U.S. Department of Labor

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Issue Date: 07 December 2005

CASE NO.: 2005-STA-37

IN THE MATTER OF

JUAN G. RAMIREZ,
Complainant

v.

FRITO-LAY, INCORPORATED,
Respondent

APPEARANCES:

Carlos E. Hernandez, Esq.,
On Behalf of Complainant

Raymond A. Crowley, Esq.,
On Behalf of Respondent

BEFORE: C. RICHARD AVERY
Administrative Law Judge

RECOMMENDED DECSISION AND ORDER DISMISSING COMPLAINT

Background

This claim arises under Section 405 of the Surface Transportation Act ("the Act"), 49 U.S.C. 31104. The Act protects employees from discharge, discipline, or discrimination for filing a complaint about commercial motor vehicle safety and/or for refusing to operate a vehicle when such operation constitutes a violation of federal motor safety regulations or because of the employee's reasonable

apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

Procedural History

The Complainant filed a complaint with the Secretary of Labor alleging that he was discriminatorily terminated in violation of the Act. Following an investigation of this matter, the Secretary of Labor, acting through her agent, the Regional Administrator, issued findings on April 22, 2005, that the complaint had no merit. ALJX 2. The Complainant requested a formal hearing, and on August 18, 2005, a hearing was held in Harlingen, Texas, at which time all parties were given an opportunity to present evidence and arguments. This decision is based on the record made at the de novo hearing which included testimony of witnesses, Administrative Law Judge Exhibits 1-3, Complainant's Exhibit 1, and Respondent's Exhibits 1-19. The parties were also granted until November 4, 2005 to file post-hearing briefs; both parties did so.[1]

Issues

The parties agreed that they are subject to the Act and that the issues for my determination are:

1. Whether Complainant's termination on August 24, 2004 was adverse action which resulted from protected activity, if any, on his part; and
2. Whether Complainant was blacklisted by Respondent in November 2004 when he attempted to procure subsequent employment elsewhere.

Stipulations

At the commencement of the formal hearing, the parties announced the following stipulations:

1. Respondent Frito-Lay, Inc., is a "person" within the meaning of 49 U.S.C. Section 31105(1);
2. Complainant is an employee within the meaning of 49 U.S.C. Section 31105(1); and

[1] The following abbreviations will be used throughout this decision when citing evidence of record: Hearing Transcript: Tr. __; Administrative Law Judge Exhibit: ALJX ___; Complainant's Exhibit: CX __, p. __; and Respondent's Exhibit: RX __, p. __.

3. Complainant was terminated from his employment with Respondent on August 25, 2004.

Findings of Fact

1. Complainant was hired by Respondent on December 12, 1999 as a general merchandiser, one who aids a route salesman in the "recovery" of stores, i.e. cleans up displays, puts products on the shelves and makes stores look presentable for store managers and the public.
2. In June 2002 Claimant became a route sales representative ("RSR") for Respondent. In this position, his duties involved servicing store accounts on a daily basis. In addition to performing recovery at stores, Complainant was required to rotate product and drive Respondent's trucks, first cargo vans then 24-bulk trucks.
3. Complainant was responsible for two routes: 4364, which he ran on Sundays and Mondays, was comprised of Foy's Globe in Mission, Texas; an HEB Food Store on Conway, and another on Griffin. Complainant's Lead RSR on this route was Adan Perez. Complainant's other route, which he worked on Fridays and Saturdays, was comprised of two HEB Food Stores in McAllen, Texas, and one in San Juan. His Lead RSR on this route was Robert Tijerina. On Tuesdays, Complainant performed a "work-with," which consisted of a ride-along with one of the other RSRs.
4. Complainant was supervised by Mario Hinojosa, District Sales Leader ("DSL") from the time he was hired until 2004, when Mr. Hinojosa took a transfer. Complainant was then supervised by Polo DeLeon.
5. On January 9, 2002, Complainant was issued a notice of Verbal Warning resulting from his involvement in a chargeable accident on December 28, 2001, wherein he backed into a Nabisco truck, causing damage to the other vehicle. Mr. Hinojosa assigned Complainant to attend a driving safety class within thirty days and Complainant was warned that any other chargeable accidents within twelve months would result in a written warning. RX 1.
6. Complainant was issued a "Written Reminder" on December 19, 2003 after records revealed that he failed to check in on December 3, 2001. Complainant was reminded of the check-in process and was warned that any future violations would result in the next disciplinary steps being taken, up to and including termination. RX 2.
7. On October 25, 2003, Mr. Hinojosa made a "Note to File," and described an incident occurring that day wherein he was contacted by a grocery manager who informed him that Complainant had not performed his

afternoon pull-up. Mr. Hinojosa indicated that he attempted to page Complainant to no avail and eventually had to service the store himself. He stated he eventually spoke with Complainant who explained he had slept through his pull-up time, his pager battery was dead, and his cellular phone was disconnected, but he assured Mr. Hinojosa that the situation would not happen again. RX 3.

8. Complainant was issued a "Final Written Warning" on January 21, 2004 because he had been unable to provide proof of delivery receipts which resulted in an overage of $2,246.08, which was a violation of the "Over and Shorts Policy." Complainant was warned that any further violations could result in corrective action, up to and including termination. RX 4.
9. Complainant was terminated by Respondent on August 25, 2004. The reason given on Complainant's Notice of Termination was because Complainant had been suspended from his job responsibilities on August 19, 2004, and as a result of an investigation, his employment was terminated. RX 8.
10. Complainant has been issued a Suspension Notice on August 18, 2004, because several issues were noted in stores on Complainant's route which "did not meet Frito-Lay's performance standards." At the HEB in Mission, Texas, Doritos, Fritos and Funyuns were not rotated, and the store gondola was "half empty and fronted." At the HEB in San Juan, Texas, Complainant "failed to service the store and the store was not filled," and "the store manager was upset, which put displays at risk." Based on the fact that Complainant had been issued a Final Written Warning on January 9, 2004, the above incident resulted in a suspension of job duties. RX 7.
11. Following his termination, Complainant applied for a driver position with TNT Logistics North America. Complainant signed the application for employment on October 28, 2004. RX 13, p. 2.
12. TNT required as part of its application an "Inquiry to Past Employers," which was sent to Respondent, and to which Respondent's Zone Assistant, Kimberly Garcia replied on November 16, 2004 that company policy prohibited her from releasing such information; she furnished an Employment Verification phone number to TNT. RX 17. TNT faxed the form to Respondent's legal department on November 23, 2004. RX 13, p. 1. Respondent's legal department completed the form and faxed it back to TNT on November 23, 2004. RX 14, p. 1. The form was refaxed on November 26, 2004. RX 14, p. 3.
13. TNT contacted Complainant in April 2005 regarding employment, and Complainant is presently employed by TNT as a driver, where he earns approximately $40,000 per year.

