



**In the Matter of:**

**GEORGE T. LUCKIE,**

**ARB CASE NOS. 05-026  
05-054**

**COMPLAINANT,**

**ALJ CASE NO. 03-STA-39**

**v.**

**DATE: June 29, 2007**

**UNITED PARCEL SERVICE, INC.**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**K. Edward Sexton, II, Esq., *Evans & Sexton, P.C.*, Birmingham, Alabama.**

*For the Respondent:*

**R. Steve Ensor, Esq., *Alston & Bird, LLP*, Atlanta, Georgia.**

### **FINAL DECISION AND ORDER DISMISSING COMPLAINT**

George T. Luckie complained under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), that his employer, United Parcel Service, Inc. (UPS), violated the STAA when it terminated his employment on November 9, 2001. A Department of Labor Administrative Law Judge (ALJ) concluded in a Recommended Decision and Order (R. D. & O.) that UPS violated the STAA and awarded \$123,200.00 in damages. As discussed below, the ALJ made a number of errors in his findings of fact, legal analysis, and conclusions of law. We conclude that Luckie was not a covered employee and that, even if he were, UPS did not violate the STAA in terminating

Luckie's employment. The decision of the ALJ is, therefore, reversed and the appeal is dismissed.

### BACKGROUND

Luckie started work for UPS in 1975. CX 1, TR at 56.<sup>1</sup> UPS subsequently promoted him to supervisor at UPS's Montgomery, Alabama hub. TR at 60. After several other managerial relocations, special assignments, and numerous promotions, Luckie took over as Security Manager for the Alabama District in November 1994.<sup>2</sup> CX 1.

Luckie's department consisted of 20 to 25 employees, including a second-line security manager, a damage reduction supervisor, and security representatives. TR at 215-17. Luckie's primary responsibilities were to direct his staff in resolving customers' claims for lost, stolen, or damaged packages; investigate incidents of employee theft and violations of UPS harassment and integrity policies; and oversee security at the company's facilities, including alarm systems and guard services. TR at 214-15, 478-80, 533-34. Luckie reported to his district manager, Christann Pojani-Martin, and his regional manager, first Jack Woods and then Steven E. Hernandez, both of whom were located in Birmingham, Alabama.

Early in the morning on October 30, 2001, a package on a conveyor belt at the Montgomery hub caught on fire. RX 16. The Montgomery Fire Department put out the fire in less than an hour, and unloading and sorting operations resumed at about 5:00 a.m. *Id.* The fire damaged or delayed the delivery of almost 5,000 packages and caused about \$100,000 in damages. RX 29-32, TR at 339. In addition to the Montgomery Fire Department, UPS's plant engineering department investigated the fire.

After being informed of the fire, Luckie sent one of his claims investigators, Richard Quincy, to the scene. TR at 74. Luckie learned from Quincy that the fire "looked suspicious in nature" because it had started without any apparent cause and burned "hotter, shooting out fire balls," according to employees at the Montgomery hub. CX 10. Supervisor Redd Cunningham reported to Luckie that the fire department allowed the plant engineering employees to go back in the building at 3:00 a.m. and that the operation was up and running about two hours later. *Id.* Quincy's notes reflected that

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<sup>1</sup> The following abbreviations shall be used: Complainant's exhibit, CX; Respondent's exhibit, RX; Administrative Law Judge exhibit, ALJX; and hearing transcript, TR.

<sup>2</sup> UPS has a policy of promoting qualified individuals from within the company. RX 2 at 7. As part of that policy, management-level employees are expected to accept periodic transfers, reassignments, and promotions anywhere in the country. RX 2 at 17-18.

Luckie told him that any investigation would be done by the plant engineering department “if it’s necessary later.” CX 12.

Luckie later contacted Vance Allison, the district human resources manager who was in charge of employee relations and the Health and Safety Department, which was responsible for UPS’s compliance with federal hazardous materials statutes and regulations. TR at 420-23. Luckie told Allison that the truck trailer from which the package was unloaded should be isolated and that the debris from the fire was being removed to the dump before the cause was determined. TR at 140-44, 151-53. Luckie added that other potentially hazardous items could be going through the Montgomery hub. *Id.*

Allison testified that trained hazardous materials inspectors from the Montgomery operations department responded to the fire and found no need for any investigation. TR at 426-27. He added that HAZMAT responder Brian Turner completed and sent in a hazardous materials response incident form to the Department of Transportation “to make sure that we had all bases covered,” but that Luckie had no part in completing the form or responsibility for hazardous materials compliance. RX 36; TR at 422, 427-29, 458.

Luckie also told his district manager, Martin, that the fire was not being properly investigated because they did not know what else was on the truck trailer or what was in other trailers yet to be unloaded. TR at 144-45. Martin told Luckie that he was over-reacting and adding to the anxiety level, that UPS was not going to investigate the fire because the fire department itself saw no need for an investigation, and that she did not want him “causing chaos down in Montgomery over a situation that had already been handled.” CX 15, TR at 347, 364. Martin admitted that she was “irritated” that Luckie got involved in the situation.<sup>3</sup> TR at 346.

A year and a half before the fire, in the spring of 2000, Luckie met with Jack Woods, the Southeast Regional Security Manager located in Birmingham, to discuss Luckie’s career progress with UPS. TR at 484-85. Luckie was told that he needed more responsibility outside of the region to move on in his career. TR at 485. Luckie explained that he had a pending divorce but that the custody issues would be resolved by the end of 2000 and he would be ready to relocate. TR at 485-87.

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<sup>3</sup> Until this incident, the record contains no indication of any discord between Luckie and UPS in the 27 years he worked for UPS. In fact, Luckie testified about his upwardly mobile career from part-time work during college to his promotions from supervisor to manager and his relocations from Montgomery and Birmingham, Alabama, to New Orleans, Springfield, Massachusetts, and Nashville, Tennessee. CX 1; TR at 56-73. Further, Luckie’s performance appraisals from 1997 through 2000 reflected steady improvement. CX 2-6.

The next year, Woods briefed his successor, Hernandez, in May 2001 about the personnel profiles of his district managers, including Luckie, who had told Woods that he would be ready for a career reassignment in 2001. TR at 488, 550-51. At a managerial personnel meeting in September 2001, Hernandez recommended to UPS corporate headquarters in San Francisco that Luckie be reassigned to a larger district with greater responsibilities.<sup>4</sup> TR at 551. Hernandez met with Luckie in Birmingham on October 19, 2001, and told him of his recommendation. TR at 552-54.

In a memorandum to Martin following the meeting, Hernandez stated that Luckie informed him that the divorce was settled.<sup>5</sup> CX 27. Hernandez also told Luckie that by the beginning of 2003, he “would no longer maintain the position of District Security Manager for the Alabama District” because it was a starter district and he had been there for seven years. *Id.*

On October 25, 2001, Woods was informed that the Mid-South security manager was being relocated to the East Bay District in Oakland, California and had started work. TR at 395-96, 490-91, 513. A few days later (before the fire), a corporate security executive in San Francisco notified Hernandez that the Mid-South position needed to be filled and Hernandez recommended Luckie. TR at 556-58. Hernandez then called Martin (again prior to the fire), and they decided to inform Luckie at a prescheduled meeting set for November 1. TR at 558-59.

On November 1, 2001, two days after the fire, Hernandez and Martin met with Luckie and told him he was being reassigned to the Mid-South District. TR at 161-66. Luckie asked if the reassignment was related to the fire, and Martin told him, “absolutely not.” TR at 471. Hernandez explained that the Mid-South manager had been transferred to California and that Mid-South was a larger district with greater responsibility. TR at 230-31. Martin told Luckie that he was “blocking” a “beginner district” and had 24 hours to make a decision.<sup>6</sup> TR at 167, 353.

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<sup>4</sup> Regional managers such as Woods and Hernandez recommended district managers for relocation, transfer, and promotion, but corporate executives always decided who was going where and when, and routinely on very short notice. TR at 487-88.

<sup>5</sup> Luckie testified that he filed for divorce in April 2000, and the matter was settled in November 2000. TR at 245.

<sup>6</sup> UPS’s policy requires management-level employees to accept periodic transfers, reassignments, and promotions anywhere in the country. RX 2 at 17-18. Allison testified that in moving from Boise, Idaho to Salt Lake City, Alabama, and Philadelphia, he usually had 24 hours to decide to accept the relocation and moved within a few days to his new position. TR at 414-19. Woods testified that he had been relocated seven times in his 28-career with UPS, TR at 473-75, and Hernandez described his moves from Chicago to New

Continued . . .

Luckie testified that during the meeting Martin told him that if he did not want to relocate, he could take a demotion and go over to “Roebuck as a business manager.” TR at 162. In response to his questions, Luckie stated that Martin got “mad” and offered him a third option – three months’ severance pay. TR at 167. Subsequently, Luckie called Woods on November 4 and talked with Martin on November 5 but did not at that time know exactly what he was going to do. TR at 189-91.

On November 9, 2001, Hernandez offered Luckie the three options in writing. The choices were relocating to the Mid-South position with more responsibility, a pay raise and more stock options; accepting a demotion to business manager within the district with a salary decrease; or signing a separation agreement with three months’ pay. CX 13, TR at 559-60. Hernandez added that if Luckie chose to stay within the district, he would keep him on the security manager’s list so that he would be eligible for promotion when another position became available. TR at 562.

Luckie refused the Mid-South transfer and said he was going to “go upstairs and do his job . . . that I would have through 2002.” TR at 231. Martin told Luckie that remaining as district manager was not an option. She later wrote a letter stating that UPS accepted his “voluntary resignation” and terminated his employment as of November 9, 2001. CX 13.

Luckie filed a complaint with DOL’s Occupational Health and Safety Administration (OSHA) on May 8, 2002, which stated only that as Security Manager he was responsible for safety and security and that he was fired during his investigation of a fire in the Montgomery facility. RX 23. OSHA dismissed Luckie’s complaint on the grounds that Luckie was not a covered employee under the STAA and that his complaint did not concern any motor vehicle safety violation. RX 24-25, ALJX 1. Luckie requested a hearing, which was held on June 8-9, 2004. ALJX 2.

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

By authority of 49 U.S.C.A. § 31105(b)(2)(C), the Secretary of Labor has delegated her jurisdiction to decide this matter to the Administrative Review Board (ARB). *See* Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c)(2006).

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York City to Atlanta, TR at 528-33. Martin, who has since moved to Sacramento, testified that for each relocation she had 24 hours to consider the move. TR at 608-10. Luckie himself transferred from job to job as a supervisor and then manager. CX 1; TR at 56-73.

Under the STAA, the ARB is bound by the ALJ's factual findings if substantial evidence on the record considered as a whole supports those findings. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). 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." *Clean Harbors Env'tl. 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. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ's conclusions of law, the ARB, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 2004). Therefore, we review the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

## DISCUSSION

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 activities. These protected activities include making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order." 49 U.S.C.A. § 31105(a)(1)(A).

To prevail on his claim under the STAA, Luckie must prove by a preponderance of the evidence that he was a covered employee, that he engaged in protected activity, that UPS was aware of the protected activity, that UPS discharged, disciplined, or discriminated against him, and that the protected activity was the reason for the adverse action. *BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 03-STA-30, slip op. at 4 (ARB Oct. 20, 2004). If Luckie fails to prove any one of these elements, his complaint must be dismissed. *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 98-STA-028, slip op. at 5 (ARB Sept. 30, 2005).

In analyzing a whistleblower case, the ARB and reviewing courts generally apply the framework of burdens developed for use in deciding cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, *et seq.*, and other discrimination laws. *Hirst v. Se. Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 03-AIR-47, slip op. at 9 (ARB Jan. 31, 2007); *Jenkins v. U.S. EPA*, ARB No. 98-146, ALJ No. 88-SWD- 2, slip op. at 17 (ARB Feb. 28, 2003). To establish a prima facie case of unlawful discrimination under the whistleblower statutes, a complainant need only to present evidence sufficient to raise

an inference, a rebuttable presumption, of discrimination. *Schlage v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 01-CER- 1, slip op. at 5 n.1 (ARB Apr. 30, 2004).

A complainant meets this burden by initially showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in protected activity under the statute of which the employer was aware, that the complainant suffered adverse employment action and that a nexus existed between the protected activity and the adverse action. *Jenkins*, slip op. at 16-17. Once a complainant meets his initial burden of establishing a prima facie case, the burden then shifts to the employer to simply produce evidence or articulate that it took adverse action for a legitimate, non-discriminatory reason (a burden of production, as opposed to a burden of proof). When the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, non-discriminatory reason, the rebuttable presumption created by the complainant's prima facie showing "drops from the case." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Schlagel*, slip op. at 5 n.1; *Jenkins*, slip op. at 18. Cf. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

After a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a prima facie showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent took adverse action against the complainant because of protected activity. *Schlagel*, slip op. at 5 n.1; *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 9 n.9 (ARB Oct. 31, 2003), *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 6 n.12 (ARB Sept. 30, 2003), *Simpkins v. Rony Co., Inc.*, ARB No. 02-097, ALJ No. 01-STA-59, slip op. at 3 (ARB Sept. 24, 2003), *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 99-STA-5, slip op. at 7-8 n.11 (ARB Mar. 29, 2000).

### ***The ALJ's erroneous legal analysis***

The ALJ described the legal framework within which he would analyze this case.

To establish a prima facie case of discriminatory treatment under the Act, Complainant must prove: (1) that he was engaged in an activity protected under the Act; (2) that he was the subject of adverse employment action; and (3) that a causal link exists between his protected activity and the adverse action of his employer. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 299 (6th Cir. 1987). The establishment of the prima facie case creates an inference that protected activity was the likely reason for the adverse action. *McDonald Douglas Corp. v. Green*, 411 U.S. 792

(1973). At a minimum, Complainant must present evidence sufficient to raise an inference of causation. *Carroll v. J.B. Hunt Transportation*, 91-STA-17 (Sec’y June 23, 1992).

R. D. & O. at 10.

The ALJ apparently used this standard to decide this case. The ALJ briefly analyzed each element of Luckie’s claim but it is not clear whether he was using the ultimate burden of proof requirements to prevail or whether he was applying the burden of persuasion requirements to establish a *prima facie* case. He concluded that the complainant established coverage under the STAA, protected activity, adverse action, knowledge, and that the temporal proximity between the protected activity and the adverse action created an inference of discrimination. He then found that UPS’s “attempt” to establish a legitimate non-discriminatory reason was pretext and concluded that Luckie suffered an employment-related adverse action (the timing of the notice of his promotion opportunity) as a result of his protected activity. Thus, UPS was in violation of the STAA.

The ALJ did not analyze the evidence in terms of Luckie’s burden to prove by a preponderance of the evidence that UPS discriminated against him because of his protected activity. Therefore, we are forced to conclude that the ALJ’s legal analysis of the merits of this case is completely inadequate.

As the Supreme Court observed in *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713-714 (1983) (footnote omitted): “Because this case was tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a *prima facie* case. We think that that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*.” The Secretary of Labor further explained in *Carroll v. Bechtel Power Corp.*, No. 91-ERA-46, slip op. at 11 (Sec’y Feb. 15, 1995):

Once the respondent has presented his rebuttal evidence, the answer to the question whether the plaintiff presented a *prima facie* case is no longer particularly useful. “The [trier of fact] has before it all the evidence it needs to determine whether ‘the defendant intentionally discriminated against the plaintiff.’” (Citations omitted).

In addition to legal error, several of the ALJ’s critical findings of fact are not supported by substantial evidence in the record. We note that the ALJ did not make any findings regarding the credibility of the witnesses. We will therefore proceed to determine whether Luckie prevailed on his STAA claim by proving that he is a covered employee who engaged in protected activity and as a result suffered an adverse action causally linked to the protected activity.

**(1) Luckie was not a covered employee under the STAA.**

The STAA defines a covered employee as “a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier.” 49 U.S.C.A. § 31101(a)(2)(A).

In construing statutory language, “the starting point is the language of the statute itself.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). There is “no more persuasive evidence of the purpose of a statute than the words by which [Congress] undertook to give expression to its wishes.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (quoted citation omitted). If the statute’s meaning is plain and unambiguous, there is no need for further inquiry and the plain language of the statute will control its interpretation. *United States v. Fisher*, 289 F.3d 1329, 1338 (11th Cir. 2002).

Our own cases have relied on these principles in construing statutory language. See e.g., *McCafferty v. Centerior Energy Corp.*, ARB No. 96-144, ALJ No. 96-ERA-6, slip op. at 6 (Sept. 24, 1997); *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB No. 04-101, ALJ No. 04-ERA-9, slip op. at 5 (Oct. 31, 2005). With these principles in mind, we analyze the relevant language of the STAA’s definition of employee.

Briefly, the ALJ concluded that Luckie was a covered employee under the STAA as “either a freight handler or a person who directly affected commercial vehicle safety in the course of his employment or both.” R. D. & O. at 11. He reasoned that, while Luckie did not exclusively handle freight, his “unrefuted” testimony was that he handled damaged packages in performing security checks and resolving damage claims.” Thus, he concluded that because of these duties Luckie fell within the STAA’s purpose of promoting a safe and efficient transportation system. *Id.* The ALJ further reasoned that because one of Luckie’s duties was to maintain proper safety conditions, he directly affected “commercial safety” and was therefore covered under the STAA. *Id.*

We have analyzed both possibilities and conclude that (1) substantial evidence does not support the ALJ’s critical findings, and (2) the ALJ erred in his legal conclusions.

*Luckie was not a freight handler*

The Labor Department’s occupational handbook describes a freight handler as one who, in the course of his employment, moves materials to and from storage and production areas, loading docks, delivery vehicles, ships’ holds or containers, and does so either manually or with forklifts, dollies, hand trucks, or carts. *Occupational Outlook Handbook*, Bureau of Labor Statistics, U.S. Department of Labor 450 (May 1994).

Luckie claimed that, as part of his job, he handled packages every day in the course of investigating and resolving claims for damages. He stated that

we monitored all the damaged packages. They would come back in, I'd have to look at them, I'd have to handle them, I'd have to inspect them and see what was wrong with them, what the problems were. I'd have to take them back to customers, explain to them what needed to be changed, and that type of stuff.

TR at 76. The ALJ found this testimony to be unrefuted, but the record reveals otherwise.

First, Luckie testified that UPS has three categories of freight handlers, termed loaders, unloaders, and sorters. TR at 221. All of these are hourly-employees covered by a union contract. RX 1 at 2. As a regular part of their jobs, these employees are totally engaged in loading, unloading, and sorting packages from UPS trucks and airplanes, and processing them through the company's distribution systems such as the Montgomery hub. TR at 479-81, *see* CX 10. Luckie confirmed on cross-examination that his security department employees handle customers' claims about loss, theft, or damages to their packages. TR at 214. He agreed that the damage reduction group, headed by a supervisor who reported to him, was responsible for the physical examination of damaged packages and investigating and auditing claims. TR at 217.

Second, Luckie's former regional security manager, Jack Woods, testified that Luckie's duties as district security manager included administering the package claims program for the district and investigating pilferage or shortages. TR at 478. Asked if Luckie's job responsibilities included "handling in any way packages shipped through UPS," Woods stated, "No, he was security department head." Woods explained that he was unaware of any occasion or circumstance in which a district security manager would handle packages being shipped through UPS. He noted that people in the security department might come into contact with packages while doing an audit, for example, but not a department head. TR at 480-81. On cross-examination, Woods stated that Luckie was responsible for the statistical data on damaged packages and claims. TR at 508.

Third, Steve Hernandez, Luckie's regional security manager, described Luckie's responsibilities as meeting his department's budget regarding claims and overseeing the physical security of the UPS facilities. TR at 534-35. Hernandez stated that Luckie might occasionally touch a package in connection with coordinating a customer audit, but his primary role would be to review the results of the audit with the customer. Hernandez added that he knew of no circumstances in which Luckie handled packages being shipped through the system. TR at 537-38. On cross-examination, he reiterated that while Luckie might on occasion "touch packages . . . during an audit," his main responsibility was to coordinate the audit and he "would not handle packages" as district security manager. TR at 578.

Based on our review of the record, we conclude that substantial evidence does not support the ALJ's finding that Luckie was a "freight handler" as defined under the STA. Rather, Luckie's bare, uncorroborated assertion is outweighed by the contrary testimony from two other managers that a district security manager would not handle packages in the UPS system as part of his job.

Luckie himself admitted that his position was administrative and that he was not responsible for package operations. TR at 212-13. He stated that his primary responsibility as district security manager was to supervise his staff in handling customers' claims of loss, theft, or damage. TR at 214. He explained that the supervisor of his damage reduction group, who reported to him, was responsible for inspecting damaged packages, investigating and auditing claims, and making customer visits. TR at 217. In addition, both of Luckie's former bosses stated that while Luckie might on occasion touch a package during an audit, he would not be handling packages on a regular basis. He was a department head, not an hourly worker under the union contract who loaded, unloaded, or sorted packages being processed through the UPS system.

Nor is package or freight handling part of the position description of an UPS manager. Indeed, UPS's general position description of a manager's essential job functions includes working in a seated position 9 to 10 hours a day, performing office tasks, managing other employees' time and activities, and demonstrating cognitive ability. RX 7. In light of the record evidence, we conclude as a matter of law that Luckie's infrequent touching of packages in connection with a claims investigation does not qualify him as a freight handler under the STAA.

*Luckie did not directly affect commercial motor vehicle safety*

Another possibility for being a covered employee under the STAA is to be an individual who "directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier." 49 U.S.C.A. § 31101(a)(2)(A).

The STAA was enacted to "combat the increasing number of deaths, injuries, and property damage resulting from vehicle accidents in the interstate trucking industry." See 128 Cong. Rec. S32,509 (1982). Congressional intent, under the STAA, was to "to encourage employee reporting of non-compliance with safety regulations governing commercial motor vehicles." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987). Accordingly, the whistleblower provisions of the STAA cover employees who directly affect the safety of commercial motor vehicles. 49 U.S.C.A. § 31101(a)(2)(A).

The ALJ found that Luckie was an "individual who directly affected *commercial safety*" in his role as district security manager, "particularly given the heightened alert following 9/11 and the company and government bulletins which followed." R. D. & O. at 11. The ALJ noted that one of Luckie's duties was to "see, hear, and communicate with sufficient capability to perform assigned tasks and maintain proper safety conditions." *Id.*, see RX 7. The ALJ concluded that Luckie "played a role in

accomplishing” the mission of UPS “in a safe and lawful manner in both his position as manager and as an employee” of a company engaged in transporting packages while using commercial motor vehicles. *Id.*

The ALJ’s reasoning addresses how Luckie’s job duties impacted “commercial safety” but his reasoning does not demonstrate how those duties directly affected “commercial motor vehicle safety” as required by the statutory definition of a covered employee. In determining that Luckie was such an individual, the ALJ referred only generally to commercial safety. He failed to analyze or discuss whether Luckie in the course of his employment directly affected commercial *motor vehicle* safety. The ALJ’s finding that Luckie directly affected commercial safety is not relevant to the issue of whether Luckie directly affected commercial motor vehicle safety.

We find and conclude as a matter of law that Luckie was **not** an individual who directly affected commercial motor vehicle safety because his job duties did not directly impact the safety of UPS’s commercial motor vehicles. Luckie’s job affected customer relations and worker safety but did not directly affect the public’s safety on the highways.

Luckie testified that he was responsible for the physical security of the UPS facilities, packages, and employees in his district. TR at 75, 79-80. He testified that after 9/11, he received many memoranda on security issues, directing employees to cooperate with federal authorities in any investigation and report any suspicious activity up the chain of command. TR at 113-18; *see* CX 21 (containing memoranda addressed to various managers and supervisors discussing the security of drivers and packages following 9/11).

He testified that his department’s concerns were the safety of the buildings, the packages, and the people and his goal was to “make sure that we had a safe environment for them to work in.” TR at 74-76. Workplace and employee safety is regulated by OSHA under the Occupational Health and Safety Act. 29 U.S.C.A. § 651 *et seq.* (West 2007). Luckie’s only responsibility for packages was to have his department determine the extent of the damaged packages and to work with UPS’s customers to resolve any claims arising from the damage. These are not truck safety related activities covered by the STAA.

Luckie had no responsibility for the operational safety of UPS’s commercial motor vehicles. Nor was Luckie responsible for reporting, auditing, or reviewing any safety defects in those vehicles. The Health and Safety Department, which Allison headed, was in charge of vehicle safety and of UPS’s compliance with the STAA and its implementing regulations. TR at 420-22. Finally, Luckie had no responsibility for dealing with hazardous materials being transported by UPS’s vehicles – that was also the province of the Health and Safety Department and designated responders who had the training and authority to investigate suspicious packages, call in outside hazmat providers, and shut down a facility. TR at 423-25. Luckie admitted that he had not taken this specialized training. TR at 252-53.

