UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, DC

Issue Date: 09 February 2024

OALJ Case No.: 2023-STA-00004
OSHA Case No.: 301005066

In the Matter of:

AUSTIN J. DOMEBO,
Complainant,

v.

OKMULGEE READY MIX CO. ET AL.,
Respondents.

Appearances:

Paul O. Taylor, Esq.
Truckers Justice Center
Edina, Minnesota
For the Complainant

Bill Barksdale, Esq.
The Barksdale Law Firm
Okmulgee, Oklahoma
For the Respondents

DECISION AND ORDER DENYING THE COMPLAINT

SUMMARY OF THE EVIDENCE

Procedural Background

On or about September 26, 2022, Austin Domebo ("Complainant") filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") alleging that Okmulgee Ready Mix Co. ("Okmulgee Ready Mix" or "Respondent") violated the employee protection provisions of the Surface Transportation Assistance Act ("STAA" or "the Act") when it terminated his employment on July 26, 2022 in retaliation for complaining about driving unsafe vehicles. 49 U.S.C. § 31105(a); 29 C.F.R. Part 1978. An OSHA Regional Supervisory Investigator dismissed the complaint on December 8, 2022, finding no violation of the Act. On December 14, 2022, Complainant filed objections to the findings and requested a hearing before the Office of Administrative Law Judges ("OALJ").

The matter was then assigned to me on December 15, 2022 and I issued *Notice of Docketing* on December 20, 2022. On May 10, 2023, I presided over a formal video hearing, admitting Complainant's Exhibits 1-6[1] and Joint Exhibits 1-2.[2] (Tr. at 6). Five witnesses, including the Complainant, testified.

On September 29, 2023, I issued an order extending the deadline for Complainant's Post-Hearing Brief to October 2, 2023. The parties timely filed their post-hearing briefs.

Issues

1. Did Complainant engage in protected activity on July 25, 2022 when he complained to Respondents about an air leak in the brake system and a blown tire?

2. If so, did Respondents take the adverse personnel action of employment termination?

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

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

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

I base my decision on all of the evidence admitted, relevant controlling statutory, regulatory, and case authorities, and the arguments of the parties.[3] As explained in

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[1] At the conclusion of the hearing, I left the record open for two weeks for Complainant to submit CX-7. On May 16, 2023, Complainant submitted CX-7, a statement of earnings and deductions from Twin Cities Ready Mix. Respondent did not make an authentication objection. The statement of earnings is ADMITTED as CX-7.

[2] The following references will be used in this decision: "CX" for Complainant's exhibits; "JX" for joint exhibits; "Tr." for the hearing transcript; "C. Br." for Complainant's brief; "R. Br." for Respondent's brief; and "Rep." for Complainant's reply brief.

[3] 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

greater detail below, I find Complainant has not proven that his protected activity was a factor in Respondent's decision to fire him. As such, the complaint is dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[4]

Complainant began working for Respondent Okmulgee Ready Mix, a motor carrier, on or about December 1, 2021.[5] (JX-2 at 1). He obtained a certificate of completion from MTC Trucking School and his job responsibilities included delivering concrete using a truck and occasionally other tasks that "neede[ed] to be done," including fixing flat tires, oil changes, and mowing grass. (*Id.* at 1; Tr. at 9, 52). Complainant earned $18.30 an hour. (Tr. at 114).

Okmulgee Ready Mix sits on about four different lots: the office and batch plant sit on the side of the garage on one lot, the employee parking lot is to the east, and to the northeast of the office is a lot where trucks are typically parked and contains Respondent's batch plant and disposed concrete. (*Id.* at 44–45). The fourth lot is directly north of the office lot and used for storage. (*Id.* at 45). Respondent adjusts brakes and fixes tires and air leaks at its shop.[6] (*Id.* at 10, 24).

At the time of the events in this case, Kenny Hager was the plant manager, Kris Hager was the dispatcher, and Lori Taylor was the bookkeeper and timekeeper.[7] (JX-2 at 2–3; Tr. at 206). Respondent employed approximately eight employees and three drivers. (Tr. at 45).

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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] The parties have stipulated to many of the facts in this case and I have incorporated those in this section.

[5] Complainant operated commercial motor vehicles with a gross vehicle weight rating of 10,001 pounds or more transporting property on the highways in commerce. (JX-2 at 1). Complainant is an employee as defined in 49 U.S.C. § 31101(2) and Respondent is an employer subject to the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA"). (*Id.* at 1–2).

[6] At the time of the events in this case, Respondent employed a mechanic that was a "certified brake man." (Tr. at 23). The company also makes service calls. (*Id.* at 24).

