U.S. Department of Labor

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Issue Date: 15 March 2010

CASE NO.: 2009-STA-47

In the Matter of:

CYNTHIA FERGUSON
Complainant

v.

NEW PRIME, INC.
Respondent

APPEARANCES:

Paul O. Taylor, Esq.
For the Complainant

Charles A. Cox, III, Esq.
For the Respondent

RECOMMENDED DECISION AND ORDER

This case arises under Section 405 of the Surface Transportation Assistance Act of 1982 (the Act), as amended and recodified, 49 U. S. C. § 31105, and its implementing regulations at 29 CFR Part 1978. A hearing was held before the undersigned in Minneapolis, Minnesota on November 18, 2009 and Joint EX (JX), Complainant's Exhibits (CX) 1-4, 7, and 9, and Respondent's Exhibits (RX) A-D and F-H were admitted into evidence. Both parties filed timely post-hearing briefs.

STIPULATIONS

The parties have stipulated that:

1. Complainant Cynthia Ferguson resides at 329 Geneva Avenue, North, Number 203, Oakdale, Minnesota, 55128;

2. Respondent New Prime, Inc. is engaged in interstate trucking operations and is an employer subject to the Act;

3. Complainant Cynthia Ferguson was an employee of Respondent within the meaning of the Act from September 8, 2008 to January 1, 2009. As a New Prime employee, Complainant operated motor vehicles having a gross weight rating of 10, 001 pounds or more on the highways in interstate commerce;

4. Respondent cancelled Complainant's Independent Operating Agreement on January 1, 2009;

5. On March 3, 2009, Complainant filed a timely complaint with the Secretary of Labor alleging that Respondent had discharged her and discriminated against her in violation of the employee protection provisions of the Act;

6. On or about June 2, 2009, the Secretary of Labor issued preliminary findings in an order pursuant to the Act;

7. On June 4, 2009 Complainant, by her attorney, filed timely objections to the Secretary's findings and order.

ISSUE

Did Respondent discriminate against Complainant in violation of the employee protection provisions of the Act?

SUMMARY OF THE EVIDENCE

Complainant holds a commercial driver's license (CDL) and has been a commercial truck driver since 1999. (TR 75). She worked for approximately seven trucking companies before being employed by Respondent in September 2008. (TR 76). Complainant was a leased driver for Respondent. She leased a truck from Success Leasing, Inc. and was responsible for making a monthly rental payment, as well as paying for the truck's operating expenses. (RX A). Complainant in turn leased the truck to Respondent which, under the terms of the lease, had exclusive possession, control, and use of the truck. (RX C). Respondent paid Complainant seventy two percent of the line haul revenue that it received from its customers to which Complainant transported freight. (RX C at 12). Furthermore, Complainant authorized Respondent to make deductions from her paychecks to satisfy payment of her truck and operating expenses associated with the truck. Each week, Respondent deducted $810.00 plus $0.045 per mile for payment of the truck; a total of $159.66 for operating expenses, $0.015 per mile for a tire replacement reserve expense, and $0.02 per mile for a fuel and road use tax. (RX C at 14-15).

Jeremy Thomas is a fleet manager for Respondent who supervised Complainant and was one of her dispatchers during her sixteen weeks of employment with New Prime. (TR at 23-24). Thomas's compensation is tied to the profitability of the drivers he dispatches and he is fined $100 for late deliveries, unless there is an excuse for the delay such as poor weather conditions. Id at 218. Thomas testified that a solo driver should drive approximately 2500 miles per week to be profitable, and that as a dispatcher he tries to make sure that solo drivers drive 2500 miles

each week. Id at 25-26. Poor weather conditions and a bad economy can affect a driver's profits. Id at 25, 50. The main factors within a driver's control that may affect his or her profits are turning down opportunities to carry loads and taking off too much time. Id at 51. Respondent measures a driver's profitability over the long run and it is not unusual for a driver to be profitable during some weeks and unprofitable during other weeks. Id at 38-39, 45. A leased driver with a negative balance may become profitable after a couple of trips. Id at 39. Thomas does not always fire a driver who has a negative balance. Id at 45-46. Thomas recommended the termination of seven drivers due to their unprofitability within six months of Complainant's termination with negative balances ranging from $2500 to $9000 with the average being $3500. Id at 212-213. Thomas also testified that four months is a sufficient period of time to determine whether a driver will likely be profitable. Id at 243.

