

**U.S. Department of Labor**

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**Issue Date: 10 November 2005**

*In the Matter of:*

**KENNETH HOBSON,**

**Complainant,**

**v.**

Case No.: **2005-STA-00035**

**COMBINED TRANSPORT, INC.,**

**Respondent.**

Before: DANIEL F. SOLOMON, Administrative Law Judge

*For Complainant:*

Randall D. Huggins, Esq., Shook, Huggins and Johnson, P.C., Tulsa, Oklahoma

*For the Respondent:*

Mike Bottjer, Combined Transport, Inc., Central Point, Oregon

**RECOMMENDED DECISION AND ORDER**

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter “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.

The Complainant in this case alleges that he was discharged in violation of the Act from his employment with the Respondent as truck driver. The Complainant worked for the Respondent as a driver of tractor trailers hauling glass on interstate routes from May 2000 until October 2004.

In September 2004, the Complainant suffered an anxiety attack and had to go to the hospital rather than haul an assigned load. After some treatment and a brief medical leave, the Complainant attempted to return to work, but further problems occurred, allegedly because of the side effect of excessive daytime drowsiness caused by the medication that the Complainant had been prescribed during his leave. These complications resulted in the delay of another assigned load and the Complainant’s discharge by the Respondent.

At the Respondent’s prompting, the Complainant got his doctor to take him off of the medication causing his daytime drowsiness. The Respondent then rehired the Complainant and assigned him a new load to deliver. The Complainant declined to deliver this load because he was concerned that the medication was not yet out of his system and might still cause him to fall asleep while driving. When the Complainant declined to drive the assigned load for this reason,

the Respondent discharged the Complainant again. The Complainant subsequently filed this complaint.

A hearing was held in this matter in Tulsa, Oklahoma, on August 18, 2005. The Complainant was represented by Randall D. Huggins, Esq. of Shook, Huggins and Johnson, P.C. in Tulsa, Oklahoma. The Respondent represented itself through Mike Bottjer, an employee of the Respondent, although the Respondent had been advised that it had a right to be represented by an attorney or other qualified representative.

At the hearing, the Complainant, Rhonda McKay, Charles Russell Godwin, and Randy Wiley all testified. Eight (8) Complainant's Exhibits ("CX") were admitted into evidence as CX 1-8. Transcript ("Tr.") at 9. Three (3) Respondent's Exhibits ("RX") were admitted into evidence as RX 1, 7 & 9. Tr. at 34 & 36. Subsequent to the hearing, the record remained open for the submission of briefs. Although the Complainant submitted a brief detailing his proposed findings of fact and conclusions of law, the Respondent failed to do so.

### **ELEMENTS OF PROOF**

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 v. Transport Drivers, Inc.***, 836 F.2d 226, 229 (6<sup>th</sup> Cir. 1987). The Secretary of Labor has taken the position that in establishing the "causal link" between the protected activity and the adverse action, it is sufficient for the employee to show that the employer was aware of the protected activity at the time it took the adverse action. See ***Osborn v. Cavalier Homes***, 89-STA-10 (Sec'y July 17, 1991); ***Zessing v. ASAP Express, Inc.***, 92-STA-0033 (Sec'y Jan. 19, 1993).

The employee protection provisions of the Surface Transportation Assistance Act provides 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).

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. Once a *prima*

*facie* case is established, the burden of production then shifts to the respondent to articulate, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. 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 pretext for discrimination. *Moon, supra; see also Texas Dept of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

I note that the Respondent is *pro se*, but it still must carry its burden of production. While a *pro se* respondent may be held to a lesser standard than legal counsel with regard to matters of procedure, the burden of rebutting a complainant's *prima facie* case by establishing a legitimate nondiscriminatory reason for the Respondent's action is no less.

### **EVIDENCE PRESENTED**

#### **The Complainant's Testimony**

The Complainant testified that he was employed by the Respondent as a truck driver of freight liners hauling glass from May 2000 until October 2004. Tr. at 11. He also testified that the Respondent operated on routes across state lines in 48 states and Canada. Tr. at 11.

According to the Complainant, he received yearly and quarterly safety awards, as well as bonuses, throughout his tenure with the Respondent. Tr. at 11-12. These awards were for driving his routes without any accidents or any damage to the glass that he hauled. Tr. at 11-12. The Complainant further testified that, prior to his termination, he had never received any written disciplinary action from his supervisor, Charles Russell Godwin. Tr. at 12-13.

The Complainant testified that he began having problems with his anxiety levels in September 2004. Tr. at 14. Those problems led to him leaving work to seek medical treatment near the end of September 2004. Tr. at 14-15. Initially, the Complainant was seen by a Dr. Johnson on September 26, 2004, and he was referred then to his primary care physician for an appointment on September 29, 2004. Tr. at 15-16. At that appointment, the doctor instructed him not to work again until October 4, 2004 and wrote him a medical note to that effect. Tr. at 16; CX-6. His doctor also placed him on the anxiety medication Xanax. Tr. at 16.

The Complainant testified that on October 4, 2004, he attempted to return to work. Tr. at 16. When he did so, the load he was to haul had not arrived, and the Complainant went to sleep because the Xanax was making him "very sleepy." Tr. at 16-17. The Complainant testified that he was "extremely" experiencing "excessive daytime drowsiness." Tr. at 20. Excessive daytime drowsiness is a listed side effect of Xanax. CX-7. According to the Complainant's prescription records, he was taking doses of a generic equivalent of Xanax, which he was prescribed on September 29, 2004. CX-8.

The Complainant had to delay loading his load until the next morning. Tr. at 17. The Complainant testified that the next morning he fell asleep again while waiting for Wiley to bring him a fuel card for the truck, and then loaded his load in the afternoon. Tr. at 17. He then went home for a shower, supper, and a nap, but he ended up sleeping until 8:00 AM the next morning. Tr. at 17-18. On his way back to pick up his truck to deliver his load that morning, he received a phone call from Godwin informing him that he was fired. Tr. at 18. When he asked why, he was informed that it was because he was late with his load. Tr. at 18.

The Complainant testified that a day or two later he was again contacted by Godwin, who inquired about whether the Complainant could have his prescription changed to something without the same side effects. Tr. at 18. The next morning, the Complainant called his doctor

and was taken off of the Xanax. The Complainant called back Godwin and told him that his doctor had taken him off of the Xanax. Tr. at 18-19. In response, Godwin informed him that the Respondent had a load that they wanted the Complainant to come pick up that day. Tr. at 19. The Complainant responded that “that’s fine, but I’ve still got the Xanax in my system.” Tr. at 19. He elaborated that he was concerned it would be unsafe for him to drive until the Xanax was out of his system and he could be sure that he would not fall asleep on the road. Tr. at 19. The Complainant testified that Godwin responded by saying “[w]ell, just fuck it then...[w]e don’t need you” and then hanging up on him. Tr. at 19.

The Complainant testified that it was his understanding that he had been rehired when Godwin offered him a load to haul and inquired about changing his medication. Tr. at 19. The Complainant testified that he had been terminated by Godwin on October 5, 2004, rehired a few days later when the load was offered, and then immediately fired again when he expressed concerns about driving that load so soon after ceasing his medication. Tr. at 13.

The Complainant testified that, after his termination in October 2004, he was not able to obtain substantially similar employment until on or around June 8, 2005. Tr. at 21. The Complainant said that his post-termination job search had been for other jobs as a truck driver, and that his search was impeded by his anxious condition. Tr. at 24-25. He testified that he had applied for work at FedEx Freight, ABF, Conway, and “several” others that he could not “really remember.” Tr. at 25. The Complainant testified that, after he had “a while of recovery,” he believed he could have physically done those jobs for which he had applied. Tr. at 25. He also testified that he had a commercial driver’s license, which was required to drive a truck in Oklahoma. Tr. at 25.

The Complainant testified that his current employment is as a truck driver hauling glass on interstate routes for Moore Freight Service. Tr. at 21. He testified that, in order to obtain substantially similar employment, he bought a tractor and leased it to Moore, which made him an owner/operator. Tr. at 26. The tractor that the Complainant purchased cost \$20,000, and he is paying for the truck through an agreement in which 20% of his fee for each load is placed in an escrow account from which \$1,000 is deducted each month. Tr. at 26-27. At the time of the hearing, only one deduction had been made, so \$19,000 was still owed on the price of the Complainant’s trailer. Tr. at 27.

He also testified that his average weekly wage had been about \$1,200 a week prior to his termination. Tr. at 21. Additionally, the Complainant testified that his current position pays him more than his prior employment with the Respondent. Tr. at 26.

#### Rhonda McKay’s Testimony

Rhonda McKay testified that she is the Complainant’s fiancée and that she was involved with him in September and October 2004. Tr. at 29-30. On the day of the anxiety attack that precipitated his visit to a doctor, the Complainant called her to tell her “that something was wrong with him.” Tr. at 30. She testified that she could tell that he was “upset big time.” Tr. at 30. She testified further that, after he came home, she took him to the hospital for treatment. Tr. at 30.

McKay further testified that she was present when the Complainant and Godwin spoke on the phone about the Complainant’s doctor taking him off of the Xanax. Tr. at 30-31. McKay testified that she heard the Complainant attempt to explain to Godwin about the medication still in his system and his safety concerns about driving in that state. Tr. at 31. She also testified that she heard Godwin say “Oh, fuck it, we don’t need you.” Tr. at 31.

Charles Russell Godwin

Charles Russell Godwin testified that he was a driver supervisor for the Respondent and that he had worked there for ten years. Tr. at 39. Godwin testified that he received a phone call from the Complainant after the Complainant had unloaded a load in Olathe, Kansas in late September 2004. Tr. at 39. Godwin testified that, during that initial call, the Complainant's anxiety issues were not discussed, but that they were discussed during a second call later in the afternoon of the same day. Tr. at 39-40. Godwin informed the Complainant that he still had to deliver his assigned load. Tr. at 40.

Godwin testified that later Randy Wiley, a yard manager for the Respondent, informed him that the Complainant was "real upset and didn't have no business driving a truck." Tr. at 40. After receiving that information, Godwin instructed the Complainant to go to the hospital. Tr. at 40. A few days later, Godwin received documentation of the Complainant's visit to the hospital and the doctor's instruction for him to take off work for a week. Tr. at 41. At that point, the Respondent placed the Complainant on medical leave and set a return-to-work date of October 4, 2004. Tr. at 41.

Godwin testified that on October 4, 2004 the Complainant returned to work and was assigned a load to deliver. Tr. at 42. Godwin testified that the Complainant had to wait for his load to arrive because it was not there yet. Tr. at 42. Godwin testified that the next morning, when the Complainant's load was there and ready to be loaded, the Complainant went to fuel his truck, fell asleep at the truck stop, and consequently, did not load his load until that afternoon. Tr. at 43. Godwin had no further contact with the Complainant until the following morning when his load was still not moving. Tr. at 43.

Godwin testified that when he discovered that the load was still not moving he called the Complainant to find out what was going on, and he was informed by the Complainant that he had gone home for dinner and a shower and had fallen asleep again. Tr. at 44. Godwin testified that he informed the Complainant that "at that particular time [the Respondent] didn't need his services anymore." Tr. at 45. Godwin testified that the Complainant reacted by asking for his job back and "everything else." Tr. at 45.

According to Godwin, the Complainant's discharge was a directive of Ron Moore and Dave Carr, upper management of the Respondent. Tr. at 45. The termination order was signed on October 6, 2004. Tr. at 45. Godwin testified that the Complainant was fired for failure to pick up or deliver on time, as described in the Respondent's employee handbook section on disciplinary actions. Tr. at 51; CX-4. Godwin also testified that this rationale for the Complainant's discharge applied only to the Complainant's first firing on October 6, 2004 and not his subsequent firing a few days later. Tr. at 59.

Godwin testified that he spoke with the Complainant a few times after the Complainant had been fired and that he had suggested that the Complainant see about getting his medicine changed. Tr. at 56. Godwin testified that later, he was instructed to contact the Complainant again. Tr. at 55. Godwin testified that he had been instructed to "ask him if he'll come back to work and do this load, then everything would go away." Tr. at 55. Godwin then testified that the Complainant said he could not deliver this newly offered load because the medicine was still in his system. Tr. at 57. Godwin testified that his response was "[o]kay...then I don't need you." Tr. at 57.

Godwin further testified that he never received documentation from a doctor about the side effects of the Complainant's medication. Tr. at 58. Godwin also testified that he "never" used any "adverse language" with the Complainant. Tr. at 45.

Godwin testified that the Complainant had been fired on October 6, 2004 but that he was rehired and offered another load. Tr. at 57.

#### Randy Wiley

Randy Wiley, a yard supervisor for the Respondent, testified that on the day of the original incident in late September 2004 he noticed how upset the Complainant was and recommended that he not drive in that condition. Tr. at 60-61. Wiley testified that he spoke with Godwin on the phone and advocated reassigning the load to someone else so that the Complainant could visit the hospital, and that is what was done. Tr. at 61.

Wiley testified that, after the Complainant returned from his week of doctor-prescribed rest on October 4, 2004, the Complainant returned to work to get a load to deliver, but the load did not arrive until after hours. Tr. at 62. Although the load was available for the Complainant to load the next morning, the Complainant did not load the load until the next evening because the Complainant fell asleep at the truck stop while waiting to refuel his truck. Tr. at 63. Wiley testified that the Complainant went home that evening after loading his load and that when Wiley returned the next morning, the Complainant's load was still there. Tr. at 64.

### DISCUSSION

The Respondent is a "flatbed trucking company" that is engaged in the transportation of raw glass on interstate highway routes throughout the United States and Canada. Tr. at 11; CX-1. The Respondent maintains its principal place of business in Central Point Oregon. CX-1. 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 to transport raw glass. Tr. at 11; CX-1. In the course of this employment, the Complainant had a direct effect upon motor vehicle safety. Tr. at 11-12. 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. *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).

The regulation that the Complainant was concerned would be violated is one commonly known as the fatigue rule. This rule states:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3 (2003). This regulation covers a driver who anticipates that his or her driving ability or alertness is so likely to become impaired that it would be unsafe to begin or continue driving. *Eash*, ARB No. 04-036, slip op. at 6, citing **Stauffer v. Wal-Mart Stores, Inc.**, ARB No. 00-062, ALJ No. 1999-STA-21, slip op. at 5 (ARB July 31, 2001).

#### *Actual Violation*

Subsection (1)(B)(i) protects a complainant's refusal to drive if his operation of a motor vehicle would have violated the fatigue rule set out *supra*. In order to prevail under this "actual violation" provision, however, the complainant must prove that driving the vehicle actually would have violated the specific requirements of the fatigue rule at the time he refused to drive – a "mere good-faith belief in a violation does not suffice." *Eash*, ARB No. 04-036, slip op. at 6, citing **Yellow Freight Sys. v. Martin**, 983 F.2d 1195, 1199 (2d Cir. 1993) and **Cortes v. Lucky Stores, Inc.**, ARB No. 98-019, ALJ No. 96-STA-30, slip op. at 4 (ARB Feb. 27, 1998). "Thus, a complainant must introduce sufficient evidence to demonstrate that his driving ability is or would be so impaired that actual unsafe operation of a motor vehicle would result." *Eash*, ARB No. 04-036, slip op. at 6, citing **Wrobel v. Roadway Express, Inc.**, ARB No. 01-091, ALJ No. 00-STA-48, slip op. at 6 (ARB July 31, 2003).

In this case, the Complainant has offered uncontested evidence that the side effects of his medication would have so impaired his driving ability that his operation of a motor vehicle would have been unsafe as a result. First, the Complainant was taking medication that produced "excessive daytime drowsiness" as a side effect. Tr. at 16-17 & 20; CX-7. The medication even warned that one's ability to operate a motor vehicle might be impaired. CX-7. Second, the Complainant had already experienced the effects of the medication first hand when he fell asleep waiting for his load, fell asleep again while waiting to get gas, and fell asleep a third time when he went home for dinner. Tr. at 16-17.

The Complainant clearly could not control his drowsiness while on his Xanax prescription. Although the Complainant had been taken off of the Xanax immediately before he declined to deliver his final offered load, if the medication was still in his system as he testified, it would have so impaired his driving ability that it would have been unsafe for him to drive that truck. Tr. at 19-20. Thus, the Complainant has established that he engaged in protected activity by refusing to drive on the basis of the actual regulatory violation that would have resulted.

### *Reasonable Apprehension*

Alternatively, subsection (1)(B)(ii) may protect a complainant's refusal to drive if he had "a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." 49 U.S.C.A. § 31105(a)(1)(B)(ii). This clause covers more than just defects in the vehicle, however, it also ensures "that employees are not forced to commit. . .unsafe acts." *Eash*, ARB No. 04-036, slip op. at 7, citing *Garcia v. AAA Cooper Transp.*, ARB No. 98-162, ALJ No. 98-STA-23, slip op. at 4 (ARB Dec. 3, 1998). Thus, a driver's physical condition, including fatigue, could cause him to have a reasonable fear of serious injury resulting from his driving in that condition. *Id.*, citing *Somerson v. Yellow Freight Sys., Inc.*, ARB Nos. 99-005 & 99-036, ALJ Nos. 98-STA-9 & 98-STA-11, slip op. at 14 (ARB Feb. 18, 1998).

In order to be protected under this subsection, the driver's belief must be objectively reasonable. *Id.* at 7. A driver's belief is objectively reasonable when a "reasonable [person] in the circumstances...confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury or serious impairment [to] health." *Id.* at 8. The driver must also ask the employer to correct the situation and be turned down before refusing to drive. 49 U.S.C.A. § 31105(a)(2).

In this case, the Complainant has established that he engaged in protected activity by refusing to drive on the basis of a reasonable apprehension that a real danger of accident or injury existed. The Complainant was taking medication that produced "excessive daytime drowsiness" as a side effect. Tr. at 16-17 & 20; CX-7. The medication even warned that one's ability to operate a motor vehicle might be impaired. CX-7. Both of these facts provide a basis for a reasonable apprehension of danger. Additionally, the Complainant had already experienced the effects of the medication first hand when he fell asleep waiting for his load, fell asleep again while waiting to get gas, and fell asleep a third time when he went home for dinner. Tr. at 16-17.

Because of these experiences, the Complainant knew that he could not control his drowsiness while on his Xanax prescription, and it was therefore reasonable for him to believe that it would be dangerous for him to drive before while he was still under the effects of the medication. Although the Complainant had been taken off of the Xanax immediately before he declined to deliver his final offered load, if the medication was still in his system as he testified, it would have so impaired his driving ability that it would have been unsafe for him to drive that truck. Tr. at 19-20. The Complainant argued that he should not drive until the medication was out of his system, but the Respondent was not receptive. Tr. at 19-20. Thus, the Complainant has also established that he engaged in protected activity by refusing to drive on the basis of a reasonable apprehension of danger, and his activity would have been protected even if an actual violation might not have occurred.<sup>1</sup>

### Adverse 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). In this case, the Complainant testified that he was discharged from

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<sup>1</sup> This case is distinguishable from *Safley v. Stannards, Inc.*, ARB No. 05-113, ALJ No. 2003-STA-54 (ARB Sept. 30, 2005) in which the Administrative Review Board found that informing an employer about a prescription for a medication with a sedative effect was not protected activity. In that case, the employee was not taking the prescribed medication, was not experiencing any side effects, said that he could drive safely, and did, in fact, drive safely. In the present case, the Complainant was taking the prescribed medication, was experiencing side effects that would prevent him from driving safely, and said so to his employer. Thus, the Complainant in this case engaged in protected activity while the employee in *Safley* did not.



his employment, rehired, and then discharged again. Tr. at 13 & 19-20. His firing, rehiring, and refiring were confirmed by the testimony of his supervisor, a witness for the Respondent. Tr. at 45 & 56-57. Thus, the Complainant has established that he suffered adverse employment action 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, proximity in time can be considered solid evidence of causation. *White v. The Osage Tribal Council*, ARB No. 99-120, ALJ No. 95-SDW-1, slip op. at 4 (ARB Aug. 8, 1997).

In this case, the protected activity and the adverse action occurred during the same conversation between the Complainant and his supervisor. The Complainant expressed his desire not to drive a load while still under the influence of his medication, and his supervisor fired him and hung up. Tr. at 19 & 57. Although their accounts differ as to the language used in the firing, both the Complainant and his supervisor testified to the conversation, the expression of the Complainant's concerns, and the firing. Tr. at 19 & 57. Thus, it is clear that the Respondent knew of the Complainant's protected activity and that the adverse action followed very closely thereafter, and the Complainant has established, therefore, a causal connection between his protected refusal to drive and his final discharge by the Respondent.

#### The Complainant's Prima Facie Case

Because the Complainant has established that he and the Respondent are covered by the Act, that he engaged in activity protected by the Act, that he suffered adverse action, and that there was a causal connection between the protected activity and the adverse action, the Complainant has carried his burden of establishing a *prima facie* case under the Act. The burden now shifts to the Respondent to articulate, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision.

#### Legitimate Nondiscriminatory Purpose

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." *Burdine*, *supra* at 254. The evidence, however, must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id.* at 255.

In this case, the Respondent has produced no such evidence. According to the testimony offered by witnesses for both the Complainant and the Respondent, the Complainant was discharged twice by the Respondent. Tr. at 13, 19-20, 45 & 56-57. The Complainant was discharged the first time on October 6, 2004, and a few days later, he was rehired and then discharged again. Tr. at 13, 19-20, 45 & 56-57. Although the Respondent has submitted some evidence that could suggest a potentially legitimate reason for the Complainant's initial discharge on October 6, 2004, the Complainant has produced no evidence of a legitimate, nondiscriminatory purpose for the Complainant's second and final firing a few days later.

In discussing these two firings, the Respondent's own witness, driver supervisor Godwin, testified that the alternate rationale provided by the Respondent (failure to pick up and deliver on time) applied only to the Complainant's first firing on October 6, 2004 and *not* his subsequent firing a few days later. Tr. at 59. He also testified that his response to the Complainant's insistence on engaging in protected activity was "[o]kay...then I don't need you." Tr. at 57. Although at first Godwin testified that the Complainant was fired for failure to pick up or deliver on time, as described in the Respondent's employee handbook section on disciplinary actions, his testimony is conflicting and I find that this allegation is not credible. Not only do I find that this argument is not credible, the record shows that the Respondent failed to establish that any violation of company policy had occurred. Moreover, I find that the spontaneous utterance is proof that the true reason for dismissal was the protected activity.

Thus, the Respondent has failed to carry its burden of demonstrating that there was a legitimate, nondiscriminatory reason for the Complainant's second and final discharge.

#### **Alternative Finding –Pretext**

Although I find that the Respondent has failed to establish a there was a legitimate, nondiscriminatory reason for the Complainant's second and final discharge, I find alternatively that if there had been a basis, it would have been pretextual. Because I find pretext, it is not necessary to consider the "but for" question of the dual motive analysis. *Hufstetler v. Roadway Express, Inc.*, 85-STA-8 (Sec'y Aug. 21, 1986), overruled on other grounds, *Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987).

#### **CONCLUSION**

The Complainant has successfully made out a *prima facie* case that he is entitled to relief under the Act in this case. Because the Complainant has carried his burden of establishing a *prima facie* case under the Act and the Respondent has failed to carry its burden of demonstrating some legitimate, nondiscriminatory reason for its actions, the Complainant is entitled to relief under the Act.

#### **DAMAGES**

As a successful litigant, the Complainant is entitled to an order requiring the Respondent to reinstate him "to [his] former position with the same pay and terms and privileges of employment." 49 U.S.C. § 31105(b)(3)(A)(ii); *Palmer v. Triple R Trucking*, ARB No. 03-109, ALJ No. 2003-STA-28, slip op. at 4 (ARB Aug. 31, 2005). Under the STAA, the issuance of an order of reinstatement is an automatic remedy and is not discretionary. *Palmer*, ARB No. 03-109, slip op. at 4, *citing Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 02-STA-30, slip op. at 4 (Mar. 31, 2005) (reinstatement under the STAA is an automatic remedy designed to re-establish the employment relationship) and *Palmer v. Western Truck Manpower*, ALJ No. 85-STA-6, slip op. at 19 (Sec'y Jan. 16, 1987) (an order of reinstatement is not discretionary).

Only where there is evidence that reinstatement would be impossible impracticable, or cause "irreparable animosity" between the parties can an order of reinstatement be omitted. *Densieski v. La Corte Farm Equipment*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 7 (ARB Oct. 20, 2004); *see further Dale*, ARB No. 04-003, slip op. at 4. Even an indication by the Complainant that he does not seek reinstatement is not adequate justification for omitting an order of reinstatement. *Id.*

Although the Complainant has not requested reinstatement in this case and may not accept an offer to return to his position with the Respondent since he has secured a comparable

job at which he earns more money, the parties have not introduced evidence that reinstatement would be impossible, impractical or produce irreparable animosity. Therefore, an order of reinstatement must be issued. The Respondent is required to make the Complainant a bona fide offer of reinstatement to the position from which he was fired with the same pay and other terms and privileges of employment.

Under the STAA, a successful complainant is also entitled to an award of back pay, which is mandatory, once it is determined that an employer has violated the STAA. 49 U.S.C. § 31105(b)(3)(A)(iii); *Moravec v. HC & M Transportation, Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992), citing *Hufstetter v. Roadway Express, Inc.*, 85-STA-8, slip op. at 50 (Sec'y Aug. 21, 1986), *aff'd sub nom., Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987). Such a back pay award need not be calculated with "unrealistic exactitude." *Pettway v. American Cast Iron Pipe Co., Inc.*, 494 F.2d 211, 260-61 (5th Cir. 1974). Any uncertainties as to the amount of the award should be resolved against the employer. *Id.* Back pay must be awarded from the date of the retaliatory discharge through the date on which the Complainant receives an offer of reinstatement or gains comparable employment. See *Polewsky v. B & L Lines Inc.*, 90-STA-21 (Sec'y May 29, 1991); *Nelson v. Walker Freight Lines, Inc.*, 87-STA-24, slip op. at 6 n.3 (Sec'y Jan. 15, 1988); *Earwood v. D.T.X. Corp.*, 88-STA-21, slip op. at 10 (Sec'y Mar. 8, 1991).

In this case, the Complainant was discharged in October 2004, and despite repeated applications, he was not able to obtain substantially similar employment until on or around June 8, 2005. Tr. at 21 & 25-26. Altogether, the Complainant was out of work for approximately thirty-two (32) weeks from the time of his discharge to the time he obtained comparable employment. Tr. at 25-26. Prior to his discharge, the Complainant's average weekly wage was approximately \$1,200. Tr. at 21. The Respondent has not submitted any evidence to contradict the Complainant's testimony as to his average weekly wage or the length of his unemployment, and the Complainant's testimony was credible. Thus, the Complainant is entitled to a back pay award of \$38,400 (32 weeks x \$1,200/week).

Additionally, a successful complainant is entitled to pre- and post-judgment interest on an award of back pay. *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 99-STA-34, slip op. at 9 (ARB Dec. 29, 2000). Interest on back pay awards under the STAA is calculated using the rate applicable to underpayment of federal taxes. 29 C.F.R. § 20.58(a); 26 U.S.C. § 6621; *Drew v. Alpine, Inc.*, ARB Nos. 02-044 & 02-079, ALJ No. 2001-STA-47, slip op. at 4 (ARB June 30, 2003). Moreover, the interest accrues, compounded quarterly, until the respondent pays the damages award. *Assistant Sec'y & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-34, slip op. at 3 (ARB Jan. 12, 2000). Therefore, the Complainant is entitled to pre- and post-judgment interest on his back pay award in accordance with these rules.

In addition to back pay, a successful complainant is entitled to other compensatory damages under the Act. 49 U.S.C. § 31105(b)(3)(A)(iii). In this case, the Complainant's long failure to find comparable employment eventually necessitated that he take riskier steps to secure employment. In order to obtain substantially similar employment, he bought a tractor and leased it to Moore Freight Service, so that he could become an owner/operator in Moore's employ. Tr. at 26. The tractor that the Complainant purchased cost \$20,000, and he is paying for the truck through an agreement in which 20% of his fee for each load is placed in an escrow account from which \$1,000 is deducted each month. Tr. at 26-27. At the time of the hearing, only one deduction had been made, so \$19,000 was still owed on the price of the Complainant's trailer. Tr. at 27. Because the Respondent's illegal discharge of the Complainant placed him in the position where this tractor purchase became necessary to obtain employment, the Complainant is

entitled to be compensated for the cost of the tractor as part of his compensatory damages. Thus, the Complainant is entitled to an award of \$20,000 for the cost of the trailer that he had to purchase in order to obtain comparable employment.

In addition to the price of the tractor, the Complainant has requested compensatory damages in the amount of \$38,400 for increased anxiety and stress that he suffered as a result of his termination as well as any other general harm from the Respondent's wrongful acts. Comp. Prop. Find. of Fact and Conc. of Law at 5 & 7. The Complainant has not provided adequate evidence of \$38,400 worth of such damages, however. In comparable cases, a complainant will often offer evidence of adverse effects that psychological trauma has had on his or her life, such as damage to a relationship, an inability to function at work, or other disruption of the normal routines of life.<sup>2</sup> In this case, the Complainant made only one reference during his testimony to the anxiety and stress that resulted from the Respondent's actions, and he testified that after "a while of recovery" he believed he was able to do substantially similar work. Tr. at 24-25.

I do find that the Complainant is credible, however, and that, as a result of the Respondent's conduct, he did suffer increased anxiety and stress at a time when anxiety was already a problem for him. I accept that this heightened stress and anxiety is compensable, and the Complainant is entitled, therefore, to compensatory damages for the "high anxiety" and "messed up" nerves that he suffered as a result of his termination. Accordingly, I find that the Complainant is entitled to \$5,000 for the stress and anxiety resulting from his wrongful discharge by the Respondent.

Finally, a prevailing complainant is entitled to the expenses of pursuing his claim, including reasonable attorney's fees and costs. 49 U.S.C. § 31105(b)(3)(B). Accordingly, the Complainant's reasonable attorney's fees and costs will be assessed against the Respondent.

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<sup>2</sup> For examples, see:

- **Hall v. U.S. Army, Dugway Proving Ground**, 1997-SDW-5 (ALJ Aug. 8, 2002) (awarding \$400,000 in compensatory damages for mental anguish, adverse health consequence, and damage to professional reputation caused by "repeated and continuous discrimination and retaliation" that caused great mental suffering, compromised mental health, and destroyed professional reputation).
- **Moder v. Village of Jackson, Wisconsin**, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003) (awarding no emotional trauma damages because the plaintiff failed to demonstrate both (1) objective manifestations of distress, e.g., sleeplessness, anxiety, embarrassment, depression, feelings of isolation, and (2) a causal connection between the violation and the distress).
- **Creekmore v. ABB Power Systems Energy Services, Inc.**, Case No. 93-ERA-24, slip op. at 25 (Dep'y Sec'y Dec., Feb. 14, 1996) (awarding \$40,000 for emotional pain and suffering caused by a discriminatory layoff after the Complainant showed that his layoff caused emotional turmoil and disruption of his family because he had to accept temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company).
- **Michaud v. BSP Transport, Inc.**, ARB Case No. 97-113, ALJ Case No. 95-STA-29, slip op. at 9 (ARB Dec. Oct. 9, 1997) (awarding \$75,000 in compensatory damages where evidence of major depression caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiatrist; evidence also showed foreclosure on Michaud's home and loss of savings).
- **Blackburn v. Metric Constructors, Inc.**, Case No.1986-ERA-4, slip op. at 5 (Sec'y Dec. after Remand, Aug. 16, 1993) (awarding \$5,000 for mental pain and suffering caused by discriminatory discharge where complainant became moody and depressed and became short tempered with his wife and children).
- **Lederhaus v. Paschen**, Case No. 91-ERA-13, slip op. at 10 (Sec'y Dec., Oct. 26, 1992) (awarding \$10,000 for mental distress caused by discriminatory discharge where the Complainant showed he was unemployed for five and one half months, foreclosure proceedings were initiated on his house, bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted).

Counsel for the Complainant shall submit a fee petition detailing the legal services rendered and litigation expenses incurred in representing the Complainant in this matter within thirty (30) days of receipt of this Recommended Decision and Order, and the Respondent's counsel shall have fourteen (14) days from the service of that fee petition to respond with any objections.

### RECOMMENDED ORDER

**IT IS RECOMMENDED** that:

1. The Respondent make a bona fide offer to the Complainant of reinstatement to his former position with the same pay, terms, and privileges of employment that he had before his illegal discharge;
2. The Respondent pay to the Complainant back pay of \$38,400;
3. The Respondent pay to the Complainant pre- and post-judgment interest on that back pay award calculated in accordance with 29 C.F.R. § 20.58(a) and 29 U.S.C. § 6621;
4. The Respondent pay to the Complainant \$20,000 in compensation for the cost of the tractor that the Complainant had to purchase to find comparable employment;
5. The Respondent pay to the Complainant \$5,000 in compensation for the stress and anxiety that the Complainant suffered as a result of his wrongful discharge;
6. And the Respondent shall pay to Complainant, all costs and expenses, including reasonable attorney fees incurred in connection with this proceeding. Counsel for Complainant will have thirty days from the date of this Order in which to submit an application for attorney fees and expenses reasonably incurred in connection with this proceeding. A service sheet showing that proper service has been made upon the Respondents and Complainant must accompany the application. Respondent will have fifteen days following receipt of the application to file objections.

**A**

DANIEL F. SOLOMON  
Administrative Law Judge

DFS/MAWV

**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.