U.S. Department of Labor

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

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

Issue Date: 31 August 2004

In the Matter of:

GERALD W. CROWELL,
Complainant,

CASE NO: 2002 STA 33

v.

AMERICOACH TOURS,
Respondent.

***Appearances*:**

Florence M. Johnson, Esquire
For the Complainant

William P. Dougherty, Esquire
For the Respondent

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER - DISMISSING COMPLAINT

Statement of the Case

This case involves a claim under the "whistleblower" protection regulations of §405 of the Surface Transportation Assistance Act of 1982, 49 USCA §31105 ("STAA" or "the Act"), and the regulations at 29 CFR Part 1978. The Act and implementing regulations protect employees against discrimination or adverse action for reporting violations of commercial motor vehicle safety rules, or refusing to operate vehicles in violation of those rules. The Secretary of Labor ("the Secretary") is empowered to investigate and determine the merits of "whistleblower" complaints filed by such employees pursuant to §31105(b)(2)(A) - (C) of the Act.

Procedural History

Complainant, Gerald W. Crowell, filed a complaint with the Department of Labor ("DOL") on August 15, 2001. Pursuant to §31105(b)(2)(A), the Regional Administrator of the Occupational Safety and Health Administration ("OSHA") of DOL investigated the Complainant's allegations, determined that they were without merit, and dismissed the complaint

on April 26, 2002.[1] Complainant filed a timely appeal and request for hearing before an administrative law judge on May 22, 2002.[2] A Supplemental Notice of Hearing and Order issued by this tribunal on July 23, 2002, directed Respondent to enter an appearance and provide an appropriate representative for a prehearing conference by telephone. Complainant was then *pro se.* With the consent of the parties, the Notice of Hearing and Prehearing Order issued on August 8, 2002, scheduled the hearing on October 17, 2002.

The Notice of Hearing and Prehearing Order directed the parties to file prehearing statements of position, briefly setting forth the issues involved and remedies requested, identification of their proposed witnesses and expected testimony, and lists of all documents to be offered in evidence. The Notice also encouraged the parties to engage in informal discovery. Complainant's initial response dated August 30, 2002, purported to enclose a prehearing statement but did not do so. Following notification by telephone on September 18, 2002, Complainant sent a second response received October 4, 2002, which identified "controversies to be debated in the matter at hand," but did not identify witnesses or documents to be offered as evidence. There was no prehearing discovery of record. Respondent filed its statement of position and list of witnesses, together with attached exhibits of documents to be offered into evidence, on September 12, 2002.

At the *de novo* hearing conducted in Memphis, Tennessee, on October 17, 2002, Complainant appeared *pro se*; the Respondent Employer appeared by counsel. Complainant was advised of his right to counsel, but indicated that he had been unable to get a lawyer. Although he stated that he did not think he had had a reasonable time to get a lawyer subsequent to the Secretary's initial finding, this tribunal declared that it would not grant a continuance of the hearing because Complainant had had several months to obtain counsel; Complainant had given no notice prior to the hearing that he would not be ready to proceed; and the expectation was that the hearing would proceed. (Tr. 6-7,15) Complainant indicated, notwithstanding, that he would go forward with the hearing. (Tr. 15-16)

Complainant was advised in some detail of the applicable law and elements of proof that he would be required to satisfy with respect to a claim under the STAA. (Tr.8-15) Complainant identified no documentary evidence that he planned to introduce; however, some documents were referred to and discussed in the course of his testimony. Respondent offered no documents, and no documents were received into evidence, during this initial hearing. The only evidence received at the initial hearing was Complainant's testimony.[3] At the conclusion of

---

[1] The list of complaints investigated and the Secretary's Findings were transmitted to the Chief Administrative Law Judge on the same date. OSHA identified the complaints as discriminatory discharge in reprisal for Complainant's voicing concerns regarding his being required on occasions in April and July 2001 to operate a commercial motor vehicle in violation of USDOT Federal Motor Carrier Safety Hours of Service Regulations.

[2] Judge Holmes set a July 3, then an August 1, 2002, hearing date. Thereafter the case was reassigned because Judge Holmes had left the office.

[3] Complainant was advised that his testimony should focus on his complaint or statement of position and indicate with as much precision as possible the basis for his claim, that the activity was protected, how the Respondent was given notice of his protected activity, and why the protected activity had any connection with his termination. (Tr. 20-22, 23-24) Complainant testified on his own behalf, largely in response to questions framed by this tribunal in relation to the several allegations listed in Complainant's statement of position. He was given an opportunity to adduce any additional testimonial evidence he felt to be appropriate, in addition to cross-examination by Respondent.

Complainant's testimony, which comprised the Complainant's case, this tribunal granted Respondent's motion to dismiss for failure to establish a *prima facie* case.

After the conclusion of the hearing and after reviewing the hearing record and applicable authorities, this tribunal issued an Order Vacating Dismissal of Claim for Failure to Establish *Prima Facie* Case, and Directing Resumption of Hearing on January 10, 2003, because it had concluded that, pursuant to applicable law, Complainant had established a *prima facie* case under the STAA. The Order requested that the parties select a date to recommence the hearing. Complainant did not respond to an informal request to select a date for the hearing or an Order to Show Cause issued on March 6, 2003, and Respondent moved for dismissal. Complainant then responded in a letter dated March 11, 2003, stating that he had not abandoned the claim and requested a hearing date. On March 18, 2003, this tribunal issued a Procedural Order Denying Respondent's Motion to Dismiss and Directing Prompt Notice of Availability for Hearing.

The hearing was resumed in Memphis, Tennessee, on July 24, 2003. Complainant appeared with counsel; the Respondent Employer appeared by counsel. Complainant did not introduce evidence at the hearing, as he had not introduced any evidence at the previous hearing, and had given no notice of any new evidence or witnesses. (Tr. 227-228) At the hearing, Respondent adduced testimony from Ira Watson, Randy Ross, and Larry Gardner, who were employees of Respondent. (Tr. 103-112, 113-130, 131-229) In addition, Respondent's exhibits one through twenty-four were admitted into evidence.[4] (Tr. 144, 145, 153, 155, 157, 160, 162, 165, 166, 168, 169, 172, 174, 176, 177, 180, 182, 185, 187, 191, 194, 195, 199) Only Respondent filed a written closing argument.

