UNITED STATES DEPARTMENT OF LABOR
Office of Administrative Law Judges
Newport News, VA

Issue Date: 16 May 2023

Case No.: 2020-STA-00110

In the Matter of:

HARUN DUALE,
Complainant,

v.

FORSAGE, INC.
and
VADIM SAVCA,
Respondents.

Appearances: Peter L. LaVoie, Esq.
Truckers Justice Center
For Complainant

Vadim Savca
Self-represented Respondent

Before: MONICA MARKLEY
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case arises from a complaint filed by Harun Duale ("Complainant" or "Mr. Duale") with the Department of Labor's Occupational Safety and Health Administration ("OSHA") against Forsage, Inc. and Vadim Savca (collectively "Respondents"), under the provisions of the Surface Transportation Assistance Act of 1982, U.S. Code Title 49, Section 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 ("STAA").[1]

[1] There was a previous mistake in the spelling of Complainant's first name in the case caption. He clarified the spelling of his name during the formal hearing and the case caption is amended as set forth above. (TR at 91.)

PROCEDURAL HISTORY

On June 25, 2020, Mr. Duale filed a complaint with OSHA, alleging that while working for Respondent, he suffered adverse employment action after reporting that he was too ill to operate his commercial motor vehicle. The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The Secretary's findings were issued on September 3, 2020. Complainant timely requested a formal hearing before the Office of Administrative Law Judges ("OALJ"). The case was docketed with OALJ on September 3, 2020, and was assigned to me on October 1, 2020.

On February 11, 2021, I held a *de novo* telephonic hearing, at which Complainant was represented by Peter L. LaVoie, Esq., and Respondent was self-represented by Mr. Savca. Respondent did not initially join the conference call on the day of the hearing, and Complainant made a motion for a default judgment.[2] (TR at 5.) However, while the court was taking testimony in support of that motion, Mr. Savca joined the conference call, explaining that he thought the hearing was scheduled for Central time. *Id.* at 32-35. Therefore, I denied Complainant's motion for default judgment and proceeded with the hearing. *Id.* at 36.

The parties were afforded a full opportunity to present evidence and argument. At the hearing, Complainant's Exhibits 1 through 7 were admitted into evidence. *Id.* at 39. Respondent did not submit any exhibits to Complainant or the court prior to the hearing; therefore, Complainant's objection to an exhibit Respondent proposed to admit at the hearing was sustained and it was excluded. *Id.* at 45-46. Both parties submitted written post-hearing arguments. The record is now closed.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES PRESENTED

The contested issues are as follows:

1. Whether Complainant engaged in protected activity under the STAA.
2. Whether Respondent had knowledge of the protected activity.
3. Whether Complainant suffered an adverse employment action.
4. Whether Complainant's protected activity was a contributing factor in the adverse employment action.
5. Whether Respondent would have taken the same adverse action against Complainant absent his protected activity.
6. Whether Complainant is entitled to damages.

[2] The following abbreviations are used in this Decision: CX – Complainant's Exhibits; TR – transcript of hearing.

(TR at 38-39.)

PARTY CONTENTIONS

Complainant's Position

Complainant argues that he engaged in protected activity when he refused to continue driving after he fell ill. Following this refusal, Respondent never gave him another dispatch and withheld his last paycheck, which Complainant contends is direct evidence of contribution. Complainant contends that Respondent has not provided any evidence that Complainant would have been terminated absent his protected refusal to drive. Complainant argues that he is entitled to back pay, compensatory damages, and punitive damages.

Respondent's Position

Respondent argues that it did not terminate Complainant's employment; they contacted him, but he never responded or returned to work. Complainant had caused many issues for Respondent over the course of his employment. However, due to a driver shortage, none of these problems, including Complainant's illness, were ever considered to be a reason for discharge.

SUMMARY OF RELEVANT EVIDENCE

I. Formal Hearing Testimony

A. Vadim Savca, Respondent and Owner, Forsage, Inc. (TR at 49-88)

Mr. Savca testified that he has owned Forsage, Inc. since 2014. The company does "over the road" work throughout the United States, obtaining their jobs from brokers. They have 52 trucks and employ 52 drivers. They also employ 14 people who are not truck drivers, for dispatching, accounting, and safety. (TR at 51-52.) Mr. Savca personally hired Complainant after his cousin, another employee, recommended him. *Id.* at 53.

When Forsage, Inc. is hired to haul a load, there is usually a strict appointment time for delivery. *Id.* at 54. Delivery is not often delayed and if it is, the company must provide an explanation. *Id.* Late deliveries cost the company money and customers. *Id.* at 55.

Mr. Savca identified the e-mail on the first page of Claimant's Exhibit 2, from Tom Chirilov, a Forsage dispatcher, as being dated July 23, 2020. It detailed that the company was charged $1,000 because Complainant had been late delivering a load in early June 2020. *Id.* at 55-58.

