U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 June 2021

Case No.: 2021-STA-00026

In the Matter of:

AUNDRE TERRELL,
Complainant,

v.

J-MAX TRANSPORTATION SERVICES, INC.,
Respondent.

Appearances:

Collin H. Nyeholt, Esq.
Law Offices of Casey D. Conklin, PLC
Okemos, MI 48864
For the Complainant

Tania E. (Dee Dee) Fuller, Esq.
Fuller Law and Consulting, P.C.
Grand Rapids, MI 49546
For the Respondent

DECISION AND ORDER GRANTING SUMMARY DECISION

The above-captioned case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA" or the "Act"), 49 U.S.C. § 31105, and the implementing regulations found at 29 C.F.R. Part 1978.

Background and Procedural History

On February 16, 2019, Aundre Terrell ("Complainant") filed a complaint with the U.S. Department of Labor, Occupational Health and Safety Administration ("OSHA"), claiming that

his former employer, J-Max Transportation Services, Inc. ("Respondent" or "J-Max") fired him on January 25, 2019 for raising safety concerns about driving hazardous materials. OSHA investigated and issued a determination letter on August 5, 2019 dismissing the complaint ("Initial Findings"). The Initial Findings advised Complainant he had thirty days from receipt to file objections and request a hearing before the Office of Administrative Law Judges ("OALJ" or "Office").[1]

While OSHA sent the August 5, 2019 determination letter to Complainant by certified U.S. mail, it was returned to OSHA as undeliverable on September 3, 2019, as Complainant had apparently moved, not properly forwarded his mail, and not apprised OSHA of his new address.

On February 8, 2021, this Office received a letter from Complainant, dated January 27, 2021, appealing the OSHA dismissal. As the time for filing the hearing request appeared to have lapsed, I issued an *Order to Show Cause* on February 17, 2021, giving Complainant thirty days to show cause why his January 27, 2021 appeal should not be dismissed as untimely filed. Respondent was given thirty days from receipt of any such filing by Complainant to respond.

Complainant, then representing himself, responded by letter dated February 23, 2021, stating "I…would like to apologize to the court for not meeting the deadline to appeal this case. Due to circumstances out of my control I never received a letter to give me the opportunity to appeal by mail…It was several months later that I was informed that certified mail sent to my previous residence in Zeeland, MI never made it to me." Regarding the date he received the OSHA letter, Complainant stated in a supplemental letter dated March 1, 2021 that "I received notice on January 21, 2021 via email from OSHA Regional Supervisory Investigator, Richard Abernathy." Respondent filed a response to the *Order to Show Cause* on March 1, 2021.

On, March 4, 2021, I issued *Order Finding Cause to Proceed to Hearing and Setting Prehearing Deadlines*, finding Complainant's appeal was timely and setting the matter for hearing on July 16, 2021 in Detroit, Michigan.[2]

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[1] Any party who desires review must file objections and a request for hearing within 30 days of receipt of the findings 29 C.F.R. § 1978.106(a). If no timely objection is filed, the findings become the final decision of the Secretary, not subject to judicial review. 29 C.F.R. § 1978.106(b). An appeal is timely when filed within 30 days of receipt of OSHA's findings.

[2] I found that OSHA sent Complainant a copy of the Initial Findings by USPS Certified Mail to the address he included in his February 16, 2019 complaint. I further found there was no dispute that the certified mail copy OSHA sent to Complainant was returned as undeliverable. Additionally, there was no evidence that OSHA sent Complainant a copy of the findings by email in 2019 or 2020 or called Complainant to obtain a different address. I held that the regulations place the burden on OSHA to ensure a copy of the findings is served on the parties, and it must take all reasonable efforts to do so, which I found was not done in this case. Accordingly, I concluded it was not until after Complainant contacted OSHA on January 20, 2021 that he received a copy of the August 5, 2019 findings, thereby starting the 30 day clock. "For the clock to start running on Complainant's right to appeal, he must receive OSHA's findings." *Lancaster v. Norfolk Southern Railway Company*, ARB No. 2019-048, OALJ No. 2018-FRS-00032, slip op. at 5 (ARB Feb. 25, 2021).