Issues

1. Did Complainant make one or more complaints or refuse to operate a vehicle so as to have engaged in protected activity under the STAA?
2. In particular, did Complainant make complaints to Respondent's management about his being required to transport passengers in violation of hours of service regulations that resulted in adverse action against him by Respondent?
3. Was Respondent aware of Complainant's alleged protected activity and take any adverse action against Complainant because of any protected activity?
4. Did Complaint establish the essential elements of proof of a *prima facie* case that could justify relief under the STAA?
5. Did Respondent adduce evidence of a legitimate, business related, non-retaliatory cause for Complainant's discharge, or other adverse action by Respondent, and prove that such legitimate cause was sufficient of itself for Complainant's discharge?
6. Did Complainant prove that Respondent's proffered reason for his discharge was pretext for unlawful retaliation, or that his protected activity was a substantial component of a dual or mixed motive for the discharge?

[4] Respondent's exhibits are referred to as "R-".

Findings of Fact

The parties stipulated that Respondent, Americoach Tours, was at all material times engaged in interstate passenger transit operations and maintains a place of business in Memphis, Tennessee. It operated passenger buses that seat in excess of fifteen passengers on interstate highways in the regular course of business transporting passengers accompanied by some limited cargo. Consequently, Respondent is a commercial motor carrier and subject to the STAA. (Tr. 17) The parties also stipulated that Respondent is, and at all times material was, an employer as defined in §311.01, sub. 3 of STAA. (Tr. 17-18) At all times material, Complainant was an employee of Respondent in that he was a driver of a passenger bus used on interstate highways, and in the course of his employment, directly affected commercial motor vehicle safety. 49 USC §31101(2). (Tr. 18) Complainant started working at Americoach on June 30, 2000, and was terminated from employment on August 14, 2001. (Tr. 131) His status had changed at various times at his request from part time to full time. He was a part-time driver when he was terminated. (Tr. 133, 174-75, 206-07)

The parties stipulated that Complainant filed a timely complaint with the Secretary on August 15, 2001, alleging that Respondent had discriminated against him in violation of §31105 of STAA. (Tr. 18)

At the time of the hearing, Ira Watson had been Respondent's employee for a little over four years and was employed by Respondent in the calendar year 2001. (Tr. 104) Randy Ross, employed by Respondent since 1998, was the safety manager during Complainant's term of employment with Respondent. His overall safety responsibilities included training, auditing the drivers' logs, and overseeing vehicle qualifications of drivers. (Tr. 113-14) Larry Gardner had been an employee of Respondent for four to five years and had always been employed as operations manager. His responsibilities included overseeing the driver operations and the dispatch office and hiring drivers. (Tr. 131-132)

Complainant's statement of position identified the bases for his complaint as follows (sic):

> The purpose of this writing is to inform the Tribunal and Respondent the positions of controversies to be debated in the matter at hand.
>
> (a) My request for a relief driver in the month of April 2001 on a tour of New York City with Kenneth Mills the lead driver.
>
> (b) My request July 22, 2001 to Larry Gardner for relief from a very disorderly group that was distracting the safe operation of the motor coach.
>
> (c) Americoach reason for separation given to the State of Tennessee Department of Employment Security.
>
> (d) Notice to all driver July 20, 2001 telling them to avoid all discrepancies that will show in a manual audit of their logs.

(e) Department of Transportation finding of Americoach engagement in unprotected safety activities with my knowledge.

I am requesting that Americoach Tours made payment to respondent Gerald W. Crowell in the amount of $150,000 for remedy.

The underlying facts as discerned from the evidentiary record are discussed with respect to each item, seriatim. Complainant testified that he had a college degree. (Tr. 7) His testimony, like his statement of position, revealed that Complainant was neither articulate nor a good historian, and his often confused, disjointed, and contradictory testimony was generally not credible. His demeanor as a witness further detracted from his credibility.

"*(a) My request for a relief driver in the month of April 2001 on a tour of New York City with Kenneth Mills the lead driver.*"

This tribunal construes this item of the statement of position as a complaint to management related to an alleged violation in April 2001 of an unspecified commercial motor vehicle safety regulation, standard, or order under 49 USCA §31105(a)(1)(A). The complaint involved being required to transport passengers in violation of hours of service regulations. (Tr. 19). The vague allegation suggests possible concern at the possible operation of a commercial bus while the driver's ability to operate the vehicle safety is impaired under 49 CFR §392.3.

Complainant testified that in April, 2001, he drove an Americoach tour bus to New York City, and complained to Gardner or Watson, the dispatcher, by telephone, when he or his fellow driver could not reach Gardner, that they were out of hours for the day, and that they were going to run out of hours, that is, they would exceed the work hours permitted by applicable regulations, because, unable to find parking for the bus, he had to "keep circling the block." (Tr. 26, 104-05, 136) Complainant testified that they requested a relief driver from Gardner during the trip because "we felt that we carry on driving that it would affect the safety ourself and the passengers."[5] Complainant testified that Watson told him "that we had to make it through the day," and that "We made it through the day. We falsified logs and did things to make it through the day."[6] (Tr. 26) Complainant testified that he told Ross of the situation regarding the hours and itinerary, and that Ross responded that they knew the situation before they left Memphis and that they "either do it or we find somewhere else to work." (Tr. 26-27)

[5] Complainant testified that when touring Manhattan, New York, drivers would "get up at about six o'clock, go through the tunnel and come up to Manhattan. . . do different activities. . . and. . . end up at about twelve o'clock at night." Because there was no legal parking for buses in Manhattan, which would allow drivers to log off duty when the passengers had been dropped off, the bus drivers had to "literally loop the block until the passengers come out." (Tr. 24) He called Gardner "[t]o tell him that the hours and things was what we were doing up there, that the itinerary we had to run was, we was running out of hours. We was coming in at twelve o'clock at night and had to clean the bus, it would be two o'clock at night and then had to be back up at six o'clock in the morning." (Tr. 56-57) He made a request for a relief driver on the April tour because he and the lead driver, Kenneth Mills, "were out of hours for the day." He testified that "Kenneth and I were running over 70 hours. Myself, I think I had a few more hours." Complainant testified that he was in fact out of hours for the particular day, not the seven-day work week, during the April 2001 tour in New York. (Tr. 48)

[6] Complainant offered no documentary evidence to corroborate his statement regarding the logs.

Both Watson and Gardner denied that Complainant told them that he was out of hours. (Tr. 105, 136) Ross denied talking to Complainant during the New York trip, and had no recollection of Complainant's not keeping an accurate log. However, he testified that during an assignment, if a bus were safely parked and could be locked, the driver could log that time as off duty, though he would be paid for that time. (Tr. 122-23, 127-30) Complainant testified that the two bus drivers were not disciplined at that time, but that he was later discharged in August because of that incident and the incident which occurred in Detroit in July. However, he was vague as to the alleged causal connection between the April incident and his termination. (Tr. 27-29) He also testified that he complained on other unparticularized occasions about running out of hours. (Tr. 56-58)

Watson, on the other hand, testified credibly that Complainant called because he was concerned that he would run out of hours because he could not park the bus in Manhattan. Complainant never stated during his call to Watson, or at any other time, that he was actually out of hours. (Tr. 105, 107, 111) Complainant was not out of hours at the time he called. Watson also denied ever telling Complainant to keep working or find another job. In fact he would have lacked authority to do so. He testified that Complainant had not run out of hours at the time that he called, "Because at the time that he called, it was around ten or eleven o'clock in the morning. He had just started his day, just started about seven or eight that morning…. But, a driver has up to fifteen hours at the beginning of their day. And since he called so early in the morning, he couldn't have been out of hours at that time." (Tr. 105-09) Complainant never told Gardner that he was actually out of hours. He adduced no evidence other than his testimonial claim that he actually ran out of hours.[7] Despite his expression of anticipatory concerns, and his threats, Complainant did not adduce evidence that at any time he actually refused and failed to operate the bus because of a safety concern or violated any applicable regulation.

Watson nevertheless attempted to find a relief driver, but none was available, and he turned the problem over to Gardner, who told Complainant, who had $600 of company expense money, "to find a place to park his bus, no matter what charge, no matter how much the charge would be," and suggested several places to park. (Tr. 107-08, 136) Complainant eventually found a parking space, but did not leave the bus. (Tr. 52-53, 108) Upon his return to Memphis, Tennessee, Complainant presented Gardner with a parking receipt, to verify that he had found a place to park the bus.[8] (Tr. 136-137, 186-187, R-19) Gardner testified that Complainant's April

[7] Ross credibly explained the "15 hour rule," stating that it is "not a consecutive hour rule. . . . In a 24 hour period, a driver could technically be there for 23 and a half hours, and have not violated the 15 hour rule, because if the driver can safely park the bus or park the bus, then that time can be logged as off duty." Ross testified that, if someone is paid for seventeen and a half hours of work, it does not necessarily mean that he or she has worked over fifteen hours, because a driver is paid for time that he is off-duty but still on the bus, as long as the bus is parked. (Tr. 125, 128-29) Ross explained that parking the bus means that the driver is able to rest on the bus without any passengers present, or lock the bus and walk away. Once a passenger returns, the driver is "basically back on the clock and has responsibility for those passengers." (Tr. 129) Gardner estimated that Complainant's New York trip itinerary could be completed within the fifteen hour drive time that a driver is allowed. (Tr. 226) Neither Ross's nor Gardner's testimony was effectively contradicted.

[8] Complainant testified that when he complained on various occasions of excessive hours, his supervisors told him, in effect, he "had to make it through the day, whatever it take[s]," and that he and another driver "made it through the day," even though they allegedly "falsified logs and did things to make it through the day," and

2001 trip to New York had no effect on his decision to terminate Complainant's employment on August 14, 2001. (Tr. 27-29, 193)

Complainant's testimony that another adverse action was that he did not get as many runs, because of his complaints on the April 2001 New York trip, was uncorroborated and unconvincing. (Tr. 50) In that regard, Complainant testified that he could not recall telling Gardner in June 2001 that he was going to be gone for three or four months, or that in July 2001 he had notified Gardner that he was back in Memphis and ready to work, because he was a part-time worker. (Tr. 50-51) Complainant testified that he had never left his employment with Respondent, and denied taking any time off, though he might not have worked during that time because he was a part-time worker. He also denied that he planned to take time off because he had to take care of his mother in Detroit. (Tr. 51-52) Gardner, however, contradicted Complainant, testifying credibly that Complainant had said at the time that "he would need to be out for . . . two to three months at one point in time," but that he came back to work a few days after he made the request and was reinstated. (Tr. 133-34, 170-176, R-12, 13, 14) There is no evidence that any protected activity prior to his termination resulted in fewer driving opportunities as an adverse action by Respondent or otherwise.

"*(b) My request July 22, 2001 to Larry Gardner for relief from a very disorderly group that was distracting the safe operation of the motor coach.*"

This tribunal construes item (b) as a complaint concerned with possible operation of a commercial bus while the driver's ability to operate the vehicle safely is impaired under 49 CFR §392.3. Complainant suggested that this statement also complained of being required to drive in violation of DOT hours of service regulations. (Tr. 20) Complainant drove an Americoach tour bus to the Detroit area in July, 2001, with the Upward Bound Group from Philander Smith College, a group of teenage students on tour. (Tr. 29-30, 53-54). There was a second bus driven by Steve Williams on the trip. (Tr. 138) Complainant testified that on the first day that the group was a "very disorderly" high school group that caused a late start by the drivers, and that the trip was delayed by various causes. Complainant testified that he was under pressure from one of the group leaders to make up the lost time, but that he insisted to the client that he drive safely, and did so. (Tr. 29, 137) Complainant testified that he stopped the bus in a rest area within a couple of hours of picking up the group and called Gardner to tell him, "I do not wish to be with this group anymore because they're distracting me and I fear that it was–it was unsafe for me to carry on at that point," but that Gardner told him, after talking to the other driver, to continue and complete the trip, which he did. (Tr. 30-31, 58-59, 81-84, 209-12) Complainant described his passengers' allegedly distracting conduct, but insisted that he drove the speed limit and at a safe pace. (Tr. 86) Thus, there is no evidence that safety was actually impaired, although Complainant made a colorable claim of safety concerns. (Tr. 81-86, 212)

---

were told on occasion that they knew their assignment in advance and had better "either do it or we find somewhere else to work." (Tr. 26-27, 56) Although Complainant charged Watson, Gardner, and Ross with threatening him with termination if he did not complete his assignments, Watson and Ross did not have such authority; Gardner did. Complainant's testimony regarding the alleged threats is not convincing in any event. (Tr. 27, 47-49, 105-106, 122-23, 140-41)

Gardner testified that he admonished Complainant "to drive that coach safely" and professionally.[9] (Tr. 137) Complainant testified that Gardner asked if he needed a relief driver, and, according to Gardner, Complainant replied, "Well, if they don't straighten up, I might," but later indicated that "we've got everything worked out." (Tr. 138, 180-182, R-17) Gardner asked Complainant specifically, "Can you drive that bus safely, can you continue to drive the bus safely," and Complainant replied, "Yes, I can." (Tr. 138-40, 180-182, 193-94; R-17) Complainant, thus, expressed concern, but did not engage in unsafe operation or refuse to operate the bus. Indeed, Gardner testified that Complainant never refused to drive a vehicle while he was employed by Respondent, and that he was never threatened with discharge if he refused to drive. Gardner testified that only he and the general manager, John Gibbs, would have had the authority to terminate the Complainant. (Tr. 140-41, 194, 199-200)

Complainant testified that on the second day the tour was behind schedule and that he advised Gardner, in addition to the fact that he was having problems with the tour guide, that he had a shortage of hours on his log available for the six or seven day itinerary, but that Gardner told him "to make it do." (Tr. 31) Complainant may have anticipated a shortage of hours, but there is no evidence that he refused to operate the bus, or operated it unsafely or in violation of applicable regulations. And there was no evidence that his alleged complaints in this regard invited any retaliatory response.

Gardner testified that he received a phone call on the second day of the itinerary from Steve Williams, a driver of another bus on the same trip, who said that he did not think that Complainant was going to drive that day. (Tr. 139, 183-184, R-18) Gardner told Williams that he would call Coach Canada to "try to effect a relief driver." (Tr. 139-40, 183-184; R-4, 18) While Gardner was awaiting the call back, Williams told Gardner that everything had worked out and Complainant later confirmed that to Gardner. Gardner testified that Complainant never refused to drive a vehicle while he was employed at Americoach. He denied the Complainant was doing so or that he was ever threatened with termination if he did not drive. (Tr. 140, 183-184, R-18) Complainant testified that he returned to the bus and drove it, when urged by Williams, who said he needed the money. However, he denied that he drove because of Williams, but testified that he continued to drive because Gardner could not find a relief driver and told him that if he continued complaining he could look for another job. (Tr. 54-59)

On the other hand, an incident occurred during the Detroit trip that was identified by Respondent as the cause for Complainant's termination. Gardner received a telephoned complaint from Gloria Billingsley, who was a group leader on the Detroit bus tour, on August 2, 2001, after the trip, and by a letter dated August 13, 2001. (Tr. 141, 212-13; R-4) The call launched Gardner's investigation. (Tr. 213-15) Williams, the other driver, described the same incident by a phone call and in a memorandum dated August 2, 2001, which Gardner received by fax about two hours after Gardner asked Williams for written confirmation.. (Tr. 142, 214-15; R-4) Both witnesses described an incident in which Complainant demanded money from Billingsly before he would continue driving on the tour. Billingsley also asserted that Complainant used profanity in front of high school students who were passengers on the bus. (Tr. 154, R-3, 4)

[9] Gardner testified that when he had telephone conversations involving situations that could pose problems for a driver, the company , the passengers, or otherwise, he would take notes in longhand recording the conversation, type them up, and retain them as part of the company business record. (Tr. 138-39)

After receiving these complaints Gardner notified Complainant that he was on part-time employee status, but that as of August 6, 2001, he would not be placed on assignment pending resolution of a serious complaint. (Tr. 188-91, 216-17; R-20)

Complainant testified that his termination notice from the company did not mention soliciting money or profanity, and those reasons did not come up until several months later during the Secretary of Labor's investigation of his complaint. (Tr. 37-38) In fact, the formal termination notice signed by Gardner cited only "a very serious customer service complaint that which on charter 9545 you conducted yourself in a manner that we determined was unacceptable" and Complainant conceded that cursing in front of students would have been a violation of company policy as well as his personal policy, as would soliciting money from a customer, but he denied doing either. (Tr. 36-37) There is no evidence of a request for clarification, and Complainant was evidently fully aware of the customer service complaint referred to.

The Americoach Employee Handbook, cited by Gardner, provided specifically, "In general, conduct that interferes with operations, brings discredit to the company, or is offensive to the customers or co-workers, are not tolerated" Gardner testified that in his opinion Complainant violated provisions of the Employee Handbook, based upon the letter from Billingsly and the letter from Williams, the driver. Gardner testified that Complainant was terminated because he had used profanity around young people in violation of the provision in the Americoach Employee Handbook which specified, "Using obscene, abusive, inflammatory or threatening language while on the job." and he testified that Complainant had brought discredit to the company by using "abusive intimidated actions that they related to, and also the client claimed that he had tried to extort money from her." (Tr. 155-157, 192-193; R-5, 21) Gardner testified that he did not terminate Complainant's employment for any reasons other than those identified in the termination letter, specifically the violation of company policy, and that the termination had followed investigation of the complaints, an interview with Complainant, receipt of the information in writing, conclusion of the investigation, and the decision to terminate. He testified, "The information from that trip alone, we felt that it had the gravity or weight for termination." (Tr. 193, 195, 197-200, 219, 225; R-20, 21, 22) Gardner's response to the Tennessee unemployment agency also expressly identified the infraction on the Canada trip based on the complaint by Billingsley as the basis for the termination. Gardner testified that both soliciting money from a customer and using profanity in the presence of clients were company violations, and he denied having instructed Complainant to violate any laws or regulations relating to Respondent's bus operations. (Tr. 197-98, 205; R-20, 23)

"*(c) Americoach reason for separation given to the State of Tennessee Department of Employment Security.*"

This item apparently should be construed as a complaint that Respondent's response to the Tennessee Department of Transportation regarding its request for separation information constitutes a discriminatory adverse action against the Complainant. Complainant seems to complain that the Respondent's statement to the Tennessee Department of Transportation's questionnaire was somehow inaccurate or incomplete. (Tr. 32-36) When Complainant was terminated, Gardner responded to an obligatory form questionnaire from the Tennessee

Department of Labor and Workforce Development, Division of Employment Security, that Complainant was terminated for bringing "discredit to the company" on July 25, 2001, citing page 14 of the Employee Handbook. (Tr. 196-198; R-23) This tribunal infers that Complainant's complaint regarding this item in his statement of position was that Gardner's report regarding Complainant's termination cited an insufficiently or inaccurately defined violation of company policy. Complainant testified that he did not know what policy he had violated in connection with an allegation that he "requested money from a customer" in the questionnaire filed by Gardner with the Tennessee agency after his termination. (Tr. 34-38) Complainant testified that he did not know just when he was terminated. He filed an initial claim, apparently before he was formally terminated because, after the July tour, he "never received a load." He testified that he understood that the report caused an initial denial of his application for unemployment benefits by the State of Tennessee, but that he filed another claim, and the denial was reversed on appeal. (Tr. 59-60)

Complainant testified that he got a notice from the Employment Office telling him that he would not get the benefits he sought because he had solicited money from a customer, which he denied, but that the notice did not mention the profanity of which he had been accused, and that the complaint of profanity that he said would have been penalized with immediate termination was not raised until the OSHA investigation of his own complaint (Tr. 36-38). Gardner indicated in his report to the Tennessee agency that termination was not immediate because the operative incident occurred in Canada, and was investigated prior to termination. (R-23)

Complainant testified that his use of profanity in front of customers as a basis for immediate termination under company policy was not mentioned in the investigated of his complaint by OSHA three months later, Complainant testified inconsistently that soliciting money or using profanity were never mentioned as reasons for the termination in the notice, and that he was unaware of these reasons "until the Secretary came up with it several months later." But he then alleged, "I went over there one day and they never did say anything about no profanity. They mentioned soliciting money, but never profanity." (Tr. 36-38) However, the Secretary's Findings following the OSHA investigation found explicitly that ". . . Complainant was discharged for a verified customer complaint regarding Complainant's use of profanity in the presence of students, and as a result of an attempt to solicit money from the same customer." (R-1)

Complainant's testimony was also contradicted by the termination letter dated August 14, 2001, which was addressed to Complainant and stated:

> The Company has received a very serious customer service complaint that while on charter 9545 you conducted yourself in a manner that we determined was unacceptable.
>
> Your record is charged with this infraction.
>
> Due to this infraction and your past record you are dismissed from the employment of Americoach Tours/Coach USA as of 8/14/2001

The letter on company letterhead was signed by Larry Gardner, Operations Mgr. A printed document was attached, inferred to be from the Employee Handbook, titled "Examples of Conduct Not Permitted" included the admonition, "In general, conduct that interferes with operations brings discredit to the company or is offensive to the customers or coworkers are not tolerated," and listed particular examples of conduct subject to disciplinary action, including "Using obscene, abusive, inflammatory or threatening language while on the job," and "Harassing, sexually or otherwise, another employee or customer." . (R-21) In addition, it admonished, "You are expected to comply with all company policies and procedures and all standards of conduct that any person exercising reasonable judgment would know is expected." (R-21) Gardner testified that Complainant was terminated on August 14, 2001, based on a letter that was received from a client on August 13, 2001, confirming the occurrence of the incident involving the solicitation of money from the customer and the use of profanity in front of high school age passengers, and confirming information from another employee bus driver. (Tr. 131,151-54, 219; R-3, 4)

Despite his denial, Complainant had knowledge of his employment status, because he had a meeting with Gardner and John Gibbs, memorialized in an internal memorandum to the file dated August 6, 2001, in which Gardner told Complainant, "your status is that you are a part time driver and you are not currently working pending the outcome of our investigation of a very serious complaint from a customer pertaining to your conduct on a recent trip," and that they were going to follow up on the complaint. The specific nature of the complaint apparently was not disclosed at that time, although it may be inferred that Complainant knew that the complaint came from Billingsly, since his particular characterization of her as described was derogative and inflammatory, and Gardner identified her has the source of the complaint in his testimony. (Tr. 189-191; R-20)

Gardner also testified that he had had a telephone conversation with Complainant before August 5 when Complainant had stopped at Gardner's office and precipitated the meeting on August 6. (Tr. 217) Complainant also knew that charges against him were being investigated, based on the conversation he had with Gardner on August 5, 2001. (Tr. 217) Gardner testified that Complainant was told "face to face" that his employment was terminated and why on August 14, though Gardner could not recall if he handed the written termination notice to Complainant or mailed it to him. (Tr. 224- 225, R-21) Gardner testified that he told Complainant what he was being terminated for and that it was for the use of profanity around young people, abusive actions and the extortion of money. (Tr. 225) Complainant's testimony indicates that he understood the violations related to the incident on the tour in July. (Tr. 32-39, 60) This tribunal finds that he so understood.

"*(d) Notice to all driver July 20, 2001 telling them to avoid all discrepancies that will show in a manual audit of their logs.*"

This tribunal construes item (d) as an allegation that Complainant's objections to a directive from Ross, which Complainant interpreted as requiring falsification of records in violation of regulatory requirements, constituted protected activity under 49 USCA §31105(a)(1)(A) and caused a retaliatory response. Complainant focused particularly upon Ross's directive regarding maintenance of operating logs which was issued to all drivers on July

20, 2001, stating in part, "I encourage you [the drivers] to take your time making sure all entries are correct, avoiding discrepancies that will show in a manual audit." (R-24, 62-65) Complainant testified that the directive necessitated falsification of the logs. He said he had made repeated complaints that the order to "avoid all discrepancy that will show in any manner of the audit" meant "to match your log with all your paperwork," and "to make it legal" which meant "falsify your log."[10] (Tr. 38, 63-65, 76-81) Complainant testified that he had told Ross repeatedly that matching the logs with the itineraries would not reflect the reality of what happened. He testified that he had made changes in the logs as Respondent required, but he provided no documentation as evidence to support his allegations, or that he actually falsified any log. (Tr. 39-40)

Ross testified that the purpose of the directive was to tell the drivers to make sure that their logs were correct and that it was necessary that they comply with the law before they submitted their logs to Respondent's Safety Department. (Tr. 120) Nothing on the face of the document directs a driver to falsify any logs. Ross testified that Respondent requires its logs to be maintained accurately in compliance with the federal regulations, and that drivers are required by law to record fuel stops, toll booth payments, and other such relevant operational events, so that the directive was "simply telling the drivers those logs need to be accurate, per law, in their own handwriting." (Tr. 121-22, 126) Ross testified that no one had ever refused to comply with his directive to keep accurate logs because to do so would violate the law. (Tr. 121) Thus, despite complaints and concerns, presumably safety related and regarding regulatory compliance, communicated to Respondent, Complainant adduced no evidence that he refused to drive a vehicle or that he operated a vehicle unsafely or for excessive hours in violation of any regulation.

"*(e) Department of Transportation finding of Americoach engagement in unprotected safety activities, with my knowledge.*"

This tribunal construed item (e) as a contention that Complainant filed a complaint or began a proceeding related to alleged violations by Respondent of unspecified commercial motor vehicle safety regulations, standards, or orders under 49 USCA §31105(a)(1)(A), which would qualify as protected activity linked in some way to Complainant's termination. Complainant testified that he had filed the same complaint with OSHA that he had with the Tennessee Department of Transportation when OSHA told him to file with the Tennessee Department of Transportation because OSHA did not have jurisdiction. (Tr. 68) Complainant testified that he had complained several times about safety concerns concerning Respondent as reflected in the

[10] Complainant testified that the issue of log maintenance involved safety to the extent that "in reality, if you're not doing that and driving 15 or 20 hours versus driving four or five hours, they won't - - meeting the itinerary that they give you. They might show you on the itinerary you're doing legal driving, eight hours, where if you run the itinerary and you actually on duty 16 hours, but they want you to show what is meant to be, 15 hours, the log. And it clearly states this in this letter. Re charges there." (Tr. 39-40) Complainant testified that Ross's July 20, memo was significant because "they are directing us to falsify logs and run over hours and for the safety of our passengers and ourself, they're disregarding that. They're telling us just make it legal." (Tr. 61-62) Complainant testified that falsification of logs was involved "Because if you go back and look at the itinerary that they give you and the field receipts and all that, all that do not jibe. All that's not - - the entries they know do not match. They want you to match them up because this is what they look for when the come in there. . . So they want you to match those toll receipt up, even though you didn't come through that toll at that time. They want you to show it on the log. That's what this letter telling me." (Tr. 64, 77-79)

Secretary's finding at 4-B once with the encouragement of the Regional Administrator of OSHA. (Tr. 42-43) Complainant testified that there had been various unspecified adverse findings against Respondent, but offered no specific evidence of such a report or findings by the Tennessee Department of Transportation. (Tr. 65-67)

On the other hand, Ross testified that he routinely dealt with Tennessee Department of Transportation and Department of Defense audits of Respondent and that the dates of the last three audits were August 24, 2000; July 25, 2002; and July 14, 2003. (Tr. 115-116) He testified that the results of the audits were all satisfactory, which is the highest rating that can be bestowed. (Tr. 117) Ross testified that Respondent has never been cited or sanctioned for any kind of violation, and that the August 2000 audit was the result of an accident unrelated to Complainant; the July 2002 audit was the result of an employee complaint processed some eleven months after Complainant had been terminated; and the 2003 audit was performed by the Department of Defense. (Tr. 117-118, 127-128) Ross's testimony was coherent, specific, and, unlike Complainant's, credible in this regard. Thus, although Complainant may have made complaints to the Tennessee agency alleging violations by Respondent of unspecified motor vehicle safety regulations or orders, the evidence is unconvincing in regard to the complaints, and does not prove that Respondent was aware of any such complaints, or that it in any way retaliated against Complainant because of such complaints.

I am requesting that Americoach Tours made payment to respondent Gerald W. Crowell in the amount of $150,000 for remedy

Complainant's request for payment of $150,000 as a remedy was allegedly based on salary loss and punitive damages. (Tr. 44) Complainant could not provide estimates of his earnings at Americoach in calendar year 2000 or 2001. (Tr. 69-70) His estimates of current earnings were general and vague. (Tr. 71-72) He testified that he earned approximately $10,000.00 in calendar year 2000, and $15,000.00 in calendar year 2001. (Tr. 135) His request for $25,000 in salary loss and $125,000 for punitive damages was undocumented and otherwise unsupported. Thus, there is essentially a failure of factual proof, which is inconsequential because of the disposition of the claims asserted by Complainant.

Assorted Violations

Respondent established that Complainant violated several company policies prior to his termination, which were unrelated to protected activity under the STAA, and contributed only incidentally, if at all, to the discharge grounded on the Complainant's serious misconduct during the bus tour to Detroit in July 2001. There is no indication that they involved protected activity or discriminatory adverse action under the STAA. (R-6-9, 11)

Conclusions of Law and Discussion

To prevail under the STAA, Complainant must first establish a *prima facie* case of adverse discriminatory or retaliatory action by Respondent related to activity by the Complainant protected under the Act. To do so Complainant must prove that (1) Complainant was engaged in protected activity; (2) Respondent was aware of the activity; and (3) Respondent took an adverse

action against him. *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Moon v. Transport Drivers, Inc*., 836 F.2d 226, 229 (6th Cir. 1987); *Byrd v. Consolidated Motor Freight*, 97-STA-9 (ARB, May 5, 1998); *Ertel v. Giroux Bros. Transportation, Inc.*, 88-STA-24 (Sec'y, Feb. 16, 1989). Complainant must offer evidence sufficient to raise the inference that the adverse action was likely caused or contributed to by the protected activity. *Id*.; 42 USCA §5851(b)(3)(C). This tribunal has ruled that Complainant has established a *prima facie* case, so that the elements of the claim and defense must be proved by a preponderance of the evidence.

Since Complainant has established a *prima facie* case, Respondent must produce evidence that the alleged adverse action was motivated by legitimate, nondiscriminatory reasons. Respondent's burden at this stage is one of production only. *Wignall v. Golden State Carriers, Inc.*, 1995-STA-7 at 5 (Sec'y, July 12, 1995); *Johnson v. Roadway Express, Inc.*, 1999-STA-5 at 12 (ARB, Mar. 29, 2000); *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y, Jan 18, 1996). If Respondent satisfies its burden of production, and articulates a non-discriminatory reason for the challenged adverse action, Complainant must show that Respondent's proffered reasons for the adverse action are a pretext for the allegedly discriminatory action. The Complainant, nevertheless, retains the ultimate burden of proof that the stated reason is a pretext for unlawful discrimination. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Complainant may then prevail on the basis of a *prima facie* case and sufficient evidence to demonstrate the asserted justification is false or pretextual, because this tribunal as the trier of fact may then conclude that the Respondent engaged in unlawful discrimination. *Reeves*, 530 U.S. at 140 If the proof establishes that the adverse action was undertaken for both discriminatory and nondiscriminatory reasons, i.e. that there were "mixed motives," Respondent must show by a preponderance of the evidence that it would have taken the same adverse action absent Complainant's protected activity. *See Clean Harbors Environmental Services, supra*. The burden of proving that Respondent was motivated by illegal animus, however, rests with the Complainant. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1992)

The STAA provides in pertinent part:

> (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 . . . 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; or (B) the employee refused 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 USCA §31105(a)

In addition, 49 CFR §392.3 provides:

> No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a 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 to begin or continue to operate the motor vehicle.

It is settled law that the phrase, "filed a complaint or begun a proceeding," under §31105(a)(1)(A) of the STAA includes an employee's communicating an internal complaint to superiors that conveys his reasonable belief regarding a violation by the employer of a federal motor vehicle safety regulation, standard, or order that is a protected activity under that provision. *See Moon v. Transport Drivers, Inc*., 836 F.2d 226, 227-29 (6th Cir. 1987) (driver that made only oral complaints to supervisors engaged in protected activity under STAA); *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12 (1st Cir. 1998)[95-STA-34]; *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) (oral complaints to supervisor are protected activity under the STAA). There is also an underlying presumption that, to be a protected activity, such complaints regarding safety concerns be asserted in good faith. *See Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998).

Complainant was not a good historian, and he did not articulate his complaints with precision or clarity. Because of his confused, and often disconnected and seemingly conflicting testimony, both his credibility overall, and in particular, were severely impaired. Nevertheless, based on the evidence as a whole, and the indicated interpretations of the items of his statement of position and related testimony, he may be deemed to have engaged in certain protected activity under the STAA. The Respondent employer was fully cognizant of that protected activity, because the complaints in question were made to Gardner, Ross, or Watson, who were responsible employees of Respondent. Some of the complaints cannot be identified as protected activity, because the activity is insufficiently defined by credible evidence, or otherwise does not qualify. Because of the relatively short time span between the protected activity which Complainant identified and his termination, a preliminary inference may be drawn that there was a causal nexus between the protected activity and the adverse action. That inference, however, is rebutted, and does not withstand Respondent's proof of a wholly independent cause for Complainant's discharge.

Employer satisfied its burden of production with evidence of misconduct which provides an independent basis for Complainant's termination from employment by Respondent. That proof requires further determinations, if pressed by Complainant: first, whether Respondent's allegations and proof of misconduct are merely pretextual; second, whether the proof of misconduct establishes a partial or mixed motive with discriminatory animus for the adverse action which is related to the Complainant's protected activity; and, third, whether Respondent has proved an entirely independent basis for Complainant's termination. This tribunal holds that the proof of misconduct is not pretextual; that the evidence does not establish a mixed motive for the adverse action; and that Respondent has established by a preponderance of the evidence an independent basis for Complainant's termination.

Status as Employee and Employer

It is undisputed that Respondent, Americoach Tours, is a commercial motor carrier subject to STAA, and that Respondent was an employer as defined in §31101(3) of STAA at all

times material to this case. Respondent employed Complainant as a driver of a passenger bus used on interstate highways who directly affected commercial motor vehicle safety in the course of his employment.

Adverse Employment Action

Respondent terminated Complainant as a driver on August 14, 2001. It is undisputed that Complainant's discharge from employment by Respondent was an adverse action. Jurisdiction to decide the case under the STAA is not in issue.

Item (a)

Complainant's statement of position, "(a) My request for a relief driver in the month of April 2001 on a tour of New York City with Kenneth Mills the lead driver," allows an inference that his request for a relief driver was protected activity under the STAA because he communicated a concern that he might run out of operating hours permitted under applicable federal regulations. During his bus driving assignment in New York in April, 2001, Complainant's allegation that he was going to run out of hours and was concerned about related safety issues was relayed to Respondent's employees, Watson and Gardner. Thus, Respondent had knowledge of Complainant's concern and complaint comprising the protected activity.

Complainant was not specific as to the statutory, regulatory, or other restraints to which he referred, although federal regulations limit the hours that a bus driver can drive under specified circumstances. However, his communications regarding possible hours of service violations are deemed to be protected under §3105(a)(1)(A). *See Chapman v. Heartland Express of Iowa, Inc*., ARB Case No. 02-030, 201-STA-35 (ALJ, Sep. 9, 203).

Watson's testimony that Complainant could not possibly have been out of hours at the time that he called, and should have little fear of running out of hours, is persuasive. Regardless, Complainant's good faith is assumed in the absence of persuasive indications to the contrary. Watson's and Gardner's testimony that Complainant was told to find a parking area no matter what the cost, and Respondent's evidence of the parking receipt support Watson's assessment that Complainant would not have run out of hours because of inability to park the bus. Thus, if refusal to operate a vehicle were assumed, relief would not be available under §3105(a)(1)(B)(i), because Complainant has not established by a preponderance of the evidence that a federal hours limitation regulation was violated. *See Ass't Sec'y & Lansdale & Le v. Intermodel Cartage Corp., Ltd*., 94-STA-2 (ALJ, Mar. 27, 195); *cf*., *Williams v. Carretta Trucking, Inc.*, 94-STA-7 (Sec'y, Feb. 15, 1995) (threat to enforce regulation would qualify as protected activity).

Complainant's inconsistent and confusing testimony regarding his alleged safety concerns, and testimony by Respondent's witnesses that Complainant agreed to keep driving without regard to any threat of discharge, support the conclusion that Complainant's complaints and related behavior did not amount to refusal to operate a vehicle under §31105(a)(1)(B). Ross's, Gardner's, and Watson's denials that they threatened to fire Complainant if he did not continue to drive are credible on this record, both because of the circumstantial context of the events and their respective demeanors during their testimony. Even if a refusal to operate a

vehicle were assumed, Complainant did not at any time contend, and there was no evidence of record, that any vehicle in question was itself in unsafe condition in violation of §31105(a)(B)(ii). To prove that element, an employee must prove (1) apprehension of serious injury to himself or the public because of a vehicle's unsafe condition; (2) that his apprehension was objectively reasonable; and (3) that he sought, but was unable to obtain, correction of the problem. "[A]n employee's apprehension of a serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health." *See Young v. Schlumberger Oil Field Services*, ARB Case No. 00-075, 2000-STA-28 at n. 6 (ARB, Feb. 28, 203). None of those requirements have been satisfied on the instant record.

In addition to his complaints regarding the New York trip, Complainant testified that the behavior of passengers on the tour bus headed to Detroit created an irritating and allegedly unsafe driving condition for him. Complainant proved by his own and Gardner's testimony that he complained to Respondent about allegedly unsafe conditions attributable to that behavior, but he adduced no evidence that he actually refused to operate a bus to which he was assigned for any reason under §31105(a)(B)(i), *Compare Chapman v. Heartland Express of Iowa, Inc*., ARB Case No. 02-030, 201-STA-35 (ALJ, Sep. 9, 2003)(A refusal to commit to taking a routing preplan constituted refusal to drive.)

Item (b)

Complainant did prove that he relayed concerns to Respondent about unsafe driving conditions related to the possible interference with his driving by unruly passengers by means of Gardner's and his own testimony, as deemed to have been alleged in item (b) of his statement of position, "(b) My request July 22, 2001 to Larry Gardner for relief from a very disorderly group that was distracting the safe operation of the motor coach." Although Complainant testified that, when he requested relief during his assignment to the Detroit tour in July 2001, he was told by Respondent to continue to drive or find new employment, Gardner's testimony establishes that Respondent never threatened Complainant with discharge from his employment. Gardner's demeanor as a witness, the content and consistency of his testimony, as well as the tenor of the evidentiary record make Gardner's denial credible. While Complainant may have believed that the behavior of his passengers had caused an unsafe condition, the safety problems were addressed at his instance, and a refusal to drive, which probably would have been unreasonable under the circumstances, never occurred.

Respondent's contention that Complainant did not engage in protected activity because he agreed to, and did in fact, continue driving after Respondent offered to find a relief driver, and because Complainant was never told to drive in a way that was unsafe, including exceeding the speed limit, is not dispositive. Complainant's complaints to Respondent regarding safety that he communicated during the New York and Detroit trips, regardless of their validity, qualify as protected activity, and as such were protected from discriminatory adverse action by Respondent under 49 USCA §31105(a)(A). However, there is no credible evidence that the Complainant was terminated because of these complaints or because of a justified refusal to perform an unsafe job. *See Patey v. Sinclair Oil Corp*., 96-STA-20 (ALJ, Aug. 2, 1996). There is no evidence that the complaints or the responses were in any way connected with Complainant's termination on

August 14, 2001. Two other incidents arising out of the bus tour to Detroit proved to be the operative factors that caused Respondent to discharge the Complainant.

Item (c)

The third item in Complainant's statement of position, "(c) Americoach reason for separation given to the State of Tennessee Department of Employment Security," does not refer to protected activity or sufficiently define an adverse action or retaliatory animus to be subject to relief on the record before this tribunal. Respondent's report to the Tennessee Department of Transportation was essentially a declaration that Complainant's termination was for cause and attributable to certain misconduct. To the extent that Claimant's statement is a suggestion that the process of his termination was procedurally or otherwise defective, or that Respondent's report reflects such defective process, no relief is available in this forum. The question to be resolved is whether retaliatory animus related to protected activity caused Respondent to discharge Complainant. It is not whether the proprieties of termination were adhered to. The report to the Tennessee Department of Transportation reinforces Respondent's claim that the discharge was for specified misconduct and was not retaliation for safety complaints. There is no evidence that Respondent misled or sought to mislead the Tennessee Department of Employment Security about the reasons that Complainant was terminated for retaliatory or other reasons. This tribunal finds that the complaint is too vague and the proof too unfocused to support a claim for relief under the STAA based upon a claim of retaliation for protected activity under the Act.

Complainant's testimony that when he returned from the Detroit trip, he did not receive further driving assignments could be deemed to suggest an adverse action by Respondent. At the time, a complaint had been lodged against him and he was under investigation by the Respondent. There is no credible evidence linking the alleged gap in assignments to protected activity rather than Claimant's misconduct. Complainant's allegation of confusion as to his employment status during the investigation of the group leader's complaint was contradicted by Gardner, who testified that Complainant knew about his employment status from several conversations. An internal memo dated August 6, 2001, corroborates Gardner's testimony that Complainant had knowledge of his employment status, and that Complainant was or should have been aware that his assignments were on hold because of the ongoing investigation of his alleged misconduct. There is no credible evidence that the hiatus in driving assignments derived in any way from retaliatory animus related to protected safety complaints. Thus, there is a failure of proof that Respondent's report to the Tennessee Department of Employment Security regarding Complainant's termination was a discriminatory adverse action related to protected activity by Complainant.

Item (d)

Item (d) in Complainant's statement of position, "(d) Notice to all driver July 20, 2001 telling them to avoid all discrepancies that will show in a manual audit of their logs," and related testimony, suggests a contention that Complainant's discharge was attributable to his complaint to Respondent regarding Ross's directive to avoid discrepancies in logs. The gist of Complainant's testimony related to that item was that the July 20, 2001, directive implicitly required drivers such as Complainant to falsify their trip logs in order to reconcile them to

applicable regulatory requirements. The complaint is sufficiently related to safety concerns and compliance with applicable safety regulations to qualify as protected activity under 49 USCA §31105(a)(1)(A). Complainant testified that he had made repeated complaints that the directive was, in effect, a mandate to falsify the logs, and testified that he had made changes in the logs as Respondent required. Other than his own testimony, however, Complainant adduced no evidence that he falsified his logs, or that he made complaints regarding the directive to Respondent. Ross testified, in effect, that the directive was solely a mandate for accuracy, necessary to approval of the logs upon audit. Ross testified that no one had complained to him that compliance with the directive on log accuracy would require violation of the law. Most significantly, there is no credible proof that any such complaint generated Complainant's discharge, directly or indirectly, or caused any retaliatory action by Respondent.

Item (e)

Item "(e) Department of Transportation finding of Americoach engagement in unprotected safety activities, with my knowledge," of Complainant's statement of position is incomprehensible on its face. His testimony was obscure and unsupported by specificity or documentary evidence. Complainant was obviously confused as to whether OSHA or the Tennessee Department of Transportation had generated allegedly adverse findings regarding unspecified complaints he had allegedly made to the agency. Complainant produced no evidence of particular agency findings adverse to Respondent. The allegations are too vague to charge Respondent with knowledge of protected activity in relation to them. Complainant gave no indication as to how the findings established or affected a violation under the STAA or any adverse action against him. Moreover, Ross's testimony, that there had been no findings of violations by the Department of Transportation against Respondent since at least the year 2000, was plausible and convincing. That testimony contradicts Complainant's claim that any government agency found violations by Respondent after he made his complaints. If Complainant's statement of position were deemed to suggest that Complainant had made a complaint against Respondent to a government agency which had resulted in adverse findings and had generated an adverse or retaliatory action against him, there is a clear failure of proof of either protected activity or retaliation.

Respondent's Independent Cause for Termination

When Respondent met its burden of going forward with the production of such evidence that its adverse action against the Complainant was motivated by a legitimate nondiscriminatory cause by proof of particular misconduct by the Complainant as an independent and sufficient reason to justify the adverse action, two additional issues emerge. First is whether the alleged misconduct is a "pretext" for the discharge. Second is whether the alleged misconduct was combined with the protected activity to create a "dual motive" for the discharge. *See N.L.R.B. v. Cement Transportation, Inc.*, 490 F.2d 1024, 1029 (6th Cir. 1974), *cert. denied,* 419 U.S. 828 (1974). Respondent adduced plausible and credible proof that the reason for Complainant's discharge was Complainant's misconduct, which consisted of profanity in front of teenage clients on the Detroit bound tour bus which he was driving, and an attempt to extort money from a client as an incentive for him to finish the Detroit tour. Complainant conceded that both

incidents would be violations of company policy, though he denied the behavior on the witness stand. His demeanor and testimony in this regard were not convincing.

Respondent's proof of a credible independent basis for its adverse action consisted of proof of an investigation which included consideration of a detailed written complaint by the client group leader who had observed the profanity and who was the object of the attempted extortion, as well as a corroborating letter from an employee who drove a second bus on the Detroit trip, and observed the attempted extortion. The Respondent's Employee's Handbook list of violations attached to the termination notice specifically identifies profanity in front of clients and harassment of clients as violations of company policy. Respondent's documentary evidence of other violations of company policy recorded in Complainant's employment record militate against the Complainant's alleged misconduct being an isolated instance used as a pretext. Respondent thus established an independent legitimate nondiscriminatory basis for its adverse action terminating the Complainant.

Conclusion

Except for the attenuated temporal proximity of the incidents to Complainant's termination, there is no credible proof of any causal connection between any of Complainant's protected activities and his discharge. Complainant has not proved by a preponderance of the evidence that his termination was in retaliation for, or otherwise caused by, any protected activity under the STAA. Respondent has proved by a preponderance of the evidence that it had an independent and sufficient cause for Complainant's termination consisting of the plausible and substantiated complaint of serious misconduct by Complainant on the Detroit tour. There is no indication of pretext. There is no convincing evidence that Complainant's protected activity played any role whatever in the decision to terminate. Consequently, a mixed motive for the termination is not in issue.

Recommended Order

The complaint of Complainant Gerald W. Crowell under the Act should be dismissed.

A

EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon