In the Matter of:

DUNCAN F. SHIELDS, **ARB CASE NO. 08-021**

COMPLAINANT, **ALJ CASE NO. 2007-STA-022**

v. **DATE: November 30, 2009**

JAMES E. OWEN TRUCKING, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul O. Taylor, Esq., *Truckers Justice Center*, Burnsville, Minnesota

For the Respondent:
Donald M. Rowe, Esq., *Rowe & Sitzler, P.C.*, Bedford, Virginia

FINAL DECISION AND ORDER

Duncan F. Shields filed a complaint with the United States Department of Labor alleging that when his former employer, Owen Trucking Transport, Inc., discharged him, it violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified.[1] A Department of Labor Administrative Law Judge (ALJ) found that Shields had proven by a preponderance of the evidence that Owen Trucking discriminated against Shields in violation of the Act when it terminated his employment, that the legitimate reason offered by Owen Trucking was mere pretext, and that Owen Trucking did not

[1] 49 U.S.C.A. § 31105 (Thomson/West 2007).

show that it would have terminated Shields in the absence of his protected activity. He recommended that Shields be reinstated, awarded Shields back pay with interest, and awarded compensation for stress and anxiety. He also recommended that Owen Trucking should expunge negative information from Shields's personnel records, should amend any reports with consumer reporting agencies to which it had furnished reports with negative information concerning Shields, and should post his Recommended Decision and Order (R. D. & O.) and the final order on its premises for 90 days. We affirm in part and modify in part.

BACKGROUND

The facts underlying this case are set forth in the R. D. & O. at pages 2-15, and we summarize them here in relevant part.

Owen Trucking is an interstate trucking operation that operates commercial vehicles on the highways in commerce with a gross vehicle weight rating of 10,001 pounds or more.[2] Owen Trucking hired Shields as a driver on or around October 11, 2006.[3]

On December 19, 2006, Shields went on duty at 4:30 a.m.[4] Between 2:00 p.m. and 2:40 p.m. on that day he received an order from a dispatcher, Butch Preston, to pick up a load in Baltimore, Maryland.[5] Preston instructed Shields to call the broker/customer, C. H. Robinson, for delivery times and when Shields did, C. H. Robinson told him that the delivery time was a window between 8:00 a.m. and 4:30 p.m. on December 20, 2006, in Gainesville, Georgia.[6] Shields told C. H. Robinson that he did not have enough hours to make the delivery within this window.[7] C. H. Robinson told him to call his dispatcher.[8] Shields called Preston and told him that he could not pick up the load in Baltimore and deliver it to Gainesville, Georgia because he did not have enough driving hours.[9]

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[2] Factual Stipulation No. 3, October 23, 2007.

[3] Tr. at 122, 137.

[4] Tr. at 139-40.

[5] Tr. at 143-44, 252-53.

[6] Tr. at 148-49. The C. H. Robinson confirmation document also noted a delivery window of 8:00 a.m. to 4:30 p.m. Factual Stipulation No. 27.

[7] Tr. at 149.

[8] Tr. at 149.

[9] R. D. & O. at 18-20; Tr. at 252-53.

Preston then transferred Shields to Dennis Gardner, the Operations Manager for Owen Trucking.[10] Shields told Gardner that he could not take the load to Gainesville, Georgia because he was going to "run out of hours" and he had to take a ten-hour break.[11] Shields refused the dispatch of the shipment from Baltimore, Maryland during the telephone conversation with Gardner and in the same conversation, Gardner fired Shields.[12] When Shields refused to pick up the load in Baltimore, Maryland and deliver it to Gainesville, Georgia, Gardner told Shields to bring the truck home and clean it out, thereby terminating him.[13] Shields drove the truck to his home and returned it to Owen Trucking on December 22, 2006.[14] Shields earned $7,334.54 from other employment after his discharge from Owen Trucking.[15]

Shields filed his STAA complaint on January 9, 2007. The Department of Labor's Occupational Safety and Health Administration (OSHA) investigated and denied the complaint. Shields objected and requested a hearing before an ALJ. At the hearing, Shields was represented by counsel, while John Sale and Dennis Gardner, employees of Owen Trucking, represented the company. Owen Trucking procured counsel after the hearing.