Complainant drove an average of 1699 miles per week while working for Respondent. (TR at 27, RX D). When Thomas made the decision to terminate Complainant he was aware that she had a negative balance of approximately $4200. Id at 234. By the time Complainant was terminated she had a negative balance of approximately $5000. Id at 211. Complainant took time off from the road twice during her sixteen weeks of employment with Respondent. Id at 214. Thomas testified that during the two visits to her home, Complainant stayed off the road longer than other drivers. Id. She was on the road as often as other drivers, but she spent less time actually driving. Id at 213. Thomas stated that even though Complainant turned down only one load, she made herself unavailable in other ways by, for example, informing him that she was going to bed after completing a delivery thereby forfeiting the opportunity to transport an additional load. Id. In Thomas's opinion Complainant was offered sufficient loads to be profitable. Id at 217.

Complainant testified that she was not told that she had to improve her financial performance and that Thomas told her she was doing well for that time of the year. (TR at 115). Thomas testified that he told Complainant that her negative balance was a concern and that it was a significant problem, although he tried to keep her in a positive state of mind. Id at 227-228.

In mid-December 2008 Complainant was assigned to be a trainer of a driver-trainee, Darla Horne. (TR at 36, 83). Thomas stated that he recommended that Complainant train another driver to help her to become more profitable as "team drivers' are Respondent's most profitable trucks. Id at 214. Complainant testified that she noted that when Ms. Horne drove the truck she was an inexperienced driver and was seldom eager to drive. Id at 84, 156-157. She stated that Ms. Horne "had absolutely not one safety rule down" and was especially frightened of driving in bad weather. Id at 84, 156-157. Complainant testified that she and Thomas discussed the possibility of her ability to make more money with another driver in her truck after the person was trained. Id at 142.

On December 20, 2008, Complainant and Ms. Horne were assigned to transport a load from Lancaster, Pennsylvania to Medford, Oregon. TR at 89-90. Complainant drove across the country on Interstate 80. Id at 91. She encountered black ice in Iowa and was forced to shut down. (JX 1 at 47, TR at 91-92). Complainant sent an electronic message to Respondent's dispatcher informing him of this. (TR at 91-92, JX at 47). Complainant observed that the

weather was getting progressively worse and she heard on her CB that there was black ice ahead and that trucks were going off the road. (TR at 94-95). Complainant testified that Thomas called her on her cell phone at 5:30 PM on December 23 and told her that if she shut down again due to bad weather she would be fired, and that she and Ms. Horne were a team and that she should let Ms. Horne drive. (TR at 98). Thomas denied telling Complainant that if she shut down again she would be fired. Id at 219.

Shortly after midnight on December 24 Complainant sent a message from near Laramie, Wyoming to Respondent stating "VISIBILITY 0.3 TO 7 MPH HAVE TO STOP CANT SEE TO DRIVE". (JX at 48, TR at 96). Complainant stated that she believed that it would have been dangerous to continue driving further with such poor visibility and slow moving traffic. (TR at 101). She thought that a Swift Transportation tractor/trailer was in the left lane when it was actually in a ditch. Id. She stated that "[t]he snow was blinding. You could not see a thing. It ended up I was not in the right lane. I was actually in the left lane…" Id. Complainant testified that although she was going only two to three miles an hour she had to stop suddenly to avoid hitting a white four wheeler truck that had stopped in the middle of the highway. Id. Complainant was forced to stop at a rest area. Id at 99. Complainant resumed driving between 7:30 and 8:00 AM on December 24. (JX at 49, TR at 102). She testified that driving conditions were not good but that she was able to drive slowly. (TR at 103). Complainant drove to Wendover, Nevada where she took a ten hour break pursuant to hours of service requirements. Id at 103-104.

