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Issue Date: 12 May 2015

CASE NO.: 2014-STA-00047

In the Matter of:

CAROLYNN MASCAREÑAS,
Complainant,

vs.

INTERSTATE HOTELS & RESORTS, INC.,
Respondent.

APPEARANCES:

CAROLYNN MASCAREÑAS,
Complainant, in propria persona

MICHAEL J. LORENGER, ESQ.
For the Respondent.

BEFORE; Christopher Larsen
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim under the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("the Act"), which went to hearing in Denver, Colorado, on January 16, 2015.

Complainant Carolynn Mascareñas, appearing *in propria persona*, works for Respondent Interstate Hotels & Resorts, Inc., as a shuttle van driver. Her principal responsibility is to drive guests of the Fairfield Inn & Suites in Denver, Colorado, to and from the Denver International Airport. She contends Respondent retaliated against her, in violation of 49 U.S.C. §31105 and 29 C.F.R. §1978.102, for engaging in "protected activity" under the statute.

To prove unlawful activity under the Act, the complainant must show 1) that she engaged in protected activity, 2) that the employer knew of the protected

activity, 3) that she suffered an adverse employment action amounting to discharge or discipline or discrimination regarding pay, terms, privileges of employment, and 4) that the protected activity was a contributing factor in the adverse employment action. *Ferguson* v. *New Prime, Inc.*, ARB No. 10-75, ALJ No. 2009-STA-47, p. 3 (ARB August 31, 2011); *Clarke* v. *Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, p. 4(ARB June 29, 2011).

In one important respect, this case is highly unusual. Ms. Mascareñas does not allege she was fired or demoted because of her protected activity. Indeed, she works for Respondent even now, doing the same job she was doing before the protected activity, with no loss of pay or benefits (TR p. 35, line 7 – p. 36, line 13). But in another respect, this case is sadly typical. The evidence documents a deteriorating working relationship, in which clear and open communication is increasingly impaired by growing suspicion and mistrust. I wish I felt the orderly resolution of the legal issues before me would address that problem, but I expect it will not.

The alleged violations of the Surface Transportation Act are almost incidental details in a list of grievances dating back to September 30, 2009, when Ms. Mascareñas told her employer she had been diagnosed with breast cancer.[1] I know this because CX 57 comprises a list of those grievances, and in some form CX 57 has been part of the record in this matter virtually since the beginning. It was attached as Exhibit 6 to the complainant's opposition to Respondent's Motion for Summary Decision. In my order denying that motion (CX 6, pp. 77-87), in a discussion with the parties before the hearing, and at the outset of the hearing (TR p. 10, line 12 – p. 11, line 5), I indicated my concern that much of the information the complainant wished to introduce seemed to have very little relevance to a claim under the Act. Nevertheless, Ms. Mascareñas introduced CX 57 into evidence at the hearing, and in her post-trial brief argues CX 57 "is provided to show a pattern of behavior on the part of Hotel management that intensified when Complainant advised them in April, 2010 of regulatory requirements for a contracted operation on behalf of a third party, the Courtyard, and continued until August, 2014" (Complainant's Post-Trial Brief, p. 2). This argument is significant for two reasons.

First of all, an objectionable "pattern of behavior on the part of Hotel management" lasting from April, 2010, through August, 2014, as we will see, would have begun long before, and continued long after, the "protected activity" in this case. It is entirely counterintuitive to suggest that Respondent began retaliating against her up to a year before it had anything, under the Act, to retaliate against. Likewise, when the record clearly shows friction between the parties on numerous matters in the meantime, it is at least partly counterintuitive to suggest that

[1] At that time, Respondent neither owned nor operated the Fairfield Inn & Suites (TR p. 156, lines 1-16), although according to Ms. Mascareñas, many of the same individual managers supervised her work both before and after Respondent took over.

Respondent continued retaliating for eighteen months after the most recent protected activity. Without a doubt, Complainant establishes that she and Respondent have had vigorous disagreements over more than four years. But in a proceeding under the Act, I do not pass judgment on the quality of the relationship between employer or employee; and even if I think the relationship is bad, it makes no difference to me which party deserves the most blame for making it so, unless and until the employee engages in protected activity, and the employer retaliates in violation of the Act. Of course an employer can be thoughtless, unkind, stupid, short-sighted, offensive, insulting, cruel, and unfair, without violating the Act; just as an employee can be disrespectful, insubordinate, argumentative, and critical without engaging in protected activity. In this proceeding, any such behavior is beside the point. Ms. Mascareñas argues "[a]lthough the initial years of the adverse actions against Ms. Mascareñas do not fall within the purview of this Court, it is relevant in that it led to the attitudes and relationships that are in place today" (CX 29, p. 182). But the Act does not address relationships or attitudes, and does not require employers and employees to be happy with each other. Consequently, this proceeding strikes me as a very poor vehicle for addressing six years of accumulated disputes, most of which have nothing to do with retaliation for protected activity under the Act.

The unsuitability of this proceeding for addressing the majority of Complainant's complaints brings me to the second point. Her use of this proceeding to address matters beyond the scope of the Act disadvantages both Respondent, which comes before the court uncertain of which complaints against it are truly in issue, and the court, which must essentially disentangle the relevant facts, and find a colorable theory of liability under the Act, from the mass of Complainant's other grievances. At the hearing, I discussed with the parties CX 11, which pertains to Ms. Mascareñas's efforts to remove an ethnic stereotype from a school textbook. It, too, appeared to me to have nothing to do with the issues before me (TR, p. 11, lines 3-9), and still does. But she argued it was relevant because

> It's not about negotiation, it's about being passionate about what I believe in. Even if I encounter resistance or roadblocks, I am passionate about safety, integrity, and excellence in customer service. If you see something – say something. I've been saying it for five years. Again, "What do we have to do, kill someone?"
>
> The fearless negotiating was about negative stereotyping in a modern textbook. To this day, if that book had not been pulled and republished – and it was pulled by McGraw Hill, they pulled their own textbook and they revised it, once I brought up the negative stereotyping. There was no stomping on me. You can't teach children, out of a textbook, negative

> stereotyping. There was no negotiating. It was a power of passion, just like this is.
>
> When this is over, I move forward with a different venue. It's not going to stop (TR p. 20, line 17 – p. 21, line 1).

