Navigating the STAA: A Survey and Recent Developments Under the Anti-retaliation Provisions of the Surface Transportation Assistance Act

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Since the 1980's, the motor carrier transportation industry has been subjected to an ever increasing number of individual lawsuits based upon the employee protection provisions of the Surface Transportation Assistance Act. The amount of litigation arising under this statute has increased steadily, consistent with the general trend of employees to seek redress for alleged workplace injustices through individual remedial schemes, rather than through collective action.

This article surveys the developments under the employee protection provisions of the Surface Transportation Assistance Act. The article discusses the remedial scheme afforded to whistleblowers in the surface transportation industry, and examines the various protections afforded to employees under Sections 405(a) and (b) of the Act. The article also reviews the allocations of the burden of proof and production at hearing. Finally, this article examines certain recent developments under the employee protection provisions of the statute.

I. Overview of the Surface Transportation Assistance Act

A. Introduction

Congress passed the Surface Transportation Assistance Act (the "Act" or "STAA") in December, 1982, and it was signed into law and became effective on January 6, 1983. Formerly codified at 49 U.S.C. App. § 2301 et seq., the Act was recodified in July, 1994, and is now found at 49 U.S.C. § 31101 et seq. Among other things, the Act provides for grants to the states for the development and implementation of programs for the enforcement of federal and compatible state safety standards for commercial motor vehicles.

The anti-retaliation or "whistleblower" provisions of the statute, Section 405 of the STAA, were designed to encourage reporting of noncompliance with safety regulations governing commercial motor vehicles.[1] Congress made the judgment that employees in the transportation industry were best able to detect safety violations. However, because they could be threatened with discharge for cooperating with enforcement agencies, Congress determined that they needed express protection against retaliation for reporting these violations.[2] Section 405 protects all employees of a commercial motor carrier (including drivers, mechanics, and freight handlers) from discharge, discipline, or discrimination for filing a complaint about commercial motor vehicle safety, for testifying in a proceeding related to a safety violation, or for refusing to

operate a commercial motor vehicle when operation would violate a safety rule, or because the employee reasonably believes it would result in serious injury to himself or others.[3]

B. The Administrative Enforcement Scheme

Congress determined that an employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack "practical effectiveness" if the employee could not be reinstated pending complete review of his complaint, and that temporary reinstatement of the whistleblower was of utmost importance.[4] Accordingly, Section 405 is designed to allow the Department of Labor, charged with enforcing the statute, to preserve the *status quo* during the administrative process, *i.e.*, by immediately ordering the employer to reinstate the employee to his or her former position.[5]

Thus, upon the filing of a complaint by an employee, Section 405 authorizes the Secretary of Labor ("Secretary") to conduct a preliminary investigation in order to determine whether there is "reasonable cause" to believe that the complaint has merit.[6] This investigative task is delegated to the Area Director of OSHA.[7] During the investigation, the employer is given the opportunity to respond to the complaint.[8] The Secretary, upon a finding of reasonable cause, may issue a preliminary order of abatement, including reinstatement, if the employee has been discharged.[9]

Not later than 30 days after the Secretary. notifies the parties of his findings, the employee or the employer may file objections to the findings or preliminary order, or both, and request a hearing on the record.[10] If objections are filed, the case is litigated within the administrative channels of the Department of Labor ("DOL"). If no objections are filed, the findings and the preliminary order become final and are not subject to judicial review.[11]

If the employer has filed the objections, the Assistant Secretary of Labor is deemed to be the prosecuting party and the employee is also a party.[12] The complaint is assigned to an administrative law judge ("ALJ") for an evidentiary hearing.[13] Most importantly, the order of reinstatement is not stayed while the hearing is pending, and becomes effective immediately upon receipt of the notice by the employer.[14]

After the close of the hearing, the ALJ issues his decision which is subject to review by the Secretary of Labor.[15] The Secretary must issue a final order within 120 days after the close of the hearing.[16] The time periods imposed upon the Secretary and administrative law judges are directory in nature, and a failure to meet them does not invalidate any action taken under Section 405.[17]

At any time prior to the filing of objections, the dispute may be settled if the parties, *including* the Assistant Secretary, agree.[18] After the filing of objections, settlement of the case is subject to approval by the ALJ and Secretary.[19] In addition, if the employer makes a settlement offer that the Secretary deems to be fair and equitable, the Secretary may decline to assume the role of the prosecuting party.[20] The burden of prosecuting then fails entirely upon the employee.[21]

An employee who files a complaint under Section 405 may also pursue arbitration remedies provided by a relevant collective bargaining agreement covering his or her employment.[22] In

recognition of the national policy favoring voluntary resolution of labor disputes through arbitration, the Secretary or the Assistant Secretary may exercise discretion to postpone a determination of the Section 405 complaint and defer to the results of the arbitration.[23] However, like the standards existing under the National Labor Relations Act, deferral to the outcome of arbitration is warranted only where it is clear that: 1) the proceedings dealt adequately with all factual issues, 2) the proceedings were fair, regular, and free of procedural infirmities, and 3) the outcome of the proceedings was not repugnant to the purpose and policy of the Act.[24]

Section 405 provides that the Secretary may file an enforcement action in a district court against a employer who has failed to comply with an order, including an order of reinstatement, that is issued by the Secretary.[25] A person adversely effected by an order issued after a hearing may file a petition for review, not later than 60 days after the order is issued, in the United States Court of Appeals for the Circuit in which the violation occurred, or the person resided, on the date of the violation.[26]

To remedy violations of Section 405, the Act provides for reinstatement, backpay, compensatory damages, costs and attorneys fees.[27]

C. Effect of 1994 Codification and Language Changes

In July, 1994, Congress recodified the transportation laws of the nation, including the Surface Transportation Assistance Act. Congress professed to substitute simple language for awkward and obsolete terms, and to make other language changes in order to attain uniformity within the statute. However, in its legislative history, Congress expressly stated that the recodification and language revisions did not effect any substantive changes in the law, and that the precedential value of earlier administrative and judicial decisions was to remain unchanged.[28]

II. Protected Activity Under Section 405

A. An Overview of Section 405 (as Codified, 1994)

The employee protection provisions of Section 405 of the STAA, 49 U.S.C. §31105, provide, in relevant part, as follows:

> (a) Prohibitions.—
>
> > (1) a person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or the privileges of employment, because—
> >
> > > (A) the employee, or some other 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
>
> (2) 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 have been unable to obtain, correction of the unsafe condition.

What has previously been referred to, prior to recodification, as Section 405(a), is now codified at 49 U.S.C. §31105(a)(1)(A). It will continue to be referred to as Section 405(a) in this article for ease of reading and clarity purposes. Section 405(a) protects an employee from discharge or discrimination because the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a motor vehicle safety regulation or rule or has testified or will testify in such a proceeding.[29]

What has previously been referred to, prior to recodification, as Section 405(b), contains two prohibitions protecting employees. These prohibitions are now codified at 49 U.S.C. §§31105(a)(1)(B)(i) and (ii). The first prohibition, commonly referred to as the "when" or "federal violation" clause, prohibits an employer from disciplining or discharging an employee for refusing to operate a motor vehicle when or because such operation constitutes a violation of any *federal* rule, regulation, standard or order applicable to commercial motor vehicle safety.[30] To promote clarity and understanding throughout this article, the federal violation provision will be referred to as Section 405(b)(i).

The second prohibition, commonly referred to as the "because" or "reasonable apprehension" clause, prohibits an employer from discharging an employee for refusing to operate a motor vehicle because of the employee's reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition.[31] To promote clarity and understanding, it will be referred to as Section 405(b)(ii). This second ground for refusal carries the further requirement that (1) the unsafe condition causing the employee's apprehension of injury must be such that a reasonable person, under the circumstances, would perceive a "real danger" to himself and others, and (2) that the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.[32]

B. Section 405(a) -- Protection Based Upon the Filing of a Complaint or Institution of Proceedings

Section 405(a) of the STAA provides protection to an employee who, by himself or through another person, files a complaint or beings a proceeding related to a violation of a motor vehicle safety standard.[33] The complaint need not explicitly mention a commercial motor carrier vehicle safety standard to be protected under Section 405(a). Rather, the Secretary has stated that "as long as the complaint raise safety concerns, the layman who usually will be filing it cannot be expected to cite standards or rules like a trained lawyer."[34] Rather the statute requires only that the complaint "relate" to a violation of a commercial motor vehicle safety standard.[35]

Moreover, the statutory "related to" language in Section 405 does not restrict the protection to complaints to or proceeding before federal or state agencies.[36] Rather, the protection extends to employees who have filed any complaint or instituted or testified in any proceedings relating to a violation of a spectrum of safety criteria. Thus, Section 405(a) provides protection to employees who make "external" or "internal" complaints which relate to Department of Transportation ("DOT") rules or other federal or state laws which relate to commercial motor carrier vehicle safety. Section 405(a) also protects employees who institute or participate in proceedings related to motor carrier safety before the DOL, DOT, under other federal or state laws, in arbitrations or in employer hearings.[37]