The Order also required Complainant to file a Pleading Complaint listing each protected activity and adverse action relied on and why such action was retaliatory along with the type of relief sought. Respondent was then required to

Respondent filed *Motion for Summary Decision* on May 14, 2021 ("Mot.") and Complainant, through counsel,[3] filed *Response in Opposition* ("Opp.") on May 25, 2021. For the reasons more fully explained below, I find the record contains evidence that, if believed, could lead a reasonable fact-finder to conclude that Complainant's reporting of his concerns about being required to drive hazardous materials without being properly licensed was a protected activity under the "file a complaint" provisions of the STAA and could have been a contributing factor in his termination. However, there is no genuine issue of material fact regarding whether Respondent would have fired Complainant, notwithstanding such protected activity. As such, summary decision is appropriate.

Positions of the Parties

Complainant

Complainant worked as a driver for Respondent J-Max Transportation Services and was primarily assigned to perform transportation services for Respondent's largest customer, Gentex Corporation. (Opp. at 1). He alleges he complained on several occasions to his direct supervisor, Respondent's owner, and once to the Michigan State Police that he was transporting hazardous materials without being properly licensed, which he believed was a violation of the Federal Motor Carrier Safety Act. (Opp. at 2; Opp. Ex. B). When he believed his concerns were not addressed, Complainant emailed 19 officers and employees of Gentex Corporation on January 25, 2019, accusing Respondent of having its drivers transport hazardous materials without the proper license, a violation of federal regulations, and calling on Gentex to investigate, threatening to go to the news if they did not. (Opp. Ex. C). Respondent fired Complainant later that day. In March 2019, Respondent, through counsel, threatened to sue Complainant for defamation and tortious interference with a business relationship.

Complainant avers that his complaints to J-Max and the state police about transporting hazardous materials without the proper licensing, as well as his January 25, 2019 email to Gentex, are protected activities under the STAA.[4] Complainant submits that his termination and Respondent's threat to sue him are adverse actions under the STAA and avers that raising the improper licensing concerns was a contributing factor to both. (Opp. at 9-10).

Respondent

Respondent disputes that Complainant ever brought concerns about transporting hazardous materials to his supervisor or the owner of J-Max or that he was ever told to illegally transport

file a response either admitting or denying such allegation and summarizing the factual and legal basis for any affirmative defense. Complainant filed his Pleading Complaint on March 22, 2021, and Respondent filed its Response on April 26, 2021.

[3] Counsel for Complainant entered his appearance on March 18, 2021.

[4] The employee protection provisions of the STAA provide, in general, that a covered employer may not take adverse employment action against an employee because the employee has filed a complaint about "a violation of a commercial motor vehicle safety or security regulation, standard, or order," 49 U.S.C. § 31105(a)(1)(A).

hazardous materials. It also asserts that the materials Complainant was transporting for Gentex did not require special licensing. (Mot. at 2). Regardless, Respondent submits that Complainant was not terminated for reporting potential Department of Transportation violations, but because he sent an email containing false and defamatory allegations mostly unrelated to safety concerns to the senior leadership of Respondent's largest customer. In other words, he was fired not for what he said but who he said it to. The decision to terminate Complainant was for a legitimate non-retaliatory business reason, and he would have been fired for sending the email whether or not it included references to illegally transporting hazardous materials. The March 2019 letter from Respondent's attorney threatening legal action is not an actionable employment action under the STAA, but simply a notice of intent to sue. (Mot. Ex. D).

Summary Decision Standard

Summary decision is proper when the record (i.e., pleadings, affidavits and declarations offered with the motion and evidence developed in discovery) demonstrates that "there is no genuine dispute as to any material fact, and that the movant is entitled to decision as a matter of law." 29 C.F.R. § §18.72(a); Fed. R. Civ. P. 56 (c); *see Townsend v. Big Dog Holdings, Inc.*, 2006-SOX-28 (ALJ Feb. 14, 2006); *see also Richardson v. JP Morgan Chase & Co.*, 2006-SOX-82 (ALJ Jul. 7, 2006). In determining whether there is a triable dispute of material fact, a tribunal must review all of the evidence and construe all inferences **in the light most favorable to the non-moving party**. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

A tribunal should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prod., Inc*., 530 U.S. 133, 150 (2000). The party who brings the motion for summary decision bears the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986); *Rusick v. Merrill Lynch & Co.*, 2006-SOX-45 (ALJ Mar. 22, 2006).

Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue of material fact exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *Anderson*, 477 U.S. at 242. However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. *Id*. at 249.

Findings of Fact

The following facts are derived from the Complaint, Pleadings, Responses to the Order to Show Cause, Motion for Summary Decision and Response, and the exhibits/attachments each party submitted in support thereof.[5]

Respondent J-Max Transportation Services, Inc. is a transportation and logistics company headquartered in Zeeland, Michigan. Respondent's largest customer is Gentex Corporation, which develops and manufactures electronic products for the automotive, aerospace, and commercial fire protection industries. Respondent maintains a fleet of trucks at the Gentex campus and provides drivers to shuttle materials to and from buildings on that campus. (Resp. at 1). Complainant worked for Respondent as a full-time driver on two occasions, April 11, 2014 to May 13, 2016 and from December 14, 2016 until he was fired on January 25, 2019. (*Id.*).

Complainant was primarily assigned to perform transportation services at Gentex Corporation. He began and ended his shift at the Gentex campus and was not an over-the-road driver. (Resp. at 2). Complainant was supervised by Justin Washington, the son of Respondent's owner, Jeweral Washington. (Compl. at 2; Opp. at 1). Complainant was issued a chauffer's driver's license on March 10, 2014, which was set to expire on February 25, 2018. He did not possess a commercial driver's license while working for Respondent and did not have a hazardous materials endorsement. (Resp. at 2; Resp. Ex. A; Compl. at 2).

On April 25, 2014, Complainant backed a company vehicle into another vehicle on the Gentex campus, causing about $2,000.00 in damage to the other vehicle. The police were not called, and no one sustained injuries. As the damage to the vehicle was under the $2,500.00 deductible, there was no requirement for Respondent to report the accident to its insurance carrier, and Respondent paid for the repairs out of pocket. (Resp. Ex. G at 4-5).

After Complainant was hired in 2014, Respondent received paperwork from the State of Michigan to withhold child support from Complainant's paychecks. Respondent processed the garnishment through its third-party payroll provider beginning on April 21, 2014. Instead of Respondent paying the state on behalf of Complainant, the payroll company was supposed to withhold Complainant's child support payments and pay them directly to the state. (Resp. Ex. G at 3). On March 31, 2015, Complainant informed Respondent that the State of Michigan put a lien

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[5] Abbreviations for citations are as follows: Complainant's March 22, 2021 Pleading Complaint – "Compl."; Respondent's April 26, 2021 Response to Complaint – "Resp."; Complainant's Show Cause Answer – "Ans."; Respondent's Response to Complainant's Show Cause Answer – "Ans. Resp."; Respondent's Motion for Summary Decision – "Mot."; Complainant's Response in Opposition to Respondent's Motion to Dismiss – "Opp." Additionally, any exhibits will indicate the filing and exhibit letter or number; i.e., Exhibit A of Respondent's Response to Complaint would be "Resp. Ex. A."

On June 9, 2021, Complainant, through counsel, filed *Complainant's Motion In Limine and Motion to Strike*, stating that Employer had submitted the transcript from Complainant's May 28, 2019 hearing regarding his claim for unemployment benefits and that use of the decision reached by that ALJ and the transcript to impeach Complainant in this proceeding is contrary to the Michigan Employment Security Act. *See* MCL Section 421.11(b)(1). Respondent filed a response on June 17, 2021, requesting this tribunal use sworn testimony from the hearing to impeach Complainant's inconsistent statements. The Motion is GRANTED. The hearing transcript and results were not considered in this Decision and Order.

on his savings account and withdrew $2,687.04 because they did not receive the child support for the previous year. (Resp. Ex. H). Complainant believed Respondent stole the money from him and stated that he had no money on which to live. Respondent immediately issued Complainant a check for $2,687.04. (Resp. Ex. G at 3). A subsequent investigation undertaken by Respondent indicated that the then-payroll provider improperly processed the required withholding to the court and did not notify Respondent of the error until April 2019. (Resp. Ex. H at 2-3).