Later, during a run from Sioux Falls, South Dakota to Romeoville, Illinois, the company found out that Complainant was sick and in the hospital. *Id.* at 60. They had been trying to contact Complainant for days and he did not respond. The company was receiving pressure from the broker because they were concerned that the load Complainant was transporting had been stolen. *Id.*

On June 12, 2020, the broker contacted Respondent to ask why Complainant's truck was moving toward Minneapolis instead of Romeoville. Mr. Savca heard from Complainant while he was in the hospital on June 13, 2020. Complainant told Mr. Savca that he would be able to make delivery on the coming Monday; therefore, Respondent did not try to reschedule.[3] However, the broker then reached out to the company again on Monday, June 15, 2020, for an update via e-mail, and the dispatcher informed the broker that Complainant was still in the hospital. *Id.* at 66-68. Mr. Savca called Complainant on Monday when he did not show up to make the delivery, but Complainant did not respond. Mr. Savca was angry because the broker was applying pressure, and everyone was confused. *Id.* at 75-76. Respondent ultimately sent another driver to take Complainant's truck and make the delivery. *Id.* at 69. He stated:

> And now -- now – I'm sorry, sir. Now, I remember what the situation was. We tried to contact Harun to get the key. He didn't answer to us. And then I believe was Harun cousin or sister, I'm not sure what exactly, she tried to get the -- fight -- you know, fight with me saying that we're not going to give you the truck until you are going to pay. And we -- we never fire Harun. We never say anything about that. She didn't -- she didn't want us to get the key so we can deliver that to the, you know, -- so we can take the truck so we can deliver the load. He cannot hold the truck as a hostage.

Id. at 70.

Mr. Savca is the person who decides when one of Respondent's drivers needs to be fired. *Id*. at 71. He has fired only three or four drivers in the past for drug use; otherwise, Respondent does not fire drivers. *Id.* at 71-72. The drivers communicate with the dispatchers via text or phone calls. *Id.* at 72. The dispatcher normally calls the driver and asks if he is ready for the next load. Alternatively, the driver calls the dispatcher and indicates when he will be ready for the next assignment. *Id*. at 73.

After Complainant's hospitalization, Respondent did not give Complainant another load to deliver because he did not get in contact. Respondent contacted Complainant and he did not respond; he never showed up for another load. *Id.* at 78. They had to send another driver

[3] Mr. Savca later testified that he thought it was Sunday, June 14, that he had this phone conversation about a Monday delivery with Complainant. (TR at 75, 77.) When they spoke, Complainant sounded okay, and Mr. Savca did not know the details of his condition. *Id.* at 77.

to retrieve the truck from Chicago. *Id.* at 79. The broker ultimately continued to work with Respondent. *Id.* at 79-80. Mr. Savca never told Complainant that he was fired; Complainant decided not to return to work. *Id.* at 80. Mr. Savca stated:

> But how can we give another load when the truck was in Chicago, and he never show up for work. We called him to let him know -- to ask him how he's feeling, when he's going to be able to, you know, to work again. But he never show up to work, he never responded to our text. How can we give another load to him? Doesn't make no sense.

Id. They did not send him text messages to inquire about him returning to work; they called him on the phone. *Id.* at 81.

Mr. Savca further testified that Complainant worked for Respondent for about seven weeks and was late 70% of the time. However, they never tried to fire him, because it was complicated to find drivers and they had trucks sitting unused. *Id.* at 82. During a previous incident, Complainant disappeared with a truck for 10 days, and they still did not fire him. *Id.* at 83-85.

With regard to load assignments, Mr. Savca explained:

> So basically -- so basically, this is how we operate in both of them. Both with the driver has to -- has to contact the dispatcher, and the dispatcher have to make sure that he's unloaded, then, you know, he's ready for the next load. So, both ways. But basically, the driver has to contact first the dispatcher to let him know how, you know, how far away, and when he's going to be empty, and all of this, and ready to go for the next load.

Id. at 85-86. He testified that in Complainant's case, he was not fired but he never came back to work. Mr. Savca testified:

> Yes -- from my knowledge, ma'am, I remember that even when we got this letter from the Court, and I called him personally. And I was trying to communicate with him to say -- to ask him what is going on, why he re- -- why -- why he's, like – he's - all of this mess, when we never fired him. I ask him come back, you know, but he never -- and then, you know, he never -- he never show up. He never -- he never come back to work. So -- and then I was -- I was very, very confused after all of this -- after all of this bad situation we had -- we had with him, all of these, like, big problems with the broker, we never fired him, and I ask him, okay, co- -- you know what? Basically we had the truck. We was waiting for him. He never show up to -- to -- to the work.

Id. at 86. When Mr. Savca called Complainant, as referenced above, Complainant told him that he would have to speak with Complainant's lawyers. *Id.* at 87-88.

