U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 October 2010

CASE NO: 2009-STA-00054

In the Matter of:
ALBERT BRIAN CANTER,
Claimant**,**

vs.

MAVERICK TRANSPORTATION, LLC,
Respondent.

Appearances: **Paul O. Taylor**
Truckers Justice Center
Burnsville, Minnesota
For Claimant

Carolyn B. Witherspoon
Travis Bo Loftis
Cross, Gunter, Witherspoon & Galchus, P.C.
Little Rock, Arkansas
For Respondent

Before: **Russell D. Pulver**
Administrative Law Judge

Decision and Order

This case arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Section 31105 of the Surface Transportation Assistance Act of 1982 ("STAA" or "the Act"), 49 U.S.C. § 31105. Albert Brian Canter ("Complainant") alleged that his former employer, Maverick Transportation, LLC ("Respondent") discriminated against him in July 2008 after he discovered that Respondent placed an unfavorable notation on his DAC (Drive-A-Check) Employment Report. Complainant alleged that the unfavorable notation was transcribed in response to his refusal to drive a truck tractor to Columbus Ohio, and for his actions in filing a complaint about violations of commercial vehicle safety regulations relating to his assigned truck tractor. On December 16, 2008, Complainant lodged a formal complaint with Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor, for violation of the Act.

On July 7, 2009, Complainant objected to the determination made by OSHA and requested a hearing before the Office of Administrative Law Judges ("OALJ"), U.S. Department of Labor. A hearing was originally scheduled for August 10, 2009 in Colorado Springs, Colorado. On July 27, 2009, Respondent filed motions to dismiss for lack of jurisdiction, for untimely filing of the claim, and for change of venue. On July 29, 2009 the undersigned issued an order notifying both parties that the hearing would be held in Denver, Colorado. On July 30, 2009, the undersigned denied each respective motion filed by Respondent. A hearing was held on the merits in Denver, Colorado on August 10, 2009. Respondent and Claimant were both represented by counsel. Complainant testified on his own behalf. Letha Haymes and Brent Wayne Hilton testified on behalf of Respondent. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were admitted to the record: Administrative Law Judge's exhibits (AX) 1-8, Complainant's exhibits (CX) 1-6 and 8-22, as well as Respondent's exhibits (RX) 1-39.

Stipulations

1) Albert Brian Canter ("Canter") was hired as a commercial vehicle driver for Maverick Transportation, LLC ("Maverick"), on or about October 2, 2003, to operate commercial vehicles on the highway in interstate commerce with a gross vehicle weight of 10,001 pounds or greater. AX 7.

2) On November 21, 2003, Canter was travelling from Butler, Indiana to Dublin, Virginia carrying metal coils for Magic Coil Products LLC, when he was involved in a traffic accident outside of Waynesboro, Pennsylvania that resulted in a fatality. *Id*.

3) A post-crash inspection was performed on Canter's vehicle by Pennsylvania State Trooper, Ty Bintrim. Officer Bintrim noted in his inspection report the following violations of commercial vehicle safety regulations:

    a. "Two (2) brakes were out of adjustment (axle 3 left side and axle 5 left side);"
    b. Power steering box had a slight fluid leak;
    c. A brake hose was chaffing on a wire tie causing visible wear;
    d. Dunnage under trailer was secured by only a rubber cord. *Id*.

4) The accident report also stated that "[I]t is my opinion that none of these violations contributed to the crash." *Id*.

5) The vendor for the trailer, FleetNet America, was called to a truck stop to adjust the trailer brakes. *Id*.

6) Upon adjustment of the brakes on the trailer and the truck, Canter drove the tractor and trailer with the load of metal coils to a truck stop approved by Maverick. He then left the trailer with the coils at the truck stop per Maverick's direction. *Id*.

7) Canter then drove the truck without the trailer to his home. *Id*.

8) On November 24, 2003, another Maverick driver, Kevin Boggs, arrived at the truck stop and swapped trailers (trailer 23005E was swapped for an empty trailer (20004E) with Canter. *Id*.

9) Mr. Boggs then proceeded to deliver the coils to Virginia. *Id*.

10) Although Canter was found not to be at fault in the accident, he was upset over the fatality and took a medical leave of absence because of depression. *Id*.

11) While on leave, Canter was contacted via telephone and instructed by Maverick to contact Trooper Schweikart for a post-crash interview. *Id*.

12) While on leave, Canter received information concerning, and utilized, Maverick's employee assistance program. *Id*.

13) A counselor with the employee assistance program referred Canter to a doctor for possible depression. *Id*.

14) Canter remained on leave until he was released to return to work on December 29, 2003. *Id*.

15) On December 30, 2003, Canter informed Ms. Carole Whitted, Safety Claims Manager for Maverick, that he was unhappy that he could not get Worker's Compensation for emotional injuries. Mr. Canter informed Ms. Whitted that he was quitting. *Id*.

16) On December 30, 2003, Canter also contacted his Fleet Manager and informed him that he was quitting. *Id*.

17) Canter had difficulty starting the truck's engine at some point on December 31, 2003. Canter drove the truck to the truck stop in West Virginia where the trailer was located. *Id*.

18) Canter sent a message to Maverick that he was leaving the truck at the truck stop in West Virginia. *Id*.

19) On December 31, 2003, Maverick noted internally in its computer that Canter had abandoned the truck and that he was not eligible for re-hire.

20) Subsequently, Canter applied and was hired as a commercial driver for the following companies:

    a. JB Hunt (1/2004 to 3/2005)
    b. Schneider (3/2005 to 4/2006)
    c. JB Hunt (4/2006 to 6/2006)
    d. Southern Refrigerated (6/2006 to 11/2006)

e. Dart (3/2007 to 4/2007)
f. JB Hunt (4/2007 to 7/2007)
g. JB Hunt (9/2007 to 4/2008)
h. DSCO (7/2008 to 9/2008) *Id.*

21) In addition, Canter was invited to and attended orientation at U.S. Xpress in February 2007, but was not hired. *Id*.

22) On or around September 27, 2008, Canter disputed entries on his DAC report furnished by 5 motor carriers: JB Hunt, Dart, US Xpress, First Fleet, and Maverick, and requested an investigation by USIS Commercial Services. *Id*.

23) On or about October 1, 2008, Maverick was requested by USIS Commercial to investigate Canter's dispute. Shortly thereafter Maverick reconfirmed the information it had previously submitted to USIS concerning Canter. *Id*.

Issues

1) Whether Complainant's claim is barred by the applicable statute of limitations under the STAA.

2) Whether Complainant engaged in protected activity as defined by the STAA.

3) Whether Respondent took discriminatory action against Complainant in violation of the STAA.

