and they all participated in Complainant's local level hearing. (Tr. 373-374, 376). Brown and Bradshaw acknowledged being aware of Complainant's previous STAA claim before terminating his employment. Bradshaw even testified in *Bishop I*. (Tr. 239, 351, 359-360). I find that Brown, Bradshaw, and Hyden were involved in the decision to discharge and not rehire Complainant in 2019. I further find that Brown, Bradshaw, and UPS had knowledge of Complainant's protected activities before terminating and not rehiring him in 2019.

Nonetheless, neither Brown nor Bradshaw were involved in the decision to terminate Complainant's employment in 2011. (Tr. 308, 320, 390-391). There is no evidence that Brown, Bradshaw, or Hyden had any personal interest in Complainant's termination in 2011, or his reinstatement with UPS in 2013. There is no evidence that they treated Complainant with any hostility or animosity, or otherwise discriminated against him from his return to UPS in 2013 until his discharge in March 2019. And, there is no evidence that they had any hostility towards or motive to retaliate against Complainant for his protected activity. For instance, there is no evidence that their salaries, any bonus, benefit, or stock, or their pensions, positions, or opportunities to advance at UPS were threatened or adversely affected in any way by Complainant's protected activity.

There was testimony that, in accordance with Judge Solomon's decision, UPS changed its policy regarding how feeder drivers record their time waiting for other drivers. (*See* Tr. 363). I credit such testimony. Complainant argues that this "undoubtedly cost[UPS] millions of dollars." (Br. at 30). There is no evidence regarding how much this change cost or will continue to cost UPS. However, even assuming it cost and will continue to cost UPS a significant amount of money, there is no evidence that this change had any effect on Brown, Bradshaw, or Hyden.

Youngermann testified that Bradshaw was involved in his termination in 2009. (Tr. 211). Complainant testified that he was also terminated in 2009, and then rehired. Complainant testified he was terminated in 2009 by Bradshaw for the same protected activity for which he was discharged in 2011. (Tr. 36-37). I credit Youngermann's and Complainant's testimony on these points.

Complainant argues that "UPS' Earth City management had animus toward STAA protected activity. It fired Mr. Bishop (twice) for engaging in protected activity, and fired John Youngermann, in 2009 for refusing to operate a tractor-trailer set without working taillights and side marker lights at night." (Br. at 30-31). Had Complainant presented evidence that UPS terminated a driver for the specific conduct determined to be protected activity in *Bishop I* or in Youngermann's STAA case after the respective decisions were issued in those cases, his argument would be more persuasive. The absence of such evidence undercuts Complainant's argument. Further, Youngermann testified that he suffered no adverse actions from UPS for testifying for Complainant in *Bishop I* over 7 years ago, and I find that to be the case. (Tr. 232). I further find that the evidence of UPS's prior terminations of Complainant and Youngermann, including Bradshaw's involvement in those discharges, does not establish that UPS or its management had hostility or animus towards Complainant's STAA protected activity after UPS brought Complainant back to work in 2013.

Based on the foregoing and the record, I find that UPS, including Brown, Bradshaw, and Hyden had no animus or motive to discriminate or retaliate against Complainant, after he returned to work at UPS in 2013, for his protected activity.[35]

5. UPS Subjected Complainant to Disparate Treatment

There is a significant amount of testimony and documentary evidence in this case devoted to how UPS treated other drivers involved in serious accidents. Bradshaw testified that UPS managers have some discretion in determining the level of discipline that is imposed on UPS employees. (Tr. 358). But,

> It's district policy whenever it meets that criteria, you pull from service and then terminate. And then from there it's decided, pushing forward, but that is the first steps.

(Tr. 389). When asked whether a UPS manager could decide not to terminate someone involved in a serious accident, Brown responded: "I guess you could, but that meets the elements [of a serious accident] so to stay in line with the contract that's been negotiated, that's what we do." (Tr. 287).

Also, according to Brown, there is no hard and fast rule applied in determining whether to bring a discharged employee back to work. A driver's seniority is sometimes taken into account, as well as the driver's overall safety record, and whether the employee is a Circle of Honor driver. (Tr. 269-271, 278-279). Brown looks back only 9 months at past crashes. (Tr. 279, 296-297).

[35] Judge Solomon issued his decision in *Bishop I* before the Eighth Circuit issued its decision in *Kuduk*. Judge Solomon did not address whether UPS had retaliatory or discriminatory motive or animus. Assuming Judge Solomon's decision in *Bishop I* necessarily implicates a finding of retaliatory motive or animus in that case, such a finding does not require me to conclude that any discriminatory motive or animus continued after UPS brought Complainant back to work.

