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Issue Date: 27 September 2007

Case No.: 2006-STA-00042

In the Matter of:

JAMES MADDEN,
Complainant,

v.

MIDWEST TRANSPORT INC.,
Respondent,

APPEARANCES:

James Madden,
Pro se

John S. Elmore, Esq.,
For the Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 ("Act" or "STAA"), 49 U.S.C. § 31105, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules.

The Complainant, James Madden ("Complainant" or "Mr. Madden"), filed a complaint with the Occupational Safety and Health Administration, United States Department of Labor, on January 30, 2006, alleging that the Respondent, Midwest Transport Inc., ("Respondent" or "Midwest Transport") discriminated against him in violation of 49 U.S.C. § 31105. (ALJX 1; ALJX 2).[1] The Secretary of Labor, acting through a duly authorized agent, investigated the

[1] In the Recommended Decision and Order, "ALJX" refers to exhibits 1 through 8 admitted into the record and offered by the Administrative Law Judge, "RX" refers to Respondent's exhibits 1 and 2, and "TR" refers to the pages in the hearing transcript.

complaints and on June 26, 2006, found no reasonable cause to believe that the Complainant was terminated in violation of the STAA. (ALJX 2).

The Complainant filed objections to the Secretary's findings by way of a notice of appeal dated July 25, 2006. (ALJX 3). A formal hearing was held before the undersigned on November 15, 2006, in Chicago, Illinois. (TR 1). All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder.

The findings of fact and conclusions of law set forth in this Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered.

ISSUE

The issue in this case is whether Midwest Transport took an adverse action against Complainant in retaliation for his alleged protected activities.

Based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Testimonial Evidence

1. James Madden

Mr. Madden testified that he was an experienced truck driver of approximately twenty-three years. (TR 27). He has performed a variety of driving jobs, including working for UPS, where he states he drove over two and one-half million accident free miles. (TR 28). He stated he worked for mostly major companies, where time was "of the essence" and he was always on time unless there was an emergency. (TR 28).

Mr. Madden began working for Midwest Transport on December 6, 2005 under a contract the Respondent had with the United States Postal Service ("USPS"). (TR 29). The Complainant was to report directly to Kathy Williams ("Mrs. Williams"), a Dispatcher for Midwest Transport in Barkeyville, Pennsylvania. He was hired for a "run" from Elk Grove, Illinois to Stoney Ridge, Ohio. (ALJX 1). He was required to pick up a truck in Elk Grove at 9:00 a.m. and deliver it and its contents to a relay point in Stoney Ridge where he would switch trailers with another driver and return to Elk Grove. (ALJX 1). Complainant stated he was to perform this same run everyday, five days a week. *Id*. He understood that it was very critical to always be punctual when delivering US mail. (TR 79).

Complainant began his first run on Tuesday, December 6, 2005. He reported to work at 9:00 a.m. and was paired with a trainer who was to "show him the ropes." (TR 31). Complainant stated that he did not complete the Tuesday run until 11:00 p.m. that night. He drove a total of ten and a half hours but was on-duty for thirteen hours.[2] (TR 31). On Wednesday, Complainant testified he was on-duty twelve and three-quarter hours and on Thursday he was on-duty fifteen hours. (TR 32). On Friday, Complainant stated that a severe storm hit the area where he was scheduled to drive. (TR 33). Due to adverse weather conditions, he was on-duty twenty-four hours with no place to sleep because he was in a tractor the whole time with no sleeper berth. *Id*. Complainant stated that he received a phone call from Ralph Williams, one of his supervisors, thanking him for his extra hours and advising him to make sure his paperwork was "up to snuff." (TR 33). According to Mr. Madden, he was told to "drop an hour here or there" in his log book in order to remain within the legal amount of hours. (TR 33). On Saturday, he worked twelve and one-half hours. (TR 35). On Sunday he worked five and a half hours and was off-duty until Tuesday morning. (TR 35). On Tuesday, he worked fourteen and a half hours and then an additional two hours on Wednesday morning. (TR 35). In an eight day time span, Mr. Madden was on-duty a total of one-hundred and five hours. (TR 37).[3]

Mr. Madden testified that he called his immediate supervisor, Mrs. Williams, on Tuesday, December 13 at 9:00 a.m., stating that his tractor would not start. He spoke with her again that afternoon and notified her that there was a slight change in his run, requiring him to drive further than scheduled. (TR 41). According to Mr. Madden, he mentioned during that phone call that he was driving too many hours. Later that evening, at approximately 10:00 p.m. Central time, Complainant testified that he called Mrs. Williams a third time and told her that he would not be able to make the 9:00 a.m. run because he was "over hours." (TR 41). He stated that he would not arrive back in Illinois until after 2:00 a.m. and he needed some sleep. Mr. Madden stated that Mrs. Williams responded by simply stating, "I'll talk to you later." (TR 47).

Mr. Madden attempted to call his supervisor several more times on what he assumed was her cell phone. (TR 46). He received only her voicemail. *Id*. According to the Complainant, he made it perfectly clear in the messages left on the voicemail that he would not be "pulling out" at 9:00 a.m. Wednesday morning because he needed to go home and go to sleep. (TR 48). He also stated that he would not drive again until his hours of service were in compliance. (TR 50). He admitted that he did not mention in the messages when he would be able to report back to work. (TR 50). According to the Complainant, Midwest Transport was well aware of the number of hours he was driving because he had had "numerous discussions" with his supervisors about the hours. (TR 60).

Mr. Madden arrived at his home at about 4:00 a.m. Wednesday morning and went to sleep. (TR 50). He testified that when he awoke he called Mrs. Williams at approximately 12:30 p.m. Central time. *Id.* Mrs. Williams asked him where the keys to the tractor were located but did not offer any other information about the status of the Complainant's job or what time he

[2] On-duty time means all the time a driver is required to be in readiness to work until the driver is relieved from work; this includes time spent loading and unloading the vehicle. 49 C.F.R. § 395.2.

[3] Mr. Madden's testimony regarding his hours of service is corroborated by his daily log book, which was submitted as part of the record. (ALJX 7).

would need to report to work. (TR 113). The following day, Complainant was informed he no longer had a job with the company. (TR 53).

2. John Elmore

John Elmore is the Vice President, General Counsel, part Owner, and Director of Postal Operations for Midwest Transport. Although he is the attorney representing Midwest Transport in this complaint, he was also the head of the Operations Committee who made the decision to terminate Mr. Madden and he testified at the hearing regarding the events surrounding the complaint. (TR 62).

Mr. Elmore stated that Midwest Transport handles contracts with the USPS that require drivers to be very punctual because they are part of a relay team. Each driver in the relay team depends on the other drivers to be punctual in order for the mail to be delivered on time. Mr. Madden was part of a three-leg relay that required teamwork in order to be successful. (TR 67). Mr. Elmore stated that it was important for all of Midwest Transport's drivers to be on time because postal contracts are not permanent in nature. The USPS can choose not to renew a contract if the service is poor or can simply cancel the contract even before it is completed if there is a "defaulting performance." (TR 68). If the USPS cancels a contract due to default, this can potentially impair a company's ability to get new contracts with other government agencies for up to one year. (TR 69).

According to Mr. Elmore, Midwest Transport would never fire anyone because of an "hours of service" issue. (TR 69). When the company receives the drivers' log books, it scans them into a computer and computes any service violations. If a driver shows problems with completing routes in a timely fashion, Midwest Transport may place a global positioning satellite telephone in the truck in order to monitor the problems. (TR 70). Mr. Elmore further testified that Midwest Transport is committed to "running things legally." (TR 72). The company has had two Department of Transportation ("DOT") audits in the last three years and has maintained a satisfactory record. *Id*. Although the DOT did find some violations, Mr. Elmore stated that the company "exhibited no pattern or nothing that would indicate an attempt to do something wrong, and consequently, no fines or penalties have been assessed." (TR 72).

Mr. Elmore states that the Complainant was discharged solely due to his failure to inform his supervisors of his intentions regarding his scheduled run on Wednesday morning. (TR 96). However, he also testified about several other incidents surrounding the Complainant's discharge. As Mr. Madden testified, there was a snow storm on the night of December 8 and the early morning hours of December 9, 2005. Mr. Madden was driving during these hours and got stuck on an off-ramp in the snow. He called his supervisors at about 4:00 o'clock in the morning for a tow service. According to Mr. Elmore, all of his other truck drivers had no problem with the snow storm. (TR 65). During that same week, Mr. Madden also complained about the type of truck he drove and he requested a truck with a sleeper compartment on it. Only about half of the company's 450 trucks are equipped with sleeper berths. *Id*. From these actions, Mr. Elmore concluded that "there might be a little bit of a performance issue" on the Complainant's part, but they did not form the basis for his termination. (TR 96).