Summary of the Evidence

Testimony of Juan Ramirez

Complainant testified that he drove a "24-bulk truck," which is a 26-ton vehicle regulated by the Department of Transportation. He stated that he received one day of actual vehicle driving training provided by Smith Driving. Complainant received instructions regarding filling out log books. Tr. 35. Complainant, through the training provided by Smith Driving, learned of the regulations regarding sleeping and break times; his understanding was that he was supposed to have at least eight hours of rest between his time off and the time he returned to work the following day. Complainant believed he could be fired for violating this rule. Tr. 36.

Complainant described a typical day of work as waking up at 3:00 a.m. and going to one of his stores in his own vehicle where he would perform an hour of recovery, which he described as removing back stock and making the store presentable. Tr. 41. Complainant testified that sometimes he would then proceed to the next store, or he would go to Respondent's Distribution Center ("DC"), located in McAllen or Pharr, Texas, where he would pick up a truck and then proceed to the next store. Tr. 42. Complainant would then service his next store, then return to the first store to deliver product. Complainant did not take a lunch break, and was "always working." Tr. 43. He testified that he would complete these tasks around 1:30 p.m., when he would go home and take a nap. Around 4:00 p.m., Complainant returned to the stores on his routes to perform "pull-ups," which consist of removing as much product as possible from the stores so there is enough space to deliver more product the next day. On Fridays, Complainant performed pull-ups at two stores, so his day would end at approximately 7:00 p.m., with a total of 13 or 13.5 hours worked. Tr. 46.

Complainant described Saturdays as being "a little worse," because he started his day at 2:00 a.m., completed his initial work by noon or 1:00 p.m., returned to do pull-ups at 4:00 p.m., and completed his work by 6:30 or 7:00 p.m., resulting in a total of 14 to 14.5 hours worked. Tr. 46-47. Complainant said on Sundays, he had a different route and went in at 4:00 a.m., was finished at 1:00 p.m., and performed pull-ups from 4:00 p.m. to 6:30 or 7:00 p.m., for a total of 12 to 12.5 hours. He said Mondays were about the same, and he worked approximately 13 hours. Tr. 48-49. On Tuesdays, Complainant assisted another RSR and worked between 5 and 12 hours. Tr. 50. Complainant testified that he

worked this schedule every week until he was terminated, and was told to get his job done no matter how he did it. Tr. 51, 47.

Complainant testified that he voiced concerns about the number of hours he worked to Mr. Hinojosa "three to five times." Tr. 53. Complainant said he told Mr. Hinojosa that he was working numerous hours and needed his rest to perform well and drive well, to which Mr. Hinojosa responded that at Respondent's business, "you have to make sacrifices." Tr. 53. Complainant testified that he worked between 75 and 91 hours per week, and said that Mr. Hinojosa never challenged Complainant's hours.

Complainant recalled an occasion where he called Mr. Hinojosa from home; Complainant was tired from working the previous day and felt ill. He said Mr. Hinojosa told him to "jump in the shower" and he would feel better. Tr. 57. Complainant said he went to work but his body ached and the receiver at his first store told him he did not look well. Tr. 58. Complainant called Mr. Hinojosa again and asked for a replacement or assistance, but Mr. Hinojosa said he could not send anyone. Complainant called Mr. Hinojosa again and told him that he was going to call human resources and tell them he was not liable if he wrecked his truck, to which Complainant recalled Mr. Hinojosa saying, "you are not calling anyone, I am sending two guys to help you." Tr. 59.

Complainant could not recall the other confrontations he had with Mr. Hinojosa, but said he mentioned that he cared about his health and there were two occasions he almost fell asleep at the wheel when he was driving home because he was tired. Tr. 60-62. He said he told Mr. Hinojosa that he was "working a number of hours," and described the number of hours. Tr. 61-62. He could not recall what Mr. Hinojosa's response to his complaints was. Tr. 66. Complainant testified that other RSRs worked the same hours and Mr. Hinojosa, as the DSL, was aware of that fact. Complainant was unsure if any other RSRs voiced complaints. Tr. 64. Complainant thought Mr. Hinojosa was a good manager, and he had respect for Mr. Hinojosa. Tr. 66-67.

Complainant testified that he believed he was fired because he was breaking DOT regulations, and that Respondent claimed his termination was the result of not rotating product so Complainant would not say anything regarding DOT violations. Tr. 60. He said that Respondent said he was fired because of previous disciplinary actions, such as the time Complainant backed into a truck behind him in 2001 or 2002. Tr. 68. Complainant said he received the notice of termination because he did not rotate product and had fresher product on the shelves in front of

older product, but Complainant had never been written up on "stales" before, and he said that most RSRs had up to $1000 worth of stales and are still employed by Respondent. Tr. 69-70.

At the time of his termination, Complainant was earning between $37,000 and $39,000 per year. Tr. 71. He testified that following his termination, he was without work for seven to eight months. Tr. 72. In November 2004, Complainant applied for a driver position with TNT Logistics, who is contracted by Sears to deliver appliances to customers. Complainant was not hired when he applied because part of his application had to be completed by Respondent. Complainant said he called Mr. Hinojosa, who told Complainant he could not provide Complainant's driving information. Tr. 73. Complainant said he gave TNT contact information for Respondent's distribution center. Complainant said that Mr. Tijerina, the supervisor at TNT, told Complainant that he must have done something "pretty bad" for Respondent to not want to answer questions about his employment. Tr. 74. TNT eventually contacted Complainant in April 2005, and he is currently employed by TNT. Tr. 75-6. Complainant testified that following his termination, he did find employment at Combined Insurance in February 2005, where he worked as an insurance agent for approximately one month and earned between $1,000 and $2,000. Tr. 76-77. Complainant testified that he had never been fired from any job. Tr. 77.

