U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW
Washington, DC 20001-8002

(202) 693-7350
(202) 693-7365 (FAX)

Issue Date: 08 June 2021

OALJ Case No.: 2020-STA-00071
OSHA Case No. 5-1260-20-033

In the Matter of:

MYKHAYLO HOLOVATYUK,
Complainant,

v.

EM CARGO, LLC,
Respondent.

Appearances:

Mykhaylo Holovatyuk, In Pro Per
Saint Augustine, Florida
For the Complainant

Alexander Reich, Esq.
Saul Ewing, LLP
Chicago, Illinois
For the Respondent

DECISION AND ORDER DENYING THE COMPLAINT

PROCEDURAL BACKGROUND

On or about December 6, 2019, Mykhaylo Holovatyuk ("Complainant") filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") alleging that EM Cargo, LLC ("EM Cargo" or "Respondent") violated the employee protection provisions of the Surface Transportation Assistance Act ("STAA" or "the Act") when it terminated his employment on October 20, 2019 in retaliation for refusing to drive over authorized hours of service. 49 U.S.C. § 31105(a); 29 C.F.R. Part 1978. OSHA's Regional Supervisory Investigator dismissed the complaint on June 1, 2020, finding no violation of the Act. Complainant filed objections to the findings on June 3, 2020 and requested a hearing before the Office of

Administrative Law Judges ("OALJ"). The matter was then assigned to me and scheduled for hearing.

Complainant filed *Motion to Compel Respondent to Identify a Witness, Produce Documents and Answer Interrogatories* ("Motion") on September 18, 2020. Respondent filed a response on September 24, 2020. Complainant replied on September 28, 2020, and Respondent filed a sur response on October 1, 2020. On October 2, 2020, Complainant filed a reply to Respondent's sur response. I issued *Order Granting, in Part and Denying, In Part, Complainant's Motion to Compel* on October 5, 2020.

On November 13, 2020, Respondent filed a *Motion For Summary Decision* and *Motion to Bar*, requesting that I bar Yuriy Yankovskyy from testifying, bar any damages other than back pay, and bar Complainant from referencing unpaid compensation. I denied both motions on December 1, 2020.

I then presided over a formal video hearing on December 8, 2020. Over objection,[1] I admitted Joint Exhibits 1-46. (Tr. at 6). Three witnesses, including the Complainant, testified. Complainant used the services of an interpreter. (Tr. at 12-66). At the close of the hearing, I informed the parties that I would take the matter under advisement and issue my decision in due course. (Tr. at 72). I now base my decision on all of the evidence admitted, relevant controlling statutory and regulatory authorities, and the arguments of the parties.[2] As explained in greater detail below, I find Complainant has not proven he engaged in any protected activity. Even if he did, he has not proven it was a factor in Respondent's decision to fire him, and deny his complaint.

ISSUES TO BE DECIDED

1. Did Complainant engage in protected activity on October 20, 2019 when he sent an email to Eddie Majus referencing the 34-hour restart rule?

2. If so, did Respondents take the adverse personnel actions of employment termination, non-payment of escrow funds, and blacklisting again him?

3. If so, was Complainant's protected activity a contributing factor to any of the adverse employment actions?

[1] Respondent objected to Joint Exhibits 27 and 28 as foreign language documents and objected to Joint Exhibit 21 for foundation. (Tr. at 5-6).

[2] In *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13, slip op. at 2 n.3 (ARB Mar. 11, 2019) (per curiam), the Administrative Review Board ("ARB") noted that an administrative law judge ("ALJ") need not include a summary of the record in the Decision and Order, as it is assumed that the ALJ reviewed and considered the entire record in making his or her decision. The ARB stated that what is more helpful for its review of whether the ALJ's findings of fact are supported by substantial evidence of record is a tightly-focused set of findings of fact. Accordingly, in this Decision and Order I focus specifically on findings of fact pertinent to the issues in dispute. I have, however, reviewed and considered the *entire* record.

4. If so, can the Respondent show by clear and convincing evidence that it would have taken the same adverse personnel actions against Complainant in the absence of the protected activity?

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

ESSENTIAL FINDINGS OF FACT[3]

Respondent EM Cargo is a trucking company that transports goods and clothes and is owned and managed by Egidijus "Eddie" Majus. (Tr. at 35-36). The drivers that work for Respondent sign independent contractor agreements and equipment rental agreements in order to use trucks owned by Respondent. (Tr. at 36-37). To set up routes, the drivers contact the load planner and dispatcher, who then communicates the routes and loads; "[i]f the driver doesn't like the loads, he can decline, and the load planner will start looking for another option that will be good for the independent contractor." (Tr. at 37).

Complainant Mykhaylo Holovatyuk signed an independent contractor agreement with Respondent on August 6, 2019, with a retroactive effective date on July 8, 2019. (JX-46). He rented a truck from Respondent for around $1,200 a week, payments that Respondent deducted from his weekly paychecks. (JX-46; Tr. at 38). On Saturday, October 12, 2019, Complainant began a route in Pennsylvania and ended in Orlando, Florida on Monday, October 14, 2019. He then began a week-long break at his home in St. Augustine, Florida. (JX-10 at 24; Tr. at 16). Complainant did not tell Eddie Majus or anyone else at the company that he was planning on taking a week's break because he did not believe it was required by his contract. (Tr. at 16-17).

On Wednesday, October 16, 2019, Loki, a dispatcher for Respondent, texted Complainant to ask when he would work again. When Complainant did not respond, Loki texted him again on Thursday, October 17. Complainant texted him back, "don't call me when I have days off if it's non-emergency situation." (JX-30 at 32). Loki continued to text Complainant on October 17 and October 18.

Eddie Majus also texted Complainant on Thursday, October 17, telling him that he "must start working tomorrow [Friday]." (JX-43 at 1). Complainant responded that he was taking one week off and would start on Monday. (JX-43 at 2). Majus then told Complainant he needed to drop the truck off in Chicago or that Respondent would pick it up in Florida. Complainant replied on the same day, "If you don't like something – Send me notice of lease termination in writing by mail as agreement requires. Certified mail. With explanations." (JX-43 at 3).

[3] The parties stipulate, and I find, that EM Cargo, LLC entered into an Independent Contractor Agreement with Complainant on August 6, 2019, with a retroactive effective date of July 8, 2019. A tractor and trailer were delivered to the company parking lot by Complainant on October 23, 2019 about 10:30 a.m. and inspected by an EM Cargo LLC safety manager. As a lease operator, Complainant was able to accept or reject loads offered by Respondent. Complainant executed a written Equipment Rental / Lease Agreement with EM Cargo, LLC whereby Complainant leased a truck from EM Cargo. Complainant's lease payments were deducted from his weekly paychecks. On October 14, 2019, after completing a delivery in Orlando, Florida, Complainant drove to his home in St. Augustine, Florida to take a week off from work. (JX-46).

On Sunday, October 20, Complainant sent an email to Majus requesting Respondent's identification number so that he could fill out an IRS Form SS-8 to "establish my employment status in company." In this email, Complainant also wrote:

> I have to work 4 weeks without days off, 34-h 'restarts,' can't refuse to haul cheap loads (any load) and can get only 3.5 days of home time…I came home on 10/14/19 and on 10/17/19 you start to send me messages, trying to force me put on the road from 10/18/19, threatened to take back truck, despite on contract provision…So, definitely, you treat me as employee and this will be a question for IRS, DOL, etc.

(JX-06 at 1). Majus replied on the same day informing Complainant that the company did not provide the requested information over the phone or emails and asked Complainant to schedule an in-person appointment. Complainant responded that he wanted the information in writing by mail to his home address. Majus replied, "You will be terminated from this company due to not making truck weekly payments and not returning tractor to the terminal location." (JX-06 at 3). Complainant noted in his next email that the truck payment should be deducted from his weekly payments, that Respondent should send him the notice of termination, and that he would bring the equipment to Chicago. (JX-06 at 3). Complainant and Majus then emailed back and forth several more times on October 20 arguing about the termination process, Complainant's break from driving, and the return of the truck. The chain of emails ended on October 21, when Majus emailed Complainant, "You need to sign termination documents in order to be eligible to receive your deposit. Truck and trailer must be in perfect condition, without damages…." (JX-06 at 6).

On October 21, Loki texted Complainant again, after which Complainant stated that he was returning to Chicago and would return the truck to the yard "on Wednesday [October 23]." (JX-30 at 33). Complainant delivered the tractor and trailer back to the company parking lot on October 23, 2019, where Respondent's safety manager inspected it at around 10:30 AM. (JX-46). Eddie Majus estimates that EM Cargo lost between $5,000-$6,000 in the week that Complainant had the truck and did not take on any loads. (Tr. at 55).

Two termination forms from October 23, 2019 record the reason for Complainant's termination as "poor communication between driver and dispatch." (JX-07 at 1, 3). Another termination form, dated October 24, 2019, stated that Complainant was fired because

> Driver was holding tractor belonging to EM CARGO LLC in Florida and not coming back on duty. We asked him to return tractor belonging to EM CARGO LLC in our yard. However, driver refused to answer to the EM CARGO LLC owner phone calls and was sending text sms, saying that due to some personal issues he cannot come back to work as it was required. Due to the poor communication with a driver, company can no longer afford to work with him.

(JX-07 at 5). This form also notes that "EM Cargo LLC Inc. agrees to pay Mykhaylo Holovatyuk any and all pay due to him through October 24, 2019…After 90 days of contract termination date send an email request for your last settlement." The October 24, 2019 termination form was created because Complainant refused to sign the first termination form when he returned the truck to the company. (Tr. at 48).

Since his termination, Complainant has not worked and has not applied for any jobs. (Tr. at 32). Around March 2020, Majus received an unsolicited reference form for Complainant from a third party recruiting company.[4] In all of the categories, Majus selected scores of 2 or 3 out of 5. (JX-20 at 1-2).

Other than the one October 20 email, Complainant did not mention 34 hour restarts in any of the other conversations with Majus or any other employee of Respondent.

Complainant filed his complaint with OSHA on or about December 10, 2019. OSHA denied the complaint on June 1, 2020. Complainant alleges here that he was terminated for reporting violations of the 34-hour restart rule.

LEGAL FRAMEWORK AND BURDENS OF PROOF

The employee protection provisions of the STAA prohibit an employer from discharging an employee when: the employee files a complaint about a violation of a commercial motor vehicle safety regulation, standard, or order; the employee refuses to operate a vehicle because such operation violates a regulation related to commercial motor vehicle safety; or the employee has a reasonable apprehension of serious injury to himself or the public because of the vehicle's hazardous safety condition.[5] 49 U.S.C. §§ 31105(a)(1)(A); 31105(a)(1)(B)(i)-(ii).

The current version of the STAA provides that whistleblower complaints shall be governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H.

[4] A review of JX-19 indicates that Complainant asked for a reference check before adding references to any job applications: "The data contained within this profile is to be used as a discrete decision-making tool whether or not to provide this particular reference for a prospective employer."

[5] The ARB has held that an actual violation need not have occurred; an objectively and subjectively reasonable belief of facts that would constitute a violation is sufficient. *See Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 9-10 (ARB Sept. 30, 2011) (stating that "the protection afforded under Section 31105(a)(1)(B)(i) also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined."). Although the Eleventh Circuit disagreed in *Koch Foods, Inc. v. Secretary, U.S. Dept. of Labor*, 712 F.3d 476 (11th Cir. 2013), the law of the case varies according to the U.S. Circuit Court that will have jurisdiction.

The question here is whether the operative facts of this case occurred in Illinois or in Florida. Respondent EM Cargo is a transportation company based in Chicago, Illinois. Eddie Majus, the owner and operator of Respondent, is also based in Illinois. Complainant Holovatyuk currently resides in St. Augustine, Florida. At the time of his termination, Complainant was in Florida, while Majus was in Illinois. Majus sent the email terminating Complainant from Illinois. Complainant was supposed to sign the formal termination agreement when he returned Respondent's truck to the parking lot in Chicago, Illinois, but the record seems to indicate he used the electronic signing feature Docusign, rather than signing in person. Additionally, while the matter at issue here is not Complainant's contract, both his independent contractor agreement and equipment lease agreement state that Illinois law would govern any potential matters in court. (JX-01 at 9; JX-02 at 8). Importantly, Complainant chose to file his original whistleblower complaint with an Illinois OSHA Regional Office located in Tinley Park, Illinois. (JX-14 at 1). As such, it appears that the operative facts in this case may have occurred in Illinois, and it appears the Seventh Circuit has yet to weigh in on this specific issue. Therefore, the standard articulated by the ARB in *Bailey* is controlling.

Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b)(2)(B)(i). 49 U.S.C. § 31105(b)(1). Under the AIR 21 standard, complainants must initially prove by a preponderance of the evidence that a protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. 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."[6] If a complainant makes this showing, an employer can avoid liability by demonstrating with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior. 49 U.S.C. § 42121(b)(2)(B)(ii).

Thus, in order to prevail in this case, Complainant must prove: (i) that he engaged in protected activity; (ii) that his employer, EM Cargo, took adverse employment action(s) against him; and (iii) that the protected activity was a contributing factor in EM Cargo's decision to take any such adverse employment action(s). If Complainant satisfies this initial burden by a preponderance of the evidence, EM Cargo may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action(s) even if Complainant had not engaged in the protected activity.

CONCLUSIONS OF LAW

Protected Activity

Complainant alleges here that he engaged in protected activity for emailing Eddie Majus about the 34-hour restart rule. The "file a complaint" clauses of the STAA is potentially applicable under the facts of this case. 49 U.S.C. § 31105(a)(1)(A).

File a Complaint

Safety complaints under § 31105(a)(1)(A) may be made to management or a supervisor and may be "oral, informal, or unofficial." *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, ALJ No. 2010-STA-041, slip op. at 4 (ARB Mar. 27, 2012). For a tribunal to consider a complaint protected activity, a complainant needs to demonstrate that he reasonably believed that there was a safety violation. *Id.*; *see also Gaines v. KFive Constr. Corp.*, 742 F.3d 256, 267-68 (7th Cir. 2014); *Guay v. Burford's Tree Surgeon's, Inc.*, ARB No. 06-131, ALJ No. 2005-STA-45, slip op. at 6-8 (ARB June 30, 2008). The standard for determining whether a complainant's belief is reasonable is both objective and subjective. For the subjective component, the complainant must show that he actually believed a violation occurred and for the objective component, complainant must show that a reasonable employee in the same circumstances would think that a violation occurred. *Garrett v. Bigfoot Energy Services*, ARB No. 16-057, ALJ No. 2015-STA-47, slip op. at 7 (ARB May 14, 2018). The complaint need only "relate" to a violation of a commercial motor vehicle safety standard and "[u]ncorrected vehicle defects, such as faulty brakes, violate safety regulations and reporting a defective vehicle falls squarely within the definition of protected activity under STAA." *Maddin v. Transam Trucking, Inc*., ARB No. 13-

[6] *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 11 (Jan. 6, 2017) (internal citations omitted).

031, ALJ No. 2010-STA-20, slip op. at 6-7 (ARB Nov. 24, 2014). In other words, protection under the complaint clause is not dependent on actually proving a violation of a federal safety provision. *See Yellow Freight System, Inc., v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). Rather, it is sufficient to show a reasonable belief in a safety hazard.

When an employer's dispatch order contemplates a violation of Department of Transportation driving time regulations, the order is regarded as requiring the operation of a motor vehicle contrary to federal rules and regulations, even if the hours violation would occur at a later time. Therefore, a driver's refusal to drive is protected under the STAA provision that prohibits an employer from discharging an employee for refusing to operate a motor vehicle "when such operation constitutes a violation of any federal rules, regulations, standards or orders applicable to commercial motor vehicle safety." 49 U.S.C. app. § 2305(b); 49 C.F.R. § 395.3.

Refusing to drive when the contemplated run would cause the driver to violate the hours of service regulation is a protected activity under the "when clause." This regulation provides in relevant part, that a truck driver shall not drive after "[h]aving been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates motor vehicles every day of the week" and that "[a]ny period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours." 49 C.F.R. §§ 395.3(b)(2), 395.3(c)(2); *see also Paquin v. J.B. Hunt Transport, Inc.*, 93-STA-44 (Sec'y July 19, 1994). Requiring drivers to drive after being on duty for 70 hours in any period of 8 consecutive days is a violation of the safety regulations in 49 C.F.R. § 395.3.

However, Complainant does not claim that he was fired for refusing to drive. Rather, the question here is whether Complainant's October 20 email to Eddie Majus, Respondent's owner and manager, constitutes a complaint under the STAA's "file a complaint" clause. Complainant argues that he was fired for sending an October 20 email stating:

> I'm requesting EM Cargo, LLC identification number that I need to fill out IRS Form SS-8 to establish my employment status in the company. I have to work 4 weeks without days off, 34-h 'restarts', can't refuse to haul cheap loads (any load) and can get only 3.5 days of home time. Last work period:9/15/19-10/14/19. I came home on 10/14/19 and on 10/17/19 you start to send me messages, trying to force me put on road from 10/18/19, threatened to take back truck, despite on contract provision…So, definitely, you treat me as employee and this will be a question for IRS, DOL, etc…

(JX-06 at 1). The question here is whether his mention of "34-h restarts'" constitutes protected activity.[7]

Given the structure of Complainant's email, it is difficult to understand the exact nature of his complaint and whether he was specifically stating that Respondent should allow him to take

[7] Complainant testified at the hearing that his retaliation claim "is based solely on the portion of this email that references 34-hour restarts." (Tr. at 24).

34-hour restarts, or if he was more generally complaining about hours of service violations by the Respondent. Assuming he was complaining about hours violations, to include improper off duty time, it is also unclear if Complainant was referring to specific events in October 2019 or generally commenting on Respondent's practices.

Looking at the circumstances surrounding the October 20 email, including the evidence in the record and the timeline to which Complainant testified at hearing, there do not seem to be any valid hours of service violations in the days preceding Complainant's email. Complainant sent the email on October 20, 2019. At that time, he had been on vacation since at least October 15, 2019, as he delivered his final load on October 14, 2019. It is Complainant's burden to demonstrate if there is a violation, and he does not make clear how many hours he worked in the days preceding his vacation. As he did not present explicit evidence to demonstrate what hours he worked on which days, my best estimate after review of the evidence is that from October 4 to October 14, 2019, Complainant was on duty between 73 hours and 45 minutes to 80 hours. (JX-10; JX-30). Respondent did not contact Complainant until October 17, 2019. Having not worked the roughly 72 hours from October 15 to October 17, Complainant was well past the 34 hour voluntary restart and also well past the off-duty period in 49 C.F.R. §§ 395.3(b)(2) and 395.3(c)(2).

I find Complainant did not believe he was reporting an October 2019 violation when he emailed Eddie Majus about 34-hour restarts when the facts clearly demonstrate that Complainant had not worked in well over 34 hours, even if he had returned to work on October 18 as Respondent had requested. Additionally, an objective employee in Complainant's situation would not have believed that a violation would have occurred if they had emailed a company about wanting a 34-hour restart after already taking 72 hours off.

An alternate explanation could be that Complainant was generally commenting that Respondent did not allow him to take required time off, to include voluntary 34-hour restarts. In Complainant's brief, he argues that as of September 15, 2019, he had 70 total hours available, but after a week, on September 21, 2019, his total driving time was 71 hours and 35 minutes. (Compl. Br. at 3-4). He then asserts, "[a]s of September 21, 2019, the Complainant was out of working hours, but the data in his log book were [sic] altered by the monitoring center. On September 22, 2019 he was assigned a new load and continued to work." (Compl. Br. at 5). Taking this information into consideration and assuming that Complainant was not just referring to his most recent on duty period in October 2019, an hours of service violation could subjectively and objectively be contemplated.

However, in Complainant's email to Eddie Majus, he only once mentions "34-hour restarts" without providing an additional information or explanation. While Majus and Complainant emailed back and forth, he never again mentions 34 hour restarts or elaborates on this complaint or what he means. Safety complaints under § 31105(a)(1)(A) can be informal, but must be made in good faith. Looking at Complainant's email in its entirety, I find he was not making a safety complaint; rather, he was telling Majus that he is emailing him because of a dispute over his employment status. Even though he mentions 34-hour restarts, the entire context of the email is too vague to establish that Complainant was filing a safety complaint.

Accordingly, I find that Complainant has not established that he engaged in protected activity under the STAA's "file a complaint" clause when he informed Eddie Majus he was not permitted voluntary 34-hour restarts.

Assuming, arguendo, that Complainant's email does rise to the level of a safety complaint that is protected activity under the STAA, and as discussed below, I would still deny his complaint for failing to demonstrate that the email about 34-hour restarts contributed to any unfavorable personnel actions.

Unfavorable Personnel Actions

Complainant alleges that three separate unfavorable personnel actions occurred as a result of his report of 34-hour restart violations.

Termination

Under the STAA, any discharge by an employer constitutes an adverse action, and a discharge is any termination of employment by an employer.[8] I find that Complainant's termination on October 20, 2019 constitutes an adverse action under the Act.

Non-payment of Escrow Account

The regulations at 40 C.F.R. § 376.12(k) require a carrier to pay interest on an escrow fund if such a fund exists. Complainant alleges that he suffered an adverse employment action because Respondent has not paid the interest on his escrow account.

Part 19 of Complainant's contract with Respondent states:

> Contractor agrees and authorizes Carrier to withhold escrow/security deposit funds "escrow funds"). The amount of escrow funds shall be a minimum of $2500, which amount is to be deducted from Contractor's compensation beginning on first week of services provided by Contractor…Carrier shall pay interest on the escrow funds on a quarterly basis…Escrow funds, less any reductions, shall be repaid within forty-five (45) days from the date of termination of this agreement.

(JX-01 at 7-8). Complainant's Equipment Rental/Lease agreement also noted that he would pay a $2,500 security deposit after the execution of the agreement. (JX-02 at 4).

Complainant asserts that he received his escrow fund on January 10, 2020, but that he was not paid interest on the fund. Eddie Majus, Respondent's owner, testified at trial that drivers were not required to pay any security deposit and that there was no escrow account. (Tr. at 55-56).

[8] *Minne v. Star Air, Inc*. ARB No. 05-005, ALJ No. 2004-STA-26, slip op. at 13-15 (Oct. 31, 2007); *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19, slip op at 10 (ARB Sept. 30, 2010).

While Complainant notes that he received his escrow fund, the records indicate that he was paid $2,024.63 on January 10, 2020. (JX-11 at 5). This amount does not equal the $2,500 amount listed in the Equipment Rental/Lease agreement; instead, it appears to be equal to the total amount Complainant earned for his final work period in October 2019. (JX-10 at 24-25). Additionally, Complainant included his checking account statements, which, while apparently not the full snapshot of his account, also do not demonstrate that EM Cargo withdrew or that Complainant paid any amount for an escrow or security deposit during the start of his employment. (JX-11).

On the record before me, I find no evidence that an escrow account actually existed, that Complainant made a security deposit at the start of his employment with Respondent, or that Complainant made deposits into an escrow fund during his employment. Because I find no such fund existed, Complainant did not establish by a preponderance of the evidence that he suffered from the adverse action of non-payment of an escrow fund.[9]

Blacklisting

Complainant further alleges that he suffered a third unfavorable personnel action, as Respondent is allegedly blacklisting him from similar jobs in the field.

The STAA recognizes that blacklisting may qualify as an adverse action. 29 C.F.R. §§ 1978.102(b), (c); *see also Murphy v. Atlas Motor Coaches, Inc.*, ARB No. 05-055, ALJ No. 2004-STA-036 (ARB July 31, 2006). Blacklisting is "'quintessential discrimination.'" *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056, 02-059; ALJ No. 2001-ALJ-018, slip op. at 9 (ARB Nov. 28, 2003) (quoting *Leveille v. New York Air Nat'l Guard*, No. 1994-TSC-003, slip op. at 18 (Sec'y Dec. 11, 1995)). The Board has said that "blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment." *Id.* at 5.

Blacklisting does not require a complainant to prove that a negative report actually led to adverse or undesirable consequences. *Beatty v. Inman Trucking Management, Inc.*, ARB No. 11-021, ALJ No. 2008-STA-00020 and 00021, slip op at 6. (ARB June 28, 2012). Additionally, even if a complainant would not have lost an employment opportunity due to a respondent's improper statement, a respondent is not shielded from liability if the statement "had a tendency to impede and interfere with [a complainant's] employment opportunities." *Earwood v. Dart Container Corp.*, ALJ No. 1993-STA-016, slip of. At 3 (Sec'y Dec. 7, 1994).

On a March 10, 2020 reference form, Eddie Majus rated Complainant either 2s or 3s in every category, which falls into the "low" classification out of 5 on the reference form. (JX-20 at 2). Majus stated that he would not recommend Complainant for a similar role. On the reference form, he also wrote that Complainant left the company because of "pour [sic] communication skills" and that he was not eligible for rehire. At no place on the form does Majus reference 34 hour restart or hours of service. Complainant asserts the reference was "untrue and was intended to injure Complainant in his profession by indicated that he was incompetent to perform

[9] I note again that the scope of the decision is whether an unfavorable personnel action occurred. The question of whether Respondent failed to create an escrow fund as described in the independent contractor agreement is outside the scope of this decision.

professional duties." (Compl. Br. at 20). Respondent argues that the negative job reference would not count as an adverse employment action because "no employer ever declined to hire him as a result of the reference form." (Resp.Br. at 9).

As noted, a complainant is not required to establish an actual loss of employment to show blacklisting. *Beatty, supra*. Here, Respondent's reference form is negative on its face and could prevent Complainant from finding employment and therefore, I find that Complainant suffered blacklisting under these standards.

Contributing Factor Causation

However, even if Complainant's actions constitute protected activity under the Act, he must still establish by a preponderance of the evidence that the protected activity was a contributing factor to his discharge and blacklisting. It is here that Complainant falls short.

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." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008). The trier of fact considers all relevant evidence in determining whether there was a causal relationship between a complainant's protected activity and the adverse employment action alleged. *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, slip op. at 21 (ARB Jan. 6, 2017), *aff'd Powers v. U.S. Dep't of Labor*, 723 Fed. Appx. 522 (9th Cir. 2018) (unpub.); *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13, slip op. at 8 n.37 (ARB Mar. 11, 2019) (per curiam) (emphasizing that the *Powers* decision allows the trier of fact to consider all relevant evidence at the contributory factor causation stage).

The parties have widely varying views of what prompted Respondent to fire Complainant, largely focusing on whether Respondent's articulated reason for discharging Complainant – that he had poor communication with the dispatcher and refused to return his leased truck for a period of days resulting in a significant loss of income to the company– were the real reasons for the discharge. Complainant argues that he was discharged because he mentioned violations of the voluntary 34-hour restart rule in an email to Eddie Majus.

Email as a Contributing Factor to Termination

Respondent contends that even if Complainant's email to Eddie Majus qualifies as protected activity under the Act, such alleged protected activity played no role in Respondent's decision-making process to terminate Complainant's employment. I agree.

Knowledge of protected activity by a decision maker on adverse employment may not be simply imputed or assumed. *See Conrad v. CSX Transportation, Inc.*, 824 F.3d 103 (4th Cir. 2016). Here, Complainant sent an email about 34-hour restarts to Eddie Majus, who made the ultimate decision to fire him. There is no dispute that Majus knew about the email.

Evidence of proximity in time between the protected activity and the adverse employment action can raise an inference of causation. Temporal proximity is not a dispositive factor, but just one piece of evidence for the trier of fact to weigh. *See Spelson v. United Express Systems*, ARB

No. 09-063, ALJ No. 2008-STA-39, slip op. at 3 n.3 (ARB Feb. 23, 2011). Even with evidence of temporal proximity, the complainant still has the burden of establishing the causation element by a preponderance of the evidence. *Id.* An inference of causation may be broken by an intervening event or by lack of knowledge of the protected activity by the decision-maker. *See Dho-Thomas v. Pacer Energy Marketing*, ARB No. 13-051, ALJ Nos. 2012-STA-46, 2012-TSC-1, slip op. at 5, n.12 (ARB May 27, 2015); *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-37, slip op. at 6 (ARB Oct. 17, 2012); *Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062, slip op. at 12 (ARB June 17, 2019) (per curiam) (causal inference based on temporal proximity diminished by intervening events showing a reasonable concern by employer that complainant was charging official time while engaged in personal activities).

Here, Complainant raised the 34-hour restart in an October 20 email with Majus, three days after first communicating with Respondent. After emailing back and forth about the best way to collect such information, Majus emailed Complainant on October 20 saying that his employment was terminated. (JX-06). Complainant's termination forms were dated October 23 and October 24. Thus, I find that there was temporal proximity between the timing of Complainant's protected activity and his termination.

Although I find temporal proximity existed between Complainant's concerns and his termination, other factors undercut the weight to be given to this temporal proximity.

First, Complainant's October 20 email follows a four-day period in which two representatives from EM Cargo, Eddie Majus and Loki the dispatcher, reached out multiple times via text message and phone, attempting to communicate about when Complainant would begin work again and when he would return Respondent's vehicle. On October 17, after Majus told Complainant that he needed to answer his questions and return the truck, Complainant texted him, "send me termination documents if you want." Majus expressed frustration on this date, texting, "You are just keeping our truck and not making any payments this week. I'm tired of it." (JX-43 at 3). On October 18, Majus also texted Complainant, "I can terminate you whenever I decide its time." These texts demonstrate that Complainant initially raised termination, which Majus was also contemplating, well before Complainant first mentioned 34-hour restarts in his email.

Respondent's issue with Complainant keeping the truck during his week-long vacation was referenced in the same email that fired him. Additional emails from Majus reiterate that he was tired of the situation and that EM Cargo would "fil[e] a police report tomorrow [Monday, October 21] due to the holding our equipment as a hostage." (JX-06 at 3). While these emails all occurred on October 20 and the text messages occurred prior to Complainant's firing, they demonstrate a pattern of communication between Respondent and Complainant regarding his vacation time, which he did not inform Respondent he was taking, and his decision to keep the truck for a week without returning it to EM Cargo. Communications between Complainant and Majus and Loki earlier in the week demonstrate Respondent's growing frustration about Complainant's decision to take vacation and not tell anyone at EM Cargo, which in turn negatively impacted the company's bottom line. Finally, the mention of 34-hour restarts is a single line in an email of several paragraphs requesting tax information from Respondent.

Second, Respondent has consistently listed the same reasons for terminating Complainant: his poor communication with the company and the fact that Complainant kept the company truck while on vacation. Complainant argues that Respondent gave false and differing reasons for termination. While Respondent may have not used identical wording in every document relating to Complainant's termination, the general premise remains the same: Complainant took a week off from driving, did not notify the company, and did not return the truck when requested. Complainant argues that, since he was an independent contractor, he did not have to inform anyone in the company when he was taking a vacation. That may be true, but failing to notify one's employer about time off, even if not required, does have its consequences. EM Cargo is a small company and Majus testified that he "needed my equipment to keep running." (Tr. at 43). As he lost roughly between $5,000-$6,000 from Complainant's vacation, it is reasonable that he would want to be informed of the drivers' vacation plans and whereabouts to plan accordingly.

Significantly here, Complainant only mentions the 34-hour restart issue once in a long series of emails and texts with both Loki and Majus about his work status and the location of the truck. Regarding Respondent's contributing factor burden, my role is not to question whether Eddie Majus's decision to fire Complainant was based on sufficient cause under EM Cargo's personnel policies or whether his actions were actually a breach of the independent contractor agreement, but, rather, whether looking at all of the evidence, did Complainant's protected activity contribute at all to Majus's decision to fire him.[10] I find that it did not. While Complainant speculates that he was fired for mentioning 34-hour restarts, having a plausible theory is insufficient to carry Complainant's burden of establishing it was a contributory factor

Email as a Contributing Factor to Blacklisting

Complainant argues that Respondent is blacklisting him through poor job references as a result of his decision to mention 34-hours restarts in an email. The job reference form at issue is from March 2020. In it, Majus rates Complainant's attributes as either 2s or 3s, which fall under the "low category." It also notes that Complainant was terminated from EM Cargo for "pour [sic] communication skills." Majus counters that his responses on the reference form are not related to Complainant's 34-hour restart email.