On December 31, 2016, about two weeks after being rehired by Respondent, Complainant was arrested for operating his personal vehicle while impaired ("OWI"). (Resp. Ex. G at 5). Complainant notified Jeweral Washington of the arrest. Jeweral Washington immediately contacted Respondent's insurance carrier to determine if Complainant could still drive for the company. The insurance carrier advised Jeweral Washington that as long as Complainant's license was not suspended and as long as he drove only within the Gentex campus, he would still be covered by the policy. Jeweral Washington instructed Complainant to keep him informed of what happened at the upcoming hearing, as Complainant would have to be terminated if his license was suspended or revoked because he could no longer remain on the company insurance policy. Respondent ran a motor vehicle report on January 9, 2017, which indicated Complainant's license was not suspended. On December 20, 2017, and consistent with company policy, Respondent randomly pulled Complainant's motor vehicle report. After doing so, it learned for the first time that Complainant was convicted for OWI on January 24, 2017 and that his license was suspended from February 11, 2017 through midnight on May 11, 2017 and remained suspended until payment of a reinstatement fee, which Complainant paid on May 15, 2017. (Resp. Ex. G at 5-6). Complainant did not inform Respondent of his conviction or that his license had been suspended for three months, and he continued to drive for Respondent during the period of suspension. Respondent did not discipline Complainant for not informing it of the OWI conviction and license suspension and allowed Complainant to continue to work for it because his license had been reinstated, he had not had any accidents, the insurance policy still covered him, and he said he needed the job. (Resp. Ex. G at 6).

On one occasion in 2017, Respondent mistakenly paid Complainant for overtime using a gift card without withholding payroll taxes. (Resp. Ex. G at 4).

Respondent's company policy and procedures require its drivers to notify their supervisor before moving any hazardous materials or materials they believe to be hazardous. The supervisor then makes the determination whether the load can be legally moved and advises the driver accordingly. (Resp. at 2-3). Respondent has a "no forced dispatch" policy, meaning that, if any driver still feels uncomfortable transporting a load, they are not required to transport the materials. A driver can transport certain materials without a hazardous materials endorsement if the load is under 1,001 lbs. (Mot. at 1-2). A driver did not require a hazardous materials endorsement if only moving materials on the Gentex campus.

Complainant alleges Justin Washington instructed him on several occasions to transport hazardous materials despite Complainant verbally expressing concern that he was not properly licensed. Complainant alleges he verbally expressed the same concerns that he was being required to drive hazardous materials without the proper license to Jeweral Washington. Complainant alleges Jeweral Washington would change the subject and refuse to respond. (Compl. at 2-3). Complainant then alleges he approached Sergeant Carl Schembri of the Michigan State Police in

November 2018 and apprised him that he was being ordered to illegally transport hazardous materials. Complainant alleges the Michigan State Police closed the case without action, but a Freedom of Information Act request indicates no record of any complaint filed by Complainant. (Compl. at 3; Mot. at 3; Mot. Ex. B).

Justin and Jeweral Washington deny that Complainant ever complained to them about transporting hazardous materials without a proper license. (Resp. at 5).

Complainant never refused to operate or drive a vehicle while employed by Respondent. (Mot. at 2).

On the morning of January 25, 2019, Complainant sent an email, with several attachments, to nineteen senior executive officers and employees of Gentex accusing Respondent of having its drivers transport hazardous materials without the proper license, which is a violation of federal regulations, and calling on Gentex to investigate, threatening to go to the news if they did not. The email also accused Respondent of other improper or illegal actions unrelated to transporting hazardous materials without a license. He also included Jeweral Washington on the correspondence. The email stated:

