



**In the Matter of:**

**CURTIS C. DICK,**

**ARB CASE NO. 14-054**

**COMPLAINANT,**

**ALJ CASE NO. 2013-STA-060**

**v.**

**DATE: August 30, 2016**

**TANGO TRANSPORT,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Curtis C. Dick, *pro se*, Cedar Hill, New Jersey**

***For the Respondent:***

**Brian R. Carnie, Esq. and S. Price Barker, Esq., *Kean Miller LLP*, Shreveport, Louisiana**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge***

### **DECISION AND ORDER OF REMAND**

This case arises under the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (2007 & Supp. 2015), and its implementing regulations, 29 C.F.R. Part 1978 (2015). Complainant Curtis C. Dick filed a complaint alleging that Respondent Tango Transport (Tango) retaliated against him in violation of the STAA's whistleblower

protection provisions. On April 18, 2014, an Administrative Law Judge (ALJ) dismissed the complaint and denied a Motion for Reconsideration on June 3, 2014.

## BACKGROUND

Respondent hired Complainant as a regional truck driver on April 21, 2010. Driver managers dispatch the drivers and give the drivers their work assignments. Qualcomm<sup>1</sup> messages dated January 31, 2012, show communications between Dick and his driver manager, Tammy Lane Smith, in which Dick complained that she had interrupted his break periods by her cell phone calls. Qualcomm messages earlier in January 2012 indicate that Dick also reported a variety of mechanical problems and breakdowns with the trucks Respondent assigned him to drive, and on January 26, 2012, he wrote a letter to the Safety Department complaining about, among other things, the condition of the mattress in his assigned truck, noting that it precluded adequate rest given the wire coils pressing through it.

On February 1 and February 6, 2012, Dick sent e-mails to Tango Driver Services (Debra Salvail) that included complaints about interruptions of his “required DOT break” by both Smith and Heather Diviney (Tango E-Log Manager).<sup>2</sup> The February 6 e-mail also included complaints about his inability to sleep in his sleeper berth due to problems with the air conditioner and mattress in his truck. On February 16, 2012, Dick complained to Ivan Buckener (Tango Safety VP) about the earlier break interruptions and on April 11, 2012, he sent an e-mail containing the same complaints to Human Resources.<sup>3</sup> In each of these communications, Dick also complained that Smith mistreated him and on February 2, 2012, he sent Smith an e-mail in which he stated that he felt she was “a very vindictive (vengeful) type person” and was “try[ing] to poison the water” against him. He also warned her that he would resort to remedies under the STAA employee protection provisions if she continued to harass him.<sup>4</sup>

On February 10, 2012, Dick suffered a work-related injury when he injured his right knee and neck while falling from the cab of his truck. He was treated at Concerta Medical Center for a lower leg contusion, shoulder sprain, knee sprain, neck sprain, and abrasion. After Dick took

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<sup>1</sup> Qualcomm is an electronic satellite tracking and messaging service used by the trucking industry. Dispatches and most communication between driver managers and drivers are done via Qualcomm. Hearing Transcript (Tr.) at 494.

<sup>2</sup> Respondent’s Exhibit (RX) 15, RX 16.

<sup>3</sup> RX 19, RX 22.

<sup>4</sup> RX 23 at 2.

leave under the Family Medical Leave Act (FMLA),<sup>5</sup> and personal leave, for 90 days, Respondent terminated his employment pursuant to the company's policy as outlined in the company's handbook. In June 2012, Dick phoned Tango to inquire about his job status and spoke with April Perkins, a human resources representative. Perkins told Complainant that Respondent had terminated his employment in May 2012, but that he could be reinstated if he was able to return to work within 60 days of his termination.<sup>6</sup> However, when Dick provided a physician's report and medical release to his employer on July 9, 2012, Respondent did not rehire him. Consequently, Dick filed a complaint with OSHA on August 17, 2012, alleging retaliation under STAA.

In addition to his allegations regarding retaliatory termination, Dick also alleged that Tango retaliated against him by reporting incorrect information to HireRight, the consumer reporting agency that maintains the DAC database.<sup>7</sup> Dick's DAC report showed that his period of service with Tango began on April 20, 2010, and ended in May 2012 and that his reason for leaving was "other."<sup>8</sup> The options on a DAC report pertaining to a driver's reason for leaving employment are "resigned," "discharged," "retired," or "other." On September 10, 2013, HireRight notified Dick that the employment dates on his DAC report had been revised to reflect employment with Tango from April 20, 2010, until April 20, 2013.<sup>9</sup> The entry of "other" remained as the reason Dick left Tango's employ.

