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Office of Administrative Law Judges
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Issue Date: 05 April 2024

CASE NO: 2023-STA-00027
OSHA Case No.: 5-2210-22-051

In the Matter of:

CODY SHARPE,
Complainant

v.

GEIGER EXCAVATING, INC. CHRISTOPHER STABLER, and BRUCE MERTZ,
Respondents

ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, DISMISSING COMPLAINANT'S CLAIMS WITH PREJUDICE, DENYING RESPONDENTS' MOTION TO CONVERT THE HEARING, AND CANCELLING HEARING

This matter 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 promulgated at 29 C.F.R. Part 1978. Currently pending before the undersigned is *Respondents' Motion for Summary Judgment, Respondents' Memorandum in Support of Summary Judgment,* and *Complainant's Opposition to Respondents' Motion for Summary Judgment.*

I. PROCEDURAL HISTORY

On February 9, 2022, Cody Sharpe ("Complainant") timely filed a Complaint with the Secretary of Labor ("the Secretary") alleging that Geiger Excavating Inc., Christopher Stabler, and Bruce Mertz ("Respondents") retaliated against him in violation of the Surface Transportation Assistance Act ("STAA"). On January 31, 2023, the Secretary issued preliminary findings. The Secretary was unable to conclude that there existed reasonable cause to believe that a violation of the STAA occurred and therefore dismissed the complaint. On February 21, 2023, Complainant objected to the Secretary's preliminary findings and requested a formal hearing before the Office of Administrative Law Judges. The matter was docketed on February 21, 2023, and assigned to undersigned on March 14, 2023. A hearing in this matter was scheduled for October 17, 2023, at 9:00 AM via telephone. On October 17, 2023, Complainant requested a continuance of the hearing. TR-6. The hearing was later rescheduled to April 16, 2024, at 9:00 AM via telephone.

On February 26, 2024, Respondents filed a Motion for Summary Decision. *Respondents' Motion for Summary Judgment; Respondents' Memorandum in Support of Summary Judgment.*

On March 11, 2024, Complainant filed an Unopposed Motion for Extension of Time to Respond to the Motion for Summary Judgment. By Order dated March 12, 2023, the undersigned granted Complainant's unopposed Motion. On March 12, 2024, Complainant filed a Brief in Opposition to Respondents' Motion for Summary Decision. *Complainant's Opposition to Respondents' Motion for Summary Judgment.* Accordingly, this matter is ripe for adjudication.

On April 3, 2024, Respondents' filed a motion to convert the hearing in this matter to a hearing to address Respondents' Motion for Summary Decision.

II. UNDISPUTED FACTUAL BACKGROUND[1]

In May 2021, Respondent Geiger Excavating, Inc. ("Geiger") hired Complainant.[2] Complainant's work for Geiger included transporting heavy construction and excavation equipment to various job sites, as well as plowing snow in the winter.[3]

Starting January 2022, Complainant took a part-time job on weekends – Friday and Saturday overnights – with Tri County Ambulance.[4] Complainant told his supervisor, Stabler, that he was unavailable to work for Geiger on weekends.[5]

On February 3, 2022, Complainant sent a text message[6] to Stabler stating that he no longer wished to plow snow for Geiger.[7] That day, Stabler decided to terminate Complainant's employment with Geiger.[8]

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[1] This factual record is supported by Declarations and exhibits cited as well as *Respondents' Memorandum in Support of Summary Judgment* and *Complainant's Opposition to Respondents' Motion for Summary Judgment*.

[2] *Respondents' Memorandum in Support of Summary Judgment* at 2; *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 3.

[3] *Id.*

[4] *Respondents' Memorandum in Support of Summary Judgment* at 4; *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 4.

[5] *Id.*

[6] There is a discrepancy in the parties' filings as to whether Complainant sent this text message to Stabler or Mertz. *See Respondents' Memorandum in Support of Summary Judgment* at 5 (stating that "[Complainant] sent a text message to Stabler informing that 'this is the last snow fall that I work.'" (citing Stabler Affidavit at 17 and Stabler-Sharpe text)); *see also Complainant's Opposition to Respondents' Motion for Summary Judgment* at 4 (stating that "[Complainant] told Mertz that he no longer wished to plow snow for Geiger." (citing Sharpe Declaration at 6)). The evidence is somewhat conflicting. *See* Sharpe Decl. at 6 (stating that Complainant sent the text message to Mertz); *See also* CX-5 at 1 (an Employee Termination Form *written by Mertz* stating that "[Complainant] text *me* on 2/3/22 and stated he will no longer help with snow removal.") (emphasis added); *see also* RX-1 at 72-73 (Complainant testimony that he sent the relevant text message to Stabler). The undersigned finds, based on the evidence, that Complainant sent this text message to Stabler. However, to note, this does not constitute a material fact which affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 317, 322 (1986). Therefore, the undersigned does not find that a genuine dispute of *material* fact exists here. Emphasis added.

[7] *Respondents' Memorandum in Support of Summary Judgment* at 5; *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 4.

[8] *Respondents' Memorandum in Support of Summary Judgment* at 5; *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 14.

On February 4, 2022, Mertz texted Complainant and asked if he was available to deliver a load to Terre Haute, Indiana – a drive approximately 200 miles each way, or 10 hours total[9] – on Saturday, February 5, 2022, or Sunday, February 6, 2022.[10] Complainant refused.[11] Specifically, Complainant responded via text message that he was unavailable to perform the job.[12] Mertz responded that Complainant could do the drive on Monday, February 7, 2022.[13] Mertz later texted Complainant that another driver had taken the load to Terre Haute, Indiana and that Complainant no longer needed to start early on Monday, February 7, 2022.[14]

On February 7, 2022, Stabler informed Complainant that his employment with Geiger was terminated.[15] During that conversation, Complainant expressed that he lacked the available hours to complete the drive to Terre Haute, Indiana.[16] To note, during the relevant week of Monday, January 31, 2022, through Friday, February 4, 2022, Complainant accumulated 54.5 hours of on-duty work for Geiger.[17]

III. APPLICABLE LAW

A. Summary Decision Standard

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, as well as the Federal Rules of Civil Procedure, apply to the proceedings at present – with the following exception:

> Notwithstanding the provisions of subpart B, including the hearsay rule (§ 18.802), testimony of current or former Department of Labor employees concerning

[9] *See Respondents' Memorandum in Support of Summary Judgment* at 5 (stating that "[Complainant] was aware that the drive… takes no more than 10 hours…"); *see also Complainant's Opposition to Respondents' Motion for Summary Judgment* at 9 (stating that the drive is "a distance of over 200 miles each way[.]").

[10] *Respondents' Memorandum in Support of Summary Judgment* at 5; *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 4.

[11] *Respondents' Memorandum in Support of Summary Judgment* at 5 (stating that Complainant responded to Mertz's text message and said "I am not [available]"); *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 4 (stating that Complainant replied to Mertz that he would not be available to perform the dispatch).

[12] *Respondents' Memorandum in Support of Summary Judgment* at 5; *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 4.

[13] *Id.*

[14] *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 4-5; RX-G (text message from Mertz to Complainant stating, "FYI no early start tomorrow Monday, Adam took loader to Terre Haute to-day.").

[15] *Respondents' Memorandum in Support of Summary Judgment* at 6; *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 5.

[16] *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 5. To note, Respondents do not explicitly acknowledge or outright stipulate to this fact in any filings. *Respondents' Memorandum in Support of Summary Judgment* at 11-12 (stating that "[Complainant] alleges that he could not have made the run to Terre Haute as requested by Bruce Mertz without violating the 60/70-hour rule." (citing *Complaint* at 13 and *Complainant's Prehearing Statement* at 2-3); stating that "[Complainant] specifically stated in his deposition that he refused to drive due to his understanding of the hours of service." (citing Sharpe Decl.)). However, Respondents do not outright dispute the fact in any filings. *Id.* Construing the facts in the light favorable to Complainant as non-moving party, the undersigned finds that there is no genuine dispute regarding the material fact that Complainant expressed that he lacked the available hours to perform the job during the conversation about his termination on February 7, 2022.