Ms. Mascareñas has every right to feel as passionate as she wishes about any cause she believes in, and I have no doubt she is convinced she is in the right with respect to all of the complaints and frustrations she details in CX 57. In fact, she closes her post-hearing brief by observing

> Claimant is "old school" and believes in always doing the right thing. She also believes in the power of passion and has stayed the course in her quest to see the Hotel's Transportation Department re-emerge as a safe operation while adhering to the tenets of sound operating principles (Complainant's Post-Hearing Brief, p. 20).

I take her at her word. Unfortunately, it is not within my power to vindicate her criticisms of the Hotel Transportation Department in these respects, as by now she must surely realize. "Staying the course" with respect to irrelevant issues, and passion that interferes with objectivity and distorts testimony, very soon cease to be virtuous.

I now consider the evidence of record. Since the evidentiary record is closed, I strike the first three paragraphs under the heading "Argument" from page 4 of Complainant's Post-Hearing Brief and do not consider them.

I. THE COMPLAINANT'S *PRIMA FACIE* CASE

1. The Complainant Engaged in Protected Activity

In this case, the evidence shows Ms. Mascareñas engaged in protected activity on at least three occasions: 1) when she complained to the Occupational Safety and Health Administration on October 10, 2012, about exposure to noxious fumes in one of the hotel's shuttle vans (CX 7, p. 1); 2) when she complained to OSHA on February 1, 2013, about having been given a low performance rating allegedly because of her raising safety concerns regarding the hotel's airport shuttle vans (CX 1, p. 1); and when she complained, on or about February 3, 2013, to the Colorado State Patrol Motor Carrier Safety Section about the hotel shuttle vans, resulting in an investigation (CX 12, CX 13). At the hearing, Complainant contended there had been a fourth protected activity, a complaint to the Colorado Public Utilities Commission in April, 2011 (TR p. 32, line 8 – pp. 33, line 12; CX 62,

p. 498),[2] and the record suggests another complaint to the PUC on or about July 20, 2012 (CX 62, pp. 499-506).

2. The Respondent Knew of the Protected Activity

The evidence also shows – indeed, Respondent does not dispute – that it knew of at least the first three incidents, and possibly all, of the protected activity (TR p. 34, lines 5-17). Thus, I find Ms. Mascareñas has established the first two elements of her claim.

3. The Complainant Suffered an Adverse Employment Action

The third element is more difficult. The Act declares an employer "may not *discharge* an employee, or *discipline* or *discriminate against* an employee *regarding pay, terms, or privileges of employment*" (emphasis added) because the employee engages in protected activity. At the outset of the hearing, I asked Ms. Mascareñas to specify the adverse actions she believed Respondent had taken against her:

> Q: And let's go now to the adverse employment action. Your pay had not been decreased since October of 2012, has it?
>
> A: No.
>
> Q: And you still have the job?
>
> A: Yes.
>
> Q: Okay. The adverse employment action, as I understand it, is that there are three corrective disciplinary records issued by the company, that are now in your personnel file. And they are at your exhibit – Complainant Exhibit 14, Complainant Exhibit 16 and Complainant Exhibit 55. Is that right?
>
> A: I'm going to say yes.
>
> Q: Okay. Are there any other adverse actions, under the statute, that you contend, today, that the hotel took against you, for your protected activity – or are those the three things we're talking about?

[2] I admit to some confusion on this, because the documents to which Ms. Mascareñas referred at the hearing (CX 62, pp. 493-497) have to do with a dispute over whether her employer had properly credited her vacation time, a complaint which is *not* "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order" under 49 U.S.C. §31105. But CX 62, p. 498, suggests she had complained to the PUC about "unsafe vehicles" sometime before September 19, 2011.

A: So, the continued harassment, that's, again, the 31 records of conversation.

Q: Okay. You're contending that the records of conversations are adverse actions?

A: Well, I'm taken into – I am always taken into the office with anywhere from one to four managers.

Q: Okay.

A: Yes.

Q: And that's happened several times, and that's documented in the record?

A: And it seems to have happened all after May 1st.

Q: Yeah, okay.

A: 2013.

Q: Okay. Anything else?

A: No. (TR p. 35, line 7 – p. 36, line 13)

Again, the most striking factor of this testimony is what it excludes. Ms. Mascareñas has not lost her job. Her pay has not been reduced. Her working hours and her job duties are no different. The adverse employment actions she identified at trial fall into two categories. She specifically objects to the creation of three documents, Claimant's Exhibits 14, 16, and 55, which bear the heading "Corrective Disciplinary Record." Additionally, she objects to thirty-one "Records of Conversation," documents memorializing oral communications with the complainant, or in some way pertaining to her job performance.

In her post-hearing brief, Complainant for the first time identified two more "adverse employment actions:" 1) "a series of two- and three-on-one meetings (numbering about 18 beginning in July, 2010 and continuing through June, 2014);" and 2) Mr. Ramirez's affidavit, CX 28 (Complainant's Post-Hearing Brief, p. 2). At the hearing, I understood the first of these to be included in Ms. Mascareñas's objection to the "Records of Conversation," and I have treated these meetings accordingly in this decision.[3] As for CX 28, whatever else it may be, there is no

[3] Even though some of those meetings must have taken place long before, and some of them long after, the protected activity between April, 2011, and February, 2013. Any such meetings that occurred before the protected activity, of course, cannot possibly comprise retaliation, and at some point after the protected activity, the temporal proximity becomes irrelevant. I nevertheless proceed

evidence in the record before me that it is an "adverse employment action." It has no apparent punitive or disciplinary purpose. On its face, it appears calculated to support Respondent's position in this, and perhaps in other, contested matters. Respondent is entitled to defend itself in litigation, and, in fact, submitted CX 28 as Exhibit 14 to its Motion for Summary Decision in this case. Ms. Mascareñas's objection to CX 28, according to her brief, is that it "contains statements, accusations, innuendoes, and fabricated information intended to cast aspersions on Complainant's character and integrity and which are in direct conflict with Discovery evidence obtained from Respondent" (Complainant's Post-Hearing Brief, p. 2). Be that as it may, CX 28 has been in the record in this case long before Ms. Mascareñas decided to categorize it as an "adverse employment action," even when she had the opportunity to do so. And it comes as no surprise to me, and I cannot imagine as any surprise to Complainant, that Mr. Ramirez has some unflattering things to say about her, as she does about him. I conclude Complainant has introduced no evidence to show that CX 28 is an adverse employment action.

"Corrective Disciplinary Records" as an Adverse Employment Action

The Act prohibits an employer from *disciplining* an employee for protected activity. CX 14, 16, and 55 all bear the heading "Corrective Disciplinary Record," and accordingly, Respondent cannot convincingly deny that they are intended as a form of discipline, however mild the consequences of that discipline may appear. If Ms. Mascareñas's protected activity was a contributing factor to this discipline, the Act prohibits it.

"Records of Conversation" as Adverse Employment Actions

The "Records of Conversation,"[4] by contrast, do not identify themselves as a disciplinary measure on their face.[5] But I can imagine two circumstances under which they might run afoul of the Act nonetheless.

First, I am not bound by the fact that Respondent labels them as non-disciplinary in nature. It is conceivable that an employer who wished to get rid of a troublesome employee might want to "make a record" – just as litigants anticipating

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with my analysis on the assumption that some of the meetings may have taken place soon enough after the protected activity to matter. I remain confused by the complainant's testimony at the hearing, cited above, that "it seems to have happened all after May 1st" of 2013 (TR p. 26, lines 3-11).

[4] "Records of Conversation" appear in the record at CX 18, p. 134; CX 31, p. 217; CX 40, pp. 305, 306, 307, 308, 309; CX 41, pp. 322, 323; CX 42, p. 324, 328; CX 43, pp. 334, 335; CX 44, p. 338; CX 45, pp. 342, 343, 344, 345-346; CX 46, pp. 347-348; CX 47, pp. 364-365, 366; CX 49, pp. 382-383, 388; CX 51, pp. 390, 391-392; CX 53, p. 414; CX 62, first page (before p. 493 but after p. 492) and p. 497; as well as RX 17, RX 18, RX 19, and RX 23.

[5] On the contrary, most, if not all, of them bear the legend "For all disciplinary action, please use the Corrective Disciplinary Record (CDR) form." This legend is consistent with the notion that a "Corrective Disciplinary Record" *is* intended as a form of discipline, while the "Record of Conversation" is not. *See also* TR p. 165, line 15 – p. 166, line 7.

an appeal sometimes do – that would justify termination in the future on grounds other than the troublesome employee's protected activity. Of course, divining Respondent's intention is difficult both for an employee and for the court. It will turn in large measure upon whether Respondent has a legitimate non-retaliatory purpose for the practice. A whistleblower, while exempt under federal law from any form of discipline resulting from his or her protected activity, nevertheless has the same obligation to follow company policy, speak and behave respectfully, and follow legitimate employer instructions as a non-whistle-blowing employee, and is not exempt under the Act for any failure to do so.

Second, the Act prohibits not only discharge or discipline, but even *discrimination* against a whistleblower. By prohibiting mere discrimination, the Act recognizes that an employer has many other tools beyond discharge and discipline to make a whistleblower's life miserable, and I have no doubt the Act intentionally restrains those other tools, as well. In this case, Ms. Mascareñas contends the records of conversation, and the underlying meetings, evidence "continued harassment," by which she might well mean prohibited *discrimination* – that, for example, she is taken into an office to be confronted by three or four managers, while another employee charged with an offense of comparable gravity would be allowed an opportunity to explain himself or herself in less-intimidating circumstances.

Unfortunately, deciding the question of whether the "Records of Conversation" comprise an "adverse employment action" for the purpose of evaluating the complainant's *prima facie* case takes me into disorienting legal territory.

The problem is this: unlike the "Corrective Disciplinary Records," which are unambiguously disciplinary in nature, the "Records of Conversation" – and the larger practices of meeting with the complainant and documenting conversations about, or with, her, and maintaining those documents – comprise an "adverse employment action" only depending on the context in which they occur, as I have stated above. If they do *not* comprise an "adverse employment action," I do not need to consider them any further. If they *do* comprise an "adverse employment action," I will have to go on to decide whether the complainant's protected activity was a "contributing factor" in the adverse employment action. But in this case, I cannot reach step four – considering whether protected activity was a "contributing factor" – without first answering the very same question at step three, to determine whether the "Records of Conversation" comprise an "adverse employment action" to begin with. And at steps three and four, the burden of proof may rest on a different party, and the standard of proof may be entirely different. Under *Fordham* v. *Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB October 9, 2014), and the more recent *Powers* v. *Union Pacific Railroad Company*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB April 21, 2015), it is Respondent who must justify, by clear

and convincing evidence, the reasonableness of its actions; *but only those actions which comprise an "adverse employment action" to begin with*.

I conclude, under *Ferguson* v. *New Prime, Inc.*, ARB No. 10-75, ALJ No. 2009-STA-47, p. 3 (ARB August 31, 2011); *Clarke* v. *Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, p. 4(ARB June 29, 2011), that it is the complainant who must show, by a preponderance of the evidence, that the "Records of Conversation," or the practicing of documenting conversations with or about her, comprise an "adverse employment action" in her case. The facts of this case demonstrate they do not.

First, any reasonable employer would document conversations with an employee who complained of unfair and dishonest treatment by her supervisors. According to CX 57, as early as July 19, 2010, Ms. Mascareñas complained about a performance review that, in her view, did not take into account that different managers were assigning her work without coordinating with each other; and did not take into account her "recognized accomplishments and awards." She also accused manager Shauna Whitney at that time of falsifying time records to conceal Ms. Mascareñas's overtime from the Regional Manager (CX 57, p. 437). In February, 2011, she complained that management had refused to recognize vacation time she had earned (CX 57, p. 439). Given these complaints, it would have been imprudent for Respondent *not* to keep records of conversations with Ms. Mascareñas.

Ms. Mascareñas not only complained, but complained forcefully. According to Ms. Whitney:

> In particular, the last couple of years have definitely been challenging. Anytime we talked to [Ms. Mascareñas], it ends up being a debate of sorts. No matter what the direction is, no matter what the intent is, no matter how we speak with her, there is always a rebuttal of some sort or another complaint, that either goes back to me, to Rich, or to my boss and by boss' boss and everyone else. And so it's just been challenging. We've really – she was amazing, when she first started for me. She's – I'm sure in her documents she has records of it. She was an exceptional employee. And she still is, very much so, with the guests. But everything that I talk to her about is met with aggression and irritation and just open hostility (TR p. 164, lines 5-17).

