U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 01 June 2012

Case No.: 2011-FRS-00028

In the Matter of

TIMOTHY A. PINSKY, D.O.,
Complainant

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),
Respondent

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the employee protection provisions of the Federal Rail Safety Act (FRSA or the "Act"), 49 U.S.C. § 20109, as amended.[1] The employee protection provisions of the Act apply to railroad employees who have been subjected to retaliatory discipline or discrimination by their employer for engaging in protected activities related to railway safety. Implementing regulations were published on August 31, 2010. *See* "Procedures for the Handling of Retaliation Complaints Under the National Transit systems Security Act and the Federal Railroad Safety Act," 75 Fed. Reg. 53,522 (Aug. 31, 2010), to be codified at 29 C.F.R. Part 1982.[2]

I. PROCEDURAL BACKGROUND

Timothy A. Pinsky, D.O. ("Complainant"), filed a complaint with the Occupational Safety and Health Administration (OSHA) of the Department of Labor (DOL) on July 13, 2010, alleging that the National Railroad Passenger Corporation ("Amtrak" or "Respondent") violated Section 20109(a)(4) of FRSA when it terminated his employment as its Corporate Medical Director effective January 15, 2010, in retaliation for (1) his refusal to categorize work-related injuries as non-work-related, and therefore non-reportable under Federal Railroad Administration (FRA) rules and (2) raising safety issues.

The Secretary, DOL, acting through the Regional Administrator for OSHA, investigated the complaint and issued her Findings dated June 22, 2011. Respondent's Exhibit (RX) 12.

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[1] Pub. L. 110-53, Title XV, §1521, Aug. 3, 2007, 121 Stat. 444; Pub. L. 110-432, Div. A, Title IV, § 419, Oct 16, 2008, 122 Stat. 4892.

[2] Unless otherwise noted, all references to regulations are to Title 29, Code of Federal Regulations (C.F.R.). References to the implementing regulations will cite to the applicable provision in Part 1982, rather than to the Federal Register.

Specifically, OSHA determined that the preponderance of evidence supports the Respondent's position that the Complainant's protected activity was not a contributing factor in his termination and dismissed the complaint. By letter dated July 22, 2011 received on July 25, 2011, the Complainant filed his objections to the Secretary's Findings and requested a formal hearing before the DOL Office of Administrative Law Judges (OALJ).

I held a hearing in Cherry Hill, New Jersey on March 27, 2012 at which the parties were given a full opportunity to present evidence and argument. The transcript of the hearing held on March 27, 2012 is referred to herein as "HT." The decision that follows is based on an analysis of the record, the arguments of the parties, including the oral closing arguments made at the hearing, and the applicable law.

II. CONTENTIONS OF THE PARTIES

The Complainant contends that he engaged in protected activity in the performance of his job duties. He maintains that his work-related injury determinations were challenged repeatedly prior to his termination. He also maintains that no deficiencies were noted with his work performance prior to the December 18, 2009 verbal exchange between him and his subordinate Barbara Sommons. The Complainant also argues that he was treated less favorably than other Amtrak employees who engaged in verbal conduct comparable to his own on December 18, 2009.

The Respondent challenges whether the performance of job duties can constitute protected activity under the Act. The Respondent further contends that the Complainant was terminated because he violated its personnel policies by his conduct on December 18, 2009 and not because of his job duties which, in part, required he make determinations as to whether Amtrak employees incurred work-related injuries. Thus, Respondent asserts the Complainant cannot meet the elements of his *prima facie* case because the performance of his job duties was not a contributing factor to his termination. In the alternative, the Respondent contends that it has shown by clear and convincing evidence that it would have terminated the Complainant regardless of his protected activity.

III. STIPULATIONS AND ISSUES PRESENTED

At the hearing, the parties presented ten stipulations of fact. JX F; HT at 10. The issues presented for resolution in this matter are as follows:

- Whether Respondent is a covered entity under the Act;
- Whether Complainant engaged in protected activity;
- Whether Respondent was aware of the protected activity;
- Whether Respondent took unfavorable action against Complainant;
- Whether Complainant's protected activity was a contributing factor in Respondent's unfavorable action;
- Whether Respondent would have taken the same action absent the protected activity;
- Appropriate damages, if any.

IV. SUMMARY OF EVIDENCE PRESENTED

a. Exhibits

The parties jointly submitted the following exhibits:

- December 18, 2009 statement from the Complainant (2 pages). Joint Exhibit (JX) A.
- Statement prepared by the Complainant (8 pages). JX B.
- Complaint filed with OSHA dated July 13, 2010. JX C.
- Termination letter from Lorraine Green to the Complainant dated January 14, 2010. JX D.
- Appointment letter from Lorraine Green to the Complainant dated February 7, 2007. JX E.
- Stipulations of Fact. JX F.
- Memorandum from Steven Falkenstein to the Complainant dated March 25, 2008. JX G.[3]

The Respondent submitted the following exhibits:

- Witness statement from Barbara Sommons dated December 18, 2009. Respondent's Exhibit (RX) 1.
- Witness statement from Saundra Worst dated December 18, 2009. RX 2.
- Witness statement from Felicia HorVargo dated December 18, 2009. RX 3.
- Witness statement from Elizabeth Gallagher dated December 18, 2009. RX 4.
- Witness statement from Marilyn McCouch dated December 18, 2009. RX 5.
- Witness statement from Linda Honnoll dated December 18, 2009. RX 6.
- Witness statement from Arlene Harrington dated December 18, 2009. RX 7.
- Amtrak Police Incident/Investigation Report dated December 18, 2009. RX 8.
- Charge of discrimination and retaliation filed with the Pennsylvania Human Relations Commission and United States Equal Employment Opportunity Commission dated April 16, 2010. RX 10.
- Findings from the Secretary, Department of Labor, dated June 22, 2011. RX 12.
- Amtrak's Standards of Excellence dated November 1994. RX 15
- Amtrak's Workplace Violence Policy dated February 14, 2005. RX 16.
- Deposition transcript of the Complainant taken March 30, 2011. RX 17.
- Deposition transcript of Barbara Sommons taken June 15, 2011. RX 18.
- Deposition transcript of Lorraine Green taken on February 29, 2012. RX 19.