> Jeweral, why does JMAX have Drivers moving hazardous materials without the proper license I reported this to the DOT in Rockford but nothing was done about this matter because SGT Carl Schembri is your friend I can't wait until the public finds out about this scandal taking child support payments for over a year and not making payments to the state which the state took all my money out of my personal accounts, JMAX Paying me on a gift card for my overtime without taxes taken out of my money. Accidents not being reported to the state, drivers not on the company insurance me having an OWI still driving for your company you know all of this is true hell these are all facts if someone at Gentex just look into this they would see that I didn't lie about none of this I know you said no I will do anything this at Gentex and I also know you are still trying to fire me because I speak about how you have did me and before I forget if anything mysteriously happens to me people are Gentex will know it was you here are copies of the past text that I sent to you, documents of the accident that happened on Gentex property that you didn't report while I was not insured at the time I was told that Tony Ross wasn't going to do anything about this matter Gentex may not do anything but Channel 13 new and news 8 will and Jeweral Washington if you fire me for your misconduct that's retaliation

Within minutes of Complainant sending the email to Gentex, Justin and Jeweral Washington received phone calls from Gentex upset about receiving the email and demanding that Complainant be removed from the premises. (Resp. Ex. E at 2-3).

Jeweral Washington met Complainant at a grocery store parking lot later that day where he fired Complainant. When Complainant asked why, Jeweral replied, "because of the email." (Resp. Ex. E at 3).

There is no evidence that Complainant filed a safety complaint with a state or federal transportation agency, such as the Federal Motor Carrier Safety Administration or other similar entity.

On February 16, 2019, Complainant filed a complaint with OSHA alleging Respondent retaliated against him in violation of the STAA. (Opp. Ex. D).

On March 16, 2019, Respondent, though counsel, sent Complainant an intent to sue letter informing Complainant that Respondent intended to sue him for defamation and tortious interference with a business relationship. (Opp. Ex. E).

Legal Burdens of Proof

The STAA is governed by the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b). *See* 49 U.S.C.A. § 31105(b)(1); *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-71 (ARB May 18, 2017). To prevail, a STAA complainant must establish by a preponderance of the evidence that:

- the complainant engaged in a protected activity;
- the complainant suffered an unfavorable personnel action; and
- the protected activity was a contributing factor in the unfavorable personnel action.

49 U.S.C.A. § 42121(b)(2)(B)(iii). If a complainant satisfies 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 the complainant's protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iii), (iv). *Huang v. Greatwide Dedicated Transport II, LLC*, ARB No. 19-0053, ALJ No. 2016-STA-17 (May 27, 2021).

Is there Some Evidence That, If Believed, Complainant Engaged in Protected Activity?

A complainant may engage in protected activity by making a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. 49 U.S.C. § 31105(a)(1)(A).

Complainant alleges the following discrete acts of protected activity: Verbal complaints to Justin Washington raising safety concerns that he was transporting hazardous materials without the proper certification or license; verbal complaints to Jeweral Washington informing him of the prior complaints to Justin; a November 2018 report of the ongoing violations to the Michigan State Police; the January 25, 2019 email to Gentex threatening to report the violations if not remedied; and the February 16, 2019 OSHA retaliation complaint. Thus, the "file a complaint" clause of the STAA is potentially applicable under the facts of this case. 49 U.S.C. § 31105(a)(1)(A).

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. 13-031, 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.

Complainant claims he made oral complaints to both Justin and Jeweral Washington, who dispute Complainant ever spoke to them. For the purposes of this motion, I find there is sufficient evidence for a reasonable fact finder to conclude Complainant complained to his supervisors at some point that that he was being required to transport hazardous materials without the proper licensing, which he reasonably believed was a violation of the regulations, and a protected activity under section 31105(a)(1)(A).

Complaint claims he filed a complaint with the Michigan State Police that he was being required to transport hazardous material without the proper license. Respondent asserts that Complainant could not have gone to the police, as they filed a Freedom of Information Act request with the Michigan State Police seeking any complaints filed by Complainant, who responded they had no such documents on record. For purposes of this motion, I find there is sufficient evidence for a reasonable fact finder to conclude that the Complainant complained to the Michigan State Police in November 2018 that his employer was requiring him to transport hazardous materials without a license and that, for purposes of this motion, such a complaint made to an agency whose duties include highway and vehicle safety, is a protected activity under section 31105(a)(1)(A).