Mr. Elmore testified that Mr. Madden had his logs with him and the Operations Committee and his immediate supervisors did not know the exact hours that he was driving. (TR 72). Although he admitted that Mr. Madden's supervisors knew that he had a "log problem," they were also aware that the Complainant was driving during a major snow storm and the regulations allow for extra driving hours during adverse weather conditions. (TR 70). His supervisors had no way of knowing the exact amount of hours that he was driving. (TR 70).

According to Mr. Elmore, the three early morning phone calls Complainant assumed were to Mrs. Williams' cell phone were actually to the office at Barkeyville, which was closed at those hours. (TR 75). In the messages, which were replayed later for Mr. Elmore, Complainant stated that he needed eight hours of sleep but never said anything about whether or not he would be able to pull his load Wednesday morning or when he would be legal to drive again.[4] (TR 74). As the Chairman of the committee that decided to terminate Mr. Madden's employment, Mr. Elmore stated that the decision to terminate was based solely on the Complainant's failure to communicate his intentions regarding the load he was scheduled to run Wednesday morning at 9:00 a.m. *Id*. Mr. Elmore stated that if Mr. Madden had simply informed his supervisors that he would not be able to drive again until Friday or Saturday, then the company could have adequately dealt with the problem. The Complainant's supervisors were under the impression that the Complainant should have been able to drive again at 12:00 noon Wednesday based on the hours he drove the previous day. (TR 77). When the Complainant failed to show up by 12:00 noon Wednesday, Midwest Transport had to reroute other drivers in order to pick up the Complainant's load and as a result the load was over six hours late. (TR 79).

Documentary Evidence:

1. Log Records

The Complainant's daily log records from December 6, 2005 to December 14, 2005 were submitted as part of the record. (ALJX 7). These records corroborate the testimony Mr. Madden provided regarding his hours of service during these dates. He began working December 6, 2005 and was on-duty over 90 hours in six consecutive days before his first day off on December 12, 2005. He then worked fourteen and one-half hours on December 13 and another two hours on December 14. (ALJX 7).

Applicable Law:

The employee protection provisions of the Act prohibit disciplining or discriminating against an employee because he had refused to drive in certain circumstances:

> (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges because

[4] Mr. Madden raised a hearsay objection to statements made by Mrs. Williams since she was not available to testify. I accord no weight to any hearsay statement made by Mrs. Williams. At issue here is whether or not Mr. Madden properly informed his supervisors what time he would be able to return to work. The statements made by Mr. Madden were recorded on Midwest Transport's answering machine and I find Mr. Elmore's recount of the messages to be credible.

> (A) the employee, or another person at the employee's request, had filed a complaint…
>
> (B) the employee refuses to operate the vehicle because
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health…

49 U.S.C.A. § 31105(a). These activities, which are referred to as protected activities, are the only activities for which redress is available under the Act. Different wrongful activities by an employer may be redressed under different statutes, but those statutes are not at issue in this proceeding.

To prevail in a whistleblower complaint filed under the STAA, the complainant must establish that his employer took adverse employment action against him because he engaged in protected activity. Under the traditional burden shifting analysis, the complainant must initially prove a *prima facie* case by showing: 1) that he engaged in protected activity; 2) that his employer was aware of his protected activity; 3) that he suffered an adverse employment action; and 4) the existence of a causal link or nexus raising an inference that he was retaliated against because of his protected activity. If the complainant makes out a *prima facie* case, the burden shifts to the employer to articulate a legitimate business reason for taking the adverse employment action, and the complainant must then show that the articulated reason is a pretext and that the employer discriminated against him because of his protected activity. *Shannon v. Consol. Freightways*, ARB No. 98-051, ALJ No 1996-STA-15 (ARB April 15, 1998).

The Administrative Review Board has held that in a case tried fully on the merits, it is not particularly useful to analyze whether the complainant has established a *prima facie* case. Rather the relevant inquiry is whether the complainant established by a preponderance of the evidence that the reason for his discharge was his protected safety complaints. *See Pike v. Public Storage Companies, Inc.*, ARB No. 99-072, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999). *See also Johnson v. Roadway Exp.*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000). Therefore I will not specifically address whether Complainant has established a *prima facie* case, but I will consider the elements of a *prima facie* case to determine whether the Complainant was discharged due to his protected activity.

A. Protected Activity and Adverse Employment Action

In the present case, Mr. Madden engaged in protected activity when he reported to his immediate supervisor that he was "over hours" and could not make the Wednesday morning run at 9:00 a.m. (TR 41). Refusing to drive when the contemplated run would cause the driver to violate the Federal hours of service regulation is protected activity under subsection (a)(1)(B)(i) of the Act. *Trans Fleet Enterprises Inc., v. Boone,* 987 F.2d 1000, 1004 (4th Cir. 1992). [5] The

[5] 49 C.F.R. § 395.3, titled "Maximum driving time for property-carrying vehicles" provides, in relevant part, "No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive…(1) More that 11 cumulative hours following 10 consecutive hours off duty" 49 C.F.R.

driver must inform the employer that his refusal to drive is based on safety issues. *Paquin v. J.B. Hunt Transport, Inc.*, Case No. 93-STA-00044, Sec. Dec. and Ord., July 19, 1994, slip op. at 5; *Asst Sec. and Waldrep v. Performance Transport, Inc.,* 93-STA-23 (Sec'y Apr. 6, 1994), slip op. at 8 (complainant's remark to employer about no longer driving "illegally" sufficient to establish protected refusal to drive).

Mr. Elmore has acknowledged that the Complainant called his supervisor at 11:00 p.m. and reported that he was over hours. (TR 74). This call was sufficient to establish the Complainant's protected refusal to drive. The Respondent has not disputed the Complainant's testimony in this regard and has admitted that the Complainant was over hours and could not legally drive at 9:00 a.m. Wednesday morning. *Id*.[6] Therefore, I find that the Complainant engaged in activity protected under the STAA and the Respondent was aware of this protected activity.

The Complainant's employment was terminated. Therefore, the Complainant has demonstrated that he was subjected to adverse action.

B. Causal Connection

The Complainant has also established a causal connection between his protected activity and his termination. In establishing a *prima facie* case, a complainant need only raise the inference that his engaging in protected activities caused the adverse action. The proximity in time between protected conduct and adverse action alone may be sufficient to establish the element of causation for purposes of a *prima facie* case. Thus, where a complainant was discharged within a week of raising safety complaints about a truck, the Secretary found that the complainant raised the inference of causation. *Stiles v. J.B. Hunt Transportation, Inc.*, 92-STA-34 (Sec'y Sept. 24, 1993).

Here, the Complainant was fired the day after he complained to management that he was over hours and would not be able to make the next morning's run. Although Respondent argues that Mr. Madden's protected activity had nothing to do with why he was fired, it is improper to consider Midwest Transport's reasons for terminating the employer when deciding whether the Complainant has presented a *prima facie* case. *See Moravec v. HC & M Transportation, Inc.,* 90-STA-44 (Sec'y Jan. 6, 1992), *appeal docketed*, No. 92-70102 (9th Cir. Feb. 18, 1992). After careful consideration of the evidence and the parties' arguments, I conclude that the Complainant

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395.3(a)(1) or for any period after "having been on duty 70 hours in any period of 8 consecutive days." 49 C.F.R. 395.3(b)(2) "Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours. " 49 C.F.R. 395.3(c)(2) (2003). If a driver has exceeded the 70 hour rule, the driver may not utilize the 34-hour restart and must continue to operate under the provisions of section 395.3(b) to calculate the hours available under the 70-hour rule. Memorandum from the U.S. Department of Transportation Federal Motor Carrier Safety Administration to the Field Administrators (Nov. 25, 2003) (on file with the author).

[6] Mr. Elmore does argue that the Complainant should have been able to return to work at 12:00 noon on Wednesday, December 14 because that would have allowed him 10 hours of off-duty time. However, Mr. Madden's log sheet indicates he was on-duty well over 70 hours in a period of 8 consecutive days. Since he had exceeded the 70 hour rule, he was not entitled to the 34-hour restart and therefore he was still over hours on Wednesday afternoon at 12:00 noon.

has established a connection between his protected activity and termination based on the close proximity of the two actions.

C. The Ultimate Burden of Persuasion

Since Mr. Madden has established a *prima facie* case, the burden of production shifts to Midwest Transport to articulate a legitimate, nondiscriminatory reason for the adverse action. The employer "need not persuade the court that it was actually motivated by the proffered reasons." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981). The evidence, however, must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id.* at 255.

Once the respondent offers a legitimate, nondiscriminatory reason for its adverse action, the burden shifts to the complainant to demonstrate that respondent's actions in fact stemmed from discriminatory motives. *Leveille v. New York Air Nat.l. Guard*, 1994-TSC-3 and 4 at pp. 7-8 (Sec.y., Dec. 11, 1995); *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 at p. 6 (Sec.y., Feb. 15, 1995). Therefore, the complainant carries the ultimate burden of proving that the adverse employment action was in retaliation for his protected activity.

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. 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." *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-18 (ARB May 24, 2007) (citing *Kahn v. U.S. Sec'y of Labor*, 14 F.3d 342, 349 (7th Cir. 1994)). *Accord Ransom v. CSC Consulting, Inc*., 217 F.3d 467, 471 (7th Cir. 2000) ("[t]his court does not sit as a super-personnel department and will not second-guess an employer's decisions"); *Skouby v. The Prudential Ins. Co.*, 130 F.3d 794, 795 (7th Cir. 1997) (same); *Bienkowski v. American Airlines, Inc.,* 851 F.2d 1503, 1507-1508 (5th Cir. 1988) (discrimination statute "was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers;" statute cannot protect employees "from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated").

Mere evidence of proximate timing of the protected activity and adverse action is inadequate to sustain complainant's ultimate burden of proof by a preponderance of the evidence. *Poll v. R. J. Vyhnalek Trucking*, ARB No. 99 110, ALJ No. 1996 STA 35, slip op. at 5-6, (ARB June 28, 2002). Complainant must introduce evidence to prove that respondent's proffered legitimate, nondiscriminatory reasons for discharge of complainant were pretextual. *Bergeron v. Aulenback Transportation Inc.*, 91-STA- 38 (Sec'y June 4, 1992). *See Williams v. Southern Coaches, Inc.*, 94-STA-44 (Sec'y Sept. 11, 1995) (holding that although the complainant's transgression appeared mild and hardly deserving of discharge, the complainant failed to show by a preponderance of the evidence that the respondent's stated reason for the discharge was pretextual and therefore dismissing the complaint).

Complainant may demonstrate that the reasons given by respondent were a pretext for discriminatory actions by establishing that discrimination was more likely the motivating factor or by showing that the proffered explanation was not worthy of credence. *Zinn v. University of Missouri*, 1993-ERA-34 at p. 4 (Sec.y., Jan. 18, 1996). The Administrative Review Board has considered several factors when determining whether the respondent's legitimate business reasons were pretextual. One factor considered is whether the respondent has followed company procedures in disciplining the complainant. *Hornbuckle v. Yellow Freight System, Inc.*, 92-STA-9 (Sec'y Dec. 23, 1992) (holding that the respondent's warning letter and three-day suspension of the complainant were issued in retaliation for the complainant's protected activity when the company's discipline procedures did not call for such severe action). In addition, evidence of inconsistent application of company policies to similarly situated employees has been held to be evidence of retaliatory motive. *Herman Bros. v. NLRB*, 658 F.2d 201 (3d Cir. 1981); *Nix v. Nehi-RC Bottling Co., Inc.*, 84-STA-1 (Sec'y July 13, 1984). Furthermore, evidence that the employer routinely encouraged drivers to make written reports of safety violations is highly relevant evidence that militates against a finding of retaliatory motivation. *Andreae v. Dry Ice, Inc.*, 95-STA-24 (ARB July 17, 1997).

Courts also consider the severity of the business interest when determining whether the adverse action is pretextual. It is the employer's subjective perception of the circumstances surrounding its business interest which is the critical focus of the inquiry. *Allen v. Revco D.S., Inc.*, 91-INA-9 (Sec'y Sept. 24, 1991). The issue is whether the legitimate business interests outweigh the policies underlying the STAA in the particular circumstances of the case. *See Squier Distributing Co. v. Local 7, Intern. Brotherhood of Teamsters*, 801 F.2d 238, 242 (6th Cir. 1986) ("[t]he question whether employees' protests should be protected by the Act involves the balancing of sensitive competing interests, and the employees' method of protest is relevant as one factor affecting this balance").

In this case, I find that Respondent has articulated a legitimate, nondiscriminatory reason for its adverse employment action against the Complainant. According to Mr. Elmore, Midwest Transport decided to terminate Mr. Madden's employment due to his failure to inform his supervisors what time he would be able to return to work. Midwest Transport's delivery times and schedules are set by the USPS. (TR 14). It is imperative for the Respondent's drivers to be punctual at all time or its contracts will not be renewed or even cancelled. (TR 16). Complainant admits that he failed to inform the Respondent exactly what time he would be able to return to work. (TR 50). Without this information, it was difficult for the Respondent to determine the best course of action for completing Mr. Madden's run and, as a result, the delivery was more than six hours late. (TR 79). Midwest Transport's desire to have adequate information about the status of its drivers is a legitimate business interest. The burden shifts to Complainant to demonstrate that Respondent's proffered motivation was pretextual and its actions stemmed from discriminatory motives. *Leveille v. New York Air Nat.l. Guard*, 1994-TSC-3 and 4 at pp. 7-8 (Sec.y., Dec. 11, 1995); *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 at p. 6 (Secy., Feb. 15, 1995).

Although Mr. Madden has established a *prima facie* case, I find that he has failed to meet his burden of proof in establishing that the Respondent's proffered motivation was pretextual. Mr. Madden asserts that the close timing of the protected activity and his discharge prove the

Respondent's motivation was pretextual; however, proximate timing alone is inadequate to sustain Complainant's ultimate burden of proof. *Poll*, slip op. at 5-6.

Mr. Madden also argues that he informed his immediate supervisor that he would be late for the 9:00 a.m. load and therefore Midwest Transport's argument that it fired the Complainant for failure to notify them of his intentions is pretextual. (TR 18, 19). Mr. Madden's argument does have some merit. He called his supervisor and informed her at approximately 10:00 p.m. Central time Tuesday night that he would not be able to make the 9:00 a.m. run on Wednesday morning. (TR 41). Therefore, Midwest Transport had notice that the run would not be completed on time and could have found another driver to take over the run. Similar to the complainant in *Williams*, Mr. Madden's transgression of not informing his supervisor of the *exact* time he would be returning to work appears mild and hardly deserving of discharge in light of the fact that Midwest Transport had notice that Mr. Madden would at least be late for the load. *Williams v. Southern Coaches, Inc.*, 94-STA-44 (Sec'y Sept. 11, 1995). However, Mr. Madden must do more than show that Midwest Transport's actions were unfair or irrational. *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-18 (ARB May 24, 2007). The Complainant must show by a preponderance of the evidence that the Respondent's stated reason for the discharge was pretextual.

Mr. Madden has not offered any evidence that Midwest Transport deviated from its company procedures in discharging him or that Midwest Transport inconsistently applied the same company policies to similarly situated employees. Although the Complainant testified that his supervisors at Midwest Transport encouraged him to falsify his hours on at least one occasion (TR 33), this statement alone is not sufficient to show his discharge was pretextual. He failed to present any evidence that Midwest Transport routinely encouraged its employees to drive illegally. Mr. Elmore testified that the company provided Mr. Madden with a truck equipped with a sleeper berth when he requested one, although only half of its trucks are so equipped. Furthermore, Mr. Madden's schedule, if completed during normal weather conditions, could have easily been performed by the Complainant within a legal amount of hours per day. When problems occur with the schedules, Midwest Transport attempts to rectify the issues and it uses computerized scanners to ensure compliance with the regulations. Based on these actions, I find Mr. Elmore's testimony that the company does everything in its power to ensure that its drivers are "legal" at all times to be very credible.

I find that the Complainant has failed to show by a preponderance of the evidence that Respondent's proffered reason for his termination was pretextual. The record as a whole compels the conclusion that Respondent discharged the Complainant because he failed to adequately inform his supervisors of his intentions regarding his scheduled load. Complainant was not discharged for refusing to drive while over hours.

Accordingly, I find and conclude that Respondent's discharge of the Complainant did not violate Section 405 of the STAA.

RECOMMENDED ORDER

For the above stated reasons, IT IS HEREBY RECOMMENDED that the complaint of James Madden under the Surface Transportation Assistance Act is DISMISSED.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE: This Recommended Decision and Order, along with the administrative file, will be forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.