[3] JX G was initially identified in the record as "CX 1." HT at 100 - 101.

- Deposition transcript of Saundra Worst taken on March 5, 2012. RX 20.

I received as Administrative Law Judge's exhibits (ALJX) the following:

- Notice of Hearing and Pre-Hearing Order dated August 1, 2011. ALJX 1.
- Order Rescheduling Hearing dated December 14, 2011. ALJX 2.

b. Testimony

Complainant

The Complainant testified under oath that he reported his injury work-relatedness determinations to a Sherry Cook, a central reporting officer for Amtrak who, in turn, presented those determinations at monthly meetings referred to herein as "open view" meetings. Those determinations were also reported to the FRA. HT at 29. Open view meetings were run by the Respondent's Environmental Health and Safety department and were attended by the Complainant telephonically, as well as the Respondent's claims administrators, safety liaisons, and department heads.

The Complainant maintained that safety liaisons and department heads routinely "scolded," "insulted," "berated," and "threatened" him because of his injury determinations presented at these open view meetings. HT at 31. He averred that he complained to Lorraine Green, then the Vice President of Human Resources (HR) and Diversity Initiatives for Amtrak and the Complainant's immediate supervisor, about the verbal treatment he received from those safety liaisons and department heads "on several occasions." HT at 33. The Complainant "felt that people were pressuring [him] to make decisions that went against [his] medical judgment." *Id*.

The Complainant described an occasion when a group of three safety liaisons verbally confronted him in person about an injury determination he had made with which they disagreed. Instead of participating in a conference call to discuss the case, the safety liaisons came to his office to discuss and "were screaming at [him]" and "wouldn't let [him] leave the room." HT at 34. The safety liaisons left him alone after he assured them he would look into the matter further.

In a memorandum to the Complainant dated March 25, 2008, the Deputy Chief Engineer, Maintenance, apologized for an encounter between employees in the Maintenance department and the Complainant. JX G. The memorandum advised that "[i]n the future, any requests for employee-related medical information will be directed through the Environmental Health and Safety department as discussed at the March 20th 'Open View' meeting." *Id*. The Complainant testified that he received that March 25, 2008 memorandum as a result of his verbal complaint to Ms. Green about the conduct of the 3 safety liaisons who verbally confronted him. HT at 33.

The Complainant stated that on December 18, 2009 he asked to speak with Barbara Sommons, then a Senior Health Services Manager, in his office about her prior planning of a Christmas luncheon with current and former Amtrak employees to be held on that date. He

maintained that they "had a conversation that became heated and it lasted only a few minutes and then she eventually screamed and left his office and walked out." HT at 35. Later that day, he was visited by Amtrak police who advised him that a "work place violence report" had been filed against him by Ms. Sommons. HT at 36. The Complainant acknowledged providing Amtrak police with a written statement of what transpired between Ms. Sommons and him. HT at 37; JX A. He later provided a second written statement to Ms. Green at her request. JX B.

The Complainant testified that he advised the Amtrak police officers who interviewed him initially that both he and Ms. Sommons raised their voices during their verbal exchange which occurred on December 18, 2009. HT at 37. Maureen Powers, then a Control Captain in Amtrak police department, and Patricia Kerins, an HR manager, came to the Complainant's office and questioned him on December 18, 2009 after his verbal exchange with Ms. Sommons. HT at 38. He was later escorted from the building by another Amtrak police after 4:30 p.m. on December 18, 2009. *Id*.

The Complainant returned to work on January 4, 2010 and spoke with Ms. Green who directed him to report to her at her office in Washington, D.C. on January 11, 2010 with a written statement about the events of December 18, 2009, along with supporting documentation.[4] HT at 39-40; JX B. In his written statement presented to Ms. Green, the Complainant outlined examples of his "act of dedication" to Amtrak, noting that he "[p]ersevered despite being subject to harassment and intimidation" and he "has been a key contributor on issues of critical import … such as FRA injury reportability[.]" JX B at 8. Also present at the Complainant's meeting with Ms. Green on January 11, 2010 was Bill Herman, then Deputy Chief Counsel for Amtrak. HT at 41–42.

According to the Complainant, he had verbally complained to Mr. Herman prior to January 11, 2010 about "being harassed and intimidated, threatened, cursed at, called insults, derogatory names" by safety liaisons and Amtrak department superintendents. HT at 42–43. The Complainant also discussed an incident with Mr. Herman in which he was called a racist and physically threatened by an employee union representative at a disciplinary hearing. HT at 43 – 44. The Complainant averred that he was unaware of any disciplinary action taken against the individuals he identified to Mr. Herman. HT at 44.

During his meeting with Ms. Green and Mr. Herman on January 11, 2010, the Complainant explained that he thought that the December 18, 2009 incident involving him "was being blown out of proportion" and that he wanted to move forward and remain at Amtrak until his retirement. HT at 44. The Complainant testified that Ms. Green advised him that she had "always stood up for [him]." *Id*. The meeting with Ms. Green and Mr. Herman on January 11, 2010 lasted for about one hour. At its conclusion, the Complainant turned in his office key and building pass at Ms. Green's request; he was told that he was being placed on administrative leave. HT at 45.

By FedEx or certified mail, the Complainant received a letter dated January 15, 2010 from Ms. Green notifying him of his termination. JX D. The Complainant averred that prior to

[4] The hearing transcript erroneously states that this document is identified as "Joint Exhibit D" when the Complainant's written statement given to Ms. Green is actually identified as "Joint Exhibit B." *See* JX B.

his termination, his performance evaluations were "excellent" and that he the Complainant had never been counseled or warned about any conduct. HT at 35.

Since his termination from Amtrak, the Complainant has sought employment relying on various publications and websites which advertise for occupational medicine physicians. HT at 46. He also continues to maintain a private medical practice as he did during his employment with Amtrak. HT at 47. He has incurred various expenses previously paid by Amtrak such as medical malpractice, dental, disability, and life insurance premiums, as well as professional society dues, licensing fees, and continuing education requirements since his termination in January 2010. HT at 48–51.

On cross-examination when presented with his prior deposition testimony, the Complainant acknowledged that he had previously described the incident on December 18, 2009 as "the most inciting event that led to [his] termination." HT at 56–57. He also acknowledged that he was advised by Ms. Green on December 14, 2009 that there had been "anonymous tips" made about his attendance in the office and that he was not scheduled to be in the office on December 18, 2009. HT at 61.

The Complainant testified that he was "taken aback that [he] was completely uninformed" about the plan of his staff members to have a holiday luncheon on December 18, 2009. HT at 62. He called Ms. Sommons into his office to "take her task" about the luncheon plan and she became defensive, pointing her finger at him while moving towards him which caused him to back into wall. HT at 63–64. The Complainant recalled advising Ms. Sommons of his feeling that she had been untruthful to him and that he could no longer trust her. HT at 65. The Complainant also acknowledged on cross-examination that he suspected Ms. Sommons of reporting to HR that he was not spending enough time in the office and that she was undermining his authority. HT at 67.

The Complainant's testimony taken by oral deposition on March 30, 2011 was offered into evidence by the Respondent. RX 17. In his deposition testimony, the Complainant averred that he felt physically threatened by Ms. Sommons during their verbal exchange on December 18, 2009, but on cross-examination at hearing he acknowledged that he did not mention such a physical threat in his eight-page statement for Ms. Green — despite his assertion in his deposition testimony that he tried to be "as thorough as possible" when he prepared that written statement for Ms. Green. HT at 73–75; JX B. Indeed, in the written statement for Ms. Green, the Complainant described his "shock at" the presence of Amtrak police in his office after the verbal exchange between Ms. Sommons and him, because "no violence or threat of violence had occurred." JX B at 4.

The Complainant testified on cross-examination that the retaliation for making subordinates accountable (which he referenced in his statement to Ms. Green) was attributable to Ms. Sommons. HT at 78; *see also* JX B. However, he testified that his subordinates including Ms. Sommons, as well Arlene Harrington and Saundra Worst (both Health Service Managers), had no involvement in reporting injuries to FRA. *Id*. The Complainant also confirmed in his testimony that the "threatening" verbal behavior exhibited toward him because of his injury

determinations started when he began working as a consultant for Amtrak 1999 and that he became a full-time Amtrak employee in 2007. HT at 103–104.

Barbara Sommons

The sworn testimony of Ms. Sommons was taken by oral deposition on June 15, 2011 and offered into evidence at the hearing by the Respondent in lieu of her live testimony. RX 18. She commenced her employment with Amtrak in 2003 as a Health Services Manager, responsible for reviewing results of physical examinations of employees and processing medical leaves of absence for employees on non-work related leave. Sommons' Deposition Transcript ("SDT") at 23–24. She was promoted to Senior Health Services Manager in February 2008 and her duties then included oversight of two Health Service Managers. SDT at 24. Before the Complainant was hired as Medical Director, Ms. Sommons reported directly to Malva Reed, then Senior Director of Health Services.

Ms. Sommons answered negatively when asked if she were involved in the decision-making process as to whether an employee incurred a work-related injury. SDT at 28. She averred that she has never attended an "open view" meeting. SDT at 29. Her proposal regarding staff scheduling was rejected by the Complainant, but her input on a fitness-for-duty policy was adopted in mid-2009. SDT at 37–38. Ms. Sommons denied making any complaint about the Complainant to Amtrak management about his work attendance or performance. SDT at 41–42. Retired employees Linda Honnoll and Marilyn McCouch, as well as current staff Arlene Harrington, Sandra Worst, Felicia HorVargo, and two temporary employees were present in the office on December 18, 2009. SDT at 48–59. After greeting the two retirees, the Complainant requested to speak with Ms. Sommons in his office. Ms. Sommons noted that the Complainant was not scheduled to be at work on December 18, 2009. SDT at 61.

Once in the Complainant's office, Ms. Sommons testified that the Complainant commenced "a tirade, ranting and raving" and "screaming and yelling about [her] having whispered conversations behind his back." SDT at 62. She maintained that he was screaming and yelling in her face, menacing, pointing his finger in her face while asking her who did she think she was and what it is she thought she was doing. *Id*. She stated that she repeatedly asked the Complainant to calm down and that she expressed a need for a representative from HR to be present for their meeting. Ms. Sommons described that the Complainant is "a bit taller than [she is] and quite a bit bigger" and that she "felt physical harm was going to happen to [her]" because of the Complainant's physical proximity to her during their interaction in his office on December 18, 2009. SDT at 63. Ms. Sommons left the Complainant's office and went to HR where she spoke with Ms. Kerins. SDT at 64.

Arlene Harrington

Ms. Harrington testified under oath at the hearing. She began working for Amtrak as a Health Services Manager shortly before to the Complainant's termination. HT at 128–129. Ms. Harrington worked as Registered Nurse for 24 years before her employment with Amtrak. *Id*. She described the Complainant as "condescending," "intimidating" and a bully. HT at 131. Ms. Harrington averred that on December 18, 2009, the Complainant questioned the retirees in the

office about how long the luncheon had been planned. Ms. Harrington stated that she saw the look of "an animal" when she looked into the Complainant's eyes on December 18, 2009. HT at 134. She observed the Complainant call Ms. Sommons into his office and heard the Complainant yelling at Ms. Sommons. HT at 135. She prepared handwritten and typed statements at the request of Amtrak police regarding the incident between the Complainant and Ms. Sommons on December 18, 2009. HT at 140–141; RX 8. The Complainant returned to the office on January 4, 2010 and did not speak to any staff.

After the Complainant's return to the office in January 2010, Ms. Harrington went to Washington, D.C., along with Ms. Sommons and Saundra Worst, another Health Services Manager, to meet with Ms. Green. HT at 139. At that meeting with Ms. Green, Ms. Harrington expressed her unwillingness to work in the current office environment which existed after the December 18, 2009 incident between the Complainant and Ms. Sommons. *Id*. According to Ms. Harrington, the Health Services staff was "terrified" about the Complainant's return after that incident. HT at 139–140.

Saundra Worst

The testimony of Ms. Worst was taken by oral deposition on March 5, 2012 and offered into evidence at the hearing by the Respondent in lieu of her live testimony at the hearing. RX 20. Ms. Worst began working for Amtrak in May 2008 as a Health Services Manager.[5] Worst's Deposition Transcript ("WDT") at 7. She is a certified occupational health nurse specialist. WDT at 8. On December 18, 2009, the Complainant asked her if she were going to lunch with the retirees who were present in the office. She observed the Complainant then asked to see Ms. Sommons in his office. WDT at 13. After his office door closed, Ms. Worst heard yelling which she characterized as "very loud." WDT at 13. She could only hear the Complainant's voice and not Ms. Sommons. WDT at 14. She observed Ms. Sommons leave the Complainant's office in tears and state she was going to HR. *Id*.

Amtrak police took Ms. Worst's statement after the incident between the Complainant and Ms. Sommons on December 18, 2009. RX 2. Her written statement was consistent with her deposition testimony as to the events of December 18, 2009. She averred that she accompanied Ms. Sommons and Ms. Harrington to Washington, D.C. in January 2010 to meet with Ms. Green about their work place concerns. WDT at 20–21, 32. Specifically, Ms. Worst was concerned about the "working atmosphere in the office," noting that "the direct reports were very nervous" about the Complainant's return to the office. WDT at 21.

Upon questioning by the Complainant's counsel at the her deposition, Ms. Worst stated that her cubicle is directly across from the Complainant's office — a distance of approximately three yards — and that she was at her cubicle during part of interaction between the Complainant and Ms. Sommons on December 18, 2009. WDT at 26.

[5] In her deposition testimony, Ms. Worst referred to her position title as Manager of Medical Services.

Maureen Powers

Maureen Powers testified under oath at the hearing. She is currently an Inspector in the Amtrak Police Department but her title was Control Captain at the time of the December 18, 2009 incident between the Complainant and Ms. Sommons. HT at 144–145. She averred that HR Manager Kerins called her on December 18, 2009 to report a workplace violence incident. HT at 148. When then-Captain Powers arrived at Ms. Kerins' office, she observed Ms. Sommons "crying" and "visibly shaken." HT at 148.

On cross-examination, she acknowledged that she went to the Complainant's office on two occasions on December 18, 2009 after the incident between the Complainant and Ms. Sommons; on the second occasion, she was accompanied by Ms. Kerins. Inspector Powers testified that the Complainant appeared "concerned" when she met with him. HT at 149. On cross-examination, Inspector Powers testified that the Complainant told her that he felt Ms. Sommons was undermining him. HT at 154. Inspector Powers also averred on cross-examination that no threat assessment response team was convened to investigate the incident between the Complainant and Ms. Sommons because such teams "had been disbanded at that point." HT at 158.

Then-Captain Powers forwarded the written statements of the Complainant, Ms. Sommons, and others obtained as part of the Amtrak police investigation of the December 18, 2009 incident between the Complainant and Ms. Sommons, to Ms. Green via email on January 4, 2010. HT at 152. In response to my questioning, Inspector Powers clarified that the police report regarding the December 18, 2009 incident between the Complainant and Ms. Sommons was not in her possession at the time of her email to Ms. Green and was sent separately by the records department. HT at 152–153, 157; RX 8.

Patricia Kerins

Ms. Kerins testified under oath at the hearing. She has been an HR Manager with Amtrak for 11.5 years. She stated that on December 18, 2009, Ms. Sommons came to her office "crying uncontrollably" and informed her that she and the Complainant had a "difference of opinion." HT at 160–161. According to Ms. Kerins, Ms. Sommons expressed feeling threatened by the Complainant. HT at 162. Ms. Kerins maintained that she asked whether Ms. Sommons wanted to file a police report and Ms. Sommons agreed that she did. HT at 162.

Ms. Kerins stated that she never received any complaints from the Complainant about harassment from other managers about his work-related injury determinations. HT at 164. When she met with the Complainant on December 18, 2009 after the incident between the Complainant and Ms. Sommons, the Complainant was very upset and complained about Ms. Sommons "going behind his back" and telling "lies about him." *Id.* Ms. Kerins testified that Ms. Sommons had come to her several times before the December 18, 2009 to complain about the Complainant's "running of the office." HT at 165–166.

Ms. Kerins maintained that union employee violence issues were handled in accordance with the labor contract and that she had no first-hand knowledge of any other managers involved in a workplace violence incident. HT at 167.

Ms. Kerins was contacted by Ms. Green after the December 18, 2009 incident between the Complainant and Ms. Sommons. HT at 167.

Lorraine Green

Ms. Green's sworn testimony was taken by oral deposition on February 29, 2012 and offered by the Respondent in lieu of her live testimony at the hearing. RX 19. Ms. Green was Vice President of HR and Diversity Initiatives at Amtrak from January 1997 until April 2011. Green's Deposition Transcript ("GDT") at 6. The Complainant reported directly to her during his tenure with the Respondent. GDT at 7. Her office was located in Washington, D.C.; most of her communication with the Complainant was telephonic. The Complainant had a 40-hour work week as a full-time employee, but no set hours. GDT at 7 – 8.

Ms. Green notified the Complainant of her decision to terminate his employment with Amtrak as Corporate Medical Officer by letter. In her deposition testimony, Ms. Green stated that the events to which she referred in that letter as having "led [her] to conclude" the Complainant was unable to perform the supervisory and managerial duties of a medical director were the December 18, 2009 incident in the Philadelphia office and her subsequent discussion with his staff who asked to speak with her. GDT at 10.

Ms. Green was informed on December 18, 2009 of the incident between the Complainant and Ms. Sommons, but she could not recall by whom. GDT at 11. She did not speak with the Complainant who did attempt to contact her on that date. GDT at 10. Ms. Green met with three employees from the Health Services department at their request in her office after the December 18, 2009 incident — Barbara Sommons, Arlene Harrington, and Saundra Worst. GDT at 12–13.

During her meeting with Health Services staff members, Ms. Green was advised by Ms. Sommons that the Complainant had been "very abusive to her" and "that she felt intimidated and threatened" and that he was "bullying her, yelling, screaming." GDT at 13–14. According to Ms. Green, the other Health Services staff members at the meeting confirmed hearing the Complainant "berating Miss Sommons." GDT at 15. All three indicated to Ms. Green that they could not continue to work under those circumstances where the Complainant had "overstepped his boundaries of professionalism" with yelling and intimidating stances. *Id.*

According to Ms. Green, she had received no complaints about the Complainant from any Amtrak staff between his hiring as a full time employee in February 2007 and December 18, 2009. GDT at 18. The termination notice states that Ms. Green met with the Complainant on January 11, 2010 but in her deposition testimony Ms. Green did not recall whether she met with the Complainant prior to his termination to discuss the incident between him and Ms. Sommons. GDT at 22.

Ms. Green averred that she did not think the Complainant was truthful with her in their discussion and that affected her decision to terminate his employment. GDT at 23. She gave the Complainant his annual performance appraisals and noted no performance issues. GDT at 25. She could not recall if she reviewed the Amtrak police report prior to her decision to terminate the Complainant. GDT at 27. She explained why she did not consider any alternative disciplinary means than termination of the Complainant as follows:

> I was convinced in talking to those ladies and looking at them in their eyes and they looking at me that could not work for [the Complainant] any longer, and I could not fire all of my nurses in the…health department and I wouldn't have a health department, but they were not going to work for him any longer. I had no choice.

GDT at 28, lines 8–14.

Ms. Green spoke with Ms. Kerins who described the demeanor of Ms. Sommons and other Health Services staff on December 18, 2009 to her. GDT at 29. Ms. Green maintained that she had never terminated one of her direct reports for workplace violence prior to the Complainant. GDT at 31. She determined the Complainant had violated Amtrak's workplace violence policy based on the information she received from the three Health Service staff members who met with her prior to the Complainant's termination. GDT at 33. Specifically, Ms. Green stated that the three health services staff members felt physically intimidated by the Complainant on December 18, 2009 because of his "body language, space between the employees, standing over them." GDT at 33.

Ms. Green recalled an instance where the Complainant did complain to her about members of the Engineering or Mechanical department questioning his decision-making as the Medical Director and she contacted the department head to convey her support of the Complainant's decision-making regarding medical matters. GDT at 35–36. She maintained that the Complainant never raised any concerns to her about work place injury decisions either in her capacity as an HR Vice President or when she was acting Inspector General. GDT at 37–38.

Ms. Green testified that she found the Complainant's verbal statements to her about the December 18, 2009 incident between him and Ms. Sommons to be inconsistent; she gave greater credence to the statements of the three health services staff members, finding them more consistent. GDT at 52. Specifically, the Complainant initially asserted to Ms. Green that Ms. Sommons was the aggressor who scheduled the luncheon with staff and retirees to antagonize or exclude him. GDT at 53. He also said he believed Ms. Sommons and Ms. Green were having conversations "behind his back" about him which Ms. Green stated was untrue. GDT at 54.

Ms. Green terminated an employee who was involved in a failure to report a work-related injury. GDT at 57. That employee did not report directly to Ms. Green but the decision as to whether to terminate her was referred to Ms. Green because there was reluctance on the part of her immediate supervisors to take such action due to the employee's otherwise outstanding work performance. GDT at 64–65.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

a. Relevant factual background

The Complainant commenced his employment with Respondent as a Corporate Medical Director on April 9, 2007, assigned to the Human Resources (HR) department. JX E. His duties included providing an opinion about the work relation of injuries and illnesses reported by Amtrak employees. JX F (Stipulation of Facts, ¶ 2). When offered the Corporate Medical Director position, the Complainant was authorized to arrange his own schedule to continue his private practice as long as he spent 40 hours per week on "Amtrak business." JX E at 3. During his tenure as Corporate Medical Director, the Complainant managed a staff of subordinate employees who were nursing professionals: a Senior Health Service Manager, Barbara Sommons who oversaw two Health Service Managers, including Sandra Worst and Arlene Harrington. RX 18, 20; HT at 128. The Complainant reported to Lorraine Green, then Vice President, HR and Diversity Initiatives. RX 19.

The Complainant attended "open view" meetings during which discussions were held with various Amtrak department heads/safety liaisons/supervisors or managers about allegations of employee injuries. HT 29–30. Amtrak is required to maintain records and to report to the Federal Railroad Administration (FRA) injuries, illnesses, and deaths which are work related pursuant to 49 C.F.R. Part 225. JX F (Stipulation of Facts, ¶ 4).

On December 18, 2009, a verbal argument occurred between the Complainant and Ms. Sommons. JX F (Stipulations of Facts, ¶ 5). The verbal argument occurred after the Complainant arrived at the office and learned that members of his staff, as well as retired Amtrak employees, intended to go out to lunch. HT at 62. The Complainant raised his voice during his verbal argument with Ms. Sommons on December 18, 2009. JX A.

Ms. Sommons reported the incident to Patricia Kerins, an HR manager, who in turn contacted Amtrak police. HT at 160 – 162. On December 18, 2009, then-Captain Powers of the Amtrak police interviewed Ms. Summons, the Complainant, and other staff; she obtained written statements from those witnesses. RX 1–7; a "Police Incident/Investigation Report" dated December 18, 2009 was prepared regarding the verbal incident between the Complainant and Ms. Sommons. RX 8. The Incident/Investigation Report stated that the "[c]ase [was] closed with no criminal conduct" and "referred to the Corporation for administrative handling." RX 8.

After the verbal argument between the Complainant and Ms. Sommons, Ms. Sommons, along with Ms. Harrington and Ms. Worst, traveled to Washington, D.C. to meet with Ms. Green, the Complainant's immediate supervisor at her office. RX 18–20. Ms. Green also met separately with the Complainant on January 11, 2010. JX D. The Complainant also prepared a written statement at Ms. Green's request which he presented to Ms. Green at their January 11, 2010 meeting. JX B.

By letter dated January 14, 2010, Ms. Green provided the Complainant notification of the termination of his employment with Amtrak effective January 15, 2010. JX D. Ms. Green stated that her decision was "based on recent events which have led [her] to conclude that [the

Complainant was] unable to perform the supervisory and managerial duties that are necessary to serve as the Amtrak Medical Director." JX D at 1.

In the termination notification letter, Ms. Green apprised the Complainant of the following:

> [Y]our behavior exhibited on December 18, 2009, with a member of your staff, and in the presence and earshot of other employees, was unprofessional, a violation of the Company's policies and is not tolerable. Your conduct violated the *Standards of Excellence* that all Amtrak employees are held to, specifically the section titled Professional and Personal Conduct, which states that, "…there is no place for activities of behaviors that compromise the safety, satisfaction, and well-being of our customers, the public or our fellow employees." When you and I met on January 11th to discuss this incident, your description of the events that you said led to this episode indicated to me that you have failed to properly supervise your staff and have failed to take appropriate managerial action in accordance with company policy.

JX D at 1.

The Respondent's Standards of Excellence, which Ms. Green referenced in the termination notification, are dated November 1994. RX 15. Amtrak also maintains a Workplace Violence Policy dated February 14, 2005 which defines "[w]orkplace violence" as "any intentional verbal or physical conduct affecting the workplace that causes any individual to reasonable fear for his or personal safety, the safety of his or her family, friends, coworkers, and/or property." RX 16.

b. Coverage under the FRSA

The Secretary's findings included (1) a determination that the Respondent is a company within the meaning of the FRSA, 49 U.S.C. Section 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and (2) that Complainant is an "employee" within the meaning of FRSA (same section as cited above). Respondent did not object to this finding and no evidence to the contrary was introduced at the hearing. That the Respondent is a "railroad carrier" and the Complainant is an "employee" covered by FRSA is deemed therefore to be established by stipulation. As a former employee of Respondent, Complainant is protected under FRSA from retaliation for protected activity.

c. Applicable provisions of the FRSA

The Act provides, in relevant part:

> (a) In general.--A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—
>
> ***
>
> > (4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee[.]

49 U.S.C. § 20109(a).

If an employee prevails in a claim of discrimination, remedies available under the Act include ― all relief necessary to make the employee whole, such as reinstatement with the same seniority status the employee would have had if the discrimination had not occurred, back pay with interest, and compensatory damages including litigation costs, expert witness fees, reasonable attorney fees, and compensation for any ―special damages sustained as a result of the discrimination. 49 U.S.C. § 20109(e). Punitive damages may also be granted in an amount not to exceed $250,000. 49 U.S.C. § 20109(e)(3).

The Act incorporates by reference the procedures and burdens of proof for claims brought under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121 (2011); *see* 49 U.S.C. § 20109(d)(2). AIR 21, and therefore FRSA, requires a complainant to prove by a preponderance of the evidence that: (1) he or she engaged in protected activity or conduct; (2) the employer knew of the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. 49 U.S.C. § 42121(b)(2)(B) (2011). A complainant who meets this burden is entitled to relief unless the employer can establish, by clear and convincing evidence, that it would have taken the same adverse action absent the protected activity. 29 C.F.R. § 1979.109(a); *see also Barker v. Ameristar Airways, Inc.*, ARB Case No. 05-058 (ARB Dec. 31, 2007), slip op. at 5; *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (ARB Jan. 31, 2008), slip op. at 4.

The regulations promulgated to administer cases brought under the FRSA are found at 29 CFR Part 1982. They incorporate the General Rules of Practice and Procedure before the OALJ which are found at 29 CFR Part 18.8.

d. Elements of FRSA Violation and Burdens of Proof

i. Protected activity

In its oral closing argument offered at hearing, the Respondent, through its counsel, raised the question of whether the Complainant's performance of his assigned work duties could constitute protected activity under FRSA. FRSA prohibits a rail carrier from retaliating against an employee who engages in certain protected activity, such as reporting a work-related injury or illness to the carrier itself or to the Secretary of Transportation. 49 U.S.C. § 20109(a). I note that the Secretary and the Administrative Review Board (ARB), as well as federal courts, have consistently found that employees who report safety concerns as part of their job responsibilities engage in protected activity. Affirming one such case, the Court of Appeals for the Ninth Circuit reasoned that quality control inspectors play a crucial role in enforcing the Nuclear Regulatory Commission ("NRC") regulations and, consequently, "[i]n a real sense, every action by quality control inspectors occurs 'in an NRC proceeding,' because of their duty to enforce NRC regulations." *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (The court further observes that "[i]f the NRC's regulatory scheme is to function effectively,

inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems.").

I find this rationale applies to an employee like the Complainant: it is undisputed that one of his job duties as Corporate Medical Director for Amtrak was providing an opinion about the work-relation of injuries and illnesses reported by Amtrak employees. It is also undisputed that Amtrak is required to maintain records and report to the FRA injuries, illnesses, and deaths which are work-related. JX F. Therefore, I find that one of the Complainant's job duties was in part, to enforce a requirement under the FRA that the Respondent maintain records and report work-related injuries and illnesses. *See also Vinnett v. Mitsubishi Power Sys.*, ARB No. 08-104, ALJ No. 2006-ERA-029, slip op. at 6,n.57 (ARB July 27, 2010) (reporting cases finding that employees who report safety violations as part of their "job duties" may still be engaged in protected activity). Accordingly, I find the Complainant did engage in protected activity under the FRSA.

ii. Knowledge of protected activity

Generally, it is not enough for the Complainant to show that the Employer, as an entity, was aware of his protected activity. Rather, the Complainant must establish that the decisionmakers who subjected him to the alleged adverse actions were aware of his protected activity. *See Gary v. Chautauqua Airlines*, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int'l, Inc.*, ARB Case No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

In the instant matter, the record shows that Ms. Green, then the Respondent's Vice-President, HR, made the decision to terminate the Complainant. I find that she was certainly aware of the Complainant's job duties. As stated, above, I have found those the Complainant's job duties which require he make work-related injury determinations constitute protected activity. More specifically, Ms. Green acknowledged that she was aware of at least one instance in which the Complainant complained to her about being questioned by staff in either the Engineering or Mechanical department about a medical decision he had made. It is unclear from Ms. Green's deposition testimony whether that "medical decision" involved a determination as to whether an injury or disease was work-related and therefore reportable to the FRA.

The Complainant testified at hearing that his verbal complaint to Ms. Green did concern his being "pressured" by Engineering department employees to change his reportable injury determinations. After complaining to Ms. Green, the Complainant received a memorandum dated March 25, 2008 from the Deputy Chief Maintenance Engineer apologizing for the Engineering department employees' conduct. JX G. I credit the Complainant's testimony that he complained to Ms. Green at least once about what he perceived as harassment or pressure from agency staff to change his work injury determinations. The Complainant's credited testimony therefore supports my finding that the decisionmaker in this matter, i.e., Ms. Green, was aware of the Complainant's protected activity.

iii. Adverse personnel action

The Act specifically prohibits an employer from taking adverse actions against employees who report injuries, including discharge, demotion, suspension, reprimand, or any other discriminatory action. § 20109(a). The regulations provide that employers may not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee for engaging in protected activity. 49 C.F.R. § 982.102(b)(1).

The record clearly established that the Complainant was subjected to an adverse action: it is undisputed that the Respondent terminated the Complainant's employment as its Medical Officer effective January 15, 2010.

iv. Contributing Factor

Finally, the Act requires that the protected activity was a contributing factor to the unfavorable personnel action against Complainant. A contributing factor is any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision. *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 11 (ARB Nov. 30, 2006). The legitimacy of an employer's reasons for taking an unfavorable personnel action should be examined when determining whether a complainant has shown by a preponderance of the evidence that protected activity contributed to the unfavorable action. *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

A complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006 AIR-00014 (ARB Sept. 30, 2009). In circumstantially based cases, the fact finder must carefully evaluate all evidence of the employer's agent's mindset regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Serv.*, 1995-ERA-40 (ARB June 21, 1996). The fact finder should consider a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken. *Id.* at 5.

The Complainant generally argues the following in support of his contention that his termination from Amtrak was unlawful under the FRSA: (1) he was pressured to change his work injury determinations; (2) he received no prior discipline or negative performance evaluation; and (3) he was treated less favorably than other Amtrak employees who engaged in similar conduct. The Respondent counters that it was the Complainant's conduct on December 18, 2009, (i.e., his verbal exchange with Ms. Simmons), which led to his termination.

The Complainant testified that he was repeatedly pressured by Amtrak safety liaisons and department heads about his determinations of reportable injuries at the monthly open view meetings, during which discussions about employee allegations of injuries would occur. He would be asked to reconsider or defend those determinations. He maintained that he complained to his supervisor, Ms. Green about the pressure he received to change his determinations "on

several occasions" when they met in person. The Complainant described the memorandum he received from the Deputy Chief Maintenance Engineer dated March 25, 2008 as an attempt to apologize for an instance in which employees form the Engineering department verbally confronted him to challenge a determination he had made that an employee injury was work related.

I credit the Complainant's testimony that Amtrak employees questioned his medical determinations as he has described. He has, however, failed to show that any of those employees were involved in his termination at issue. There is no support in the record for finding that the decisionmaker in this matter, i.e., Ms. Green, harbored any animus toward the Complainant because of his medical determinations or his purported resistance to changing such determinations. Indeed, Ms. Green averred in her deposition testimony that she had advised Respondent's department heads that the Complainant's medical determinations were entitled to deference. She also described a situation in which she terminated an Amtrak employee for failure to report a work-related injury which defeats any inference that she supported under- or non-reporting of work-related injuries.

On cross-examination, the Complainant acknowledged his deposition testimony that he was subject to harassment by Amtrak employees because of his medical determinations when he served as a consultant or contract employee for approximately eight years prior to his appointment to a full time position of Corporate Medical Officer in April 2007. RX 17 (Complainant's Deposition Transcript at 47); HT at 103–104. Ms. Green's selection of the Complainant for that appointment also contradicts finding that the Complainant's reportable injury determinations were considered negatively in the termination decision at issue.

Ms. Green maintained that her decision to terminate the Complainant was predicated on the incident which occurred between the Complainant and Ms. Sommons on December 18, 2009. She credited the description of that incident given to her by Ms. Sommons, Ms. Harrington and Ms. Worst — staff members in the Complainant's department — over that given to her by the Complainant. Furthermore, the Complainant conceded on cross-examination that Ms. Sommons, Ms. Harrington, and Ms. Worst were not involved in reporting injury determinations to the FRA. Any animus that those staff members had toward the Complainant has not been shown to be related in any way to his reportable injury determinations. The Complainant himself suggested that those staff members retaliated against him because he attempted to hold them "accountable." JX B. The FRSA offers the Complainant no protection against such retaliation.

Evidence of disparate treatment, where a complainant is disciplined more harshly than other employees for similar infractions, can constitute circumstantial evidence of a causal relationship between protected activity and an adverse action. *Sylvester v. Parexcel Int'l LLC*, ARB No. 07-123, (ARB May 25, 2011), slip op. at 27; *Trancanna v. Arctic Slope Insp. Svc.*, ARB No. 98-168 (ARB July 31, 2001), slip op. at 8-9. However, any comparison made must be between employees who are similarly situated. *Sasse v. Office of the U.S. Atty.*, ARB Nos. 02-077. 02-078, 03-044 (ARB Jan. 30, 2004).

As evidence of disparate treatment, the Complainant stated that there were many instances in which Amtrak employees engaged in loud verbal conduct directed at him and were not terminated. Specifically, the Complainant maintained that he was yelled or cursed at by safety liaisons during the monthly open view meetings when his work injury determinations were challenged. Even if I credit the Complainant's testimony regarding the loud or offensive verbal conduct of other Amtrak employees toward him and find that it is similar to that which he exhibited during his verbal exchange with Ms. Sommons on December 18, 2009, I find such employees were not shown to be similarly situated to the Complainant in all relevant aspects of their employment. Specifically the Complainant and the employees he has cited did not perform the same job duties or report to the same direct supervision. Indeed, Ms. Green stated in her deposition testimony that she considered the Complainant's conduct on December 18, 2009 particularly unacceptable because of his singular stature as the Respondent's sole Medical Officer.

The Complainant's arguments that he was subject to unlawful retaliation because he received good performance evaluations and no prior discipline alone are not persuasive. It has been consistently held that courts should not second guess an employer's exercise of its business judgment in making personnel decisions, as long as such decisions are not based on statutorily prohibited factors. To discredit an employer's proffered reason for taking an adverse personnel action, the Complainant cannot simply show that the employer's decision was wrong or mistaken because the factual dispute at issue is whether statutorily prohibited animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. *Fuentes v. Perskie,* 32 F.3d 759, 765 (3d Cir.1994) (citations omitted).

My inquiry in this matter is limited to whether the employer gave an honest explanation of its behavior. I do not sit as a super-personnel department that reexamines the merits or even the rationality of an entity's business decisions. *See Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 332 (3d Cir. 1995) (citations omitted); *Dister v. Continental Group, Inc.*, *Mesnick v. Gen. Elec. Co.*, 57 FEP Cases 822 (1st Cir. 1991). Thus, it is irrelevant whether Complainant believes that his good performance evaluations or lack of prior discipline should have precluded his termination. It is also irrelevant whether the Complainant believes his conduct violated the letter or spirit of Amtrak's workplace violence policy or standards of excellence on December 18, 2009.

The key inquiry is whether Complainant can establish that the Respondent's decision maker, Ms. Green, was motivated by retaliatory animus prohibited by the Act. To successfully establish retaliatory intent circumstantially by attacking an employer's asserted justification, the Complainant must demonstrate such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reason for its action that a reasonable fact finder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-discriminatory reasons. *Fuentes,* 32 F.3d at 765. The Complainant has not shown that the articulated reasons for his termination by Ms. Green, (i.e., his conduct on December 18, 2009 and the events leading up to that conduct), are unworthy credence.

In sum, I find that the Complainant is unable to establish, by a preponderance of the evidence, that his protected activity was a contributing factor to the adverse action. *See* 29 C.F.R. § 1982.109(a).

v. Employer's Action in the Absence of Protected Activity

Because I find the Complainant is unable to establish all of the elements of proof, as is required for him to prevail under the Act, I conclude that it is not necessary for me to address the issue of whether the Respondent would have taken the same action, notwithstanding the Complainant's protected activity.

VI. CONCLUSION

The Complainant is unable to establish all of the elements of proof, as is required for him to show that a violation under the Act occurred. 29 C.F.R. § 1982.109(a). Consequently, I must conclude that the Complainant is not entitled to any remedies.

As set forth under the governing regulation, the Complainant's complaint is DISMISSED. *See* 29 C.F.R. § 1982.109(a).

IT IS SO ORDERED.

A

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within 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, D.C. 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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. § 1982.110(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. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed 10 double-spaced typed pages, within such time period as may be ordered by the Board.

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, D.C. 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. § 1982.110(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. §§ 1982.109(e) and 1982.110(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 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. §§ 1982.110(a)-(b).