On December 25 Complainant resumed driving slowly, averaging fifteen miles an hour, through "very bad" weather conditions. Id at 104. She drove to Fernly, Nevada where she shut down in the evening due to her hours of service and bad weather. Id at 104-106, JX at 51. At that time, Complainant sent Respondent the following in a Qualcomm message[1]:

> HAD TO SHUT DOWN IN FERNLY NV AROUND 7:30. I WAS OUT OF HOURS AND STUDENT DID NOT FEEL COMFORTABLE DRIVING OWN DONNER MTN. SHE ALSO REPORTED THAT SHE WAS TIRED. WE DROVE THRU SNOW STORMS FROM CLOSE TO THE BORDER OF UTAH TO THIS POINT AND DUE TO THE STORMS WERE UNABLE TO DRIVE MANY MILES.

(JX at 51).

Complainant testified that the weather conditions in Fernly were icy and that she had heard that Donner Pass, which she was approaching, had been closed down. Id at 106. She also stated that she would not allow Ms. Horne to drive because there were flashing lights indicating that the roads were hazardous. Id. On the morning of December 26, Complainant drove approximately forty five miles to Reno, Nevada before calling the 800 number which informed her that driving conditions through Donner Pass were hazardous, that driving through the pass was not recommended, and that it had been shut down intermittently. Id at 108. She also talked to other truck drivers who advised her not to attempt to drive through Donner Pass and received

[1] Qualcomm is an instantaneous electronic messaging system that sends messages from Respondent's drivers to Thomas's computer. (TR 55).

messages on her CB radio providing the same information. Id at 109-110. Complainant testified that Donner Pass is a curvy mountainous road with between six and seven percent grades, sharp vertical drops, and places with no shoulders or guard rails. Id at 113.

After deciding not to drive through Donner Pass at that time, Complainant and Thomas had the following colloquy via Qualcomm:

12/26/2008	06:24	Complainant	DONNER PASS REQUIRES CHAINSAND HAS BEEN CLOSED OFF AND ON FROM YESTERDAY UP TO NOW. I WONT BE TRAVELING ANY FURTHER UNTIL THEY CLEAR THE ROAD
12/26/2008	06:58	Thomas	why didn't you cross it yesterday? you should have been across the country twice by now
12/26/2008	07:01	Thomas	chain up asap

(JX at 51).

Thomas testified that he was being sarcastic when he sent this message because he was frustrated that Complainant had shut down. (TR at 61-62). He also stated that when he told her to chain up he was not telling her to get moving but just telling her that chains were required. Id at 240.

Thomas decided to recommend Complainant's termination on December 28, 2008. Id at 62, 72. He filed an incident report on December 28 in which he stated:

> CYTHIA [sic] TOLD ME SHE TRAINED AT HER LAST COMPNAY [sic] AND WAS A GOOD TRAINER. SO FAR SINCE I HAVE MADE HER A TRAINER HAVE HAD TO REPOWER HER 3 TIMES ON THE LAST 4 LOADS AND THE ONLY LOAD SHE DELIVERED IT TOOK HER 6 DAYS TO MOVE ACROSS COUNTRY AND HAD TO BE RESCH 3 TIMES DUE TO WEATHER. THE WEATHER WAS BAD BUT MOST TRKS PUSHED THRU WITH LITTLE DELAYS. DARLA FEELS COMFORTABLE DRIVING IN THE WEATHER BUT CYNTHIA WILL NOT GIVE HER THE CHANCE TO DO IT. WHILE DOWN IN THE WEATHER DARLA WOUULD LIKE PRACTICE BACKING AND PRETRIPS BUT CYNTHIA WI [sic] NOT PRACTICE WITH HER AT ALL DARLA SAYS. DARLA SAYS CYNTHIA SEEMS BIPOLAR AND HAS A TERRIBLE ATTITUDE IN GENERAL. I HAVE HAD COMPLAINTS FROM BUTLB OLSA ALLIJ AND MOST EVERY ONE THAT DEALS WITH HER SAYS SHE IS VERY UNPLEASANT TO WORK WITH. EXTREMELY RUDE PERSON HAS NOT MADE A PAYCHECK SINCE SHE CAME TO PRIME.

(RX G at unnumbered pages 3-4.)

On December 31, 2008, Complainant received a message instructing her to see Jack Ewing, Respondent's fleet manager, the following day, at Respondent's terminal in Kansas City, Missouri. (TR at 116-117, JX at 69). She returned to Respondent's terminal in Kansas City on the evening of December 31 and slept in her truck that night. (TR at 116). Complainant sent a reply message indicating that she would be seeing safety. (TR at 116-117, JX at 69). On January 1, 2009 while still in her truck at the terminal she received a phone call from one of Respondent's dispatchers asking her to come and speak with him. (TR at 119). At first, Complainant did not want to go but when she was told it was mandatory she started to get dressed. Id at 119-120. Security Officer Roger Worley arrived at her truck and she told him she was trying to get dressed. RX G at unnumbered page 5, TR at 120. The police were called and Complainant was dressed by the time they arrived. (TR at 121). Ewing came to the truck and told Complainant that her lease was terminated and that she had two hours to pack up and leave the premises. Id. Ewing testified that he told Worley that he had decided to terminate Complainant's lease prior to the incident at Respondent's terminal. (RX G, TR at 199-200). Complainant was taken to Ewing's office and he explained to her that her lease was being terminated because she had a large negative balance and that she had two hours to vacate the premises. (TR at 121, 178-180). Complainant left a number of items of personal property at Respondent's terminal including a lock box for which she paid $680.00, a refrigerator for which she paid $535.00, an air hose that cost $36.00, four load locks that cost her $30.00 each, a complete set of tire chains for which she paid over $300.00, four produce separators which cost her $12.00 each, tools such as hammers and wrenches which Complainant estimated were worth $500.00, and bedding worth about $50.00. (TR at 122-126). Complainant testified that Ewing did not tell her that Respondent would ship her personal property to her nor give her boxes to transport her personal property. (TR at 180-181). Complainant never advised Respondent that she was leaving personal property behind. (TR at 181).

Complainant stated that she experienced emotional distress as a result of the termination of her lease. (TR at 127-130). She stated that she "was treated as a felon and I didn't do anything wrong. I was harassed. I was name called. I was told I was unprofessional and would never work in this industry again." (TR at 127-128). Since Respondent terminated her lease foreclosure proceedings have been initiated on Complainant's house, and she lost her medical insurance, phone service, and internet service. Id at 129-130. She relies on a shelter for food. (TR at 130). Complainant states that she feels "like a failure". Id. She has applied for jobs with other trucking companies but was turned down because Respondent told them that she had been fired. Id at 132-133. She has been unemployed since January 1, 2009. Id at 135.

CONCLUSIONS OF LAW

Liability

As pertinent here, the STAA states as follows:

> (a) Prohibitions.- (1) A person may not discharge an employee, or discipline or discriminate against any employee regarding pay terms, or privileges of employment because –
>
> (A) The employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (B) The employee refuses to operate a vehicle because –
>
> (i) The operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> (ii) The employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

To prevail on a complaint filed under the Act, the complainant must prove by a preponderance of the evidence that: (1) she engaged in protected activity, (2) her employer was aware of the protected activity, (3) employer discharged her, or disciplined or discriminated against her with respect to pay, terms, or privileges of employment, and (4) there is a causal connection or nexus between the protected activity and the adverse action. *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 03-STA-47, slip op. at 4 (ARB April 26, 2005). If the complainant makes out a *prima facie* case, the burden shifts to the employer to articulate a legitimate business reason for taking the adverse employment action, and the complainant must then prove that the articulated reason is pretextual and that employer discriminated against complainant because of his or her protected activity. *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 6 (ARB Sept. 30, 2004). If the respondent carries this burden, complainant must then prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but were a pretext for discrimination. *Id. See also Eash v. Roadway Express, Inc.*, ARB Case Nos. 02-008 & 02-064, ALJ 2000-STA-47, slip op. at 3. (ARB June 27, 2003). However, in a case which has been fully tried on the merits, it is not particularly useful to analyze whether the complainant has established a *prima facie* case. Rather the relevant inquiry is whether complainant established by a preponderance of the evidence that he or she was discharged or disciplined for his or her protected activity. *Pike v. Public Storage Companies*, ARB No 99-072, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999), *Johnson v. Roadway Exp.*, ARB No. 99-111, ALJ No 1999-STA-5, slip op. at 7, n 11 (ARB Mar. 29, 2000).

Complainant alleges that she engaged in protected activity under 31105(a)(1)(A) when she made internal complaints to Respondent regarding hazardous driving conditions and the

inadequate training and driving skills of her driver-trainee, Darla Horne. Complainant's Brief at 12-14. Complainant argues that her internal complaints are related to a violation of 49 C.F.R. § 392.14 which provides in pertinent part:

> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated.

Complainant also alleges that her internal complaints are related to 49 C. F. R. § 396.7, which provides that "A motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle."

I do not consider that Complainant's Qualcomm messages to Thomas regarding the hazardous driving conditions in Iowa, Laramie, Fernley, or Donner Pass rise to the level of internal complaints as that term is construed in (a)(1)(A), but rather represented her efforts to inform Thomas of the dangerous driving conditions she was experiencing and why she considered it unsafe to proceed and was forced to shut down. The same is true of her Qualcomm messages to Thomas that Ms. Horne did not feel comfortable driving down Donner Mountain and that she felt tired. *Compare Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-63 (ARB June 30, 2008). (On the day complainant met with management to discuss his safety concerns with his assigned truck, the complainant threatened to call, and did then call, FMCSA and state and local police from Respondent's employee break room.) I find that Complainant did not engage in protected activity pursuant to (a)(1)(A).

To prove that Complainant engaged in protected activity under subsection (a)(1)(B)(i) for refusing to operate a motor vehicle because the operation violates a safety, health, or security regulation, Complainant must show that an actual violation of 49 C.F. R. §§ 392.14 and 396.7 would have occurred if she did not refuse to drive. *Robinson v. Duff Truck Line, Inc.*, ALJ No. 86-STA-3 (Sec'y Mar. 6, 1987), *Eash, supra*. Complainant encountered black ice in Iowa, blinding snow and zero visibility near Laramie, Wyoming, snow and ice in Fernley, Nevada, and heard reliable reports that it was unsafe to drive through Donner Pass due to extremely inclement weather conditions. She testified that she narrowly avoided plowing into a truck stopped in the middle of the highway near Laramie. The evidence is undeniable that Complainant would have violated 49 C.F.R. §§ 392.14 and 396.7had she had continued to drive in these hazardous weather conditions and not shut down when she did. Therefore Complainant engaged in protected activity at . (a)(1)(B)(i).

Section 31105(a)(2) provides that:

> Under paragraph 1(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To

qualify for protection, the employee must have sought from the employer, and been unable to obtain correction of the unsafe condition.

Complainant has demonstrated that she had a reasonable apprehension of serious injury if she or Ms. Horne had continued to drive in each of the four instances when they ceased driving due to poor weather. Before making the decision to shut down in Iowa, Complainant observed that the weather was becoming progressively worse and that she had received CB reports that black ice was ahead and trucks were going off the road. A reasonable person in Complainant's position would conclude that the black ice presented a real danger of an accident, and a reasonable person in Complainant's circumstance near Laramie who encountered blinding snow and observed a truck in a ditch beside her and one stopped in the middle of the highway in front of her would conclude that the weather conditions presented serious danger of an accident. The icy weather conditions in Fernley would also have caused a reasonable person to shut down to avoid an accident. Complainant's refusal to drive through Donner Pass, a curvy steep road with vertical drops and areas that had no shoulders or guard rails, and the warnings of other truck drivers not to attempt to drive through Donner Pass because of the weather was based on her reasonable apprehension that driving through Donner Pass could very likely result in an accident and serious injury. Although Thomas asserted that other trucks had made it through Donner Pass, he was unable to identify any specific trucks or the specific times they traversed Donner Pass. Furthermore, evidence that other trucks successfully traveled through Donner Pass on December 26 does not invalidate Complainant's reasonable apprehension of serious injury due to poor weather conditions. As the Sixth Circuit noted, "[t]he successful completion of a mission, in the absence of other evidence, does not necessarily prove that the mission was safe." *See Duff Truck Line v. Brock*, 848 F. 2d 189 (6th Cir. 1988) (unpublished). Complainant informed Thomas each time that she shut down due to hazardous weather conditions but Respondent was clearly not in a position to correct unsafe conditions caused by the weather. I therefore find that Complainant engaged in protected activity at (a)(1)(B)(ii).

Respondent argues that Ewing was unaware of Complainant's protected activity when he terminated her lease on December 31, 2008, but this argument is meritless. Thomas filed an incident report on December 28, 2008 recommending that Complainant's lease be terminated in part because of her protected activity and it is not credible that Ewing, Respondent's fleet manager and Thomas's superior, would not have seen the report. Moreover, in its answers to Complainant's interrogatories Respondent referred to certain incident reports as forming part of the basis for her termination and I conclude that Respondent was referring to Thomas's incident report.

Respondent avers that it terminated Complainant's lease solely because she had a negative balance of approximately $4200 when Thomas recommended her termination which had risen to $5000 by the time her lease was terminated. Although Complainant maintains that other drivers with larger negative balances were not terminated, the average negative balance of those drivers was $3500 and Respondent contends that the driver with a negative balance of $9000 who was not terminated was in an unusual situation because he had a newborn baby at home and needed extended periods off the road. See Respondent's brief at 5, n. 10. Thomas testified that a driver needed to drive 2500 miles a week in order to be profitable and that Complainant drove only 1699 miles a week during her employment with Respondent.

Therefore, I find that Respondent terminated Complainant's lease in part because of her negative balance and it has therefore shown a legitimate nondiscriminatory reason for her termination.

I also conclude that Respondent terminated Complainant's lease in part because of her protected activity as described infra. Respondent's actions clearly demonstrate that it was motivated to terminate Complainant because she refused to drive in severe weather conditions in violation of DOT regulations and because of her reasonable apprehension that continuing to drive could result in serious injury to her or the driving public. I find credible Complainant's testimony that when she shut down in Iowa due to black ice, Thomas told her that if she shut down again she would be fired. This is consistent with Thomas's testimony that his compensation was tied to timely deliveries. When Complainant shut down as she approached Donner Pass due to unsafe driving conditions, Thomas's response was clearly designed to pressure Complainant into driving through Donner Pass despite its normally unsafe features and the snow she was encountering which made driving through the pass even more hazardous. Although Thomas stated that his response of "why didn't you cross it yesterday? you should have been across the country twice by now" was sarcastic because of his frustration due to Complainant shutting down, there is no doubt that Thomas was pressuring Complainant to drive through the pass despite the bad weather conditions. Thomas's statement in his December 28 incident report that the weather was bad but most trucks pushed through with little delays is completely unsupported and I give it little weight. Even if his statement is true it does not negate the conclusion that Respondent's terminated Complainant's lease due to her refusal to drive through Donner Pass. *Duff Truck Line v. Brock.*

The temporal proximity of Complainant's protected activity and the adverse employment action also supports a strong inference of discrimination. *Cefalu v. Roadway Express, Inc.*, ARB No. 04-103, 04-161, ALJ No. 2003-STA-55, slip op. at 7 (ARB Jan. 31, 2006). Thomas recommended that Complainant's lease be terminated on December 28, two days after she refused to cross Donner Pass, and Ewing actually terminated her lease on January 1, 2009, five days after her refusal to traverse Donner Pass. If Ewing was motivated to terminate Complainant solely due to her negative balance he could have done so at any time during the sixteen weeks she was employed by Respondent, but he chose to do so only a few days after her protected activity.

Respondent terminated Complainant's lease for both legitimate and illegitimate reasons and therefore this is a mixed motive case. Where an adverse employment action was motivated, at least in part, by protected activity, the respondent may avoid liability only by establishing that it would have taken the same adverse action in the absence of the protected activity. *Calmat Company v. United States Department of Labor*, 364 F. 3d 1117, 1122-1123, n. 4 (9th Cir. 2004). Respondent has not offered any compelling evidence that it would have terminated Complainant's lease in the absence of her protected activity and therefore Complainant has prevailed on the question of liability. *Price Waterhouse v. Hopkins*, 490 U. S. 228, 250-258 (1989). I find that Respondent has violated the Act at (a)(1)(B)(i) and(a)(1)(B)(ii).

Reinstatement and Compensatory Damages

Complainant seeks reinstatement, back pay, interest on the damage award, damages for emotional distress, non-monetary relief, punitive damages, and attorney fees and costs.

Under the Act, Complainant is entitled to automatic reinstatement to her former position with the same pay and terms and privileges of employment. 49 U. S. C. § 31105(b)(3)(A)(ii); *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26, slip op. at 6 (ARB Aug. 31, 2004). Respondent argues that reinstatement would be problematic because Complainant currently owes Respondent $5000 and because her previous work experience with Respondent suggests that she would likely go deeper into debt if she resumed her former position. Respondent's Brief at 16. Respondent's concerns are immaterial to the question of whether Complainant is entitled to reinstatement.

An award of back pay under the Act is not a matter of discretion but is mandated once it is determined that an employer has violated the Act. *Moravec v. HC & M Transportation, Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992). In *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005), the ARB summarized the legal background to back pay awards in STAA whistleblower cases:

> A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA. (citation omitted). The purpose of the back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. …
>
> Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U. S. C. A. § 2000e et seq (citation omitted). …Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. …While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." …

Respondent's company drivers are paid approximately $0.30 per mile and typically earn less than leased drivers in the long run. TR 50-51. Complainant drove an average of 1699 miles a week. Id at 27. Uncertainties in determining an employee's earnings should be resolved against the discriminating employer. *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26, slip op. at 7 (ARB Aug. 31, 2004). Back pay awards are approximate at best. *Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, 95-STA-34, slip op. at 20-21 (ALJ Apr. 14, 1997). I conclude that Complainant is entitled to a back pay award of $509.70 a week ($0.30 X 1699) based on the average earning rate of Respondent's company drivers and the average number of miles she drove each week. As she has been out of work for sixty two weeks her back pay award would be $31,601.40 (62 X $509.70). The $5000 she is in arrears to

Respondent will be deducted from this amount and therefore her total back pay award is calculated as $26,601.40. Complainant is entitled to interest on the back pay amount at the rate specified for underpayment of Federal income tax. 26 U.S.C. § 6621. Respondent must pay Complainant back pay of $509.70 each week until she is reinstated or receives a bona fide offer of reinstatement.

A complainant may recover an award for emotional distress when her mental anguish is the proximate result of respondent's unlawful discriminatory action. *Dutkiewicz.* The ARB has affirmed reasonable emotional distress awards solely based on the complainant's testimony. *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008). The amount of an award for emotional distress is usually based on amounts awarded in similar whistleblower cases. *See Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery*, 95-STA-37, slip op. at 2-3 (ARB Sept. 5, 1996). Complainant relies on *Michaud v. BSP Transport, Inc.*, ARB No. 97-113, ALJ No. 1995-STA-29, slip op. at 8 (ARB Oct. 9, 1997) in which the ARB affirmed the ALJ's recommendation of damages for emotional distress of $75.000 where prior to his discharge, complainant had owned a home and had a stable financial position, but after his discharge, he lost his house through foreclosure and received public assistance. Complainant seeks an award of $100,000 in damages for emotional distress as she maintains that she has experienced hardship similar to that of the complainant in *Michaud.* Complainant's Brief at 27. Complainant testified that she has felt "like a failure" since her termination and that as a result of losing her job her house is about be foreclosed, she lost her medical insurance, phone, and internet service, and she must obtain food from a shelter. As many Americans can attest in these parlous economic times losing one's job is both financially and emotionally devastating. However, in *Michaud* there was evidence from a treating physician, a licensed social worker who provided therapy, and a consulting psychiatrist all of whom testified that complainant suffered from major depression as a result of his termination. There was no such evidence in this case. Therefore, I conclude that Complainant is entitled to an award for emotional distress of $50,000.

Complainant also seeks recovery for personal property she left at Respondent's terminal worth $2369.00.[2] Although Complainant did not inform Respondent that she left personal property at its terminal, Respondent knew or should have known that these items were Complainant's personal property and made an effort to deliver the items to her. *See Carter, supra.* Therefore, Respondent must pay Complainant an additional amount of $2269.00 in compensatory damages.

Punitive Damages

The 2007 amendments to the Act allow for the imposition of punitive damages not to exceed $250,000. 49 U.S.C. § 31105(b)(3)(C). Complainant seeks an award of $75,000 in punitive damages in order to serve the statutory purpose of the Act of combating "the increasing number of deaths, injuries, and property damage" resulting from commercial trucking accidents. Complainant's Brief at 28.

[2] The value of Complainant's personal property left at Respondent's terminal was $2269.00 based on Complainant's testimony regarding the worth of these items.

In *Leveille v. New York Air National Guard,* ARB No. 98-079, ALJ No. 1994-TSC-3, slip op. at 6 (Oct. 25, 1999), a whistleblower case arising under the Toxic Substances Control Act, the ARB relied on the following standard when deciding whether to award punitive damages:

> The Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law. (citation omitted). The Court explained the purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others from similar conduct in the future. "Restatement (Second) of Torts § 908(1) (1979). The focus is on the character of the tortfeasor's conduct – *i.e.*, whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards.

In the instant case, Thomas intentionally violated 49 C.F.R. §§ 392.14 and 396.7(a) when he pressured Complainant to drive through Donner Pass although Complainant had informed him of the extremely hazardous driving conditions that existed there. In addition, by pressuring Complainant to drive through Donner Pass Thomas demonstrated a total disregard not only for her and her co-driver's safety but for the safety of other drivers on the road. Thomas then recommended termination of Complainant's lease in part because of her refusal to drive through Donner Pass and Respondent terminated her in part for that reason. Congress enacted the STAA to combat the "increasing number of deaths, injuries, and property damage due to commercial vehicle accidents" on America's highways, *Brock v. Roadway Express, Inc.*, 481 U. S. 252, 262, 95 L. Ed. 2d 239, 107 S. Ct. 1740 (1987), and Respondent's conduct was both reprehensible and inimical to the purpose of the Act. I conclude that an award of punitive damages of $75,000 is warranted in this case.

RECOMMENDED ORDER

IT IS ORDERED THAT Respondent New Prime, Inc.:

1. Reinstate Complainant to her former position with the same pay and terms and privileges of employment ;

2. Pay Complainant compensatory damages in the form of back pay of $26.601.40 plus interest and $509.70 a week until she is reinstated or receives a bona fide offer of reinstatement, $50,000 for emotional distress, and $2269.00 for her personal property;

3. Pay Complainant punitive damages of $75,000;

4. Post a copy of this Recommended Decision and Order at all of its terminals for ninety consecutive days in all places where employee notices are customarily posted; and

5. Expunge all information pertaining to Complainant's wrongful discharge from her personnel records, and to cause all consumer reporting agencies to which it has made a report regarding Complainant to amend its report to delete any unfavorable work record information, and to show continuous employment with Respondent.

Complainant's counsel has thirty days to submit an application for attorney fees and costs and Respondent has thirty days from receipt of this application to submit a response.

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DANIEL L. LELAND
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.

The order directing reinstatement of the complainant is effective immediately upon receipt of the decision by the respondent. All other relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).