[7] Kenny Hager has been employed by Okmulgee Ready Mix for thirty-five years and has been the plant manager for about seven to eight years. (*Id.* at 8). His job duties include overseeing the company and supervising Complainant. (*Id.* at 9). Kris Hager did not directly supervise Complainant but drivers typically informed him about their schedules. (*Id.* at 12). His duties involve scheduling jobs, customer service, and sales. (*Id.* at 31). Ms. Taylor maintains personnel records for the company. (*Id.* at 208).

On July 11, 2022, Kris was under the impression that Complainant provided his two weeks' notice.[8] Ms. Taylor testified that Complainant told her that she should be receiving a job verification from Yoakum and discussed his two weeks' notice, which would have ended July 25, 2022.[9] (*Id.* at 198, 206). However, Complainant continued to report to work beyond the two week timeframe.[10]

On July 25, 2022, Complainant reported to work around 6:00 a.m. and was assigned to operate Truck No. 30, a 10-yard mixer truck.[11] (JX-2 at 2; Tr. at 65). Before he left the terminal, Complainant performed a vehicle inspection and did not observe defects that rendered the truck unsafe or non-compliant with commercial vehicle safety regulations.[12] (JX-2 at 2). Complainant had the truck loaded with wet concrete and began driving to the job site to deliver the load.[13] (*Id.* at 3).

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[8] Kris stated other employees told him later that day that Complainant was going to work at Yoakum Trucking ("Yoakum"). (*Id.* at 173). Approximately a week and a half later, Kris recalled that Complainant told him that he intended to work for Yoakum. (*Id.* at 171, 173).

[9] Ms. Taylor testified that Complainant gave his notice orally. (*Id.* at 199). She agreed that Department of Transportation ("DOT") regulations require companies that hire commercial vehicle operators to conduct a background check from every company that the trucker has worked at to determine whether he had drug and alcohol violations or accidents. (*Id.* at 208–09). No one from Yoakum contacted Ms. Taylor and she did not receive a past employment inquiry. (*Id.*).

[10] Okmulgee Ready Mix does not require parties to give two weeks' notice before departing. (*Id.* at 211). Complainant testified that he did not give two weeks' notice to Okmulgee Ready Mix on or about July 11 that he was going to work for another company. (*Id.* at 164). Complainant applied to work at Okmulgee Ready Mix because he received custody of his five kids full-time in February 2021 and needed to be home for their day-to-day operations, including evening activities. (*Id.* at 55–56, 163). He testified that based on his family situation, he would not resign from a job without having another one lined up. (*Id.* at 102–03). I credit Complainant's testimony that he did not submit his two weeks' notice on July 11, 2022. Ms. Taylor agreed that DOT regulations require companies to inquire with previous employers about drug and alcohol violations or accidents and that she did not receive such an inquiry from Yoakum. Complainant's notice is also not substantiated by the record, as Complainant chose to work at Okmulgee Ready Mix because of the hours. I therefore find that Complainant did not submit his two weeks' notice on July 11, 2022.

[11] Respondent's drivers are typically assigned to a particular truck on an ongoing basis and Complainant was typically assigned to operate Truck No. 30. (*Id.* at 9–10).

[12] During his pre-trip inspection, Complaint ensured that nothing was obviously broken, there were no leaks, and the concrete chutes were secured. (*Id.* at 60). Complainant also checked the tire gauge for proper inflation and conducted an air brake test. (*Id.* at 61–62).

[13] When assigning a job, Kris gives drivers a ticket with the amount of concrete to be loaded, which the drivers then gave to the batch man. (*Id.* at 61). A batch man loads the trucks using an automatic system that deposits the amount of concrete into the truck. (*Id.* at 11, 213). While the batch man fills the truck, drivers are responsible for hosing concrete powder off the outside of the truck to ensure that concrete mix does not adhere and harden to the outside of the truck. (JX-2 at 4).

While at the job site near Wilson, Oklahoma, a low air warning buzzer sounded and Complainant noticed that the air system in the truck lost all air, engaging the emergency brakes.[14] (Tr. at 67–68, 129). The first time Complaint observed the air pressure gauges, the pressure went down to zero. (*Id.* at 69). Complainant was able to build the air pressure to approximately 55 p.s.i. and reported to his dispatcher Kris that the air system had an air leak.[15] (JX-2 at 3; Tr. at 69). Complainant stopped the vehicle and was able to build sufficient air pressure to about 90 p.s.i. to release the emergency brakes, and completed the concrete pour at the job site. (JX-2 at 3; Tr. at 67–68, 70).

After Complainant finished the job, Kris told Complainant to "walk the truck back."[16] (JX-2 at 3; Tr. at 47–48). Complainant built the pressure back to normal levels, approximately 125 p.s.i., before he left the jobsite. (Tr. at 131). While on his way back to the terminal, the truck lost all air pressure again, causing the brakes to lock up. (JX-2 at 3). The truck stopped in a lane on 20th Street, blocking a lane of traffic. (Tr. at 72, 134–35). Complainant notified Kris by sending him a photograph of the truck's gauges showing low air pressure and using the two-way radio. (*Id.* at 38–40, 176; CX-3 at 2). Kris tried to radio and call Complainant but he did not respond. (*Id.* at 176). Kris then texted Complainant.[17] (*Id.* at 176–77).