The ALJ concluded that Owen Trucking violated the STAA when it discharged Shields on December 19, 2006. He ordered Owen Trucking to reinstate Shields and awarded him back pay, interest, $2,000 in compensation for emotional damages, and abatement measures. The ALJ later awarded Shields attorneys' fees and costs.

On December 4, 2007, Owen Trucking filed a motion for relief from judgment and in the alternative, a motion to alter or amend the judgment with the OALJ. Owen Trucking claimed that there was newly discovered evidence that could not have been discovered by due diligence prior to the hearing and that should be admitted and relieve it from the ALJ's judgment. Shields responded to the motion on December 19, 2007. After a conference call on the issues, the ALJ dismissed the motions because he found that he did not have jurisdiction.

On December 4, 2007, the Board issued a Notice of Review and Briefing Schedule permitting both parties to submit briefs in support of or in opposition to the ALJ's order. Owen Trucking submitted a brief in opposition to the ALJ's R. D. & O. Shields filed a brief partially in support of and partially in opposition to the ALJ's R. D. & O.

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[10] Factual Stipulation No. 11; Tr. at 252-53.

[11] Factual Stipulation No. 26; Tr. at 150.

[12] Factual Stipulation No. 30.

[13] Factual Stipulation No. 31; Tr. at 33-34.

[14] Factual Stipulation No. 33; Tr. at 186.

[15] Factual Stipulation No. 36.

JURISDICTION AND STANDARD OF REVIEW

The case is now before the Administrative Review Board (ARB or the Board, which automatically reviews an ALJ's STAA decision.[16] The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.[17] Under the STAA, the ARB is bound by the ALJ's findings of fact if substantial evidence on the record considered as a whole supports those findings.[18] Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[19] In reviewing the ALJ's conclusions of law, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[20] Therefore, we review the ALJ's conclusions of law de novo.[21]

LEGAL STANDARD

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;" or who "refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."[22]

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16 49 U.S.C.A. § 31105 (b)(2)(C); 29 C.F.R. § 1978.109 (c)(1) (2009).

17 Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

18 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).

19 *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

20 5 U.S.C.A. § 557(b) (West 1996).

21 *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, -029, slip op. at 2 (ARB Oct. 31, 2003).

22 49 U.S.C.A. § 31105(a)(1).

To prevail on an STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity and took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.[23] If the employee does not prove one of these requisite elements, the entire claim fails.[24]

If the employer presents evidence of a nondiscriminatory reason for the adverse action, the employee can prevail if he or she can prove by a preponderance of the evidence that the reason the employer proffered is a pretext for discrimination.[25] At this juncture, the ALJ may reject the employer's proffered reasons and infer the ultimate fact of intentional discrimination.[26] On the other hand, the ALJ may conclude that the employer was not motivated, in whole or in part, by the protected conduct, and find that the employee has failed to prove retaliation.[27]

If, however, the ALJ concludes that the employer was motivated by both a prohibited and a legitimate reason (has mixed or dual motives), the employer escapes liability only by establishing, by a preponderance of the evidence in STAA cases, that it would have reached the

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[23] *Formella v. Schnidt Cartage, Inc.*, ARB No. 08-050, ALJ No. 2006-STA-035, slip op. at 4 (ARB Mar. 19, 2009) (*citing Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004)).

[24] *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] *Formella*, slip op. at 5 (citing *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 5 (ARB Nov. 27, 2002) (citations omitted)).

[26] *Montgomery v. Jack in the Box*, ARB No. 05-129, ALJ No. 2005-STA-006, n.30 (ARB Oct. 31, 2007) (quoting *Ridgley v. C.J. Dannemiller*, ARB No. 05-063, ALJ No. 2004-STA-053, slip op. at 5 (ARB May 24, 2007); *St. Mary's Honor Ctr. at v. Hicks*, 509 U.S. 502, 511 (1993)).