As mentioned above, evidence of proximity in time between the protected activity and the adverse employment action can raise an inference of causation. The reference form was filled out in March 2020, about five months after Complainant's email, so the factor of temporal proximity is more removed. Additionally, in this reference form, Respondent only mentions Complainant's communication skills as a reason for his termination; he does not mention any protected activity or Complainant's 34-hour restart email.

The information in the reference form submitted by Majus is true and accurate. It is understandable that, after Complainant took vacation time without telling him and not returning his truck until a week later, Majus would rate Complainant "low" in areas like "Reliability" and

[10] The STAA does not forbid unfair employment actions; it forbids retaliatory ones. *See, e.g.*, *Toy Collins v. American Red Cross*, 715 F.3d 994, 999 (7th Cir. 2013); *Brown v. Advocate S. Suburban Hosp*., 700 F.3d 1101, 1106 (7th Cir. 2012).

"Communications." There is no evidence in the record to support Complainant's allegation that Majus purposefully filled out the reference report with false information to prevent future employment, so I find this is not actionable blacklisting under the STAA. *See Estate of Braude v. United States*, 35 Fed. Cl. 99, 114 (1996) ("remarks that honestly describe a worker's prior history generally are to be encouraged rather than deemed wrongful and tortious"); *Barlow v. United States*, 51 Fed. Cl. 380, 395 (Ct. Fed. Cl. 2001) (an employee cannot claim under the Whistleblower Protection Act that he has been blacklisted if the information disseminated about him is truthful). Additionally, unlike *Timmons v. CRST Dedicated Services, Inc*., ARB No. 14-051, ALJ No. 2014-STA-9 (ARB Sept. 29, 2014), where a supervisor who knew about protected activity added disparaging information into a computer system used for employment verification, Eddie Majus simply checked boxes on the reference form and briefly answered the prompt asking why Complainant was terminated; he did not add any additional information disparaging Complainant or mentioning whether Complainant engaged in protected activity.

I find that Complainant's reference to 34-hour restarts did not contribute in any way to Majus's decision on how to fill out the reference form. As such, I find that the record as a whole fails to show that Complainant established by a preponderance of the evidence that his protected activity contributed to how or why Majus completed the reference report.

Affirmative Defense

Because I find that Complainant's protected activity did not contribute to Respondent's decision to terminate Complainant's employment, Respondent is not required to establish by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the Complainant's protected activity.

Assuming arguendo that Complainant met his burden of showing by a preponderance of the evidence that protected activity contributed to his termination and the negative reference form, Respondent may still prevail if it shows by clear and convincing evidence that they would have taken the same adverse personnel action in the absence of the protected activity. *Palmer v. Canadian Nat'l Ry.*, No. 16-035, 2016 WL 5868560 at *31, 36 (ARB Sept. 30, 2016) (reissued Jan. 4, 2017). Clear and convincing evidence requires that "the ALJ believe that it is 'highly probable' that the employer would have taken the same adverse action in the absence of the protected activity. . . . It is not enough for the [respondent] to show that it *could* have taken the same action; it must show that it *would* have." *Id.* at *31, 33 (*citing Speegle v. Stone & Webster Constr. Inc.*, No. 13-074, 2014 WL 1758321 at *6-7 (ARB April 25, 2014)) (emphasis in original).

I find Respondent has established by clear and convincing evidence that it would have terminated Complainant based on the lack of communication surrounding his time off.

The decision to fire Complainant as a driver was reasonable and expected given the loss in revenue by not having Complainant's truck on the road. Where a business only gets paid for the loads it delivers, an employee cannot pick and choose the days he takes off knowing that decision directly impacts a company's bottom line, without first coordinating with the company to develop a plan to keep the truck on the road while the employee is on vacation. That is what happened here. No employer can tolerate an employee taking vacation without informing the company, keeping a company truck during the entirety of that vacation, and not effectively communicating

when questioned about his work status and the location of the truck, the consequence of which was between $5,000.00 and $6,000.00 in lost revenue to the company. In other words, the decision to terminate Complainant as a driver for EM Cargo was strictly a business decision. Whether this court would have made the same decision is not the issue as "federal courts do not sit as a super-personnel department that re-examines" employment decisions. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792 (8th Cir. 2014). Here, the decision to fire Complainant would have happened whether or not he engaged in protected activity.

ORDER

Accordingly, IT IS ORDERED that the complaint filed by Mykhaylo Holovatyuk with the Occupational Safety and Health Administration against EM Cargo is DENIED.[11]

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

[11] The regulations [at 29 C.F.R. 1978.109(d)(2)] provide that "[i]f the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint." *Buie v. Spee-Dee Delivery Services, Inc*., ARB No. 2019-015, OALJ No. 2014-STA-00037 slip op. at 2 (ARB Oct. 31, 2019) (per curiam).

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.