B. Harun Duale, Complainant (TR at 90-125)

Complainant testified that Respondent was the second trucking company for which he worked. (TR at 92.) His cousin recommended him to Mr. Savca, they met in Chicago, and Mr. Savca hired Complainant. *Id.* at 93. He was delivering freight all over the country and received his assignments from a dispatcher, via text message. *Id.* at 93-94. A dispatcher would send him information about the load, and he picked it up. When he later dropped it off, he would let the dispatcher know. *Id.* at 94. There was always another load for him to pick up after he finished an assignment. *Id.* Respondent owned the truck that Complainant was driving, and he always hauled dry loads. *Id.* at 95. When he received an assignment, there was always a designated delivery appointment, but it was up to him to determine the best route to drive. *Id.* at 99.

On June 13, 2020, Complainant was in the process of hauling a load from Sioux Falls, South Dakota to the Chicago area. *Id.* at 96. On the way, he felt sick and stopped in St. Paul, Minnesota, where his aunt lived. He was having trouble breathing and passed out on her couch. They called an ambulance, and he was admitted to the hospital. He woke up the next day in the hospital but was hooked up to a lot of equipment, including a ventilator. *Id.* at 96-97, 103. He was diagnosed with pneumonia and stayed in the hospital for three days. *Id.* at 97-98. However, he was still sick when he was released, and it took him two weeks to actually start feeling better. During that time, he stayed with his aunt. *Id.* at 98, 108.

Complainant contacted Mr. Savca via text message at 6:09 p.m. on Saturday, June 13, 2020, to inform him of the situation. *Id.* at 103-104. He was unable to speak at that time and he sent a photo to Mr. Savca to show him what was going on. *Id.* at 104. He still had two days until the load had to be delivered in the Chicago area, and it was less than one day's worth of driving. *Id.* at 105-106.

Complainant's sister, Fadumo Duale, communicated with Mr. Savca on Complainant's behalf while he was in the hospital. She was in Atlanta, Georgia. She talked to Mr. Savca on the Saturday or Sunday before the truck load was due to be delivered. *Id.* at 107.

Complainant received a last text message from Mr. Savca on Tuesday, June 16, 2020, and they then spoke on the phone sometime after that. Regarding their phone conversation, Complainant stated they spoke about "[b]asically, why he called me these kind of words and he explained my situation. Me and him going back-and-forth." *Id.* at 107-108.

After staying with his aunt in Minnesota for two weeks, Complainant took a flight back to Atlanta. *Id.* at 108. After another driver picked up Complainant's truck to make the delivery in Chicago, the company never contacted him to return the truck to him or put him in a

different truck. *Id.* at 109. He never received another assignment from dispatch, and they did not pay him for the miles he drove on his last assignment. *Id.* They also did not reimburse any of the escrow funds that they had taken from his paycheck. *Id.*

After Complainant was fired from Respondent, he had financial problems. His family gave him money. *Id.* at 109-110. He currently lives with his parents. *Id.* at 110. After he lost his job with Respondent, Complainant reached out to contacts in the trucking industry to look for available jobs. *Id.* However, he was trying to take only local jobs, due to the COVID-19 pandemic. After being out of work for about three months, he was hired for one local job, but it only lasted about three weeks. He was paid $800 per week. *Id.* at 110-113. After the three weeks, the work slowed down and Complainant was laid off. *Id.* at 113-114. He has not held any other jobs since that time. *Id.* at 114. Complainant is currently taking online classes in general education. He plans to study international business. *Id.*

When Complainant spoke to Mr. Savca on the phone for the last time, "there was no good intention of what was going on at that moment. I was sick, and and the way he spoke to me is not a way I would speak to anybody, and the conversation ended like that." *Id.* at 115-116.

On cross-examination, Complainant testified that when he was ready for another load with Respondent, the communication went both ways; he would let the dispatcher know he was ready, and then the dispatcher would call him back with an assignment. *Id.* at 118. Complainant confirmed that he had escrow money deducted from his checks while employed with Respondent, and he was told he would receive the money back when he left the company. *Id.* at 119.

The route Complainant chose to take on his last assignment with Respondent might have been about 30 miles longer than the other available route. *Id.* at 120. When he got sick, he did not inform anyone at Forsage that he was not feeling well and would visit a doctor; he did not have the chance to do so. *Id.*

Complainant did not remember telling Mr. Savca on Sunday, June 14, 2020, that he was feeling better and would be able to deliver his load the next day. *Id.* at 121. Complainant was not aware that his sister called Mr. Savca and told him to come take the truck on Monday, after the delivery was missed. *Id.* Complainant also did not remember whether he received a final statement from Respondent for his escrow account. *Id.* at 122.

When asked if he "ever intended to return and work for Forsage Inc. after the hospitalization," Complainant answered "no." *Id.* When asked what he did to return to work—whether he called, texted, or emailed Respondent to start working again after he was released from the hospital—Complainant testified:

> Think about it, it com- -- it's common sense. How can I get back to work for a guy who's calling me a monkey. And the conversation we had, you didn't even seem like you wanted to see my face, and I did not want to see your face. So what makes you think I will call and want to work with you?

Id. at 122-123. Complainant agreed that he had called Mr. Savca the n-word in an earlier text message, on an occasion when his paycheck was cut by approximately $500 "because the appointment got mixed up and [Mr. Savca] blamed [Complainant]." *Id.* at 123.

Complainant testified that he and Mr. Savca "never had a communication" after his hospitalization. *Id.* at 124. Complainant denied that Mr. Savca called him and asked him to return to work after the hospitalization. *Id.* He did not recall Mr. Savca asking when he was coming back, and telling him that from now on he needed to speak with Complainant's lawyer. *Id.*

On redirect examination, Complainant was asked whether he thought going back to work for Respondent was "even an option" after the disagreement he had with Mr. Savca, and he responded: "The disagreement we had clearly – for me because I'm not crazy – is the – was – was the way we was talking to each other, the way he was talking to me, there was clearly no intention of working with each other at all." *Id.* at 125. Complainant stated that Mr. Savca did not offer to put Complainant in another truck or ask him to come back to Chicago. *Id.*

C. Fadumo Duale, Complainant's Sister (TR at 127-142)

Ms. Duale found out that Complainant was in the hospital on the day after his admission. (TR at 129.) She spoke to Complainant on the telephone while he was in the hospital, and he said that he had let his employer know about his condition. Ms. Duale asked Complainant to give her the contact information for Respondent, so she could also speak to them. When she talked to them on Saturday, June 13, they were upset about the situation, because they needed Complainant's truck load to be delivered. *Id.* at 130, 132. An unidentified person she spoke to on the phone was yelling and she told him to send a driver to pick up the truck if he needed it to be delivered. *Id.* at 130-131. This person called her again the next day asking whether Complainant could deliver the load. She told him that Complainant was still in the hospital and that they could send someone to pick up the truck. *Id.* The person was really upset again, and they yelled at each other. *Id.* The person she spoke to never expressed any concern about Complainant's health and said he would not be paid. *Id.* at 132-135.

On cross-examination, Ms. Duale testified that Complainant communicated with Respondent a couple of times while he was in the hospital, both over the phone and via text message. *Id.* at 136. On Sunday, the doctor told Complainant that he was not fit to be discharged from the hospital. She did not know what conversations Complainant had with Mr. Savca on that day. *Id.* at 137-138. The last conversation Ms. Duale had with Mr. Savca was on

Sunday; she did not speak to anyone on Monday. *Id.* at 138. She did not speak with Complainant about whether he intended to return to work with Respondent. *Id.* at 141.

II. Documentary Evidence

A. Text Messages (CX-1)

Complainant exchanged text messages with an unidentified number in the (373) area code, regarding an assignment given to Complainant on May 28 to pick up a load in Chicago. Complainant was directed to start driving to a particular address but did not respond and the messages indicate that he did not answer a phone call at that time. (CX-1 at 1.)

The second page of text messages that Complainant submitted into evidence show that, on an unspecified date and time, Mr. Savca sent him messages asking what happened and requesting that he call. *Id.* at 2. Next, at 6:09 p.m. on Saturday (presumably June 13, 2020), Complainant texted Mr. Savca the following message: "They put me to sleep I have [i]nfection doctor said on my lungs so they put me tube down my throat I'm negative COVID they telling other problems." A read receipt indicates that Mr. Savca read the message the next day. *Id.*

At 8:53 a.m. on Monday, June 15, 2020, Mr. Savca texted Complainant: "Call me back emergency!!!!!!!!!!" At 11:19 a.m., Mr. Savca texted: "Call me back we having huge problems with the broker !!!!!!!!! U supposed to be this morning at the delivery." *Id.*

Mr. Savca sent a final text message to Complainant on Tuesday, June 16, 2020, at 8:02 p.m. He used expletives and slurs, writing that Complainant had caused "worse problems ever," that he had lost the biggest broker because of Complainant, and that Complainant was the worst driver he ever had.[4] *Id.*

The exhibit also contains a printout of a picture of Complainant in the hospital, but there is no indication of when the picture was sent. *Id.* at 3.

B. Customer E-Mails (CX-2)

Complainant submitted copies of a series of e-mails from late May 2020 into early June 2020, documenting a late delivery Complainant made in Washington state. Per the e-mails, Complainant was approximately 10 days late in making the delivery. (CX-2 at 1-7.)

Regarding the load Complainant was driving when he became ill in mid-June 2020, Complainant submitted an e-mail indicating that the broker, Knight Logistics, requested an update on the delivery at 10:28 a.m. on June 15, 2020. Mr. Chirilov, dispatcher for Respondent,

[4] The text message reads: "Motherf**er monkey u got me the worse problems ever no I lost because of u the biggest broker the worse driver I ever had f***ing black shit." (CX-1).

responded via e-mail at 10:30 a.m., stating that the driver, Complainant, was in the hospital and requesting that the broker call his manager. *Id.* at 8.