[17] *Respondents' Memorandum in Support of Summary Judgment* at 4, 11; *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 5, 13.

> information obtained in the course of investigations and conclusions thereon, as well as any documents contained in Department of Labor files (other than the investigation file concerning the violation(s) as to which the penalty in litigation has been assessed), shall be admissible in proceedings under this subpart.

29 C.F.R. § 580.7(a) and (b); *see also* 20 C.F.R. § 655.835 and 29 C.F.R. Part 18, Subpart A; *see also* Fed. R. Civ. P. 56.

The applicable rules provide that "[a] party may move for summary decision, identifying each claim or defense – or the part of each claim or defense – on which summary decision is sought." 29 C.F.R. § 18.72(a); Fed. R. Civ. P. 56(a). The presiding Administrative Law Judge "shall grant summary decision if the movant shows that there is no *genuine dispute* as to any *material fact* and the movant is entitled to decision as a matter of law." *Id.* (emphasis added). A fact is *material* when it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 317, 322 (1986) (emphasis added). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

A party seeking summary decision always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id*. at 322-23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987).

The Administrative Review Board stated that "[o]nce the moving party has demonstrated an absence of evidence supporting the nonmoving party's position, the burden shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation." *Reddy v. Medquist, Inc.,* ARB No. 04-123 ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005) slip op. at 4-5.

If the moving party meets its initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co., Ltd. V. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986); *see also Triton Energy Corp. v. Square D Co.,* 68 F.3d 1216, 1221 (9th Cir. 1995) ("The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient" (citing *Anderson,* 477 U.S. at 252)). That is, "[t]he nonmoving party may not rest upon mere allegations, speculations, or denials in [their] pleadings, but must set forth specific facts in each issue upon which [they] would bear the ultimate burden of proof." *Reddy* at 4-5. Rather, the nonmoving party must "go beyond the pleadings, and by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quoting former Fed. R. Civ. P. 56(e)). Therefore, "[i]f the nonmoving party fails to sufficiently show an essential element of [their] case, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Reddy* at 4-5.

In assessing the facts, the undersigned must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita,* 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255. Thus, the summary decision ruling shall not include a weighing of the evidence or determination of the truth of the matters asserted. *Reddy* at 4-5. The undersigned "should state on the record the reasons for granting or denying the motion." 29 C.F.R. § 18.72(a); Fed. R. Civ. P. 56(a).

B. STAA Retaliation Claim

Congress enacted the STAA in response to concerns over safety in commercial trucking practices. Pub. L. No. 97-424, Title IV, § 405, 96 Stat. 2157 (1982) (now codified as 49 U.S.C. § 31105). The Act was "intended to assure that employees are not forced to drive unsafe vehicles or commit unsafe acts." 128 Cong. Rec. S. 14018 (daily ed. December 7, 1982).

To prevail on a claim of retaliation under the STAA, the Complainant must establish by a preponderance of the evidence that (1) the complainant engaged in a protected activity; (2) the complainant suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 31105(b) (incorporating the burdens of proof set forth in 49 U.S.C. § 42121(b)); *see also* 49 U.S.C. § 42121(b)(2)(B)(iii); *see also* 75 Fed. Reg. 53, 544-53, 550 (Aug. 31, 2010) ("the [C]omplainant [in an STAA case] must prove by a 'preponderance of the evidence' that his or her protected activity… contributed to the adverse action at issue."). To note, the contributing factor standard is low, as a contributing factor means "'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the [unfavorable personnel action].'" *Palmer v. Canadian National Railway*, ARB No. 16-035 at 53-54, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016). That is, "'[a]ny' factor really means any factor. It need not be 'significant, motivating, substantial or predominant' – it just needs to be a factor. The protected activity need only play some role, and even an '[in]significant' or '[in]substantial' role suffices." *Id.*

If Complainant fails to establish any one of these elements by a preponderance of the evidence, his or her claim fails. *West v. Kasbar, Inc. / Mail Contractors of Am.*, ABR No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005). If Complainant satisfies this burden of proof, however, Respondent may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action absent Complainant's protected activity. *See generally* 49 U.S.C. § 42121(b)(2)(B)(iii), (iv).

The STAA states that:

> [a] person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –
>
> (A) (i) the employee, or another person at the employee's request, has *filed a complaint* or begun a proceeding related to a violation of a commercial

> motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or
> (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;
>
> (B) the employee refused to operate a vehicle because –
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security, or
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.

49 U.S.C. § 31105(a)(1)(A)-(B)(emphasis added).

To be sure, "[a]n employee's internal complaint to superiors conveying his reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA." *Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, ARB No. 97-090, ALJ No. 95-STA-34 (ARB Aug. 8, 1997). To file a complaint for purposes of the STAA, an employee must have communicated the issue or violation in some effective manner to put the employer on notice that he or she is engaging in protected activity. *Calhoun v. United States DOL*, 576 F.3d 201, 212 (4th Cir. 2009). Silent departures from work duties do not constitute the filing of a complaint for purposes of the Act. *Id*. at 213 (finding that "[e]ven against the backdrop of [Complainant's] verbal complaints on other days, his *silent departures* from UPS practice in his supervisor's presence *do not suffice to constitute the filing of a complaint* for purposes of the statute.")(emphasis added). However, "internal complaints to company management, whether written or oral, suffice to satisfy the complaint requirement…" *Id*. at 212.

Internal complaints filed with supervisors which are "related to" reasonably perceived violations of commercial vehicle safety regulations are protected under 49 U.S.C. § 31105(a)(1)(A)(i). Complaints related to reasonably perceived violations of commercial vehicle safety regulations are protected even if actual violations are not found to have existed. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (stating that "protection is not dependent upon whether [Complainant] was actually successful in proving a violation of a federal safety provision. The primary consideration is not the outcome of the underlying grievance hearing, but whether the proceeding is based upon possible safety violations."). Therefore, a complaint must be based on a reasonable belief in a violation of a motor vehicle safety regulation. *Calhoun*, 576 F.3d at 212 (citing *Dutkiewicz,* ARB No. 97-090 at 6).

Moreover, in pertinent part:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue,

> illness, or any other cause, as to make it unsafe for him to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3. Furthermore, the regulations provide for a 60/70-hour rule, under which:

> (b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—
>
> > (1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
> > (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

49 C.F.R. § 395.3(b)(1)-(2). To be clear, "[a]ny period of 7 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours" and "[a]ny period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours." 49. C.F.R. § 395.3(c)(1)-(2).

It is worth noting that "[o]n-duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work." Also, "[o]n-duty time shall include…[p]erforming any compensated work for a person who is not a motor carrier." 49 C.F.R. § 395.2.

IV. POSITIONS OF THE PARTIES

Respondents contend that Complainant's employment was terminated because Complainant limited his availability, refused to do work for which he was hired, and exhibited some anger issues. *Respondents' Motion for Summary Judgment* at 2. Respondents argue that Complainant did not engage in any protected activity under the STAA as he did not file any complaint. Therefore, Respondents maintain that Complainant's termination was not in retaliation for filing a complaint or any protected activity. *Id* at 3. Thus, Respondents request that the undersigned grant summary judgment in favor of Respondents and dismiss all of Complainant's claims with prejudice.

Complainant argues that Respondents' Motion for Summary Judgment should be denied because issues of material fact exist pertaining to whether Complainant engaged in protected activity and whether protected activity contributed to any adverse actions taken by Respondents against Complainant. *Complainant's Opposition to Respondent's Motion for Summary Judgment* at 1. Furthermore, Complainant maintains that clear and convincing evidence does not show that Respondents would have terminated Complainant absent protected activity. *Id*. In summary, Complainant contends that Respondents fail to demonstrate an absence of material facts in dispute

and thus, as the evidence must be viewed in the light most favorable to Complainant as the non-moving party, a summary decision in favor of Respondents is unwarranted.

V. DISCUSSION

To note at the outset, the undersigned finds that there is no genuine dispute of material fact that Stabler informed Complainant that his employment with Geiger was effectively terminated on Monday, February 7, 2022. *Supra*. Thus, the undersigned finds that Complainant demonstrates by a preponderance of the evidence that he suffered unfavorable personnel action in this case.

Regarding whether Complainant engaged in a protected activity, under applicable law, filing a complaint based on reasonable belief in a violation of a commercial motor vehicle safety regulation is a protected activity. *Supra*. As discussed *supra*, an internal complaint to management, whether written or oral, constitutes filing a complaint for purposes of the STAA. *Supra*. However, silent departures do not constitute filing a complaint. *Supra*. Rather, an employee must have communicated the issue or violation in some effective manner to put the employer on notice that he or she is engaging in protected activity. *Supra*.

Here, Complainant alleges that he engaged in protected activity. Complainant argues that he filed a complaint when he refused to drive a load to Terre Haute, Indiana. *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 8. Complainant maintains that his complaints were based on a reasonable perception of violations of 49 C.F.R. §§ 392.3 and 395.3. *Id.* at 11. Specifically, Complainant asserts that he engaged in protected activity because he refused to drive based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of injury to the Complainant or the public. *Id.* at 12. That is, to note and to be clear, Complainant alleges that his refusal to complete the drive to Terre Haute, Indiana was based on his own internal reasonable belief that the drive would constitute a safety violation; but not necessarily that Complainant effectively communicated the perceived safety violation to Respondents at the time that he refused to complete the drive. *Id*. Further, Complainant argues that, based upon Complainant's schedule during the relevant timeframe, the undersigned "could find that [Complainant] was too fatigued, or would have become too fatigued, as to make it unsafe to operate a commercial motor vehicle." *Id* at 10. While Complainant asks the undersigned to *infer* that, based upon his schedule during the relevant timeframe, he would have been too fatigued or would have become too fatigued to complete the drive safely; but does not necessarily aver that Complainant expressed this fatigue to Respondents at the time when he refused to complete the drive. *Id.* (emphasis added). Moreover, Complainant states that he verbally, expressly communicated to Stabler on Monday, February 7, 2022, that he had lacked the available hours to make the drive to Terre Haute, Indiana; and that, assuming this fact as true, the undersigned could conclude that Complainant's refusal was based on a reasonable actual violation of safety regulations. Therefore, considering the foregoing, Complainant contends that he engaged in a protected activity under both the actual violation as well as the reasonable apprehension clauses of 49 U.S.C. § 31105(a)(1)(A)-(B).

Respondents contend that Complainant did not engage in any protected activity, as he did not file a complaint and as his refusal to haul a load to Terre Haute, Indiana was not based on an actual violation nor a reasonable apprehension of serious injury. *Respondents' Memorandum in*

Support of Summary Judgment at 9-12. Respondents argue that Complainant essentially performed a "silent departure" by refusing to drive to Terre Haute, Indiana without any explanation, either verbal or written, as to why he could not complete the drive. *Id*. at 9. Respondents maintain that Complainant did not communicate that he was too impaired for the drive or that he was likely to become impaired. *Id.* at 11. Further, Respondents argue that Complainant had the available hours to make the drive to Terre Haute, Indiana. *Id*. at 11. Finally, Respondents set forth that Complainant did not communicate that he refused to drive due to an apprehension of serious injury. *Id*. at 12. Therefore, Respondent maintains that Complainant did not put Geiger on notice that the drive violated any safety rule; and furthermore, that Respondents were unaware of any actual or perceived violation at the time when Stabler and Mertz discussed terminating Complainant's employment on February 4, 2022. *Id* at 6 and 12. Thus, Respondent argues that Complainant's refusal to work, without further explanation, does not constitute filing a complaint or a protected activity for purposes of the STAA. *Id*. at 10.

The undersigned agrees with Respondents. The undersigned finds no genuine dispute of material fact that when Mertz asked Complainant if he was available to drive to Terre Haute, Indiana, Complainant replied with a text message stating, "I am not [available]." *Supra*. The undersigned finds that Complainant's cursory text message refusal did not incorporate any explanation that the drive would result in an actual violation of any safety regulation or any further elucidation that the refusal was based on a reasonable apprehension of serious injury. Thus, there is no genuine dispute of material fact that at the time when Complainant refused to complete the drive to Terre Haute, Indiana via text message, he did not provide verbal or written explanation regarding actual or perceived violations, nor notice that he was engaging in a protected activity.

The undersigned finds that Complainant's refusal is analogous to a silent departure, as he offered no verbal or written notice to Respondents that he was engaging in a protected activity when he refused the drive to Terre Haute, Indiana. Therefore, undersigned finds, as a matter of law, that Complainant did not file a complaint for purposes of the STAA. Thus, his refusal to work does not constitute a protected activity under the Act. As the undersigned finds that Complainant did not engage in any protected activity for purposes of the STAA, Complainant fails to demonstrate by a preponderance of the evidence an essential element of his claim. Consequently, Complainant's retaliation claim necessarily fails.[18] Accordingly, the undersigned finds that Respondents are entitled to summary judgment as a matter of law.

Even if assuming *arguendo* that Complainant did engage in a protected activity, the undersigned finds that the outcome of this case does not change. Inferring the facts in the light most favorable to Complainant as non-moving party, the undersigned finds that when Stabler informed Complainant that his employment with Geiger was terminated on February 7, 2022, Complainant expressed to Stabler that he lacked the available hours to complete the drive to Terre

[18] The undersigned notes that, after Complainant's employment with Geiger was terminated, he continued to work and had no unemployed time. *Complainant's Prehearing Statement of Position* at 6 (stating that "[f]rom February 13, 2023, to present, Complainant has been employed… and earns higher wages than he did with Respondent Geiger… Between February and May of 2022, Complainant worked part time for Eaton EMTs…"). Therefore, even if Complainant established all necessary elements of his claim, he would not be entitled to any compensatory damages.

Haute, Indiana.[19] At present, Complainant is subject to the 70-hour rule.[20] 49 C.F.R. § 395.3(b)(2). Therefore, Complainant is permitted to work on-duty for 70-hours in any period of 8 consecutive days. *Id*. To be clear, as discussed *supra*, any period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours. 49 C.F.R. § 395.3(c)(2). There is no genuine dispute of material fact that during the week of Monday, January 31, 2022, Complainant worked 54.5 hours of on-duty time for Geiger. *Supra*. Therefore, when Mertz sent Complainant a text message assigning him a drive to Terre Haute, Indiana on Friday, February 4, 2022,[21] Complainant had 15.5 remaining available hours – enough hours to complete the drive. Therefore, Complainant did not legitimately decline to drive the requested route and Respondent terminated Complainant's employment for non-retaliatory reasons. Furthermore, to note, the undersigned also finds no genuine dispute of material fact that Stabler and Mertz were not aware of any actual or perceived hour violation on February 4, 2022, when they discussed terminating Complainant's employment and ultimately determined to terminate Complainant's employment with Geiger.[22] So, the undersigned stresses that at the time when Mertz and Stabler discussed and decided to terminate Complainant's employment, neither were aware of any safety violation nor had been notified by Complainant that he was engaging in a protected activity. *Supra*. Thus, even if assuming *arguendo* that Complainant engaged in protected activity, that protected activity did not play a role – was not *any* contributing factor – in Respondents' decision to terminate his employment. Emphasis added.

It is worth noting, Complainant alleges that he worked a paid 12-hour shift with Tri County from 7:00 PM on Friday, February 4, 2022, until 7:00 AM on Saturday, February 5, 2022; thus, Complainant asserts that he accumulated 66.5 on-duty hours during the relevant timeframe.[23] Sure, as stated *supra*, "[o]n-duty time shall include…*[time spent p]erforming any compensated work for a person who is not a motor carrier*." 49 C.F.R. § 395.2 (emphasis added). Thus, Complainant's hours logged with Tri County do factor in as on-duty hours for purposes of the 70-hour rule. However, at the time when Mertz sent the text message to Complainant assigning the drive to Terre Haute, Indiana, in the afternoon on Friday, February 4, 2022, Complainant retained the available hours to complete the drive. *Supra*. Instead, Complainant chose to perform his part-time job with Tri County on Friday night into Saturday morning, rather than complete the assignment from his full-time employer over the relevant weekend. ***The Act does not protect Complainant's choice to work his part-time job rather than complete the assignment from***

[19] *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 5; *see* Sharpe Decl. at 11.

[20] Complainant applied the 60-hour rule in his filings. *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 13. Respondent applied the 70-hour rule in its filings. *Respondents' Memorandum in Support of Summary Judgment* at 11. The undersigned finds, as a matter of law, that the 70-hour rule applies in this case, as Geiger operates commercial motor vehicles every day of the week. 49 C.F.R. § 395.3(b)(1)-(2) (stating that whether the 60-hour or 70-hour rule applies depends upon whether "the employing motor carrier" does or does not operate "commercial motor vehicles every day of the week."). There is no genuine dispute of material fact that Geiger, the employing motor carrier at present, operates commercial motor vehicles every day of the week.

[21] There is no genuine dispute of fact that Mertz sent the text message to Complainant assigning the drive to Terre Haute, Indiana on Friday, February 4, 2022, in the afternoon at 2:44 PM. *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 4; *Respondents' Memorandum in Support of Summary Judgment* at 5.

[22] *Respondents' Memorandum in Support of Summary Judgment* at 6; *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 14 (stating that Stabler decided to terminate Complainant's employment on February 4, 2022, but finalized the termination on February 7, 2022).

[23] *Complainant's Opposition to Respondents' Motion for Summary Judgment* at 4, 13.

Respondent when he possessed the available hours to complete the drive to Terre Haute, Indiana at the time of the assignment. Emphasis added.

The undersigned finds that Respondent terminated Complainant's employment not because he engaged in any protected activity but because he refused the assignment to drive to Terre Haute, Indiana – and, to note, because he dictated to his supervisor the type of work he would do when he expressed that he would no longer plow snow for Geiger. *Supra*. Therefore, Respondent legitimately terminated Complainant's employment for non-retaliatory reasons. Thus, the undersigned finds that, if assuming *arguendo* that Complainant engaged in a protected activity, Complainant fails to demonstrate by a preponderance of the evidence that the protected activity was a contributing factor – *any* factor – in the unfavorable personnel action. Emphasis added. Accordingly, in the alternative, Respondents are entitled to summary judgment as a matter of law.

VI. CONCLUSION

In conclusion, the undersigned finds that Complainant demonstrates by a preponderance of the evidence that he suffered unfavorable personnel action in this case, as there exists no genuine dispute of material fact that his employment with Respondent Geiger was terminated. *Supra*. However, Complainant fails to demonstrate by a preponderance of the evidence that he engaged in a protected activity. *Supra*. Complainant therefore fails to prove an essential element of his case, and his retaliation claim under the STAA thereby fails. *Supra*. Accordingly, Respondents are entitled to summary judgment as a matter of law. Even if, assuming *arguendo*, Complainant engaged in a protected activity, the undersigned finds that Complainant fails to demonstrate by a preponderance of the evidence that the protected activity constituted a contributing factor to the unfavorable personnel action. *Supra*. Thus, even in the alternative, Complainant's retaliation claim necessarily fails and Respondents are entitled to summary judgment as a matter of law.

Accordingly, the undersigned **GRANTS** Respondents' Motion for Summary Judgment. Complainant's claims are **DISMISSED** with prejudice.

ORDER

WHEREFORE, having considered *Respondents' Motion for Summary Judgment*, *Respondents' Memorandum in Support of Summary Judgment,* and *Complainant's Opposition to Respondents' Motion for Summary Judgment*:

1. The undersigned hereby **GRANTS** Respondents' Motion for Summary Judgment;

2. Complainant's claims are hereby **DISMISSED** with prejudice;

3. The hearing scheduled for April 16, 2024, at 9:00 AM is hereby **CANCELLED**; and

4. Respondents' Motion to convert the hearing to address Respondents' Motion for Summary Decision is hereby **DENIED**.

SO ORDERED.

DREW A. SWANK
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).

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.