In July 2022, Randy Skiles was the batch man for Respondent and supervised by Kris Hager. (Tr. at 11–12).

[14] In an air brake system, when the brake pedal is pushed, air is supplied to the brake pads, which stops or slows the truck down. (*Id.* at 21, 23). A truck's air system operates its brakes and other accessories like air suspension and the horn. (JX-2 at 3; Tr. at 29). There are two air lines: a red and a blue side. (Tr. at 21). If air pressure is lost on the red supply side, a warning buzzer sounds, signaling to the driver to pull over. (*Id.* at 22). The air pressure warning buzzer typically sounds when the air pressure is below 60 p.s.i. and the tractor protection valve locks up the brakes at 20 p.s.i. (*Id.* at 63).

[15] The joint stipulations refer to the dispatcher as "Chris." The record does not contain a reference to another dispatcher named Chris and I find that the joint stipulations are referencing Kris Hager.

[16] Kris explained that walking the truck back required Complainant to build up air and drive the truck back to the terminal slowly. (*Id.* at 34, 72). Kenny testified that it was typical at Okmulgee Ready Mix to instruct a driver with an air leak to build the air and walk the truck back carefully. (*Id.* at 24).

[17] Kris asked for Complainant's location to send Steve, Respondent's mechanic, to inspect the truck. (CX-3 at 2; Tr. at 35-36, 38–39). It does not appear that Complainant sent Kris his location via text message and a mechanic did not arrive. (CX-3 at 2; Tr. at 35–36). Kris knew what intersection Complainant was at and was preparing to drive to the intersection to assist Complainant with traffic when Complainant returned to the terminal with the truck. (Tr. at 177).

Complainant built sufficient air pressure and drove about one mile back to the terminal. (JX-2 at 3). After Complainant returned to the terminal, he told Kenny "[n]ext time y'all make me drive that truck like that without the air working I'm just going to leave it where it set" and "y'all can tow it in," to which Kenny responded that Complainant would not have a job.[18] (Tr. at 71, 75). Upon his return, Complainant did not wash the truck out. (*Id.* at 181). Complainant's duties required him to clean leftover concrete by washing the inside of the drum out with water if it was not washed out at the job site. (*Id.* at 101, 125). If the truck's drum, chutes, and rim are not washed out, the concrete will likely set and clog. (*Id.* at 126). Failing to wash the truck out can potentially ruin a truck because the concrete can dry.[19] (*Id.* at 232).

At approximately one or one-thirty in the afternoon, Complainant was assigned to a 7-yard mixer truck and Kris gave him his ticket for the next job.[20] (JX-2 at 4; Tr. at 37, 179–80). Before he left the terminal, Complainant inspected the vehicle to ensure it complied with commercial vehicle safety regulations and checked the tires and air brakes. (JX-2 at 4; Tr. at 74). Randy Skiles, the batch man, loaded the vehicle and Complainant began to drive to the job site in Council Hill, Oklahoma, about twenty-two miles from Respondent's terminal. (JX-2 at 4; Tr. at 76, 216). When Complainant was approximately three to four miles from the job site, a tire on the inside driver's side of the rear axle blew out, which scattered rubber pieces on the road surface. (JX-2 at 4; Tr. at 79, 140). The road did not have a shoulder, so Complainant did not have a place to immediately and safely stop the vehicle.[21] (JX-2 at 4). He told Kris that a tire had blown and that rubber debris was scattered on the road. (*Id.*). Complainant also informed Kris that he did not think that it was safe to drive the truck and Kris instructed him to drive the truck

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[18] Kenny testified that he did not speak with Complainant until he saw him at the Council Hill jobsite. (*Id.* at 230–31). However, Kenny did not deny that he told Complainant that he would not have a job if he refused to drive a truck. Complainant argues, and I find, that Okmulgee Ready Mix is a small employer and drivers take multiple loads a day, making it likely that Complainant spoke to Kenny prior to the Council Hill jobsite.

[19] Kris explained that Complainant may have been told to leave the truck without washing it out and that it would be taken care of by another employee because another truck was waiting for Complainant. (*Id.* at 181). It is not unusual for a driver to wash out another driver's mixer. (*Id.* at 222).

[20] Complainant took about a thirty to forty minute break, which Kenny stated was a problem because Complainant did not inform office personnel. (*Id.* at 37, 179–80). Drivers are allowed to take lunch breaks at Okmulgee Ready Mix. (*Id.* at 194).