On June 16, 2020, at 10:19 a.m., Mr. Savca sent an e-mail to personnel at Knight Logistics, stating:

> Driver Harun, the one in the picture is still in the hospital.
>
> I spoke with him yesterday around 4 PM and he said that will start driving in the next hour and bring the load to IL, but doctors didn't release him. Today in the morning he send me the picture with him in the hospital stating that he is not getting released.
>
> At 8 am I called Stephen, could not reach him on the general line and spoke with him shortly after when he called letting him know load is still in MN.
>
> I was able to find another driver Ebrahim in MN . . . to take the trailer and bring it to IL. After [I] sent Ebrahim all the info and he started rolling to this truck we realized that Harun, driver that is in the hospital, took the truck keys with him. So had to change Ebrahim route to the hospital to take the keys.

Id. at 9. Subsequent e-mails document that the truck arrived at its destination on June 17, 2020. *Id.* at 11.

C. Complainant's Employment Paperwork

Complainant completed a "Driver's Application" for Respondent on March 19, 2020. It lists his employment start date as March 19, 2020. Mr. Savca also signed the application as the interviewing officer.

On a page "For Company Use," under the section header "Termination of Work with Applicant," the document lists a "Date Terminated" of June 15, 2020, from the department of "Driver." In a blank next to the phrase "Voluntarily Quit," a handwritten note states, "got sick." (CX-3 at 1.)

Also on March 19, 2020, Complainant signed an "Hours of Service Policy," which listed the monetary penalties for logbook and moving violations. The policy further indicated that Respondent would deduct $200 per week from the driver's pay for a total $2,500 escrow. The entire escrow account was to be returned 45 days after the end of employment, in the event no claims occurred. *Id.* at 11.

CREDIBILITY DETERMINATIONS

The factfinder is entitled to determine the credibility of witnesses, to weigh evidence, and to draw her own inferences from evidence, and the factfinder is not bound to accept the theories or opinions of any particular witness. *See, e.g.*, *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968). In weighing testimony, an administrative law judge may consider the relationship of the witnesses to the parties, the interests of the witnesses, and the witnesses' demeanor while testifying. An administrative law judge may also consider the extent to which the testimony is supported or contradicted by other credible evidence. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan. 31, 2006). Additionally, the Administrative Review Board ("the ARB" or "the Board") has held that an administrative law judge may "delineate the specific credibility determinations for each witness," but such delineation is not required. *See, e.g.*, *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-8 (ARB July 2, 2009) (noting that the ARB prefers such delineation but does not require it). My findings set forth in this Decision and Order are based on my review and consideration of the entire record in this case, including my findings as to the demeanor of the witnesses and the rationality or internal consistency of the witnesses' testimony in relation to the evidence as a whole.

There are some key points on which the testimony of Complainant and Mr. Savca conflict in this matter, and I generally find that Mr. Savca's statements are more credible. Specifically, Mr. Savca testified that when he spoke to Complainant during his hospital admission, Complainant stated that he would be able to complete the delivery on the upcoming Monday. Therefore, Mr. Savca did not try to reschedule the delivery. (TR at 66-68.) Alternatively, Complainant testified that he did not recall telling Mr. Savca on Sunday, June 14, 2020, that he was feeling better and would be able to make the delivery the next day. *Id.* at 121. However, Complainant's contention that he did not remember making the statement was vague, equivocal, and less believable than Mr. Savca's specific recollection of the conversation. Moreover, if Mr. Savca had not been assured of Complainant's quick recovery when they spoke, it is unlikely that he would not have rescheduled the delivery or made other arrangements for the truck immediately. Furthermore, he would not have been so clearly unprepared when Complainant did not make the delivery on Monday morning, as evidenced by the text messages from that day, in which he characterized Complainant's failure to deliver as an emergency. (CX-1.) E-mail correspondence from June 16, 2020, indicates that Mr. Savca spoke to Complainant the previous day and expected him to start driving around 4:00 p.m., but he was still not released from the hospital. (CX-2 at 9.) It was then that Mr. Savca planned for another driver to pick up the truck. *Id.*

The other significant point on which the testimony between Complainant and Mr. Savca differed pertained to their communication after Complainant's hospitalization. Mr. Savca testified that Respondent contacted Complainant and he did not respond or ever show up to take another load. (TR at 78.) They called to ask how he was feeling and when he could work

again, but he never responded. *Id.* at 81. Mr. Savca indicated that even after Complainant filed this action, he called Complainant personally to discuss the situation, because he had never fired Complainant; however, Complainant referred Mr. Savca to his counsel. *Id.* at 86-88. Alternatively, Complainant testified that his last communications with Mr. Savca were a text message and phone conversation on June 16, 2020, both of which were unpleasant, and that the company never contacted him again to return his truck or put him in a new truck. (TR at 107-109.) He specifically denied that Mr. Savca had called him to ask him to return to work and said that he did not remember telling Mr. Savca to speak with his lawyer. *Id.* at 124.

