



**In the Matter of:**

**LAVAN WILLIAMS,**

**ARB CASE NO. 09-092**

**COMPLAINANT,**

**ALJ CASE NO. 2008-STA-052**

**v.**

**DATE: January 31, 2011**

**DOMINO'S PIZZA,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Lavan Williams, *pro se*, Ypsilanti, Michigan**

***For the Respondent:***

**Lesley N. Salafia, Esq., *Shipman & Goodwin LLP*, Hartford, Connecticut**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, Luis A. Corchado, *Administrative Appeals Judge*, and Joanne Royce, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER**

Lavan Williams filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on November 13, 2007. OSHA Findings at 1 (May 1, 2008). Williams alleged that his employer, Domino's Pizza, violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified, when it terminated his employment. 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2009). The STAA protects from discrimination employees who

report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. Following an evidentiary hearing, a Department of Labor (DOL) Administrative Law Judge (ALJ) made findings and concluded that Domino's violated the STAA when it terminated Williams's employment. He ordered that Domino's reinstate Williams and pay him back pay and interest. We affirm the ALJ's Recommended Decision and Order (R. D. & O.).

## BACKGROUND

A preponderance of the evidence supports the ALJ's findings of fact contained in the section of the R. D. & O. entitled "Findings of Fact." We hereby adopt these findings and incorporate them by reference in this Final Decision and Order. *See* R. D. & O. at 3-19. They are summarized here in relevant part.

Domino's employed Williams as a driver beginning on January 29, 2007. R. D & O. at 3. Williams worked with another driver on routes so that, while one person was driving, the other rested, so that neither would violate the hours of service rules. *Id.* at 7. Williams's coworkers at times asked him to help them make deliveries during his rest period. *Id.* He consistently refused because he did not want to be terminated for violating the hours of service rules. *Id.* This caused discord with some of his coworkers. *Id.*

In early April 2007, one of Williams's coworkers, Mike Puger, asked Williams to help him with deliveries during Williams's rest period. *Id.* Because Williams wanted to rest during his rest period rather than help with deliveries, Puger became irritated. Williams and Puger "became involved in an escalating verbal confrontation" while Puger was driving. *Id.* After they each called the dispatcher about the issue, the dispatcher replaced Williams with another driver. *Id.*

Jeff Hargan, Williams's supervisor, discussed with Williams, on more than one occasion, his claim that his coworkers improperly pressured him to leave his rest period to work. *Id.* at 8. In late July or early August 2007, Williams called the Domino's compliance hotline and left a message that his coworkers pressured him to work outside of the hours of service and that Domino's had assessed him three violation points related to an incident for which he was not responsible. *Id.* at 9. When the compliance hotline returned his call, Williams reported that Domino's fostered an atmosphere in which drivers pressured each other to work outside of the hours of service and that other drivers did not like that he refused to work outside of the hours of service. *Id.* The hotline representative told Williams that Domino's would investigate and keep his complaint confidential. *Id.*

Two weeks later Hargan and Greg Higgins, the manager of the distribution center, asked Williams to meet with them. *Id.* Higgins had told Hargan that Williams had called the compliance hotline about being asked to work illegally. *Id.* Hargan and Higgins asked Williams about the compliance hotline complaint. *Id.* at 10.

On October 26, 2007, Williams was involved in an accident while driving a work route. *Id.* at 12. After the accident, Williams briefly pulled to the side of the road where he was able to see minor damage, but because there was no breakdown lane where he could closely inspect the truck, Williams decided to continue to his first scheduled stop, which was only a short distance away. *Id.* At the stop, Williams parked and inspected the truck. *Id.* He then attempted to use the mobile phone assigned to the truck to call the distribution center, but the phone had no signal. *Id.* Williams then completed an accident report and diagram and typed a report of the accident into the Domino's PeopleNet system. *Id.* After unloading the truck, Williams went to get breakfast, leaving his coworker sleeping in the truck. *Id.* at 13. On the way to breakfast, Williams called two people at the distribution center from a pay phone, but he did not reach either one and did not leave a voicemail because he did not have a number to leave for a return call. *Id.* Williams did not call anyone else or the accident hotline because he did not have the telephone numbers. *Id.* Domino's' procedures require that drivers notify their team leader and contact the Domino's accident hotline no later than two hours after an accident occurs. *Id.* at 3. Williams did not call the accident hotline. *Id.*