Normally, an employee makes a safety complaint internally to another company employee or externally to a federal or state agency, or similar organization, tasked with vehicle safety. The January 25, 2019 email was instead sent to a third party. Under some circumstances, complaints to a third party may be a protected activity. *See Dho-Thomas v. Pacer Energy Marketing*, ARB No. 13-051 (ARB May 27, 2015) (holding that the Board will not rule out entertaining protection for disclosures to third-party non-employers under certain circumstances). *Cf. Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1575 (11th Cir. 1997) (ERA may protect expression of safety related concern to co-worker when viewed in context: "The important question, however, is . . . whether he was acting in furtherance of safety compliance when he spoke to the co-workers."). Given the parties' factual dispute as to why Complainant sent the email to Gentex, I

assume, without deciding, that the January 25, 2029 email is also a protected activity under section 31105(a)(1)(A).

The February 26, 2019 complaint is a protected activity under section 31105(a)(1)(A).

Is There Some Evidence That Respondent
Took An Unfavorable Personnel Action?

The STAA prohibits a person from, *inter alia*, discharging an employee because the employee filed a complaint relating to a violation of commercial motor vehicle safety or security regulation. 49 U.S.C.A. § 31105(a)(1)(A)(i). Here, there is no dispute that Respondent fired Complainant on January 25, 2019.

However, I find the March 16, 2019 letter from Respondent's counsel notifying him of the intent to sue him for defamation and tortious interference with business is not an unfavorable personnel action under the STAA. Court filings and counsel statements related to on-going or potential court proceedings may not be used as the basis for a STAA whistleblower complaint as "statements of [respondent's] counsel are not evidence." *Levi v. Anheuser Busch Co.*, ARB Case Nos. 06-102, 07-020, 08-006, at 13, (ARB Apr. 30, 2008), *citing Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 593 n.4 (9th Cir. 2002) (statements of counsel "are not evidence and do not create issues of material fact").

Is there Some Evidence That, If Believed, Complainant's Protected
Activity Was A Contributing Factor in the Unfavorable Personnel Action?

As noted above, an STAA complainant must establish by a preponderance of the evidence that the protected activity was a contributing factor in the unfavorable personnel action. 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 contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity, *See, e.g., Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014). Evidence of proximity in time between protected activity and the adverse employment action can raise an inference of causation. An inference of causation may be broken by an intervening event. *See Dho-Thomas v. Pacer Energy Marketing*, ARB No. 13-051 (ARB May 27, 2015).

Complainant filed his OSHA complaint on February 26, 2019, after his termination on January 25, 2019, so it could not have been a contributing factor. Given my previous finding that the intent to sue letter is not an actionable unfavorable personnel action, the only remaining issue is whether the concerns Complainant says he raised to Justin and Jeweral Washington and the Michigan State police and the January 25, 2019 email were a contributing factor in his termination.

The parties have dramatically different views of what motivated Respondent to fire Complainant, largely focusing on whether Respondent's articulated reason for discharging Complainant – that Complainant sent an accusatory and defamatory email to its largest customer – was the real reason for the discharge. Given Complainant's January 25, 2019 email specifically accused Respondent of having its drivers move hazardous materials without the proper license,

and Respondent admitting the reason for the discharge was the email, I find there is sufficient evidence for a reasonable fact finder to conclude the protected activities were a contributing factor in his termination. Taking all the evidence in the light most favorable to Complainant, these assertions, if believed, would establish Complainant's required *prima facie* case under the STAA and summary decision on this basis is inappropriate.

Has Respondent Demonstrated by Clear and Convincing Evidence that It Would Have Taken the Same Unfavorable Personnel Action Absent the Protected Activity?

Even if Complainant could meet his burden of establishing by a preponderance of the evidence that protected activity contributed to his termination, 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).

There is no dispute that Complainant sent an email to Respondent's largest customer accusing Respondent of unsafe and illegal activity, to include allegations about misappropriated child support payments, gift card misuse, and allowing drivers to continue to operate vehicles despite an OWI conviction, all occurring years before and unrelated to hazardous materials transport.