[27] *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-063, slip op. at 13 (ARB June 30, 2008).

same decision even in the absence of the protected conduct.[28] The complainant bears the ultimate burden of persuading the ALJ that his employer discriminated against him.[29]

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. The STAA also protects employees who refuse to drive because "the employee refuses to operate a vehicle because the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health."[30] An employee who refuses to drive because of a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition is also protected.[31]

The STAA's work refusal clause protects two categories of work refusals commonly referred to as the "actual violation" and "reasonable apprehension" categories.[32] Under the actual violation category, the refusal to drive is protected only if the record establishes that the employee's driving would have violated a motor vehicle regulation, standard, or order.[33] Under the reasonable apprehension category, the refusal to drive is protected only if it was based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious

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[28] *Carter*, slip op. at 13 (citing *Muzyk v. Carlsward Transp.*, ARB No. 06-149, ALJ No. 2005-STA-060, slip op. at 5 (ARB Sept. 28, 2007)). Since Shields filed his complaint, Congress has amended the STAA to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b) (Thomson/West 2007). 49 U.S.C.A. § 31105(b)(1)(Thomson/West 2007 Supp. 2008). Neither party has requested leave to supplement or amend its brief in light of the change in the standard of review for questions of fact. We therefore assume that neither party considers the change in the standard of review material to this case. *Cf.* Fed. R. App. P. 28(j) (the parties have the burden of calling the court's attention to any pertinent and significant authorities that came to the parties' attention after its brief has been filed).

[29] *Formella*, slip op. at 5 (citing *Calhoun*, slip op. at 5 (citations omitted)).

[30] 49 U.S.C.A. § 31105(a)(1)(B)(i).

[31] *See* 49 U.S.C.A. § 31105 (a).

[32] *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 4 (ARB July 31, 2003) (citing 49 U.S.C.A. § 31105(a)(1)(B)(i), (ii) and *Ass't Sec'y v. Consol. Freightways (Freeze)*, ARB No. 99-030, ALJ No. 1998-STA-026, slip op. at 5 (ARB Apr. 22, 1999)).

[33] *Leach*, slip op. at 4 (citing 49 U.S.C.A. § 31105(a)(1)(B)(i) and *Freeze*, slip op. at 7 (citations omitted)).

injury to the employee or the public.[34] The reasonable apprehension provision expressly requires that the employee had "sought from the employer, and been unable to obtain, correction of the unsafe condition."[35] In cases involving regulations limiting drivers' hours of service, protection by the actual violation provision requires the driver to notify the employer of the basis for the concern before refusing an assignment.[36]

The regulation that Shields claims he would have violated if he had accepted the dispatch was 49 C.F.R. Part 395.3, which provides that drivers may not drive more than 11 cumulative hours following 10 consecutive hours off duty and may not drive after the end of the fourteenth hour after coming on duty following 10 consecutive hours off. He claimed that if he had accepted the dispatch he received from Gardner for a delivery from Baltimore, Maryland to Gainesville, Georgia, on December 19, 2006, which was scheduled for the delivery the next day between 8:00 a.m. and 4:30 p.m., he would have violated this regulation.

I. Motion to Reopen the Record

After the ALJ issued the R. D. & O. awarding Shields damages, Owen Trucking filed a Motion for Relief from Judgment. The ALJ found that he did not have jurisdiction, citing *Dutile v. Tighe Trucking Inc.*[37] and dismissed the motions. Owen Trucking argued that the ALJ should reconsider his decision because Shields had been convicted of crimes after the record closed. As Owen Trucking has again made the argument to us in its brief that the evidence should be allowed into the record, we will consider Owen Trucking's argument as a motion to reopen the record to submit additional evidence

When considering a request to admit additional evidence, the Board relies upon the same standard found in 29 C.F.R. Part 18, the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges.[38] The applicable Rule of Practice states: "Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record."[39] Additionally, 29 C.F.R. § 18.609 provides that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has

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34 Id.

35 *Leach*, slip op. at 4 (citations omitted).

36 *Id.*

37 1993-STA-031 (Sec'y Mar. 16, 1995).

38 *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-010, slip op. at 6-7 (ARB Jan. 31, 2001).

39 29 C.F.R. § 18.54(c) (2009).

been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted."

In its brief, Owen Trucking requested that we accept the additional evidence of the criminal convictions into the record even though the ALJ did not considered it. Owen Trucking argues that the ARB "should accept" this additional evidence into the record because "it is new and material evidence which was not available prior to the closing of the record." It submits evidence that Shields was found guilty of six felony counts to distribute a controlled substance and of conspiracy to distribute the same. Owen Trucking asserts that each of the offenses occurred after the hearing, the first offense having been committed on June 14, 2006, two days after the hearing.

Owen Trucking argues that the evidence is material because it goes to Shields's credibility and because the ALJ found that Shields was the most credible witness regarding the termination of his employment. Owen Trucking argues that the evidence was "not readily available prior to the closing of the record" because Shields was not convicted until November 27, 2007, and the Order was not entered until November 28, 2007. Owen Trucking asserts that the new evidence would very likely change the outcome.

But this evidence cannot be admitted because it was not only not readily available at the hearing, it did not even exist. For new evidence to be admitted under 29 C.F.R. § 18.54(c), it is necessary that it was in existence at the time of the hearing.[40] Also 29 C.F.R. § 18.609 requires that the witness "has been convicted of a crime," but the new evidence shows that Shields was convicted after the hearing. For these reasons, we deny the motion to reopen the record.

II. Merits of the Complaint

A. Whether Shields Engaged in Protected Activity

The ALJ found that Shields's refusal to pick up the load in Baltimore, Maryland and deliver it to Gainesville, Georgia was protected activity because it would have resulted in an actual violation of the hours of duty regulations. The ALJ specifically found that Shields would have had to drive the entire route from Baltimore to Gainesville, Georgia, on December 20, which would have led to an hours of service violation because "[u]nder the best circumstances, the Complainant would be unable to complete the trip with less than 11 hours of driving time." Thus, the ALJ found that the ten-hour break that would have been required on December 20, 2006, would have precluded Shields from delivering the load in Gainesville, Georgia without an hours of service violation.

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[40] *Timmons v. Mattlingly Testing Servs.*, ARB No. 97-082, ALJ No. 1995-ERA-040, slip op. at 2 (ARB June 21, 1996); *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363 (5th Cir. 1978); *NLRB v. Hanna Boys Ctr. at*, 940 F.2d 1295, 1299 (9th Cir. 1991).

The parties stipulated that Shields went on duty at 4:30 a.m. on December 19, 2006.[41] Therefore, as the ALJ found, Shields would have had to go off duty no later than 6:30 p.m. on December 19, 2006, because of the 14-hour rule.[42] The ALJ found that even if Shields had completed the pick up in Baltimore and gone off duty by 5:00 p.m. rather than 6:30 p.m., the hours of service regulation required Shields to take 10 hours off duty.[43] Therefore, the earliest Shields could have gone back on duty was 3:00 a.m. on December 20, 2006. The ALJ found that even under optimal conditions, the trip from Baltimore to Gainesville could not be completed in less than 11 hours.[44] In so finding, the ALJ relied on PC Miler software used by Owen Trucking, which calculated that the trip would take 11.20 hours.[45] The ALJ calculated that the best possible time, with no stops and constant driving at the maximum speed limit would lead to a trip duration of 10 hours and 27 minutes.[46] Owen Trucking did not contest the ALJ's finding that the trip would have taken more than 11 hours. Substantial evidence supports the ALJ's finding that the trip duration would have exceeded 11 hours. Therefore, after a second mandatory 10-hour break, Shields could not begin driving until at least midnight on December 20, 2006, and thus, could not have delivered the load on December 20, 2006.

Therefore, substantial evidence supports the ALJ's conclusion that Shields engaged in protected activity when he refused the dispatch to pick up a load in Baltimore, Maryland and deliver it to Gainesville, Georgia on December 20, 2006, because accepting the dispatch would have resulted in a violation of the hours of service regulations.

B. Causal Relation of Protected Activity to Adverse Action

The ALJ noted that Owen Trucking terminated Shields immediately after he refused to pick up the load in Baltimore, Maryland and deliver it to Gainesville, Georgia such that the firing was contemporaneous with the protected activity. The ALJ noted that temporal proximity between protected activity and an adverse employment action may raise the inference that the protected activity was the likely the reason for the adverse action.[47]

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41 R. D. & O. at 2, Factual Stipulation No. 7.