On October 30, 2007, Williams called one of his supervisors to talk about the accident. *Id.* at 14. He met with Hargan that day. *Id.* Hargan told Williams that he knew that Williams was in an accident and that he did not report it. *Id.* Williams countered that he completed a written accident report, a diagram, and reported the accident in PeopleNet. *Id.* Hargan commented that if Williams had been able to call the compliance hotline, he should have been able to contact the accident hotline. *Id.* Hargan told Williams that he was suspended without pay pending an investigation. *Id.*

Hargan completed his investigation, which confirmed that Williams had not reached anyone at Domino's to report the accident. *Id.* at 15. He decided to terminate Williams's employment for failure to properly report an accident. *Id.* Hargan mailed a termination letter to Williams, which was returned because it had an invalid address. *Id.* Later, human resources decided to change the reason for termination to job abandonment because Williams allegedly failed to return telephone calls Domino's made to him. *Id.* at 16. The termination notice stated that Williams would be terminated effective November 8, 2007, because he violated safety/security policy and did not to respond to management's request to come to discuss disciplinary procedures. *Id.* at 17.

Williams reported to Domino's headquarters his belief that he had been suspended for calling the compliance hotline. *Id.* at 18. Headquarters eventually told him that he had been terminated for failure to follow proper accident reporting procedures. *Id.*

Williams filed a complaint alleging that Domino's violated the STAA by terminating his employment allegedly in retaliation for calling the Domino's compliance hotline. *Id.* at 16. OSHA investigated the complaint. OSHA found that there was no reasonable cause to believe that Domino's had violated the STAA. *Id.* at 1. Based on its findings, OSHA dismissed the complaint. *Id.*

Williams objected to OSHA's Findings and requested a hearing, which the presiding ALJ held on October 15, 2008. *Id.* at 2. On April 28, 2009, the ALJ issued a decision ordering

Domino's to reinstate Williams and to pay him back pay and interest because he proved that his protected activity was a contributing factor in Domino's' decision to terminate his employment. *Id.* at 3.

The case is now before the ARB pursuant to the STAA's automatic review provisions. 49 U.S.C.A. § 31105(b)(2)(C); *see* 29 C.F.R. § 1978.109(c)(1)(2009). The ARB "shall issue a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050, slip op. at 2 (ARB Sept. 26, 2001).

The STAA's implementing regulations permit each party to submit a brief to the Board in support of or in opposition to the ALJ's order; each of the parties submitted a brief. 29 C.F.R. § 1978.109(c)(2).

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions under the STAA to the Administrative Review Board (ARB or the Board). 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).

The Board automatically reviews an ALJ's recommended STAA decision. 29 C.F.R. § 1978.109(c)(1). The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c).

Under the STAA, we are bound by the ALJ's fact findings if substantial evidence on the record considered as a whole supports those findings. 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla" and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

Williams is acting pro se. The Board "construe[s] complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude." *Menefee v. Tandem Transport Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 7 (ARB Apr. 30, 2010) (quoting *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2 (ARB Apr. 26, 2005) (citations omitted)).

## THE LEGAL STANDARDS

This case arises under “The Implementing Recommendations of the 9/11 Commission Act of 2007,” signed into law on August 3, 2007. They provide that the STAA prohibits a person from discharging, disciplining, or discriminating 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 refuses 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;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

49 U.S.C.A. § 31105(a)(1). Subsection 31105(b) provides that “complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b),” which is under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (Thomson/West 2007). AIR 21 provides that the Secretary may determine that a violation has occurred only if the complainant demonstrates that any protected activity was

a contributing factor in the unfavorable personnel action alleged in the complaint. 49 U.S.C.A. § 42121(b)(2)(B)(iii). AIR 21 further states that relief may not be ordered if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior. 49 U.S.C.A. § 42121(b)(2)(B)(iv). Thus, our burdens of proof follow the burdens of proof that we use in AIR 21 cases.

To prevail on his STAA claim, Williams must prove by a preponderance of the evidence that he engaged in protected activity, that Domino's was aware of the protected activity and took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action. *Williams v. American Airlines, Inc.*, ARB 09-018, 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010); *Peters v. Renner Trucking & Excavating*, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008).