Immediately after Complainant sent the email to its largest customer, Justin Washington received calls from Gentex telling him to remove Complainant from their property. (Resp. Ex. E at 3). Jeweral Washington, Respondent's owner and the sole decision-maker on Complainant's discharge, stated that he had been fielding Gentex's phone calls throughout the morning and that he "clearly would have taken the same disciplinary action against [Complainant] regardless of . . . any protected activity," particularly considering that Complainant's email included additional allegations unrelated to truck safety. (Resp. Ex. E at 3; Mot. Ex. D). Mr. Washington's assertion is more than simply suggesting a non-retaliatory reason for Complainant's termination; it explains the other four other topics in the email that he took issue with and that led to him to fire Complainant, (Mot. Ex. D), and establishes that there is no genuine issue of material fact regarding whether J-Max would have taken the same adverse action even absent Complainant's protected activity.

It is one thing to complain to one's supervisor or a government official about potential safety concerns. It is quite another for an employee to complain to a customer about company business, especially when those complainants do not relate to company business. Here, Complainant violated the most fundamental principles of the employment relationship by raising misleading and outrageous statements outside the company. The ARB has found that legitimate, non-discriminatory reasons for firing an employee include when the employee expresses distrust in the company. *Auman v. Inter Coastal Trucking,* 91-STA-32 (Sec'y July 24, 1992). Complainant says that he sent the January 25th email because he was not getting results. The fact

that Complainant included nineteen Gentex employees on the email complaining about Respondent indicates a marked distrust in the company and the way it was run. No employer can tolerate an employee making what it reasonably concludes to be false or defamatory charges about the company to its largest customer. Such allegations potentially impact the company's short and long term reputation, the financial health and well-being of the entire company, and the continued employment of its other employees.[6] Further, "an employer may terminate an employee who behaves inappropriately, even if that behavior relates to a legitimate safety concern, as long as the termination is not because of the safety complaint." *Am. Nuclear Res., Inc. v. U.S. Dept. of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998); *see also Ridgley v. U.S. Dept. of Labor*, 298 Fed. Appx. 447 (6th Cir. 2008). In this case, there is no factual dispute that Jeweral Washington believed Complainant behaved wholly inappropriately by sending the email to senior representatives of Respondent's largest customer and that such conduct could not be tolerated. There is no genuine factual dispute that the subsequent termination was solely due to who Complainant sent the email to and that it included stale and dated grievances unrelated to truck safety, not because it mentioned moving hazardous materials without a license.

Regarding Respondent's clear and convincing evidence burden, my role is not to question whether Jeweral Washington's decision to fire Complainant was wise or based on sufficient 'cause' under J-Max personnel policies, but only whether all the evidence, taken in the light most favorable to the Complainant, makes it highly probable that he would have fired him absent the protected activity.[7] I find that the record provides clear and convincing evidence that Respondent would have fired Complainant for sending the email to its largest customer, even if Complainant had never raised the issue of transporting hazardous materials without a proper license. I further find that Complainant has not submitted any evidence that would rebut Respondent's affirmative defense.

Conclusion

For the foregoing reasons, while I find that there is a material factual dispute whether Complainant's protected activity was a contributing factor in his termination, I find no genuine dispute of material fact regarding whether Respondent would have taken the same adverse employment action notwithstanding such protected activity. Under the circumstances, resolution of this issue will not require credibility determinations, the weighing of evidence, and a formal hearing on the merits of the case. As such, summary decision on this basis is appropriate. Accordingly,

[6] The ARB has also held that "insubordination and the deleterious effect on worker morale" is a legitimate and nondiscriminatory reason for firing an employee. *Gentry v. Rocket Express, Inc.*, 1994-STA-25 (Sec'y Mar. 17, 1995). Here, potentially losing the company's largest customer would cause stress to employees at the company. *See also Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 1214 (firing employee after multiple customer service complaints about him).

[7] The STAA does not forbid unfair employment actions; it forbids retaliatory ones. *See, e.g., Toy Collins v., American Red Cross* No. 11-3345 (7th Cir. Mar. 8, 2013); *Brown v. Advocate S. Suburban Hosp*., 700 F.3d 1101, 1106 (7th Cir. 2012).

Order

Respondents' Motion for Summary Decision is GRANTED. Complainant's February 16, 2019 complaint is DENIED. All previously issued deadlines are REVOKED. The July 13, 2021 hearing in Detroit, Michigan is CANCELLED.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).

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.