On cross-examination, Complainant agreed that part of his job with Respondent was to keep the freshest product at the front of shelves. He agreed that as product enters the stores, it belongs to the store, but his job as an RSR was to remove any damaged or stale product and give the store credit for any removed product. Tr. 79-80. Complainant acknowledged that Respondent has a code of conduct, and that it is a violation of that code to fail to control stale product and to fail to rotate product. Tr. 80-81.

Complainant agreed that in his deposition, taken one week before the hearing, he testified that he "might" go into a store before going to the DC, but most days he would start his shift at 4:00 or 5:00 a.m., but he testified that most of the time he started his shift at the stores. Tr. 85. Complainant said that Mr. Hinojosa told him that his timesheet was supposed to reflect the time that he left the DC, not the stores. He agreed that Mr. Hinojosa instructed him to indicate on his timesheet any time he worked, regardless of whether it was at the DC or somewhere else. Tr. 86. He agreed that he was instructed to indicate on his timesheet any time he went into overtime as soon as it occurred, and he agreed that his timesheets did not reflect that he worked 91 hours per week. Complainant

explained that he noted on his timesheets the time he left the DC, not the time he was at a store in his own vehicle. Tr. 87.

Complainant acknowledged that either he could choose when to perform pull-ups, or the store instructed him when to perform them. He did not agree that he could start pull-ups at 2:00 or 3:00 p.m., because on the occasions he did perform them that early, he had to return to the store later because of rush hour. Complainant said pull-ups could be completed by 6:00 p.m., depending on the perimeters and displays of the store. Tr. 89.

Complainant was asked about his deposition testimony wherein he stated that he told Mr. Hinojosa that he was not getting the required DOT time off only on one occasion. Complainant responded that he had to leave work to attend the deposition so he was distracted; he acknowledged that he testified under oath at his deposition, but explained that he was tired and his concentration was on his work. Tr. 91-92. Despite testifying in his deposition that he voiced complaints regarding DOT regulations to Mr. Hinojosa only once, Complainant maintained that he expressed such concerns three to five times, but could not recall specific dates. Tr. 98-99.

Complainant said that he never mentioned DOT violations or his hours to Mr. DeLeon, who was his supervisor at the time he was terminated. Tr. 100-101. Complainant agreed that Mr. Hinojosa had written him up on several occasions, and he did not believe that Mr. Hinojosa was "trying to get back" at him for something. Complainant recalled being written up for failing to properly complete his log books, and he agreed Mr. Hinojosa was justified in issuing the reprimand. Tr. 103; RX 2. He recalled an incident with a store manager regarding Complainant's lack of attention to the store, which he was disciplined for, and agreed that he testified in his deposition that he had been in Mexico and was late getting back. Tr. 103; RX 3. Complainant recalled receiving a final written warning from Mr. Hinojosa regarding overages, and said he did not believe that Mr. Hinojosa had an illegal motive in disciplining him. Tr. 105; RX 4.

Complainant agreed that he did not inform Mr. Hinojosa that he was waiting tables at a restaurant in late 2003, though the employee handbook requires employees to notify their supervisors if they have other employment. Tr. 106. Complainant agreed that this was occurring at the time he told Mr. Hinojosa that he needed more rest, but said that his other job was not why he wanted time off, though he agreed that his work for Respondent was suffering at that time. Tr. 107.

Complainant agreed that Mr. Hinojosa never told him that he had to work during the eight-hour period he was required to have off. Tr. 109. Complainant recalled the incident that led to his termination, when he was written up on August 18, 2004, by Mr. DeLeon. Mr. DeLeon told Complainant he was being suspended for violating the code of conduct after an inspection of Complainant's store revealed that product had not been serviced. Complainant said as far as he knew, Mr. DeLeon was who made the decision to suspend him. Tr. 112. Complainant agreed that the reasons Mr. DeLeon listed on paper were the reasons Complainant was fired, and said the same in his deposition, but he then explained that "that's what the letter said," and "of course" he did not believe those were the real reasons he was fired. Tr. 115. Complainant was shown a letter he wrote which was a challenge of his termination, and agreed that he said Mr. DeLeon fired him due to a "grudge" regarding "two personal issues" that Mr. DeLeon and Complainant had. Tr. 117; RX 12.

Complainant said he completed his application for employment with TNT on October 28, 2004, and understood that it was sent to the DC in Pharr, Texas for past employment verification. Complainant said when he called Mr. Hinojosa, he told Complainant to send the form to Kim in Corpus Christi. Tr. 199. Complainant said he did not know if Mr. Hinojosa was trying to keep him from securing other employment. Tr. 120. Complainant said he did not know Kimberly Garcia, and did not know if she was attempting to prevent him from obtaining another job. Tr. 124. Complainant did not know if Respondent was trying to prevent him from working for TNT; he explained that TNT wanted to hire him and asked what he did to cause Respondent to not want to released information about him. Tr. 124-125.

Complainant acknowledged that he signed a form indicating that he was given the employee handbook. Tr. 125; RX 9. He identified RX 10 as a copy of the employee handbook, which provided examples of conduct which was subject to disciplinary action, including "neglect of defined job responsibilities and assignments, including being barred from servicing an account, failure to properly rotate product, and/or remove stales from the market." Tr. 126, RX 10. Complainant agreed that he was told he was fired for a violation of that provision. Tr. 126.

Complainant agreed that by November 23, 2004, he was no longer seeking employment with TNT. He explained that TNT told him he would be contacted when TNT received the information from Respondent, and he was never called. Tr. 128. However, Complainant admitted that he worked for TNT on a temporary

basis and was paid $50.00 per day, and he agreed that he never followed up with TNT to determine whether it received information from Respondent. Complainant said he is content with his present employment at TNT and does not want to be reinstated with Respondent. TR. 131.

On redirect, Complainant agreed that he filed a complaint with the EEOC on February 13, 2005. Complainant claimed he was retaliated against and believed he was fired because of his gender and for complaining to management about illegal practices regarding the STAA. Tr. 132-133; CX 1. Complainant said that he believed the real reason he was fired was Respondent wanted to find a way to terminate him so he would not speak up about DOT violations, and he believed the reason Respondent provided for his termination was "probably just an excuse." Tr. 135-136. Complainant said the August 14, 2004 investigation of his stores revealed stale product, but none of the products identified were stale; rather, they were good for another month or six weeks. Tr. 137, 144. Complainant could not recall when he worked the other job waiting tables, but said he worked there for one week, and quit because he heard he could not "moonlight." Complainant said he made $125.00 at that job. Tr. 145. Complainant explained that the final warning he received from Mr. Hinojosa was related to "overs and shorts," and that Mr. Hinojosa told Complainant to persuade the stores to accept product, but the stores had too much backstock, so Respondent would charge the store, which did not have the product, and then Respondent claimed that Complainant was short, even though Mr. Hinojosa told Complainant to leave excess product in the truck for another RSR to deliver. Complainant said that product is supposed to be acknowledged when it enters a store, and Mr. Hinojosa was asking Complainant to acknowledge some product and deliver it the next day which was a violation. Tr. 147-148. On recross, when asked if he waited tables for more than one week, Complainant replied, "I believe so, I don't know." Tr. 150.

Testimony of Mario Hinojosa

Mr. Hinojosa testified that he is the District Sales Leader of South Texas, and has worked for Respondent for twenty-four years, and has been a DSL for ten years. Tr. 152-153. Mr. Hinojosa explained that as a DSL, he supervises a sales team ranging from 12 to 16 people, and is responsible for sales, waste control, customer service, and administrative activities. Tr. 154. Mr. Hinojosa did not believe that Complainant worked 91 hours per week. Tr. 156. He explained that a typical work week involved going in at 4:00 or 5:00 a.m. and working until 10:00 a.m. or noon. Tr. 156. He testified that he typically saw Complainant arrive at the

DC at 10:00 or 11:00 a.m. He said that reporting afternoon pull-ups is done on the "honor system." Tr. 157.

Mr. Hinojosa recalled one occasion in 2003 that Complainant complained of working too much. He said that Complainant said he was not getting his requisite time off, and Mr. Hinojosa told Complainant that Complainant controlled whether he got that time. He said he never told anyone to ignore the DOT rules. Tr. 157-158. Mr. Hinojosa explained that during the eight-hour period, employees cannot work; however, he said that in the other sixteen hours there is plenty of time to get the work done. He said that he could not say he was "put on notice" that Complainant was violating a rule. Tr. 160. Mr. Hinojosa did not tell anyone about the conversation he had with Complainant because Complainant only made the comment in passing. Tr. 161. He said that from September 2003 until Mr. Hinojosa accepted a transfer, Complainant did not mention DOT regulations again. Tr. 162.

Mr. Hinojosa recalled the occasion when Complainant said he was ill on the job. He said he did not make Complainant work, but Complainant said he was going home and Mr. Hinojosa told him not to abandon his route, that he would get Complainant some help but it would take a while. He eventually got two employees to assist Complainant, and Complainant reported to work the next day. Tr. 163.

Mr. Hinojosa discussed the occasions he disciplined Complainant. On January 21, 2004, Mr. Hinojosa issued a "Final Written Warning" to Complainant, because, Mr. Hinojosa testified, Complainant did not complete his administrative activities for the day regarding follow-up. Tr. 165; RX 4. Mr. Hinojosa explained that product was delivered to an HEB store and not "closed out," which he said was not common; usually product is taken to a store and either a receipt or credit is received. The document indicates that Complainant's "failure to maintain Over/Short Balances has resulted in overage of $2,246.08" which Complainant had not been able to resolve. The warning states that pursuant to the "National Over and Shorts Policy," "all RSRs must submit in full the total cash received from customers together with daily reports to the company on a daily basis," and the cash submitted must exactly match the amount shown as "Cash Due" on the daily

report. RX 4. Complainant was unable to provide proof of daily delivery receipts on four occasions.[2] RX 4.

On June 4, 2004, Mr. Hinojosa authored a document addressed to Complainant with the subject line "Attitude Adjustment."[3] RX 5. Mr. Hinojosa testified that he prepared the document as a part of his normal duties with the intent that it become part of Complainant's personnel file. Tr. 166. On August 9, 2004, Mr. Hinojosa authored a memorandum regarding a "service issue" at an HEB store. He explained that David Mora, a grocery manager, called and said Complainant was not performing pull-ups in the afternoon. Mr. Hinojosa said he wrote a note to Complainant's file to document the activity, but he continued to receive calls from managers at HEB stores, Wal-Mart stores, and Sam's stores in the area in October, November and December. Tr. 167. The document indicates that Mr. Hinojosa discussed the problem with Complainant, who explained that he had performed the pull-up early and that is why no one had seen him. Mr. Hinojosa indicated that he instructed Complainant to be sure to sign in at the front door to show store management that he was performing his pull-ups, which Complainant agreed to do. RX 6.

Mr. Hinojosa testified that he did not fire Complainant following these incidents because he had known Complainant "since day one," and became personally involved with Complainant. He explained that if he had followed company policy "word for word," he would have terminated Complainant pretty quickly. Tr. 168-169. Mr. Hinojosa learned of Complainant's termination in late August 2004, when Mr. DeLeon told him. Mr. Hinojosa said he was "disappointed," but that he had absolutely no involvement in the decision to terminate Complainant. Tr. 169. Mr. Hinojosa testified that he never told Mr.

[2] The dates and amounts listed are 7/18/03: $234.28; 9/27/03: $688.90; 10/25/03: $358.08; and 8/23/03: $965.52. The dates and amounts are accompanied by "document numbers," "AAM numbers," and "service numbers." RX 4.

[3] The document states: "Friday noon I asked you to certify inventory at the end of the sales day on route 4364, to which you said angrily that the truck had inventory in it and that you were not responsible for the product. I said hold-on it is your responsibility and that we were going to inventory the truck. After we completed [sic] the inventory, I sat you down and asked why you became so angry over a mandatory task. You replied that you were sorry that you got mad at me and that you were under a lot of pressure at home. I explained to you that our customers can sense when someone is angry or rather not happy about working for our company and are less likely to buy our displays and product. You said that when you were working in the stores you are not angry, and I said that I felt that you showed a certain amount displeasure [sic] all the time. You replied that maybe I was right, then you apologized for snapping at me and pledged to be a better route sales representative."

DeLeon or anyone in the company about Complainant's mentioning of DOT regulations. Tr. 170. He said that Complainant being terminated as retaliation was "false," and there were many opportunities to terminate Complainant's employment. Tr. 170.

Following Complainant's termination, Mr. Hinojosa recalled receiving a call from Complainant regarding his records. He informed Complainant that he had nothing to do with obtaining employment records and instructed Complainant to call the zone administrator; he could not recall whether he told Complainant to check the company's website. Tr. 170. Mr. Hinojosa said that he had completely forgotten about the incident since that time, and he was not trying to prevent Complainant from getting another job. Tr. 171-172.

On cross-examination, Mr. Hinojosa said that Complainant was "initially" a good employee, but the quality of his attendance changed in mid-2004. Tr. 173. He said he learned of Complainant's termination the day before it occurred when speaking to Mr. DeLeon. Tr. 174. He said that Complainant only mentioned DOT regulations on one occasion, and did not say "DOT," rather, he said he was not getting his eight hours of rest. Tr. 175. Mr. Hinojosa explained that he relied on the honesty of employees when they reported their hours. Tr. 176. He said that Complainant did not lie, but he was "evasive." Tr. 177. However, he knew that Complainant's statement that he arrived at an HEB store at 2:00 a.m. was not true, because he knew that certain store did not let people in until 6:00 a.m. Tr. 178.

Regarding the incident where Complainant called in sick, Mr. Hinojosa could not recall whether Complainant said he was uncomfortable driving because he might have an accident. He said Complainant did say he was going to call human resources, to which Mr. Hinojosa said "that is your option." Tr. 184. Mr. Hinojosa testified that he "absolutely" would have told Complainant to work until he got the job done, and that if an employee is not able to pull two stores, service them, make deliveries, and perform pull-ups in sixteen hours, then he needs to delegate his time better. Tr. 184. Mr. Hinojosa agreed that some employees go to stores before going to the distribution center, and acknowledged that Complainant informed Mr. Hinojosa he was doing so. Tr. 185.

Mr. Hinojosa did not agree that Complainant was working 91 hours per week, stating that ninety hours "can't be done." Tr. 186. He did agree that Complainant's performance declined around the time he mentioned DOT regulations. Tr. 187. Mr. Hinojosa said there were many times that Complainant did not even turn in a timesheet because he did not work forty hours. Tr. 188. He

reiterated that work starts when an employee "hits the stores," and that is what should be reflected on timesheets, and "everyone" is aware of that policy. Tr. 188. Mr. Hinojosa saw Complainant's notice of termination "in passing," and from what he understood, Complainant was fired because he was not performing pull-ups and was on the disciplinary track. Tr. 189.

Mr. Hinojosa was shown Complainant's suspension notice and agreed it was dated August 18, 2004. Tr. 190; RX 7. He said he could not recall the exact date he spoke with Mr. DeLeon regarding Complainant's termination. Tr. 190. He agreed that none of the products listed in Complainant's suspension notice were stale, but explained at Respondent's company, the products were "as bad as having stales" because they were not rotated. Tr. 192. Mr. Hinojosa was asked about the Final Written Warning he issued to Complainant, and explained that at that time, the RSRs would bring in product, drop a partial delivery, and were required to close out the manifest and receivers; in other words, the RSRs would unload the truck but leave some product in the truck and the invoices were not closed out. Tr. 195. He admitted that the way the HEB was serviced was a violation of company policy but explained that that was the way the receivers at the back door of the store wanted the process done. He said he disciplined Complainant because Complainant was not completing the appropriate paperwork; he was not closing out the manifest when everything was done; he did not do his work in a timely manner. Tr. 196-197.

Regarding the verbal warning Mr. Hinojosa issued Complainant on January 9, 2002, for being involved in an accident on December 28, 2001, Mr. Hinojosa could not recall how many hours Complainant was working at the time. He said that the period between Christmas and New Year's Day is slow. Tr. 198. On redirect, Mr. Hinojosa explained that the company procedure is that an employee is suspended prior to being terminated. He said when he learned Complainant was being terminated, he had just been suspended pending termination. He reiterated that he learned of Complainant's termination the day before it occurred. Tr. 199.

Testimony of Polo DeLeon

Mr. DeLeon has worked for Respondent for twenty-one years. He is currently a district sales manager, a position he has held for four years; he was previously a route sales representative. Tr. 202. Mr. DeLeon testified that he had no relationship with Complainant prior to becoming Complainant's supervisor in August 2004. He said at first, he had no opinion regarding how Complainant performed his job, but he later began to receive many calls from disgruntled

customers stating that Complainant was not "very accurate at doing his work." Tr. 204. Mr. DeLeon said that Complainant had problems keeping the racks and shelves full at the stores he serviced, and that Mr. DeLeon had difficulty finding Complainant because Complainant avoided Mr. DeLeon "as much as possible." Tr. 204.

Mr. DeLeon testified that he went to the stores on Complainant's route where he found a lack of rotation of product and that the stores were not full. Tr. 204. He testified that he wrote Complainant's suspension notice on August 18, 2004, because Complainant was not performing up to company standards. Tr. 205; RX 7. Mr. DeLeon explained that it is "very important" that product gets rotated; he said, "that's our job." Tr. 205. When he placed Complainant on suspension, Mr. DeLeon said he intended to fire Complainant within a matter of days, without Complainant returning to work. He said it is common practice to suspend an employee as a part of the termination process. Mr. DeLeon said he made the decision to terminate Complainant. He testified that Complainant never voiced any DOT-related concerns to him. Tr. 206.

Mr. DeLeon stated that he never knew that Complainant mentioned not getting the proper time off pursuant to DOT regulations. He disagreed that Complainant was terminated as a result of conversations he had with Mr. Hinojosa, stating, "I don't know anything about that." Tr. 207. Mr. DeLeon denied receiving any form he was supposed to complete on Complainant's behalf. He said Complainant never called him to ask for assistance in completing a form. He had no intention to interfere with Complainant getting another job. Tr. 207.

On cross-examination, Mr. DeLeon testified that he has never fired any of Respondent's employees for not having fresh product in stores which had not yet sold; he agreed that it would make no sense to do so. Tr. 208. Mr. DeLeon examined the Suspension Notice he issued to Complainant and agreed that none of the products listed were stale or dangerous to sell. Tr. 209; RX 7. He explained that he wrote Complainant up because he was not doing his job, specifically, because there was fresher product behind older product, and it was Complainant's responsibility to rotate product every time he went into a store. Tr. 209. Mr. DeLeon said he knew that Complainant did not rotate the product (as opposed to customers perhaps moving the product) because there were four or five fresher bags of product in front of each older product listed. Tr. 210. He said that Complainant already had other issues when this incident occurred, and this incident did not solely lead to Complainant's termination. Tr. 210. He said he disciplined Complainant and then learned that a final warning had been previously

issued. He explained that since Mr. Hinojosa had previously issued a final warning, the next step was termination if any other incident occurred. Tr. 212.

On redirect, Mr. DeLeon said that regarding the suspension notice, Complainant failed to service the San Juan HEB store that afternoon, and Mr. DeLeon personally witnessed Complainant's failure to do so. He said he learned from the Zone Business Manager that Complainant had a final written notice on file; he was not aware of any plan to set Complainant up to result in his termination. Tr. 214. On recross, Mr. DeLeon said that he went to the San Juan HEB store after receiving a call from the manager. He said he tried to contact Complainant but could not do so, but acknowledged that Complainant eventually returned to the store and serviced the location. Tr. 215-216.

Testimony of Michelle R. Thatcher

Ms. Thatcher is the Senior Vice President of Human Resources for Respondent, a position she has held for three months. Previously, she was the Associate General Counsel for Respondent. Tr. 217. Ms. Thatcher testified that she received a fax the second or third week of November 2004, which was a letter from Complainant's counsel regarding completing a form. Ms. Thatcher explained that under DOT regulations, bulk drivers are in a unique position in that they are governed under different regulations than "over the road" drivers. Tr. 218. Ms. Thatcher explained that the DOT regulations changed in October 2004, and required past employers to complete questionnaires regarding employment, including bulk drivers. Tr. 219.

Ms. Thatcher explained that Respondent has a "no reference" policy, meaning that management is not allowed to provide references on employees; rather, Respondent has a toll-free number to which potential employers are referred, and if they possess a previous employee's Social Security number, they may verify dates of employment, positions and wages. Ms. Thatcher was concerned that Respondent would receiver requests, pursuant to the new DOT regulations, and assumed that it was an employment check, which was against company policy, so Respondent conducted training on how to handle such requests, because there was a change in the information Respondent was legally required to supply. Tr. 220. She said that prior to October 2004, a request like the one sent from TNT regarding a bulk driver would not have been answered. Tr. 221.

Ms. Thatcher explained that she understood the problem to be that when Kimberly Garcia received the request regarding Complainant from TNT, she treated it as if it were an ordinary personal reference check. Tr. 222. Ms. Thatcher identified Respondent's Exhibit 17 as the fax she received. When she received it, she contacted Mr. Tijerina at TNT, introduced herself, apologized, and explained the changes in regulations which had occurred, and told Mr. Tijerina that she would complete the form if he sent it to her. Tr. 222- 224. Ms. Thatcher said in order to complete the form, she had to make an inquiry and check the DOT-reportable accident log. She recalled that it took a couple of days for TNT to fax the form, and identified the form she received on November 23, 2004, as Respondent's Exhibit 13. Ms. Thatcher said she spoke to Mr. Tijerina before she received the form and told him that she had obtained Complainant's information, that he had no DOT-reportable accidents and had not failed any DOT drug or alcohol tests. TR. 226. Ms. Thatcher was out of town when the form arrived, and another attorney, Leeann Oliver, not knowing that Ms. Thatcher had obtained the answers, did her own research and completed the form. Tr. 226; RX 13. Ms. Oliver faxed the form to TNT on November 23, 2004. Tr. 227; RX 14.

Ms. Thatcher received a message from Mr. Tijerina that he had not received the form; she called him and said that the fax confirmation sheet indicated that the fax was successful, but refaxed the form on November 26, 2004. Tr. 228; RX 14, p. 3. Ms. Thatcher said she never heard from Mr. Tijerina again. Tr. 228. She said it was not true that Respondent attempted to prevent Complainant from obtaining the job at TNT; rather, she said she did everything she could to prove that the misunderstanding was no reflection on Complainant. Tr. 229.

On cross-examination, Ms. Thatcher said she did not have a conversation with Mr. Tijerina wherein he expressed concern over what occurred with Complainant while in Respondent's employ. She said that Mr. Tijerina believed that Complainant was an "over the road" driver, and when she explained the situation, Mr. Tijerina seemed to understand. Ms. Thatcher agreed that the application to work at TNT was signed by Complainant in October 2004. Tr. 231. Ms. Thatcher did not know when Mr. Tijerina originally sent the form to Respondent. She said she clearly understood that Mr. Tijerina was interested in hiring Complainant. Tr. 238.

Testimony of Kimberly N. Garcia

Ms. Garcia is a twenty-three year old student who has worked for Respondent for two years. She works at the distribution center in Corpus Christi as

the Zone Administrator; she performs the administrative duties for four locations: Harlingen, McAllen, Laredo, and Corpus Christi. Tr. 245-246. Ms. Garcia had worked for Respondent for four months in November 2004. She recalled receiving a phone call to verify past employment and referred the caller to the Employment Verification Line. Tr. 247. She said she then received a fax requesting the same information, and another phone call; she referred the potential employer to the Employment Verification Line again and also told them the information could be obtained on-line. Tr. 247. Ms. Garcia identified Respondent's Exhibit 16 as the fax she received; it indicates that Complainant was seeking employment with TNT. Respondent's Exhibit 17 is the fax Ms. Garcia sent to TNT, dated November 16, 2004, which states "per company policy, we are not allowed to disclose the information requested," and provided the phone number for the Employment Verification Line and Respondent's code. RX 17.

Ms. Garcia explained that she was supposed to refer all prospective employers to the verification line, and was told not to complete any forms. She said that she received the form on November 16, 2004, and returned it the same day. Tr. 250. Ms. Garcia said she was not trying to prevent Complainant from finding other employment. She said that as part of her job, she maintains all the personnel files in Corpus Christi. She identified Respondent's Exhibit 18 as a notice of suspension, explaining that a DSL will provide a rough draft and Ms. Garcia prepares all the final employee documents. RX 18 regards an employee named Avery Callas, who was suspended for failing to properly rotate product and remove stales. Ms. Garcia identified RX 19 as a termination notice for Adan Davilla who also was terminated for failure to properly rotate and/or remove stale product.

On cross-examination, Ms. Garcia explained that she made a mistake regarding the form TNT sent requesting Complainant's past employment; she believed she could not answer the questions. Ms. Garcia was unsure of what size truck Complainant drove, but did know that he never failed a breath test. Tr. 254. She agreed that she probably could have obtained the other information requested by TNT. She agreed that in Mr. Davilla's termination notice, stale products were documented. Tr. 255.

Discussion and Conclusion of Law

This proceeding is brought under the employee complaint provision of the Act, which states, in pertinent part:

A person may not discharge any employee, or discipline or discriminate against and 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 motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding…
>
> 49 U.S.C. 31105(a)(1)(A).

In this instance, the parties stipulated, and I find that, Complainant is an employee within the meaning of 49 U.S.C. Section 31105(1) and Respondent is a "person" within the meaning of 49 U.S.C. Section 31105(1). As a result, the Act is applicable in this case.

To prevail on a whistleblower complaint under the Act, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that there is a causal connection between the protected activity and the adverse action. *BSP Transport, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Systems, Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003).

A respondent may rebut the complainant's prima facie case by demonstrating that the adverse action was motivated by legitimate, nondiscriminatory reasons. 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, but "need not persuade the court that it was actually motivated by those reasons." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The burden then shifts back to the complainant to establish that the proffered reason was pretextual and the protected activity was the true basis for the adverse action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 402, 406-408 (1993). The ultimate burden of persuasion that the respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Center*, 509 U.S. at 502; *Poll v. Vyhnalek Trucking*, 96-STA-35, slip op. at 5 (ARB Jun. 28, 2002).

The Administrative Review Board has instructed that when a case has been fully tried on the merits, it is unnecessary to determine whether the complainant presented a prima facie case of discrimination and whether the respondent rebutted that case. Rather, once the respondent produces evidence attempting to demonstrate that the complainant was subjected to an adverse employment action for legitimate, nondiscriminatory reasons, it no longer serves any analytical purpose to determine whether the complainant has presented a prima facie case. *Ciotti v. Sysco Foods of Philadelphia*, 1997-STA-30 at p.4 (ARB July 8, 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991). The relevant inquiry is whether the complainant has prevailed by a preponderance of the evidence on the ultimate question of liability. *Johnson v. Roadway Express, Inc.*, 1999-STA-5 (ARB Mar. 29, 2000).

The Parties' Contentions

Complainant asserts that the evidence establishes that he engaged in protected activity when he voiced concerns to his supervisor that he was working in violation of the Act. He maintains that his testimony that he voiced such concerns three to five times in the year of his termination creates an issue of fact which should be decided in his favor. In addition, Complainant states that the testimony of Mr. DeLeon "lacks any indicia whatsoever of credibility or truthfulness," and that Mr. Hinojosa's testimony is "certainly suspect," in that he himself violated company policy. Complainant asserts that Mr. DeLeon's testimony "strongly suggests" that the reason given for Complainant's termination was pretext.

Respondent argues that Complainant did not sustain his burden of proof regarding his retaliatory dismissal claim because he cannot establish causation between his protected activity and the adverse action taken against him. Respondent maintains that Complainant was terminated for legitimate, nondiscriminatory reasons, specifically because Mr. DeLeon had no knowledge of any protected activity. Finally, Respondent asserts that Complainant's testimony lacks credibility.

Protected Activity

Under subsection (A) of the Act, protected activity may be the result of complains or actions filed with agencies of federal or state governments, or the result of purely internal complaints to management, relating to a violation of a

commercial motor vehicle safety rule, regulation or standard. *Reed v. National Minerals Corp.*, 91-STA-34 (Sec'y July 24, 1992).

In this instance, it is undisputed that Complainant complained at least once to management, specifically Mr. Hinojosa, regarding what he believed to be a violation of a commercial motor vehicle standard which violated the hours of service rule. Complainant specifically complained that he was not "getting his eight hours off." Protection under the complaint provision of the Act is not dependent upon actually proving a violation of a commercial motor vehicle safety regulation; rather, the complainant need only relate to such a violation. *Schulman v. Clean Harbors Environmental Services, Inc.*, 98-STA-24, p. 6 (ARB Oct. 18, 1999). It is clear that Complainant's voicing concerns to Mr. Hinojosa was protected under the Act.

Adverse Action

It is undisputed that Complainant was terminated on August 25, 2004. Clearly, he suffered an adverse action regarding the terms of his employment.

Cause of the Adverse Action

The burden now shifts to Respondent to demonstrate that it terminated Complainant's employment for legitimate, nondiscriminatory reasons. Again, the burden of proof at this point requires only that Respondent adduce probative evidence. I find that Respondent has proffered legitimate, nondiscriminatory reasons for the adverse employment actions taken against Complainant. Respondent asserts that Complainant was terminated because he had received several disciplinary warnings in the past, including a "Final Written Warning," before the incident involving non-rotated product which ultimately led to his termination. Respondent maintains that failure to rotate product is a violation of the company Code of Conduct, and Complainant's previous disciplinary record, combined with such a violation, resulted in the termination of his employment. The evidence establishes that Complainant had many instances of discipline in his personnel file, and Complainant agreed that failure to rotate product was a violation of the Code of Conduct. Accordingly, Respondent has articulated a legitimate, nondiscriminatory reason for Complainant's termination, and Complainant is afforded the opportunity to establish that Respondent's proffered reason is pretext, and that the adverse action was the result of discriminatory motives.

Complainant asserts that Respondent's proffered reason for his termination is pretext. He argues that Complainant's testimony at the hearing establishes that he brought DOT issues to Mr. Hinojosa's attention three to five times. Further, Complainant asserts that Mr. DeLeon's credibility "strongly suggests that the reason given" to Complainant for his termination "was merely a pretext for illegal retaliation." Complainant's Brief, p. 6. In particular, he focuses on Mr. DeLeon's testimony regarding the inspection of Complainant's stores which led to disciplinary action. Though Complainant asserts that Mr. DeLeon's testimony lacks credibility, he makes no mention of the fact that his own testimony contradicts his prior sworn testimony given in his deposition, taken one week before the hearing. I find Mr. DeLeon's testimony credible. Further, the testimony Complainant points to establishes that Complainant was disciplined for non-rotation.[4]

The "Final Written Warning" issued January 21, 2004 indicates that "any future violations that occur, as defined in the Route Sales Employee Handbook, could result in further corrective action up to and including termination." RX 4. Mr. Hinojosa thereafter issued two memos documenting problems with Complainant's job performance on June 4, 2004, and August 9, 2004. The evidence demonstrates that Complainant was perilously close to having adverse action taken against him while under the supervision of Mr. Hinojosa. Further, the evidence shows that other employees were disciplined for the same reasons Complainant was: Mr. Callis was suspended for failure to properly rotate and/or remove stales from the market, and Mr. Davila was terminated for failure to rotate product and for removing stales, following a final written warning. RX 18; RX 19. Respondent's Code of Conduct, which Complainant testified he was issued and read, states that neglect of defined job duties including "[f]ailure to properly rotate product and/or remove stales from the market" is an example of conduct which is not permitted and "will subject an employee to disciplinary action --- which can include immediate dismissal." RX 10, p. 2.

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[4] Complainant urges that the following testimony is suggestive of pretext:
Q: How many people have you fired at Frito-Lay who had fresh product in a store that hadn't been sold yet?
A: None.
Q: None?
A: None. Why would you fire them? (Tr. 208).
Q: If on August 18 some of these bags had over a month of shelf life, why are you writing up [Complainant]?
A: Because he's not doing his job. There was fresher product behind that, that's why. (Tr. 209).

In the instant case, it appears clear that Complainant, on one occasion, complained to his supervisor, Mr. Hinojosa, that he was not getting eight hours off. Despite the fact that Complainant testified that he expressed his concerns "three to five times," he could not recall the exact dates or even the context of the conversations, and he agreed that he testified in his deposition that he voiced concerns to Mr. Hinojosa on that one occasion. Further, while it is clear that Complainant was terminated from his employ with Respondent, the record is replete with evidence establishing a history of disciplinary actions against Complainant. Mr. Hinojosa testified that had he followed procedure, he would have fired Complainant earlier. Complainant testified that he believed the disciplinary action taken against him by Mr. Hinojosa was justified, and he did not believe that Mr. Hinojosa was "out to get him."

Neither is there any evidence that Mr. DeLeon, who was solely responsible for making the decision to terminate Complainant's employment, was aware of any conversation that Complainant may have had with Mr. Hinojosa regarding DOT regulations, or any protected activity at all. Complainant asserts that of the products listed on his suspension notice, none were stale; however, both Mr. Hinojosa and Mr. DeLeon testified that Complainant failed to rotate product, and Complainant admitted that was an important part of his job duties, and failure to do so was a violation of the company code of conduct. Complainant testified that he recalled stating in his deposition that the reasons given by Mr. DeLeon were the real reasons for his termination. Tr. 115. Complainant issued a written challenge of his termination, in which he stated he believed "Mr. DeLeon had developed a grudge" against him due to two altercations they had in past years. Nowhere in the statement does Complainant indicate that he believed he was terminated for engaging in protected activity. RX 12. Further, the only established incident of protected activity occurred around September 2003, and Complainant was not terminated until August 2004. While close proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action, *see Kovas v. Morin Transport, Inc.,* 92-STA-41 (Sec'y Oct. 1, 1993) (*citing Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir. 1987)), I find that the events which occurred here are too remote in time to raise such an inference.

In sum, I do not find that Complainant was terminated in retaliation for engaging in protected activity; rather, I find that the evidence establishes that Complainant was terminated for multiple incidents for which disciplinary action was taken against him. Further, there is no evidence that establishes that Mr. DeLeon disciplined Complainant as a result of any concerns Complainant voiced

to Mr. Hinojosa, and there is no evidence that Mr. Hinojosa was involved in the decision to terminate Complainant. In fact, the evidence and Mr. Hinojosa's testimony establish that he could have terminated Complainant long ago but did not do so because of their friendship. Because Complainant failed to meet his burden of establishing that Respondent discriminated against him because he engaged in protected activity, he has failed to establish causation, an essential element of his case.

Complainant's claim of "blacklisting" also fails. Complainant asserts that Respondent attempted to prevent him from securing employment with TNT when it neglected to complete a past employment verification form. However, while the evidence establishes that Complainant signed the employment application on October 28, 2004, it also establishes that the first Respondent knew of the form was on November 16, 2004, when Ms. Garcia mistakenly referred TNT to the Employment Verification Line. Ms. Thatcher testified that she received a phone call on November 17, 2004, determined the problem and identified the mistake, and TNT either received the information it desired on November 23, 2004 (the day it faxed the form to Ms. Thatcher's office), or on November 26, when she sent the form to TNT again. At any rate, Complainant testified that he did not hear from TNT until April 2005, but the uncontradicted evidence establishes that TNT had the information it needed on Complainant in November, and Complainant testified that he worked for TNT on a temporary basis. He also procured other employment as an insurance agent during this time.

In sum, I find that Complainant has not carried his burden of establishing that Respondent's proffered legitimate, nondiscriminatory reason for terminating his employment was pretext, or that the true reason for his termination was retaliation because of engaging in protected activity. Complainant has not established that Respondent's reasons were the true reasons for his dismissal. Further, Complainant has not shown that Respondent intentionally interfered with his attempts to procure subsequent employment.

ORDER

Based upon the findings of fact, conclusions of law, and the entire record, Complainant's claim is hereby **DISMISSED**.

So ORDERED this 7th day of December, 2005, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order Dismissing Complaint, 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.