On September 28, 2012, shortly after filing his OSHA complaint, Tango Transport offered Dick unconditional reinstatement to his former position, including reinstatement of his original hire date.<sup>10</sup> Dick accepted this offer on October 8, 2012, and returned to work as a

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<sup>5</sup> 29 U.S.C. §§ 2601-2654 (2000).

<sup>6</sup> See Tr. at 64.

<sup>7</sup> Administrative Law Judge Exhibit (ALJX) 1 at 2 n.11. A DAC (Drive-a-Check) report is a report containing a truck driver's employment history, which is maintained by HireRight Solutions, Inc. a consumer reporting agency and which may contain negative information sent by former employers. See *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 13-039, ALJ No. 2008-STA-020, -021, slip op. at 3 n.13 (ARB May 13, 2014).

<sup>8</sup> Complainant's Exhibit (CX) 13.

<sup>9</sup> CX 30.

<sup>10</sup> Stipulated Fact 6.

regional driver.<sup>11</sup> However, shortly after his reinstatement, Dick began having problems with his new driver manager, Jan Baxter, claiming that she detrimentally changed his former work assignments by, among other things, demanding that he work on weekends and assigning him loads with low hours. Dick sent a written complaint, titled “Possible Retaliation Complaint,” to Baxter’s supervisor about these practices on October 31, 2012.<sup>12</sup> Dick also charged in this complaint that Tango encouraged drivers to falsify their hours of service (HOS) logs. Dick sent another “Retaliation Complaint” regarding Baxter to Tango on December 17, 2012, and accused Baxter of racially motivated assignments on December 28, 2012.<sup>13</sup>

Qualcomm messages during the months of December 2012 and January 2013 indicate that Dick repeatedly refused assigned loads despite Baxter’s warning that he was not allowed to refuse loads.<sup>14</sup> On February 19, 2013, after delivering a load to the wrong destination, Dick was placed on 90 days probation and notified that Tango would immediately terminate his employment for any future misconduct.<sup>15</sup> Dick took medical leave for knee surgery from March 6 until April 9, 2013. On April 12, 2013, Baxter informed Dick by Qualcomm message that if he refused her assignments, Tango would terminate his employment.<sup>16</sup> Dick refused another load on April 14, 2013, claiming he had a doctor’s appointment.<sup>17</sup> Baxter notified Nelson of Dick’s refusal and Nelson informed Baxter that Dick would be fired.<sup>18</sup> On April 16, 2013, Dick was assigned another route that he considered different from his pre-reinstatement duties.<sup>19</sup> Although he challenged the assignment, he nevertheless delivered the load and returned the

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<sup>11</sup> Following Dick’s OSHA complaint filed on August 17, 2012, Tango offered Dick unconditional reinstatement and he accepted it on October 8, 2012; however, the settlement negotiations ultimately fell through. ALJX 1 at 2.

<sup>12</sup> CX 15.

<sup>13</sup> CX 17, CX 18.

<sup>14</sup> Tr. at 341(Baxter); RX 3-381, -497, -517.

<sup>15</sup> CX 39.

<sup>16</sup> CX 37.

<sup>17</sup> RX 4-653-654.

<sup>18</sup> Tr. at 367 (Baxter).

<sup>19</sup> RX 4 at 662.

tractor to Respondent's facilities with the keys. Shortly thereafter, early in the morning on April 17th, he sent a Qualcomm message stating "I've quit this job."<sup>20</sup>

Following an investigation of Dick's allegations, OSHA's Regional Supervisory Investigator issued a letter on July 5, 2013, finding Dick's August 17, 2012 complaint lacked merit. Dick requested a formal hearing before a Department of Labor Administrative Law Judge, which the ALJ held in Dallas, Texas on November 4th and 5th, 2013. On April 18, 2014, the ALJ issued a decision dismissing Dick's complaint.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated authority to this Board to issue final agency decisions in STAA cases.<sup>21</sup> The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence.<sup>22</sup> We review an ALJ's evidentiary rulings for abuse of discretion.<sup>23</sup>

### **DISCUSSION**

The STAA provides that an employer may not discharge or otherwise retaliate against an employee with respect to the employee's compensation, conditions, or privileges of employment because the employee engaged in STAA-protected activity.<sup>24</sup> The employee activities the STAA protects include making a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order."<sup>25</sup> To prevail on a STAA claim, an employee must prove that he engaged in protected activity, that his employer took an adverse employment action against him, and that the adverse action taken against him was because of his protected

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<sup>20</sup> CX 35, CX 36.