Ms. Mascareñas filed several written rebuttals to her employer's records (*see, for example,* CX 15, CX 17, CX 26, CX 29, CX 31, CX 36, CX 37, CX 38, CX 39, CX 40, CX 41, CX 42, CX 43, CX 44, CX 45, CX 46, CX 47, CX 49, CX 50, CX 51, CX 52, CX 53, CX 56, CX 62, CX 63). In these, she acknowledges she "has a less than

cordial attitude towards this management team" (CX 29, p. 183). She asserts "with respect to a shuttle van transportation operation, she does indeed know more than anyone else at the hotel" (CX 29, p. 180). She accuses Respondent of mismanagement and nepotism, with a tinge of insubordination into the bargain. For example, in response to CX 14, documenting a warning to her not to report a missing proof-of-insurance card on the DVIR form, she wrote a two-page letter to her supervisor indicating she had discussed the gravity of driving without proof of insurance "with several police officers," outlined the criminal penalties she might face for violating a specific state statute on the subject, and demanding that he remove CX 14 from her file (CX 15) – all without acknowledging, as she did at the hearing, that she could easily report the very same problem in a manner consistent with her supervisor's instructions (TR p. 45, line 12 – p. 50, line 17). Criticized in CX 16 for being "argumentative and openly hostile" at a department meeting, Ms. Mascareñas replied that her supervisors "seemed confused as to how to resolve the conflict" between their interpretations of policy, and added, "I suppose neither one is accustomed to anyone questioning their knowledge and/or authority" (CX 17, p. 133). In an October 2, 2011, memo to the General Manager, Ms. Mascareñas concludes her detailed complaints about a fellow employee, Clara Schneider, by observing "[i]t appears to most that policies and procedures do not apply to Clara, and having a direct blood line to the Transportation Department Manager has its perks/privileges/benefits" (CX 36, p. 278). In December, 2011, after her employer criticized her for allegedly soliciting job-recommendation letters from employees she would supervise if she got the job, Ms. Mascareñas wrote that the criticism "shows `how little [management] know[s] about principles of effective management. A good manager will strive to foster and keep a good relationship with his or her subordinates. Managing by motivating instead of intimidating always bears more fruit" (CX 27, p. 285). No prudent employer would fail to alert the supervisors of an employee who had said such things to keep careful records of conversations with or about her.

Second, there is no evidence in the record, apart from the complainant's own subjective dislike of the procedure, to show Respondent singled Ms. Mascareñas out for particular treatment when it met with her, or documented conversations with or about her. The record does not show me to what extent, if any, Respondent has maintained "Records of Conversation" with respect to other employees, much less other employees who had been similarly forceful about management's perceived shortcomings. I cannot conclude, on the record before me, for example, that Ms. Mascareñas is called in to speak with several managers at one time, while an employee charged with an offense of comparable gravity is allowed to discuss the matter in less intimidating circumstances. The record provides no reliable example of Respondent dealing with a different employee in comparable circumstances.

Third, as I discussed above, the meetings about which Ms. Mascareñas complains in her brief began in July, 2010, and continued through June, 2014, while the earliest protected activity in this case took place no earlier than April, 2011, and

most recently in February, 2013. Respondent could not possibly have retaliated against Ms. Mascareñas in July, 2010, for protected activity that hadn't happened yet, and, by her own admission, the Respondent's practice of counseling her was in place both long before, and well after, the protected activity occurred.

Fourth, as discussed more thoroughly below, Ms. Mascareñas's testimony is not credible in important respects.

Fifth, to date, at least, there is no evidence that the documentation of conversations has in any way affected Ms. Mascareñas's pay, or terms or privileges of employment. There is no evidence, beyond the complainant's own speculation about what may happen in the future, that she has suffered any untoward consequence of any kind by reason of Respondent's documentation.

I emphasize it is not any one of these factors, but the presence of all of them together, which persuades me the "Records of Conversation," Respondent's meetings with the complainant, and its practice of documenting conversations with or about the complainant and the performance of her job, do not comprise "adverse employment action" on the record before me.

4. The Protected Activity Was a Contributing Factor

The final element of the *prima facie* case is a showing that the protected activity was a "contributing factor" to the adverse employment action. The notion that the protected activity must be a "contributing factor" in the adverse employment action represents a change from earlier case law. Under the 2007 amendments to the Act, I must decide this claim under the so-called "AIR 21 standard," as set forth in 49 U.S.C. §42121, subsection (b):

> The complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent's reason for the unfavorable personnel action was pretext, or that the complainant's activity was the sole or even predominant cause. The complainant "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination." . . . Thus, for example, a complainant may prevail by proving that the respondent's reason, "while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity." Moreover, the complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence.
>
> If the complainant proves that his/her protected activity was a contributing factor in the unfavorable personnel action, the

> burden shifts to the respondent, in order to avoid liability, to prove "by clear and convincing evidence" that it would have taken the same adverse action in any event. "The 'clear and convincing evidence' standard is the intermediate burden of proof, in between 'preponderance of the evidence' and 'proof beyond a reasonable doubt.' To meet the burden, the employer must show that 'the truth of its factual contentions is highly probable.'" Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain."

Beatty v. *Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Case Nos. 2008-STA-020, 2008-STA-021 (ARB May 13, 2014), citations omitted. This two-step analysis represents a departure from the three-part analysis applied in older cases under the Act. The former three-part analysis derived from Title VII of the Civil Rights Act of 1964, *see McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802-804 (1973). The current two-part "contributing-factor" standard "is far more protective of complainant-employees and much easier for a complainant to satisfy than the *McDonnell Douglas* standard." *Beatty, supra; see also Ass't Sec'y & Bailey* v. *Koch Foods, LLC*, ARB No. 14-041, ALJ No. 2008-STA-61, pp. 3-4 (ARB May 30, 2014).

One of the difficulties in applying this standard appears in *Fordham* v. *Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB October 9, 2014), and in *Powers* v. *Union Pacific Railroad Company*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB April 21, 2015), particularly in the dissenting opinion. Following the AIR 21 standard has enmeshed the courts in questions of relevance, and trying to distinguish "complainant's evidence" from "respondent's evidence," at various stages of decision. In my view, these cases instruct that a complainant is not to be thrown out of a hearing, especially at an early stage, simply because his or her employer can rationalize an adverse employment action with an explanation unrelated to protected activity. A complainant, at least in some cases, need not offer direct evidence of the employer's intention. And an employer's explanation of its conduct is not necessarily to be taken at face value when evaluating a complainant's *prima facie* showing. Ultimately, *Fordham* and *Powers* deal with the question of when it is fair to require the employer to prove, by clear and convincing evidence, that its "adverse employment actions" did not comprise retaliation for protected activity.

In the case of the "Corrective Disciplinary Records," the question is easy. As we have already seen, the evidence shows Respondent intended these as disciplinary measures. Their temporal proximity to the protected activity, and the employer's knowledge of the protected activity, is sufficient in this case to warrant shifting the burden of proof, under the more demanding standard, to Respondent.

In the case of the "Records of Conversation," and Respondent's practice of documenting conversations with or about the complainant generally, the question is

not easy. I have concluded above that these do not constitute "adverse employment action" at all. The complainant introduced into evidence all of the documents on which I relied to reach that conclusion, except for the lack of evidence regarding whether the practice was discriminatory, and, on that question, it was the complainant who failed to introduce any such evidence. However, for the sake of judicial economy, I will, in the alternative, consider them a second time below, as if Respondent had the burden of proof to demonstrate, by clear and convincing evidence, that they do not comprise retaliation for the complainant's protected activity.

II. THE RESPONDENT'S DEFENSE

Once a complainant makes a *prima facie* showing under the Act, the burden shifts to the employer to show, by clear and convincing evidence, that it had a legitimate, non-retaliatory reason for the adverse action, and would have taken the adverse action even if the protected activity had never happened. *Beatty* v. *Inman Trucking Management, Inc.*, *supra*. I conclude Respondent does so in this case.

The Corrective Disciplinary Records Do Not Violate the Act

I first consider the Corrective Disciplinary Records, CX 14, 16, and 55.

CX 14

According to CX 14, p. 214, on April 3, 2013, a supervisor gave Ms. Mascareñas a verbal warning that she should not report, on a Drivers Vehicle Inspection Record (DVIR), a vehicle's lack of a current proof-of-insurance card. At the hearing, Ms. Mascareñas acknowledged that she understood her supervisor did not want her to report a missing proof-of-insurance card on the DVIR form; that she knew three other methods she could use to report a missing proof-of-insurance card to him; and that when she reported the missing card on the DVIR form, she knew she was ignoring her supervisor's instructions not to use the DVIR form for that purpose (TR p. 45, line 12 – p. 50, line 17). Because Ms. Mascareñas herself admits these facts, I conclude Respondent would have issued CX 14 regardless of her previous protected activity.

CX 16

According to CX 16, on May 1, 2013, supervisors met with Ms. Mascareñas to discuss four separate incidents of her failure to follow directions or hotel policies, and gave her a written warning. They included 1) Ms. Mascareñas's continuing to drive a van on October 9, 2012, after complaining of a "rotten egg smell" that was causing her to feel sick; 2) Ms. Mascareñas taking photographs in and around the hotel without permission, and in violation of instructions from a supervisor; 3) transporting, in a hotel shuttle, a passenger who was not a guest of the hotel, without permission; and 4) being "argumentative and openly hostile" during an

April 23, 2013 department meeting at which the proper use of the DVIR form was discussed.

With respect to the first issue, Ms. Mascareñas testified at the hearing that she noticed a foul odor in the shuttle van she was driving on October 9, 2012 (TR, p. 64, line 22 – p.65, line 5). She reported the condition over the radio about halfway through her shift, and at about 11:00 in the morning, possibly 11:30, she brought the shuttle back to the Springhill Suites hotel so that her supervisors, Mr. Ramirez and Mr. Schneider, could see the problem (TR, p. 68, lines 4-23). When she arrived at the hotel, her eyes were burning, "burning from my nose to my throat," and she told her supervisors she had headaches and nausea from the odor (TR, p. 69, lines 1-8). Her further testimony on this point is instructive:

> Q: You stopped the van at the Springhill Suites, and did Mr. Schneider and Mr. Ramirez meet you and walk around the van?
>
> A: They both got into the van. Eric went in first, they went directly to the back of the van and I thought that was strange, because it seemed like Mr. Schneider knew something was wrong with the van. But I didn't think it was the interior, I thought it was on the exterior. But I said – because they acted like they didn't smell anything, when they got into the van, and I said, "You don't smell anything?" And Eric never said a word, throughout the whole time I saw him – Mr. Schneider. And then Rich Ramirez said, "Oh, yeah, we smell it."
>
> Q: And at this time you were still – did you say to them, you know, listen to my voice, I'm coughing, I'm hacking, those kinds of things?
>
> A: I wasn't hacking. I had –
>
> Q: Coughing?
>
> A: -- a cough and I had a burning sensation in my eyes, nose and throat.
>
> Q: Did you tell them that?
>
> A: Yes. And neither asked me if I was okay. They never – there was nothing.
>
> . . .

Q: Okay. So I understand your testimony is that neither of them ever said anything about getting a different van, is that right?

A: No, neither one.

Q: So, let me make sure I've got this straight. You were near the end of your shift and you stopped to report this problem, right?

A: No.

Q: You waited –

A: I was asked to bring the van to Springhill.

Q: You reported the problem over the radio, right?

A: I said yes, there was an odor, fumes.

Q: So you reported the problem over the radio and were asked to come to the Springhill Suites, right?

A: Yes.

Q: Mr. Schneider and Mr. Ramirez – or Mr. Ramirez confirmed that he could smell something, right?

A: Yes.

Q: You explained to them that you had burning eyes and coughing and respiratory distress and those kinds of things, right?

A: Yes.

Q: And they clearly saw you in distress. In fact, you're annoyed that they didn't ask you how you were doing, is that right?

A: No.

Q: They saw you in distress?

A: It's typical.

Q: They saw you in distress – you complained about it?

A: I told them what I was feeling.

Q: And so, according to your testimony, they didn't even give you the option of switching vans?

A: They looked at me – I waited for them for direction. I had two managers right in front of me, one a brand new manager. I waited for direction. Neither one gave me any.

Q: So, your testimony is neither one of them even gave you an option of switching vans?

A: They made no statement, whatsoever, aside from Rich said that – Mr. Ramirez said that he was taking the van to Brakes Plus that afternoon. And I said "Brakes Plus?" I was kind of surprised, you know, that he was taking it to Brakes Plus. And I did tell them that that van would never make it into – when we were going to get the new vans. They were due six weeks before Mr. Ramirez was hired.

. . .

Q: Now, given the physical state that you were in, did you consider – did you – consider the van to pose a health risk to you?

A: No.

Q: You didn't?

A: I didn't realize that I was inhaling all of that, no, I didn't.

Q: What did you think – why did you think your eyes were burning?

A: That was at the very end. Because I thought, when I would go to load the luggage, the exhaust pipe on the old vans was coming right out, where you bend over to lift the luggage to put it in the van. Exhaust fumes are coming right out at me. I really did not realize. Then I would get in the van, I thought it was all on the outside of the van. So, I kept the window closed. Again, I drive an eight-hour shift without lunch or breaks.

Q: You stopped at the Springhill Suites at approximately 11:15 o'clock a.m. with burning eyes, burning nose, burning throat,

coughing and respiratory distress from driving the van. And you didn't think that it posed a health risk to you?

A: I didn't realize it. I did not realize it. That was towards the very end of my shift, I had – and I believe that's correct – one run left.

Q: You filed an OSHA complaint?

A: No, I did not realize it.

Q: You filed an OSHA complaint the very next day, about the van, so you clearly must have realized that there was a health concern, right?

A: Mr. Lorenger, when I'm in the van, I wasn't talking, you know, when I'm driving and if I'm by myself or driving, a lot of times I'm not talking. I realized, when I was talking, that my voice changed and I could feel the burning sensation. I did not feel all that in the beginning. It took – towards the very end of my shift, that I realized, when I got to Eric Schneider and Rich Ramirez, I really thought the headache was because I hadn't eaten. I always eat in the morning, and I didn't that one day and I really thought the headache was from having not eaten.

Q: Go ahead and look back at this letter that I gave you, this June 24th, 2013 letter that you and Mr. Fontaine wrote to Mr. Pope?

A: Um-hum.

Q: Do you see, in the second paragraph – and take your time to read the whole paragraph – but you say in this letter, that you told Mr. Schneider and Mr. Ramirez, quote, "Listen to my voice, I'm burning from my nose to my upper chest, I'm nauseous, I have a headache and my eyes are burning," end quote. Is that what you told them?

A: Yes. I had just started feeling all that.

Q: And you knew that that was because you had been driving the stinky van, right?

A: We always drove that way.

Q: That's not my question. That's not my question. You know that the symptoms you were suffering, at that time, were the result of your having – at least you believed that they were the result of your having driven that van, is that right?

A: I didn't think that at the time, no. I really did not realize what was happening.

Q: Why did you make a point of telling Mr. Ramirez and Mr. Schneider – I'm not done with the question – why did you make a point, at that moment, at the Springhill Suites, of telling Mr. Ramirez and Mr. Schneider, "Listen to my voice, I'm burning from my nose to my upper chest, I'm nauseous, I have a headache and my eyes are burning." Why did you tell them that, when they were –

A: Because I had felt that.

Q: And you're telling –

A: Because then I felt it.

Q: -- you're telling us, under oath, that you didn't have any inkling of an idea that that was being caused by the van, that you had just reported as being smelly and brought in?

A: Yes, that's what I'm telling you. Yes. I did not realize it (TR p. 74, line 6 – p. 81, line 2).

I cite this testimony at length[6] because it is incredible, as is much of Ms. Mascareñas's testimony in this matter, much more reliable as an illustration of her power-of-passion theory of litigation than as an objective account of what happened at a particular place at a particular time. According to CX 16, Ms. Mascareñas did

[6] And I've omitted a considerable quantity of it. The logical contortions continue at TR p. 81, line 10 – p. 92, line 12. I find it more than coincidental than I had observed, in my order denying Respondent's Motion for Summary Decision, "[i]f I were to weigh the evidence today, I would think it significant that Ms. Mascareñas never alleges that she continued to drive the van because she had no choice in the matter. On the contrary, on May 5, 2014, she stated she continued to drive the van because she was late for her last trip to the airport (Exhibit 7, p. 1). She does not allege that her employer expressed any concern to her whatsoever about her being late, or that her employer expressly directed her to keep driving the van in spite of the smell. What is more, according to her Timeline, attached to her Brief in Opposition as Exhibit 6 [CX 57 in the hearing record], she had refused on January 4, 2012, to drive a shuttle van in violation of airport security regulations. This raises the question of why she did not refuse to continue driving the malodorous van the following October, regardless of what anyone else said or did not say" (CX 6, p. 83, final paragraph). Ms. Mascareñas's testimony at the hearing raises a different question: why did she complain about the van in the first place, if she thought she was not taking any risk by continuing to drive it?

not follow her supervisors' instructions. Ms. Mascareñas becomes so wrapped up in trying to prove she received no instructions that she ends up testifying in essence that there was no reason for her supervisors to instruct her in the first place, a significantly different version of the events than she had told previously.[7] Her testimony on this point is so wildly improbable that I cannot give it any evidentiary weight at all.

The second criticism in CX 16 has to do with the taking of photographs in and around the hotel. At the hearing, Ms. Mascareñas testified that Mr. Ramirez had told her, on or about March 5, 2013, that she should not take pictures of the shuttles or of hotel property without permission (TR p. 104, lines 3-21). She did not remember taking any additional photographs between the time Mr. Ramirez spoke to her and the April 30 meeting which CX 16 documents (TR, p. 107, lines 2-10), but she did not deny taking such photographs in her written response to CX 16, dated May 5, 2013 (CX 17, pp. 132-133; TR, p. 111 line 2 – p. 133, line 5). In fact, in that response, she wrote

> I did take some photographs to assist medical care providers in deciding treatment options after on the job injuries. I understand that Rolanda had taken pictures of meeting rooms that she had prepared and she had shown them to Chris Feaster. I mentioned to her that this was against hotel policy and she said that Chris never said anything. So I assumed it would be all right in my case given the circumstances surrounding my injuries (CX 17, pp. 132-133).

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[7] For example, she wrote to the Directorate of Whistleblower Protection Programs on May 10, 2014, asserting she had been "overcome by unknown fumes" on the day of the incident (CX 27, pp. 167-168). She previously claimed she had told Thera Irey, Assistant General Manager of the hotel, at the end of her shift, in the presence of a witness, "that the van I had been driving was a serious problem" (CX 19, p. 137). In her version of the events in CX 57, she writes, "I was overcome by sulfur dioxide fumes after driving one of the hotel vans (#1) for an eight hour shift. The battery was later found to be heavily sulfated and fizzing, releasing toxic sulfur dioxide fumes. I was transported by ambulance to a hospital emergency room. . . . Towards the end of my shift I had asked two managers . . . if they could smell fumes in the van as guests were coughing and covering their noses complaining about the smell around the hotel shuttle van. I advised the managers "listen to my voice, my eyes are burning, I'm burning from my nose, throat and upper chest, I have nausea and a headache.' . . . No concerns for my well being were ever expressed by either of the managers." The next day, she "drove down to the Denver OSHA office and filed a verbal complaint with OSHA regarding the operation of the van I was overcome in the previous day" (CX 57, pp. 444-445). In her October 10, 2012, complaint to OSHA, she reported "An operator for van #1 was taken to the hospital on October 9, 2012 due to potentially inhaling fumes while operating the vehicle. Employees report headaches, nausea, and other adverse health effects while operating van #1" (CX 7, p. 88). In a recorded statement about the incident on November 1 and 2, 2012, Ms. Mascareñas said she had intended "to try and switch vans" even before Mr. Ramirez and Mr. Schneider inspected it (CX 20, p. 140).

This statement implicitly admits there was a hotel policy against taking pictures on hotel property, and expressly admits that Ms. Mascareñas was aware of that policy, and took photographs in violation of that policy because a co-worker told her a supervisor had not objected when he might have inferred the co-worker had done so. What is more, witness Shauna Whitney, Respondent's Area General Manager (TR p. 155, lines 8-25), testified that she personally heard Ms. Mascareñas admit, in a meeting with supervisors, to having taken photographs after having been instructed not to (TR p. 190, line 1 – p. 191, line 2).

The third criticism in CX 16 is that Ms. Mascareñas allowed a passenger who was not a guest of the hotel to ride the shuttle without the approval of the General Manager. At the hearing, Ms. Mascareñas testified that the hotel had a policy against transporting passengers, other than guests of the hotel, in the shuttle vans, without advance permission from hotel management (TR p. 94, line 14 – p. 96, line 1; p. 101, lines 5-13). She testified that she knew of that policy (TR p. 94, line 21 – p. 96, line 1; p. 101, lines 5-13). She testified that she invited an investigator, Cruz Watkins, to ride the shuttle, and did not notify hotel management before he did (TR p. 96, lines 2-17; p. 101, lines 5-13). At different times, she has advanced different justifications for her failure to follow the policy; saying she thought Mr. Watkins, a state official, did not need permission to ride the shuttle (TR p. 98, lines 8-12; p. 101, lines 5-13); or that she did not learn Mr. Watkins was going to ride the van until shortly before he did (TR p. 98, line 13 – p. 99, line 14); or, in an argument she raised for the first time after the hearing, that she had expected Mr. Watkins himself to notify the hotel.[8] These changing rationalizations persuade me Ms. Mascareñas, with the power of her passion engaged, in truth gave no thought to the policy at all. Consequently, I conclude Respondent would have reprimanded her regardless of her earlier protected activity.

The final criticism in CX 16 is that Ms. Mascareñas was "argumentative and openly hostile" at a department meeting. Her supervisor, Richard Ramirez, who conducted that meeting, testified

> . . . Ms. Mascareñas would pretty much jump in and disrupt my speech, asking questions about the DVIR program – which I had already answered to her, many times. And again, it wasn't so much that she was asking questions, it's how she was asking. It was in a disruptive motion, very angry, just very disruptive. It wasn't in a general view, when you're in a meeting with somebody and you ask questions, you know, I

[8] In her post-hearing brief, Ms. Mascareñas argues, "Whenever investigators from the Colorado PUC, OSHA, or the Colorado State Patrol were going to come to the Hotel, they called with advance notification. [I] assumed that if a Department of Labor investigator was going to come to the Hotel, he/she would have done likewise" (Complainant's Post-Hearing Brief, p. 12). She did not so testify at the hearing, and I see no evidence to support this assertion anywhere else in the record before me. This practice of justifying her actions *ex post facto* also reflects negatively on her credibility.

> really don't understand – it was, again, it just seemed like it was her goal to embarrass me, to make me look bad in front of the other drivers. And it seemed like her goal was just to disrupt the meeting and then make things as hard as possible for me (TR p. 220, line19 – p. 221, line 5; *see also* CX 27, pp. 364-365).

In her written response to CX 16, Ms. Mascareñas identified Mr. Ramirez as one of the supervisors who was "not accustomed to anyone questioning [his] knowledge and/or authority" (CX 17, p. 133). In a written response to his statement that Ms. Mascareñas "is the most negative employee I have reporting to me" (CX 28, p. 169, ¶ 7), she asks rhetorically, "After four years of harassment and retaliation by this management group, what would he expect?" (CX 29, p. 174). In general, according to Mr. Ramirez, Ms. Mascareñas "often fights with me about my management decisions" (CX p. 28, p. 171, ¶ 11). The meeting described in CX 16 took place when Ms. Whitney was away from the hotel, but while returning to the hotel by shuttle, one of the other drivers told Ms. Whitney that the meeting had been "really, really bad" and that "Carolynn had been really argumentative" (TR p. 185, line 17 – p. 186, line 7).

Thus, with respect to this fourth criticism, there is clear and convincing evidence that Mr. Ramirez and Ms. Mascareñas are deeply suspicious of each other. As to what actually happened at the meeting, the question is more difficult. Ms. Mascareñas admits that most people at the meeting said nothing (TR p. 58, lines 4-16). She admits that she "described [her] frustrations" and asked questions, in contrast to the other drivers (TR p. 58, line 20 – p. 59, line 8). She admits that she raised questions about the use of DVIRs, and her own disciplinary record (TR p. 60, lines 1-15), and that Mr. Ramirez suggested they discuss her disciplinary record in private, rather than in the meeting (TR p. 61, line 4 – p. 62, line 18). All of those things might have been done politely and respectfully, or aggressively and maliciously. What sets this particular issue apart from a typical "swearing contest" is the context in which it occurs. CX 16 sets forth four criticisms of the complainant, three of which, by her own admission, are based in fact. Her written statement admits to a negative attitude towards Mr. Ramirez (CX 29, p. 174), and she expressly admits to having asked more questions and expressing more frustrations at the departmental meeting than the other drivers (TR p. 58, line 20 – p. 59, line 8). And given her confusing and contradictory testimony on other matters, I do not find her credible here.

I conclude Respondent has shown, by clear and convincing evidence, that CX 16 does not comprise retaliation for protected activity.

CX 55

In the Corrective Disciplinary Record dated November 13, 2013 (CX 55), Ms. Whitney and Mr. Ramirez reprimanded Ms. Mascareñas for altering documentation written by another driver, and for advising a third driver not to operate the van in question. For her part, Ms. Mascareñas contends she wrote the words "uneven wear" *under* the second driver's documentation (CX 55, p. 422; CX 56, p. 424), and admits she told the third driver the van in question was "unsafe" (CX 55, p. 422). In Ms. Mascareñas's view, Mr. Ramirez and hotel management misinterpret the DOT standard for tire wear. In her judgment, as she interprets the standard, the tires in question are not in compliance; as Respondent interprets the standard, they are (CX 56, p. 423; *see also* Complainant's Post-Hearing Brief, p. 14).

CX 55 was written about nine months after the most recent protected activity Ms. Mascareñas identified at the hearing. Its temporal proximity to the protected activity is the most attenuated of any of the alleged "adverse employment actions." What is more, during the approximately nine months between the most recent protected activity and CX 55, the relationship between Ms. Mascareñas and her supervisors appears to have grown increasingly strained. During that interval, Respondent issued CX 16 and Ms. Mascareñas responded by initiating a Department of Labor investigation (CX 16, p. 131) and writing her own detailed rebuttal to the Corrective Disciplinary Record (CX 17). During those same nine months, Ms. Mascareñas's supervisors documented several conversations with or about her on a variety of issues (CX 44, p. 338; CX 45, pp. 342, 343, 344, 345-346; CX 46, p. 347-348; CX 47, pp. 364-365, 366, 382-383, 391-392; *see also* RX 23). Overall, this evidence shows that by the time Respondent issued CX 55, it had many more immediate concerns about Ms. Mascareñas than punishing her for her earlier complaints to management and regulatory authorities.

I pause to consider a theory that Ms. Mascareñas herself did not expressly raise at the hearing. It is that her complaint about tire wear, and her arguing for her own interpretation of the applicable DOT tire-wear standard, *itself* comprised "protected activity" for which she should not have been disciplined by issuance of CX 55. The "documented verbal warning" set forth on CX 55, p. 421, addresses this issue:

> Carolyn *[sic]*, as we have discussed with you repeatedly, you will never be disciplined for reporting in good faith safety concerns. However, there is a process that we have asked you to follow that is consistent with the rules of the DOL *[sic]* and PUC. Your continued disregard for this process is what is being addressed with you today and it is being emphasized to you to *[sic]* through this corrective action. Any questions or concerns need to be addressed professionally with your manager following the Hotel's Standards of Conduct.

Indeed, CX 55, p. 421, describes the offensive conduct as 1) altering the report of another driver (although, in Ms. Mascareñas's view, she merely added a comment to it); 2) trying to persuade another driver to refuse to drive the van; and 3) continuing personally to drive the shuttle in question even after complaining its tires were too worn, suggesting Ms. Mascareñas herself did not take her own complaint seriously. As with the missing proof-of-insurance card previously, then, the problem was not the complaint itself, but the manner in which the employee made it, and the question of whether the employee acted in good faith in making it. I conclude Respondent did not intend to discipline Ms. Mascareñas for complaining about tire wear when it issued CX 55.

In summary, I conclude Respondent has shown, by clear and convincing evidence, that it did not discipline Ms. Mascareñas in violation of the Act when it issued CX 55.

The "Records of Conversation" Do Not Violate the Act

As set forth above, I have identified five factors which, in combination, persuade me Respondent's conversations with Ms. Mascareñas, the "Records of Conversation," and Respondent's practice of documenting conversations with or about Ms. Mascareñas, do not, individually or in combination, comprise "adverse employment action." But I recognize that some triers of fact might conclude, under current authority, that Respondent ought to bear the burden of proof on this point under the clear-and-convincing standard. On the record before me, I conclude the same five factors satisfy even that more demanding standard in this case. Consequently, if, in the alternative, the "Records of Conversation," and Respondent's practice of documenting conversations with or about Ms. Mascareñas, comprise "adverse employment actions," I conclude they do not comprise retaliation for Ms. Mascareñas's protected activity.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The complainant, Carolynn Mascareñas, has at all relevant times been employed by Respondent as a hotel shuttle van driver.

2. Ms. Mascareñas engaged in "protected activity" under the Act

a. On or about October 10, 2012, when she filed a complaint with the Occupational Health and Safety Administration;

b. On or about February 1, 2013, when she complained to OSHA about a poor performance evaluation allegedly based on her reports of safety concerns;

c. On or about February 3, 2013, when she complained to the Colorado State Patrol Motor Carrier Safety Section about the hotel shuttle vans, resulting in an investigation;

d. On or about July 20, 2012, when she complained to the Colorado Public Utilities Commission about safety concerns.

e. In or around April, 2011, but in any case before September 19, 2011, when she complained to the Colorado Public Utilities Commission about safety concerns.

3. Respondent knew of Ms. Mascareñas's protected activities, as set forth above.

4. Respondent issued "Corrective Disciplinary Records," which are maintained in its personnel records, memorializing warnings to Ms. Mascareñas

a. On or about April 4, 2013 (CX 14, p. 124);

b. On or about May 1, 2013 (CX 16, p. 130); and

c. On or about November 13, 2013 (CX 55, pp. 421-422).

5. The complainant's managers have met with complainant, and documented conversations with her, and about her job performance, in records entitled "Record of Conversation" at various times beginning in 2011.

6. The Corrective Disciplinary Records comprise an "adverse employment action" for purposes of the Act.

7. The Records of Conversation, together with the underlying conversations, and the managers' meetings with complainant to discuss job performance issues, do not comprise any adverse employment action for purposes of the Act.

8. Under the AIR 21 standard as set forth in *Beatty* v. *Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Case Nos. 2008-STA-020, 2008-STA-021 (ARB May 13, 2014), for purposes of making a *prima facie* showing, Ms. Mascareñas's protected activities were a contributing factor in the issuance of the Corrective Disciplinary Records.

9. The Records of Conversation, together with the underlying conversations, and the managers' meetings with complainant to discuss job performance issues, do not comprise any adverse employment action for purposes of the Act. But, in the alternative, if they do comprise adverse employment actions, I find, under the AIR 21 standard as set forth in *Beatty* v. *Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Case Nos. 2008-STA-020, 2008-STA-021 (ARB May 13, 2014), for purposes of making a *prima facie* showing, Ms. Mascareñas's protected activities were a contributing factor in these activities by Respondent.

10. Respondent has shown, by clear and convincing evidence, that it has legitimate, non-retaliatory reasons for issuing the Corrective Disciplinary Records, and would have done so even if the protected activities had never happened.

11. The Records of Conversation, together with the underlying conversations, and the managers' meetings with complainant to discuss job performance issues, do not comprise any adverse employment action for purposes of the Act. But, in the alternative, if they do comprise adverse employment actions, I find Respondent has shown, by clear and convincing evidence, that it had legitimate, non-retaliatory reasons for these actions, and would have carried them out even if the protected activities had never happened.

ORDER

Complainant is not entitled to relief under the Act.

SO ORDERED.

Digitally signed by John C. Larsen
DN: CN=John C. Larsen, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

CHRISTOPHER LARSEN
Administrative Law Judge