Luckie's only reference relating his job to UPS vehicles concerned UPS's response to post 9/11 fears of truck bombs. He testified that "we had to have a physical inventory of every UPS vehicle . . . and make sure on a daily basis that we could account for every one of our vehicles." TR at 113, 118. Luckie did not testify that he either conducted or kept such an inventory. Nor do we find any record evidence that this inventory had any direct effect on the safety of those vehicles.

We conclude that Luckie's administrative responsibilities did not directly affect commercial motor vehicle safety at UPS. Therefore, as a matter of law, he was not a covered employee under the STAA.

**(2) Even if covered, Luckie did not engage in protected activity under the STAA.**

The STAA protects employees who have filed a complaint or begun a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order," or who have testified or will testify in such a proceeding. 49 U.S.C.A. § 31105(a)(1)(A). Protection is afforded to activities ranging from the voicing of concerns to one's employer to the filing of formal complaints related to commercial motor vehicle safety. *Brink's*, 148 F.3d 179 n.6.

Under the complaint clause, 49 U.S.C.A. § 31105(a)(1)(A), the complainant must at least be acting on a reasonable belief regarding the existence of a violation. *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 02-STA-5, slip op. at 3 (ARB July 31, 2003). Thus, 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." *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 99-STA-37, slip op. at 5 (ARB Dec. 31, 2002).

Luckie must prove by a preponderance of the evidence that he engaged in protected activity, i.e., his complaints concerned a potential or actual violation of a commercial motor vehicle safety regulation or that he had a reasonable belief of such violation. Thus, protected activity has two elements: (1) the complaint itself must involve a purported violation of a regulation relating to commercial motor vehicle safety, and (2) the complainant's belief must be objectively reasonable.

The ALJ concluded that Luckie engaged in protected activity when he complained to his district manager, Martin, about the investigation into the cause of the fire and the potential dangers of possibly hazardous packages being unloaded. R. D. & O. at 12. Noting that an employee need demonstrate only a reasonably perceived violation of the underlying statute, the ALJ found that Luckie's concerns about the fire were "in good faith," particularly in the wake of 9/11. R. D. & O. at 13.

We do not disagree that Luckie's complaint to Martin was "in good faith." The issue is whether Luckie had a "reasonable belief" that UPS's or Martin's actions were in violation of the STAA or a STAA regulation.

Initially, we note that Luckie's complaint to OSHA did not refer to any motor vehicle safety standard, but stated only that as security manager, he was responsible for the investigation of safety and security, and was terminated during his investigation of a fire in the Montgomery facility. RX 23. Luckie later claimed, however, that his job duties included oversight and participation in investigations concerning the safety and health of UPS employees who were connected to the transit of packages over the interstate highways. TR at 75-76, 143. As security manager, he stated that his responsibility was to ensure that the October 30, 2001 fire was fully investigated so that the proper governmental notifications could be made. TR at 152-55.

Luckie testified that he knew of no statute, rule, or regulation that would be violated if UPS did not act on his concerns. TR at 249-53. Our review of the record demonstrates that Luckie's "good faith misgivings" about the fire were not in any way related to a violation of the STAA or its implementing regulations. Luckie expressed his concerns about the origin of the fire and the lack of investigation, but there is no evidence in this record that he complained to anyone about a violation of a commercial motor vehicle safety regulation, standard, or order.

Luckie testified extensively that he told UPS managers that the trailer from which the package was unloaded should have been isolated, and that UPS should have called in a hazmat responder to unload the trailer, taken samples of the burned materials to determine the cause, and shut down the facility to investigate further. TR at 142-3, 241-42, 247-48, 253-54, 259-60, 339-40, 431. But his investigator reported to him that all the trucks had been unloaded and left the facility that night only hours after the fire was extinguished. TR at 286-87. Thus, there was no further unloading of the truck with the offending package to investigate. Nor was there any way to determine which truck had contained the package that caught fire.

Luckie also stated that it was not his job to complete the hazmat reporting form, take samples of the burn debris, or call in the outside hazmat responders. TR at 255-59. He stated that he was not a trained hazmat responder and that he never visited the fire scene or saw the damaged packages. TR at 205-07, 252-53. Pressed on why he believed the fire required more investigation, when the fire department itself saw no need, he responded: "I just felt it should be investigated." TR at 254. Based on this evidence, we find that Luckie's personal opinion does not constitute a reasonable belief that UPS was violating the STAA by not investigating the cause of the fire.

Further, the fire itself did not implicate motor vehicle safety. The fire occurred on a conveyor belt inside a sorting facility, not in a truck or on a public highway. As we have said, the purpose of the STAA is to promote highway safety, encourage the safe operation and maintenance of commercial motor vehicles, and protect the health and safety of operators. *See* 128 Cong. Rec. S32,510 (1982). We fail to see how a package fire caused by a possible malfunction of a conveyor belt in a sorting center such as the Montgomery hub could endanger public safety on the highways. The record contains no evidence that a package fire in a sorting center has a direct effect on commercial motor vehicle safety.

Luckie argues on appeal that he had a “reasonable apprehension” that the safety and security of UPS employees, facilities, and property “may be at risk,” especially in the aftermath of 9/11. He contends that he reasonably perceived that without an adequate investigation, the required notifications could not be properly made, and that as a result safety could be compromised. Complainant’s Brief at 18. But Luckie did not complain to Martin, his supervisor, about the notification not being made or being incomplete. Hazmat incident notification to the appropriate authorities was not Luckie’s responsibility. It was the responsibility of the human resources manager, Allison, who testified that a certified HAZMAT responder made the proper hazmat notification and submitted it. TR at 426-29.

Luckie’s actions in attempting to investigate the fire further had no effect on motor vehicle safety. His concerns about the package that burned on the conveyor belt within the package sorting center were directed, as he testified, to the safety of the employees who continued the unloading process after the fire was put out. TR at 146, 253-55. His concerns about removing from the loading dock the trailer from which the package was unloaded were unreasonable because it could not be determined which trailer had contained the package. TR at 286, 333. His concerns about the cause of the so-called “suspicious” fire were similarly unfounded because the fire department itself concluded that the fire was not suspicious and permitted the employees to return to work within three hours. TR at 288, 330, see CX 10.

While Luckie may have thought that the fire could have had dire consequences, there is no evidence that he had a reasonable belief that those consequences would have affected motor vehicle safety. The record contains only Luckie’s speculation that there might have been other “suspicious” packages in the trucks being unloaded, that the fire might have been an intentional attempt to disrupt UPS operations, or that employees might have been hurt if they unloaded additional trucks after the fire.

We find that, based on the record, Luckie’s “might have been” scenario is insufficient to demonstrate that he had a reasonable belief that UPS was violating any safety regulations under the STAA. Because the record is devoid of evidence establishing a violation of the STAA or its implementing regulations, we conclude that Luckie, even if a covered employee, failed to establish that he engaged in protected activity. *Gage v. Scarsella Brothers, Inc.*, ARB No. 05-095, ALJ No. 05-STA-21, slip op. at 3 (ARB Aug. 31, 2006).

**(3) Martin and Hernandez knew of Luckie’s concerns about the fire; Luckie did not preponderate that UPS corporate staff was aware of the alleged protected activity.**

Luckie must prove by a preponderance of the evidence that those responsible for the adverse action were aware of the alleged protected activity. The ALJ made findings of fact establishing that Martin and Hernandez, Luckie’s supervisors, were aware of Luckie’s alleged protected activity on October 30, 2001. Substantial evidence in the record supports these findings.

The ALJ did not make findings of fact or conclude that UPS corporate security executives at headquarters were aware of Luckie's concerns about the fire. We find that the record is devoid of any evidence that corporate executives in San Francisco were aware of Luckie's alleged protected activity. We conclude that Luckie did not preponderate that these executives were aware of his concerns when they made the decision to offer Luckie a promotion and relocation to Mid-South. In fact, the decision to offer Luckie a promotion and relocation to Mid-South was made and communicated to Hernandez prior to the fire. TR at 557-58.

**(4) Luckie did not suffer an adverse action in “the form of the untimely nature of [employment] choices.”**

The ALJ determined that Luckie voluntarily resigned, R. D. & O. at 13, but also suffered an adverse action “on November 1, 2001,<sup>7</sup> when he was told that he must transfer immediately outside the district or take another position until a later time or separate from the company. . . ,” R. D. & O. at 12. The ALJ stated that the “untimely nature” of these choices related to his personal life was adverse since “it was confirmed in a memorandum that because of his domestic situation, his slated transfer would not take place until the year 2003.” *Id.* But the ALJ also found that Hernandez did not guarantee Luckie that he would not be relocated before 2003. R. D. & O. at 6. These findings are contradictory, in our view. The memorandum indicates clearly that while UPS had tried to accommodate Luckie and his personal life, he needed to be ready to relocate, and he “fully understood the circumstances” that would lead to such relocation. CX 27.

It is a fact that Hernandez and Martin, in the November 1 meeting two days after the fire, presented Luckie with three options related to his employment and that he was asked to make a decision within 24 hours. We disagree with the ALJ that the “timing” was an adverse action.

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<sup>7</sup> The parties assumed that Luckie's firing on November 9, 2001, constituted the adverse action in this case. But the ALJ determined that Luckie voluntarily resigned and that the adverse action occurred on November 1, 2001, when Martin verbally offered Luckie the three choices of relocation, demotion, or severance. R. D. & O. at 12. Luckie filed his complaint on May 8, 2002, the 180th day after the November 9, 2001 letter accepting his voluntary resignation. *See* 49 U.S.C.A. § 31105(b). If the adverse action were indeed the “untimely nature” of the choices Luckie was offered on November 1, 2001, then his May 8, 2002 complaint was untimely filed. *Thissen v. Tri-Boro Constr. Supplies, Inc.*, ARB No. 04-153, ALJ No. 04-STA-35, slip op. at 7 (ARB Dec. 15, 2005). UPS did not raise this argument before the ALJ or the ARB and has, therefore, waived it. *See Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 02-STA-50, slip op. at 3 (ARB Oct. 19, 2004) (STAA limitations period is not jurisdictional and therefore is subject to waiver).

*What constitutes adverse action?*

Not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996); *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 12 (ARB Feb. 29, 2000) (approving *Smart* and other cases that “make the unexceptionable point that personnel actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions or privileges of employment”); cf. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999) (the American with Disabilities Act, like Title VII, is neither a “general civility code” nor a statute making actionable ordinary tribulations of the workplace).

A whistleblower must prove by a preponderance of the evidence that the employer’s action was a “tangible employment action” that resulted in a significant change in employment status, such as firing or failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. See *Jenkins*, slip op. at 20; see also, e.g., *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 7-12 (ARB Nov. 27, 2002) (holding that an employer’s instructions, monitoring practices, break restrictions, and written criticism did not constitute adverse actions); *Ilgenfritz v. U.S. Coast Guard*, ARB No. 99-066, ALJ No. 99-WPC-3, slip op. at 8 (ARB Aug. 28, 2001) (holding that a negative performance evaluation, absent tangible job consequences, is not an adverse action); *Shelton v. Oak Ridge Nat’l Labs.*, ARB No. 98-100, ALJ No. 95-CAA-19, slip op. at 6-7 (ARB Mar. 30, 2001) (holding that in the absence of a tangible job consequence, a verbal reprimand and accompanying disciplinary memo are not adverse actions).

In deciding whistleblower complaints that the Secretary of Labor is authorized to adjudicate, we often have relied upon cases arising under Title VII of The Civil Rights Act of 1964. 42 U.S.C.A. § 2000e, *et seq.* (West 2003) See *Shelton*, slip op. at 10. Title VII’s anti-retaliation provision prohibits an employer from retaliating because of protected activity.<sup>8</sup> In *Burlington Northern & Santa Fe Ry. Co. v. White*, --- U.S. ---, 126 S. Ct. 2405 (June 22, 2006), the United States Supreme Court resolved a split among the Courts of Appeals concerning the scope of Title VII’s anti-retaliation provision. The Court first concluded that the anti-retaliation section “extends beyond workplace-related or employment-related retaliatory acts and harm.”<sup>9</sup> And more relevant for purposes of

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<sup>8</sup> “It shall be an unlawful employment practice for an employer to discriminate against” an employee or job applicant because that person “opposed any practice” that Title VII forbids or “made a charge, testified, assisted, or participated in any manner” in a Title VII investigation, proceeding, or hearing. 42 U.S.C.A. § 2000e-3(a).

<sup>9</sup> In doing so, the Court rejected arguments that the anti-retaliation provision should be construed together (*in pari materia*) with the Title VII’s substantive anti-discrimination provision. That provision makes it unlawful for an employer, because of an individual’s

Continued . . .

this case, the Court also held that a Title VII plaintiff bringing a retaliation claim must show that a reasonable employee or job applicant would find the employer's action "materially adverse." That is to say, "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." 126 S. Ct. at 2409. We will apply this standard to the facts herein.<sup>10</sup>

The ALJ was apparently concerned about the "coincidence" that two days after the fire Martin and Hernandez met with Luckie and informed him of three options related to his future employment. Luckie was asked to select an option within 24 hours. The ALJ found the "timing" to be adverse to Luckie's conditions of work.

But the record reflects that the November 1 meeting had been previously scheduled on other matters, and Hernandez decided, after learning of the relocation decision from corporate headquarters (prior to the fire on October 30, 2001) to offer Luckie the three options at that meeting. TR at 556-59. Apparently, the ALJ did not find the offer itself to be adverse but the "timing" to be adverse. It is not clear if the ALJ's concern was based on the short time frame given Luckie to make a decision or on the "coincidence" that the offer was made two days after the fire.

With regard to the first possibility, we disagree with the ALJ that the short time frame in which to make a decision was adverse to an employee of UPS. The record contains numerous accounts of the UPS promotion process involving managers, and UPS's promotion-from-within policy often involved very short notice for making a decision. *See supra*, nn. 2, 6. Applying the standard laid out in the *White* case, we conclude that a reasonable employee at UPS would not consider the short time frame materially adverse. If that were so, most of UPS's promotions and relocations could be considered adverse actions.

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race, color, religion, sex, or national origin, to "*fail or refuse to hire or to discharge*" or otherwise discriminate against any individual with respect to that person's "*compensation, terms, conditions, or privileges of employment*" or "deprive or tend to deprive any individual of *employment opportunities* or otherwise adversely affect his *status as an employee*" because of race, color, religion, sex, or national origin. 42 U.S.C.A. § 2000e-2(a) (emphasis added). The Court held, therefore, that because the language of the anti-retaliation section does not contain the substantive section's limiting words, italicized above, the former is not limited to workplace-related or employment-related retaliatory acts or harm. 126 S. Ct. at 2411-2414.

<sup>10</sup> Even though the events in this case occurred before *White*, when the United States Supreme Court decides a case and applies a new rule of law to the parties before it, other courts, and this Board, must apply the new rule retroactively to parties before them. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993).

The other possibility is that the ALJ concluded that the timing of the offer two days after the fire and Luckie's protected activity was adverse because it negatively affected Luckie's home life. But UPS is not required by STAA to time its promotions (and accompanying relocations) according to Luckie's home life.

The evidence shows that Luckie had known for some time that a promotion and relocation were in the works. TR at 224-29. It is evident that UPS knew the timing would be disruptive and that UPS attempted to accommodate Luckie's concerns by offering two other options – continued employment with UPS in the Birmingham area but in a different position with a lower pay grade until another promotion opportunity arose or resign with three months' severance pay. Through previous meetings with Woods and Hernandez, Luckie was well aware that staying in his security manager position in Birmingham was not an option and would prevent someone else from being promoted.

We conclude that the timing of the promotion offer and other options was not in itself an adverse action. We also conclude that a reasonable employee would not find UPS's timing for the meeting to be so harmful that the employee would be dissuaded from making a whistleblower complaint.

Luckie argues on appeal that the November 9, 2001 termination was an adverse action. Complainant's Brief at 19. The ALJ found, however, that Luckie "terminated" himself on November 9, 2001 by refusing any of the three options offered. R. D. & O. at 13. Because Luckie's employment with UPS ultimately ended, we will assume without determining that Luckie suffered adverse action.

**(5) Luckie did not prove by a preponderance of the evidence that there was a causal connection between the alleged protected activity and the adverse action.**

Finally, to succeed in a STAA discrimination complaint, Luckie must prove by a preponderance of the evidence that the adverse action was causally linked to his protected activity. The ALJ found an *inference* of causal connection between protected activity and adverse action based on the "proximity in time" between the two. Specifically he found "that the timing of Complainant's concerns over the fire and his sudden transfer option was not coincidental." R. D. & O. at 12. He then found that UPS's "attempt to put forth legitimate, non-discriminatory reasons for Complainant's abrupt removal as Alabama District Security Manager was pretext." He reasoned that the evidence "showed that prior to a transfer, an employee is usually interviewed for the new position and not terminated if he or she refuses the position offered. Martin was unhappy about Complainant's concerns over the origin of the fire, and the coincidence of his transfer immediately following the fire defies any explanation other than retaliation." R. D. & O. at 13. For these reasons, the ALJ concluded that UPS had taken adverse action/retaliated against Luckie in violation of the STAA.

We find that substantial evidence does not support the ALJ's findings. Evidence in the record and proper legal analysis require a conclusion that UPS proffered a

legitimate, non-discriminatory reason for its action on November 1, 2001, and Luckie's termination on November 9, 2001.

Prior to the fire, on October 19, 2001, Hernandez recommended to corporate headquarters security managers that Luckie be promoted to a larger district with more responsibility. TR at 551. The corporate security coordinator identified a position that became available on or about October 25 at Mid-South in Tennessee and needed a district manager to replace the outgoing manager. TR at 395-96. In accordance with UPS's promotion policy, the coordinator called Hernandez, prior to the fire, to inform him that Luckie had been chosen for the position. TR at 557-58. Hernandez was to inform Luckie and move him immediately. Because the fire had not yet occurred, Hernandez could not have known of any protected activity by Luckie when he recommended Luckie for a promotion. Nor did corporate security know of any protected activity by Luckie when it selected him and communicated its choice to Hernandez because the fire had not yet occurred.

Martin had no communication with corporate headquarters about Luckie and had no part in his selection for the Mid-South position. TR at 613-15. The November 1, 2001 meeting with Luckie and Martin had been scheduled on other matters before the fire, and Hernandez determined that there was no need to change the meeting date. Knowing that Luckie might have family-related concerns about a move at that time, Hernandez and Martin developed two additional options to accommodate his concerns. They told Luckie he had 24 hours to decide which option to accept.

Between November 1 and 9 Luckie had conversations with Woods and Martin, but ultimately refused to take any of the options. TR at 189-91. Instead, at the November 9 meeting he insisted that he intended to stay in his present job until the end of 2002 and left the room. Because he had been told this was not an option and he refused to select one of the proffered options, UPS sent Luckie a termination letter on November 9, 2001. Based on this evidence, we conclude that UPS proffered a legitimate, non-discriminatory reason for terminating Luckie's employment.

At this stage Luckie must adduce facts that if proven would establish that UPS's averred legitimate, non-discriminatory reason for transferring him was a pretext for discrimination.

In *Burdine*, the Supreme Court described the plaintiff's burden to prove unlawful discrimination, "[The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. In the absence of direct evidence of retaliation, a complainant may prove that the legitimate reasons the employer proffered were not the true reasons for its actions, but instead were a pretext for discrimination. *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 04-STA-18, slip op. at 14 (ARB May 27, 2007). To establish pretext, it is not sufficient for a complainant to show that the action taken was not "just, or fair, or sensible . . . rather he must show that the explanation is a phony reason." *Gale*

*v. Ocean Imaging*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 9 (ARB July 31, 2002) (citation omitted).

The ALJ found that UPS's reason was pretext. He reasoned that the evidence "showed that prior to a transfer, an employee is usually interviewed for the new position and not terminated if he or she refuses the position offered; that Martin was unhappy with Luckie for expressing his concerns about the fire; and the coincidence of his transfer immediately following the fire defies any explanation other than retaliation." R.D. & O. at 13.

The ALJ's reasons are not supported by substantial evidence in the record. First, regarding the statement that an employee is usually interviewed for the new position, the ALJ's own finding of fact number 15 states:

Respondent, by all accounts, is committed to a policy of promoting qualified individuals from within the Company; and when an employee accepts a management-level position, it is understood that he/she will be expected to accept periodic reassignments and promotions anywhere in the country. It is common for Respondent's managers to relocate on numerous occasions to multiple geographic locations throughout their careers. Also, unrefuted was testimony that when a management-level employee receives notification that he /she has been identified for reassignment, he/she is not informed of the specific location of the new position until he accepts the transfer.

R. D. & O. at 5.

This finding of fact does not square with the ALJ's finding that prior to a transfer, an employee is usually interviewed for the new position and not terminated if he or she refuses the position offered. Fact number 15 regarding the UPS process for promoting qualified individuals is consistent with the process proffered in its legitimate, non-discriminatory reason for terminating Luckie's employment. We find that fact number 15 is supported by substantial evidence in the record.

Second, the ALJ stated that Martin was unhappy with Luckie for trying to involve himself in the fire investigation decisions made by the plant engineering manager, the human resources manager, and presumably, Martin. We do not quarrel with the finding that Martin was unhappy with Luckie. She testified that she was "irritated" with him. But was she so irritated that she was motivated to take action to adversely affect Luckie's employment. We think not. Neither the ALJ nor Luckie provided any such evidence.

Luckie was a 25-years-plus employee with UPS. He received numerous promotions and good performance ratings over the years. The record has no evidence of any discord between Luckie and his supervisors or co-workers. UPS had many years of

experience invested in Luckie. It is not reasonable or even conceivable to believe that UPS would decide within a day or two of Luckie's "good faith" concern over the fire investigation to manipulate events so that Luckie would be, in effect, forced to "self terminate."

Third, the ALJ concluded that the timing of the meeting defied any other explanation than discrimination. Apparently, the ALJ did not carefully analyze the evidence to determine if there was a causal connection between the protected activity and the adverse action. We have done so and conclude that there is none.

The fire and alleged protected activity occurred on October 30, 2001. The evidence establishes that Martin knew about the protected activity but that she had no part in the selection of Luckie for the Mid-South position. TR at 321, 350. Hernandez recommended Luckie to corporate headquarters for a promotion and relocation prior to having any awareness of protected activity. There is no evidence that corporate managers had any knowledge of Luckie's complaints about the fire investigation when they selected him for the open Mid-South position. They communicated Luckie's selection directly to Hernandez who was to inform Luckie of his selection. This communication occurred prior to the fire and, of course, prior to any protected activity. We find there is no connection between the selection of Luckie, the presumed adverse action, and his alleged protected activity.

Hernandez called Martin to tell her that Luckie had been selected for the Mid-South position. He and Martin knew that Luckie might be concerned about a move at this time and so, in an attempt to accommodate his concerns, they developed two options in addition to the proposed promotion and relocation to Mid-South. One option was to stay in Birmingham and accept a lower graded and salaried position but remain on the promotion list to await another opportunity. The other option was to resign with three months' severance pay. Hernandez and Martin felt the promotion offer and the other two choices were three reasonable options for Luckie.

The ALJ was concerned that the November 1 meeting occurred so close in time to the protected activity on October 30 and 31. To him, that proximity defied any explanation other than discrimination. But the record discloses that the timing was coincidental since corporate security executives had made the decision in late October and prior to the fire to relocate Luckie with the intent of giving him a promotion. That decision was based on Hernandez's September recommendation and on Luckie's past good performance. Based on these facts, we find that temporal proximity is insufficient to prove a causal connection between the alleged protected activity and the adverse action on November 9, 2001. Thus, we conclude that the ALJ erred in his evaluation of the evidence in the record and in his legal conclusion that UPS violated the STAA.

## CONCLUSION

We have reviewed the record and find that substantial evidence as a whole does not support the ALJ's findings that Luckie was a freight handler or directly affected commercial motor vehicle safety. Therefore, we conclude as a matter of law that he was not a covered employee under the STAA.<sup>11</sup> Assuming coverage, substantial evidence also does not support the ALJ's findings that Luckie's complaints concerned motor vehicle safety violations or that UPS's reason for firing him was pretext. We conclude that Luckie failed to establish by a preponderance of the evidence that he engaged in protected activity or that such activity was the reason for UPS's adverse action. Based on these conclusions, we **DISMISS** Luckie's complaint.

**SO ORDERED.**

**DAVID G. DYE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

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<sup>11</sup> In light of our decision, we need not address the ALJ's findings regarding the award of damages nor his decision awarding attorneys fees.