U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 16 January 2007

In the Matter of:
MICHAEL NOETH
Complainant

v. Case No.: 2006-STA-00034

INDIANA WESTERN EXPRESS, INC.
d/b/a IWX MOTOR FREIGHT
Respondent

APPEARANCES:
James Arneson, Esq.
For the Complainant

Kevin Austin, Esq.
For the Respondent

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

DENYING THE COMPLAINANT'S CLAIM

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the "Act" or "STAA"), 49 U.S.C § 31105, and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters. This matter is before me on the Complainant's request for hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration ("OSHA") after investigation of the complaint.

SUMMARY OF THE EVIDENCE

The Complainant's Testimony

The Complainant testified that he was hired on November 2004 and was terminated on January 23, 2006. (TR at 49) On the 19th of January, the Complainant was scheduled to begin a delivery originating from Shepherdsville, KY, and ending at Springfield, MO. There was a pre-loaded trailer ready for the Complainant at the Shepherdsville terminal. The Complainant had not weighed the pre-loaded trailer at the station but did so after driving a few miles to a nearby

truck scale. The weight of the rear axle was 34, 720 lbs.[1] According to the Complainant the gross weight of the truck was legal but not the axle weights. The weight received at the scale stop showed that the rear axle was 34,720 pounds. This was reported to IWX. The Complainant testified that the Respondent told him to rescale the load and move the tandems back. The Complainant also noted that the load was not "California legal."

In adhering to company policy, the Complainant testified that he was following the policies and procedures of the company. He testified that the company's handbook states that the driver should ensure that the trailer tandems are legal in every state prior to leaving the shipper's facilities. When told of the fact that the load was not "California legal", the dispatcher suggested modifying the v-hole until the axle weights were in compliance. (TR at 58) The Complainant did not see any way, given his experience or knowledge, in doing this without breaking the seal. (TR at 59) Breaking the seal would allow for readjustment of the internal contents of the trailer. The Complainant reported the excess weight to Leslie Chastain, the safety officer. (TR at 61) The assertion was that the load was not "California legal", but was also in violation of statutory limits to drive to Missouri. The Complainant did not make the adjustments and drove to Missouri. After arriving in Springfield, Missouri, the truck was driven by a relay team to Kingsman, Arizona. (TR at 64) The load was driven from Kingman, AZ to Carson California by Michael George. (TR at 65) During the entire route the seal was the same – number 662602, a strong indication that the seal was never broken. The complainant stated that there was no way to make the load California legal without rearranging the load inside the trailer.

The Complainant's termination letter stated that his services were no longer needed. (TR at 67) In a separate letter to Mr. Tim Proffitt, additional reasons were cited for the termination. Some of the reasons were that the Complainant was a problem employee and his layoff was part of a reduction in force. (TR at 71) In a letter sent to the Complainant's potential employer, IWX had stated that the complainant had "voluntary quit." As the evidentiary record indicates, he was, in fact, terminated on January 23, 2006. Mr. Noeth's testified that his annual review did not show anything negative in his record. The company's driving record shows that the Complainant failed inspections even though he had not failed any inspections as evidenced by the Department of Transportation report. (TR at 76-80) Several inconsistencies in the Respondent's records were highlighted by the Complainant.

On Cross-Examination:

The Complainant had an accident following his annual review in October 2005, of which he was at fault. (TR at 119) The load of January 20, 2006 was legal from Kentucky to Missouri once the Complainant moved the tandems back two holes, and it would have been legal all the way to the California border. (TR at 120) The Complainant worked for RBX for one month after leaving IWX. The Complainant testified that he had filed a safety violation against RBX and was terminated as a result. Regarding the January 20, 2006 load, the Complainant first communicated with IWX at 10:01 in the morning on that same day, while he was on duty. At 1:22 p.m. the Complainant left the shipper and started his "driving time"; however, the Complainant had recorded his off duty time as 11:45 p.m. on his log sheet. (TR at 126) The Complainant also admitted that he earns, in addition to the 38 cents per mile rate, an additional 4 cents per mile for pulling a HAZMAT load.

On questioning by the ALJ:

The Complainant averaged about 10,000 miles per month for the entire period of time that he worked for IWX.

[1] TR at 55

Testimony of Florence Noeth

The Complainant's wife testified that she was with the Complainant at the time of an accident which occurred in Arizona in 2005.[2] (TR at 35) The accident involved the Complainant's truck and another passenger vehicle. The passenger vehicle did not remain at the scene of the accident. The police did not issue a citation, and the company did not attribute fault to the Complainant indicating that the accident was a "hit and run, non-preventable" in the Complainant's annual review and driving summary record. (TR at 40)

On cross-examination, Counsel for the Employer highlighted the police report's indication that the Complainant was driving too fast although the police never issued a citation for speeding. (TR at 43) Attempting to question her credibility, the Employer, over the objections of the Complainant's attorney, noted that the witness had been convicted of a Class B misdemeanor of making a false police report in Green County, Missouri. (TR at 45) There is no indication as to the specific charge that the witness was convicted of.

Testimony of Cathy Carl[3]

Ms. Carl served as the dry freight dispatcher as IWX.

Direct Examination by Complainant:

Ms. Carl dispatched the Complainant on the load in Shepherdsville, KY. She was told that the load was not California legal. She responded by telling Complainant to slide it and make it legal; however, she testified that she did not know whether sliding would make it California legal. Ms. Carl testified that she had instructed the Complainant to slide the trailer tandem slider back one position. He never did scale it back. Minus one would have been -- he could have slid it at minus one and scaled it and he never did do that. He automatically went to the minus two position. So, I told him to bring it to Springfield, I'd have somebody look at it. The Complainant was to go to Springfield and have someone look at it to ensure it was legal. The load was not in California position at the scale. Ms. Carl admitted that company policy required drivers to ensure that when scaling, loads were legal with the trailer tandem slider set in the California position. Ms. Carl stated that the load was always legal fro travel from Kentucky to Missouri and from Missouri to Arizona.

Direct Examination by Respondent:

Ms. Carl stated that the load was legal to travel from Kentucky to Springfield and from Springfield to Arizona. The witness testified that she had experienced difficulties in supervising the Complainant. In her conversation with the Complainant, Ms. Carl asked the Complainant to slide the tandems under the trailer in order to take the excess 720 pounds off of the tandems and make them legal. The Complainant responded that he could not make it California legal and wanted to take it back to the shipper. IWX has an agreement with the shipper not to take loads back. We have the facilities in Springfield to do that, so we ask that it be taken back to Springfield. Ms. Carl testified about several text messages that were sent back and forth to the Complainant regarding actions to be taken in response to the overweight tandems. The number

[2] "TR" refers to the transcript of the hearing which was held in Springfield, Missouri, on October 5, 2006 before ALJ Daniel Solomon.

[3] There was an agreement between the parties that Ms. Cathy Carl would serve as both a Complainant witness as well as a Respondent witness. TR at 143.

of messages required to resolve the situation was typical of the Complainant, Ms. Carl testified. Ms. Carl also testified as to the occurrence of a reduction in force in the fall of 2005 – Spring 2006, due to a slowdown in business.

Cross-Examination by Complainant:

The witness reiterated her prior testimony regarding company policy to ensure that loads were California legal prior to leaving scales and that the Complainant was simply following company policy.

Cross-Examination by Complainant:

The witness also testified that the company handbook states that drivers should follow the direction of IWX management.

Testimony of Rebecca Stover Dieterich

Direct Examination by Complainant:

Rebecca Stover is a driver manager at IWX. Ms. Stover testified that she recommended termination of Mr. Noeth because he was "…a constant problem, he argued about nearly everything." (TR at 169) Ms. Stover testified as to the Complainant's status as a full time driver and with regards to the logistics of scheduling drivers.

Direct Examination by Respondent:

Ms. Stover testified that IWX was undergoing a reduction in force in the fall of 2005 – Winter 2006. Ms. Stover was approached by Mr. Louis Stevens about terminating drivers. Ms. Stover made a list of potential drivers to be terminated and this list was compiled prior to the January 2006 load that has been the subject of testimony in this case. The Complainant's name was on the list of drivers to be terminated because the Complainant was troublesome, difficult to work with, and was one of the 10 drivers out of fifty that had been selected as the most difficult to work with.

Testimony of Rebecca Leslie Chastain

Direct Examination by Complainant:

Ms. Chastain is an adjuster in safety for IWX. She is also responsible for work comp, non-occupational accidents, HAZMAT. When asked about her understanding of "California legal", Ms. Chastain defined it as the length of the wheelbase. Ms. Chastain was not aware of the length requirements, points of entry for loads out of Kingman, AZ into California, whether there was a weight station there, or if there are scales at that location. Ms. Chastain testified that the Complainant had expressed his concern that IWX was attempting to make him run illegal into California. Ms. Chastain verified that he was to bring the load to Missouri and doing that was legal. Ms. Chastain also testified that she did not understand the company handbook as requiring drivers to be "California legal" when scaling if they were not driving into California. This interpretation is contrary to the Complainant's understanding. The load had to be driven ultimately to California but that did not mean that it had to be California legal at this particular time.

Direct Examination by Respondent:

Ms. Chastain testified that she had had a conversation with the Complainant about permission to smoke on loads and the Complainant had several arguments concerning this issue with Ms. Chastain. The witness also testified that the company was downsizing and reducing the number of trucks, staff, and drivers. Ms. Chastain also stated that, to her knowledge, she had not been aware of any driver being reprimanded, terminated, or disciplined because of voicing a

safety concern. According to Ms. Chastain, the Complainant did not take kindly to following directions.

Testimony of Todd Staples

Direct Examination by Complainant:

The witness was referred to several complaints that were received by the company regarding potential size/weight violations. Mr. Staples did not have any knowledge as to these violations. The witness also testified that he had no knowledge as to a "termination list".

Direct Examination by Respondent:

Mr. Staples is a fuel manager with IWX motor freight and also in charge of road control, which manages some of the dispatch functions. Mr. Staples manages all of the fuel purchasing for the terminals. He also makes sure that inbound and outbound traffic at the Springfield terminal arrives on time. Mr. Staples was not aware of any threats of discipline or termination being made to the Complainant regarding the allegation of safety violations. Mr. Staples was also not aware of any problems with past safety violations or citations received in California.

Testimony of Lewis Stevens

Direct Examination by Complainant:

Mr. Stevens is Vice President of Administration and Safety. He testified that he is responsible for all safety issues out on the road, insurance, accidents, policy establishment, and policy administration. He has been employed with IWX since 1989. (TR at 203) He testified that, in his opinion, the seal on this particular load was broken, but could not say for certain whether this was the case. There are instances, Mr. Stevens testified, where the bills do not say "seal intact", but where the seal was not broken.

Direct Examination by Respondent:

Mr. Stevens testified that as of April 14, 2006, there were 460 drivers and that the company terminated between 75-80 drivers between December 2005 and April 1006. MR. Stevens also testified that the company has in place procedures for handling driver concerns regarding safety issues, possible violations, and complaint handling. The facilities in Springfield and Arizona were equipped to handle the problem of overweight tandems. Mr. Stevens also testified that the complainant's concern about possible violations played no part in his termination.

Testimony of David Brown

Direct Examination by Complainant:

Mr. Brown served as the safety director for RBX, the company that the Complainant worked for following his departure from IWX. Mr. Brown stated that he terminated the Complainant after 30 days of work. The reason for termination was due to log violations. (TR at 238) Mr. Brown testified that the Complainant alleges that he was terminated because he reported safety violations.

Testimony of Mark Twaddle

Direct Examination by Respondent:

Mr. Twaddle testified that he worked in the Department of Road Control where he was responsible for directing and assisting drivers as well as taking care of dispatch duties. Mr. Twaddle, at the time of the hearing, had been employed at IWX for three years. He testified that

the Complainant had contacted him on January 20, 2006, concerning the weight of the trailer on a load that the Complainant was to bring from Kentucky to Missouri. The Complainant wanted to know whether the load, as it sat, could be brought into Springfield. The witness recalled telling the Complainant to go back to the shipper. The witness was not aware of the special contractual arrangements that IWX had regarding the policy of not returning loads to the shipper. As Mr. Twaddle testified, IWX had several facilities that the trailer could have gone into to make changes prior to entering California. These include the Springfield, Missouri, and Kingman, Arizona facilities. Mr. Twaddle also denied making any statements regarding termination if employees voice concerns about the "California legal" issue. (TR at 243-244)

Cross-Examination by Complainant:

The witness denied that it may be easier to correct loads at the shipper's location as opposed to the Springfield and Kingman facilities.

Testimony of Robert Hogbin

Direct Examination by Respondent:

Mr. Hogbin was employed in the trucking industry from 1976 until May 2005. Beginning in 1996 Mr. Hogbin began working as a trainer in the Safety Department. Mr. Hogbin testified that the fifth wheel on a trailer can be slid back and forth to make changes to a load. This process probably takes about 15-20 minutes to complete and results in a slight change in terms of the weight. A slight change indicates anywhere from a couple of hundred to three hundred pounds. The other way you can make a change is to slide the tandems back and that makes the weight go forward to the tractor. If you slide the tandems forward the weight goes back to the trailer. You can also get permission from the shipper to break the seal and reposition the load and reseal it. Sometimes the weight shifts from driving down the road. It could be anywhere up to a thousand pounds of movement. The fuel determines how much weight you can have on the tractor. In terms of the January 20, 2006 load it is possible to move the tandems, along with fuel and the settling of freight to get the weight readjusted or redistributed. The Kingman facility has the capability to remove the seal and make the necessary changes.

Cross-Examination by Complainant:

Mr. Hogbin agreed with the Complainant's counsel that he had no idea whether any of the procedures or actions that he spoke of had been undertaken. It was mere speculation. If the seal is the same from the point of origin to the point of destination there is no reason to believe that it had been broken. Therefore, we do not know if there were any attempts to correct this load.

Rebuttal Testimony of Michael Noeth

Direct Examination by Complainant:

The Complainant testified that he was never made aware of the special contractual arrangements that IWX had with the shipper. He also testified that in the past he had been required to drive a load out of Kingman, Arizona into California and the load was illegal. The Complainant also testified that he reported the load as not being California legal at the terminal in Kingman, Arizona. The terminal in Kingman said they had nothing to do with it and that he should contact dispatch in Springfield. The Springfield dispatch stated that he should go with it or he would be terminated. The Complainant also testified that the seal number is generally entered by each driver that handles that load. When the driver reports the seal that is an indication that the seal is not broken. The fact that it was not signed off means that the seal was not broken.

DISCUSSION

The Respondent is engaged in transporting cargo and maintains a place of business in Springfield, MO. (RX 0001) The Respondent is a "person" within the meaning of 49 U.S.C. § 31101 and 49 U.S.C. § 31105 and a "commercial motor carrier" within the meaning of 49 U.S.C. § 31101, and it is therefore covered by the Act. The Respondent employed the Complainant as a driver of a commercial vehicle in its commercial motor carrier business, and he drove the Respondent's trucks over highways on interstate routes. In the course of this employment, the Complainant had a direct effect upon motor vehicle safety. He is therefore covered by the Act.

APPLICABLE LAW

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

(a) Prohibitions:

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

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

(B) the employee refuses to operate a vehicle because:

(i) The operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(ii) The employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. 49 U.S.C. § 31105(a).

Prima Facie Case

Claims under the STAA are adjudicated pursuant to the standard articulated in ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973). Under that framework, the complainant must initially establish a prima facie case of retaliatory discharge, which raises an inference that the protected activity was likely the reason for the adverse action. ***Moon v. Transport Drivers, Inc.***, 836 F.2d 226, 229 (6th Cir. 1987); *see also* ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 248, 253 (1981). To establish a prima facie case of retaliatory discharge under the Act, the complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of an adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of the employer. ***Moon***, *supra*.

Protected Activity

Under 49 U.S.C. § 31105 (a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. ***Yellow Freight System, Inc. v. Martin,*** 954. F.2d 353, 356-57 (6th Cir. 1992); *see also* ***Lajoie v. Environmental Management***

Systems, Inc., 1990-STA- 00031 (Sec'y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. ***Nix v. Nehi-R.C. Bottling Co.***, 1984-STA-00001, slip op. at 8-9 (Sec'y July 4, 1984). An employee's threats to notify officials of agencies such as the Department of Transportation or the Federal Motor Carrier Safety Administration may also be protected under the STAA. ***William v. Carretta Trucking, Inc., 1994-STA-00007 (Sec'y Feb. 15, 1995)***.

Such complaints may be oral rather than written. ***Moon v. Transport Drivers, Inc.***, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed. *See* ***Clean Harbors Environmental Services, Inc. v. Herman***, 146 F.3d 12, 22 (1st Cir. 1998) (holding that the complainant's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

Under the STAA, an employee can also engage in protected activity by refusing to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health" or because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. §§ 31105(a)(1)(B)(i)-(ii). These two types of refusal to drive are commonly known as the "actual violation" and "reasonable apprehension" subsections. ***Eash v. Roadway Express, Inc.***, ARB No. 04-036, slip op. at 6 (Sept. 30, 2005) (*citing* ***Leach v. Basin Western, Inc.***, ARB No. 02-089, slip op. at 3 (July 31, 2003)). Since the Complainant has made no allegation that he ever refused to operate a vehicle, however, these two provisions are inapplicable in this case.

Adverse Employment Action

The employee protection provisions of the Surface Transportation Assistance Act provide that "[a] person may not discharge an employee" for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). There is no dispute that the Complainant was terminated by the Respondent on January 23, 2006. (RX 122) Thus, it has been established that he suffered adverse employment action within the meaning of the Act in this case.

Causal Connection

A causal connection between the protected activity and the adverse employment action may be circumstantially established by showing that the employer was aware of the protected activity and that adverse action followed closely thereafter. *See* ***Couty v. Dole***, 886 F.2d 147, 148 (8th Cir. 1989). Thus, close proximity in time can be considered evidence of causation. ***White v. The Osage Tribal Council***, ARB No. 99- 120, slip op. at 4 (Aug. 8, 1997). While temporal proximity may be used to establish the causal inference, it is not necessarily dispositive. ***Barber v. Planet Airways, Inc.***, ARB No. 04-056, slip op. at 6 (Apr. 28, 2006). When other, contradictory evidence is present, inferring a causal relationship solely from temporal proximity may be illogical. ***Id.*** Such contradictory evidence could include evidence of intervening events or of legitimate, nondiscriminatory reasons for the adverse action. ***Id.***

Rebutting the Complainant's Prima Facie Case

If the Complainant can carry his burden of establishing a prima facie case, the burden shifts to the Respondent to rebut that prima facie case. The Respondent can do so by articulating, through the introduction of admissible evidence, a legitimate, nondiscriminatory

reason for its employment decision. The employer "need not persuade the court that it was actually motivated by the proffered reasons," but the evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 248, 254-255 (1981). "The explanation provided must be legally sufficient to justify a judgment for the [employer]." Id. If the Respondent is successful, the prima facie case is rebutted, and the complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the respondent was a mere pretext for discrimination. ***Id.*** at 255-256.

The Respondent is a trucking company that is engaged in the transportation of goods on interstate highway routes throughout the United States. The Respondent is a "person" within the meaning of 49 U.S.C. § 31101 and 49 U.S.C. § 31105 and a "commercial motor carrier" within the meaning of 49 U.S.C. § 31101, and it is therefore covered by the Act. The Respondent employed the Complainant as a driver of a commercial vehicle in its commercial motor carrier business, and he transported loads of goods over highways on interstate routes. In the course of this employment, the Complainant had a direct effect upon motor vehicle safety. He is therefore covered by the Act.

Protected Activity

Under the STAA, an employee can engage in protected activity by "refus[ing] to operate a vehicle because . . .the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C.A. § 31105(a)(1)(B)(i). An employee can also engage in protected activity by "refus[ing] to operate a vehicle because. . .the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. § 31105(a)(1)(B)(ii). These two types of refusal to work are commonly known as the "actual violation" and "reasonable apprehension" subsections. *See* ***Eash v. Roadway Express, Inc.***, ARB No. 04-036, ALJ No. 1998-STA-28, slip op. at 6 (ARB Sept. 30, 2005), *citing* ***Leach v. Basin Western, Inc.***, ARB No. 02-089, ALJ No. 02- STA-5, slip op. at 3 (ARB July 31, 2003). Where subsection (1)(B)(i) deals with actually existing violations, "section (1)(B)(ii) deals with conditions as a reasonable person would believe them to be." ***Eash***, ARB No. 04-036, slip op. at 6. A complainant can establish protected activity using either of these two subsections. ***Id.*** Determining when the STAA protects a refusal to drive requires an analysis of the specific circumstances of the refusal to drive under each of these subsections. ***Id.***, *citing* ***Johnson v. Roadway Express Inc.***, ARB No. 99-011, ALJ No. 1999-STA-5, slip op. at 7-8 (ARB Mar. 29, 2000).

There is no dispute that the Complainant's employment with the Respondent ended on January 23, 2006, and that the Complainant, shortly prior to the termination, had voiced concerns and raised complaints about the legal status of the load that he was to deliver to Springfield, Missouri. The issue is whether the Complainant was engaged in a protected activity and whether the termination of employment constituted an adverse employment action as a retaliatory measure for the Complainant's protected activity.

The Complainant, Michael W. Noeth, was hired by respondent in November 2004 as a truck driver. The Complainant was paid 34 cents a mile plus 6 cents per mile per diem. (CX3) On January 20, 2006, the Complainant was to deliver a load from Shepherdsville, Kentucky to Springfield, Missouri. Following delivery of the load to Springfield, the load was then to be driven by another trucker into California. After stopping at a scale station following pick up at the shipper's location, the Complainant noticed that the weight on the load was excessive. The

Complainant alleges that the load was not legal in any state. (TR at 54) Mr. Noeth pointed to the Company's handbook of policies and procedures, which requires that loads be "California legal" before they leave the shipper's facilities. The Complainant allegedly was told to make it "legal" over the Arizona line. The Respondent alleges that the Complainant's load was legal for delivery into Missouri; the only route that the Complainant was responsible for on this particular trip.

To establish a prima facie case of retaliatory discharge under the Act, the complainant must first prove that he engaged in protected activity under the STAA. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. ***Yellow Freight System, Inc. v. Martin,*** 954. F.2d 353, 356-57 (6th Cir. 1992); *see also* ***Lajoie v. Environmental Management Systems, Inc.***, 1990-STA- 00031 (Sec'y Oct. 27, 1992).

The Complainant argues that the load he was responsible for delivering from Shepherdsville, Kentucky to Springfield, Missouri was not "California legal" and that the Respondent's own company handbook reminds drivers that, "[w]hen scaling, please remember we need to be legal with the trailer tandem slider set in the California position." (CX 13, page 156). Mr. Noeth realized, shortly after picking up the load, that the weight on the rear axles was 34, 720 pounds; several hundred pounds in excess of the California limit. (TR at 20) The Complainant knew the load was destined for Carson, California, although he would not be the one delivering the load.

The Complainant called dispatch and reported this. (TR at 21) Company policies state that corrections should be made at the shipper's location because once the seal is broken after receiving shipment, responsibility shifts from shipper to transporter. When scaling, "any corrections must be made prior to leaving the general area." (CX13) The driver's handbook also states that the drivers "picking up cargo were to make certain that the weight is below 34,000. (TR at 3)[4] This policy appeared to be an explicit attempt at preventing the shift in responsibility from shipper to transporter. The company informed the Complainant to just make it legal for Missouri and to bring the truck back to Missouri. (TR at 21) The Complainant was to accomplish this by moving the axle back two points. (TR at 21) Upon receipt of load in Missouri, the load would then be made "California legal" and driven to Carson, California by another driver.

The Complainant also testified as to previous deliveries into California where the load was not legal. (TR at 254-255) The load was delivered to Carson, California on January 23, 2006, the same day that the Complainant received notice of his employment termination. The seal on the load had remained the same, thus indicating that no attempt had been made to shift the inside contents of the load as to make it California legal. (TR at 22-23) This was the same seal that was on the load in Kentucky raising the presumption that the load may not have been shifted to be legal in California. The Complainant was told to move the tandems two holes back to make it Missouri compliant. The Employer alleges that the Complainant did not do so.

The Respondent's brief asserts that the Complainant fails to establish the first element of the cause of action because Complainant had actual knowledge that the load in question was not in any actual violation for the trip he was to take.[5] Furthermore, the Employer concedes that the

[4] *See In the Matter of Michael Noeth v. Indiana Western Express*.

[5] *See* page 11 of Respondent's brief of December 12, 2006. (The Employer alleges that no cause of action can arise from these facts because there is no actual violation of any regulations, orders, laws, or standards in the jurisdictions in which the Complainant was to drive.)

evidence does not indicate a refusal on the part of the Complainant to drive. The Complainant must actually refuse to operate a vehicle to be protected under the refusal to drive provision of the STAA. ***Williams v. CMS Transportation Services, Inc.*** 94-STA-5 (Sec'y Oct. 5, 1995) Nevertheless, an actual violation must form the basis of any claim. Since none has been put forth, the Respondent argues, the Complainant's cause of action must fail.

The STAA whistleblower provision protection extends beyond just complaints relating to federal motor vehicle safety regulations, but any relevant motor vehicle regulation, standard or order. *See* ***Chapman v. Heartland Express of Iowa***, ARB No. 02 030, ALJ No. 2001 STA 35 (ARB Aug. 28, 2003) In testimony, Ms. Chastain, adjuster in safety for the Respondent, conceded that the load left the terminal in Shepherdsville, Kentucky without being California legal; a violation of company policy. (TR at 149) The load was ultimately delivered to Carson, California on January 23, 2006. The Complainant maintains that the lack of a broken seal conclusively proves that the load was never made California legal and the violation actually occurred as the load was driven into California. The Respondent denies this allegation. The Respondent's argument that the Complainant's cause of action is without merit is premised on distinctions between actual and potential violations. Such distinctions are not applicable in the jurisdiction in which this case arises.

Protection under the whistleblower provision of the STAA is not dependent on actually proving a violation. *See* ***Yellow Freight Systems****, supra*. It is sufficient that the Complainant had a reasonable belief that the violation could occur and it was related to a safety issue. There is no requirement that the Complainant determine the probability of occurrence or whether the alleged violation does, in fact, constitute a legal violation. *See* ***Barr v. ACW Truck Lines., Inc.*** 91-STA-42 (Sec'y Apr. 22, 1992) (A complainant related to safety violation is protected under section 2305(a) of the STAA even if the complaint is ultimately determined to be meritless.) Therefore, I find that the Complainant has successfully established the first element of his *prima facie* case; he was engaged in a protected activity under the STAA.

Adverse Employment Action

Although some of the Employer's records indicate that the Complainant quit his position voluntarily, the preponderance of the evidence, including testimony by the Respondent's representatives, establishes that the Complainant's employment was terminated by the Respondent on January 23, 2006. Any employment action by an employer which is unfavorable to the employee constitutes an adverse action. *See* ***Long v. Roadway Express, Inc.***, 88-STA-31 (Sec'y Mar. 9, 1990) Moreover, the fact that an employer may have had a legitimate non-discriminatory reason for the action does not alter the fact that an adverse action took place. Regardless of the employer's motivations, the fact that such an action occurred is sufficient to establish that an adverse employment action was undertaken by the employer. ***Id.*** The Complainant has met his burden of proving that an adverse employment action was taken.

Causal Link Between Adverse Employment Action and Protected Activity

Direct evidence is not required for a showing of causation. *See* ***Clay v. Castle Coal & Oil Co., Inc.***, 90-STA-37 (Sec'y Nov. 12, 1991). While the Complainant alleges that his termination is direct evidence of retaliation, nothing in the record demonstrates a direct link between the Complainant's concerns regarding the legality of his load and the Respondent's decision to terminate the Complainant's employment soon afterwards. Circumstantial evidence is sufficient to prove the presence or absence of a motive. Close proximity between the protected activity

and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action. *See* ***Kovas v. Morin Transport, Inc.***, 92-STA-41 (Sec'y Oct. 1, 1993) The Complainant's employment was terminated on January 23, 2006, three days after he delivered a load to Springfield, MO. This is the same load which prompted Complainant to raise concerns regarding the legality of the load. Temporal proximity such as this raises a presumption that there is a causal nexus between the protected activity and the adverse action.

The proximity in time between the protected conduct and adverse action alone may be sufficient to establish the element of causation for purposes of a *prima facie* case. *See* ***Couty v. Dole,*** 886 F.2d 147 (8th Cir. 1989) (temporal proximity sufficient as a matter of law to establish the final element in a prima facie case of retaliatory discharge); *See also* ***Stiles v. J.B. Hunt Transportation, Inc.***, 92-STA-34 (Sec'y Sept. 24, 1993) (where the Complainant was discharged a week after he raised safety concerns, the Secretary found that the Complainant raised the inference of causation.) In the present case, the termination occurred so close on the heels of the Complainant's protected activity that it raised an inference as to the Respondent's motive for such adverse action. *See* ***Bergeron v. Aulenback Transportation, Inc.***, 91-STA-38 (Sec'y June 4, 1992) (inference is raised when the discharge immediately follows protected activity.)

In an STAA whistleblower proceeding, a *prima facie* case requires the Complainant to show that the Respondent was aware of the protected activity when the adverse action was taken. *See* ***Melton v. Morgan Drive Away, Inc.***, 90-STA-41 (Sec'y April 26, 1991) Neither party disputes the knowledge of the Respondent as to the regulatory guidelines which control trucking functions, and especially, the California statutes concerning the legal limitations on weight and size of loads.

Because the Complainant raised safety issues regarding the load he picked up on January 20, 2006 and was subsequently discharged on January 23, 2006, there is an inference that it was motivated by the Complainant's allegations of illegal loads. Because there is close proximity between these two events, there is the inference that Respondent's adverse employment action was motivated by the Complainant's allegations. Any legitimate, non-retaliatory reasons the Respondent had for terminating the Complainant's employment with the company will not be a consideration at this stage of the analysis. In considering whether the Complainant has established a prima facie case under STAA, it is improper to consider the Respondent's reasons for the adverse action, regardless of their legitimacy. *See* ***Moravec v. HC & M Transportation, Inc.***, 90-STA-44 (Sec'y Jan. 6, 1992); ***Barr v. ACW Truck Lines, Inc.***, 91-STA-42 (Sec'y Apr. 22, 1992); ***Hernandez v. Guardian Purchasing Co.***, 91-STA-31 (Sec'y June 4, 1992).

The Complainant has established a reasonable inference of retaliatory discharge.

An employer attempting to rebut a prima facie case of discrimination must produce evidence that the adverse action was taken for a legitimate, nondiscriminatory reason. The employer "need not persuade the court that it was actually motivated by the proffered reasons." *See* ***Texas Dept. of Community Affairs v. Burdine,*** 450 U.S. 248, 254 (1981).

Rebutting the Complainant's Prima Facie Case

Since the Complainant has established a prima facie case of retaliatory discharge, the burden shifts to the Respondent to rebut that prima facie case. The employer "need not persuade the court that it was actually motivated by the proffered reasons," but the evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)

The Employer asserts that the Complainant was terminated as part of a reduction in force, that management initiative for the reduction in force had begun prior to the protected activity, that the Complainant was on a list of drivers to be laid off because of his driving record, that the Complainant's had a difficult working relationship with staff members, and his refusal to accept directions from management and supervisors . All of these represent legitimate non-discriminatory reasons for the Complainant's adverse employment action, the Respondent asserts.

The Respondent's burden is one of articulation, not proof. The Employer is never under the burden to prove a legitimate non-discriminatory, non-pretextual reason for its actions. *See* ***St. Mary's Honor Center v. Hicks***, 113 S.Ct. 2742 (1993); ***Shute v. Silver Eagle Co.***, 96-STA-19 (ARB June 11, 1997).

Burden of Proof - Pretext

Once the Respondent has offered a legitimate non-discriminatory reason for its actions, the burden shifts back to the Complainant to demonstrate that the Respondent's proffered reasons for the adverse employment action were a pretext for discrimination. *See* ***Burdine*****,** 450 U.S. at 253; ***Moon v. Transport Drivers, Inc.,*** 836 F.2d 226, 229 (6th Cir. 1987); ***Reeves v. Sanderson Plumbing Products, Inc.***, 530 U.S. 133, 147-148 (2000).

The Respondent cites several reasons for terminating the Complainant's employment. In testimony, Vice President of Administration and Safety for Respondent, Mr. Louis Stevens, stated that between December 2005 and April 2006, somewhere between 75-80 drivers were terminated, including Mr. Noeth. (TR at 218) Respondent's records show a total of 81 drivers terminated between December 5, 2005 and March 1, 2006. (RX 121) Given a staff of 470-480 drivers, this represents approximately a 20% reduction in force. Neither the Complainant nor the Respondent submitted evidence to show the number of drivers hired, if any, during this time period. The Employer alleged that two other drivers were terminated as part of the lay-off at the same time that the Complainant was laid off.

The respondent also attributed the termination of Complainant to a negative driving record. The evidence, although inconsistent, shows that the Complainant was involved in three accidents: April 4, 2005, July 19, 2005, and January 14, 2006; the first and the last one listed as preventable. The Complainant and Respondent dispute how many of the accidents were preventable; Respondent asserts that two were preventable while the Complainant testifies that one was preventable and was, in fact, told by the Respondent that he would only be classified as having been at fault for one of the accidents. (TR at 72-78, CX 28-page 116, RX 128-129).

The Respondent also alleges that the Complainant was difficult to work with. Witnesses for the Respondent testified that communication between the Complainant and dispatchers would be more extensive and longer in duration because the Complainant would not always follow direction or orders like other drivers. (TR at 152, 188).

I have reviewed the evidence in the record and noted the respective allegations and assertions put forth by both parties in this case. The Complainant has demonstrated a *prima facie* case of retaliatory discharge and the Respondent has proffered evidence that the adverse employment action was based on a legitimate, non-discriminatory, non-pretextual reasons. In their respective briefs, both parties urge that I carefully consider the opposing party's assertions and find that it is without legal merit. The evidentiary record is, at times, inconsistent on both sides of this case. In his brief, the Complainant does not specifically address pretext. He alleges that the Employer engaged in a "campaign of misinformation". The Employer's assertion that the

Complainant had voluntarily quit employment can be seen as suspicious for pretext, but the Complainant does not articulate this in his brief. The fact that an employer offers shifting explanations for its challenged personnel action can serve to demonstrate pretext. ***Vieques Air Link, Inc. v. USDOL***, 437 F.3d 102, (1st Cir. Feb. 2, 2006) (per curiam). I can, where appropriate infer pretext from the facts. A complainant need not proffer direct evidence that unlawful discrimination was the real motivation. Instead, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." ***Reeves v. Sanderson Plumbing Prod., Inc.***, 530 U.S. 133, 146 (2000).

However, I note that at this stage of the analysis, the Complainant bears the burden of proof in demonstrating that any proffered reason given by the Respondent is merely a pretext. I note that two other employees were terminated as part of the alleged workforce reduction in this case, but the Complainant did not develop this evidence for disparate treatment or set forth a basis why other employees were retained and he was laid off. On the record I advised the parties to address this issue. TR 258. The Complainant filed a proposed findings and a reply to the Employer's proposed findings but did not set forth a basis for a finding on this issue. I find that the "voluntary quit" issue and inconsistencies have not been shown, to a reasonable degree of probability, to be evidence of animus or pretext.

Both parties have proffered compelling arguments against and for a finding that there was a retaliatory discharge against the driver. Nevertheless, the Complainant has not shown that the reasons given for the employment action taken against the Complainant were merely a pretext. As such, I find that the Complainant has failed to meet his burden of demonstrating that the Respondent's actions were merely a pretext for retaliatory discharge.

Mixed Motive

In the alternative, I find that even if the Complainant maintained his burdens, the Employer's evidence shows that the Complainant would have inevitably been part of the Employer's reduction in force. ***Calmat Co. v. U.S. Dept. of Labor***, 364 F.3d 1117, (9th Cir., April 19, 2004).

This finding might be otherwise, but again, the Complainant failed to establish that was treated differently than those employees who were retained.

Conclusion

The Complainant has been able to establish a prima facie case of retaliatory discharge. The burden of proof then shifted to the employer to advance legitimate, non-discriminatory reasons for discharging the Complainant. The Respondent put forth various legitimate reasons for the discharge and, once again, the burden shifts back to the Complainant to prove, by a preponderance of the evidence, that the proffered reasons given by the Respondent were merely a pretex. The Complainant loses this case because there were no legitimate, non-discriminatory reasons for the discharge.

RECOMMENDED ORDER

It is **ORDERED** that the complaint of Michael Noeth is **DISMISSED**.

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DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically 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 (30) 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.