

U.S. Department of Labor

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Issue Date: 02 January 2008

Case No.: 2007-STA-00019

In the Matter of

PETER KLOSTERMAN
Complainant

v.

E.J. DAVIES, INC.
Respondent

Appearances:

Joseph J. Ranni, Esquire
For Complainant

Richard M. Ziskin, Esquire
For Respondent

Before: ADELE H. ODEGARD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Jurisdictional Basis

This proceeding involves a complaint filed under the “whistleblower” employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the Act), as amended, 49 U.S.C. § 31105 (formerly 49 U.S.C. § 2305), and its implementing regulations, 29 C.F.R. part 1978.¹ The Act protects employees who report violations of commercial motor vehicle safety rules or refuse to operate vehicles in violation of those rules from retaliatory acts of discharge, discipline or discrimination.

Procedural History

According to the record, the Complainant filed a Complaint with OSHA officials in New York City on October 17, 2006. See 29 C.F.R. § 1978.102.² His Complaint alleged he was terminated from employment by Fred Vordermeier, Jr., owner of the Respondent company, E.J. Davies, Inc., on December 20, 2005, after refusing to drive a truck with a flat tire and after the

¹ Unless otherwise noted, all references are to Title 29, Code of Federal Regulations (C.F.R.).

² As discussed below, the exact date on which the Complainant filed his complaint remains at issue.

owner refused the Complainant's request for a substitute vehicle.^{3,4} On January 3, 2007, the OSHA Regional Administrator, acting on behalf of the Secretary of Labor, dismissed the Complaint, based on a determination that it was untimely, having been filed more than 180 days after the Complainant was terminated from employment. See 49 U.S.C. § 31105(b); § 1978.102(d). The Regional Administrator also found there was no evidence to indicate the Complaint had been filed on an earlier date, as the Complainant had alleged.

On February 9, 2007, in accordance with § 1978.105, the Complainant objected to the Secretary's Findings and requested a formal hearing before the Office of Administrative Law Judges.⁵ Appended to the Complainant's letter were unsigned copies of letters his counsel had sent to OSHA officials on September 5, 2006 and October 17, 2006; the latter letter averred the Complainant had been refused employment with a different firm in retaliation for his complaints about the Respondent.

Subsequently, this matter was assigned to me.⁶

By Order dated February 22, 2007, I ordered the Complainant to file, within three business days, a pre-hearing "Statement of Position" addressing the issue of the timeliness of his Complaint. Additionally, I directed the Complainant to state which of the Respondent's actions he considered adverse. See § 1978.106(d).

³ The Complainant's written complaint is not in the record. This description of the gravamen of his Complaint is extracted from the Secretary's findings and dismissal order, dated January 3, 2007. In pertinent part, the findings state: "In brief, the Complainant alleged that Respondent terminated his employment on December 20, 2005 because he refused to drive a tractor trailer with a flat tire after he raised the safety issue to the Respondent." Findings and Dismissal Order, at 1.

⁴ Hereinafter, "Respondent" refers to the company, E.J. Davies, Inc.

⁵ This section permits a party's objections and request for hearing to be made within 30 days of receipt of the Secretary's findings, and states the date of the postmark of the party's communication is the date of filing. § 1978.105(a). The record indicates the Secretary's findings were mailed on January 5; the date the Complainant received them is not in the record. However, the record reflects that the Office of Administrative Law Judges received its copy of the Secretary's findings on January 12. Complainant's objections and request for hearing was postmarked February 6, 2007 and stamped "received" on February 9. The envelope in which the Complainant's communication was sent is not in the record. Based on the evidence of record, I presume the Complainant received the Secretary's findings the same day as the Office of Administrative Law Judges: that is, January 12, 2007. I find, therefore, that the Complainant's objection and request for a hearing were timely.

⁶ The following abbreviations are used in this Opinion: "CX" refers to Complainant's Exhibits; "RX" refers to Respondent's Exhibits; "T." refers to the transcript of the hearing. The Complainant's exhibits are numbered; the Respondent's exhibits carry letters. At the hearing, Complainant's Exhibits 1 through 10 and Respondent's Exhibits A through X were received into evidence. Both parties submitted the Local 282 collective bargaining agreement (CX 6; RX-A), and the Complainant's February 2, 2006 affidavit (CX 8; RX-N). To simplify, I will refer to these exhibits throughout this Decision as Complainant's exhibits (CX 6, 8).

In response to my Order, on March 1, 2007, through counsel, the Complainant filed his "Statement of Position," which included an affidavit, dated February 2, 2007, in which he made the following assertions:⁷

1. On March 29, 2006, he called the OSHA office in Queens, New York and made an oral complaint regarding the Respondent's actions.
2. He sent a letter, detailing his complaints, to OSHA after the March 29, 2006 conversation, but neglected to keep a copy.
3. He made several later phone calls to the OSHA office regarding his complaint.
4. Later he requested that his counsel make contact with OSHA. Upon his counsel's initial contact, counsel discovered OSHA had no record of the Complainant's Complaint.

Regarding the issue of which of the Respondent's actions were considered adverse, the Complainant's counsel responded: "Commencing on December 20, 2005 and continuing to date, Complainant has not been assigned work by E.J. Davies despite his being the Union Shop Steward assigned and the most senior man at the location."

In its response to the Complainant's "Statement of Position," the Respondent argued that the Complainant's claim was untimely, and noted there was no written evidence of a timely claim. The Respondent also asserted that the Complainant failed to establish that he suffered any adverse employment action.⁸ Attached to the Respondent's response was the affidavit of Fred Vordermeier, President of E. J. Davies, Inc., dated December 18, 2006.⁹ Mr. Vordermeier's affidavit did not directly address the Complainant's OSHA complaint.

A hearing was held before me in New York City on April 24, 2007 and May 9, 2007, at which the parties had full opportunity to present evidence and argument. At the hearing, I admitted, but did not receive, certain items of evidence (CX 11; RX-Y, RX-Z). I received these items after the hearing and, on June 13, 2007, closed the record.¹⁰ Both parties filed closing briefs.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

The Parties' Contentions

As set forth in their post-hearing briefs, the parties' positions are as follows:

The Complainant asserts the following:

⁷ The parties submitted additional copies of this affidavit as evidence in the hearing (CX 8).

⁸ The Respondent later offered, and I accepted into evidence, the affidavit. RX-O.

⁹ The Respondent did not submit a Motion for summary decision. See § 18.40.

¹⁰ By Order dated July 23, 2007, I listed all the items of evidence received after the hearing and directed the parties to file any objections to my listing by July 31, 2007. No party objected.

1. He made a timely complaint to OSHA. Brief at 4.
2. He engaged in protected activity by making complaints regarding the Respondents' unsafe equipment, including complaints to the U.S. Department of Transportation, and that the Respondent was aware of this activity. Brief at 5-10.
3. He was "terminated from employment on December 20, 2005 as a result of his complaints of safety violations which he had made that day as well as previously." Brief at 11-12.
4. The Respondent's claim that the Claimant voluntarily quit his employment is pretextual. Brief at 13-19.
5. The Respondent is continuing to retaliate against him by "blackballing" him from employment with other trucking companies. Brief at 20.

The Respondent's position is as follows:

1. The Claimant's complaint was untimely and is thus barred.¹¹ Respondent's Brief at 31-33.
2. The Claimant voluntarily quit his position on December 20, 2005, and afterward never reported (or "shaped") for work.¹² Brief at 13-17.

In addition, the Respondent conceded that the Complainant had complained about the condition of the truck to which he was assigned, as well as other items of the Respondent's equipment, but denied the Complainant made a specific complaint about a flat tire on December 20, 2005. Brief at 8-12. The Respondent also denied any attempt to blackball the Complainant from employment. Brief at 18.

Issues

The following issues are presented for adjudication:

1. Whether the Complainant's Complaint was timely filed;
2. Whether the Respondent's actions, on or after December 20, 2005, constituted adverse actions;
3. Whether the Complainant's allegations about unsafe equipment (to the Respondent and others) constituted protected activity under the Act; and
4. Whether the Respondent's actions were motivated by the Complainant's alleged protected activity.

¹¹ The Respondent also asserts the Complainant failed to abide by the 30-day time limit for filing a complaint that he was subject to retaliation for reporting workplace safety violations under 29 U.S.C. § 660(c). I find the Complainant has not asserted that he has made any claim under 29 U.S.C. § 660(c), so I do not consider the Respondent's contention on this matter.

¹² A discussion of "shaping" appears later in this Decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of the Evidence

Documents Submitted by the Parties

Complainant

The Complainant submitted the following exhibits:

- Photographs of trailers and trucking equipment, taken by the Complainant (CX 1);
- A copy of a letter from the Complainant's counsel, submitted to the New York State Department of Transportation, about defective and unsafe trucks and trailers, dated April 7, 2006 (CX 2);
- Letter Complainant's counsel received from Charles DeWeese, Acting Division Administrator, U.S. Department of Transportation, Federal Motor Carrier Safety Administration, dated April 25, 2006 (CX 3);¹³
- Letter from Complainant's counsel, addressed to Mr. Michael Mabee of OSHA and Mr. Chuck DeWeese of the U.S. Department of Transportation, dated October 17, 2006, stating that the Complainant "recently suffered further retaliation as a result of his complaints of safety violations against E.J. Davies." Specifically, this letter reflects the Complainant's allegation that the Respondent told a trucking company it should not employ the Complainant, and the Complainant's employment with that trucking company terminated (CX 4);
- Letter to Complainant's counsel from Charles DeWeese of the U.S. Department of Transportation, Federal Motor Carrier Safety Administration, dated September 21, 2006, stating that an investigator had conducted a review of the Respondent's operations and had discovered violations; letter to Complainant's counsel from the U.S. Department of Transportation FOIA Officer, enclosing documents relating to the Respondent, and advising the Complainant's counsel that "our New York division office is currently conducting an investigation on this motor carrier;" and the enclosed documents, consisting of reports of inspections of the Respondent's records and vehicles, covering the period between April 2003 and September 2006 and the report of a crash involving one of the Respondent's vehicles, dated June 1999 (CX 5);
- Local 282, International Brotherhood of Teamsters ("Local 282"), New York City Heavy Construction & Excavating Contract, 2002-2006 ("Union contract")(CX 6);¹⁴

¹³ The address and signatory of this letter, Charles DeWeese, appear to be the same as the addressee of the letter in CX 2. I conclude, therefore, that the Complainant's complaints to Mr. DeWeese were in fact directed to the U.S. Department of Transportation, even though they appear to be addressed to a state official.

¹⁴ The Complainant's copy of the Contract is incomplete in that it contains only the odd-numbered pages.

- Complainant's telephone records, reflecting calls made to OSHA's office in Queens on March 29, 2006; May 9, 2006; and August 30, 2006 (CX 7);
- Complainant's affidavit, dated February 2, 2006, detailing his assertions regarding contact with OSHA on his complaints about the Respondent (CX 8);
- Complainant's Abstract of Driving Record from the State of New York Department of Motor Vehicles, dated May 11, 2006 (CX 9), showing that the Complainant's license was suspended in September 2004 and May 2005 for failure to pay tickets; these suspensions were cleared on October 14, 2004 and May 23, 2005, respectively;
- The Complainant's W-2 forms, covering the years 2002 through 2004, and the initial page of his federal tax returns for 2005 and 2006 (CX 10); and
- Letter from Fred Vordermeier of E.J. Davies, Inc. to Louis Bisignano of Local 282, dated December 19, 2005, with fax cover sheet. In the letter, Mr. Vordermeier alleges that the Complainant's activities, including "outright refusal to do his job when asked" have cost the company customers, and also resulted in fewer drivers willing to work for the company. The letter also states: "In the best interest of our company and that of the reputation of local 282, I think that replacing Peter Klosterman will be in the best interest of both our company and the union." (CX 11).

Respondent

The Respondent's exhibits consist of the following:

- Local 282, International Brotherhood of Teamsters ("Local 282"), New York City Heavy Construction & Excavating Contract, 2002-2006 ("Union contract") Local 282, Union Contract (RX-A);¹⁵
- Local 282 Panel Form No. 4091, dated December 7, 2005, in which the Complainant alleged a violation of the seniority rules (Fred Vordermeier used his son, a junior driver) (RX-B);
- Local 282 Panel Form No. 4092, dated December 7, 2005, in which the Complainant alleged violations of the seniority rules (junior drivers called in to work ahead of senior drivers) (RX-C);
- Local 282 Panel Form No. 4093, dated December 7, 2005, in which the Complainant alleged he was never paid trailer pay since employed by the Respondent (RX-D);
- Letter, dated December 20, 2005 from Fred Vordermeier to Local 282, stating that the Complainant informed him that day, after reporting at 6:30 a.m. to shape, that he was quitting his employment (RX-E);
- December 21, 2005 letter from Local from Local 282 Labor Management Dispute Panel Chairman Thomas Gesualdi to Respondent, informing the Respondent that

¹⁵ This is the same item the Complainant submitted as CX 6. To avoid confusion, I will refer to this item as "CX 6" throughout this Decision.

the panel would meet on January 3, 2006, regarding complaints made against the respondent (RX-F);¹⁶

- Local 282 Joint Labor-Management Disputes Panel Decision, dated February 7, 2006, reflecting adjudication of the Complainant's three claims, # 4091, 4092, 4093. The Complainant was awarded 8 hours pay and benefits on claim # 4092 and was awarded \$88.00 on claim # 4093, "settled under the 15-day rule." The result of claim # 4091 was to be determined based on additional information (RX-G);
- February 22, 2006 letter from Thomas Gesualdi to the Respondent, advising of the Panel's decisions regarding the Complainant's three claims (RX-H);
- National Labor Relations Board (NLRB) Unfair Labor Practice charge, dated June 2, 2006, filed by Local 282 against E.J. McNulty and Co., alleging that the Employer fired the Complainant on May 31, 2006, because the Complainant spoke to a union shop steward, after having been told not by the employer not to speak to the steward (RX-I);
- OSHA Discrimination Case Activity Worksheet, dated October 31, 2006, reflecting the Complainant's complaint against the Respondent. Complaint is summarized as follows: "Complainant alleges that he worked full time for Respondent for approximately 7 years. In December of 2005, Complainant refused to drive an unsafe truck and has been given very few work days since that time, although drivers with less seniority have been working. Complainant alleges that his reduction in work hours is due to his complaints to Respondent about the safety of the Respondent's trucks (RX-J);
- OSHA letter to the Complainant, dated January 3, 2007, enclosing the Secretary's findings on the Complainant's Complaint (RX-K);
- Decision of NLRB Administrative Law Judge Raymond Green, dated March 2, 2007, regarding various charges against A.J. McNulty & Co., Inc., including the charge that the Respondent reduced work activities for the Complainant because he spoke to the shop steward and because of other union activities. In the decision, Judge Green found it was more probable the company did not offer work to the Complainant because of reasons other than for the reason the Complainant asserted, and dismissed the complaint (RX-L);
- Letter from the Office of the NLRB General Counsel to the Complainant's Counsel, dated March 30, 2007, denying the appeal from the Regional Director's refusal to issue a complaint on the Complainant's behalf against the union, primarily because the Complainant's allegations were untimely (RX-M);
- The Complainant's affidavit, dated February 2, 2006 (RX-N);¹⁷
- Affidavit of Fred Vordermeier, president of E.J. Davies, Inc., dated December 18, 2006. In this affidavit, Mr. Vordermeier states that his company is covered by the union local 282 contract. Mr. Vordermeier states, among other things, that the

¹⁶ The letter indicates that copies of the claims are attached; however, the exhibit does not contain the attachments.

¹⁷ This is the same item the Complainant submitted as CX 8. For the sake of consistency, I will refer to this item throughout this Decision as CX 8.

Complainant quit his employment on December 20, 2005, and has not returned to his company to “shape” since that time (RX-O).

- Subpoenas to Thomas Gesualdi, Louis Bisignano, and Edward Casale, dated March 7, 2007 (RX-P; RX-Q; RX-R, respectively);
- Subpoena to Kevin Brennan, Assistant Area Director of OSHA, dated April 5, 2007 (RX-S);
- Letters to Thomas Gesualdi Louis Bisignano from counsel for the Respondent, dated April 10, 2007, informing him of the hearing date in this matter (RX-T and RX-U, respectively);
- Letter from Complainant’s counsel to Richard Mendelson of OSHA, dated September 5, 2006, requesting an investigation into workplace and equipment safety at the Respondent’s place of business (RX-W);
- Letter to Complainant’s counsel from OSHA, signed by Kevin Brennan for Richard Mendelson, dated September 15, 2006, informing him that the allegations against the Respondent must be closed unless specific information about a workplace hazard can be provided (RX-X);
- Letter, dated May 23, 2005, from the New Windsor Justice Court to Complainant, showing a hearing date of June 30, 2005, for tickets issued for defective brakes and brakes out of adjustment (RX-Y).
- Series of letters between counsel for the Complainant and counsel representing union local 282, covering the time period between January 2006 and November 2006.¹⁸ This correspondence reflects that, as early as January 2006, the Complainant’s counsel had raised his complaints about the Respondent (including allegations that the Respondent’s equipment was unsafe) with the union, and requested the union’s assistance in submitting grievances against the Respondent (RX-Z).

Among the documents submitted, the following are of special note:

The Union Contract (CX 6)

The parties agreed that the Teamsters’ Local 282 Union Contract, 2002-2006, covered the Complainant’s work for the Respondent. Under the contract, the shop steward is the “first man to go to work and the last man laid off.” Section 10(A). In addition, a shop steward may not be discharged by an employer unless the matter is submitted to an impartial arbitrator, and the arbitrator authorizes the discharge. Section 9(F)(2).

Although the Contract does not specifically define “shaping,” its provisions presume that an employee must, “shape” (that is, report to the Employer’s dispatch yard or other designated location) each work day, because it is not certain whether work will be available on any given day. The contract also includes the following provisions: an employee who wishes to make a claim regarding a violation of the contract is required to “shape” the employer’s yard by 8:00

¹⁸ A detailed listing of these items is set forth in my Order of July 23, 2007, in which all post-hearing evidentiary submissions were listed.

a.m; and all disputes and grievances shall be referred to a joint union-management panel, which shall meet regularly and issue decisions on such matters. Section 9.

Other Documents Relating to the Local Union

The Complainant submitted a letter from Mr. Vordermeier to Louis Bisignano, the union local representative, with a completed fax cover sheet, dated December 19, 2005. CX 11. In the letter, Mr. Vordermeier alleges that the Complainant's activities, including "outright refusal to do his job when asked" have cost the company customers, and also resulted in fewer drivers willing to work for the company. The letter also states: "In the best interest of our company and that of the reputation of local 282, I think that replacing Peter Klosterman will be in the best interest of both our company and the union."

The Respondent submitted correspondence from Mr. Vordermeier, dated December 20, 2005, informing the union representative, Louis Bisignano, that the Complainant had quit his employment with the Respondent. RX -E. In addition, the Respondent submitted three grievance forms the Complainant had submitted on December 7, 2005, against the Respondent. RX-B, C, and D. Two of the three grievances alleged the Respondent had violated the union contract seniority rules by giving work to persons junior in seniority to the Complainant. The Respondent also submitted the results of the labor-management dispute panel adjudication, held on February 7, 2006, which reflected that at least one of the Complainant's grievances in this regard was upheld. RX-G.

The Respondent also submitted a series of letters between the Complainant's counsel and counsel for the union local. RX-Z. The purpose of these letters appears to be an attempt, by the Complainant, to get the union to intervene on his behalf in his disputes with the Respondent. These letters establish that, as early as January 31, 2006, the Complainant informed the union that he was "unemployed as a result of a refusal to drive unsafe equipment" and that the Respondent was violating the collective bargaining agreement by assigning work to less senior drivers. The Complainant also asserted that he attempted to file grievances regarding these matters but his grievances were not accepted. The union's response, in early February, was that the union representative, Mr. Bisignano, had had numerous meetings and telephone conversations with the Complainant and had advised him to file additional grievances, but the Complainant did not do so. Nor, according to the union's response, did the Complainant raise the issue of his job status with Mr. Bisignano at the February 7 labor-management dispute panel adjudication. Complainant's counsel responded to this letter two months later. In his response, the Complainant's counsel stated that the Complainant "never abandoned his position" but instead would report for work ("shape a job") and be told there was no work, only to learn after returning home that other persons were working, in violation of the union contract's seniority provision. Later, in June, the Complainant's counsel requested that the union institute an unfair labor practice action against the Respondent, based on violations of the contract's seniority provision. In August, the Complainant's counsel informed the union's counsel that the U.S. Department of Transportation had investigated the Respondent and found safety violations, and requested that the union take action on this issue, which Complainant's counsel characterized as a violation of the union contract. In October, the Complainant's counsel reiterated his request that the union initiate action on the Complainant's behalf against the Respondent, "to be assigned

work consistent with his title in safe equipment.” The union’s counsel responded to this letter by stating that the Complainant was informed by the union that he had voluntarily left the Respondent’s employment, and also stating that the Complainant was “repeatedly advised that he had to continue shaping at Davies in order to protect his seniority, and that Local 282 would represent him whenever he refused in good faith to operate an unsafe vehicle,” and the union would also seek to recover back pay for the Complainant if the Respondent sent out other drivers on any day that the Complainant properly refused to drive an unsafe truck.

The Respondent submitted documents establishing that the union local had submitted an unfair labor practice complaint against A.J. McNulty Co., on behalf of the Complainant. After a hearing, the union’s complaint was dismissed. RX-I, L.

Testimony at Hearing

Peter Klosterman

The Complainant, Peter Klosterman, testified in his own behalf. He testified he began working for E.J. Davies, Inc., the Respondent in 2000 or 2001, and was appointed the Shop Steward for his Employer’s site in Astoria, Queens, somewhat later, when the previous shop steward retired. T. at 38-41.

In response to his counsel’s questions, the Complainant described the requirement to “shape” in this way:

Q. If you're going to work, on a Tuesday, when would you get the call that you'll be working Tuesday?

A. If I'm working Tuesday? Monday night.

Q And on a Monday night, who would call you?

A. Actually nobody would call me, before we left we knew what was going on. If there was work tomorrow, if he says he was on the slow side, that's all right, I'm still coming down and that's what I'm saying, that's where the shape comes in. When you come down, you show up, if there's work, fine. He would call me at home once in a while though or he'd call me on the radio. If something does happen, he'll call me, I'll come back down, I did work.

Q. Just seeking to establish a standard work day when you would be assigned the work and when you would show up the following morning, so on a Monday, you would be told that Tuesday you would be working; is that fair to say on a regular working day?

A. If you had an assignment you knew you were working; if you had an assigned job, you knew you were working the whole week. If you did not have an assigned job, you came down and you shaped.

T. at 49-50.

Later, in response to my questions, the Complainant described shaping and advance notice as follows:

A. If I was told the night before, I would work the next day because he would need drivers. We would all know we were working the next day; he would let us know.

Q. Did you have to physically go down there in order to shape?

A. Every day.

Q. Under the contract, what was the employer's obligation to notify you by telephone?

A. Under the contract, I really don't know that part, but I had to be there and shape the job, I think three or four hours to get paid, but I would go up to Fred and say, Fred is there any work and he would say no, but I would come down and shape. Is that answering something better for you?

Q. I think so, so you would come in -- if he said no and you came down and shaped -- you could come down and shape anyway?

A. Yes.

Q. But you were not required to?

A. Exactly.

T. at 203-204.

The Complainant testified that he was familiar with the grievance procedure set forth in the union contract. He stated that the employee filled out a written grievance on a numbered form; the grievance was countersigned by Louis Bisignano, the union representative, and presented to the labor-management panel for resolution. T. at 165-70.

Regarding his complaint to OSHA, the Complainant recounted that he first contacted OSHA by telephone in March and made complaints about the Respondent. He stated that he wrote a letter confirming his conversation, and mailed the letter to OSHA, but neglected to keep a copy of the letter. Later, in May, he contacted OSHA again, to check the status of his complaint, but OSHA did not have a copy of his letter. The Complainant also testified to a third conversation he had with OSHA in June, where he again asked OSHA "what's going on," and was told "[w]e're looking into it." The Complainant stated that the first time OSHA told him that it did not have a complaint from him was at an appointment "a few months ago." T. at 127.

Regarding the incidents that led to the filing of his Complaint, the Complainant stated he first started making complaints to Mr. Vordermeier concerning E.J. Davies' equipment "[r]ight after [he] started working for him," complaining mainly about the brakes and the lights." T. at 54-55.

Concerning the events of December 20, 2005, the Complainant testified as follows:

That was a Monday. That weekend I worked and the truck I was using it got a flat tire and I went inside. He said you got to move a machine for me today. I said, Fred, I can't move a machine, I got a flat tire. He says, you just got to move a machine, it's one move, use the truck. The tire was off the rim, it was that flat. It wasn't just flat, it was hanging, it was broken from the rim of the truck. I could not and I did not use that truck. I told him, I said give me another truck and he said, you got to use that truck....

I said, give me another truck. He said, no, you use that [truck] you only got one move to do, one machine. I said, no, I'm not using it, fix the tire. He wouldn't fix it....

I refused to drive it and I even asked him, give me something else to do, I told him let your son go and get it, I ain't doing it. I'm not working with that truck. He said it's either that or that's it, go home, I got nothing for you. That was it so I said,

okay, if that's the way you want to do it and I refused to operate the truck that day. That was the straw, the camel's back right there, I had enough of it.... Because I can't say it, but it all piles up; the tickets, the unsafe equipment, everything, it just kept piling up and adding up. There was no more I could take.

T. at 84-87.

The Complainant testified that, after this discussion, he called the union; Louis Bisignano called him back that afternoon, and told the Complainant that he was "going to look into it." T. at 93.

The Complainant stated his belief that he did not ever abandon his job; he "just refused to drive that truck, period." T. at 93. However, concerning whether the Complainant ever told Mr. Vordermeier that he was leaving his employment for E.J. Davies, the Complainant testified, "Many times we got into heated arguments....yeah, I quit once, I do remember that and then I called Louie [Bisignano] why I was quitting, because I had enough of his shit in plain English. Fix your trucks. I quit once, that was it." T. at 94.

Concerning his work availability during the week of December 20, the Complainant testified as follows:

Q: Now, during that week were you ready, willing and available for work?

A: Yes, sir, I was.

Q: And, being that you had not been on the project the day before, on the 20th, did anyone call you to tell you of work the following day?

A: No.

T. at 104.

The Complainant testified that Mr. Bisignano first told him he had been terminated from his job three months after the December 20 incident, in March of the following year. The Complainant testified that, before that time, he "was calling the union" in order to try to get back to work, asking them to "[r]epresent me; back me up." The Complainant stated that during the three month period, work was assigned to people who were junior to him. T. at 113-114. The Complainant also testified that when he was first told that he was terminated, he tried to file a union grievance about the termination. He stated that he signed the grievance ledger, and filled out the papers necessary to file the grievance, as well as for safety equipment, his license, and about a trailer; then, he "left them there," which was a "mistake" because "[t]hose three grievances were lost, never to be found." T. at 116-117.

Concerning which retaliatory action the Complainant believed the Respondent took as a result of his safety complaints, the Complainant stated, "every time I went for a job where he [Mr. Vordermeier] could have said and backed me up and said I was a good driver, what he did, he could have spoke up for me and tell people what I'm really like, not that I became working for him." T. at 137. Concerning whether the Complainant believed his inability to get work was a result of retaliation, the Complainant stated, "Yes, not just from Fred, but mainly the union." Further, he stated that he believed that the Respondent did not clear his tickets in retaliation for

his complaints because “[h]e [Mr. Vordermeier] could have cleaned my license right up, he knew what to do, pay the tickets.” Moreover, he stated that he believed that he was not being returned to work at E.J. Davies is a result of his safety complaint. T. at 137.

On cross-examination, the Complainant stated that December 20 was the day he refused to drive the tractor, but that he “didn’t say I quit, I just refused to drive the truck.” T. at 144. Concerning his employment for A.J.McNulty, the Complainant stated that no one at A.J. McNulty ever told him that the Respondent or Mr. Vordermeier said not to hire him. T. at 145.

Concerning whether he physically shaped at the Respondent’s yard after December 20, 2005, the Complainant stated, “I went down there once....Freddie wasn’t there, his sister was there. I went down there the one time and there was bad blood and I just left;” the Complainant did not recall the specific date. Further, he stated, “I went there and I just walked out. There was nothing there for me to do. It was still the same crap sitting there.” In response to an inquiry about why he did not continue to shape the yard and E.J. Davies, the Complainant stated “[b]ecause I was listening to my union.” He stated that Fred Vordermeier never told him to stop shaping his yard, and that during their conversation on December 20, 2005, Fred never told him never to come back, nor did he ever say to him “you’re fired” or “terminated.” Also, the Claimant testified that he never received any written correspondence from Fred Vordermeier or the Respondent that he had been terminated. T. at 150-151.

The Complainant also testified that he understood that, under the union contract, a company cannot terminate a shop steward without going through arbitration, but stated that “Fred never told me I was fired, the union did.” T at 178. Concerning whether Mr. Bisignano ever told the Complainant to shape the yard at E.J. Davies, the Complainant stated “right before I was terminated yes, but it was already too late.” T. at 185. The Complainant also testified that he made complaints to Mr. Vordermeier concerning the condition of the company’s equipment “many times;” he further testified that Mr. Vordermeier never took him off work on a particular day that he complained about the condition of equipment; Mr. Vordermeier still permitted him to drive. T. at 178-86.

Upon my questioning, the Complainant testified that if there was no work available, some days he would go down to the yard and shape, and if there was nothing going on, no work available, he would go home; if there was work available, he would then drive.¹⁹ T. at 203-04.

On cross-examination, the Claimant confirmed that after December 20, 2005, he only went down to the company’s yard on one occasion, and stated that after that date, he never made any calls to Mr. Vordermeier to ask him for work, nor did he write him any letters. He also testified that he never asked Mr. Casale, who was appointed the new shop steward, about whether there was work available, even though he admitted that it was common for drivers to inquire with a shop steward about whether work was available. T. at 219-221.

¹⁹ However, the Complainant testified, as senior man he could give work to a junior man who had not had the opportunity to work; he stated that if he knew he was giving work to a junior man, and knew there was no other work, he would not shape. T. at 206-208.

Concerning why he did not go down to the yard on December 21, the day following the discussion on December 20, the Complainant stated “Because I refused to drive unsafe equipment, that was it. The straw that broke the camel’s back. I had enough.” Also, he testified that he had called the union on December 20, and he was waiting to get a call back from them.” He testified that he was ready to work that day, but no one called him to work. T. at 226.

Louis Bisignano

Mr. Bisignano, who is union business agent for Queens, New York, as well as recording secretary and a fund trustee, testified on behalf of the Respondent. He acknowledged that the Respondent is a signatory to the Local 282 agreement. T. at 254.

Mr. Bisignano stated that shop stewards are appointed by the union. Under the contract, shop stewards receive an extra dollar per hour, and they have “superseniority” T. at 256-258. Concerning the contractual provisions on procedures for the termination of shop stewards, Mr. Bisignano stated:

If a shop steward is going to be terminated, there’s language in this collective bargaining agreement that says unlike a regular employee a shop steward cannot be terminated or suspended or disciplined until an arbitrator reaches that decision. It says that although they need not assign him work, they still have to pay him until the arbitrator reaches a decision.

T. at 259.

Mr. Bisignano testified that he received a letter from Mr. Vordermeier that the Complainant had quit, and also testified that he spoke to the Complainant after receiving the letter. According to Mr. Bisignano, the Complainant “basically said he didn’t quit, that he just didn’t want to drive an unsafe vehicle.” However, Mr. Vordermeier told Mr. Bisignano the Complainant “quit, he walked out, he had enough.” T. at 260-261

Mr. Bisignano related an earlier conversation, in October 2005, in which the Complainant claimed his seniority was being violated; Mr. Bisignano stated:

I spoke to him about, did you shape. He says no, I don’t have to shape, I’m the steward, to which I said, you do have to shape, you have an obligation to shape, which he insisted he doesn’t because he’s the steward, which I told him you do because everybody has to shape.

T. at 263.

Mr. Bisignano testified further about shaping, stating that it means “you show up and you walk into the shape room or where the drivers gather to be available for work assignments.” T. at 286-287. He further stated:

[An employer] may tell you there’s no work for you tomorrow, you don’t worry about it. A lot of guys do that with all good intentions. I know you live 50 miles

away, there is no work tomorrow. They say thanks, nobody wants to drive, pay tolls, this, that, if there is no work.

Ultimately, what always happens is that at some point in time they're [the Employer] going to get a phone call. Now, they're not going to wait for the guy to come the 50 miles, they're going to put somebody who lives close by or somebody who happens to shape. Then the fellow who was told last night there was no work is going to scream, "Look, my seniority is violated, he told me there was no work. I want to put a grievance in."...

The union's position is that the men like a telephone shape, that's what they all want. The union's position...is it's a shape job regardless of what these employe[r]s tell you...get yourself down to the job because you don't know if somebody is going to be sick tomorrow, if God forbid somebody is going to get into an accident, if there's going to be calls.

Make yourself available, it's a shape job, so the union's position is whether they tell you there's no work or not, be there.

T. at 287-288.

Mr. Bisignano went on to state: "The union's position is and...the wording in the contract for disputes under Joint Management/Labor Panel is a claim is not valid unless the employee first shapes the barn by 8:00....In order to be a valid claim, you must shape. The contract says it, we have arbitrated decisions that say in order to protect your seniority you have to shape." T. at 289-290. He read from section G-8, at page 14 of the contract: "Any employee, whether on the seniority list or not who wishes to make a claim due to an alleged infraction of rules in reference to the union agreement, that employee must first be obligated to shape either the home barn of the employer or the job site by 8:00 a.m. The employee must make himself known to supervisory personnel on the job. If that employee was not on the seniority list the employee must remain on the job site and be available to work for at least the first four hours of the day." T. at 291.

Mr. Bisignano also testified that he told the Complainant that he had the right not to drive an unsafe truck; however, he also stated "It's not a grievance if you refuse to drive an unsafe truck....The only time it becomes a grievance is if the employer carries out his threat, sends him home and works a junior guy." Then, if another truck went out, the union would file a grievance. Mr. Bisignano stated, however, that the Complainant never told him that occurred. T. at 327-330.

On cross-examination, Mr. Bisignano reiterated that "in order to file a grievance you have to shape....When there's a seniority violation then we file a grievance. If no trucks went out, there is no violation." T. at 340.

Edward Casale

Edward Casale, an employee of the Respondent, testified on behalf of the Respondent. He stated that he had been employed by E.J. Davies for about five years as a truck driver. He also stated that he is a member of Local 282, which has a collective bargaining agreement with the Respondent, and has known the Complainant for between 15 and 20 years. T. at 354-356.

Mr. Casale acknowledged the Complainant was not happy with the conditions of the Respondent's trucks, and had talked about getting a job elsewhere. Mr. Casale also stated he had heard the Complainant tell Mr. Vordermeier that he was going to quit. T. at 358-39.

Mr. Casale testified that he is currently the shop steward, and that he was appointed in March 2006. He testified that the day he was appointed the new shop steward, he called the Complainant to tell him. He testified that since December 2005, he has not personally seen the Complainant shape at the Employer's facility. Mr. Casale also stated that he was aware the Complainant had concerns about the condition of the company's equipment, and this was part of the reason why the Complainant was not happy there. T. at 361-367.

On cross-examination, Mr. Casale confirmed that he heard the Complainant complain about the condition of the equipment multiple times. Regarding the Complainant's last day, Mr. Casale testified that the Complainant laid his trip ticket on the desk and said he couldn't take it anymore, and left, and indicated he did not hear the Complainant make any comment about the condition of the equipment on that occasion. T. at 388-386.

Mr. Casale stated: "Pete [the Complainant] was there, and me and Fred [Vordermeier]. I don't think anyone else was there yet. Fred gave him his job ticket and Pete was in a bad mood that morning. He looked at the ticket and he said, I've had it, you know, he put the ticket on the desk he said he can't do it no more and he left." T. at 388. Mr. Casale also indicated that some of the Respondent's trailers had been badly damaged and were unsafe. He also admitted that he had borrowed money from Mr. Vordermeier. T. at 396-398.

Fred Vordermeier²⁰

Fred Vordermeier, the President of E.J. Davies, Inc. testified on behalf of the Respondent. He stated that he is a 50 percent owner of E.J. Davies, and has been for about 15 years, since his father passed away; he also acts as dispatch, truck driver, mechanic painter, grease monkey, tire changer. He also testified that he is currently a member of Local 282, his dues are paid and he is in good standing.

Mr. Vordermeier stated the Complainant was appointed shop steward in 2003 and thereby moved from number nine man to number one man. T. at 410-16. Concerning his recollection of December 20, 2005, Mr. Vordermeier testified that the Complainant "told me in the last two months prior to that several times that he was giving me two weeks notice, that he was moving on, at which time two weeks went past, he still kept working. Never questioned it. Then he walked in that morning and said 'I've had enough, can't take it no more, quit.' He turned around and walked out my office door." Mr. Vordermeier testified that, when this occurred, Eddie Casale and two of his sons were also in the room. T. at 417.

Mr. Vordermeier testified that, on December 20, 2005, he sent a letter to Louis Bisignano, and a copy to Tom Gesualdi, who was the Vice President of the Union, that the Complainant had quit his job. He also stated that he spoke with Mr. Bisignano after he sent the

²⁰ Mr. Vordermeier's surname is misspelled as "Vortemeyer" throughout the hearing transcript.

letter. "He had called me, asked me what happened and [I] explained to him what happened, that Peter had quit this morning. Said put it in writing like you said should put it in writing and [I] did it according to the way the union wanted it done because [I] know [I] don't have the power to fire a shop steward.... Because he's appointed by the union and he's discharged by the union only." T. at 418-419.

Mr. Vordermeier testified that he did not receive a grievance from Local 282 with respect to the circumstances surrounding Mr. Klosterman leaving E.J. Davies, but the Complainant had filed several earlier grievances. These grievances were heard in early 2006. Mr. Vordermeier stated that the Complainant's employment status was not discussed at the labor-management panel meeting. T. at 420.

Mr. Vordermeier denied telling the Complainant to drive or go home, and also denied ever talking to other trucking companies about the Complainant, after December 2005. Regarding the Complainant's complaints, Mr. Vordermeier admitted that the Complainant made numerous complaints about what he perceived as safety violations. T. at 425-430.

Regarding the Department of Transportation inspection and investigation, Mr. Vordermeier stated these took place in May or June of 2006, and that the violations found were primarily on inoperable vehicles, as the other vehicles were out at job sites when the inspectors arrived. At that time, the Complainant was not shaping at the company's yard. Mr. Vordermeier stated that the Complainant filed for unemployment benefits about a month prior to the hearing. T. at 433-440.

Mr. Vordermeier admitted that the Complainant shaped on December 20, 2005. However, he testified that the Complainant did not complain about a flat tire that day, and did not go out to the truck. Rather, the Complainant threw the truck ticket on the desk and said he had had enough, and left. According to Mr. Vordermeier, the Complainant had been telling him for several months he was going to leave, and Mr. Vordermeier assumed it was the day, and the Complainant was moving on to another job. Mr. Vordermeier also stated that he had called the Complainant the night before. As he stated: "so you made sure if you needed his presence you made a phone call to his home that previous night." T. at 440-443.

In addition, Mr. Vordermeier testified that on occasion he told the Complainant, the day before, if there was no work available the next day. On whether he expected the Complainant to come in anyway, Mr. Vordermeier responded:

Knowing he lived up on Monroe, [I] did it as a courtesy to him so he wouldn't have to come the distance and if there was no work, would say to him, there's nothing going out tomorrow, what do you want to do and if [I] got a call in the morning for one guy or whatever, would go to the first guy on the list that was present.

T. at 446-47.

He testified that neither of his female relatives who worked at the yard told him that the Complainant returned to the yard after December 20. Mr. Vordermeier acknowledged that the Complainant complained about the safety of the trucks, but stated the Complainant had negative

comments about everything, such as the way the business was run and the way Mr. Vordermeier's sons were employed. T. at 447-48.

Mr. Vordermeier stated that he fixed the flat tire on the Complainant's truck the day before December 20, because he knew the Complainant would be in that day to drive. Therefore, he stated, on December 20, the flat tire "did not exist." T. at 448-49. The witness denied that he intentionally failed to pay the Complainant's traffic tickets, and stated that the Complainant told him he would take care of them, because he lived in the area in which the tickets were issued. Time went by, and the Complainant received a suspension notice for the unpaid tickets. Mr. Vordermeier stated he took action right away to reinstate the license. T. at 452-53.

Mr. Vordermeier admitted that some of the Complainant's complaints regarding safety were valid, and stated that he checked on the Complainant's complaints about 80% of the time. He admitted that the newer trucks were assigned to his family members, and remarked "why not"? He testified that Mr. Bisignano called him after receiving his letter that the Complainant quit his job, but they did not talk about the matter again. T. at 456-75.

He also testified that he was unable to fire the Complainant due to the union contract. As he stated:

...the union appoints the shop steward on my job and only the union can replace him, lower him down from being shop steward to a driver, they're the only ones that have control over Peter Klosterman. The only control I have over him is paying him his salary.

The testimony continued:

Q: Now the collective bargaining agreement controls the relationship between you and the union; is that correct?

A: Correct.

Q: Does the collective bargaining agreement prevent you from firing Peter Klosterman?

A: "I can fire him, but then if we go to collective bargaining and they find that I didn't have a rightful right to firing him then I would have to pay him back pay which would make my company broke.

....

It's better to have him work.

Q: However, if he was to have abandoned his job, then...do you think he would be able to grieve it?

A: No.

T. at 485-87.

Mr. Vordermeier conceded that he never told the Complainant that he considered him to have abandoned his job, and never sent the Complainant a copy of the letter he sent to Mr. Bisignano on December 20. T. at 489. He also testified that he composed a letter to Mr. Bisignano on December 19, 2005, and filled out a fax cover sheet but did not send the letter. He

stated that he wrote it in a moment of anger, and the letter reflected his state of mind at the time he wrote it. T. at 504-06. Mr. Vordermeier testified that he believed it was in the best interest of the union to replace the Complainant because he wanted a new shop steward, one that was not creating problems with the customers as he believed the Complainant was. He also stated he believed he lost several customers due to the Complainant's actions. T. at 489-506.

As Mr. Vordermeier testified, he believed it was in the best interest of the union to replace the Complainant:

I was looking for a new shop steward that wasn't so aggressive with customers, wasn't bad mouthing me to customers. I hear, you know, that there is only a certain amount of customers in this field and we all know each other for many, many, many years and to get call-backs that – about him bad mouthing the company on the job, not performing, telling other company employees that they're not doing their jobs and complaining to them about what they're doing; it just took a small family business and just shrunk it in half to get away from this turmoil which was something they were never used to from our company....

T. at 507-08.

On further examination by Respondent's counsel, Mr. Vordermeier testified that he talked to the Complainant "all the time" about the customer complaints, and did not pursue having the Complainant removed as the shop steward. T. at 511-12.

Credibility of the Witnesses

During the course of the hearing, which took place over two full days, I had ample opportunity to observe the witnesses and their demeanor.

In general, the Complainant appeared sincere in his statements regarding his observation and reporting of safety-related deficiencies in the Respondent's vehicles. His allegations are supported by the U.S. Department of Transportation investigation, which revealed violations. However, I find the Complainant was not clear in his testimony regarding his obligation to "shape" in person, and also was vague regarding his conversations with Mr. Bisignano on this subject. Although it is possible that the Complainant was unaware of the "shaping" requirement, I find that to be unlikely, particularly since the Complainant was a union steward and the "shape" requirement was discussed in the union's contract.

Based on my observations of his demeanor, I find Mr. Bisignano was not entirely forthcoming regarding his conversations with Mr. Vordermeier, particularly any conversations arising out of Mr. Vordermeier's letter of December 20, 2005. Based on the circumstances set out in the letter, it seems unlikely that communication between Mr. Bisignano and Mr. Vordermeier would be as limited as Mr. Bisignano testified.

I also find Mr. Vordermeier was not entirely credible regarding his relationship with the Complainant. Based on the evidence of record, and in particular the evidence relating to the December 19, 2005 letter Mr. Vordermeier drafted (but said he did not send), it appears there

was a significant clash of personalities between Mr. Vordermeier and the Complainant. It also appears that the Complainant's concerns regarding the condition of the Respondent's vehicles were often justified and were not always addressed satisfactorily.

In contrast, I find the testimony of Edward Casale to be credible, even recognizing that Mr. Casale has admitted that he has borrowed money from Mr. Vordermeier. Mr. Casale was familiar with the condition of the Respondent's vehicles, and was well aware of the tensions between the Complainant and Mr. Vordermeier, and was witness to the incident on December 20, 2005. I am cognizant of the fact that, even though he stated that his standards were not as strict as the Complainant's, Mr. Casale nevertheless also admitted that some of the Respondent's equipment was unsafe.

Discussion

Elements of a Complaint under the Act

The Act prohibits discharge, discipline or discrimination of an employee because an employee:

“has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard or order ...” § 31105(a)(1)(A); or refuses 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 “the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.” § 31105(a)(1)(B).

Under the statute, “reasonable apprehension” is measured by an objective standard: “an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health.” § 31105(a)(2). Moreover, in order to qualify for protection, the Act also requires that the complaining employee “must have sought from the employer, and been unable to obtain, correction of the unsafe condition.” Id.

To prevail on a claim under the Act, a Complainant must establish the following elements:

1. The Complainant engaged in protected activity, as defined in the Act;
2. The Employer was aware of the protected activity;
3. The Employer discharged, disciplined, or discriminated against the Complainant; and
4. There is a causal connection between the protected activity and the adverse action.

Yellow Freight Systems, Inc. v. Reich, 27 F.3d 1133, 1138 (6th Cir. 1994); Bettner v. Daymark, Inc., ARB Case No. 01-088, 2000-STA-41 (Oct. 31, 2003).

Timeliness of the Complainant's Complaint

The Act sets forth strict time limits for filing complaints. An employee must file a complaint with the Department of Labor within 180 days of the employer's retaliatory discharge, discipline, or discrimination. § 31105(b). The implementing regulation, at § 1978.102, states that no particular form of complaint is required. This regulation states that complaints should be filed with the OSHA Area Director responsible for enforcement activities in the geographic region, but also indicates that "filing with any OSHA officer or employee is sufficient." § 1978.102(b) and (c). In this matter the Respondent has asserted that the Complainant's claim to OSHA was untimely.²¹

In his affidavit dated February 2, 2007, the Complainant asserted that he contacted the OSHA office located in Queens, New York, by telephone, at least three times during the year 2006, on March 29, May 9, and August 30. CX 8.²² He also asserted that, during the March 29 phone call, he told an OSHA representative the facts surrounding his safety complaints, and told the representative his belief that he "was suffering retaliation and denied assignment as a result thereof." CX 8 at 1.

According to the Complainant, the OSHA representative advised him that the information he gave was sufficient to file a complaint, and requested also that he send a written letter that detailed his complaint. The Complainant asserted that he wrote such a letter, which he mailed to the OSHA office, but that he did not keep a copy of the letter. He also stated that, at the time he made his initial contact with OSHA, he was not represented by counsel, and he indicated he subsequently learned his complaint should have been directed to a different office. CX 8 at 2.

As stated above, on January 3, 2007, the OSHA Regional Director dismissed the Complainant's complaint after finding that the complaint was filed outside of the 180 day filing period, and was therefore untimely. The Secretary found the Complainant filed his complaint through counsel on October 17, 2006, and that in his complaint he alleged that he was terminated on December 20, 2005 for refusing to drive a tractor trailer with a flat tire. The Regional Director's notification to the Complainant does not mention whether the Complainant made any other complaints to OSHA about the safety of the Respondent's vehicles.²³

Under the Act and the regulation, a written complaint is not required. As one administrative law judge has noted: "the complaint procedure is relatively informal in that it is designed merely to compel OSHA to conduct an investigation." Assistant Secretary of Labor for Occupational Safety and Health, and Frank Ralph Kovas v. Morin Transport, Inc., No. 92-STA-41 (ALJ: June 2, 1993). Indeed, oral complaints made by telephone have been determined to be

²¹ Prior to the hearing, in its Statement of Position filed on March 7, 2007, the Respondent asserted the untimeliness of the Complainant's OSHA complaint. However, the Respondent did not file a motion to dismiss the action.

²² The Complainant submitted his telephone records denoting phone calls made to the phone number of the OSHA office in Queens. CX 7.

²³ The Notification to the Complainant is attached to the Complainant's request for hearing. The OSHA investigative report is not included in the record (except for its first page).

sufficient. Id., slip op. at 5; Reemsnyder v. Mayflower Transit, Inc., Case No. 93-STA-4 (ALJ: Nov. 12, 1993), slip op. at 11.

The Administrative Review Board (“Board”) has held that the Act’s limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling. Miller v. Basic Drilling Co., ARB Case No. 05-111, 2005-STA-20 (August 30, 2007); Reemsnyder, supra. Moreover, telephone contact by a complainant to an OSHA district office has been found to be sufficient for the purpose of determining whether a complaint under the Act was timely filed. Id. Lastly, the governing regulation does not state that complaints must be made to a specific individual. Rather, the regulation specifically provides that a complaint made to any official of OSHA is sufficient.

At the hearing, the Complainant testified that he reported safety violations during the conversation with the OSHA official; he testified that “OSHA didn’t want to get involved because they would only do job sites. I had to point out to them that it was a job site.” The Complainant also testified: “I told them more or less everything that’s going on; the trailers, the bed, everything is in bad shape....No brakes, no lights, the floorboards; guys were falling through the decks. We were working on the bridge and if the guys fall off that trailer or fall through that trailer they’re going right off the bridge. I told them that.” T. at 118-121. Only upon questioning from his counsel about what he said concerning his license did the Complainant mention that his license had been suspended. Moreover, when asked about retaliation, while he did state that “Freddie,” presumably Mr. Vordermeier, was not giving him work, the Complainant’s first response was to focus on union retaliation. T. at 122.

Based on his testimony and the phone records he presented, I find that the Complainant called OSHA several times, beginning on March 29, 2006. Further, I find that the Complainant testified credibly that he had several phone conversations with OSHA representatives. The Complainant’s hearing testimony, including his allegation that the Respondent retaliated against him by refusing to give him work, is consistent with his affidavit, executed before the hearing. Although there is no written record of the allegations he made to OSHA, under the regulation, no written complaint is required.²⁴

Consequently, based on the evidence of record, I find that the Complainant’s complaint was timely.²⁵

²⁴ The confusion regarding the substance of the Complainant’s allegations, as illustrated in this discussion, demonstrates the shortcomings of oral complaints.

²⁵ As noted above, the record is unclear regarding the exact nature of the Complainant’s complaint to OSHA. The report of OSHA’s investigation mentions only the incident of December 20, 2005. The Complainant testified at the hearing regarding the incident. However, it is not mentioned in his affidavit. The OSHA “Discrimination Case Activity Worksheet,” dated October 31, 2006, indicates the Complainant “refused to drive an unsafe truck and has been given very few work days since that time, although drivers with less seniority than him have been working. Complainant alleges that his reduction in work hours is due to the complaints to Respondent about the safety of the Respondent’s trucks.” RS-J.

Whether the Employer Subjected the Complainant to Adverse Action

Whether the Complainant was Discharged

Under the Act, an Employer is prohibited from “discharging, disciplining, or discriminating against” an employee in retaliation for engaging in protected activity. Regarding the issue of which of the Respondent’s actions were considered adverse, in his “Statement of Position,” filed prior to the hearing, the Complainant’s counsel responded: “Commencing on December 20, 2005 and continuing to date, Complainant has not been assigned work by E.J. Davies despite his being the Union Shop Steward assigned and the most senior man at the location.” Statement of Position at 1.

The Respondent conceded that the Complainant and Mr. Vordermeier had an argument on December 20, 2005, regarding the Respondent’s vehicles, and that the Complainant did not drive any vehicle that day. T. at 417-19. However, the Respondent’s position is that the Employer did not discharge the Complainant or commit any adverse action. Rather, according to the Respondent, on that date the Complainant voluntarily absented himself from his place of employment, and did not return. Brief at 14-16.

All of the witness agreed that the Complainant made many complaints to Mr. Vordermeier about the condition of the Respondent’s vehicles, and that these complaints included allegations the vehicles were unsafe. See, e.g., T. at 54, 62 (Complainant); 261 (Bisignano); 365 (Casale); 427 (Vordermeier). Internal complaints to any level of management have consistently been held to be “complaints” under 49 U.S.C. § 31105(a)(1)(a). Zurenda v. J & K Plumbing & Heating Co., ARB Case No. 98-088, 1997-STA-16 (June 12, 1998). Assuming arguendo that the Complainant’s complaints to Mr. Vordermeier constituted protected activity under the Act, the Respondent has violated the Act if he “discharged” “disciplined” or “discriminated against” the Complainant based on the Complainant’s protected activity. 49 U.S.C. § 31105(a)(1).

In an action alleging a violation of the Act, the Complainant must establish that the adverse action was taken in response to his protected activity, and not for some other reason. 49 U.S.C. § 31105(a); Metheany v. Roadway Package Systems, Inc., ARB Case No. 00-063, 2000-STA-11 (Sept. 30, 2002); Muzyk v. Carlswald Transportation, ARB Case No. 06-149, 2005-STA-060 (Sept. 28, 2007). The Board has held that, while a party need not establish economic harm in order to show that an adverse action occurred, a party must demonstrate that the Employer’s action constituted a tangible job consequence. West v. Kasbar, Inc., ARB Case No. 04-155, 2004 STA-34 (Nov. 30, 2005). However, several recent cases have held that, where retaliatory activity is alleged, an adverse action need not rise to the level of an ultimate employment decision. Calhoun v. United Parcel Service, ARB Case No. 00-026, 1999-STA-7 (Nov. 27, 2002). See generally Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. ___ ; 126 S.Ct. 2405 (June 22, 2006); Kessler v. Westchester County Dept. of Social Services, 461 F.3d 199 (2d Cir. 2006). In the Burlington Northern case, the Supreme Court defined adverse retaliatory actions as those that “could well dissuade a reasonable worker from making or supporting a charge of discrimination,” 548 U.S. at ___, 126 S.Ct. at 2409.

Termination of employment is an adverse action covered under the Act. 49 U.S.C. § 31105(a)(1). The Board has held that where no clear statements are made by management, the test of whether an individual has been discharged depends on reasonable inferences the employee could draw from the employer's conduct. Jackson v. Protein Express, ARB Case No. 96-194, 95-STA-38 (Jan 9, 1007), slip op. at 3, quoting Pennypower Shopping News, Inc. v. NLRB, 726 F.2d 626, 629 (10th Cir. 1984).

Additionally, discharge can be either actual, as when the employer informs an employee that he is fired, or constructive. Constructive discharge occurs "when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an individual to quit involuntarily. Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Whidbee v. Garazelli Food Specialties, 223 F.3d 62, 73 (2d Cir. 1999), quoting Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996. Depending on the circumstances, a failure to assign work may be construed as a "constructive discharge." Patane v. Fordham University, No. 06-3446-cv (2d Cir., November 28, 2007). Constructive discharge also requires deliberate action on the part of the Employer. The Second Circuit has noted that the meaning of "deliberate" is unsettled, but has stated that "something beyond mere negligence or ineffectiveness is required." Whidbee, 223 F.3d at 74. See also Mack v. Otis Elevator Co., 326 F.3d 116, 129 (2d Cir. 2003).

Based on the evidence of record, I find that, on December 20, 2005, the Complainant did complain to Mr. Vordermeier about the condition of the truck he was to drive, and walked out when Mr. Vordermeier refused to assign him to a different truck. I also find that it is likely that Mr. Vordermeier told the Complainant, on December 20, 2005, that if he did not want to drive the assigned vehicle he could leave. Although I am not convinced that the Complainant used the words "I quit" on December 20, 2005 during his confrontation with Mr. Vordermeier, I find that his actions on that day, including his departure from the Respondent's premises, could lead a reasonable person to infer that the Complainant had quit, particularly in light of the fact that he had previously made statements to Mr. Vordermeier that he was going to quit or was looking for work elsewhere.

I also find the evidence establishes that Mr. Vordermeier's "drive or go home" statement was made specifically in response to the Complainant's comments about the vehicle he was assigned to drive. However, as the evidence is in conflict as to whether the truck in question had a flat tire, I am not convinced that Mr. Vordermeier's comment was a response to protected activity, as defined in the Act and the regulation. Rather, based on the pattern of the relationship between the parties, including the Complainant's practice of occasionally stating that he was quitting, I find Mr. Vordermeier's statement was likely made as a result of his overall impatience and frustration with the Complainant and the Complainant's conduct

However, even if Mr. Vordermeier's statement was made in response to the Complainant's complaint about a flat tire, and even if the Complainant's statement to Mr. Vordermeier constitute protected activity, I find that Mr. Vordermeier's actions did not constitute an actual discharge of the Complainant. As he testified, Mr. Vordermeier knew that he did not have the power to unilaterally discharge the Complainant. As is evident, the Complainant also

was aware that union action was necessary to discharge him. Under the governing standards, where the Complainant knew that the Respondent could not discharge him, it would not be reasonable for the Complainant to infer from Mr. Vordermeier's words that his employment was terminated. See Jackson, supra.

I have also considered the possibility that the Complainant did not "shape" after December 20, 2005, because the circumstances of his departure amounted to a constructive discharge. This is a much closer question. However, based on the evidence, I find this scenario unlikely. In addition to being aware that the Respondent did not have the power to unilaterally terminate his employment under the contract, the Complainant was aware that his job required "shaping" in order to preserve his employment and seniority rights. As the union shop steward of several years' standing, the Complainant could be expected to understand the requirements of the union contract, which discussed the shaping requirement. Indeed, the "shaping" provision ensured that the Complainant himself held the power to enforce his concerns about safety, for if he refused to drive an unsafe vehicle and the Respondent gave the work to a junior driver, the Complainant could file a grievance based on violation of the union contract's seniority provision. As the Complainant's action in filing a grievance in early December 2005 illustrated, the Complainant understood that if the Respondent used a junior driver instead of him, for whatever reason, the Complainant had a remedy.

Based on the evidence of record, and in particular Mr. Vordermeier's letter of December 19, 2005, there is no question that Mr. Vordermeier would have liked to appoint someone other than the Complainant as shop steward. From Mr. Vordermeier's perspective, the Complainant's removal from the shop steward position would make things easier with customers. Removing the Complainant from the position as shop steward would mean that he would no longer be the "first man" to drive. Not incidentally, perhaps, Mr. Vordermeier would not be confronted so much with the Complainant's concerns about the condition of the vehicles and equipment.

However, there is no credible evidence that Mr. Vordermeier took any deliberate action on his wish. At best, the evidence shows that Mr. Vordermeier may have been indifferent to the Complainant's concerns. There is evidence Mr. Vordermeier was at times unresponsive to the Complainant's complaints; there is also evidence, chiefly from the Department of Transportation inspection, that the Respondent's vehicles had significant violations. See, e.g., CX 5. Clearly, some of the vehicles, including vehicles the Complainant was assigned to drive, were not well maintained. Nevertheless, there is no credible evidence that Mr. Vordermeier's failure to maintain the Respondent's vehicles in good condition was deliberate, or was intended to induce the Complainant to quit his job, as is required under a constructive discharge theory. See Whidbee, supra. Moreover, Mr. Vordermeier stated that his refusal to provide the Complainant with the best vehicles was motivated by his practice of providing those vehicles to his relatives. This policy, though certainly cause for resentment by the Complainant, is not a violation of the Act.

Rather, the evidence shows that the Complainant's conduct after December 20, 2005, was consistent with a voluntary relinquishment of his job with the Respondent. As noted above, the Complainant admitted in his testimony that he did not "shape" after December 20, 2005. T. at 150-51. Under the practice that had developed, a telephone call substituted for an in-person

“shape;” however, the Complainant also admitted he did not call Mr. Vordermeier to ask him whether work was available. T. at 219. In addition, the Complainant’s letter to the Department of Transportation, in April 2006, shortly after his initial contact with OSHA, does not mention that he was terminated from his employment, either directly or constructively. CX 2. Had the Complainant’s employment been terminated, or had he felt compelled to quit due to his safety concerns, he would likely have mentioned this fact.

According to the Complainant’s testimony, he discussed the events of December 20, 2005 with his union representative, Mr. Bisignano, on that day. Mr. Bisignano admits to multiple conversations with the Complainant regarding his employment situation. It is apparent that the Complainant felt aggrieved and had discussions with Mr. Bisignano regarding his possible remedies. The evidence as to precisely when Mr. Bisignano told the Complainant that he was required to “shape” in order to have the union file a grievance on his behalf is in conflict: Mr. Bisignano testified he told the Complainant this advice almost immediately, whereas the Complainant testified that he was not told this until March. The Complainant asserted that he was unaware of what needed to be done to protect his seniority.

I find neither version completely credible. I am not convinced that Mr. Bisignano told the Complainant in December or January 2006 that he was required to “shape.” The record establishes that the Complainant’s counsel contacted union officials, as early as January 31, 2006, in an effort to get the union to intercede in the Complainant’s dispute with the Respondent. This correspondence would not be necessary had the Complainant been informed that he was required to shape (or had the Complainant communicated this information to his counsel). On the other hand, the record establishes that the Complainant, Mr. Bisignano, and Mr. Vordermeier were all present at the labor-management panel meeting on February 7, 2006, and the issue of the Complainant’s discharge from the Respondent did not come up. Had the Complainant felt aggrieved at that time regarding his employment, it is likely he would have raised the issue. The fact that he did not raise the Respondent’s actions at that time indicates the Complainant did not believe he had a dispute with the Respondent regarding a termination of employment.

Based on the foregoing, I must conclude that the Complainant’s actions on December 20, 2005, and thereafter, manifested his voluntary abandonment of his job. Based on his experience in the trucking industry and as a union shop steward, the Complainant knew that he would be required to “shape” in person in order to be considered eligible for work. His failure to “shape” is consistent with job abandonment.

Based on the foregoing, therefore, I find that the Complainant has failed to establish, by a preponderance of the evidence, that the Respondent discharged him, either actually or constructively.

Allegations of “Blackballing”

In his post-hearing brief, the Complainant asserted that, after the Respondent terminated his employment on December 20, 2005, the Respondent engaged in a “blackballing” campaign that prevented him from obtaining adequate work. Brief at xx. At the hearing, the Complainant testified that he was unable to get work, because the Respondent had “blackballed” him. Among

other things, the Complainant alleged that Mr. Vordermeier told other potential employers not to hire him. T at 122, 137. The Complainant also stated that Mr. Vordermeier did not pay several tickets that had been issued to the Complainant for faulty and unsafe equipment, which resulted in suspension of the Complainant's driving license. T. at 137-45.

At the hearing, Mr. Vordermeier testified that he did not speak to any potential employer about the Complainant. T. at 425-29. He also acknowledged that any tickets the Complainant received for unsafe equipment were the Respondent's responsibility; however, he stated, the Complainant told him he would take care of the tickets that had been issued in New Windsor, because he lived in the vicinity. T. at 452-53.

"Blackballing" in retaliation for protected activity is a violation under the Act. See Becker v. West Side Transport, Inc., ARB Case No. 01-032, 00-STA-4 (Feb. 27, 2003). In addition, based on the principle enunciated by the Supreme Court decision in Burlington Northern, supra, negative comments about a former employee, if motivated by the employee's protected activity, may constitute adverse action. Becker, supra.

In general, the Complainant's evidence regarding the Respondent's alleged "blackballing" is speculative. The Complainant provides no information, other than his own testimony, about any communications Mr. Vordermeier allegedly made to potential employers. For his part, Mr. Vordermeier denied making any statements to any employers. Even if I credit the Complainant's testimony entirely, and discount Mr. Vordermeier's, the Complainant did not establish that any communications Mr. Vordermeier made were in retaliation for the Complainant's protected activity, as opposed to some other reason.²⁶

The Complainant's allegations that the Respondent retaliated against him by failing to pay his tickets, thus blemishing his driving license and making the Complainant undesirable for employment, are misplaced. According to the record, the Complainant's driving license was twice suspended for failure to answer a summons or pay a fine (CX 9). However, these suspensions were cleared in October 2004 and May 2005, well before the incident of December 20, 2005, so the events of that date could have played no role in any failure of the Respondent to act upon the Complainant's tickets, thereby jeopardizing his driving license.

Based on the foregoing, I find, therefore, that the Complainant has failed to establish, by a preponderance of the evidence, that the Respondent "blackballed" him in retaliation for protected activity.

Conclusion

Assuming arguendo that the Complainant engaged in protected activity on December 20, 2005, and before, I find that the Complainant has failed to establish, by a preponderance of evidence, that the Respondent took any adverse action in retaliation for the Complainant's protected activity. Because I have found that the Complainant has failed to establish that the

²⁶ For example, Mr. Vordermeier's letter of December 19, 2005 establishes that Mr. Vordermeier thought the Complainant was a liability to good relations with customers. CX 11.

Respondent subjected him to adverse action, I must conclude that the Complainant has failed to establish a prima facie case. Consequently, this action should be dismissed. See 29 C.F.R. § 1978.109.²⁷

Recommended Order

For the reasons set forth above, it is ORDERED that the complaint of Peter Klosterman under section 405 of the Surface Transportation Assistance Act of 1982, as amended, 49 U.S.C. § 31105, is DENIED.

A

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

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.

²⁷ Because I have found that the Complainant has not established this requisite element, it is not necessary for me to examine the other elements of a prima facie case.