42 R. D. & O. at 20-21, Factual Stipulation No. 23.

43 R. D. & O. at 21.

44 *Id.*

45 Id.

46 *Id.*

47 R. D. & O. at 22 (citing *Kovas v. Morin Transp., Inc.*, 1992-STA-041 (Sec'y Oct. 1, 1993)).

The ALJ also noted that Owen Trucking had demonstrated a legitimate, non-discriminatory reason for the termination of Shields—namely that Shields made sixteen or seventeen out of 21 late deliveries and left his truck at home on some occasions.

But, the ALJ noted that Gardner admitted that the refusal to pick up the load was the last straw in a series of incidents indicating poor job performance that led to his termination.[48] He also noted that the only evidence that Gardner warned Shields about late deliveries came from Gardner himself. Therefore, the ALJ found that firing Shields was at least in part based on his refusal to pick up the load in Baltimore and deliver it to Gainesville on December 20, 2006.

C. Pretext

The ALJ found that Owen Trucking was "generally not credible because of [] inconsistent statements and because of impeachment of the testimony of Mr. Gardner and Mr. Preston."[49] He noted that there were no written warnings to substantiate that Owen Trucking reprimanded Shields for being late and that neither Preston nor Gardner explained why they continued to give him loads if he was such a poor driver. The ALJ found that Gardner's testimony regarding Owen Trucking's reasons for terminating Shields was undermined in part because of Gardner's inconsistent statements such that he reported to OSHA that Shields was only 17 miles from Baltimore at the time he was given the dispatch when it was actually 51.8 miles away. Additionally, Gardner made a distinction between steering wheel drivers and truck drivers, which the ALJ inferred meant that Shields was expected to follow instructions above and beyond the call of duty if he were to be considered a "truck driver." The ALJ also inferred that company policy made safety less important than persistence because of these statements. The ALJ found that Preston was not credible because he had a conviction for aiding and abetting making false entries on log books.

On the other hand, the ALJ found that Shields was the most credible witness to the incident that led to his termination. He accepted Shields's testimony that he would have had to drive the entire route from Baltimore, Maryland to Gainesville, Georgia on December 20, 2006.

The ALJ found that "Owen Trucking [wa]s simply unable to offer a logical explanation reconciling inherently contradictory motives of striving to satisfy its client base while, at the same time, continuing to assign loads to the Complainant who makes repeated late deliveries that allegedly adversely affect clients." The ALJ noted that the warnings that Owen Trucking stated were made to Shields were unsubstantiated and that he did not find that Owen Trucking was credible. The ALJ also noted that "Owen Trucking did not provide any evidence that it was dissatisfied with [Shields's] job performance beyond the introduction of computer generated printouts of its scheduled load data entry system and [a] letter of dissatisfaction from one of its

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[48] R. D. & O. at 8. Sale also stated that Shields's refusal to pick up the load from Baltimore was the "'straw that broke the camel's back'" that led to Shields's termination. R. D. & O. at 9.

[49] R. D. & O. at 26-27.

clients."[50] For these reasons, the ALJ concluded that Shields has shown that Owen Trucking's reasons were merely a pretext for unlawful termination of employment based on protected activity. Substantial evidence supports these findings by the ALJ.

E. Dual Motive Analysis

The ALJ found that the employer's purported reason for terminating Shields was mere pretext for discrimination but noted that Owen Trucking alleged that the protected activity was the "last straw" in its decision to terminate Shields. Because more than one motive for Shields's termination have been alleged, the Employer may escape liability only by establishing by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.

The ALJ found that the fact that Owen Trucking did not discipline Shields because he left his truck at home indicated that Shields had stopped this practice or that it was not of sufficient concern to warrant disciplinary measures against Shields. The ALJ also found that while Owen Trucking asserted that Shields was untimely in his deliveries, nothing in the evidence or testimony of the parties demonstrated that Owen Trucking would have terminated his employment absent the protected activity. The ALJ stated that he was "unable to accept as credible . . . that in the face of such a high percentage of late deliveries that continued to be a problem, with little evidence of customer dissatisfaction, and continued assignment of scheduled loads, that Shields's termination, which was effected immediately upon notice to Mr. Gardner of [the] Complainant's refusal to accept the scheduled dispatch order, would have occurred regardless of the protected activity." Also notable is that while Owen Trucking purports that it fired Shields for tardiness and leaving the truck at home, Gardner did not mention these reasons in the conversation in which he fired Shields - the termination conversation solely concerned Shields's protected activity of refusing to accept the dispatch.