Again, Mr. Savca's statements on this matter are more credible than those of Complainant, particularly because they are supported by other documentation. On Complainant's application paperwork, the company notated that he had "voluntarily quit" when he got sick. (CX-3 at 1.) In addition, the hours-of-service policy indicated that Complainant's escrow account was to be returned after his employment ended; however, since Mr. Savca was presumably hopeful that Complainant would return to work, it is logical that this money was not released. *Id.* at 11. Additionally, Mr. Savca explained that he was reticent to fire people because of a driver shortage. This contention is borne out by the fact that there was at least one previous incident in which Complainant was significantly late in making a delivery in Washington, causing Respondent to incur a monetary penalty, and in which Complainant called Mr. Savca the n-word, yet Complainant was not fired on that occasion. (CX-1; CX-2 at 1-7.) Finally, Complainant's account is vague, self-serving, and lacking in any detail. He offered only conclusions—e.g., "you didn't seem like you wanted to see my face, and I did not want to see your face. So what makes you think I will call and want to work with you?" (TR 123), and "the way we was talking to each other, the way he was talking to me, there was clearly no intention of working with each other at all" (TR 125)—but he never specifically detailed what was actually said in this conversation, despite its central role in his case.[5] He answered "I do not remember" to several of Mr. Savca's questions on cross-examination.[6] I find Complainant's account is vague, conclusory, and self-serving. I find Mr. Savca's account is supported by other evidence in the record and more credible. Therefore, I find Mr. Savca's account of the communications between himself and Complainant credible, and I credit Mr. Savca's testimony that he did not fire Complainant and requested that he return to work.

For all these reasons, I give greater credit to the testimony and statements of Mr. Savca here than to the testimony and statements of Complainant. In reaching my decision in this case, I will take into consideration the credibility assessment discussed above.

[5] The lack of detail is particularly problematic in light of Complainant's general lack of credibility. By way of example, Claimant said Mr. Savca "called me these kind of words" and said he would never speak to anyone the way Mr. Savca spoke to him (TR 107-108, 115-116), yet Complainant called Mr. Savca the n-word in a previous discussion (TR 123), refuting his contention.

[6] Additionally, Complainant's testimony on other matters—such as his contention that he did not have time to notify Respondent when he started feeling unwell and detoured to his aunt's house, before becoming hospitalized—is not credible and affects his overall credibility.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. STAA Legal Framework

To prevail in a STAA whistleblower complaint, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, suffered an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 31105(b)(1) (adopting the legal burdens of proof at 49 U.S.C. § 42121(b)(2)(B)(iii)); 29 C.F.R. § 1978.109; *Buie v. Spee-Dee Delivery Serv., Inc.*, ARB No. 2019-0015, ALJ No. 2014-STA-37, slip op. at 3 (ARB Oct. 31, 2019). If a complainant meets this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. 49 U.S.C. § 42121(b)(2)(B)(iii), (iv).

The STAA provides that an employer may not discharge, discipline, or discriminate against an employee regarding pay, terms, or privileges of employment, because of an employee's protected activity. 49 U.S.C. § 31105(a)(1); 20 C.F.R. § 1978.102(a). Employment termination constitutes an adverse action under the STAA. *Id.*; *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-71, slip op. at 6, n.15 (ARB May 18, 2017). A negative notation in a driver's employment report also constitutes an adverse action. *See Beatty v. Inman Trucking Management, Inc.*, ARB No. 15-064, 15-067, ALJ Nos. 2008-STA-20, 2008 STA-21 (ARB June 27, 2016).

II. Complainant's Burden

As set forth above, to establish a case for retaliation, Complainant must show by a preponderance of the evidence that (1) he engaged in protected activity, (2) he suffered an unfavorable personnel action (adverse action), and (3) his protected activity was a contributing factor in the adverse action.

A. Protected Activity

Under the STAA, there are several different kinds of protected activity. Complainant argues that his activity was protected under the "refusal" provision. Under this part of the statute, an employer is prohibited from taking an adverse action against an employee if the employee refuses to operate a vehicle either because (1) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security, or (2) the employee has a reasonable apprehension of serious injury to himself or the public because of the vehicle's hazardous safety or security condition. 49 U.S.C. § 31105(a)(1)(B). The statute provides that "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of

accident, injury, or serious impairment to health." 49 U.S.C. § 31105(a)(2). In addition, for the employee's activity to be protected, he has to seek correction of the hazardous safety or security condition from the employer and be denied. *Id.*

In this matter, Complainant has alleged that if had not refused to operate the truck while ill, his actions would have violated 49 C.F.R. § 392.3, which prohibits drivers from operating commercial vehicles if their ability or alertness is so impaired by illness as to make operation of the vehicle unsafe. Complainant also alleges that he had a reasonable apprehension of serious injury to himself or the public because of his impaired condition.

There is little question here that Complainant's refusal and/or inability to continue driving his commercial vehicle to the Chicago area on approximately June 13, 2020, constituted protected activity. Respondent does not dispute that Complainant was ill and admitted to the hospital, and all the evidence in this matter confirms the situation, including, but not limited to, the text messages, e-mail correspondence, and testimony from Ms. Duale. Therefore, I find that Complainant has shown, by a preponderance of the evidence, that his refusal to drive his truck due to illness constituted protected activity under the STAA.

B. Adverse Action

Having established that he engaged in protected activity, Complainant must also prove that he was the subject of an adverse action taken by Respondent. Complainant alleges that following his hospitalization and inability to deliver his assigned load, his employment was effectively terminated by Respondent. However, Respondent contends that Complainant was not terminated and instead, voluntarily left his job when he never returned to work.

The STAA prohibits an employer from taking adverse action against an employee in retaliation for the employee engaging in protected activity. 49 U.S.C. § 31105(a)(1). Adverse action includes discharging or otherwise retaliating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in protected activity. 29 C.F.R. § 1978.102(a). Adverse action may also include intimidating, threatening, restraining, coercing, blacklisting, disciplining, harassing, suspending, or demoting an employee. 29 C.F.R. § 1978.102(b). Complainant bears the burden of establishing by a preponderance of the evidence that Respondent took an adverse action against him. 29 C.F.R. § 1978.109(a).

The ARB has previously spoken to the distinctions between explicit terminations, constructive discharges, and abandonment of employment. For example, in *Jackson v. Protein Express*, the Board considered a situation in which a complainant refused to drive a tractor-trailer because of defective brakes. After communicating this to management, they removed the complainant's belongings from the truck. Thereafter, all the complainant's numerous attempts to contact management to get clarification of the situation went unanswered. The

Board disagreed with the ALJ's conclusion that the complainant had abandoned his position and there was no adverse employment action. The Board found that the complainant had taken several actions to evidence his intent to continue working for the employer, but the employer's conduct, including its removal of the complainant's belongings from the truck and its failure to respond to the complainant's communications, indicated that it had discharged the complainant. The Board held that absent a clear statement on employee status, the test of whether an employee has been discharged depends on the reasonable inferences the employee can draw from the statements or conduct of the employer. ARB No. 96-194, ALJ No. 95-STA-38, slip op. at 4 (ARB Jan. 9, 1997).

Similarly, in *Minne v. Star Air, Inc.*, the ARB again considered a situation where it was disputed whether the complainants had quit their jobs or been discharged. In that case, the complainants refused to drive certain trucks until they had been brought into compliance with safety regulations, and when they did not report to work, the employer ultimately removed them from the driving schedule and canceled their company credit cards. The Board found that though the ALJ had believed it was the complainants' behavior that had ended the employment relationship when they decided not to return to their jobs, it was actually the employer's behavior that ultimately ended the relationship. The Board noted the employer "chose to react to [the complainants'] refusal to work by considering them to have resigned, rather than by addressing all the issues they had raised." ARB No. 05-005, ALJ No. 04-STA-26, slip op. at 14 (ARB Oct. 31, 2007). Later, the Board generally affirmed its position in *Klosterman v. E.J. Davies, Inc.*; there, the complainant had complained about the condition of a truck he was to drive, was told by his supervisor to "drive it or go home," and walked out. His supervisor immediately sent a letter to the complainant's union representative stating that the complainant had quit. In holding that the complainant had not abandoned his job but had been discharged, the Board considered the supervisor's failure to address the issues with the truck and his immediate correspondence regarding the complainant's departure, and concluded, "As demonstrated in *Minne*, it is the supervisor's behavior . . . rather than the employee's, which ultimately ended the employment relationship." ARB No. 08-035, ALJ No. 2007-STA-019, slip op. at 10 (Sept. 30, 2010).

Also of note, in *Atkins v. Salvation Army*, the Board took up a case in which the complainant argued that though he was not explicitly terminated, he was constructively discharged due to harassment after he engaged in protected activity. Specifically, the complainant and a supervisor had a disagreement over whether two trucks were having safety problems, and presumably in retribution, the supervisor made a comment about the complainant not being able to take leave requested for a medical appointment that day. The complainant responded by walking off the job and telling the supervisor he was quitting because of harassment. The supervisor attempted to persuade the complainant to stay, to no avail. In considering the question of constructive discharge, the Board affirmed the ALJ's finding that in the absence of a termination, a constructive discharge occurs when a reasonable person in the employee's position would have felt forced to quit because of intolerable and

discriminatory working conditions. The nature of the conditions at issue is a factual question, and to establish constructive discharge, the complainant must show aggravating factors, such as a continuous pattern of discriminatory treatment. ARB No. 00-047, ALJ No. 2000-STA-19, slip op. at 4 (ARB Feb. 28, 2001). In agreeing that the complainant was not constructively discharged, the Board noted that the employer had not forced him to drive the trucks about which he complained, the statement about his early departure was not so oppressive that a reasonable person would have felt forced to resign, and the supervisor pleaded with him to stay. These facts did not support a finding of constructive discharge. *Id.* at 5.

Here, there was no explicit termination. The question is whether Complainant was constructively discharged (as he alleges), or whether he abandoned his employment (as Respondent argues). Looking to the behavior of Complainant and Respondent here and employing the guiding principles given by the Board, I conclude that it was not reasonable for Complainant to infer that he had been terminated based on the conduct of Mr. Savca, nor were the conditions under which he worked such that a reasonable person in the same circumstances would have felt forced to quit. Throughout the course of the situation, Mr. Savca took few, if any, actions that could have reasonably been interpreted as him terminating Complainant's employment. By both parties' accounts, sometime after Complainant was admitted to the hospital, he and Mr. Savca communicated regarding his status. Mr. Savca ultimately had Complainant's truck picked up by another driver, reportedly at Ms. Duale's insistence, in order to have the pending delivery completed. During this situation and after the delivery was late, Mr. Savca admittedly sent an offensive text message to Complainant. (CX-1 at 2.) The parties discussed the matter on the telephone, though I have found Complainant's account of the call to be vague, conclusory, and self-serving, and I credit Mr. Savca's account of the parties' communications over Complainant's (as discussed above). Mr. Savca credibly testified that he contacted Complainant to ask when he could return to work and received no response. He did not take any further actions regarding Complainant's employment, other than to notate on his application that Complainant had voluntarily quit when he got sick.

Therefore, aside from the profane text message, which did not include a termination of Complainant's employment, Mr. Savca did not engage in any behavior from which Complainant could reasonably infer that he had been terminated. He questioned Complainant about when he would be well enough to complete the delivery, had the truck retrieved by another driver at Ms. Duale's direction, and contacted Complainant to arrange a return to work. Moreover, he had previously allowed Complainant to be significantly late with a delivery in Washington without any negative effect on his employment. Additionally, Complainant had used a racial slur against Mr. Savca in that incident, and was not fired. Though Mr. Savca in turn used racist language in his text message on June 16, he did not tell Complainant that he was fired. I find that the text message and its use of offensive language does not constitute a constructive discharge, where there was a single incident with no pattern of such behavior (this was the only documented instance of Mr. Savca using such language); there was no altercation (as this

occurred over text message); and Complainant himself had used a racial slur in communications with Mr. Savca previously.

It is true that in the *Jackson*, *Minne*, and *Klosterman* cases discussed above, the Board consistently found each time that it was the employer's behavior that had ended the employment relationship and ultimately resulted in termination. However, the facts of this case differ from the cited cases. Primarily, in each of the previous cases, the complainants made safety complaints about their trucks that went unaddressed by the employers, and the Board considered this inaction to be part of the employers' behavior that effectively terminated the complainants' employment. Here, there is no such inaction or failure to address a safety concern on the part of Respondent. Complainant was not forced to drive his truck while ill and there was no action needed by Respondent to remedy the situation and allow Complainant to return to work. Instead, it was Complainant's actions (or inactions) that resulted in his separation from employment. Complainant moved to Atlanta after recovering from his illness (TR at 108), and never responded to Respondent or contacted the company again to resume work.

This case is more comparable to *Atkins*, in which the Board found that the complainant was not constructively discharged because he had not been forced to drive an unsafe truck, an alleged harassing statement was not so oppressive that a reasonable person would have felt forced to resign, and the employer asked him to continue working. Here, Complainant was not forced to violate any safety standards, the statements made by Mr. Savca would not have caused a reasonable person to feel forced to quit in the circumstances here, and Mr. Savca reached out to Complainant to ask him to return to work. Again, it was not Respondent's actions that caused the cessation of the employment relationship here. Instead, I find that Complainant quit or abandoned his employment. Therefore, Complainant has not shown, by a preponderance of the evidence, that he suffered an adverse action.

III. Conclusion

In summary, I find that Complainant has not established the second element of his case under the STAA—that he suffered an adverse action—by a preponderance of the evidence. Therefore, Respondent is not liable under the STAA, and Complainant's June 25, 2020 complaint must be dismissed.

ORDER

For the reasons set forth above, IT IS ORDERED that Complainant's June 25, 2020 complaint is DISMISSED.

SO ORDERED.

MONICA MARKLEY
Administrative Law Judge

MM/RC/jcb
Newport News, VA

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).

IMPORTANT NOTICE ABOUT FILING APPEALS:

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

Filing Your Appeal Online

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

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact. If you file your appeal online, no paper copies need be filed with the Board.

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

Filing Your Appeal by Mail

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

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

Access to EFS for Other Parties

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

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

After An Appeal Is Filed

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

Service by the Board

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