[21] The highway intersected with dirt roads about every mile. (*Id.* at 143). Complainant did not pull off the road because he was concerned that he would block an intersection, creating a safety hazard. (*Id.* at 144). He decided that it was safer to the public to drive to the jobsite. (*Id.*).

slowly. (*Id.*). Complainant reached the job site and informed Kris of the truck's condition and that the tire needed to be replaced. (*Id.*). Kris texted Complainant "[y]ou can drive that truck back with the blown tire" and Complainant responded "[y]ou say I can but sounds like I have too [sic]" and "[f]or the record I don't feel safe driving like this no mudflap or nothing just rubber flying in the air hitting other cars." *Id.* at 5; CX-3 at 3. Kris replied "[d]rive slow." (JX-2 at 5).

Kenny met Complainant at the job site to bring Complainant a new hose and spray nozzle.[22] (JX-2 at 5; Tr. at 12, 18). Complainant asked Kenny if he was expected to drive the vehicle back in its condition and Kenny told him "we've done it before."[23] (CX-1 at 1:20-1:23). Complainant told Kenny that he had not driven a vehicle in this condition and felt unsafe driving the truck to the terminal. (*Id.* at 1:23-1:27). Kenny stated that he did not want to pay about $600 on a service call to have the tire replaced and that there was not much rubber left on the wheel.[24] (*Id.* at 00:59-01:02; Tr. at 15). Kenny also told Complainant that he did not have a lot left over, indicating that cement was being poured out of the truck. (CX-1 at 1:07-1:10).

Complainant drove the truck back to the terminal with the blown tire via the same route he used to drive to the jobsite. (JX-2 at 5; Tr. at 94–95). On his drive back to the terminal, Complainant passed Kenny, who was picking up the rubber off the highway.[25] (Tr. at 149). When Complainant arrived at Okmulgee Ready Mix, he parked the truck on the side of the office, which was not the usual parking spot

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[22] When the tire blew, the hose used to wash the truck down after pouring concrete was torn. (*Id.* at 12, 82–83).

[23] Complainant indicated apprehension about driving back, expressing concern about his CDL and telling Kenny "I'll drive it back . . . because I need a job." (CX-1 at 01:02-1:07, 1:10-1:16; Tr. at 15). Complainant explained that he felt stranded and that he did not have another choice but to drive the truck back because it was over one hundred degrees and he was twenty-one miles from the terminal. (Tr. at 86–87). Kenny left the job site while Complainant was unloading the concrete and did not offer Complainant a ride back because Complainant did not tell Kenny that he would not drive the truck. (*Id.* at 147–48, 237–38, 240). Complainant also told Kenny he would drive the truck, stating "[a]s long as y'all take responsibility I don't care. . . . I'm the one's [sic] going to get the ticket," to which Kenny said "[w]ell I know." (*Id.* at 15).

[24] While the tire could have been replaced at the job site, it was less expensive to replace it at Okmulgee Ready Mix's shop. (*Id.* at 27–28). Respondent's policy to allow drivers to drive with blown out tires is on a case-by-case basis. (*Id.* at 193). Kenny explained Complainant's truck did not need to be fixed "on the spot" because the truck still had a tire that was "aired up," meaning Complainant was able to drive. (*Id.* at 236). The sidewalls were still on the tire. (*Id.* at 25, 230).

[25] Complainant testified that he did not stop to tell Kenny that he felt unsafe and would not drive the truck back because he felt it would put the community at risk and that Kenny's mind was already made up. (*Id.* at 149).

for a truck.[26] (*Id.* at 96, 100). Complainant did not wash the truck at the jobsite because he ran out of water and he did not wash the truck out at the terminal.[27] (*Id.* at 100, 148). Complainant left the truck running and left work for the day between 3 p.m. and 4 p.m.[28, 29] (JX-2 at 5; Tr. at 149–50).

At approximately 5:50 a.m. on the morning of July 26, 2022, Kris texted Complainant that he still had a job. (Tr. at 186–87). This text was ostensibly in response to a text Complainant sent Kris in the evening of July 25, 2022, telling Kris that he hoped he still had a job.[30] (*Id.* at 186). In the morning of July 26, before Complainant reported for work, Kenny learned that Complainant had not installed the nozzle and hose nor washed out the truck. (*Id.* at 231).

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[26] The trucks were typically parked in the northeast lot overnight. (*Id.* at 45, 64–65, 100, 127–28).

[27] In addition to washing the truck out, Complainant's end of day routine also involved him taking in his ticket to Kris, who tells the drivers if there is another load or if they should wash the truck out. (*Id.* at 127).

[28] Complainant testified that he went to the office to speak to Kris, return his ticket, and reiterate his concerns about risking his CDL. (*Id.* at 95, 149). Complainant stated that Kris got upset and told him to go home and that other drivers would take care of the truck. (*Id.* at 95). Kris testified that he saw Complainant pull into the yard but denied speaking with Complainant when he returned, explaining that Complainant did not come into the office, bring him the ticket, or discuss leaving the truck. (*Id.* at 185–86). Kris also stated that the driver who washed the truck out, Bobby Swayze, later brought him the ticket. (*Id.* at 189, 205). Ms. Taylor corroborated Kris's recollection of the events and explained that she was in the front office with Kris and saw Complainant return but that he did not come into the office or give the ticket to anyone. (*Id.* at 204). Additionally, Mr. Skiles testified and corroborated Kris's recollection of the events, explaining that he was sitting in the office when Complainant returned and did not see Complainant enter the office. (*Id.* at 218). I credit Kris's testimony that Complainant did not return to the office when he returned with the truck. Complainant demonstrated failures in communication earlier in the day when he did not return Kris's calls or text while stopped on 20th Street and was absent for thirty to forty minutes after he returned the first truck. While it is not unusual for a driver to wash out another driver's mixer, I find it unlikely that a dispatcher would not require a driver to wash out a truck when the driver is not assigned to another job because of the potential for damage. Further, Kris's testimony is bolstered by Ms. Taylor and Mr. Skiles's testimony that they saw Complainant leave without coming to the office. Therefore, I find that Complainant did not enter the office to speak with Kris and return his ticket, and that he was not told that another driver would wash out the truck.

[29] Complainant did not make any written complaints. (*Id.* at 123–24). Prior to July 25, 2022, Complainant had previously made complaints to Respondents about issues with vehicles he drove and the issues were resolved. (*Id.* at 227).

[30] Kris testified that this July 25, 2022 text from Complainant contained an apology and guidelines for a blown tire. (*Id.* at 186). Kris understood that Complainant sent the guidelines "to affirm his position that he was in the right." (*Id.* at 190).

Complainant reported for work at approximately 6 a.m. on July 26, 2022.[31] (*Id.* at 167). In the driver's room, Kenny told Complainant that he did not need him anymore and told Complainant to "bring back [his] shit," indicating that Complainant should return his uniforms. (JX-2 at 5; Tr. at 103). Kenny also told Complainant that he needed team players. (Tr. at 153, 155, 242). Complainant then walked into the breakroom of the office and told Kris "I thought I had a job." (*Id.* at 97–98, 103–04, 187). Kenny subsequently walked into the room and Complainant and Kenny argued, resulting in Complainant reiterating his displeasure about driving the trucks with the air leak and blown tire.[32] (*Id.* at 188–89). Kenny then threatened to throw the coffee in his hand onto Complainant. (*Id.* at 98, 104, 188). Kris told Complainant to leave, and Complainant left. (*Id.* at 98, 188).

Okmulgee Ready Mix does not keep records about the reason for a driver's departure or discharge.[33] (*Id.* at 211). Complainant previously had not been disciplined for poor performance and there is no written disciplinary record. (*Id.* at 166–67, 243). Complainant returned his uniforms and received his final paycheck. (*Id.* at 167–68).

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.[34] 49 U.S.C. §§ 31105(a)(1)(A); 31105(a)(1)(B)(i)-(ii).

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[31] Complainant typically was notified that he was scheduled to work via text message. (*Id.* at 166). He stated that he reported for work on July 26, 2022 because "you come back unless they tell you not to." (*Id.*).

[32] Complainant told Kenny "[t]his is messed up" and "this is not right," referring to regulations regarding tires and air leaks. (*Id.* at 192).

[33] As discussed in greater detail below, Kenny had heard that Complainant gave his two weeks' notice but stated that it did not factor into his decision. (*Id.* at 233).

[34] 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

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. 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.[35] 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."[36] 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: (1) that he engaged in protected activity; (2) that Respondents took an adverse employment action against him; and (3) that the protected activity was a contributing factor in Kenny Hager's decision to take the adverse employment action. If Complainant satisfies this initial burden by a preponderance of the evidence, Respondents may avoid liability by demonstrating by clear and convincing evidence that they would have taken the same adverse action even if Complainant had not engaged in the protected activity.

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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 operative facts in this case occurred in Oklahoma, and it appears the Tenth Circuit has yet to weigh in on this specific issue. Therefore, the standard articulated by the ARB in *Bailey* is controlling.

[35] I note that the U.S. Supreme Court has recently held that a whistleblower need not prove retaliatory intent under the employee protection provisions of the Sarbanes-Oxley Act, a statute similar to the STAA. *Murray v. UBS Securities, LLC*, 601 U.S. _, slip op. at 14 (Feb. 8, 2024) ("A whistleblower . . . bears the burden to prove that his protected activity 'was a contributing factor in the unfavorable personnel action alleged in the complaint,' . . . but he is not required to make some further showing that his employer acted with 'retaliatory intent.'")

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

CONCLUSIONS OF LAW

Protected Activity

File a Complaint

The STAA protects an employee if the employer perceives that the employee has filed or is about to file a complaint or begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation. 49 U.S.C. § 31105(a)(1)(A)(ii). Filing a complaint includes writing or speaking orally with an employer or a government agency. 29 C.F.R. § 1978.102(b)(1).

For a complaint to be protected activity under the STAA, the complaint must "relate" to a violation of a safety standard; however, a specific standard need not be expressly cited in the complaint. 49 U.S.C. § 31105(a)(1)(A)(i); *see also Ulrich v. Swift Transp. Corp.*, ARB No. 11-016, ALJ No. 2010-STA-00041, slip op. at 4 (ARB Mar. 27, 2012). Furthermore, "a complainant must show that he reasonably believed he was complaining about the existence of a safety violation." *Ulrich*, ARB No. 11-016, slip op. at 4. It need not be true that the complaint concerned an *actual* violation of the regulations. *Elbert v. True Value Co.*, ARB No. 07-031, ALJ No. 2005-STA-00036, slip op. at 2–3 n.5 (ARB Nov. 24, 2010). A reasonable belief requires a complainant to prove that a person with his expertise and knowledge would have a reasonable belief that an actual or potential violation of a commercial vehicle safety regulation existed. *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31, at 11 (ARB Sept. 14, 2007). The fact that reporting safety issues is part of a truck driver's duties does not prevent such reports from being protected activity. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-30, slip op. at 8 (ARB Feb. 29, 2012).

An employee's internal complaint to management conveying his reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under § 31105(a)(1)(A). *Calhoun v. U.S. Dep't of Labor*, 576 F.3d 201, 212 (4th Cir. 2009), *rev'd on other grounds by Greatwide Dedicated Transp. II, LLC v. U.S. Dep't of Labor*, 72 F.4th 544, 554 n.5 (4th Cir. 2023); *Clean Harbors Env't Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998). An employee's raising of a concern, either formally or informally, that is related to commercial motor vehicle safety standards constitutes protected activity. *Assistant Sec'y and Freeze v. Consol. Freightways*, ARB No. 99-030, ALJ No. 1998-STA-00026, slip op. at 6 (ARB Apr. 22, 1999).

Here, Complainant made internal oral complaints to Okmulgee Ready Mix's dispatcher and plant manager. While Complainant never made a formal written or oral complaint to any government agency, it is undisputed that Complainant made complaints to Respondents about the air leak in the brake system and the blown tire. His complaints related to an air pressure issue that caused his brakes to lock

up and a blown tire, which are violations of safety standards.[37] His complaints also conveyed a reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation: Complainant experienced the lack of air pressure that caused his brakes to lock up and the damaged tire, informing Kris and Kenny of the issues.[38] Accordingly, I find that Complainant has established that he engaged in protected activity under the STAA's "file a complaint" clause when he informed Respondents of the air pressure issue and blown tire.

Unfavorable Personnel Action

Under the STAA, any discharge by an employer constitutes an adverse action and a discharge is any termination of employment by an employer. *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-26, slip op. at 13–15 (ARB 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).

Complainant argues that he understood that he was fired when Kenny told him to that he was no longer needed and to bring back his uniforms. (C. Br. at 25). Complainant also states that he did not tell anyone at Okmulgee Ready Mix that he resigned. (*Id.*). Respondent argues that Complainant was not fired because he submitted this two weeks' notice, which ended on July 25, 2022, and that he was no longer an employee on July 26, 2022. (R. Br. at 11).

I found above that Complainant did not submit his two weeks' notice on July 11, 2022. It belies common sense that an employee would give his two weeks' notice and report for work after the notice period ended or that Kris, the employee in charge of scheduling, would text the employee the day after the period ended that he still had a job at the company.[39]

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[37] "No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed," which includes service brakes and wheels and rims. 49 C.F.R. § 392.7(a). "No motor carrier may operate a commercial motor vehicle, or cause or permit such vehicle to be operated, unless it is equipped in accordance with the requirements and specifications of this part." 49 C.F.R. § 393.1.

[38] Even if the issues with the air brakes and tire did not constitute actual regulatory violations or have any apparent effect on the vehicle's operability or road safety, that is not the standard and simply reporting a defective vehicle under these facts is a protected activity.

[39] Additionally, when Complainant returned to the office after his first job of the day and told Kenny that he would not drive another truck with air brake problems, Kenny responded that Complainant would not have a job. It is not intuitive why Kenny would make such a statement if July 25 was Complainant's last day.

Therefore, Complainant was terminated on July 26, 2022 when his supervisor Kenny told him that he did not need him anymore and told him to return his uniforms. Complainant then spoke with Kris and Kenny, and after an argument that ended with Kenny threatening Complainant, Kris told Complainant to leave. I find that Complainant's discharge on July 26, 2022 constitutes an adverse action under the Act.[40]

Contributing Factor Causation

Complainant's actions constitute protected activity under the Act, but he must still establish by a preponderance of the evidence that the protected activity was a contributing factor to his discharge. It is here that Complainant falls short. Complainant argues that Respondents demonstrated animus towards compliance with commercial vehicle regulations as evidenced by (1) Kenny telling Complainant that he would not have a job in response to Complainant's statement that he would not drive another truck with air pressure issues, (2) Kenny's assertion that he would not spend $600 to have a tire repaired, (3) not conducting background checks on drivers, and (4) pressuring Complainant to operate the truck with the blown tire in violation of commercial vehicle safety regulations. (C. Br. at 27). Respondents contend that even if Complainant's complaints qualify as protected activity, they did not play a role in the decision to terminate Complainant's employment. (R. Br. at 1, 11). They argue that Kenny terminated Complainant because he did not (1) return his ticket or check in with the office when he returned after his second job, (2) hook up the nozzle or hose, (3) wash out the cement residue from the truck, or (4) park the truck in the proper location. (*Id.* at 12–13). Respondents assert that Complainant knew that not washing the truck out could cause damage and that his actions required another employee to perform the tasks instead of their own duties. (*Id.*).

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." *Lockheed Martin Corp. v. Admin. Rev. Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013). 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 10, 17 (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.*,

[40] Even if Complainant did give his two weeks' notice on July 11, he rescinded his notice by asking Kris on the evening of July 25 if he still had a job and by coming in on July 26. Complainant put Kenny on notice by coming to the driver's room, where Kenny told Complainant that he did not need him anymore and to return his uniforms. It is clear by making these statements, Kenny, Complainant's supervisor, ended the relationship and discharged Complainant. *Minne*, ARB No. 05-005, slip op. at 14.

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).

Temporal Proximity

Evidence of proximity in time between 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).

In the instant case, there is no dispute that Complainant notified Respondents of various deficiencies and necessary repairs in the morning and again in the afternoon on July 25, 2022. Complainant was terminated at approximately 6 a.m. on July 26, 2022. Thus, I find that there was temporal proximity between the timing of Complainant's complaints and his discharge.

Intervening Event

Although I find that there was temporal proximity between Complainant's concerns and his discharge, other factors undercut the weight to be given to this temporal proximity. Even with evidence of temporal proximity, the complainant still has the burden of establishing the causation element by a preponderance of the evidence. *Spelson*, ARB No. 09-063, slip op. at 3 n.3. 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 Mktg.*, ARB No. 13-051, ALJ Nos. 2012-STA-46, 2012-TSC-1, slip op. at 5, n.12 (ARB May 27, 2015) (Corchado, J., concurring); *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. Mont. 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 the complainant was charging official time while engaged in personal activities).

There was even closer temporal proximity between the time Kenny learned that Complainant had not washed out the truck and Complainant's termination. Kenny was not aware until approximately 5:50 a.m. on July 26 of Complainant's failure to conduct his end of day routine on July 25. The timing of the termination, which occurred after Kenny learned about the condition Complainant left the truck in the previous day, supports a conclusion that the specific actions of not returning his job ticket, not installing the replacement hose and nozzle, not washing out the truck, not parking the truck in the proper location, and leaving without telling

Respondents was the proximate cause of Complainant's discharge.[41] Further, when firing Complainant on July 26, Kenny told Complainant that Respondent needed team players, which reasonably relates to the fact that other employees had to conduct Complainant's end of day routine because he left the truck.

Additionally, after Complainant returned with the truck with the defect in the air brake system, Complainant was not disciplined or fired for making a complaint. Instead, Respondent assigned Complainant a different truck to complete the second job. Furthermore, prior to July 25, 2022, Complainant had made complaints to Respondents about issues with vehicles he drove and the issues were resolved without any disciplinary actions. Finally, on the evening of July 25, Kris told Complainant that he still had a job, *after* Complainant had made the complaints. These events tend to show that Complainant's termination was unrelated to his complaints.

In sum, Complainant was terminated because he failed to complete or correspond with his supervisor or dispatcher regarding his end of day routine, potentially causing damage to equipment. While there was temporal proximity between the date Complainant made complaints and his termination, it is outweighed by the closer proximity between Kenny's discovery of Complainant's inactions on July 25 and Complainant's termination. Additionally, the evidence shows that Complainant was given a second truck after making the complaint regarding the air pressure in the first truck, that Complainant had previously reported issues with vehicles to Respondents, and that Kris reassured Complainant that he still had a job after he made complaints. Viewing the record as a whole, I find that Complainant has not establish by a preponderance of the evidence that his July 25 complaints contributed to Respondent's July 26 decision to terminate him.

Respondents' Affirmative Defense

As I find that Complainant's protected activity did not contribute to Respondents' decision to fire him, Respondents are not required to establish by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

Conclusion

Complainant's firing is an adverse action under the Act. I also find Complainant engaged in protected activity under the Act's "file a complaint" clause when he reported problems with the two trucks on July 25, 2022. However, I find

[41] Respondents were particularly concerned about the way Complainant left the truck at the end of the day because serious damage to the truck could have resulted. (Tr. at 230–31, 234).

such protected activity did not contribute in any way to Complainant's January 26, 2022 discharge, which was based solely on the potential damage to equipment, lack of communication, and disruption to other employees that conducted Complainant's end of day routine.

ORDER

Accordingly, IT IS ORDERED that the complaint filed by Austin J. Domebo with the Occupational Safety and Health Administration against Respondents is hereby **DENIED**.[42]

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

[42] 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). Because I find that Complainant failed to establish a contributing factor causation, it is not necessary to address the other issues in this case.

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).

FILING AND SERVICE OF AN APPEAL

1. **Use of EFS System:** The Board's Electronic Filing and Service (EFS) system allows parties to initiate appeals electronically, file briefs and motions electronically, receive electronic service of Board issuances and documents filed by other parties, and check the status of appeals via an Internet-accessible interface. Use of the EFS system is free of charge to all users. To file an appeal using the EFS System go to https://efile.dol.gov. All filers are required to comply with the Board's rules of practice and procedure found in 29 C.F.R. Part 26, which can be accessed at https://www.ecfr.gov/current/title-29/subtitle-A/part-26.

    A. **Attorneys and Lay Representatives:** Use of the EFS system is **mandatory for all attorneys and lay representatives** for all filings and all service related to cases filed with the Board, absent an

exemption granted in advance for good cause shown. 29 C.F.R. § 26.3(a)(1), (2).

B. Self-Represented Parties: Use of the EFS system is strongly encouraged for all self-represented parties with respect to all filings with the Board and service upon all other parties. Using the EFS system provides the benefit of built-in service on all other parties to the case. Without the use of EFS, a party is required to not only file its documents with the Board but also to serve copies of all filings on every other party. Using the EFS system saves litigants the time and expense of the required service step in the process, as the system completes all required service automatically. Upon a party's proper use of the EFS system, no duplicate paper or fax filings are required.

Self-represented parties who choose not to use the EFS system must file by mail or by personal or commercial delivery all pleadings, including briefs, appendices, motions, and other supporting documentation, directed to:

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

2. EFS Registration and Duty to Designate E-mail Address for Service

To use the Board's EFS system, a party must have a validated user account. To create a validated EFS user account, a party must register and designate a valid e-mail address by going to https://efile.dol.gov, select the button to "Create Account," and proceed through the registration process. If the party already has an account, they may simply use the option to "Sign In."

Once a valid EFS account and profile has been created, the party may file a petition for review through the EFS system by selecting "eFile & eService with the Administrative Review Board" from the main dashboard, and selecting the button "File a New Appeal - ARB." In order for any other party (other than the EFS user who filed the appeal) to access the appeal, the party must submit an access request. To submit an access request, parties must log into the EFSSystem, select "eFile & eService with the Administrative Review Board," select the button "Request Access to Appeals," search for and select the appeal the party is requesting access to, answer the questions as prompted, and click the button "Submit to DOL."

Additional information regarding registration for access to and use of the EFS system, including for parties responding to a filed appeal, as well as step-by-step User Guides, answers to frequently asked questions (FAQs), video tutorials and contact information for login.gov and EFS support can be found under the "Support" tab at https://efile.dol.gov.

3. Effective Time of Filings

Any electronic filing transmitted to the Board through the EFS e-File system or via an authorized designated e-Mail address by 11:59:59 Eastern Time shall be deemed to be filed on the date of transmission.

4. Service of Filings

A. Service by Parties

Service on Registered EFS Users: Service upon registered EFS users is accomplished automatically by the EFS system.

Service on Other Parties or Participants: Service upon a party that is not a registered EFS user must be accomplished through any other method of service authorized under applicable rule or law.

B. 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 (unless otherwise required by law). If a party unrepresented by counsel files their appeal by regular mail, that party will be served with Board-issued documents by regular mail. Any party may opt into e-service at any time by registering for an EFS account as directed above, even if they initially filed their appeal by regular mail or delivery.

5. Proof of Service

Every party is required to prepare and file a certificate of service with all filings. The certificate of service must identify what was served, upon whom, and manner of service. Although electronic filing of any document through the EFS system will constitute service of that document on all EFS-registered parties, electronic filing of a certificate of service through the EFS system is still required. **Non EFS-registered parties must be served using other means authorized by law or rule.**

6. Inquiries and Correspondence

After an appeal is filed, all inquiries and correspondence related to filings should be directed to the Office of the Clerk of the Appellate Boards by telephone at 202-693-6300 or by fax at 202-513-6832. Other inquiries or questions may be directed to the Board at (202) 693-6200 or ARB-Correspondence@dol.gov.