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Sievers*, ARB No. 05-109, slip op. at 4. A complainant can succeed by providing either direct or indirect proof of contribution. *Id.* Direct evidence is "smoking gun" evidence that conclusively links the protected activity and the adverse action and does not rely upon inference. *Id.* at 4-5. If the complainant does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment. One type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation.<sup>1</sup> *Riess v. Nucor Corp.*, ARB 08-137, 2008-STA-011, slip op. at 6 (ARB Nov. 30, 2010). If the complainant proves pretext, we may infer that his protected activity contributed to the termination, although we are not compelled to do so. *Id.*

If, the complainant has proven discrimination by a preponderance of evidence, the employer may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. *Id.* (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citing BLACK'S LAW DICTIONARY at 577).

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<sup>1</sup> A complainant may also prove his case under the mixed motive analysis. *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104; ALJ Nos. 2008-STA-012, -041, slip op. at 7 (ARB Sept. 23, 2010) (citing *Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-022, slip op. at 5-6 (ARB Nov. 30, 2009) (citations omitted)).

## DISCUSSION

### 1. Protected Activity

The ALJ found that “Williams credibly testified that his refusal to gamble that he and his co-driver could complete a route legally if he ended his rest period prematurely to help with deliveries precipitated confrontations with the other drivers.” The ALJ also found that “some routes could very likely place the driving team in a position where neither driver could complete the route without violating the maximum driving limit imposed by the hours of service rule.” The ALJ noted that Hargan agreed that not all of Williams’s hours of service concerns were unfounded. Based on his findings, the ALJ concluded that Williams proved by a preponderance of the evidence that he engaged in protected activity when he complained to the Domino’s compliance hotline about possible violations of the hours of service rules. Substantial evidence supports the ALJ’s finding that Williams made a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order when he made a complaint to the Domino’s compliance hotline. We therefore agree with the ALJ that Williams proved by a preponderance of the evidence that he engaged in protected activity.

Domino’s argues that Williams did not assist Domino’s in its investigation of his allegations and therefore, Williams did not engage in protected activity and was precluded from satisfying his prima facie case. The ALJ found that during the meeting to discuss Williams’s hotline complaint, Williams informed Hargan and Higgins that he was being pressured to work outside of the allowable hours of service. R. D. & O. at 10. Williams explained his complaint to Hargan and Domino’s but declined to provide his coworkers’ names. *Id.* The ALJ credited Williams’s account of his complaint over Hargan’s based on witness demeanor and in light of conflicting testimony. *Id.* at 11. The ALJ found that Williams engaged in protected activity under the STAA when he complained that Domino’s fostered an atmosphere where drivers felt pressured to violate the law. We agree that simply refusing to name coworkers who pressured him does not preclude Williams from prevailing on a STAA whistleblower complaint.

Domino’s argues that internal complaints are not protected. In *Davis v. H.R. Hill, Inc.*, 1986-STA-018 (Sec’y Mar. 19, 1987), the Secretary held that it would be inconsistent with the STAA’s purpose to limit the coverage of paragraph (a) of section 2305 only to those complaints filed with governmental agencies. The Act’s purpose is to promote safety on the highways. The Secretary stated that an employee’s safety complaint to his employer is the initial step in achieving this goal. Therefore, internal complaints to management are protected activity under the STAA’s whistleblower provision. See *Goggin v. Administrative Review Bd.*, No. 97-4340, 1999 WL 68694 (6th Cir. Jan. 15, 1999) (case below 1996-STA-025); *Clean Harbors Env’tl. Servs., Inc., v. Herman*, 146 F.3d 12 (1st Cir. 1998) (case below 1995-STA-034); *Doyle v. Rich Transp., Inc.*, 1993-STA-017 (Sec’y Apr. 1, 1994); *Juarez v. Ready Trucking Co.*, 1986-STA-027 (Sec’y July 7, 1988). Williams’s internal complaint through the compliance hotline was protected activity under the STAA.

## 2. Knowledge

The ALJ found that Williams met his burden of proving that Domino's knew of his protected activity because the evidence established "that Hargan, who was responsible for making the termination decision, knew that Williams had complained to the compliance hotline." Substantial evidence in the record supports this finding.

## 3. Adverse Action

The ALJ concluded that Williams established that Domino's took an adverse action against him because he found that Domino's terminated Williams's employment. Discharging an employee is adverse action under the STAA. 49 U.S.C.A. § 31105(a).<sup>2</sup> Substantial evidence supports the ALJ's finding that Domino's took adverse action against Williams.

## 4. Causation

The ALJ found that Domino's articulated non-retaliatory reasons for terminating Williams's employment – failure to report the October 26, 2007 accident, failure to properly follow accident reporting procedures, and job abandonment.<sup>3</sup> The ALJ found however, that Williams proved by a preponderance of the evidence that Domino's' stated reasons were pretextual.<sup>4</sup>

The ALJ concluded that Domino's' explanation that Williams was terminated for failure to report or properly report an accident was unworthy of credence. The ALJ inferred from the falsity of Domino's' reasons that Domino's was guilty of discrimination against Williams. The ALJ concluded that Domino's was not believable based on the findings that (1) it "provided multiple and shifting reasons for the termination decision," (2) Hargan falsely testified that Domino's never found Williams's accident report when another supervisor contradicted that testimony at Williams's unemployment hearing,<sup>5</sup> (3) there were no other instances where Domino's terminated other drivers for failure to completely follow all of the accident reporting requirements, and (4) Hargan's reference to Williams's call to the compliance hotline when

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<sup>2</sup> Because termination is materially adverse on its face, a determination as to whether Domino's' discharge of Williams was materially adverse or whether it could dissuade a reasonable worker from engaging in protected activity is unnecessary.

<sup>3</sup> The ALJ's finding on this issue is implicit in his statement about Domino's' asserted legitimate reasons for terminating Williams's employment, which included failure to report an accident, failure to follow reporting procedures, and job abandonment. R. D. & O. at 23.

<sup>4</sup> We note that while Williams met his burden by proving pretext, another possible way of meeting his burden of proof is to show that the discriminatory reason for termination contributed to his discharge under the mixed motive analysis. *Salata*, ARB Nos. 08-101, 09-104, slip op. at 7.

<sup>5</sup> Complainant's Exhibit 3.



asking why he did not call the accident hotline indicated an element of hostility on Hargan's part directed at Williams's protected activity. The ALJ found it significant that Domino's informed the local managers, who were clearly implicated by Williams's complaint, about his complaint, rather than investigating the matter themselves and protecting Williams's confidentiality. The ALJ concluded that Williams met his burden of proving by a preponderance of the evidence that his protected activity was a contributing factor in Domino's decision to terminate his employment.

The ALJ further found that Domino's did not demonstrate by clear and convincing evidence that it would have terminated Williams in the absence of his protected activity.<sup>6</sup> In making this determination, the ALJ considered that Domino's introduced no evidence that it had discharged other drivers in circumstances comparable to this case in which an employee reported an accident, but not by the proper procedures.

Additionally, the ALJ found that Hargan's testimony that he was going to wait three days to hear from Williams and if Williams did not call, discharge him, revealed "that Domino's had no legitimate basis to believe that Williams had abandoned his job and that it decided to let Williams unwittingly stumble into an abandonment scenario that would provide cover for an unlawful termination action." The ALJ found Domino's claim that Williams abandoned his job not credible both because of the phone calls that Williams returned to Domino's and because Williams traveled to and visited the Domino's headquarters on a day that Domino's claims he was unresponsive and unavailable.

Substantial evidence supports the ALJ's findings of fact regarding causation. Therefore, we agree with the ALJ that Williams proved by a preponderance of the evidence that his protected activity was a contributing factor in his termination. We also agree with the ALJ that Domino's failed to prove by clear and convincing evidence that it would have terminated Williams in the absence of his protected activity.

Domino's argues that the ALJ erred when he admitted the unemployment hearing transcript because using it violated Domino's due process right to confrontation. Domino's also asserts that the transcript "is inadmissible hearsay testimony given in a limited forum held for a different, discrete purpose unrelated to Williams' retaliation claim."

STAA administrative hearings are conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings. See 29 C.F.R. § 1978.106(a) (citing 29 C.F.R. Part 18). Under these rules, which substantially follow the Federal Rules of Evidence, hearsay statements are inadmissible unless they are defined as non-hearsay or fall within an exception to the hearsay rule. 29 C.F.R. § 18.802. Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter

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<sup>6</sup> While the ALJ stated that there is no precise definition of "clear and convincing evidence," the Board has found, as stated supra, that clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *Brune*, ARB No. 04-037, slip op. at 14. As explained above, we agree with the ALJ that Domino's failed to demonstrate by this high standard that it would have terminated Williams's employment absent his protected activity.

asserted by the out-of-court declarant. 29 C.F.R. § 18.801(c). A statement is not hearsay if it constitutes an admission by a party opponent. 29 C.F.R. § 18.801(d)(2).

In this matter, the prior statements that Williams sought to introduce as evidence were statements by Domino's agents concerning matters within the scope of the agency, made during the existence of the relationship and were therefore, admissions by a party-opponent and not hearsay. As such, the ALJ did not err in admitting the evidence. Neither did the admissions violate Domino's right to confrontation, as the statements were made by Domino's itself. Even if the evidence was admitted incorrectly, the ALJ had cited other reasons that discredited Domino's articulated reasons for terminating Williams's employment. For example, the printout from the PeopleNet system unequivocally demonstrated that, contrary to Domino's assertions, Williams took adequate steps to report the accident, even if not exactly according to company policies.

Thus, after reviewing the evidence of record, we affirm the ALJ's findings of fact as supported by substantial evidence and agree with the ALJ's conclusions that Williams proved by a preponderance of the evidence that his protected activity contributed to his termination and that Domino's failed to prove by clear and convincing evidence that it would have terminated Williams in the absence of his protected activity.

## **5. Relief**

The ALJ ordered Domino's to reinstate Williams to his former position with the same pay, terms, and privileges of employment. Williams argues that reinstatement would be inappropriate because he does not think it will be safe to return to work for Domino's. He requests payment for future education expenses. Domino's asserts that (1) there is no evidence in the record that reinstatement is not appropriate and that (2) Domino's is not obliged to pay for Williams's desired education.

Reinstatement is an automatic remedy under the STAA, although when reinstatement is impossible or impractical, alternative remedies such as front pay are available. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4-5 (ARB Mar. 31, 2005). We agree with the ALJ that there is insufficient evidence in the record that reinstatement would be impossible, impracticable, or cause irreparable animosity. Thus, we affirm the ALJ's order to reinstate Williams, rather than pay front pay or for education.

The ALJ also ordered Domino's to pay Williams back pay and interest on the back pay award. Domino's argues that the ALJ failed to consider mitigation of damages in his back pay award. It argues that it is relieved of the burden to introduce evidence of available substantially equivalent work because Williams made no reasonable efforts to seek comparable employment. In fact, the ALJ did consider mitigation and found that Domino's failed to prove that Williams failed to mitigate his wage loss. The ALJ also found that Domino's had not introduced any evidence that substantially equivalent employment was available to Williams.

Where an employer is found to have violated the STAA and the complainant is found to be entitled to an offer of reinstatement to his or her former position and to back pay, the burden

of showing that the complainant failed to make reasonable efforts to mitigate damages is on the employer. *Polwesky v. B & L Lines, Inc.*, 1990-STA-021 (Sec’y May 29, 1991), citing *Carrero v. N.Y. Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989) and *Rasimas v. Michigan Dep’t of Mental Health*, 714 F.2d 614 (6th Cir. 1983). See also *Dale*, ARB No. 04-003, *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005 (ARB Mar. 29, 2000); *Moyer v. Yellow Freight Sys., Inc.*, 1989-STA-007 slip op. at 9, 12 (Sec’y Aug. 21, 1995); *Dutile v. Tighe Trucking, Inc.*, 1993-STA-031 (Sec’y Oct. 31, 1994). We agree with the ALJ that Domino’s failed to satisfy its burden of showing that Williams failed to make reasonable efforts to mitigate his damages. Therefore, the ALJ’s award of back pay and interest is affirmed.

Finally, Williams argues that he is entitled to punitive damages for pain and suffering. Domino’s argues that Williams failed to properly serve his additional request for punitive damages in a timely manner so his request should be stricken as improper. It also argues that there was no evidence of animosity towards Williams to justify punitive damages. The ALJ declined to award punitive damages as provided for in 49 U.S.C.A. § 31105(a)(3)(c). We also so decline.

#### CONCLUSION

Substantial evidence supports the ALJ’s factual findings that Williams’s protected activity contributed to Domino’s decision to discharge him, and the ALJ’s recommended order is in accordance with law. Accordingly, we **AFFIRM** the ALJ’s decision.

**SO ORDERED.**

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

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**