**In the Matter of:**

**WALTER ABBS,**

**COMPLAINANT,**

**v.**

**CON-WAY FREIGHT, INC.,**

**RESPONDENT.**

**ARB CASE NO. 08-017**

**ALJ CASE NO. 2007-STA-037**

**DATE: July 27, 2010**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***
**Walter Abbs, *pro se*, Sturgis, Michigan**

***For the Respondent:***
**Daniel W. Egeler, Esq., Con-Way Freight Inc., Ann Arbor, Michigan; David L. Smith, *Constangy, Brooks & Smith, LLC*, Atlanta, Georgia**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Wayne C. Beyer, *Administrative Appeals Judge***

## FINAL DECISION AND ORDER

Walter Abbs, a truck driver, filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended

and recodified, and its implementing regulations.[1] Abbs alleged that his former employer, Con-Way Freight, Inc. (Con-Way), violated the STAA when it fired him for engaging in activity the STAA protects. Following investigation by the Labor Department, the Occupational Safety and Health Administration (OSHA) determined that Abbs's STAA claim had been adjudicated in federal court and, therefore, dismissed his complaint.[2] Abbs objected to OSHA's determination, and requested a hearing before the Office of Administrative Law Judges (OALJ). Prior to a hearing, the assigned ALJ granted Con-Way's motion to dismiss Abbs's STAA complaint on collateral estoppel and res judicata grounds. This case is before the Administrative Review Board for review pursuant to the STAA's automatic review provision.[3]

## BACKGROUND

The ALJ dismissed Abbs's STAA complaint on procedural grounds and consequently did not make any factual findings nor reach a determination on the merits of the case. We provide the following narrative for background purposes only. We make no factual findings in this narrative and no narrative statement should be construed as such.

Walter Abbs drove a truck for Con-Way Freight from June 1993 until December 2003, when Con-Way fired him. From the evening of December 4 to the morning of December 5, 2003, Abbs drove from Detroit, Michigan to Con-Way's Fremont, Indiana facility. Abbs alleged that he became ill during that overnight run due to the fact that while in Detroit, he had been exposed to carbon monoxide fumes from loading-dock forklifts. Abbs claimed that he felt too ill to continue to drive safely and consequently stopped driving while in route and took a "safety break." Taking that break caused Abbs to arrive three hours late at the Fremont facility. He was due at the Fremont facility at 5:00 a.m., but he arrived at 7:51 a.m. Once at the Fremont facility, Abbs informed his supervisor, Rick Pogliano, that he had stopped driving to take a "safety break" because he felt ill and, as a result, he was late. Despite having arrived at the Fremont facility at 7:51 a.m., Abbs entered an arrival time of 5:00 a.m. in his driving log and an arrival time of

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[1] 49 U.S.C.A. § 31105 (Thomson/West 2007); 29 C.F.R. Part 1978 (2009). The STAA has been amended since Abbs filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007); 49 U.S.C.A. § 31105(b)(1) (Thomson/West 2007 & Supp. 2010). However, we need not decide whether the amendments incorporating the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121(b) (Thomson/West 2007), are applicable to this case because even if they were they would not affect the Board's decision in this case.

[2] Secretary's Findings dated May 10, 2007.

[3] 29 C.F.R. § 1978.109(c)(1).

5:05 a.m. on his payroll sheet. Con-Way alleges that it subsequently fired Abbs on the grounds that he falsified his driving log and payroll sheet.

The relevant procedural facts are as follows: Abbs filed a STAA complaint with OSHA on July 24, 2004, claiming that Con-Way violated the STAA by firing him after he "us[ed] a safety break as a result of being ill during his scheduled work time."[4] While his OSHA complaint was pending, Abbs filed another complaint against Con-Way in the United States District Court, Eastern District of Michigan.[5] Abbs's district court complaint alleged breach of employment contract, age, and employment discrimination in violation of the Age Discrimination and Employment Act (ADEA),[6] and Title VII of the Civil Rights Act of 1964,[7] and wrongful discharge purportedly in violation of the Federal Motor Carrier Safety Improvement Act[8] and the Surface Transportation Assistance Act.[9] In response, Con-Way filed a Motion for Summary Judgment urging dismissal under Fed. R. Civ. P. 12(b)(6) and/or Fed. R. Civ. P. 56(c).[10] Specific to Abbs's purported STAA claim, Con-Way asserted that dismissal was warranted because the STAA provides no private cause of action and, therefore, the claim was not properly before the court. In response, Abbs denied that he had brought a STAA claim before the court and averred that his only STAA claim was pending with OSHA.[11]

The district court granted summary judgment with respect to all counts. In dismissing Abbs's purported STAA claim, however, the district court did not address Con-Way's argument that the STAA claim was not properly before the court. Rather, the court addressed Abbs's claim of wrongful discharge under 49 U.S.C.A. § 31105(a)(1)(B) of the STAA and pursuant to the Federal Motor Carrier Safety Regulation (FMCSR)

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4 Respondent's Exhibit 1. Abbs's STAA complaint was not filed with OSHA within "180 days after the alleged violation occurred." *See* 49 U.S.C.A. § 31105(b). Notwithstanding, OSHA deemed Abbs's complaint to be timely because "he made a good faith effort to file his discrimination [sic] in the correct venue on March 5, 2004." Secretary's Findings dated May 10, 2007 at 1; *see* Respondent's Exhibit 2. The timeliness of Abbs's complaint is not at issue in this case.

5 Respondent's Exhibit 3.

6 29 U.S.C.A. § 623 (Thomson/Reuters/West 2008).

7 42 U.S.C.A. § 2000e *et seq*. (West 2003).

8 49 U.S.C.A. § 113 (Thomson/West 2007).

9 Respondent's Exhibit 3. at 2-3; Respondent's Exhibits 4, 5.

10 Complainant's Exhibit 6.

11 Respondent's Exhibit 6.

392.3. The district court determined that these laws only protect employees who refuse to drive and Abbs never refused to drive. The court determined:

> Plaintiff admitted at his deposition that no one at CCX required him to drive on December 5, 2003, after informing them he was too ill to safely drive his truck. Dep. of Abbs at 228. Plaintiff further testified that Pogliano never told him he could not take a safety break. *Id.* at 341. Plaintiff's own admissions, and the statutes themselves, negate his claim that he was wrongfully terminated for following the mandates of the FMCSR and the STAA.[12]

Accordingly, the district court dismissed Abbs's STAA claim. The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision without addressing any STAA claim.[13]

As noted above, before filing his district court case in September 2004, Abbs filed his STAA complaint with OSHA Following an investigation, OSHA determined that Abbs's STAA claim had been adjudicated in court, and thus dismissed his complaint.[14]

Abbs requested a hearing but before any hearing was held, Con-Way filed a Motion to Dismiss or for Summary Judgment with the ALJ. Con-Way argued that the ALJ should dismiss the complaint because of the prior litigation, based on the doctrines of issue preclusion or "collateral estoppel" and claim preclusion or "res judicata," and pursuant to the regulation at 29 C.F.R. § 1978.112(c).[15]

In a Recommended Decision and Order, issued November 13, 2007, the ALJ granted Con-Way's motion to dismiss Abbs's complaint, holding that the doctrines of collateral estoppel and res judicata barred Abbs's STAA complaint from being relitigated.

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[12] Respondent's Exhibit 7; *Abbs v. Con-Way Cent. Exp., Inc.*, No. Civ. 04-60201, 2005 WL 2417632, slip op. at 6 (E.D. Mich. Sept. 30, 2005).

[13] Respondent's Exhibit 8; *Abbs v. Con-Way Central Express, Inc.*, No. 05-2493, slip op. at 4 (6th Cir Oct. 11, 2006.). The Sixth Circuit found that Abbs abandoned his Federal Motor Carrier Safety Improvement Act claim for purposes of appellate review by failing to challenge the district court's rationale in dismissing that claim. *Id.* at 3.

[14] Secretary's Findings dated May 10, 2007.

[15] 29 C.F.R. § 1978.112(c) implements the STAA and codifies the doctrine of issue preclusion. *Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998-STA-008, slip op. at 9 n.7 (ARB July 28, 1999).

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978.[16] In reviewing STAA cases, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole.[17] The ARB reviews the ALJ's conclusions of law de novo.[18]

## DISCUSSION

The STAA protects employees who engage in protected activity from discharge, discipline, and discrimination. STAA-protected activity occurs when the employee files a complaint or begins a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or when an employee testifies or will testify in such a proceeding.[19]

To prevail on a STAA complaint, the complainant must prove by a preponderance of the evidence that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him regarding his pay, or terms or privileges of employment; and that the protected activity was the reason for the adverse action. Failure to establish any one of these elements requires dismissal of the complaint.[20]

In STAA cases, the ARB has adopted the *McDonnell-Douglas*, burden-shifting framework developed under Title VII of the Civil Rights Act of 1964.[21] Thus, the complainant must first adduce evidence that he engaged in STAA-protected activity, that

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[16] Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(a).

[17] 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

[18] *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

[19] *See* 49 U.S.C.A. § 31105 (a).

[20] *Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 4 (ARB June 30, 2005).

[21] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

the employer was aware of this activity, and that the employer took adverse action against the complainant because of the protected activity.[22] Only if the complainant makes this prima facie showing does the burden shift to the employer to produce a legitimate, non-discriminatory reason for the adverse action. If the employer meets this burden, the prima facie inference "drops from the case," and the complainant must then prove intentional discrimination by a preponderance of the evidence. The complainant may prove that the employer's proffered reason for the adverse action is a pretext for discrimination under the STAA.[23] In proving that an employer's asserted reason for the adverse action is a pretext, the employee must prove not only that the employer's asserted reason is false, but also that discrimination was the true reason for the adverse action. If the complainant does not prove one of the requisite elements, the entire claim fails.[24] The employee bears the ultimate burden to show that the employer discriminated against him.[25]

Once the employee has proved by a preponderance of the evidence that the employer did act against him at least in part because he engaged in activity protected by the STAA, the burden shifts to the employer whose only means of escaping liability is by then proving by a preponderance of the evidence that it would have taken the adverse action even in the absence of the protected activity.[26] This is a "mixed-motive" analysis.

Before the ALJ in this case was the question of whether Abbs met the foregoing burden of proof necessary to establish that his discharge from employment was in unlawful retaliation for having engaged in STAA-protected activity. Instead, as previously noted, the ALJ dismissed Abbs's complaint on res judicata and collateral estoppel grounds in light of the dismissal of Abbs's litigation in federal court. As discussed below, we conclude that neither res judicata nor collateral estoppel bars the

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[22] *Bethea v. Wallace Trucking Co.*, ARB No. 07-057, ALJ No. 2006-STA-023, slip op. at 7 (ARB Dec. 31, 2007).

[23] *Israel v. Schneider Nat'l Carriers, Inc.*, ARB No. 06-040, ALJ No. 2005-STA-051, slip op. at 7 (ARB July 31, 2008).

[24] *Carpentier v. Golden Valley Transfer, Inc.*, ARB No. 08-116, ALJ No. 2008-STA-045, slip op. at 6 (ARB Feb. 26, 2010), citing *see West v. Kasbar, Inc./Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

[25] *Carpentier*, ARB No. 08-116, slip op. at 6, citing *Calhoun v. United Parcel Serv.*, ARB No. 1999-STA-007, slip op. at 5 (ARB Nov. 27, 2002) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993)).

[26] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989); *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21-22 (1st Cir. 1998); *Mourfield v. Frederick Plaas*, ARB No. 00-055, ALJ No. 1999-CAA-013, slip op. at 5 (ARB Dec. 6, 2002).

litigation of Abbs's STAA complaint before the Department of Labor, and accordingly remand this matter for disposition consistent with this Decision and Order.

**Res judicata does not bar Abbs's STAA complaint where the district court lacked jurisdiction to determine any STAA claim.**

"Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action."[27] Res judicata, or claim preclusion, has four elements: (1) a final decision on the merits in the first action by a court of competent jurisdiction; (2) the second action involves the same parties or their privies, as the first action; (3) the second action raises an issue actually litigated or which should have been litigated in the first action; and (4) the cases involve the same cause of action.[28]

The ALJ determined that res judicata barred litigation of Abbs's STAA complaint before the Department of Labor because the district court properly exercised its jurisdiction in dismissing the complaint purportedly before the court.[29] The ALJ's determination is, however, contrary to applicable law. An adjudicative agency or court with jurisdiction over a particular complaint is one that is authorized by Congress to determine the merits of a particular dispute between parties and to grant relief to a successful plaintiff.[30] The 2003 version of the STAA, in effect at the time Abbs filed his complaint with DOL, gives the Secretary of Labor jurisdiction to investigate and adjudicate employee whistleblower complaints related to violations of commercial motor vehicle safety.[31] While the STAA provides for judicial review of "an order issued [by the Secretary] after a hearing under subsection (b) of this section … in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on

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[27] *Montana v. United States*, 440 U.S. 147, 153 (1979), citing, inter alia, *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877).

[28] *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 323-24 (1971); *Sanders Confectionary Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 480 (6th Cir. 1992), citing *King v. South Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524 (6th Cir. 1986); *Westwood Chem. Co. v. Kulick*, 656 F.2d 1224 (6th Cir. 1981).

[29] ALJ Recommended Decision and Order Granting Respondent's Motion for Dismissal (R. D. & O.) at 5, 6.

[30] *See OFCCP v. Keebler*, ARB No. 97-127, ALJ No. 1987-OFC-020, slip op. at 10 (ARB Dec. 21, 1999).

[31] 49 U.S.C.A. § 31105(b)(1) ("An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section . . . may file a complaint with the Secretary of Labor . . . .").

the date of the violation,"[32] the STAA in existence at all times relevant to the instant case did not provide federal district courts with jurisdiction over a civil action by a discharged employee against his former employer alleging violation of the STAA whistleblower protection provisions.[33] Therefore, contrary to the ALJ's finding, the district court lacked subject matter jurisdiction over Abbs's whistleblower complaint arising under federal statutory law, the STAA. "It is black-letter law that a claim is not barred by res judicata if . . . the court rendering judgment lacked subject-matter jurisdiction over a claim."[34] Because the district court lacked subject matter jurisdiction over Abbs's STAA claim, its decision was not rendered by a court of competent jurisdiction and does not have preclusive effect barring litigation of Abbs's STAA complaint. Accordingly, we reverse the ALJ's finding that Abbs's STAA complaint is barred under the doctrine of res judicata.

The ALJ's alternative citation to the supplemental jurisdiction provision at 28 U.S.C.A. § 1367(a)(Thomson/Reuters 2010) in support of his finding that Abbs's STAA claim was properly before the district court[35] is unavailing. 28 U.S.C.A. § 1367(a) provides:

> Except as provided in subsections (b) and (c) *or as expressly provided otherwise by Federal statute*, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. [emphasis added].

By its terms section 1367(a) excepts from federal court supplemental jurisdiction those cases in which a federal statute provides otherwise, such as the STAA provisions

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32 49 U.S.C.A. § 31105(c).

33 *Elbert v. True Value Co.*, 550 F.3d 690 (8th Cir. 2008), *aff'g Elbert v. True Value Co.*, No. 07-CV-3629, slip op. at 7-8 (D. Minn., Dec. 11, 2007) (district court did not have jurisdiction over STAA complaint because August 3, 2007 amendment to the STAA did not apply retroactively to pending claims); *Hernandez v. Mohawk Indus., Inc.*, No. 6:08-cv-927-Orl-28GJK, 2009 WL 3790369 (M.D. Fla. Nov. 10, 2009). *See also Kornischuk v. Con-Way Cent. Express*, No. Civ. 1-03-CV-10013, 2003 WL 21977202 (S.D. Iowa, June 4, 2003).

34 *Browning v. Navarro*, 887 F.2d 553, 558 (5th Cir. 1989).

35 R. D. & O. at 6.

controlling in this case, which accorded exclusive jurisdiction to the Secretary of Labor, subject to review before the federal circuit courts.

**Collateral estoppel does not bar Abbs's STAA complaint where Abbs did not have a full and fair opportunity to litigate the issue of whether Con-Way's proffered reason for discharging him was the true reason or was a mere pretext for unlawful retaliation.**

We next examine the principles of collateral estoppel or issue preclusion to determine whether the ALJ properly found that these principles barred the Department of Labor's adjudication of Abbs's STAA complaint. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation."[36] Collateral estoppel "'bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim."[37] A prior court resolution has preclusive effect when the following four elements are satisfied: (1) the precise issue raised in the present case was raised and actually litigated in the prior proceeding; (2) determination of the issue was necessary to the outcome of the prior proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.[38]

In this case, the ALJ noted that the standard the district court applied with respect to the ultimate burden of proof required of a claimant under the ADEA where the employer establishes a legitimate, non-discriminatory reason for its employment decision is the same standard that is applied in STAA cases.[39] The district court having found that Abbs failed to demonstrate that Con-Way's proffered reason for terminating his employment constituted pretext for age discrimination under the ADEA, the ALJ concluded that the precise issue of pretext under the STAA had been effectively raised and resolved, and thus that collateral estoppel barred relitigation of this issue.[40] The ALJ

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[36] *Montana*, 440 U.S. at 153, citing, inter alia, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

[37] *Id.*; *SEC v. Quinlan*, 2010 WL 1565473, slip op. at 4 (6th Cir. Apr. 21, 2010) quoting *Taylor v. Sturgell*, 553 U.S. 880 (2008).

[38] *Montana*, 440 U.S. at 153-154; *Parklane* Hosiery, 439 U.S. at 328, 332; *Quinlan*, 2010 WL 1565473, slip op. at 4, citing *Smith v. SEC*, 129 F.3d 356, 362 (6th Cir. 1997) (en banc) (quoting *Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 515 (6th Cir. 1987)).

[39] R. D. & O. at 4.

[40] *Id*. at 5.

found that collateral estoppel barred relitigation of Abbs's STAA complaint because the district court addressed the same issue, namely whether Con-Way's reason for discharging Abbs was the true reason for the discharge or pretext for unlawful retaliation. Furthermore, the ALJ reasoned, the determination of that issue was as necessary to the outcome of the district court case as it is to the adjudication of Abbs's STAA complaint, the district court rendered a judgment on the merits, and Abbs had a full and fair opportunity to litigate before the district court the issue of Con-Way's reasons for discharging him.[41]

What the ALJ fails to take into consideration, however, is that the required showing to establish that Con-Way's proffered reason for terminating Abbs's employment constituted pretext for age discrimination under the ADEA is not necessarily the same showing that is required of Abbs to establish that Con-Way's proffered reason for the termination was a pretext for retaliation because Abbs engaged in STAA-protected activity. Con-Way asserted that it fired Abbs for falsifying his driving log and company payroll sheet. As previously noted, where an employer produces evidence of a legitimate, non-discriminatory reason for the adverse action, a complainant under the STAA has the burden to show that the employer's proffered reason for the adverse action was not the true reason but was mere pretext for retaliation because of the employee's STAA protected activity. A complainant may establish pretext by showing that his employer's proffered reason did not motivate his discharge, with proof that the employer's proffered reason is unworthy of credence.[42]

In his district court complaint, Abbs alleged "that other drivers routinely falsified logs, were not disciplined for doing so, or were allowed to correct mistakes on previously submitted logs,"[43] and in support of these allegations testified to disparate treatment on deposition and developed witness testimony. These allegations of disparate treatment, if proven, may serve as evidence of pretext under the STAA.[44] Such proof is, however, wholly irrelevant to the issue of pretext for age discrimination under the ADEA and, in fact, the district court did not consider Abbs's claim of disparate treatment and the evidence he developed in support of the claim in finding that Abbs failed to establish pretext under the ADEA. Thus, it cannot be said that the district court adjudicated the precise issue of pretext for alleged discrimination under the STAA in dismissing Abbs's ADEA complaint.

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41 *Id*. at 6.

42 *Gavalik v. Cont'l Can Co.,* 812 F.2d 834, 853 (3d Cir, 1987).

43 Respondent's Exhibit 7; *Abbs v. Con-Way Cent. Exp., Inc.,* No. Civ. 04-60201, 2005 WL 2417632, slip op. at 3.

44 *McDonnell-Douglas Corp.*, 411 U.S. at 804 ("Especially relevant" to a showing of pretext "would be evidence that white employees involved in acts against petitioner of comparable seriousness … were nevertheless retained or rehired.").

Furthermore, given the nature of the summary judgment proceedings before the district court, and the manner by which Con-Way sought dismissal of Abbs's purported STAA complaint, it cannot be said that Abbs was afforded a full and fair opportunity to litigate the issue of pretext under the STAA in the prior proceeding. As previously discussed, Con-Way sought dismissal of Abbs's purported STAA claim based on jurisdictional grounds, and Abbs defended against Con-Way's motion with respect to STAA by asserting that he had not filed a STAA claim with the district court. The merits of Abbs's STAA complaint were never raised and, thus, Abbs had no reason to present any evidence he might have had that Con-Way's stated reasons for his employment termination were pretext under the STAA.

The Department of Labor's regulations implementing the STAA, at 29 C.F.R. § 1978.112(c), provide:

> Deferral to the outcome of other proceedings. A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-by-case basis, after careful scrutiny of all available information. Before the Assistant Secretary or Secretary defers to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the Act. In this regard, if such other actions initiated by a complainant are dismissed without adjudicatory hearing thereof, such dismissal will not ordinarily be regarded as determinative of the section 405 complaint.

In granting Con-Way's motion to dismiss, Abbs was not afforded an adjudicatory hearing on his STAA claims, nor were his rights thereunder adjudicated.[45] Abbs did not have a full and fair opportunity to litigate before the district court the claim that his discharge violated the STAA's whistleblower protection provisions. We therefore conclude that the district court's decision does not preclude Abbs, under the doctrine of collateral estoppel, from litigating his STAA complaint before the Department of Labor.[46]

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[45] *Tuggle v. Roadway Express, Inc.,* ARB No. 03-081, ALJ No. 2003-STA-008, slip op. at 3 (ARB May 28, 2004).

[46] *See Scott v. Roadway Express, Inc.,* ARB No. 99-013, ALJ No. 1998-STA-008, slip op. at 9 (ARB July 28, 1999), as followed in *Germann v. Calmat Co.,* ARB No. 99-114, ALJ No. 1999-STA-015, slip op. at 4-5 (ARB Aug. 1, 2002), *aff'd Calmat Co. v. U.S. Dep't of Labor,* 364 F.3d 1117, 1125-26 (9th Cir. 2004).

## CONCLUSION

Abbs's STAA complaint is not barred by res judicata nor is the litigation thereof barred by collateral estoppel as a result of the district court's disposition of Abbs's complaint filed in that court, *Abbs v. Con-Way Central Express, Inc*., No. Civ. 04-60201, 2005 WL 2417632 (E.D. Mich. 2005). Accordingly, the Board **REVERSES** the ALJ's R. D. & O. and **REMANDS** the case for further proceedings consistent with this opinion.

**SO ORDERED**.

**E. COOPER BROWN**
**Deputy Chief Administrative Appeals Judge**

**PAUL M. IGASAKI**
**Chief Administrative Appeals Judge**

**WAYNE C. BEYER**
**Administrative Appeals Judge**