Although it is not necessary that a complaint expressly cite the specific motor vehicle standard which it is alleged has been violated, the complaint must "relate to" a violation of a commercial motor vehicle safety standard. Thus, where the employee wrote a letter to company's president concerning safety conditions in relation to the width of the company's scales at the employer's terminal, the employee was not protected, and his Section 405(a) complaint was dismissed, because there was no evidence that the complaint related to a motor vehicle safety standard.[38] Likewise, an employee's Section 405(a) complaint was dismissed where the employee only complained that the employer violated its discipline policy in its employee handbook, and there was not implication of any commercial motor vehicle safety standard.[39]

A complaint related to a safety violation is protected under Section 405(a) even if the complaint is ultimately determined to be meritless.[40] For Section 405(a) protection, it is sufficient that the employee's complaint about the alleged violation was based upon a reasonable belief.[41] Likewise, an employee receives protection under Section 405(a) for testifying at a grievance proceeding of a co-worker even if the grievance is ultimately found to be without merit.[42]

Counseling other employees about DOT regulations is also protected under Section 405(a).[43] Additionally, disciplining an employee for not being available for work when the employer knows the employee is participating in a hearing related to motor carrier safety is a violation of Sec. 405(a).[44]

C. Section 405(b)(i) The "When" or "Federal Violation" Clause

Section 405(b)(i) provides an employee with protection from discipline or discharge where the employee refuses to operate a vehicle when the operation would violate a federal regulation, standard or order relating to commercial motor vehicle safety or health, or a state standard incorporated within or mandated by a federal standard.[45] A complainant's unsubstantiated. subjective opinion is insufficient to establish a violation under Section 405(b)(i), even if it is made in good faith.[46] Rather, to invoke the protection of Section 405(b)(i), an employee must prove that his assessment of the condition is correct.[47] Moreover, an employee has no right to impose his own subjective standard of safety on the employer, and therefore has no protection from discharge where the employee's subjective notion of safety is more stringent than federal law (or state law mandated by federal law). Thus, an employee was found to be unjustified in refusing to drive a vehicle, where the tires on the vehicle complied with federal standards and with the even more stringent state standards.[48]

Moreover, a violation of Section 405(b)(i) may occur prospectively where it is inevitable that a violation must occur over time. Accordingly, there is no requirement in Section 405(b)(i) that the driver's operation of the vehicle must immediately violate a federal rule or regulation. For example, where a violation of DOT driving time regulations is necessarily contemplated in a dispatch order, albeit at a somewhat later time, the order is regarded as requiring the operation of a motor vehicle contrary to federal rules and regulations, and consequently a driver's refusal is protected under Section 405(b)(i).[49]

An employee's refusal to drive based upon illness, physical condition or fatigue may constitute protected conduct under Section 405(b)(i).[50] Likewise, a refusal to drive because a driver is on medication and in pain is protected activity under Section 405(b)(i).[51] However, the employee must sufficiently communicate his condition and the circumstances surrounding his refusal to drive in order for the employer to be charged with knowledge of the protected activity.[52]

The Secretary and the administrative law judges possess the authority to determine whether operating a vehicle would constitute a violation of the safety regulation, even in the absence of a citation by a motor vehicle inspector.[53] Moreover an employee's refusal to drive an unsafe vehicle is protected under Section 405(b)(i) even where there is no proof that the employee sought correction of the unsafe condition which prompted his or her work refusal.[54] This is because Section 405(b)(i), unlike Section 405(b)(ii), contains no statutory requirement that the employee first seek correction from his employer of the unsafe condition.

D. Section 405(B)(ii)—The "Because" Or "Reasonable Apprehension" Clause

Under Section 405(b)(ii), it is unlawful to discharge or discriminate against an employee for refusing to operate a vehicle because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of the vehicle.[55] Moreover, an employee may establish a violation of Section 405(b)(ii) where the unsafe condition at issue is

caused by "the physical condition of the driver that could affect the safe operation of the equipment.[56]

The unsafe conditions causing the employee's reasonable apprehension of injury must be of such a nature that a reasonable person, under the same circumstances then confronting the employee, would conclude that there is a "real danger" of accident, injury or serious impairment to health. The statute further requires that the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.[57]

While Section 405(b)(ii) requires that an employee have a reasonable apprehension of a real danger to himself or others, it does not require that the hazardous condition later be confirmed or in fact exist. Rather, an alleged hazardous condition or mechanical defect is not considered unreasonable, as a matter of law, simply because a subsequent inspection of the vehicle finds no sign of the hazardous condition or mechanical defect. Likewise, the fact that other employees completed a driving assignment successfully, does not, standing alone, necessarily prove that there was no reasonable apprehension.[58] Moreover, the Secretary has indicated that it is proper to consider evidence that repair work was performed later in judging the reasonableness of an employee's refusal to drive.[59] However, where an employee refuses to drive because of an alleged unsafe condition, and the employer, using experienced personnel, inspects the vehicle and determines that there is no unsafe condition, the employee's later, subsequent refusal to drive has been found to be unreasonable.[60]

The recent case of *Chapman v. T.O. Haas Tire Co.*, 94-STA-2 (Sec'y Aug. 3, 1994), is illustrative of the reasonable apprehension standard. In *Chapman*, the Secretary found that a reasonable person under the circumstances confronting the employee at the time he decided to refuse to make some deliveries because of bad weather would have concluded that there was a real danger of an accident or injury, and that therefore the employee had a reasonable apprehension of serious injury to himself or the public under Section 405(b)(ii). The Secretary based his finding on evidence that the employee's truck was almost empty, that the temperature was below freezing, that the terrain to the delivery sites was elevated and curvy, and that there was up to 12 inches of snow in the area with road closures because of stuck tractor-trailer rigs, despite evidence that other commercial vehicles were operating in the area.

1. The Communication Requirement

Under the "reasonable apprehension" clause, the employee has the burden, absent unusual circumstances, to show that he or she communicated or attempted to communicate his or her safety concerns to his employer and was unable to obtain correction of the dangerous condition.[61] Thus, where the preponderance of evidence failed to establish that at the time the employee was terminated, the company was aware that the employee's refusal to drive was because he was in pain and taking medication, the employee failed to establish a *prima facie* case of a violation of Section 405(b)(ii).[62]

Moreover, the communication must be sufficiently clear to the employer. For example, where the employee told her supervisor that she was "too stressed out" to drive, the employee

failed to establish that she had conveyed to her supervisor that her refusal to drive was because she was unable to do so safely without danger of accident. Rather, the Secretary found that her statement came at the conclusion of an angry conversation over an ongoing dispute concerning whether the employee had to return her bus to the terminal at the end of her shift.[63] On the other hand, an employee articulated his complaint sufficiently to meet the communication requirement of the "reasonable apprehension" standard, where the employee detailed the truck's defects in his post-trip vehicle inspection report which was submitted consistent with the company's policy.[64] Similarly, where the focus of the complaints were not related to safety, but rather extra job assignments, the employee failed to communicate safety defects as a basis for her refusal to work.[65]

III. Burden of Proof and Production

A. The *Prima Facie* Case

In order to establish a *prima facie* case in a STAA case, the employee must show:

(1) that he or she engaged in protected activity;

(2) that he or she was subject to an adverse employment action; and

(3) that the employer was aware of his or her protected activity when it took the adverse action, raising the inference that the protected activity was the likely reason for the adverse action.66

In establishing a *prima facie case*, it is critical that the employee establish employer knowledge of the protected activity.[67] Where the decision maker taking the adverse action has no knowledge of the protected activity, the causation element of a *prima facie* case is not established.[68] However, the Secretary has indicated that it will borrow the National Labor Relations Board's "small shop" doctrine, and apply it where appropriate.[69] This would allow the Secretary to infer that the person who carried out the adverse action was aware of the employee's protected activity where the number of employees in the employer's operation is small.[70] Moreover, the Secretary has found that a supervisor's suspicion that an employee has made protected complaints to be sufficient to establish the employer knowledge element of a *prima facie* case.[71]

When considering whether a *prima facie* case has been established under Section 405, the proximate timing of the protected activity in relation to the adverse action tends to support an inference of a causal connection, i.e., the protected activity was the likely cause of the adverse action. Thus, the inference is raised where the adverse action follows the protected activity.[72] The Secretary also has found that a causal connection exists where the adverse action occurred within several weeks after the protected activity.[73] However, where the employee's protected activity predated his discharge by at least 15 months, and other protected activity was even more distant in time, the protected activity was too remote to raise an inference of causation.[74]

B. The Shifting Burdens of Proof and Production

The burdens of proof and production adopted by the Secretary for use in STAA proceedings derive from models articulated and approved by the Supreme Court in Title VII discrimination cases.[75] Under those models, the employee has the initial burden of establishing a prima facie case of a Section 405 violation (See III A, *supra*).

After a *prima facie* case has been established, the burden shifts to the employer to rebut the presumption of discrimination by producing evidence that the adverse action was taken for a legitimate, non-discriminatory reason.[76] The employer need not persuade the court that it was actually motivated by the proffered reasons.[77] However, the evidence must be sufficient to raise a genuine issue of fact as to whether an employer discriminated against the employee, i.e., "the explanation provided must be legally sufficient to justify a judgment for the [employer]."[78] If the employer is successful in rebutting the inference of discrimination, the employee bears the ultimate burden of demonstrating by preponderance of the evidence that the alleged legitimate reasons were a pretext for discrimination, and that the real reason for his discharge was discriminatory.[79] However, the finding that an employer's proffered reasons for an adverse action are pretextual does not, standing alone, compel a finding in favor of the employee.[80]

The "dual motive" doctrine is implicated when it is found that the employer's adverse action against the employee was motivated both by prohibited and legitimate reasons, *i.e.*, that the employer had dual motives[81]. In such a case, in order to avoid liability, the employer has the burden of showing by a preponderance of the evidence that it would have made the same decision as to the employee's discharge even in the absence of the protected conduct.[82]

IV. Other Developments

A. Secretary Defers to ALJ Findings if Supported by Evidence

On April 26, 1995, the United States Court of Appeals for the Second Circuit directed the Secretary of Labor to dismiss a Section 405 complaint by a driver who alleged that, *inter alia*, he refused to make deliveries because of unsafe conditions.[83] In ordering the Secretary to dismiss the complaint, the Second Circuit found that the Secretary improperly ignored the conclusions of the administrative law judge in violation of STAA Rule 109(c)(3).[84]

In *Castle Coal* the employer fired a driver after he failed to make oil deliveries to residential sites located on the left hand side of one-way streets because it required the driver to stand in the street and thread the delivery hose under the truck. The employee had previously filed OSHA complaints about his procedure, but OSHA indicated that there was no violation. After a *de novo* hearing, the ALJ found that the employer did not violate Section 405 and dismissed the complaint, on the grounds that the driver failed to establish a real danger from an unsafe condition where he did not even attempt to make the deliveries. On review, the Secretary of Labor reversed what was largely a factual dispute, and ordered the employer to reinstate the employee with backpay.

On appeal, the Second Circuit set aside the Secretary's order. The Second Circuit noted that STAA Rule 109(c)(3), 29 C.F.R. § 1978.109(c)(3), provides that the Secretary must treat the ALJ's factual findings as conclusive if supported by substantial evidence on the record considered as a whole. The Second Circuit concluded that if Rule 109(c)(3) was to have any meaning, the Secretary must either defer to the ALJ's findings, or address them and demonstrate the ways in which they are not supported by substantial evidence. However, the Secretary failed to either defer to or address the findings; rather, she reached her own conclusions based solely on the exhibits and transcripts. Accordingly, the Secretary's order was set aside, and she was directed to adopt the ALJ's order dismissing the complaint.

B. Employee's Right to Hearing Where Secretary Declines to Prosecute

The Second Circuit made clear that an employee has a right to proceed to a *de novo* hearing before an administrative law judge, and have the ALJ consider the facts and the issue of deferral, even where the Secretary, after a preliminary finding of reasonable cause, subsequently declines to be a prosecuting party and defers to a grievance arbitration award finding just cause for the employee's discharge. Thus, the right to a hearing is not lost even if the assistant secretary defers to the decision of an arbitrator.[85]

C. Statute of Limitations

The Sixth Circuit has affirmed that the triggering act for the running of the 180 day statute of limitations period is the date that the employee was discharged, rather than the day that he first began receiving warning notices, and that the employee was not required to file "protective" Section 405 complaint each time he was disciplined.[86]

D. Driver Fatigue

The Secretary has established that where an employee stops driving and rests because of fatigue, he engages in protected activity under Section 405(b).[87] A protected refusal to drive also may come in the form of inadvertently falling asleep and failing to report for assignment.[88] Furthermore, the Secretary has found that a driver is protected under Section 405 where he refuses to drive on the grounds of fatigue, even though the driver has had an adequate period of off-duty time in which to obtain rest and obtain sleep.[89]

The Circuits have continued to defer to and uphold the Secretary's decisions regarding driver fatigue as being reasonable, not an abuse of discretion, and supported by substantial evidence in the record as a whole. The Fourth Circuit determined that an employer suspended a driver in violation of Section 405 for delivering freight late due to the driver's taking unscheduled naps and breaks due to driver fatigue.[90] The court rejected the employer's argument that it did not discipline the driver for taking unscheduled breaks, but rather disciplined him for failing to take advantage of the employer's procedures to get adequate rest between runs, *i.e.*, by taking a "slide" or scheduling days off. The court found that the employer's policies did not afford the employee any real measure of protection against discipline when he needed a break because of fatigue.[91] The driver's run had been delayed by circumstances beyond his control and he had been repeatedly informed by the employer that he was about to be

dispatched. Moreover, at the time the driver was dispatched, he was not fatigued. The court concluded, "The Act does not require a driver to remain awake all day awaiting dispatch and then to drive all night. In applying the Act, the Secretary was entitled to protect a trucker who chose to pull over and take a nap instead of risking catastrophe.[92]

V. Conclusion

Plaintiff attorneys and unions are becoming increasingly aware of, and acquiring greater sophistication, under the employee protection provisions of the Surface Transportation Assistance Act. It can be expected that complaints under Section 405 will become more frequent and also more litigious. Accordingly, it is increasingly important for commercial carriers to educate their management and supervisors as to the ramifications and pitfalls of Section 405 of the STAA. Such training and education is essential in order to allow management to recognize those situations in which an employee may be engaging in protected activity under Section 405. It is also essential to allow management to minimize a carrier's risks and exposure arising from taking adverse action against employees who may be protected under Section 405 of the STAA.

NOTES

[1] Brock v. Roadway Express, Inc., 481 U.S. 252, 258 (1987).

[2] Brock v. Roadway Express, Inc. 481 U.S. at 258.

[3] 49 U.S.C. § 31105.29 C.F.R. § 1978.101.

[4] Brock v. Roadway Express, 481 U.S. at 259.

[5] 49 U.S.C. § 31105(b)(3)(A): 29 C.F.R. § 1978.104(a).

[6] 49 U.S.C. § 31105(b)(2)(A).

[7] 29 C.F.R. § 1978.102.

[8] 29 C.F.R. § 1978.103.

[9] 49 U.S.C. § 31105(b)(3)(A) 29 C.F.R. § 1978.104.

[10] 49 U.S.C. § (b)(2)(B) 29 C.F.R. § 1978.105.

[11] 29 C.F.R. § 1978.105(b)(2).

[12] 29 C.F.R. § 1978.107.

[13] 29 C.F.R. § 1978.106.

[14] 29 C.F.R. § 1978.105(b)(1).

[15] 29 C.F.R. § 1978.109.

[16] 49 U.S.C. § 31105(b)(2)(C). 29 C.F.R. § 1978.109(c).

[17] 29 C.F.R. § 1978.114. *Trans Elect Enterprises, Inc., v. Boone*, 987 F.2d 1000 (4th Cir. 1992).

[18] 49 U.S.C. §31105(b)(2)C): 29 C.F.R. §1978.111(d)(1).

[19] 29 C.F.R. §1978.111(d)(2).

[20] 29 C.F.R. §1978.111(d)(3).

[21] Id.

[22] 29 C.F.R. §1978.112(a).

[23] 29 C.F.R. §1978.112(a)(2)(3).

[24] 29 C.F.R. §1978.112(c).

[25] 49 U.S.C. §31105(c).

[26] 49 U.S.C. §31105.

[27] 49 U.S.C. §31105(b)(3); 29 C.F.R. §1978,104(a).

[28] H.R. Rep. No. 103-180 (1994) *reprinted in 1994* U.S.C.C.A.N. 818, 820, 822.

[29] 49 U.S.C. §31105(a)(1)(A).

[30] 49 U.S.C. §31105(a)(1)(B)(i).

[31] 49 U.S.C. §31105(a)(1)(B)(ii).

[32] 49 U.S.C. §31105(a)(2); *Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76 (2d Cir. 1994); *Castle Coal & Oil Co. v. Reich*, 55 F.3d 41, 1995 U.S. App. LEXIS 9597 (2d Cir. 1995); *Read v. National Minerals Corp.*, 91-STA-34 (Sec'y July 24, 1992).

[33] 49 U.S.C. § 31105(a)(1)(A).

[34] *Nicks v. Nehi - R.C. Bottling Company, Inc.* 84-STA-1 (Sec'y July 13, 1984), Slip op. at 8-9.

[35] Id.

[36] *Doyle v. Rich Transport*, 93-STA-17 (Sec'y Apr. 1. 1994). *Stiles v. J.B. Hunt "Transportation*. 92-STA-34 (Sec'y Sept. 24, 1993).

[37] *Moyer v Yellow Freight System*, Inc. 89-STA 7 (Sec'y Sept. 27, 1990).

[38] Perrine v. Poole Truck line, Inc., 85-STA-13 (Sec'y Mar. 11, 1986).

[39] Brothers v. Liquid Transporters, Inc. 89-STA-1 (Sec'y Feb. 27, 1990).

[40] Doyle v. Rich Transport, Inc. 93-STA-17, supra: Moyer v. Yellow Freight Systems, Inc., 89-STA-7, supra, enforced sub nom. Yellow Freight Systems, Inc. v. Martin, 954 F.2d 353.357 (6th Cir. 1992).

[41] Doyle v. Rich Transport, Inc. supra, slip op at 2.

[42] Yellow Freight System v. Martin, 954 F.2d at 357 _____ Moyer v. Yellow Freight System, Inc. 89-STA 7, supra.

[43] *Smith v. Yellow Freight System, Inc.*, 91-STA 45 (Sec'y Mar. 10, 1993) slip op. at 13. enforced sub nom. *Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133 (6th Cir. _______).

[44] *Nolan v. A.C. Express*, 93-STA-38 (Sec'y May 13, 1994).

[45] 49 U.S.C. §31105(a)(1)(B)(ii). *Wiggins v. Roadway Express, Inc.* 84-STA-7 (Sec'y Aug. 9, 1985).

[46] *Yellow Freight System, Inc. v. Martin.* 983 F.2d 1195, 1199 (2d Cir. 1993), *Robinson v. Duff Truck Line, Inc.*, 86-STA-3 (Sec'y March 6, 1987). Slip op. at 12, enforced, Dun Truck Line, Inc.,, v. Brock, 848 F.2d 189. 1988 U.S. App. LEXIS 9164 (6th Cir. 1988)(unpublished).

[47] *Id.*

[48] Wiggins v. Roadway Express, Inc., 84-STA-7, supra.

[49] Boone v. TFE, Inc., 90-STA-7 (Sec'y July 17, 1991) enforced sub nom. Trans Fleet Enterprises, Inc., v. Boone, 987 F.2d 1000 (4th Cir. 1992).

[50] *Turgeon v. Maine Beverage Container Services,* 93-STA-11 (Sec'y Nov. 30, 1993) (refusal to operate vehicle in excess of "10/15 DOT hour prohibition" establishes fatigue and is protected). *Killcrease v. S&S Sand & Gravel*, 92-STA-30 (Sec'y Feb. 5, 1993)(refusal to operate because of illness is protected activity under Section 405(b)(i)).

[51] *Palazzola v. OST Vans, Inc.* 92-STA-23 (Sec'y Mar. 10, 1993).

[52] Id. Smith v. Specialized Transportation Services, 91-STA-22 (Sec'y Apr. 20, 1992).

[53] *Zessin v. ASAP Express, Inc.,* 92 STA-33 (Sec'y Jan. 19, 1993).

[54] Hadley v. Southeast Coop. Serv. Co., 86-STA-24 (Sec'y June 28, 1991).

[55] 49 U.S.C. §31105(a)(1)(B)(ii).

[56] Self v. Carolina Freight Carriers Corp., 89-STA-9 (Sec'y Jan. 12, 1990).

[57] 49 U.S.C. §31105(a)(2). *Dutile v. Tighe Trucking Inc.,* 93-STA-31 (Sec'y Nov. 29, 1993) (refusal to drive because the cab of tractor was rusted into an unsafe condition, employer refused to remedy problem). *Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76, 83 (2d Cir. 1994).

[58] *Thom v. Yellow Freight System, Inc.* 93-STA-2 (Sec'y Nov. 19, 1993) enforced sub nom. *Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76 (2d Cir. 1991).

[59] Dutile v. Tighe Trucking, Inc., 93-STA-31, supra.

[60] Brame v. Consolidated Freightways, 90-STA-20 (Sec'y June 17, 1992).

[61] 49 U.S.C. §31105(a)(2). *Boone v. TFE., Inc.*, 90-STA-7, supra.

[62] Palazzlo v. PTS Vans, Inc., 92-STA-23, supra.

[63] Smith v. Specialized Transportation Services, 91 STA-22, supra.

[64] *Read v. National Minerals Corp.,* 91-STA-34 (Sec'y July 24, 1992).

[65] Mace v. Ona Deliver Systems, Inc., 91-STA-10 (Sec'y Jan. 27, 1992).

[66] Yellow Freight Systems v. Reich, 27 F.3d 1133 (6th Cir. 1994); Osborn v. Cavalier Homes of Alabama, Inc. and Morgan Drive Away, Inc., 89-STA-10 (Sec'y July 17, 1991); Moon v. Transport Drivers, Inc. 836 F.2d 226 (6th Cir. 1987).

[67] Homen v. Nationwide Trucking, Inc. 93-STA-45 (Sec'y Feb. 10, 1994).

[68] *Gay v. Burlington Motor Carriers, 92-STA-5* (Sec'y May 20, 1992) (Causation element of a *prima facie* case not established where complaints about shop safety were raised in shop meeting by a group of employees, and the supervisor who discharged the complainant did not know of his complaints).

[69] Ertel v. Giroux Brothers Transportation, Inc., 88-STA-24 (Sec'y Feb. 16, 1989).

[70] Id.

[71] Stiles v. J.B. Hunt Transportation Inc., 92-STA-34 (Sec'y Sept. 24, 1992).

[72] *Zessin v. ASAP Express, Inc.,* 92-STA-33 (Sec'y Jan. 19, 1993).

[73] *See, e.g., Moyer v. Yellow Freight System, Inc.,* 89-STA-7 (within five weeks); *Stiles v. J.B. Hunt Transportation, Inc.*, 92-STA-34 (Sec'y Sept. 24, 1993)(within one week): *Toland v. Werner Enterprises*, 93-STA-22 (Sec'y Nov. 16, 1993) (the same day).

[74] *Bolden v. Distron, Inc.* 87-STA-28 (ALJ Mar. 21, 1988).

[75] See e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Texas Dept. of community Affairs v. Burdine, 450 U.S. 248 (1981); Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (12988); St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993); see also, Roadway Express, Inc. v. Brock, 830 F.2d 179, 181 n.6 (11th Cir. 1987).

[76] Sickau v. Bulkmatic Transport Co., 94-STA-26 (Sec'y Oct. 21, 1994); Yellow Freight System, Inc. v. Martin, 954 F.2d 353 (1992).

[77] Brothers v. Liquid Transporters, Inc., 89-STA-1 (Sec'y Feb. 27, 1990) slip op. at 4-5, citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 254.

[78] Id.

[79] *Peacock v. Triad Trans. Inc.*, 94-STA-42 (Sec'y Mar. 16, 1995); *Nolan v. A.C. Express,* 93-STA-38 (Sec'y May 13, 1994); *Bryant v. Bob Evans Transportation* 94-STA-24 (Sec'y Apr. 10, 1995); *St. Mary's Honor Center v. Hicks,* 113 S.Ct. at 2749.

[80] Yellow Freight System, Inc. v. Reich, 27 F.3d 1133, 1139 (6th Cir. 1994) citing St. Mary's Honor Center v. Hicks, 113 S.Ct. at 2749.

[81] See e.g. Park v. McLean Transportation Services, Inc. 91-STA-47 (Sec'y June 15, 1992)

[82] Yellow Freight System, Inc. v. Reich, 27 F.3d 1133, 1139 (6th Cir. 1994) citing St. Mary's Honor Center v. Hicks, 113 S.Ct. at 2749.

[83]Castle Coal & Oil Company, Inc. 55 F.3d 41, 1995 U.S. App. LEXIS 9597 (2d Cir. 1995).

[84] 29 C.F.R. §1978.109(c)(3).

[85] *Martin v. Yellow Freight System, Inc.,* 983 F.2d 1195, 1199-1200 (2d Cir. 1993).

[86] Yellow Freight System, Inc. v. Reich, 27 F.3d 1133 (6th Cir. 1994).

[87] Hornbuckle v. Yellow Freight Systems, Inc. 92-STA-9 (Sec'y Dec. 23, 1992); Sickau v. Bulkmatic Transport Co., 94-STA-26, Supra.

[88] *Webb v. Hickory Springs, Inc.* 94-STA-20 (Sec'y Aug. 5, 1994).

[89] Self v. Carolina Freight Carriers Corp., 91-STA-25 (Sec'y Aug. 6, 1992).

[90] Yellow Freight Systems, Inc. v. Reich, 8 F.3d 980 (4th Cir. 1993).

[91] Id., at 985.

[92] *Id.*, 987. *See also, Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133 (6th Cir. 1994)(Sixth Circuit affirmed the Secretary's findings that the employer discharged the driver in violation of Section 405 for making unscheduled stops due to driver fatigue).

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