4) Whether Complainant is entitled to damages and attorney's fees.

Findings of Fact

Complainant began working for Respondent, a transportation and logistics service, on or around October 2, 2003. AJX 8 at 1. He went through an orientation and training program upon being hired. Respondent's Post-Hearing Brief at 2 ("RPHB"). On November 21, 2003, Complainant was travelling from Butler, Indiana to Dublin, Virginia carrying metal coils for Magic Coil Products LLC, when he was involved in a non-preventable traffic accident outside of Waynesboro, Pennsylvania that resulted in a fatality. AJX 8 at 1. Complainant was following a group of motorcyclists on a highway when a deer collided with a cyclist knocking him to the roadway. CX-6, p.13-14, 16. Complainant was unable to avoid the cyclist and ran him over resulting in his death. Trial Record at 98-99 ("TR"). Complainant called 9-1-1 to report the crash and informed Respondent of the incident. Complainant provided law enforcement authorities with a statement regarding the incident and underwent a post-accident controlled substance and alcohol test. TR at 100. Both tests were negative. TR at 100-101. Pennsylvania State Trooper Ty Bintrim conducted a post-crash inspection on Complainant's vehicle which revealed the following defects: (1) two brakes were out of adjustment (axle 3 left side tractor and axle 5 left side trailer); (2) The power steering box had a fluid leak; (3) A brake hose was chaffing on a

wire causing visible wear; and (4) Dunnage under the trailer was not properly secured. AJX 8 at 1-2. Officer Bintrim testified that "[I]t is my opinion that none of the violations contributed to the crash." AJX 8 at 2. Officer Bintrim also informed Complainant that the truck-tractor and trailer would be released if the brakes were adjusted. TR at 104.

Complainant notified Respondent that Officer Bintrim found several defects with the vehicle. TR at 103-104. In addition, Complainant informed Respondent that law enforcement had authorized him to drive home, provided that the truck-tractor brakes were adjusted and upon Respondent's assurances that the remaining defects would be corrected. TR at 103-104. Complainant spent the night at a nearby hotel. TR at 105. The following day, November 22, 2003, Respondent made arrangements to send a vendor to adjust the brakes at a truck stop near the crash scene. TR 52, 105-106. The mechanic who made the repair informed Complainant that he did not possess the necessary parts to correct the air line or steering fluid leak. TR at 106. Complainant informed Respondent of this. TR at 106. The Fleet Manager from Respondent informed Complainant that he had spoken with law enforcement officials and that Complainant was permitted to drive the vehicle to his home in Flatwoods, West Virginia, provided that the necessary repairs were made there. TR at 107. Respondent also informed Complainant that another driver would exchange trailers with him when he arrived home. TR at 108-109. Respondent did not arrange to have the power-steering fluid leak or chaffing air hose repaired before Complainant drove the vehicle to his home. TR at 106. Complainant drove the vehicle roughly 70-80 miles to a truck-stop at Flatwoods, West Virginia. Complainant left the loaded trailer at the truck stop as authorized by Respondent. TR at 108. Complainant proceeded to drive the truck a few miles to his home. TR at 114. On November 24, 2003, Respondent dispatched another driver, Kevin Boggs, to pick up the loaded trailer to complete the delivery. AJX 8 at 2.

Respondent required that Complainant take a medical leave of absence to deal with the depression he was experiencing as a result of the crash. TR 109-110. During this period, Complainant spoke frequently with his immediate supervisor/fleet manager, Brent Roberson about the prospects of Complainant's return to work. TR 110-111. While on leave, Complainant utilized Respondent's Employee Assistance program, and also consulted a therapist. TR 109-111. Complainant unsuccessfully attempted to obtain compensation from Respondent during his recovery period. AJX 8 at 3. On December 29, 2003, Complainant was released to return to work and subsequently notified Roberson of this. On December 30, 2003, Complainant contacted Carole Whitted, Senior Claims Manager for Maverick and told her that although he had been released to return to work, he was nonetheless quitting. TR at 132-133. Complainant also informed Whitted that he was unhappy about his inability to obtain workers compensation benefits during his leave. Complainant's Post-Hearing Brief at 5 ("CPHB").

Following Complainant's voluntary termination of his employment, Respondent requested that he drive the truck-tractor and trailer 200-250 miles to its yard in Middletown, Ohio. TR at 114. Complainant refused to do so unless the chaffing air line and steering fluid leak were repaired and Respondent arranged for Complainant to have a bus ticket home. TR at 114, 118. Complainant informed Roberson that the truck-tractor had "too many deadline problems" and that the defects were in violation of Department of Transportation (DOT) regulations. CPHB at 6. Complainant then drove the truck-tractor to the truck stop in Flatwoods, West Virginia which Complainant had the authority to do. TR at 240. Another driver for Respondent, Billy

Daniels, picked up the truck tractor and trailer and drove it to Respondent's headquarters in Little Rock Arkansas, despite the fact that the tractor and trailer still had a power steering fluid leak and chaffing brake hose which had yet to be corrected. TR at 59. The existing defect with the chaffing brake hose could have led to a loss of air pressure which could have resulted in a failure of the service brakes. TR 59; CPHB at 6.

After Complainant quit, Roberson prepared a "Final Notification of Driver Termination" to be submitted to Respondent's Rehiring Committee. Roberson noted that Complainant had refused to drive the truck-tractor to Middletown, Ohio because it had "too many deadline problems." CPHB at 7. Roberson was aware that the truck-tractor had been involved in a fatal crash, that DOT had found violations and placed it out-of-service, and that the only repair made to the truck-tractor since the accident was the brake adjustment. CPHB at 7. Roberson had discussions with Respondent's officials about placing an abandonment notation on Complainant's DAC Report. In January 2004, Respondent's Rehire Committee consisted of Dean Newell (Vice-President of Safety), Letha Haymes (Vice-President of Human Resources) and Respondent's Vice President of Operations. TR at 190-191, 193. The Rehire Committee reviewed the Final Notification of Driver Termination prepared by Roberson. The Rehire Committee determined that a notation should be placed on the DAC Report indicating that he was ineligible for rehire by Respondent and that he abandoned Respondent's equipment. TR at 192. On January 19, 2004 Respondent noted on Complainant's DAC Report "Unauth. Location – W/O Notice." TR at 225. This notation indicates an abandonment of equipment. Roberson Dep. p. 16. The notation was placed on the DAC Report for refusing to drive the truck-tractor to Middletown, Ohio. TR at 229-230.

A DAC Report is a consumer report setting forth employment history on truck drivers. TR at 201. It is maintained by the consumer reporting agency HireRight Solutions, Inc. (formerly USIS Commercial Services), a consumer-reporting agency. CPHB at 8. Potential Employers can access this information to determine whether a potential candidate should be considered for employment. TR at 191, 194-195, 232. When employees of Respondent part ways with the company, they sometimes speak with officials about the information placed on their DAC Report out of concern that an abandonment notation would inhibit their chances of obtaining future employment in the trucking industry. TR at 242. An abandonment notation will hinder a candidate's ability to be hired by Respondent. TR at 230. Complainant initially found employment after he voluntarily terminated his employment with Respondent. AJX 8 at 3-4. He was unemployed for some time after April 2008 and this prompted Complainant to order his DAC Report. TR at 230. Complainant was informed by a recruiter that he was not hired due to information on his DAC Report. TR at 120.

Around July or August 2008, Complainant received his DAC Report for the first time and found that Respondent placed an abandonment notation on the report. TR at 120. Complainant submitted a dispute to USIS for the information on the report. On October 8, 2008, USIS Commercial Services requested that Respondent investigate Complainant's dispute. AJX 8 at 4. After investigation, Respondent's Rehire Committee reconfirmed the information. AJX at 4. In November 2008, Complainant applied for work with K & B Transportation. TR 121. Complainant was qualified for the position but nonetheless was denied specifically due to the abandonment notation on the DAC Report. Ratkiewicz Dep. pg. 6-8. From September 2008 to

November 2008, Complainant worked for DSCO. Shortly thereafter, he moved to Colorado to live with his sister. Due to his difficulty finding work, Complainant has experienced a loss of appetite and suicidal thoughts. TR at 130. On December 16, 2008, within 180 days of discovering that Respondent placed the abandonment notation on his DAC Report, he filed a complaint with the Secretary of Labor alleging that Respondent discriminated against him in violation of the employee protection provisions of the STAA, 49 U.S.C. § 31105. TR at 24. On July 7, 2009, the Secretary of Labor issued preliminary findings and an order. On July 7, 2009, Complainant filed objections to the Secretary's Findings and Order and requested a hearing before an administrative law judge of the Department of Labor pursuant to 29 C.F.R. § 1978.105. TR at 24.

Conclusions of Law

The STAA prohibits discrimination against an employee who refuses to operate a vehicle when "the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health" 49 U.S.C. § 31105(a)(1)(B)(i). Congress extends whistleblower protection to employees in the transportation industry because these employees are often best situated to discern safety violations. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

Where, as here, a Complainant relies on circumstantial evidence, a prima facie case may be established by proving three elements: (1) that he engaged in protected activity under the Surface Transportation Assistance Act; (2) that he was the subject of adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of his employer. *See Moon v. Transport Drivers*, 836 F.2d 226, 229 (1987). Where a case has been fully tried on the merits, however, there is no particular need to determine whether the employee has established a prima facie case. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-16 (1983) (Title VII). Instead, the relevant inquiry is whether an employer was motivated by a discriminatory purpose when it took adverse action against a complainant. *Pike v. Public Storage Companies, Inc.*, ARB 99-072, ALJ 1998-STA-35 (ARB Aug. 10, 1999). The ultimate burden of persuasion remains on Complainant. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

Timeliness

Under the STAA, a complainant alleging employer retaliation must generally file his complaint "not later than 180 days after the alleged violation of the STAA occurred." 49 U.S.C. § 31105(b)(1). The STAA limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling principles. *See, e.g., Miller v. Basic Drilling Co.*, ARB No. 05-111, ALJ No. 2005-STA-020, slip op. at 3 (ARB Aug. 30, 2007). Since a major purpose of the 180-day period is to allow the Secretary to decline to entertain complaints that have become stale, complaints not filed within 180 days of an alleged violation will ordinarily be considered untimely. 29 C.F.R. § 1978.102(d)(2). However, an STAA regulation provides for extenuating circumstances that will justify tolling of the 180-day period when the discrimination is in the nature of a continuing violation. 29 C.F.R. § 1978.102(d)(3). The Administrative

Review Board has recently held in a blacklisting case that the 180-day statute of limitations under the STAA begins to run when the former employee has received "final, definitive and, unequivocal notice of an adverse employment action by the Respondent." *Eubanks v. A.M. Express, Inc.*, 2008-STA-40, ARB Case No. 08-138 at 6 (ARB Sept. 24, 2009) *citing Thissen v. Tri-Boro Constr. Supplies, Inc.*, 2004-STA-35, ARB No.04-153 slip op. at 5 (ARB Dec. 16, 2005). In support of his claim that Complainant timely filed his complaint within the 180-day statutory period, Claimant's counsel raises three arguments: (1) Respondent committed a continuing violation of the STAA by virtue of the continued posting of adverse information on Complainant's DAC Report and the continued accessing of that information by prospective employers; (2) The act of blacklisting by Respondent was a continuing violation of the STAA; and (3) The complaint was timely given in that it was filed within 180 days after receiving final, definitive, and unequivocal notice of an adverse employment action by Respondent. Two of the three arguments raised by Complainant are unsupported by case law. However, Complainant's third argument is successful for reasons stated below.

Complainant alleges that Respondent committed continuing violations of the STAA by virtue of the continued posting of adverse information on Complainant's DAC Report and the continued accessing of that information by prospective employers. CPHB at 24. Previously, the Board rejected the same argument raised by Complainant's counsel. In response to the argument, the Board held that there was no continuous violation because Complainant alleged that Respondent performed only one adverse action—the act of providing false information about him in the DAC Report. *Eubanks v. A.M. Express, Inc.*, 2008-STA-40, ARB Case No. 08-138 at 7 (ARB Sept. 24, 2009). Further, the Board added that even though the DAC Report is still accessible as maintained by a consumer reporting agency, that fact does not create a continuous violation by Respondent. *Id.* Complainant's counsel acknowledges that the Board previously rejected a similar argument. However, he contends that the present scenario is distinguishable because Complainant acted promptly after receiving his DAC Report. *Id*. In *Eubanks v. A.M. Express, Inc.*, 2008-STA-40 (ARB Sept. 24, 2009), the fact that Complainant did not act promptly in filing his claim within the 180-day statutory period was irrelevant to the Board's determination that the continued accessibility of the DAC Report did not constitute a continuing violation. *Id*. The Board never mentioned the 180-day statutory period when addressing Complainant's continuing violation argument in regards to the availability of the DAC Report. However, similar to the Complainant in *Eubanks*, Complainant is alleging only one adverse action—the placing of the abandonment notation on his DAC Report. *Id*. Given the similarities between the two scenarios, the Board's reasoning controls. Thus, I reject Complainant's argument that continued accessibility of the DAC Report constituted a continuing violation under the STAA.

Complainant also asserts that the act of blacklisting by Respondent was a continuing violation of the STAA. CPHB at 24. Complainant's counsel cites to authority dealing with blacklisting in the context of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851; *Egenrieder v. Metropolitan Edison Co.*, 1985-ERA-23 (Sec'y April 20, 1987). The Secretary noted that "blacklisting, by its very nature is a continuing course of conduct, [and] it <u>may</u> constitute a continuing violation if it is based upon an employee's protected activity…" (emphasis added). *Id.* The undersigned is not compelled to adhere to case-law decided under the Energy Reorganization Act of 1974. In addition, Complainant's counsel cites to permissive,

rather than mandatory language in the Board's holding. Given the success of Complainant's third argument, I need not accept Complainant's contention that blacklisting by Respondent was a continuing violation.

Lastly, Complainant argues that receiving his DAC Report containing the adverse information constituted the "final, definitive, and unequivocal notice" of an adverse employment action by the Respondent. *Eubanks v. A.M. Express, Inc.*, 2008-STA-40, ARB Case No. 08-138 at 6 (ARB Sept. 24, 2009) *citing Thissen v. Tri-Boro Constr. Supplies, Inc.*, 2004-STA-35, ARB No.04-153 slip op. at 5 (ARB Dec. 16, 2005). Complainant contends that since he received the report around July or August 2008, and he officially filed his claim on December 16, 2008, his complaint was timely filed within the 180-day statutory period. Respondent claims that the complaint fell outside the required 180-day statute of limitations period. RPHB at 17. Respondent asserts that the 180-day statutory period began running when the DAC Report was officially made. According to Respondent, the DAC report was prepared in early 2004, five years prior to Complainant's filing. *Id*.

A similar situation was recently addressed by the ARB in *Beatty v. Inman Trucking Management, Inc.*, ARB No. 09-032 (June 30, 2010). In Beatty, the ARB held that the 180 day limitations period in the STAA did not begin to run until the Complainant was made aware of a negative DAC report. Complainant herein argues that his December 16, 2008 complaint was timely as it was filed within 180 days of the date on which he obtained a copy of his DAC report in July or August of 2008. TR at 120. Respondent contends that Complainant, as an experienced trucker, should have known of the abandonment notation on his DAC report long before he requested the DAC report. Alternatively, Respondent contends that at the least, Complainant knew of the negative abandonment notation on his DAC report when he spoke to the recruiter who reported the negative DAC report to Complainant following which Complainant testified that he requested the DAC report which took about 30 days for his receipt thereof. TR at 119-120. Accordingly, counting back from the December 16, 2008 filing date, Respondent argues that the conversation with the recruiter could have taken place earlier than 180 days prior to filing, i.e.–prior to June 16, 2008.

Complainant presents the more compelling argument that the 180-day statutory period began running upon receipt of his DAC report. Although the report was prepared in early 2004, Complainant could not have been aware of the contents in the report given that he had already voluntarily terminated his employment with Respondent. Complainant's argument is supported by the Board's reasoning in *Eubanks* and *Beatty*. The Board in *Eubanks* reasoned that "Eubanks knew by at least August 15, 2007, that his DAC Report contained information about him that he believed was false, was supplied by A.M. Express, and constituted blacklisting. Assuming all facts in the light most favorable to Eubanks, he had 180 days from the time when he discovered that A.M. Express had supplied allegedly false information for inclusion in the DAC report to file his STAA claim because this was when he received 'final, definitive, and unequivocal notice' of an adverse employment action by the Respondent." *Eubanks v. A.M. Express, Inc.*, 2008-STA-40, ARB Case No. 08-138 at 6 (ARB Sept. 24, 2009). According to the Board, since Complainant waited approximately 210 days before submitting the complaint, it was not timely filed. Here, unlike in *Eubanks*, the Complainant filed his complaint within 180-days of discovering that Respondent placed the abandonment notation on his DAC report. Receiving the

DAC report constituted the final, unequivocal notice of an adverse employment action by Respondent. Although Respondent argues that Complainant may have received the initial information from a recruiter over 180 days prior to filing his complaint, that contention fails on two counts. First, I find that the actual receipt of the DAC report by Complainant in this case was his first actual knowledge of the negative report made by Respondent. Complainant could have taken no action with DAC to attempt to correct the report without first having the report in hand. Further, while the recruiter's remarks may have given Complainant reason to begin investigation by requesting the DAC report, he certainly was without a solid basis to file an STAA complaint against Respondent until actually received the DAC report to confirm the recruiter's comments to him.

Even were I to find that the 180 day limitation period began with the recruiter's report to Complainant of the abandonment notation on the DAC report, I find that Respondent has failed to prove that the filing was not within the 180 day limitation period. The 180 day limitation period is not jurisdictional. *Thissen v. Tri-Boro Constr. Supplies, Inc.*, 2004-STA-35, ARB No.04-153 slip op. FN 23 at 7 (ARB Dec. 16, 2005); Nixon v. Jupiter Chemical, Inc., 89 STA-3 (Sec'y Oct. 10, 1990). Accordingly, the party pleading the limitation defense bears the burden of proof with respect to such defense. In this case, the only evidence submitted pertaining to the timeframe is the testimony of Complainant that he received the DAC report in July or August of 2008 and that he had to wait 30 days after his request which he made based on the recruiter's comments to him. TR at 119-120. Based on this testimony, Complainant could have received the DAC report as early as July 1, 2008, or as late as August 31, 2008. Relating back and assuming Complainant requested the DAC report immediately following his conversation with the recruiter, that conversation then could have taken place as early as June 1, 2008, or as late as July 31, 2008. Therefore, applying the date of the conversation with the recruiter as the initiation date for purposes of the 180 day limitation period, Complainant's testimony indicates that he may have filed up to 15 days late or that he may have filed timely by up to 45 days. Clearly, such evidence does not sustain Respondent's burden of proof with respect to the claim that the complaint was untimely filed.

Therefore, since Complainant filed his complaint within 180 days of receiving the DAC report, I find the complaint was timely filed.

Protected Activity

The complainant in an STAA proceeding bears the burden of proving that he engaged in protected activity. The STAA protects the following employee activities: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," 49 U.S.C.A. § 31105(a)(1)(A); "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," 49 U.S.C.A. § 31105(a)(1)(B)(i); or "refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition," 49 U.S.C.A. § 31105(a)(1)(B)(ii).

As a general matter, employee activities protected by the STAA can be grouped into two categories of work refusal commonly referred to as the "actual violation" and "reasonable

apprehension" subsections. *Leach v. Basin W., Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 3 (ARB July 31, 2003). Whereas subsection (1)(B)(i) deals with conditions as they actually exist, section (1)(B)(ii) deals with conditions as a reasonable person would believe them to be. Whether a refusal to drive merits STAA protection requires evaluation of the circumstances surrounding the refusal under the particular requirements of each of the provisions. *Johnson v. Roadway Express Inc.*, ARB No. 99-011, ALJ No. 1999-STA-005, slip op. at 7-8 (ARB Mar. 29, 2000) (the ALJ properly considered all the circumstances of the complainant's refusal to drive, including his work record and medical excuses).

A complainant's refusal to drive may constitute protected activity under subsection (1)(B)(i) if his operation of a motor vehicle would result in an actual violation of Department of Transportation (DOT) regulations. DOT regulations extend beyond federal motor vehicle safety regulations to include any relevant motor vehicle regulation, standard, or order. *Chapman v. Heartland Express of Iowa*, ARB No. 02-030, ALJ No. 2001 STA 35 (ARB Aug. 28, 2003) (as reissued under Sept. 9, 2003 errata). For example, DOT regulations prohibit a truck driver from operating a commercial motor vehicle ". . . while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle." 49 C.F.R. § 392.3 (2005). Although commonly referred to as the "fatigue rule," this regulation is designed to cover a driver who anticipates that their ability or alertness is sufficiently likely to become impaired that it would be unsafe to begin or continue driving, and extends whistleblower protection under subsection (i) where a complainant can show that operation of the vehicle would in fact violate the specific requirements of the "fatigue rule" at the time he refused to drive. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-21, slip op. at 5 (ARB July 31, 2001); *Yellow Freight Sys. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993); *Cortes v. Lucky Stores, Inc.*, ARB No. 98-019, ALJ No. 96-STA-30, slip op. at 4 (ARB Feb. 27, 1998). In particular, the ALJ looks to whether the employer's actions in some way precipitated the employee's fatigue or illness in determining whether an employee's work refusal constitutes protected activity under the "fatigue rule." *In Re Eash v. Roadway*, ARB Nos. 02-008, 02-064, at 3 (Mar. 13, 2006).

A complainant's refusal to drive may also be protected under subsection (1)(B)(ii) if he has "a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." This clause of the STAA covers more than just mechanical defects of a vehicle—it is also designed to ensure "that employees are not forced to commit . . . unsafe acts." *Garcia v. AAA Cooper Transp.*, ARB No. 98-162, ALJ No. 1998-STA-023, slip op. at 4 (ARB Dec. 3, 1998). Thus, a driver's physical or psychological condition might cause him to have a reasonable apprehension of serious injury to himself or the public if he drove in that condition. *Somerson v. Yellow Freight Sys., Inc.*, ARB Nos. 99-005, -036, ALJ Nos. 1998-STA-009, -11, slip op. at 14 (ARB Feb. 18, 1998). The STAA provides that "an employee's apprehension of serious injury is reasonable only if a reasonable [person] in the circumstances . . . confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury or serious impairment [to] health."

Complainant alleges that his refusal to drive constituted protected activity under the STAA. In so arguing, Complainant invokes both §31105(a)(1)(B)(i) and §31105(a)(1)(B)(ii) of the Act. First, pursuant to §31105(a)(1)(B)(i), Complainant asserts that driving the truck would

have resulted in violation of DOT regulations. Complainant repeatedly emphasized to Respondent that the truck had a chaffing brake hose and steering fluid leak, both of which could lead to catastrophic failure of the service brakes. Moreover, Complainant's testimony indicates that he suffered serious mental instability from the collision, rendering Complainant potentially unsafe to drive. Second, pursuant to §31105(a)(1)(B)(ii), Complainant's post-hearing brief suggests that Complainant had a reasonable apprehension that driving the truck 200-250 miles from his home in Flatwoods, West Virginia to the Middletown, Ohio terminal would result in serious injury to himself as well as others. To qualify for protection under subsection (1)(B)(ii) of the Act, an employee must have sought from and been unable to obtain from his employer correction of the hazardous safety or security condition. Consistent with this requirement, Complainant informed Respondent that he was uncomfortable driving the truck-tractor and trailer to the Middletown, Ohio terminal unless Respondent repaired the chaffing air line and steering fluid leak. CPHB at 6. Only after Respondent informed Complainant that repairs would not be made until Complainant "took it to the yard" did Complainant abandon the vehicle at the Flat Woods, West Virginia truck stop. Tr. 112.

By contrast, Respondent asserts that Complainant never informed Maverick of his safety concerns regarding the truck. RPHB at 8. Respondent argues in the alternative that the fluid leak and chaffing brake hose did not render the vehicle unsafe. *Id.* at 10 (citing Tr. 180). Although Respondent acknowledges the possibility of minor violations of DOT regulations, Respondent alleges that Complainant failed to introduce sufficient evidence necessary to demonstrate that an actual violation would have occurred. *Id.* at 27-28.

Weighing both sides' arguments, Complainant's position is supported under both subsections (1)(B)(i) and (1)(B)(ii) of the Act. First, pursuant to subsection (1)(B)(i), there is compelling testimony in the record that driving the truck would have resulted in violation of DOT regulations. Respondent's director of maintenance, Brent Hilton, testified that Complainant's truck had both a chaffing air hose and a power steering fluid leak which could result in jack-knifing. Tr. 51, 59. Moreover, Complainant's testimony provides extensive evidence that Complainant was suffering psychological trauma from the collision which posed a realistic threat of danger. Second, pursuant to subsection (1)(B)(ii), there is support for the conclusion that Complainant had a reasonable apprehension that driving 200-250 miles to the Middletown, Ohio terminal could result in serious injury to himself and others. Complainant's argument under subsection (1)(B)(ii) is supported by distinguishing his case from the ALJ's recommended decision and order in *Harris v. C&N Trucking*, 2004-STA-37 (ALJ Sept. 8, 2004). As in the instant matter, the complainant in *Harris* refused to drive the respondent's vehicle due to safety concerns that there was "play" in the "kingpins." Respondent, a mechanic, asserted that there was no evidence of damage or unusual wear, informing the complainant that it was impossible for the wheels to fall off. After the complainant refused to drive the truck, the respondent terminated the complainant's employment, and the truck subsequently logged 80,000 miles without accident or injury. As a result, the ALJ found there was insufficient evidence to establish protected activity under the "actual violation" prong of the STAA. The ALJ also found that the facts were insufficient to satisfy the "reasonable apprehension" standard, concluding that a reasonable person under the circumstances would not conclude that there was a bona fide danger of accident or injury. In so holding, the ALJ focused in particular on the fact that

subsequent drivers of the same vehicle had not expressed concerns regarding the safety of the truck.

Here, in contrast to *Harris*, Complainant had grounds for "reasonable apprehension" that driving the truck would result in serious injury. Complainant had recently experienced a traumatic accident involving a motorcyclist due to his inability to avoid the cyclist in the roadway. Tr. 97-98. Although there is no evidence that the chaffing brake hose and steering fluid leak caused the accident, it is reasonable to conclude that a person in Complainant's situation would have reasonable concern that driving the same truck a significant distance would again result in injury. As Complainant testified: "with an air line, [the brakes] could go out at any time. Who knows how bad the chafing is, and when it's going to pop. The steering could go bad. When he had me—when I tried to fire the truck up the day before, it wouldn't even start. You know, *I don't know when those things can go bad*. After killing that guy, I under – I had a lot of time to think. And I understand a lot better that you don't know when something is going to happen after that." Tr. at 116 (emphasis added). Complainant added that the truck had "blood and guts all over it," causing Complainant to experience psychological trauma—it is therefore conceivable that Complainant had a "reasonable apprehension" that driving the truck a significant distance would lead to accident or injury. *Id.* at 115. As the analysis above indicates, there is substantial evidence that Complainant engaged in protected activity when he refused to drive the truck to the Middletown, Ohio terminal, rather than the nine miles to the Flatwoods, West Virginia truck stop. Therefore, I conclude that Complainant's work refusal constituted protected activity under the STAA.

Discriminatory Purpose

Pursuant to 49 U.S.C. § 31105(a)(1), the STAA whistleblower provision prohibits "discharge . . . discipline *or discriminat[ion]* . . . regarding pay, terms, or privileges of employment" because of protected activity. 49 U.S.C. § 31105(a)(1) (emphasis added). To establish a prima facie case of unlawful discrimination under the STAA, the complainant has the initial burden to show that (1) he engaged in protected activity under the STAA, (2) he was the subject of adverse employment action, and (3) his employer was aware of the protected activity when it took the adverse action. *Osborn v. Cavalier Homes of Alabama, Inc. and Morgan Drive Away, Inc.*, 89-STA-10 (Sec'y July 17, 1991). The respondent may then present a legitimate non-discriminatory reason for the adverse action. The complainant bears the burden of establishing that the proffered reason was not the true reason for the adverse action. *Roadway Exp., Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987).

Complainant asserts that Respondent acted with discriminatory purpose when it placed an abandonment notation on Complainant's DAC Report indicating that he was ineligible for rehire. Tr. 192, CPHB at 8. DAC Reports provide a truck driver's employment history, and are used by prospective employers in hiring decisions. Tr. 191, 194-95. Complainant alleges that Respondent purposely hindered Complainant's subsequent employment prospects in placing the notation on his DAC Report. CPHB at 9. Complainant was out of work for a significant period of time after April 2008. Although this extensive period of unemployment was due in part to decreased availability of trucking jobs resulting from a downturn in the economy, Complainant

asserts that he was not hired for one of the jobs to which he applied because of the abandonment notation on his DAC Report. *Id.*

To establish that Respondent acted with discriminatory purpose, Complainant must prove that the protected activity motivated Respondent's actions in placing the abandonment notation on Complainant's DAC Report. *See Dixon v. United States Dep't of Interior, Bureau of Land*, 2008 WL 4124113, *8, ARB No. 06-14706-160 (Aug. 28, 2008) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). Respondent alleges that Maverick was unaware of Complainant's safety concerns related to the abandonment. RPHB at 23. Rather than providing intentionally damaging information, Respondent asserts that it placed the abandonment notation on Complainant's DAC report merely as a piece of relevant information about Complainant's employment history. *Id.* at 34.

Complainant counters that there is direct evidence of discrimination in violation of the STAA. CPHB at 19. Citing testimony from Respondent's Vice-President of Human Relations, Complainant asserts that since Respondent knew that the truck had "too many deadline problems," it discriminated against Complainant when it placed an abandonment notation on Complainant's DAC Report for failing to return the truck to the Middletown, Ohio terminal. *Id.* Complainant points to evidence in Respondent's Final Notification of Driver Termination, which states that Complainant is not eligible for rehire "ever! ever!" (CX-12).

In attempting to rebut a prima facie case of discrimination, an employer must produce evidence that the adverse action was taken for a legitimate, non-discriminatory reason. However, the employer "need not persuade the court that it was actually motivated by the proffered reasons." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Nevertheless, the evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. *Id.* at 255. For example, the Secretary has found no discriminatory motive on the part of the employer where the employer has introduced direct testimonial and documentary evidence supporting legitimate, non-discriminatory reasons for its workers' compensation challenge. *Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec'y Oct. 10, 1991).

Although Respondent presents a strong argument, Complainant ultimately makes a compelling case that Respondent did not place the abandonment notation on his DAC Report for the proffered reason. This conclusion can be seen by distinguishing the instant matter from the Board's decision in *Wainscott v. Pavco Trucking, Inc.*, ARB No. 05-089, ALJ No. 2004-STA-54 (ARB Oct. 31, 2007). The latter case involved a complainant's discharge for using a leased tractor without authorization and leaving a HAZMAT trailer in a "lay-by" in violation of company policy. The ALJ ruled that the complainant engaged in protected activity when he refused to drive the trailer due to an ice storm. Nevertheless, the ALJ found that there was insufficient evidence of discriminatory purpose, as the complainant was not discharged for his refusal to drive, but rather for leaving the HAZMAT trailer unattended and taking the tractor to an unauthorized location.

In contrast to *Wainscott*, Complainant was authorized to leave Respondent's truck at the Flatwoods, West Virginia truck stop. *See* Tr. 138-39. Although Complainant acknowledges that he quit without notice, and although Respondent requested that Complainant return the vehicle to

its Middletown, Ohio terminal, Respondent was aware of the extenuating circumstances that led to Complainant's refusal to drive, including Complainant's concerns that the truck had "too many deadline problems" and was thus unsafe to drive. CPHB at 19. Given the seriousness of the matter, and the fact that Respondent's vehicle had recently been involved in a fatal crash, Complainant was therefore justified in his refusal to drive Respondent's truck 200-250 miles, rather than a mere nine miles to the Flatwoods, West Virginia truck stop. As a result, one can conclude that Respondent's decision to place an abandonment notation on Complainant's DAC Report was motivated, at least in part, by discriminatory purpose, rather than the proffered explanation that the notation was simply intended to record a stage in Complainant's employment history.

CONCLUSION

Based upon the above findings of fact and conclusions of law, Complainant is entitled to relief in the form of back pay, interest on the damage award, attorney fees and costs, and abatement of the violation. Appropriate damages in an STAA case are determined according to § 405(c)(2)(B), which in pertinent part states: "[T]he Secretary of Labor shall order (i) the person who committed such violation to take affirmative action to abate the violation, (ii) such person to reinstate the complaint to the complainant's former position together with the compensation (including back pay), terms, condition, and privileges of the complainant's employment, and (iii) compensatory damages."

Back Pay

Back pay may be awarded where an employer has violated the STAA. *Moravec v. HC&M Transportation, Inc.*, 1990-STA-44 (Sec'y Jan. 6, 1992), *citing Hufstetler v. Roadway Express, Inc.*, 1985-STA-8 (Sec'y Aug. 21, 1986), slip op. at 50, *aff'd sub nom.*, *Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987). Back pay awards are calculated according to the make-whole remedial scheme embodied in § 706 of Title VII of the Civil Rights Act (1964). A back pay award is based on the earnings the employee would have received but for the discriminatory action taken against him, in this case a retaliatory notation on his DAC Report. In November 2008, Complainant applied for work with K & B Transportation ("K &B"). (Tr. 121; Ratkiewicz Dep. pg. 8; CX-16-9). K & B disqualified him due to the abandonment notation on his DAC Report. (Ratkiewicz Dep. pg. 6-8).

It is likely that K &B would have hired Complainant if Respondent had not placed the notation on his DAC Report. At the time Complainant applied for the job, he had 11 years experience as a driver operating tractor-trailer combinations in 48 states. He also held a Colorado commercial driver's license with endorsements allowing him to transport hazardous materials. (Canter Aff. ¶ 3). Complainant testified that he met all of the other hiring criteria that K&B required. TR 124. Complainant would have earned 34 cents per mile and driven an average of 2,500 miles weekly had K&B hired him. (Ratkiewicz Dep. pg. 10-11). While Respondent argues that these figures should be reduced by 15% based on Lunde's testimony that freight is running 15% less than a year previous, this testimony does not substantiate such a reduction as individual circumstances may vary within the industry. Thus, an industry-wide decrease in freight does not equate to a similar reduction in any particular driver's miles driven. Since K &B disqualified

him, Complainant earned $11,085.61 in 2009 as a produce clerk for Dillon Companies. In 2010 through August 21, 2010, he earned $9,937.90 from Dillon Companies. (Canter Aff. ¶ 6).

I find Complainant is therefore entitled to $850.00 per week ($0.34/mile at 2,500 miles = $850.00) in back pay as compensation for wages lost as a result of the abandonment notation on Complainant's DAC Report less the total amount received from Dillon Companies for his employment through August 21, 2010, which yields the amount of $55,136.49. Additionally, Complainant is awarded wage loss damages at the rate of $585.70 per week ($850.00 less $264.30) from August 21, 2010, until the DAC report is corrected or Complainant obtains comparable employment, whichever occurs first.

Front Pay

Front pay is an award for the reasonable future period required for the victim of discrimination to reestablish his or her rightful place in the job market. *Gross v. Exxon Office Sys. Co.*, 747 F.2d 885, 889 (3rd Cir. 1984). The ARB has determined that front pay is available to a successful STAA litigant. *Michaud v. BSP Transp., Inc.*, ARB No. 97 STA 113, ALJ No. 95 STA 29, slip op. at 5-6 (ARB Oct. 9, 1997); *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005). "[F]ront pay is appropriate where the working relationship is impossible or impractical, including: circumstances where an amicable relationship is impossible, where the employer no longer employs workers in the pertinent job classification, or where the employer no long has positions for which the complainant is qualified." *Palmer v. Triple R. Trucking*, 2003-STA-00028 (ALJ March 10, 2006).

In situations where reinstatement is not possible, front pay is designed to provide the complainant the same benefits as reinstatement. *Williams v. Pharmacia*, 137 F.3d 944, 952 (7th Cir. 1998). Additionally, the entitlement to, and amount of, front pay are equitable issues to be decided by a judge. *Price v. Marshall Erdman & Assocs., Inc.*, 966 F.2d 320, 324 (7th Cir. 1992). "The litigant who seeks an award of front pay must provide the district court "with the essential data necessary to calculate a reasonably certain front pay award. *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992). Such information includes the amount of the proposed award, the length of time the complainant expects to work, and the applicable discount rate. Id. Moreover, front pay awards, while often speculative, cannot be unduly so." *Ass't Sec'y & Bryant v. Medenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005).

In this case, neither party requests reinstatement as a remedy. Reinstatement is not an appropriate remedy because Complainant voluntarily quit his employment with Respondent in 2003. There is also animosity between the parties as a result of the retaliatory notation. Complainant asks the court for an additional two-years in wage loss damages, totaling $60,912.80, the amount he claims he would have earned working for K & B. Complainant argues that it is unlikely that Complainant will find work in the trucking industry even if Respondent removes the notation on his DAC. Because of the unfavorable work notation, Complainant argues that he has been unable to secure a trucking job which would allow him to gain additional experience and make him more marketable. Complainant's witness, Richard Lunde, testified that

the present oversupply of drivers in the trucking industry makes placement difficult. Many carriers insist on one year current driving experience (Lunde Dep. pg. 10).

I find that Complainant has failed to provide sufficient data to calculate a front pay award. Since he quit working for the Respondent, Complainant has held eight different truck driving positions. Complainant quit his last trucking job with DSCO in September 2008. He testified that DSCO wanted him to break the law by working over his hours in violation of 49 C.F.R. § 395.3.Complainant does not provide a reason for quitting the other trucking jobs. He also does not provide information about his compensation at those companies. Based on Complainant's past work history it would be unduly speculative for the court to conclude that Canter would have maintained a job at K & B from December 1, 2008, until two years hence as Complainant has rarely, if ever, worked for a single employer that long. Accordingly, the claim for front pay is denied.

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Emotional Distress Damages

In addition, a court may award compensatory damages for emotional distress suffered as a result of a complainant's discharge in proceedings brought pursuant to the STAA. *See Dutkiewicz v. Clean Harbor Environmental Services*, 1995-STA-34 (ARB Aug. 8, 1997). For example, the Secretary of Labor has upheld an award of $75,000 where a complainant suffered mental pain as a result of his failure to find a truck driving job given the extent of the adverse information placed on his DAC Report. *Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery*, 1995-STA-37 (Sept. 5, 1996). Similarly, in *Michaud v. BSP Transport*, ARB No. 97-113, ALJ No. 1995-STA-029 (ARB Oct. 9, 1997), the ARB affirmed an award of $75,000 where the Complainant lost his house through foreclosure, his savings, and his ability to obtain credit and was receiving treatment for depression from his treating physician.

In some STAA cases, the ARB has awarded damages for emotional and mental distress where the claims were unsupported by medical evidence. *See Murray v. AirRidge, Inc*., ARB No. 00-045, ALJ No. 1999-STA-034 (ARB Dec. 29, 2000) (affirming "modest award" of $20,000 when complainant gained weight from depression and stress, had trouble sleeping, and had damages self-esteem); *Jackson v. Butler & Company*, ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004) (affirming finding of $4,000 for emotional distress that was unsupported by professional counseling or medical evidence); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 03-095, ALJ No. 02-STA-035 (ARB Aug. 6, 2004), slip op. at 17 (affirming award of 10,000 for humiliation and emotional distress based on complainant's testimony).

In this case, due to his difficulty finding work, Complainant has experienced a loss of appetite and suicidal thoughts. TR at 130. On one occasion, Complainant put a pistol to his head and as he started pulling the trigger moved his head out of the way and put a bullet hole through the ceiling and roof. (Canter Aff. ¶ 16). The receipt of debt collection notices and calls from collection agencies have caused him great distress. (Canter Aff. ¶ 13). Complainant's checking accounts were closed due to insufficient funds, and he currently owes bank fees and charges for overdrafts. (Canter Aff. ¶ 13). Complainant was forced to vacate his manufactured home in Alabama and move in with his sister in Colorado in July 2008. (Canter Aff. ¶ 14, 15).

Complainant's stepson and stepdaughter lived with Complainant in Alabama. *Id*. at 14. Complainant regarded his stepchildren as his own. Complainant has not seen his stepchildren since March 2008 because he cannot afford to travel to see them. (Canter Aff. ¶ 18). This has caused him great distress and emotional pain. *Id*.

Nevertheless, the hearing transcript and briefs in the instant matter indicate that Complainant's emotional distress was also due to the trauma Complainant experienced as a result of his collision with the motorcyclist, as well as the difficulty Complainant experienced in securing employment due to the abandonment notation on his employment record. Complainant originally sought an emotional distress award of $75,000.00 but revised his request to $150,000.00 in his Supplemental Brief Concerning Damages. I find that Complainant is entitled to compensation for emotional distress in the amount of $75,000.00.

Punitive Damages

Punitive damages may be awarded pursuant to the STAA where the statutory purposes of a whistleblower statute will not be adequately served without resorting to punitive damages. *Jayko v. Ohio Environmental Protection Agency*, 1999-CAA-5, slip op. at 96-96 (ALJ Oct. 2, 2000).

Complainant asserts that an award of $250,000 in punitive damages is necessary to serve the statutory purposes of the STAA in this case, and will deter Respondent from blacklisting drivers who engage in protected activities under the STAA in the future. CPHB at 28. Despite Complainant's assertions, there is no evidence to suggest that Respondent routinely blacklists drivers who engage in protected activity.

Complainant further asserts that Respondent acted in reckless or callous disregard of Complainant's rights when it reconfirmed the negative information on his DAC report which requires imposition of punitive damages, citing *Leveille v. N.Y. Air Nat. Guard*, ARB Case no. 98-079, 1994 TSC-3 (ARB Oct. 25, 1999) and *Smith v. Wade*, 461 U.S. 30 (1983). Respondent asserts that it was merely following the information which it had available; and if it was wrong in doing so, that was not willful, reckless or an intentional violation of the law. The undersigned agrees with Respondent. Respondent simply relied on the information presented by its employees regarding the abandonment dispute. The fact that the undersigned has determined that Complainant was correct in the dispute regarding return of the equipment does not convert Respondent's conduct in taking the opposite view reckless or in callous disregard of Complainant's rights. Complainant's request for a punitive damages award is therefore denied.

Interest

Complainant also seeks interest on any back pay, attorney fees, or costs that are awarded by this court. As a general matter, the rate of interest applied is governed by 29 C.F.R. § 20.58(a), the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621. Interest is compounded quarterly. *Ass't Sec'y and Cotes v. Double R. Trucking*, 1998-STA-34 (ARB Jan. 12, 2000), slip op. at 3. Complainant is therefore entitled to interest on any recovery awarded by this court.

Attorney Fees and Costs

Pursuant to the STAA, Complainant's counsel is entitled to costs, including attorney's fees, incurred in bringing the proceeding against an employer. *Eash v. Roadway Express, Inc.*, ARB Case Nos. 02-008 & 02-064, 2000-STA-7 at 1 (ARB Mar. 9, 2004).

Complainant is therefore directed to file a petition for attorney's fees and costs within 20 days of issuing this opinion. Respondent shall file any reply thereto within 20 days of receipt thereof.

Abatement of the Violation

Finally, Complainant asks that the court direct Respondent to post any favorable finding at all of its terminals for 90 consecutive days in all places where employee notices are customarily posted. Pursuant to the STAA, the ARB has held that the "standard remedy in discrimination cases [is to] notif[y] a respondent's employees of the outcome of a case against their employer." *Michaud v. BSP Transp., Inc.*, 1995-STA-29 at 9 (ARB Oct. 9, 1997), *rev'd on other grounds sub nom. BSP Transp., Inc. v. United States Dep't of Labor,* 160 F.3d 38 (1st Cir. 1998).

Complainant also requests that the court order Respondent to delete any unfavorable work record information from his DAC Report. The ARB has frequently ordered employers to delete information pertaining to an employee's wrongful or discriminatory discharge from its personnel records. *See Michaud, supra* at 9; *Ass't Sec'y v. T.O. Haas Tire Co.*, 1994-STA-2 at 6 (Sec'y Aug. 3, 1994).

Respondent is therefore ordered to post notice of this court's finding in favor of Complainant in all places where employee notices are customarily posted, and to take such measures as are necessary to delete the abandonment notation from Complainant's DAC Report.

ORDER

1. Maverick Transportation, LLC shall take such measures as are necessary to delete the abandonment notation from Complainant's DAC Report.

2. Maverick Transportation, LLC is ordered to pay to Albert Brian Canter as back wages through August 21, 2010, the sum of $55,136.49, and the weekly amount of $585.70 from August 22, 2010, until such date that the abandonment notation has been removed from Complainant's DAC report or Complainant finds comparable employment, whichever comes first.

3. Maverick Transportation, LLC is ordered to pay to Albert Brian Canter the sum of $75,000 for emotional distress and mental pain.

4. Maverick Transportation, LLC shall pay interest on all amounts awarded hereunder as required by law through the date of payment.

5. Maverick Transportation, LLC shall post notice of this court's finding in favor of Complainant in all places where employee notices are customarily posted, and to

IT IS SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).