<sup>21</sup> Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

<sup>22</sup> 29 C.F.R. § 1978.110(b); *Lachica v. Trans-Bridge Lines*, ARB No. 10-088, ALJ No. 2010-STA-027, slip op. at 2, n.3 (ARB Feb. 1, 2012) (citations omitted).

<sup>23</sup> *Zinn v. Commercial Lines*, ARB No. 13-021, ALJ No. 2009-SOX-025, slip op. at 4 (ARB Dec. 17, 2013).

<sup>24</sup> 49 U.S.C.A. § 31105(a)(1); 29 C.F.R. § 1978.102(a).

<sup>25</sup> 49 U.S.C.A. § 31105(a)(1)(A).

activity.<sup>26</sup> If the employee does not prove one of these elements, the entire claim fails.<sup>27</sup> If the complainant proves that the employer discriminated against him because of his protected activity, then the employer may escape liability by demonstrating that the employer would have taken the same unfavorable personnel action in the absence of the protected activity.<sup>28</sup>

Initially, the ALJ found that Dick failed to establish any protected activity. Assuming arguendo that protected activity was established, the ALJ further considered whether Tango Transport took an adverse employment action against Dick. The ALJ rejected Dick's contentions that the notation of "other" on his DAC report was an adverse action and that he had been constructively discharged in April 2013. The ALJ did find that Dick's termination in May 2012 and the refusal to rehire him are actionable adverse actions. Despite recognizing that temporal proximity existed between the alleged protected activity and both the May 2012 termination and the July 2012 refusal to rehire, the ALJ held that Dick failed to establish that his protected activity was causally related to those adverse actions. The ALJ found that Respondent submitted overwhelming evidence that it made a legitimate business decision in terminating Dick's employment in May 2012. The ALJ also accepted Respondent's evidence that Tango's refusal to rehire Dick was not based on his complaints but was based instead upon Tango's determination that Dick was "not happy being an employee of Respondent."<sup>29</sup> Finally, the ALJ summarily found that Tango Transport established by clear and convincing evidence that it would have taken the same adverse actions absent any protected activity.

In his Petition for Review, Dick asserts that the ALJ erred: (1) by denying Dick's request for witness, Tammy Lane Smith, to attend the hearing; (2) in determining that Dick's complaints did not constitute protected activity; (3) in determining that neither Dick's blacklisting allegations nor his constructive discharge allegation constituted adverse action; and (4) by failing to find that Respondent violated STAA by refusing to rehire Dick.

## **1, Denial of Access to Witness**

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<sup>26</sup> *Myers v. AMS/Breckenridge/Equity Grp. Leasing 1*, ARB No. 10-144, ALJ Nos. 2010-STA-007, -008; slip op. at 5 (ARB Aug. 3, 2012) (citation omitted); 49 U.S.C.A. § 31105(b)(1).

<sup>27</sup> *See West v. Kasbar, Inc./Mail Contractors of Am., Inc.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

<sup>28</sup> *Muzyk v. Carlsward Transp.*, ARB No. 06-149, ALJ No. 2005-STA-060, slip op. at 5 (ARB Sept. 28, 2007).

<sup>29</sup> ALJ's April 18, 2014 Decision and Order (D. & O.) at 39.

Preliminarily, we address Complainant's contention that the ALJ erred in failing to require the appearance of Dick's former service manager, Tammy Lane Smith, at the formal hearing. Complainant's Pre-Hearing Exchange included Tammy Lane Smith as a proposed witness. Dick stated that Smith was expected to testify that she interrupted Dick's "required D.O.T. break time on more than one occasion, and requested him to perform company related business when doing so."<sup>30</sup> During a pre-trial conference call on October 31, 2013, Dick made the same representation to the ALJ regarding Smith's expected testimony. Respondent's counsel countered that Smith's appearance was unnecessary since Tango did not dispute that Smith made such calls and that Dick complained about the calls, as demonstrated in documentary evidence admitted at the hearing. The ALJ found that Smith's testimony was not necessary since the allegations against Smith were set forth in the Qualcomm messages and his written complaints to the company.<sup>31</sup>

Given the scope of her testimony as repeatedly designated by Dick, we agree with the ALJ's reasoning that Smith's oral testimony was unnecessary in light of the extensive documentary evidence of the interactions between Dick and Smith. Dick claims that the ALJ took advantage of his lack of legal training by expecting him to "be aware of every type question that will need to be asked or answered during the progress of the hearing."<sup>32</sup> Dick however made no specific showing of how the lack of Smith's oral testimony affected the ALJ's decision. Further, although pro se complainants should be accorded a measure of adjudicative latitude, they cannot shift the burden of litigating to the ALJ.<sup>33</sup> Having examined the ALJ's treatment of the parties as demonstrated by the record, we find that the ALJ generously accommodated Dick in deference to his lack of formal legal training and accorded him just and evenhanded treatment. The ALJ did not abuse his discretion by failing to compel Smith's attendance at the hearing.

## 2. Protected Activity

The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order." 49 U.S.C.A. § 31105(a)(1)(A). For the activity to be protected, a complainant must prove that he reasonably believed in the existence of a violation—this reasonable belief has both objective and subjective

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<sup>30</sup> Complainant's Pre-Hearing Exchange (Oct. 25, 2013) at 1.

<sup>31</sup> ALJ's June 3, 2014 Order Denying Motion for Reconsideration at 5.

<sup>32</sup> Complainant's Reply Memorandum to Tango Transport's Brief in Opposition to PFR at 4 (Sept. 12, 2014).

<sup>33</sup> See *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2 (ARB Apr. 26, 2005).

components. To prove subjective belief, a complainant must prove that he held the belief in good faith. To determine whether a subjective belief is objectively reasonable, one assesses a complainant's belief taking into account "the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."<sup>34</sup> An "internal complaint to superiors conveying [an employee's] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA."<sup>35</sup>

Referencing the DOT regulations regarding requisite rest breaks, Dick repeatedly complained to Tango that his prescribed rest had been broken by contact from Tango Transport. For example, in his February 6, 2012 e-mail to Respondent he stated that the "constant interruption of my required DOT break . . . is a very serious concern," which, Dick claimed, constituted "a violation of DOT law and regulations . . ."<sup>36</sup> The ALJ concluded however that Dick's written complaints on February 1, February 6, February 16, and April 11, 2012, about Respondent interrupting his sleep did not constitute protected activity because they "did not involve a concern about a violation of a specific safety regulation."<sup>37</sup> The ALJ further held that Dick did not have a reasonable belief that his employer was violating a motor vehicle safety regulation when making "de minimis" interruptions during his rest period.<sup>38</sup>

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<sup>34</sup> *Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 12-098, ALJ No. 2010-SOX-003 (ARB Aug. 30, 2012).

<sup>35</sup> *Dutkiewicz v. Clean Harbors Env'tl. Servs., Inc.*, ARB No. 97-090, ALJ No. 1995-STA-034, slip op. at 3-4 (ARB Aug. 8, 1997); *Luckie v. United Parcel Serv., Inc.*, ARB Nos. 05-026, -054; ALJ No. 2003-STA-039, slip op. at 13 (ARB June 29, 2007).

<sup>36</sup> CX 4.

<sup>37</sup> D. & O. at 32.

<sup>38</sup> The ALJ based this finding on OSHA's July 5, 2013 Determination Letter which contained a statement that FMCSA advised OSHA that calls that momentarily interrupt a driver's rest period do not prevent the driver from obtaining adequate rest. We do not consider this evidence sufficiently probative to support the ALJ's finding that Dick lacked a reasonable belief that such interruptions implicated safety violations. 29 C.F.R. § 1978.107 (hearings are conducted de novo). We note that the FMCSA responded to comments to a proposed hours-of-service (HOS) regulation revision restricting interruptions by a carrier to a driver that: [t]hese interruptions while brief in duration have a significant impact on the quality of rest drivers obtain if they occur while the driver is sleeping . . . [c]ommunications between a carrier and a driver that causes that driver to lose the opportunity for restorative sleep is a safety issue that falls within the purview of the FMCSA and its state partners. See Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 68 Fed. Reg. 22,456-01 (Apr. 28, 2003).



The ALJ incorrectly analyzed the issue of whether Dick engaged in protected activity when he complained about break interruptions. First, a complainant need not prove an *actual* violation of a vehicle safety regulation to qualify for protection under Section 31105(a)(1)(A), nor does the statute require that protected activity involve a “specific” safety regulation.<sup>39</sup> The statute requires only that an employee’s complaint be “*related* to a violation of a commercial motor vehicle safety regulation, standard, or order.”<sup>40</sup> The use of this broad “related to” language signals that the scope of protected activity should be liberally construed.<sup>41</sup> Indeed, STAA has long afforded protection to complaints “related to safety violations” even if the complaint is ultimately determined to be without merit.<sup>42</sup> We find no statutory or precedential support for the ALJ’s exclusion of “de minimis” complaints from coverage under the statute. Thus, we vacate the ALJ’s finding that Dick’s complaints about break interruptions do not amount to protected activity and remand for the ALJ to reconsider whether Dick’s belief of a safety violation was objectively and subjectively reasonable.

In addition, Complainant raised issues about the condition of the trucks he was assigned.<sup>43</sup> Several Qualcomm messages sent in January 2012 indicate that Dick reported inoperative equipment, mechanical problems and other concerns with the trucks Tango assigned him to drive. On January 3, 2012, he complained about a cooling leak that led to his truck breaking down the following day. On January 12, 2012, he reported that the engine lights on his truck needed to be checked. On January 26, 2012, his driver manager referenced an e-mail Dick sent regarding safety concerns including problems with his mattress and the lack of air conditioning in his truck, and on January 31, he expressed frustration about continuing mechanical problems with his truck and lack of preventive maintenance done on his truck prior to assigning it. On January 26, 2012, he sent an e-mail to the Safety Department complaining

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<sup>39</sup> See *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-357 (6th Cir.1992); *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-009, slip op. at 8 (ARB Feb. 13, 2015).

<sup>40</sup> 49 U.S.C.A. § 31105(a)(1)(A)(i)(emphasis added).

<sup>41</sup> *Nix v. Nehi-R.C. Bottling Co.*, No. 1984-STA-001, slip op. at 4 (Sec’y July 13, 1984).

<sup>42</sup> *Allen v. Revco D.S., Inc.*, No. 1991-STA-009, slip op. at 6, n.3 (Sec’y Sept. 24, 1991); see also *Guttman v. Passaic Valley*, No. 1985-WPC-002, slip op. at 10 (Sec’y Mar. 13, 1992)(“That Complainant’s views in this regard may have been shown on this record to be wrong, narrow, misguided, or, as the ALJ found, ‘ill-formed and not based on direct knowledge,’ does not render Complainant’s communication of his views unprotected.”), *aff’d Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor*, 992 F.2d 474 (3d Cir. 1993).

<sup>43</sup> See Tango Transport’s Brief in Opposition to Petition for Review at 6-8: RX 1-0026, -0045; RX 2-0077-0078, -0096; RX 15; CX 4.

about the condition of the mattress in his assigned truck, noting that it precluded adequate rest given the wire coils pressing through the mattress. On February 1, 2012, Dick sent an e-mail to Respondent's Driver Services (Debra Salvail) complaining about a number of issues including repeated truck breakdowns, interruptions of his break time, inoperative air conditioning, and lack of preventive maintenance on the truck assigned to him. He sent another e-mail to Salvail on February 6, 2012, that included similar complaints. The ALJ found that, "Complainant failed to present any evidence showing that the safety complaints he made were not addressed. Accordingly, I find that complaints made about previously resolved motor vehicle safety issues do not constitute protected activity under the STAA."<sup>44</sup>

However, protected disclosures do not lose their protected status because the employer resolves the concern; the fact that "management agrees with an employee's assessment and communication of a safety concern does not alter the status of the communication as protected activity under the Act, but rather is evidence that the employee's disclosure was objectively reasonable."<sup>45</sup> An employer cannot "cure" protected activity or erase that it occurred by admitting to wrongdoing, by apologizing, or by agreeing with the employee about a safety concern.<sup>46</sup> Dick's complaints about the trucks can be protected activity even if they were resolved. It appears that these complaints about the condition of the truck and service hour violations were undisputed. Documentary evidence including Qualcomm messages containing Dick's complaints, along with the ALJ's fact findings establish that Dick's reports about the condition of his truck and service hour violations were each protected activity under STAA.

Dick alleges in his September 2013 complaint before the ALJ that his original OSHA complaint, filed in August 2012, was protected activity,<sup>47</sup> and that he was subjected to continuing harassment and "intolerable" conditions despite being reinstated in October 2012. Although the ALJ did not address this allegation, Dick clearly engaged in protected activity when he filed a whistleblower complaint with OSHA in September 2012.<sup>48</sup> Thus, we reverse

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<sup>44</sup> D. & O. at 33.

<sup>45</sup> *Benjamin v. Citationshares Mgmt., LLC*, ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at 6 (ARB Nov. 5, 2013) .

<sup>46</sup> *Sewade*, ARB No. 13-098, slip op. at 8.

<sup>47</sup> CX 1 at 6.

<sup>48</sup> 49 U.S.C.A. § 31105(a)(1)(A)(i); *see also Stack v. Preston Trucking Co.*, No. 1986-STA-022, slip op. at 2 (Sec'y Feb. 26, 1987) ("The fact that Complainant's safety complaints filed with the DOT and OSHA between 1981 and 1985 had been subsequently considered and either 'resolved or dismissed', does not transform them into non-protected conduct, nor eliminate the possibility of subsequent retaliatory action by the employer.").

the ALJ's determination that Dick engaged in no protected activity and remand for additional findings on the issue of protected activity.

### 3. Adverse Employment Action

The STAA states that an employer may not “discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment.” 49 U.S.C.A. § 31105(a)(1). In interpreting the relevant regulatory language promulgated under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121, which is nearly identical to the comparable STAA regulatory language, we ruled that “the term ‘adverse actions’ refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.”<sup>49</sup>

The ALJ found that the only actionable adverse actions were Dick's May 2012 termination and the decision not to rehire him in July 2012. The ALJ rejected Dick's claim that Tango blacklisted him by indicating “other” as the reason for his initial discharge on his DAC Report.<sup>50</sup> Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that “would or could prevent” a person from finding employment.<sup>51</sup> The ALJ rejected Dick's allegation of blacklisting because he credited testimony that the designation “other” was not damaging information in the context in which it appeared.<sup>52</sup> This finding is supported by substantial evidence and we affirm it.

The ALJ also rejected Dick's contention that he was constructively discharged. He found that Dick was treated no less favorably than other employees and that he did not establish that his working conditions were so difficult or unpleasant that a reasonable person would feel compelled to resign. Thus, the ALJ concluded that Dick did not establish that he was constructively discharged in April 2013.

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<sup>49</sup> *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 15 (ARB Dec. 29, 2010); *see also Strohl v. YRC, Inc.*, ARB No. 10-116, ALJ No. 2010-STA-035, slip op. at 4-5 (ARB Aug. 12, 2011).

<sup>50</sup> D. & O. at 34-35.

<sup>51</sup> *Beatty v. Inman Trucking Mgmt.*, ARB Nos. 11-021, ALJ Nos. 2008-STA-020, -021; slip op. at 6 (ARB June 28, 2012).

<sup>52</sup> D. & O. at 35. The ALJ credited Watson's testimony that DAC report entries are made only when a driver leaves employment and not if the driver is reinstated unless he leaves employment again. She also testified, as corroborated by Nelson, that the designation “other” was more beneficial to Dick than the other possible entries.

The legal standard ordinarily used to determine what constitutes a constructive discharge is whether the employer has created “working conditions so intolerable that a reasonable person in the employee’s position would feel forced to resign.”<sup>53</sup> Constructive discharge is a question of fact,<sup>54</sup> and the standard is objective: the question is whether a “reasonable person” would find the conditions intolerable, and the subjective beliefs of the employee (and employer) are irrelevant.<sup>55</sup> However, as the Board held in *Dietz*, “that is not the only method of demonstrating constructive discharge. When an employer acts in a manner so as to have communicated to a reasonable employee that [he] will be terminated, and the . . . employee resigns, the employer’s conduct may amount to constructive discharge.”<sup>56</sup> Under this standard, an employee who can show that the “handwriting is on the wall” and the “axe is about to fall” can make out a constructive-discharge claim.<sup>57</sup>

The record contains evidence that following Dick’s reinstatement, he was repeatedly threatened with imminent termination for refusing to accept certain dispatches.<sup>58</sup> Respondent’s witness, Baxter, testified that, when Dick again refused a load on April 14, 2013, Tango planned to fire Dick, but he quit before Tango was able to fire him.<sup>59</sup> As the ALJ did not consider this evidence suggesting that Dick reasonably believed that he would be terminated, we vacate the

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<sup>53</sup> *Strickland v. United Parcel Svc.*, 555 F.3d 1224, 1228 (10th Cir. 2009); *see also Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002 (ARB Mar. 30, 2016); *Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-049, slip op. at 10 (ARB Feb. 28, 2011) (formulating the question of constructive discharge as whether employer created ‘working conditions . . . so difficult or unpleasant that a reasonable person in the employee’s shoes would have found continued employment intolerable and would have been compelled to resign.

<sup>54</sup> *Strickland*, 555 F.3d at 1228.

<sup>55</sup> *Id.*

<sup>56</sup> *E.E.O.C. v. Univ. of Chi. Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002); *see also Burks v. Okla. Pub. Co.*, 81 F.3d 975, 978 (10th Cir. 1996) (“This court has recognized that an employee can prove a constructive discharge by showing that she was faced with a choice between resigning or being fired.”). *But see Ames v. Nationwide Mut. Ins. Co.*, 760 F.3d 763, 769 (8th Cir. 2014) (noting that the Eighth Circuit has “not recognized the second form of constructive discharge in . . . non-hostile work environment cases”).

<sup>57</sup> *Univ. of Chi. Hosps.*, 276 F.3d at 332.

<sup>58</sup> *See, e.g.*, Tr. at 364, 496-498.

<sup>59</sup> Tr. at 366-368.

finding that Dick did not establish that he was constructively discharged in April 2013 and remand for reconsideration consistent with *Dietz*.

#### 4. Contributing Factor

Although the ALJ found that Dick had not established that he engaged in protected activity, he considered whether contribution was established assuming arguendo that there was activity protected by the Act. The ALJ ultimately found that Dick failed to establish causation.<sup>60</sup> Dick did not appeal the causation finding in connection with his May 2012 termination, so we do not address it. Nevertheless, we believe the ALJ's causation analysis was flawed with respect to both his May 2012 termination and Tango's refusal to rehire Dick in July 2012.

The STAA incorporates by reference the legal burden of proof standards governing employee whistleblower protection under the Wendell H. Ford Investment and Reform Act for the 21st Century (AIR 21), at 49 U.S.C.A. § 42121(b) (Thomson/West 2007).<sup>61</sup> Under AIR 21, and thus under STAA, “[t]he Secretary may determine that a violation . . . has occurred only if the complainant demonstrates [by a preponderance of the evidence] that any behavior [protected by the statute] was a contributing factor in the unfavorable personnel action alleged in the complaint.”<sup>62</sup> The AIR 21 burden of proof framework is much more protective of complainant-employees and much easier for a complainant to satisfy than the *McDonnell Douglas* standard.<sup>63</sup> The AIR 21 complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent's reason for the unfavorable personnel action was pretext, or that the complainant's activity was the sole or even predominant cause.

Notwithstanding the ALJ's articulation of the correct standard under STAA, namely, that a complainant must prove by a preponderance of the evidence that his or her protected activity was a contributing factor in the unfavorable personnel action,<sup>64</sup> the ALJ appeared to analyze whether Dick met his burden of proof applying the standard that preceded the 2007 amendments to STAA. Citing *Newkirk v. Cypress Trucking Lines, Inc.*, No. 1988-STA-017 (Sec'y Feb. 13, 1989) and *Allen v. Revco D.S., Inc.*, No. 1991-STA-009 (Sec'y Sept. 24, 1991), both of which were abrogated by the 2007 STAA amendments insofar as the burden of proof standard is

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<sup>60</sup> D. & O. at 39.

<sup>61</sup> See 49 U.S.C.A. § 31105(b)(1).

<sup>62</sup> 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1978.109(a).

<sup>63</sup> See *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013).

<sup>64</sup> D. & O. at 34.

involved, the ALJ based his holding of no causal connection on his finding that “employer has presented overwhelming evidence regarding the legitimacy of the decision to terminate Complainant [in May 2012],” that Respondent was not required to rehire Complainant in July 2012, and that Nelson concluded that Complainant should not be rehired “because he was not happy being an employee of Respondent.”<sup>65</sup> But as the ARB has explained in prior cases, the legitimacy of a Respondent’s reasons for adverse actions does not preclude a complainant from demonstrating contributory causation because under the “contributing factor” burden of proof standard a complainant is not required to prove that the protected activity was the only or the most significant reason for any adverse action taken against him—the complainant need only establish that the protected activity affected in any way the adverse action at issue.<sup>66</sup>

The proof standard the ALJ actually employed is no longer applicable in light of the 2007 STAA amendments. As the Board explained in *Beatty v. Inman Trucking Mgmt.*:

[T]he “contributing factor” standard was “intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a ‘significant’, ‘motivating’, ‘substantial’, or ‘predominant’ factor in a personnel action in order to overturn that action.” The complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent’s reason for the unfavorable personnel action was pretext, or that the complainant’s activity was the sole or even predominant cause. The complainant “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination.” A “contributing factor,” the ARB has repeatedly noted, is “any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision.” Thus, for example, a complainant may prevail by proving that the respondent’s reason, “while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant’s] protected activity.”<sup>[67]</sup>

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<sup>65</sup> *Id.* at 39.

<sup>66</sup> *Rudolph v. Amtrak*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 16 (ARB Mar. 29, 2013).

<sup>67</sup> *Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ Nos. 2008-STA-020, -021; slip op. at 8 (ARB May 13, 2014)(citations omitted).

With regard to Respondent's decision not to rehire Dick in July 2012, the ALJ again acknowledged the existence of temporal proximity but concluded that it did not support a finding of causation because Nelson's decision not to rehire Dick was legitimately based upon Nelson's perception that Dick was not a "happy" employee. We reverse this finding for several reasons. First, the ALJ's misapplication of the pre-2007 analytical framework led him to limit his discussion to the persuasiveness of employer's reasons to deny reinstatement in July 2012, rather than fully address the evidence as to whether Dick's complaints were a factor in Respondent's decision.

Additionally, the ALJ's holding is not supported by substantial evidence. The ALJ states that "Nelson testified that the decision not to re-hire Complainant was not based on the complaint letters."<sup>68</sup> This is a significant mischaracterization of Nelson's testimony, which was actually as follows: "I suppose you could say that the letters were in my mind to the extent that you were constantly complaining about your unhappiness with our systems. But it was not because I was concerned that you were going to go to the DOT or some other protected agency. That wasn't in my mind."<sup>69</sup> Nelson explicitly concedes that Dick's "complaint letters" were a factor in his decision not to rehire Dick. This is direct evidence of causation. Nelson's attempt to distinguish Dick's internal complaints as "unhappiness with our systems" rather than "going to the DOT" does nothing to undermine their protected status or neutralize his admission that Dick's complaints were a factor in his decision not to rehire Dick. While the letters in question may well have contained both protected and unprotected subject matter, the protected activity need only be a contributing factor and does not have to be a significant or motivating factor.

Furthermore, Nelson repeats his admission: "You were not happy working at Tango. It came through loud and clear from the totality of everything I heard. And so I said to myself, 'Why should Mr. Dick come back here? He's not happy with us. *He doesn't think we are properly and professionally run.* We certainly are not happy with him.'"<sup>70</sup> It appears likely that Dick's "unhappiness," as well as Tango's reciprocal feelings, were a manifestation, at least in part, of Dick's alleged protected complaints. As the Third Circuit has observed: "We have reviewed this evidence and conclude that it permits the conclusion that any alleged 'personality' problem or deficiency of interpersonal skills was reducible in essence to the problem of the inconvenience Guttman caused by his pattern of complaints. There is no evidence before us that Guttman's alleged personality or professional deficiencies arose in any other context outside of his complaint activity."<sup>71</sup>

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<sup>68</sup> D. & O. at 39.

<sup>69</sup> Tr. at 505-506.

<sup>70</sup> Tr. at 509 (emphasis added).

<sup>71</sup> *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 481 (3d Cir. 1993).

Thus, we vacate the ALJ's finding that Complainant's protected activity did not contribute to the adverse employment action and instruct the ALJ on remand to consider whether Tango Transport took any adverse action against Dick due at least in part to his protected activity.

Moreover, although Dick was reinstated in October 2012, he alleges that his filing a complaint in September 2012 colored everything that happened afterwards. Dick alleges he was treated much worse because of his earlier complaints and Tango constructively discharged him in April 2013. Nelson appears to testify Dick would have been fired much sooner but for his complaints. As the ALJ did not properly consider whether Dick was constructively discharged, he did not fully consider whether the discharge was related to his protected activity. Thus, if on remand the ALJ finds that Dick was constructively discharged in April 2013, he must consider whether Dick's protected activity was a contributing factor in the adverse action.

## 5. Clear and Convincing Evidence of an Affirmative Defense

If a complainant proves by a preponderance of the evidence that his or her protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same personnel action even in the absence of the protected activity. In *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014), the ARB explained that assessing "clear and convincing evidence" requires a case-by-case balancing of three factors: "(1) how 'clear' and 'convincing' the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer 'would have' taken the same adverse actions; and (3) the facts that would change in the 'absence of' the protected activity."<sup>72</sup> Evidence clearly and convincingly "supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion."<sup>73</sup>

The ALJ in this case found that "the evidence clearly establishes that Complainant's employment was terminated because he had exhausted his FMLA leave, and Respondent was not obligated to rehire Complainant."<sup>74</sup> As the case is remanded to the ALJ to further consider the issues of protected activity, adverse employment action, and contributing factor, we also instruct

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<sup>72</sup> *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 12 (ARB Apr. 25, 2014) (internal citations omitted).

<sup>73</sup> *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012).

<sup>74</sup> D. & O. at 39.



the ALJ to reconsider whether employer is entitled to the affirmative defense that it would have taken the same unfavorable personnel action in the absence of the protected activity if reached.

### **CONCLUSION**

Accordingly, for the foregoing reasons, the Board **VACATES** the ALJ's dismissal of Dick's complaint, and **REMANDS** the case to the ALJ for reconsideration consistent with this opinion.

**SO ORDERED.**

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

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

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