Complainant argues that UPS drivers Sue Steininger, Ronald Robinson, and Andre Murphy were similarly situated to Complainant and all treated more favorably than him after having serious accidents. (Br. at 31-33). And, driver Cecil Samson and a driver with a brain tumor were treated more favorably than Complainant after suffering medical conditions. (Br. at 33). Complainant further argues that he should not have been treated the same as Paul Henderson, Brent Johnson, Sandra Mance, and David Brawley, that is to say terminated and not rehired, because there were better reasons not to rehire those individuals as compared to Complainant. (Br. at 34). Respondents counter that the comparator situations used by Complainant either were not "serious at-fault accidents" or were less problematic than Complainant's accident, and other similarly situated drivers were treated the same as Complainant. (Resp. at 20).

a. Evidence Regarding Sue Steininger

Sue Steininger testified as follows:

> She worked as a feeder driver for UPS for approximately 23 ½ years. She retired on March 1, 2020. She had an accident on December 5, 2017. She was driving approximately 65 or 70 mph. She looked down at a text on her phone. When she looked up she collided with the rear of a tractor-trailer that was traveling slower than her. She was issued a citation by law enforcement and her tractor-trailer had to be towed from the scene. Daryl Bradshaw took her out of service after the accident for about three weeks. She returned to work after completing additional safety training. Previously, she had accidents at UPS on January 3, 2012, and November 5, 2005, which UPS determined were avoidable. In total, she had four avoidable accidents at UPS prior to December 5, 2017. She was fired for one of the prior accidents, but UPS rehired her. (Tr. 155-176, 184-186).

CX 11 includes records of UPS's investigation of Steininger's December 5, 2017 accident and corroborates her testimony, except that it shows she had 8 avoidable accidents before December 5, 2017. (CX 11 at 2). I find Steininger to be a credible witness.

Brown testified that he was told by people in management that Sue Steininger was texting during her December 5, 2017 accident. (Tr. 268-269). He further testified that the difference between Complainant's accident and Steininger's accident is that:

> [I]n Sue's cases she talked about yesterday, you know, she was awake and was completely aware of what she was doing. She just took her eyes off the road and ended up running into the back of another vehicle. You know, the problem with Tim's case and the problem with Tim is that he's driving down the road and is completely unconscious when he falls asleep and he's just free wheeling down the highway and ends up having a crash. And that's a dangerous situation. So it doesn't – that's why it's different.

(Tr. 318).

Similarly, Bradshaw testified that Steininger's situation differed from Complainant's as follows:

> Sue was distracted. She looked down. It could happen with a radio or with looking at a text. You shouldn't do it, but she did. But she was in control, behind the wheel. She was awake. She was cognizant of what was going on versus Tim was not cognizant and was not in control of the equipment at any time during this accident.

(Tr. 398-399). According to Bradshaw, Steininger's discharge was reduced to a suspension. (Tr. 400). But, Bradshaw did not request a discipline letter be issued to Steininger and was never made aware that such a letter was issued. (Tr. 412-413).

b. Evidence Regarding Ronald Robinson

According to CX 10, UPS driver Ronald Robinson had a hire date at UPS of July 24, 1975, and a job start date of April 10, 1995. He crashed his tractor trailer into the rear of another tractor trailer on May 17, 2017. Law enforcement cited him for the accident and the vehicles required towing from the scene. Robinson had multiple, prior avoidable accidents on his UPS accident record, including one from April 25, 2017. UPS determined that the May 17 accident was avoidable. (CX 10 at 1, 2, 19, 26, 36). UPS terminated Robinson "pursuant to Article 17 (d) of the Central Regional Teamsters/UPS Supplemental Agreement and Article 18, Section 3 of the National Master UPS Agreement for [his] involvement in a serious accident on May 17, 2017." (CX 10 at 22). Brown testified that UPS discharged Robinson for a serious crash and then his discipline was reduced at the local level hearing on May 26, 2017, to a one-month suspension. (Tr. 248-250).

According to CX 10, Robinson had 5 avoidable accidents while driving for UPS before the May 2017 accident, including 2 avoidable accidents within 9 months before the May 2017 accident. (CX 10 at 2).

According to Brown, the difference between Complainant's accident and Ronald Robinson's accident is that:

> Robinson . . . anticipated that the driver in front of him was going to go so Ron could advance, and he claims that when you read his statements that he look left and he look up, and all of sudden, which he thought the guy was moving, wasn't moving, and Ron ran into the back of him. And in both cases, in Sue and in Ron's, both of the people are awake and they're making decisions to where, oh, you know, they ran into the back of somebody. But again, in Tim's case it's completely different because he is not awake and not cognizant of what's going on.

(Tr. 319).

c. Evidence Regarding Andre Murphy

According to CX 12, UPS discharged feeder driver Andre Murphy "effective February 13, 2018, pursuant to Article 17 (d) of the Central Regional Teamsters/UPS Supplemental Agreement and Article 18, Section 3 of the National Master UPS Agreement for [his] involvement in a serious accident on February 7, 2018." (CX 12 at 1).

Murphy testified as follows:

> He is a feeder driver and has been employed by UPS since September 16, 1988. He received a discharge letter from UPS in February 2018 for a serious accident on February 7, 2018. He was cited for the accident for excessive speed on a ramp, his trailer suffered disabling damage, and there was a tow involved. There were icy conditions and he slid into the rear of a trailer that was illegally parked. He was awake and in control of his vehicle the entire time, until he hit the ice. He grieved his termination. It was settled at the local level and UPS rehired him. He had four prior accidents with UPS before then. He was first fired for an accident by UPS in 2001 or 2002. That was a serious accident also. UPS rehired him after the 2001 or 2002 termination. He has never brought a case against UPS. (Tr. 70-74, 77-78, 86-88; *see* Tr. 359).

I find Murphy to be a credible witness.

Brown testified that the difference between Complainant's accident and Murphy's accident is that:

> [Murphy is] coming down the road, he's got to go to the restroom really bad, and he gets on the exit ramp and ends up hitting a patch of ice which causes him to slide. And he even said, you know, I was in control until that point and hit ice, and then once he got traction, he was able to stop. In the Bishop case, Tim didn't have any opportunity to be alert or make adjustments or brake or anything until after he was in the median. That's the difference.

(Tr. 319). Similarly, Bradshaw testified that Murphy's situation differed from Complainant's as follows:

> Again you have factors that went into Andre's or Mr. Murphy's case whereas he was in control of the tractor up to the point that he hit the ice. He was aware. He was cognizant of what was taking place. And he did gain control of the equipment, but it was too late to avoid the trailer at the end. Whereas, Mr. Bishop's case, he was not cognizant as I stated before with the (audio drop) himself and Ms. Steininger's case, you know, to where he was not in control of the equipment until the cable brought him to a stop.

(Tr. 401-402).

d. Evidence Regarding Lorinda Bextermueller

According to CX 7, UPS driver Lorinda Bextermueller had a hire date at UPS of January 1, 1986. She had an avoidable accident on April 14, 2014 (CX 7 at 2). Brown testified that UPS discharged her for a serious accident, but her discharge was reduced to a suspension. (Tr. 267-268). The accident did not involve another vehicle. (CX 7 at 2). Bextermueller had prior avoidable and unavoidable accidents, including avoidable accidents on September 26, 2013, and December 3, 2013. (CX 7 at 3-4).

e. Evidence Regarding Paul Henderson, Brent Johnson, Sandra Mance, and David Brawley

According to RX 13, UPS terminated Paul Henderson "effective December 15, 2014, pursuant to Article 17 (d) of the Central Regional Teamsters/UPS Supplemental Agreement and Article 18, Section 3 of the National Master UPS Agreement for [his] involvement in a **severe** accident on December 12, 2014." (RX 13 at 6 (emphasis added)). Henderson was an inside UPS employee driving seasonally. (RX 13 at 4). He had a prior avoidable accident. (RX 13 at 16). Brown testified that UPS terminated Henderson for a serious crash and the termination was upheld. The accident involved multiple vehicles and a party that required medical treatment. (Tr. 327-328; *see* RX 13).

Correspondence from UPS dated January 13, 2014, advises UPS package car driver Brent Johnson of his termination "pursuant to Article 17 (d) of the Central Regional Teamsters/UPS Supplemental Agreement for [his] involvement in a **severe** accident on January 10, 2014." (RX 12 at 6; *see* RX 12 at 4 (emphasis added)). Brown testified as follows: UPS terminated Johnson after a serious accident on January 10, 2014, in which Johnson failed to clear an intersection and drove into another vehicle. The other vehicle's occupant required medical treatment at an emergency room. The case was deadlocked at the local level and the MoKan denied the union's claim. (Tr. 324-326; RX 12).

According to RX 14, UPS terminated full-time driver Sandra Mance "effective June 15, 2015, pursuant to Article 17 (d) of the Central Regional Teamsters/UPS Supplemental Agreement and Article 18, Section 3 of the National Master UPS Agreement for [her] involvement in a **severe** accident on June 11, 2015." (RX 14 at 7; *see* RX 3-4 (emphasis added)). RX 14 also describes this accident as a "serious accident." (RX 14 at 4). The driver of the other vehicle involved in the accident sought immediate medical treatment away from the scene. (RX 14 at 4). Brown testified that this was a serious crash because Mance received a ticket and there was towing from the scene. (Tr. 328). Mance was not rehired at the local level hearing; her termination was sustained. (Tr. 238-329).

Brown testified that UPS terminated package car driver David Brawley for a serious accident. Brawley was not paying attention and caused a multi-vehicle accident; people were treated at a hospital. UPS did not change his termination at the local level and the MoKan denied his claim. (Tr. 321-324; RX 11). According to RX 11, the serious accident occurred on April 10, 2017. (RX 11 at 3).

Brown further testified that the terminations of Brawley, Johnson, Henderson, and Manse demonstrate that there are cases where UPS drivers involved in serious accidents are terminated

and such decision is not changed at the local level. Brown does not know whether any of these drivers ever filed STAA claims. (Tr. 329).

Paul Henderson and David Brawley had hire dates at UPS of October 13, 2003, and December 5, 1994, respectively. (RX 13 at 7; RX 11 at 39). Brent Johnson had an injury while employed by UPS on January 2, 2007. I infer that he was hired by UPS on or before such date. And, Sandra Mance had a seniority date at UPS of September 26, 1994, which I infer is close to her hire date. (RX 14 at 2).

f. Evidence Regarding Cecil Samson

Bradshaw testified that a UPS driver, Cecil Samson,

> was actually driving down the road and he passed out. Had some medical condition that caused him to pass out. He had no awareness as to what it was. Looking at the tach, he never applied the breaks [sic]. Came to a total stop traveling 700 yards, you know, down an incline into a bean trail and came to a stop and was woke up by a farm. He was sitting in the middle of the field. At that point. [sic] and there was no way that I could take and put him behind a tractor trailer wheel, you know, without getting looked at professionals to say that he was safe to drive.

(Tr. 403). Bradshaw further testified that he has had other drivers present with medical conditions such as a heart attack, eye condition, and brain tumor. They had to be cleared by a physician approved by UPS before they could continue to drive. (Tr. 403-404). UPS takes drivers who are not medically qualified to operate vehicles out of service until the medical condition is treated, and a medical professional certifies their fitness to drive. (Tr. 385-386, 404).

g. The National Master United Parcel Service Agreement

The effective period of The National Master United Parcel Service Agreement (NMUPS Agreement) and the Teamsters Central Region and United Parcel Service Supplemental Agreement to the National Master United Parcel Service Agreement, in evidence as JX 2, JX 3, and RX 4, is August 1, 2018 through July 31, 2023. (JX 2 at 1; JX 3 at 1; Tr. 283). The NMUPS Agreement in effect starting August 1, 2018, defines a "serious accident" as one that involves certain alternative circumstances, including one in which:

> A citation is issued and one or more motor vehicles incur disabling damage as a result of the accident requiring a vehicle to be transported away from the scene by a tow truck or other vehicle.

(RX 4; *see* Tr. 283-284). The exact language, including the definition of the term "serious accident" in union contracts in effect before August 1, 2018, is not in evidence. However, Brown testified that the history of the NMUPS Agreement "has varied between a three-year window and a five-year window. Most recently five-year windows for the past three negotiated items." (Tr. 283).

h. Findings Regarding Disparate Treatment

Based on the foregoing and the record, I find the following regarding whether UPS treated Complainant differently than other similarly situated drivers:

1. It is the policy of the UPS district in which Complainant was employed that UPS drivers are terminated for serious accidents, but the district does not always follow that policy. UPS managers have discretion in determining whether to discharge drivers that cause serious accidents and whether to rehire drivers that it has discharged for causing serious accidents. In deciding whether to rehire a driver, the driver's seniority, overall safety record, and whether the driver is a Circle of Honor driver are sometimes taken into account.

2. Based on the circumstances of Murphy's February 7, 2018 accident, Robinson's May 17, 2017 accident, UPS's classification of these accidents as serious accidents under the contracts, and Brown's testimony regarding the history of the contracts, I find that an accident in which "[a] citation is issued and one or more motor vehicles incur disabling damage as a result of the accident requiring a vehicle to be transported away from the scene by a tow truck or other vehicle," constituted a serious accident under the NMUPS Agreement in effect from August 1, 2013 through July 31, 2018. Further, based on RX 14 and Brown's testimony, I find that the terms "serious accident," "severe accident," and "serious crash" are used interchangeably by UPS to refer to a "serious accident" as that term is defined in the NMUPS Agreement. (*See* RX 14 at 3-4, 7; Tr. 238).

3. Sue Steininger had worked as a feeder driver for UPS for approximately 21 years before she caused a serious accident in December 2017. She had multiple avoidable accidents while driving for UPS prior to December 2017, but none within 9 months before the December 2017 accident. UPS did not terminate Steininger for the December 2017 serious accident.

4. Steininger was similarly situated to Complainant in that they both had over 20 years of employment with UPS at the time of their serious accidents and did not have any avoidable accidents on their record in the 9 months before such serious accidents. Further, there is no evidence that any other party involved in their accidents required medical treatment.

5. UPS treated Complainant differently and less favorably than Steininger because it terminated his employment, purportedly for a serious accident, but did not terminate Steininger for her serious accident.

6. Ronald Robinson had worked for UPS for approximately 42 years before he caused a serious accident in May 2017. He had multiple avoidable accidents while driving for UPS prior to May 2017, including 2 avoidable accidents within 9 months before the May 2017 accident. UPS terminated Robinson for the May 2017 serious accident and then rehired him.

7. Andre Murphy had worked for UPS for approximately 29 years before he caused a serious accident in February 2018. He had four prior accidents with UPS, including a serious accident in 2001 or 2002, for which UPS terminated and then rehired him. UPS terminated Murphy for the February 2018 serious accident and then rehired him.

8. Lorinda Bextermueller had worked for UPS for approximately 28 years before having a serious accident in April 2014. She had multiple prior avoidable accidents while driving for UPS, including 2 avoidable accidents within 9 months before the April 2014 accident. UPS terminated Bextermueller for the April 2014 serious accident and then rehired her.

9. Robinson, Murphy, and Bextermueller were all similarly situated to Complainant in that they all had over 26 years of employment with UPS before their aforementioned serious accidents and they were all discharged for such serious accidents. Further, there is no evidence that any other party involved in their accidents required medical treatment.

10. UPS treated Complainant differently and less favorably than Robinson, Murphy, and Bextermueller because it rehired all of them, but did not rehire Complainant. This is especially true in light of the fact that Robinson and Bextermueller each had 2 avoidable accidents within 9 months before their serious accidents and Complainant had none within 9 months before his serious accident.

11. Henderson, Johnson, Mance, and Brawly were all similarly situated to Complainant in that they were all terminated by UPS for serious accidents and not rehired during their grievance processes. Further, Mance and Brawly had long employment histories with UPS like Complainant.

12. UPS did not treat Complainant differently than Henderson, Johnson, Mance, and Brawley in that it did not rehire any of them.

13. Steininger, Robinson, Murphy, Bextermueller were all more similarly situated to Complainant than Henderson, Johnson, Mance, and Brawly because there is no evidence that any other party in Steininger's, Robinson's, Murphy's, Bextermueller's, or Complainant's serious accidents required medical treatment. Whereas Henderson's, Johnson's, Mance's, and Brawly's serious accidents all involved other parties requiring medical treatment.

14. There is no evidence that Cecil Samson was involved in a serious accident after passing out. Further, there is no evidence that UPS was aware that Complainant had or may have sleep apnea, a medical condition, before discharging him in March 2019. Samson and Complainant were not similarly situated employees.

15. There are exhibits and testimony regarding other UPS drivers, like Gerald Thomas, Paul Hon, Michael Kapp, Christopher Jaycox, Terry Baumgarte, and Wayne Rodgers, receiving discipline or being involved in accidents, but there is insufficient evidence in the record that they were involved in "serious accidents" as that term is defined by the NMUPS Agreement in effect at the time of those accidents or that their situations were substantially similar to Complainant's. (*See* CX 5; CX 6; CX 8; CX 9; CX 13; RX 15; Tr. 96, 103-108, 265-267, 329-334, 363-364).[36]

[36] Retired UPS feeder driver James Bivens testified about driving with on-the-road driver supervisor Shannon Stephens and her talking about another UPS driver, Wayne Rodgers, who was tired and had an accident. (Tr. 94, 96, 2013-106, 108). Shannon Stephens testified that she had no information that Rodgers had called UPS saying he felt tired or that

16. There is no evidence that Steininger, Robinson, Murphy, Bextermueller, Henderson, Johnson, Mance, Brawly, or Samson have been involved in protected activity under the STAA.

17. Based on the foregoing, UPS treated Complainant differently than similarly situated drivers with no history of protected activity under the STAA.

Although I have considered Respondents' explanations for treating Steininger, Robinson, and Murphy differently than Complainant (i.e. Complainant was not cognizant or in control during his accident while the other drivers allegedly were), the explanations do not diminish the similarities among these drivers or their situations. Rather, the explanations are pertinent to the reason why UPS treated Complainant differently than Steininger, Robinson, and Murphy, which is discussed below.

6. UPS's Purported Reason for Terminating Complainant's Employment Is Not Pretextual or Unworthy of Credence

Brown and Bradshaw testified that they decided to terminate Complainant because his motor vehicle accident on March 16, 2019, constituted a "serious accident." (Tr. 236, 280-286, 339, 373-374). As stated above, the NMUPS Agreement defines a "serious accident" as one that involves certain alternative circumstances, including one in which:

> A citation is issued and one or more motor vehicles incur disabling damage as a result of the accident requiring a vehicle to be transported away from the scene by a tow truck or other vehicle.

(RX 4; *see* Tr. 283-284). Brown testified that the accident was a "serious accident" because law enforcement issued Complainant a citation for the accident and his vehicle suffered disabling damage such that it had to be towed from the scene. (Tr. 284-286; *see* Tr. 40-41; RX 2; RX 3; RX 4). Complainant agrees that his March 16, 2019 accident was a "serious accident" as defined by the National Master Union Agreement. (Br. at 10-11).

After UPS discharged Complainant, he grieved his termination at three levels of hearings described by the stipulations above. Brown testified that at the first or local level hearing, Complainant told him that Complainant "had caught himself getting sleepy and pulled over to rest." (Tr. 277; *see* Tr. 294). Brown testified:

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such tiredness resulted in him having an accident. Stephens does not recall having a conversation with Bevins in which she "told him that Mr. Rodgers was in an accident and that he admitted that he had fallen asleep and that's what caused the accident." (Tr. 422). Brown testified about Rodger's accident. He testified that according to UPS's investigation, the accident was caused by a blown tire and UPS deemed it unavoidable. Further, the investigation did not indicate that Rodger's fell asleep. (Tr. 329-334; RX 15). UPS's records show the accident as being classified avoidable and unavoidable. (Compare RX 15 at 1, 16, with RX 15 at 10). The records do not indicate that Rodgers was tired or fell asleep before or during the accident. (*See* RX 15). I find that Rodgers did not fall asleep immediately before or during the crash; UPS did not determine that he was involved in a serious accident; and his situation is not similar to Complainant's.

> Q. And did Mr. Bishop tell you or say that, you know, he had previously caught himself either feeling like he was falling asleep or that he needed to pull over previously to this accident?
> A. He did. I had asked him if he's ever fallen asleep before and he says, I've dozed off before, and when I did, I would pull over, and in fact he took a nap the same night this happened.

(Tr. 294-295). Brown further testified that Complainant explained he fell asleep, he did not burn the candle at both ends, and he did not think he had sleep apnea. According to Brown, Complainant then stated that maybe he does have sleep apnea; he went to a doctor and had a sleep test scheduled for the day after the local level hearing. (Tr. 292).

Brown testified that he did not take into account the fact that Complainant was a Circle of Honor driver because that was not relevant. It was not relevant because:

> [I]n this case, Tim Bishop fell asleep. When we went through all the facts, I mean, when I'm looking at it and Tim's driving down the road, has already admitted that he has dozed off before and had taken a nap previously and still continues to drive and falls asleep.
>
> It was just I couldn't see -- the company can't tolerate that kind of behavior when that happens, because we can't have drivers falling asleep at the wheel like this. It's too dangerous. But it sounds (audio drop).

(Tr. 317-318). According to Brown, he, Bradshaw, and Hyden decided at the local level hearing that their termination decision was good because,

> when an individual falls asleep on the job, it's a very dangerous situation. And Tim hadn't taken any steps to try to rectify that until he got terminated. And the problem was is that we didn't feel comfortable putting him back on the road in a reduced manner, and we felt this is a dischargeable offense. We're not going to put him on and risk the safety of himself and other people.

(Tr. 343).

Similarly, Bradshaw testified that at the local level hearing, Complainant "had said that he was also reiterated that he had trouble, you know, prior to the dozing off, falling asleep, and that he had seen or had an appointment to go see somebody for testing . . . ." (Tr. 377). According to Bradshaw,

> Q. What [Complainant] said was that he dozed off sometimes or got sleepy and pulled over to park. Isn't that what he said?
> A. He did say that he --

Bradshaw testified that at the local level hearing, he, Brown, and Hyden discussed Complainant's request for a suspension instead of termination:

> [B]ased upon the case and my personal feelings with it was I could not with a clear conscious say that we could put him back with him having the existing problems that he's had, you know, falling asleep. I was not prepared to take and make that case or make that choice to agree with putting him back. And I think, I can't speak for them, but I know they did say that they did not feel comfortable putting him back as well. He didn't address his problem until this actually had happened. And he had said that he had been fighting this and it had been a problem where in the past I guess he had pulled over and went to sleep, which is a good thing. You know, we encourage our drivers to take -- any time they're having issues like that, they should do that.
>
> * * *
>
> In this case, speaking for myself, and I know we had the discussion, I did not feel comfortable letting Tim behind the wheel with him having a condition where he was falling asleep admittedly and not having done anything to address that. And making that appointment, he was getting himself -- he had made an appointment for the following day, but still had not addressed what was causing him to fall asleep. And I could not with a clear conscious put him behind the wheel of a tractor.
>
> * * *
>
> We discussed this case and we discussed Tim and his sleeping, not having control of the equipment. We discussed as how relevant that was to the case. I know that I expressed that I would not feel comfortable putting somebody with that unaddressed condition behind the wheel of a 70,000 pounds of equipment traveling down the highway.
>
> I know that Tim had said during the hearing, and we discussed that, that he had an appointment for the following day to see if he had sleep apnea and to get his situation addressed. So that all came in, but yes, we did discuss it. And Joe ultimately made the decision as to what we were going to do to, you know, uphold the termination or deadlock it and send it to the next level.

(Tr. 378-379, 381-383).

Bradshaw explained the difference between Complainant's case of falling asleep at the wheel and cases of distracted driving as follows:

> JUDGE GOLDEN: Okay. And why do you consider Mr. Bishop's case of falling asleep at the wheel different than distracted driving?
> THE WITNESS: Because at no time was he cognizant of what was taking place.

> JUDGE GOLDEN: And is that -- I guess I don't really understand that because, you know, you can be distracted for a second, you could be distracted for a half a minute, depending on what you're doing. So is it just a length of time sort of thing that's important to you? I'm trying to understand why that distinction is important to you.
> THE WITNESS: I think the distinction lies in that a distraction can be, can be anything to your point. You know, you can look down at the radio to change a station, you look back up and you have an accident. Whereas, you know, if somebody has a condition that would affect their driving long term to where they're actually falling asleep behind the wheel admittedly and loosing total control, there's a big difference in that. Whereas, I don't know how I could fix that versus I know that with somebody that has distracted driving, you can fix them, eliminating changing the station on the radio or --

(Tr. 407-408).

Complainant admits telling Brown and Bradshaw that he had become sleepy while driving and pulled off the road to rest on prior occasions, but denies telling them that he had fallen asleep while driving on prior occasions. (Tr. 38-39, 124-126). Complainant denies telling them that he had sleep apnea. He does not recall telling them he had an ongoing issue with feeling tired. (Tr. 128).

Brown testified that there was no discussion of Complainant's prior STAA claim while making the decisions to terminate and not rehire him. (Tr. 295, 334-335, 343-344; *see* Tr. 288, 305). Brown testified that they did not take the decision in Complainant's prior STAA claim into account in making the decision to terminate his employment. And, they did not discuss the decision in Complainant's prior STAA claim during the meeting at the local level hearing. (Tr. 295, 334-335, 343-344; *see* Tr. 288, 305). Similarly, Bradshaw testified that they did not discuss Complainant's prior STAA claim and did not take it into account in deciding to terminate him. (Tr. 374; *see* Tr. 378-379). There is no direct evidence that contradicts Brown's and Bradshaw's testimony regarding not discussing or considering Complainant's prior STAA claim.

a. Complainant's, Joe Brown's, and Daryl Bradshaw's Credibility and the Credence of Their Explanations

With respect to the contradictory testimony regarding whether Complainant told Brown and Bradshaw that he had fallen asleep while behind the wheel prior to March 16, 2019, based on Complainant's and Bradshaw's testimony, I find that Complainant did not tell Brown or Bradshaw that he had fallen asleep while behind the wheel before March 16, 2019. Nonetheless, I do not discredit Brown's testimony based on his differing recollection of what Complainant stated. The differences in the tenses between "falling asleep" and "fallen asleep" or "dozing off" and "dozed off" are too similar to conclude that Brown is dishonest or a poor historian of events.

Moreover, I will not upset UPS's decision regarding not rehiring Complainant solely because Brown was mistaken about what Complainant told him. In *Kuduk*, the Eighth Circuit pronounced that in the absence of evidence connecting a complainant's protected activity to the

adverse action taken against him, a complainant is not entitled to anti-retaliation relief in an FRSA case if the respondent inaccurately concludes that the complainant committed the act for which he was disciplined.[37]

I closely observed Complainant, Brown, and Bradshaw testify by video. Brown and Bradshaw wore face masks that covered their mouths and noses during most of their testimony because they were in the same room together. Complainant did not wear a mask while testifying. All 3 witnesses' visual depictions and audio were clear enough for me to make credibility determinations based on my observations of them while testifying. I observed nothing that led me to question their credibility.

On cross examination, Bradshaw admitted that his deposition testimony regarding what he, Brown, and Hyden discussed at the local hearing was incomplete: "I was really nervous so I'm sure I probably could have added more. I'm not for sure what, but I did say that we did discuss the reduction and what was involved with it. So I just elaborated a little bit more today." (Tr. 414-416). This explanation pertains to whether they discussed Complainant's possible sleep apnea or just his loss of control as the reason for not rehiring him. (*See id*.) I find that Bradshaw's omission during his deposition was not so great as to discredit his explanation at hearing for why UPS did not rehire Complainant.

In and of itself, UPS's explanation that it did not rehire Complainant because he was not cognizant and lost complete control of his tractor trailer during his serious accident, and he had a preexisting problem with becoming sleepy while driving is reasonable. However, when compared to the comparator cases of Steininger, Robinson, and Murphy, UPS's explanation makes less sense. Similar to Complainant, Steininger, Robinson, and Murphy were all incognizant and lost control of their vehicles during their serious accidents. Similar to Complainant, they all made bad decisions that resulted in them losing control of their vehicles, e.g., looking at a phone, not paying attention to traffic, and exiting a highway ramp at a speed excessive for conditions.[38] But, if UPS was measuring the lack of cognizance of all these drivers, which I believe it was, albeit inarticulately, it could reasonably conclude that a sleeping driver is far less cognizant than a driver distracted by something else.

At the end of the day, "'federal courts do not sit as a super-personnel department that re-examine[]' an employer's disciplinary decisions."[39] Complainant testified that a tractor-trailer can have a gross weight of 80,000 pounds. You have to be very careful and safe when driving them. Falling asleep at the wheel of such a vehicle would be extremely dangerous. (Tr. 150-151). Although the distinction UPS makes between Complainant's serious accident and those of Steininger, Robinson, and Murphy is weak, it is not so weak that it is unworthy of credence or pretextual. And, UPS's explanation is worthy of even more credence when considering its purported concern that Complainant had a preexisting sleeping problem that he had not attempted to take care of before his serious accident.

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[37] *Kuduk*, 768 F.3d at 792.

[38] Complainant's bad judgement was not exiting the highway and resting for a sufficient amount of time when he became tired.

[39] *Id*. (quoting *Kipp v. Mo Highway & Transp. Comm'n*, 280 F.3d 893, 898 (8th Cir. 2002)).

b. Additional Findings Regarding Lack of Pretext

With respect to whether UPS's explanation for terminating and not rehiring Complainant is pretextual or unworthy of credence, I find as follows:

1. Complainant, Brown, and Bradshaw were all credible witnesses.

2. Complainant's March 16, 2019 accident was a "serious accident" as defined by the NMUPS Agreement in effect at the time.

3. The UPS district in which Complainant was employed terminates most drivers who cause "serious accidents," as that term is defined by the NMUPS Agreement. (*See* Section IV.C.5 above).

4. The UPS managers who decided to terminate and not rehire Complainant did not discuss or take into account his prior STAA claim, or the judge's decision on that claim in deciding to terminate and not rehire Complainant.

5. Respondents terminated Complainant's employment for causing a "serious accident" as that term is defined in the NMUPS Agreement.

6. Complainant did say something to Brown and Bradshaw that they could have reasonably interpreted as meaning that Complainant had a preexisting problem with becoming sleepy while driving.

7. Respondents decided not to rehire Complainant because he was not cognizant and lost complete control of his tractor trailer during his serious accident, and they reasonably believed he had a preexisting problem with becoming sleepy while driving.

8. The reason given by UPS for terminating Complainant's employment was neither pretextual nor unworthy of credence.

9. The reason given by UPS for not rehiring Complainant was neither pretextual nor unworthy of credence.

10. UPS did not treat Complainant differently than similarly situated drivers, by discharging and not rehiring him, because of his protected activities.

7. Conclusion Regarding Contributing Factor Causation

The lack of close temporal proximity between Complainant's protected activities and the adverse actions against him; the lack of discrimination or retaliation against Complainant between his return to work in December 2013 and his termination in March 2019; the lack of retaliatory motive or animus by Respondents; and the creditable and non-pretextual explanation for UPS's decisions to terminate and not rehire Complainant all weigh against a finding of contributing factor causation. Although I did find that UPS subjected Complainant to disparate

treatment, I further found that such disparate treatment did not result from Complainant's protected activities. Thus, the fact that UPS treated Complainant differently than similarly situated drivers with respect to its decisions to terminate and not rehire him does not merit a finding of contributing factor causation.

I found that UPS displayed indifference and disregard for Complainant's rights, the STAA, and the authority of Judge Solomon, OALJ, and the United States Department of Labor when it failed to post and distribute Judge Solomon's decision in *Bishop I*, and by failing to expunge Complainant's labor records of his 2011 termination. Further, I found that such indifference and disregard were flagrant and callous because of UPS's attempts to unjustifiably excuse its failures. However, I did not find that such indifference and disregard demonstrated any animosity or hostility by UPS against Complainant for his protected activity. Thus, UPS's indifference and disregard does not merit a finding of contributing factor causation.

Although I concluded that the Eighth Circuit requires a finding of retaliatory motive or animus to prevail on a whistleblower claim under the STAA, I base my decision in this case on all the factors discussed above, not solely the absence of retaliatory motive or animus. And, I have given the absence of retaliatory motive or animus no greater weight in my analysis than any other factor. Indeed, the two factors that I find most persuasive are the lack of close temporal proximity between Complainant's protected activities and the adverse actions against him, and the lack of discrimination or retaliation against Complainant between his return to work in December 2013 and his termination in March 2019.

Based on the foregoing, I find that Complainant has failed to prove by a preponderance of the evidence that his protected activities were a contributing factor in Respondents' adverse actions against him.

D. CONCLUSION

Although I have concluded that Complainant engaged in protected activity under the STAA while employed by UPS and subsequently suffered adverse personnel actions, I have further found that Complainant has failed to demonstrate contributing factor causation, which is a required element of his claim. Thus, Complainant has failed to prove by a preponderance of the evidence that Respondents violated the STAA by retaliating or discriminating against him for his protected activities.[40]

V. ORDER

Based on the foregoing, it is ORDERED that Complainant Timothy J. Bishop's claim filed on July 19, 2019, is DENIED.

[40] There was a good deal of testimony from various witnesses about the grievance process after a UPS employee is terminated and the grievance process in Complainant's case. I give no weight to the determinations of the various grievance panels in Complainant's case because I am charged with making a de novo decision regarding whether there has been a violation of the STAA. Whether a grievance panel, operating under different procedures than this tribunal and considering evidence that may be different than the evidence before this tribunal, finds that a termination was or was not justified under a union agreement is unpersuasive, if not irrelevant, with respect to any decision this tribunal must make.

Jason A. Golden
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within **fourteen (14) days** of the date of 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).

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