Thus, because Owen Trucking had not terminated Shields for being late or for leaving his truck at his home but did terminate his employment on December 19, 2006, during the very phone conversation in which he refused a load (engaged in protected activity), the ALJ found that Owen Trucking failed to establish that it would have discharged him even if Shields had not engaged in protected activity. Substantial evidence supports this finding.

III. Remedies

A. Reinstatement

Because Shields succeeded on his STAA claim, the ALJ, consistent with the STAA, ordered Owen Trucking to reinstate Shields "with the same seniority, status, and benefits he would have had but for [the] Respondent's unlawful discrimination."[51] Reinstatement is an

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50 R. D. & O. at 24.

51 *See* 49 U.S.C.A § 31105(b)(3)(A)(ii).

automatic remedy under the STAA, though when reinstatement is impossible or impractical, alternative remedies such as front pay are available.[52] We affirm the ALJ's order to reinstate Shields.

B. Back Pay

Under the STAA, Shields is also entitled to "compensatory damages, including back pay."[53] In determining how much back pay to award, the ALJ first found that, as stipulated by the parties, Shields's average weekly wage was $558.28. Although Shields argues that the ALJ erred in failing to use the representative employee method to determine Shields's damages, the record supports the ALJ's finding that Shields earned $558.28 per week. We affirm this finding.

The ALJ ordered that Owen Trucking remit to Shields back pay for the period from December 19, 2006, the date of the discharge, until November 16, 2007, the date of the ALJ's decision. The ALJ therefore awarded Shields $26,797.44 in back pay discounted by the wages Shields earned from interim employment in the amount of $7,334.54, plus pre-judgment and post-judgment interest thereon.

Here the ALJ erred. Back pay liability ends when the employer makes a bona fide, unconditional offer of reinstatement or, in very limited circumstances, when the employee rejects a bona fide offer, not when the ALJ decides the case.[54] The record contains no evidence whether or when Owen Trucking made a bona fide offer to reinstate Shields. Therefore, since the record does not show when Owen Trucking's back pay liability to Shields ended, we must modify the ALJ's back pay award.

C. Compensatory Damages

As noted above, a successful STAA litigant like Shields is also entitled to "compensatory damages." The purpose of a compensatory damage award is to make the complainant whole for the harm caused by the employer's unlawful act.[55] In other words, compensatory damages are meant to restore the employee to the same position he would have been in if the employer had discriminated against him.[56] Compensatory damages are designed to compensate not only for

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[52] *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at4-5 (ARB Mar. 31, 2005).

[53] 49 U.S.C.A. § 31105 (b)(3)(A)(iii).

[54] *See Dale,* slip op. at 6; *Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 1995-STA-029, slip op. at 5-6 n.3 (ARB Oct. 9, 1997).

[55] *Smith v. Esicorp,* ARB No. 97-065, 97-112; ALJ No. 1993-ERA-016, slip op. at 5 n.4 (ARB Aug. 27, 1998).

[56] *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 14 (ARB Mar. 29, 2000).

direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering.[57]

The ALJ awarded Shields $2,000.00 in compensatory damages for the stress and anxiety he suffered as a result of the discharge. The Secretary and the Board consistently have held that compensatory damages under the STAA include damages for pain and suffering, mental anguish, embarrassment, and humiliation.[58]

Owen Trucking has not appealed this aspect of the ALJ's order. Shields and his fiancé each testified that he suffered emotional distress.[59] Although Shields's testimony was unsupported by medical evidence, it was also unrefuted. Additionally, the ALJ found that Shields had suffered emotional pain and distress as a result of his wrongful termination. We have affirmed reasonable awards for emotional distress based solely upon the employee's testimony.[60] Therefore, since substantial evidence supports the ALJ's finding that Shields suffered emotional injury as a result of his termination, we affirm the $2,000 compensatory damage award.

D. Abatement

The ALJ also ordered Owen Trucking to expunge all negative or derogatory information from Shields's personnel records relating to his protected activity or its role in Shields's termination and to contact every consumer reporting agency to which it may have furnished a report about Shields to request that the reports be amended. Additionally, the ALJ ordered that Owen Trucking shall conspicuously post copies of the R. D. & O. and of the final decision and order in this case for ninety days in all places on Owen Trucking's premises where employee notices are customarily posted.

The ALJ did not abuse his discretion in ordering these abatement measures. We have affirmed ALJ orders to expunge references to adverse actions taken against complainants for

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[57] *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-030, slip op. at 31 (ARB Feb. 9, 2001).

[58] *See Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 1995-STA-029, slip op. at 9 (ARB Oct. 9, 1997) and cases cited therein.

[59] Tr. at 128-29.

[60] *See Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-035, slip op. at 8 (ARB Jan. 31, 2008); *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144; ALJ No. 2003-STA-026, slip op. at 9 (ARB Aug. 31, 2004); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 03-095; ALJ No. 2002-STA-035, slip op. at 17 (ARB Aug. 6, 2004).

protected activity and have ordered such measures in the past.[61] Additionally, we note that it is a standard remedy in discrimination cases to notify a respondent's employees of the outcome of a case against their employer.[62]

CONCLUSION

Substantial evidence in the record as a whole supports the ALJ's finding that Shields engaged in activity the STAA protects when he told Gardner that he would not accept the dispatch on December 19, 2006, from Baltimore, Maryland to Gainesville, Georgia. The record also supports the ALJ's finding that Owen Trucking discharged Shields for refusing to drive on December 19, 2006. Therefore, we accept these findings and the ALJ's conclusion that Owen Trucking violated the STAA. We make the following modification and orders:

1. Owen Trucking shall reinstate Shields with the same seniority, status, and benefits that he would have had but for the unlawful discrimination.

2. Since the ALJ did not properly calculate the back pay owed to Shields, we **MODIFY** the ALJ's back pay award. We vacate the ALJ's back pay award of $19,462.90 and **ORDER** Owen Trucking to pay Shields back pay at the rate of $558.28 per week from December 19, 2006, until the date Owen Trucking made, or makes, Shields a bona fide, unconditional offer of reinstatement to his former position with the same pay, terms, and privileges of employment that he had before he was discharged. The back pay due to Shields will be reduced by any money Shields earned between December 19, 2006, and the date that Owen Trucking made or makes a bona fide offer of reinstatement. Furthermore, we **ORDER** that Owen Trucking pay to Shields pre-judgment and post-judgment interest on the back pay owing according to the rate used for underpayment of federal taxes.[63]

3. Owen Trucking shall pay Shields $2,000 compensatory damages for his emotional suffering.

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[61] *See, e.g., Dickey v. West Side Transp., Inc.*, ARB Nos. 06-150, 06-151; ALJ Nos. 2006-STA-026, -027, slip op. 8-9 (ARB May 29, 2008); *Ass't Sec'y & Marziano v. Kids Bus Serv., Inc.*, ARB No. 06-068, ALJ No. 2005-STA-064, slip op. at 4-5 (ARB Dec. 29, 2006); *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-026, slip op. at 13 (ARB Aug. 31, 2004).

[62] *Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 1995-STA-029 (ARB Oct. 9, 1997).

[63] *See* 26 U.S.C.A. § 6621(a)(2), *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 18-21 (ARB May 17, 2000) (outlining the procedures to be followed in computing the interest due on back pay awards).

4. Owen Trucking shall expunge negative information regarding Shields's protected activity and its role in his termination from his personnel file, contact every consumer reporting agency to whom it may have furnished a report about Shields and request that such reports be amended, and post the ALJ's R. D. & O. and this final decision for ninety days on its premises as outlined in the R. D. & O.

Shields's attorneys shall have fifteen days from receipt of this Order in which to file a fully supported attorneys' fee petition for services rendered while this matter was before the Board, with simultaneous service on opposing counsel. Thereafter, Owen Trucking shall have fifteen days from receipt of the fee petition to file a response.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge