U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)
OALJ-DC-District@DOL.GOV

Issue Date: 30 September 2020

CASE NO.: 2016-STA-00032
OSHA NO.: 6-0030-16-010

In the Matter of:

JORDAN THIERY,
Complainant,

v.

COASTAL PLAINS TRUCKING, LLC,
Respondent.

APPEARANCES:

Tracey D. Lewis, Esq.
Melissa Fuller, Esq.
Rosenburg Sprovach
For the Complainant

Andrea M. Johnson, Esq.
Demetri J. Economou, Esq.
Kane Russell Coleman & Logan PC
For the Respondent

BEFORE: Carrie Bland
Administrative Law Judge

DECISION AND ORDER DISMISSING THE COMPLAINT

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA" or the "Act"), 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, and corresponding regulations found at 29 C.F.R. Part 1978.

PROCEDURAL HISTORY

On November 20, 2015, Jordan Thiery ("Complainant" or "Mr. Thiery") filed a formal complaint of retaliation with the U.S. Department of Labor ("DOL"), Occupational Safety and Health Administration ("OSHA"), under the Surface Transportation Assistance Act ("STAA"), alleging that his employer, Coastal Plains Trucking, LLC ("Respondent"), terminated his employment in retaliation for reporting safety violations. After conducting an investigation, the Assistant Secretary of Labor issued a final determination letter dated February 12, 2016, dismissing the complaint.[1]

On March 11, 2016, Complainant filed objections to the Secretary's Findings with the Office of Administrative Law Judges ("Office" or "OALJ"). This matter was docketed before OALJ on March 22, 2016, and I issued a Notice of Assignment and Preliminary Order on April 29, 2016. On June 14, 2016, I set this matter for hearing on November 2, 2016. On October 28, 2016, Employer requested a continuance, which was unopposed. This matter was then set for hearing to begin May 31, 2017.

On May 31, 2017, I convened a formal hearing in San Antonio, Texas, at which both parties were afforded a full and fair opportunity to present evidence and argument. At hearing, Respondent's Exhibits ("RX") 1-28, 32-59, 60-79, and Complainant's Exhibits ("CX") 3-5, 7-20, 23-52, and 54 were admitted into evidence. Seven witnesses testified. The record remained open for the submission transcripts of audio and video evidence, and post-hearing briefs. On September 7, 2017, I issued a Briefing Order requesting that the parties submit closing briefs by September 29, 2017. The parties submitted their supplemental briefs on October 5, 2017 and October 6, 2017, respectively. My previous evidentiary rulings, if not expressly discussed, are incorporated by herein by reference.

The findings and conclusions that follow are based on a complete review of the record in light of the arguments of the parties, the testimony and evidence submitted, applicable statutory provisions, regulations, and pertinent precedent. Although I do not discuss every exhibit in the record, I have carefully considered all the testimony and exhibits in reaching my decision.

ISSUES PRESENTED

- Has Complainant proven by a preponderance of the evidence that he engaged in protected activity?

- Has Complainant proven by a preponderance of the evidence that he suffered an adverse employment action?

- Has Complainant proven by a preponderance of the evidence that his protected activity contributed, in part, to Respondent's decision to take adverse action against him, i.e. was the protected activity a factor which, alone or in connection with other factors, tended to affect in any way the outcome of its decision?

[1] The following references will be used: "Tr." for the official hearing transcript; "CX" for a Complainant Exhibit; and "RX" for a Respondent Exhibit.

- If Complainant met his burden, can Respondent show by clear and convincing evidence that they would have taken adverse action against Complainant in the absence of protected activity?

- If Respondent does not meet its burden, what are the appropriate compensatory damages, costs and expenses and what further relief, if any, is appropriate?

Hearing Testimony

Michael Crawford (Tr. at 40-207)

On direct examination, Mr. Crawford testified that he began working with Coastal Plains Trucking ("CPT") in May or June of 2011, and that he currently serves as manager of the Nitrogen division. (Tr. 41-42). He worked with Complainant while he was the West Texas Regional Manager. (Tr. 42). He was not Complainant's direct manager during Complainant's entire employment of August 26, 2014 through January 26, 2016, but "was involved with some of the operations in and out of West Texas and Longwood, the Nitrogen Division." (Tr. 43). Mr. Crawford estimated that he worked with Complainant two to three days a week and that these interactions usually entailed "seeing him in and out of our facilities," and that he did not usually have extensive interaction with him beyond "hi" and "bye." (Tr. 44-45). One of the occasions where he spoke more extensively with Complainant was when Complainant "talk[ed] about having some sort of a video of some supervisors that he felt was on duty and were at a local gym. And he felt like they shouldn't have been because he was under the assumption that they were on duty." (Tr. 45). Mr. Crawford said that he asked Complainant to send him the video and that they would discuss it, but that Complainant never sent him the video and they did not discuss it again. (Tr. 45). Mr. Crawford testified to the pay rate in Complainant's job, and work-related procedures such as dispatching and pre-trip inspections. (Tr. 46-56).

Mr. Crawford testified that he arrived at the Jal yard at around mid-day on January 26, 2015, in response to being notified that the gate had been run over. (Tr. 56-57). He said that once they determined that the gate had been run over, they decided to inspect the vehicles in the field "to see if our company's responsible." (Tr. 57). Mr. Crawford's colleague, Ernest Watson, would have been responsible for assigning supervisors to inspect the vehicles. (Tr. 58-59). Mr. Watson then waited for other drivers to return from their shifts so that they could inspect the remaining vehicles. (Tr. 60). Mr. Crawford said that he did not speak with any of the supervisors about who was driving the truck before Complainant was terminated. (Tr. 61). He spoke with Andrew Tallichet about an employee corrective action before it was created, and told Mr. Tallichet that Mr. Tallichet was going to write the corrective action for Complainant's termination. (Tr. 61). After discussing the issue with Mr. Watson and other management from South Texas, they "were reasonably sure that [Complainant] was involved in the incident and that the decision to go ahead and terminate him was the correct one." (Tr. 62). Mr. Crawford acknowledged that Complainant was terminated for "failure to report an incident." (Tr. 63).

Mr. Crawford testified that management made its determination that Complainant ran over the cattle gate based on statements from other drivers and an examination of other vehicles, which showed that only Complainant's vehicle had green paint on the front that matched the

green paint on the cattle gate. (Tr. 66 – 68). He further testified that they had spoken to the other drivers who arrived from the yard before Complainant, and that they did not see any damage to the gate when they were driving through. (Tr. 68). While Mr. Crawford did not see the damaged gate, his field supervisors, Troy Pruitt and Kurt Grandsire, saw the gate. (Tr. 68). After playing video footage for Mr. Crawford to review, Mr. Crawford testified that the evidence connecting Complainant's truck with the green gate was a green strip of paint on the driver's side workbox of the truck that Complainant was driving that the day of January 26, 2016. (Tr. 70 – 80). The decision to terminate Complainant was made by Mr. Crawford, Ernest Watson, Scott Marcotte, and Jenny Flores. (Tr. 83). Mr. Crawford said he was not involved directly in any other disciplinary action taken against Complainant during his employment with Respondent. (Tr. 83).

On cross-examination, Mr. Crawford confirmed that he had worked for Respondent for six years, beginning as a driver, then a dispatch manager, then night shift supervisor, then night shift manager over South Texas, then West Texas regional manager, before becoming the regional operations manager for the Nitrogen Division. (Tr. 84 – 85). He explained that Respondent is a transportation company that transports crude oil and liquid nitrogen, and that his company office was in Monahans, Texas, at the time of Complainant's termination. (Tr. 86 – 87).

Mr. Crawford explained that Complainant was driving a truck hauling crude oil (Tr. 87) and reported to Mr. Crawford when Complainant was first hired. (Tr. 89). Mr. Crawford said that Complainant had a good attitude, and was a "go-getter," that Complainant "worked hard and he took care of what we needed him to take care of, and that was haul oil." (Tr. 89). They did not consider Complainant for a supervisor position, however, because they believed that "his particular personality type was not one of which I thought would fit well in a supervisory position at the company." (Tr. 90). While Complainant wanted a position driving the nitro trucks, Mr. Crawford said they did not have a position for him. (Tr. 92).

Mr. Crawford described Respondent's progressive discipline process, saying that "we have different levels of corrective actions … from verbal to written and even up to termination. (Tr. 92). He testified that this progressive discipline process exists because "we want to give the employee opportunities to adhere to the rules and policies that [Respondent] has in order to help the company operate. And because we're not just trying to run people off. We're trying to get employees in there, accomplish the goals of company." (Tr. 92). Mr. Crawford explained that "hiring people was difficult," and the "we operate … in a difficult area where housing is not available. It's something that we have to provide our employees in order just to be able to get them out there." (Tr. 93).

Mr. Crawford then described an incident in which a ranch owner reported that Complainant was driving recklessly on his property. After investigating the incident and seeking to give their employee the benefit of the doubt, they could not verify that Complainant was driving recklessly, and concluded that Complainant did the right thing in avoiding striking the ranch owner's vehicle. (Tr. 93 – 97). Rather than disciplining Complainant, Mr. Crawford testified, Respondent "gave him the benefit of the doubt," and chose to not dispatch him back to any of the properties owned by the ranch owner. (Tr. 98). Respondent, however, still noted the

event as a "corrective action" on Complainant's record. (Tr. 111 – 112). Mr. Crawford described another incident on October 21, 2015, in which a driver called Respondent's 1-800 number to report that Complainant was driving in a reckless manner on the public roads. (Tr. 103 – 110). He then detailed a second corrective action involving Complainant throwing a chair in a meeting at the Jal yard, after which they decided to take statements from any employees present at the time, and reported the incident to the H.R. manager Jenny Flores. (Tr. 116 – 118). Mr. Crawford then detailed a third incident on December 19, 2015, in which Complainant declined to drive to two locations required by the dispatcher. (Tr. 124 – 128). Complainant was written up for this event. (Tr. 128). Mr. Crawford explained that there was no excuse for Complainant to not take a dispatch, and indicated that if a driver did not have enough hours to complete a job, a "fresh driver" would be dispatched to take over the job for the driver. (Tr. 129 – 131). Mr. Crawford said that he knew of these previous write-ups when he and management made the decision to terminate Complainant's employment with Respondent. (Tr. 128 – 129).

Mr. Crawford detailed the corrective action form terminating Complainant's employment, which said that Complainant:

> [f]ailed to report a vehicle action and/or property damage at 0500. Statements indicated no property damage to gate at Jal yard. [Complainant] was dispatched at 5:11 and was the last truck to leave the yard. Additional statements indicate the discovery of gate damage. Eight trucks were dispatched from Jal in the morning. Afternoon check-in was conducted and were inspected. Seven trucks returned with no damage. Truck 505 returned with green paint on the trailer toolbox and some damage and fresh scratches.

(Tr. 131 – 132). The statement also indicated that "the trailer fender was coated with crude oil, diesel, or varsol in attempt to cover up scratches." (Tr. 132). Mr. Crawford explained that the Jal yard is leased by Respondent, and the cattle gate is a common exit to Highway 28 that Respondent shares with several other companies. (Tr. 133). He said that Respondent has a policy that an individual can be terminated from employment if they do not report an accident. (Tr. 134). He said that this has happened in a separate instance in October of 2016, in which another driver ran over the same cattle guard gate at the Jal yard and failed to report it, resulting in an investigation and the driver's termination. (Tr. 135 – 138). Mr. Crawford said that the paint transfer from the gate onto this driver's truck was similar to the paint transfer on Complainant's truck. (Tr. 138 – 139).

Mr. Crawford testified that Complainant's truck was examined for damage as part of Respondent's policy of examining vehicles to ensure there is no unreported damage. (Tr. 143). He described a picture in which a stripe of green paint was visible on Complainant's truck workbox. (Tr. 144 – 152). He also described a video in which Complainant is seen using a rag to wipe the green paint off the workbox, saying that it is not green paint. (Tr. 153 – 160). He then described another video that was filmed by Complainant, in which the fender had rags on it which he said were used to wipe the paint from the fender. (Tr. 168 – 169). Mr. Crawford said that Complainant was instructed to come to the management office after completing his post-trip inspection, and that upon coming to the office Complainant was informed that his employment with Respondent was terminated. (Tr. 170).

Mr. Crawford testified that Complainant did not once raise safety concerns with him. (Tr. 177). He explained that the company had an open door policy that permitted all employees to have access to management to report safety violations. (Tr. 177 – 178). Mr. Crawford said that he was unaware that Complainant had filed an "OSHA complaint" immediately following the chair-throwing incident," and he also did not know about an earlier complaint regarding uniforms. (Tr. 181). He said that he did not terminate Complainant for any of these complaints. (Tr. 182).

On redirect, Mr. Crawford viewed two photos, one of Complainant's fender, and one of the fender of the other driver who was terminated for running over the same cattle gate. Mr. Crawford confirmed that the trailers were different. (Tr. 190 – 193). He acknowledged that the disciplinary statement did not specifically state that Complainant threw a chair. (Tr. 194 – 196). He reaffirmed that the reason they fired Complainant was the belief that he struck the cattle gate and did not report it to management, although acknowledging that he did not witness Complainant strike the cattle gate. (Tr. 197). On re-cross, Mr. Crawford reviewed two pictures and confirmed that they were both of Complainant's fender, with the fender in one picture being cleaner than the fender in the other picture. (Tr. 205).

Jordan Thiery (Tr. at 208-403)

Complainant indicated that he began working for Respondent on August 24, 2014, initially starting as an operator in the crude oil division. (Tr. 209). He testified that he stayed in this role for the entirety of his time working for Respondent, until he was terminated on January 26, 2016. (Tr. 209). He said that duties involved:

> We test oil from different production facilities under the producer EOG, which was the only producer during my time of employment. And we took it to injection points that were usually midstream pipeline. From there flows carry to facilities outside our jurisdiction or anything to do with us.

(Tr. 210).

The two locations where Complainant worked were Monahans and Jal, and he lived at Respondent's "man camp" premises in Monahans. (Tr. 211). He initially only worked at Monahans, but beginning October 3, 2015, he was required to work in Jal as well. (Tr. 212). Complainant said that he worked for a crude oil trucking company immediately prior to working for Respondent, and described his prior driving experience and licensing. (Tr. 215 – 216). He said that training with Respondent involved a two-day ride-along with another driver followed by a pass or fail test. (Tr. 216)

Complainant testified that Phil Pinington was his direct supervisor for four to six months when he began working with Respondent, and that Ernest Watson was his supervisor on January 26, 2016. (Tr. 217). To his knowledge Ernest Watson reported to Mr. Crawford for a brief period, and then reported to Scott Marcotte and Todd Sims. (Tr. 218). Complainant's field supervisors were Troy Pruitt, Kurt Grandsire, and Pat Leal. (Tr. 219).

Complainant began work each day by clocking in at the Jal yard. (Tr. 220). After clocking in, he would do a pre-trip check on his truck. (Tr. 221). He said that he was aware that Mr. Crawford thought a pre-trip check could be completed in 15 minutes, but that Complainant disagreed, saying that it takes longer. (Tr. 222). He said that if the pre-trip inspection did not demonstrate any issues, he would proceed to wherever he was dispatched. (Tr. 222 – 223). He explained the sheets that he had to fill out during the day, including the DVIR and a run ticket, and that he would give these to his dispatch at the end of his shift. (Tr. 223). He also explained various documents that detailed his trips during the day. (Tr. 223 – 229).

Complainant described the incident that took place on December 19, 2015, in which he was suspended for seven days for refusing a dispatch. Complainant explained that he did not believe that he could retrieve the loads from the dispatch sites within his shift. He acknowledged that he miscalculated the time and distance, but that he returned to the yard empty with the permission of the dispatcher. He said that he was shocked when he learned that he was being suspended for this incident. (Tr. 229 – 233; RX 22).

Complainant testified that on December 3, 2015 he noted that he had "a severely damaged windshield to the point where I was almost unable to see out of it. It shattered and cracked badly. And I was sent home and wasn't – and they refused to fix it and I was sent home." (Tr. 234). He said that he communicated with his supervisors, Pat and Richard, as well as the on-duty mechanic, Marty. (Tr. 235). Respondent said that he felt he had been treated unfairly, and sent a text message to his supervisor, Ernest Watson, asking how the issue would be resolved. (Tr. 239 – 240). Complainant said that he filed a complaint dated November 20, 2015, with the "Whistleblower Protection Agency," because "I had nowhere else to turn in help from my employer retaliating incident after incident after incident." (Tr. 242). In his complaint he noted an incident dated October 3, 2015, in which Andrew Tallichet allegedly "dismissed mechanics on duty knowing I needed my brakes inspected. Andrew proceeded to tell me this is not safety sensitive. He then threatened me with a one-day suspension for failure to leave the yard." (Tr. 243). He also noted an incident dated October 18, 2015, when he recorded a supervisor on-shift arrive at a local gym using a company truck and proceed to work out. (Tr. 243). Complainant said that prior to this he made numerous complaints to his supervisors via text and email as well as verbal complaints. (Tr. 245 – 247).

Complainant testified that he worked the day shift on January 26, 2016, arriving at the Jal yard at 3 or 4 AM. (Tr. 247 – 248). After being dispatched by Kurt Grandsire, Complainant gathered his supplies and did the pre-trip inspection on his truck, filled out his usual paperwork and left the yard. (Tr. 250). He recalled that he was driving truck number 505. (Tr. 251). Complainant was asked to describe the scene in various video clips, including video clips displaying the damaged cattle gate. (Tr. 251 – 258). Complainant said that Michael Crawford and Ernest Watson told him that he was being terminated for failure to report running over the gate. (Tr. 262). Complainant detailed his post-termination employment. (Tr. 262 – 270).

Returning to his whistleblower complaint, Complainant testified that he informed Ernest Watson in person and via text message that he was going to file the complaint before he did so. (Tr. 273 – 274). He testified that afterward, Ernest Watson approached Complainant on behalf of Scott Marcotte and Jenny Flores and "essentially I was met with an ultimatum and with, you

know, threats of take this and walk or…." (Tr. 274 – 275). He believed that this conversation took place on December 18 or 19, 2015. (Tr. 275). He testified that he also discussed the whistleblower complaint on a conference call with Ernest Watson, Phil Pinington, Scott Marcotte, Stephen Greak, Jenny Flores, and possibly Todd Sims. (Tr. 283). Complainant testified that during this conference call they discussed the dispatch incident, and Complainant expressed that he felt that he was experiencing retaliation from Respondent. (Tr. 284).

Complainant also testified regarding an email that he sent to Jenny Flores, Ernest Watson, and Stephen Greak, on January 19, 2016, in which he discussed "further retaliation, retaliatory actions taken against me and, ultimately, the hostile work environment I was forced to work in." (Tr. 284 – 285). He said that he spoke with Jenny Flores on the telephone over the next few days regarding his email, before being terminated on January 26, 2016. (Tr. 289). Complainant indicated the he believed that he was retaliated against by Respondent "for voicing the truth and standing for what's right, and bringing these issues to the light, these issues of essentially consequence (sic) for doing what we're required by law; for filing those complaints with OSHA, the proper authorities when, as seen, first going to my supervisors availed nothing. I believe – excuse me – I believe I was terminated for that." (Tr. 291 – 292). Complainant said that he believes he lost "almost hundreds of thousands of dollars" by not being employed by Respondent, and also felt that he sacrificed a lot for Respondent because he moved his family to Texas in order to work for Respondent. (Tr. 292 – 293).

On cross-examination, Complainant was played a video, and asked to what he was referring in the video when he said "I have some things that Todd Sims and Stephen Greak may want to look at and may want to consider." (Tr. 294). Complainant said that he was not referring to videos he had taken, but was referring to the email that he sent [on January 19, 2016]. (Tr. 295 – 296; CX 25). Complainant affirmed that he had taken several videos of different management officials employed by Respondent, and that he did not discuss these videos with any of management. (Tr. 297 – 298). Complainant then testified that various reports by management were "fabricated" for saying that Complainant's was the driver who damaged the cattle gate. (Tr. 310). He said that he also disagreed with Respondent's conclusion regarding the chair-throwing incident. (Tr. 313). Complainant testified with regard to a statement related to a parking lot confrontation between Complainant and Moises Alivez, saying that the statement was "fabricated and coerced in the office of Costal Plains at Monahans." (Tr. 314). Complainant discussed Respondent's Exhibits 10, 14, 15, 16, 17, 18, 20, 22, 25, all of which he said had fabrications within them. (Tr. 314 – 320). With regard to RX 25, Complainant testified that he was not the last truck to leave the Jal yard premises. He therefore disputed statements in RX 25 – 28 in which other drivers stated that Complainant was the last truck to leave the Jal yard. (Tr. 321). He also disputed that RX 48, 50, and 53 were pictures taken of his truck. (Tr. 322 – 323). Complainant also repeatedly denied that there was green paint on his truck, or that he had attempted to remove green paint from his truck's tool box. (Tr. 323 – 332).

Complainant confirmed that he did not have any contemporaneous emails documenting the various incidents that he described in his testimony. (Tr. 343 – 351). He also said that the reason he never had the opportunity to drive the nitro truck was because Respondent was preventing him from doing so as an act of retaliation. (Tr. 351 – 352). In a text message sent November 20, 2015, Complainant said that he complained of "abuse of position" by company

officials, but that he did not directly speak of any safety violations. (Tr. 353). Complainant answered several questions regarding which management officials were involved in the different incidents. (Tr. 354 – 378). He answered questions regarding the parking lot altercation. (Tr. 379 – 385). Complainant described in detail the process of his pre-trip inspection, and answered questions regarding how long it took him to complete each step in the inspection. (Tr. 385 – 393).

On redirect, when asked how he felt about the accusation that he used a racial slur against a Mexican coworker in the parking lot, Complainant said he felt the accusation was "absurd." He said that "first and foremost I'm born and raised in South Florida, speak the Spanish language, self-taught. My fiancée is Mexican. We have a son together who is also half Mexican." (Tr. 397).

<u>Jennifer Flores (Tr. 403-455)</u>

Ms. Flores testified that she serves as the Human Resources Manager for Respondent, having served in the role for the previous six years. (Tr. 404). Her role requires her to "assess both hiring, termination decisions. I work with the company benefits, work with employees and management on various issues," including "employee complaints, management complaints against employees." (Tr. 405). With regard to employee complaints, Ms. Flores said that "I generally start an investigation if an complaint (sic) is filed brought to my attention and follow our standard operating procedures by gathering statements from the complainant and any others that they name involved." (Tr. 405). She testified that she is involved in the disciplinary process of Respondent's employees outside of termination. (Tr. 405). Ms. Flores said that she was involved in the hiring of Complainant, having interviewed him and setting up his road test, saying that she believed he was a qualified candidate when she interviewed him. (Tr. 406 – 407).

Ms. Flores said that Complainant was not suspended nor received any discipline for the reckless driving incident on the H.E. Cattle Company property. (Tr. 409). At the time of Complainant's termination, Ms. Flores spoke with several individuals, including Mike Crawford, Scott Marcotte, and Todd Sims. (Tr. 410). She said that the reason she gave for Complainant's termination was "for violating a company policy, for failure to report an accident, damage to company equipment." (Tr. 411). She said that she spoke with Mike Crawford and Scott Marcotte about getting statements from witnesses and taking pictures after being told that the gate was damaged. (Tr. 411 – 412). She did not speak with any employees directly about the gate incident. (Tr. 413).

Ms. Flores recalled receiving a whistleblower complaint from Complainant, which she forwarded to her supervisor, Todd Sims, who then forwarded it to his supervisor, Stephen Greak. (Tr. 413 – 415). She said that this complaint was turned over to Respondent's legal counsel. (Tr. 416). Ms. Flores recalled that she was a party to a phone call in which Stephen Greak spoke with Complainant regarding his suspension in December 2015 for refusing the dispatch. (Tr. 417 – 418). She confirmed that this suspension took place after Complainant filed his whistleblower complaint. (Tr. 419). Ms. Flores recalled an email sent by Complainant to Ernest Watson, Stephen Greak, and herself on January 19, 2016, entitled "Hostile work environment, further

targeting, and retaliation." (Tr. 419). She confirmed that she spoke with no other employees regarding the damaged gate, and did not ask Complainant directly whether he hit the gate. (Tr. 420).

On cross-examination, Ms. Flores said that she was not aware of any employees being coerced into making statements, as Complainant alleged. (Tr. 421). She said that there are occasions where an employee is immediately terminated without progressive discipline, including failure to report an incident, failure to follow company policies, insubordination, and on-road accident. (Tr. 423). Ms. Flores said that Complainant never sent any harassment complaints to her about being bullied on the job or being retaliated against for safety complaints. (Tr. 434 – 435). She said that she had received complaints from employees before, and that when she does, the company begins an investigation by asking for statements from everyone involved. (Tr. 425). She confirmed she was aware of two unsafe driving incidents involving Complainant, both of which involved violations of the policy handbook. (Tr. 425 – 426). She confirmed that he received no disciplinary action for the first incident but received a one-day suspension for the second incident because they were able to confirm that Complainant was responsible. (Tr. 426).

Ms. Flores said that after Complainant was terminated, another employee ran over the same cattle gate and failed to report it. He was questioned at the office, at which time he admitted to running over the gate, and he was terminated. (Tr. 427). Ms. Flores said that this employee had no write-ups prior to his termination, and that Complainant had three write-ups prior to his termination. She said that when she first met Complainant she was "impressed" and thought that he was "very polite, sounded very professional." She said that Complainant was an at-will employee, meaning "he can quit or we can term[inate] him at any time without disciplina[ry] or retaliation action." (Tr. 428). Ms. Flores said that by not disciplining him for the first incident of reckless driving, "we conveyed the message that we wanted him to succeed in the company, that we believed in him, and we wanted to see him continue to grow within the company." (Tr. 429 –
430). She said that in her phone conversation with Complainant regarding his second reckless driving incident, he did not raise any safety complaints with her. (Tr. 431). His main concern in the phone call was that the caller was lying and that he was not in the location described. (Tr. 431). She said that the company looked at Complainant's trip activity report to compare the routes that Complainant would have taken that day, and determined that he was in the place described at the time. (Tr. 431 – 432). She said that she did not know of any safety complaints filed by Complainant at the time of his second reckless driving incident and subsequent write-up. (Tr. 432). She was unaware of any videos, emails, text messages, or information he may have sent concerning safety violations. (Tr. 432). In giving Complainant a one-day suspension, Ms. Flores said the company was seeking to "bring to his attention that we take safety very seriously. We want him to drive safe and follow our rules of safety." (Tr. 433).

Ms. Flores testified on cross-examination that Complainant was noted for insubordination after he threw a spare cone out of his tool box during his pre-trip inspection, and that this record was kept as part of business records regarding Complainant. (Tr. 434 – 435). She said that he was not disciplined for this incident because of an incident that occurred the very next day in which Complainant allegedly threw a chair into the middle of the floor. Complainant received a

write-up for this event. (Tr. 436). She said that two individuals said that Complainant had "tossed" the chair into the middle of the room and refused to pick it up and "argued with them and he finally did move it." (Tr. 437). She said that Complainant was given three days suspension for this event "because of the safety issues involved and insubordinations of refusing initially to pick up the chair and place it out of harm's way." (Tr. 437). Ms. Flores said that at the time she did not know of any safety complaints, videos, text message, or emails from Complainant. (Tr. 437 – 438). She said that company was seeking to convey the message to Complainant "that we take safety seriously for all of our employees. And you have to follow the rules to what the supervisors ask you to do, as long as it's not unsafe, illegal, or immoral." (Tr. 438). Ms. Flores said she hoped this action "would correct his actions and turn out to be a good employee." (Tr. 438).

Turning to Exhibit 79, Complainant's OSHA complaint, Ms. Flores confirmed that she did not receive the OSHA complaint until December 4, 2015, although Complainant had filed it on November 20, 2015, and that by the time she received it, Complainant had already been written up twice. (Tr. 439). She said that Complainant had not produced any videos, text messages, phone call, or emails concerning safety complaints at the time of the OSHA complaint. (Tr. 440). Ms. Flores was directed to RX 15, 16, 17, 18, and 19, statements from employees regarding an incident in which Complainant "had his personal vehicle where the 18-wheelers were parking. And there was conflict between himself and the drivers regarding that." (Tr. 441 – 442). She said that an investigation was conducted in which Scott Marcotte was involved." (Tr. 443). She said that Complainant received verbal counseling from Scott Marcotte regarding parking after this incident and was not disciplined. (Tr. 443). Turning to RX 22, a corrective action notice concerning the dispatching incident, Ms. Flores confirmed that Complainant was suspended for seven working days without pay for this incident. (Tr. 443). She said he was not terminated because "we were trying to show him that we believed in him, trying to get him to follow the rules, follow safety." (Tr. 444). She said that she was unaware of any videos, text messages, or emails from Complainant concerning safety issues. She recalled that Complainant disputed the corrective action, saying that "the dispatcher had told him 10-4 when he said he was just going to bring it to the yard, meaning 'okay.' But we have our dispatchers to not argue with a driver. Take it up, take the matter to your supervisor or the manager on duty." (Tr. 445 – 446). Ms. Flores confirmed that she knew of Complainant's OSHA complaint at the time of the cattle gate incident. (Tr. 445). She testified that Complainant had sent an email on December 19, 2015, but that he did not send any text messages or disclose any safety issues during this time period. (Tr. 445 – 446).

On redirect, Ms. Flores testified that she did not request any videos, text message, or emails from Complainant in response to his OSHA complaint. (Tr. 448 – 449). Ms. Flores was directed to RX 13, a statement from Judy Pruitt regarding the incident of November 18, 2015, in which Judy Pruitt said that "he put the chair in the middle of the floor." Ms. Flores confirmed that the statement says that Complainant put the chair in the middle of the floor because it was broken, and that he picked it up after Judy Pruitt asked him to do so. (Tr. 450 – 452). She confirmed that she did not personally witness Complainant strike the cattle gate, and that no employees of Respondent witnessed Complainant strike the cattle gate. (Tr. 452).

On re-cross, Ms. Flores confirmed that Complainant's complaints regarding uniforms and deductions in pay were received anonymously, and that she did not know that he had submitted the complaint. (Tr. 453 – 454).

Ernest Watson (Tr. 455-521)

Mr. Watson testified that he is employed by Respondent, having been hired in October 2013, and that he was currently serving as the Operations Manager. (Tr. 456). He began working for Respondent as a driver, and became operations manager in January of 2016. (Tr. 456). He confirmed that he worked with Complainant and that his role was as a shift manager at the time of Complainant's employment. (Tr. 457). He said that he would have interacted with Complainant once a day as shift manager when Complainant was coming in during shift. (Tr. 458 – 459). He said that he would not necessarily interact with Complainant daily, and there were days when he did not speak with Complainant at all during the day. (Tr. 459). As a shift supervisor, Mr. Watson was responsible to "keep track of, at time it was just Monahan yard, to keep track of the fuel, keep track of fuel and components, keeping track of engaging equipment, production equipment." (Tr. 459). He said that he was involved in disciplinary actions of employees as a group effort with other members of management. (Tr. 460). He recalled that Complainant received suspensions for reckless driving and tossing a chair. He was not involved in the reckless driving suspension, but was involved in the chair-tossing suspension, in which he gathered information from Richard Dozier to give to H.R. (Tr. 461). He said that he never spoke with Complainant when gathering statements about the incident. (Tr. 463).

Mr. Watson was directed to RX 61, which documented Complainant's dispatching incident. (Tr. 464). Mr. Watson confirmed that traffic delays or mechanical issues at the oil transfer site could cause delays for drivers. (Tr. 465 – 466). He confirmed that a driver may need to stop driving to a certain site if the driver knew that he would exceed the maximum driving hours allowed under Department of Transportation ("DOT") regulations. (Tr. 467). He said that he signed the disciplinary action suspending Complainant following the dispatching incident, and that Ms. Flores was also involved in the suspension. (Tr. 468).

Mr. Watson recalled Complainant complaining that "the trucks are deplorable" but said that Complainant would not be specific with him. (Tr. 469). Mr. Watson was directed to CX 16, a text message that Complainant purportedly sent Mr. Watson when Complainant was "sent home for refusing to drive a truck with a broken windshield." Mr. Watson said he had never seen the text message before and was not aware that Complainant had reported a broken windshield or that he was sent home. (Tr. 470). He was directed to CX 17, a text message from Complainant to Mr. Watson which Mr. Watson said he remembered "vaguely." (Tr. 471). He said that he did not recall any other communications with Complainant regarding retaliations, whether by email, text message, or verbal communication, and Complainant never discussed the OSHA complaint with him. (Tr. 474). Turning to CX 24, Mr. Watson did not recognize an email in which he purportedly indicated that he would forward a message from Complainant to the corporate office, Lufkin. (Tr. 479).

Mr. Watson recalled learning that the cattle gate had been damaged on January 26, 2016, and that he instructed Troy Pruitt to investigate the incident. (Tr. 480 – 481). Other than this, he did not have any other direct involvement in the investigation. (Tr. 485). Mr. Watson testified that he was present in the meeting when Complainant was terminated. (Tr. 485). He said he inspected Complainant's truck with Andrew Tallichet, Mike Crawford, Don Shaw, Richard Jimenez, and Rudy Delgado. (Tr. 485). He said that Complainant was terminated for not reporting the accident. (Tr. 486).

On cross-examination, Mr. Watson testified that he had no knowledge that any witnesses were coerced to write statements against Complainant. (Tr. 488). He explained that all drivers underwent training to ensure that they abided by safety precautions. (Tr. 489 – 491). Mr. Watson testified that he would talk with Complainant from time to time, and that Complainant "seemed like a great guy. He wanted to advance. He was young, wanted to advance his career, and I wanted to give him some good advice to keep him going." (Tr. 491). He said that he and Complainant also used to work out in the gym together. (Tr. 492). He recalled one instance in which Complainant complained about the condition of the trucks, and Mr. Watson asked Complainant about the problem. (Tr. 492). Complainant told him the "the trucks are deplorable." (Tr. 493). Mr. Watson said that he asked Complainant more than once to clarify what was wrong with the trucks, but that Complainant did not provide any further detail. (Tr. 493). He said that Complainant never raised safety complaints with him during any of their other interactions, whether at work or at the gym. (Tr. 493). Complainant never told him that he was being harassed or bullied or retaliated against by Respondent. (Tr. 493). Mr. Watson said he had "no idea" what Complainant was referring to in CX 24, the partially admitted OSHA complaint, and he testified that neither the company nor Complainant disclosed to Mr. Watson that Complainant had filed an OSHA complaint. (Tr. 493 – 494). Referencing CX 17, a text message to Mr. Watson from Complainant, Mr. Watson did not consider the text message to be a safety complaint, because the message discussed "abuse of position, going to the gym in company vehicles on company time, being in Odessa grocery shopping while driving in the field, and then in turn not protecting—not protected from the company but penalized." (Tr. 495).

Mr. Watson explained that a truck is assigned to a driver at the beginning of the shift, and that mechanics perform inspections of the trucks while shift supervisors ensure that drivers are not under the influence of any alcohol or drugs before leaving the yard with the truck. (Tr. 495 – 500). Mr. Watson testified that while other drivers would typically take two to three loads per day, Complainant would normally only take one to two loads per day, and that there was no other conditions that made Complainant's trips any different than those of the other drivers. (Tr. 500). Turning to RX 20, Complainant's text message to the dispatcher, Mr. Watson testified that he knew that Complainant could have driven to either the Apollo 7 or Endurance dispatch sites in a timely fashion, because Mr. Watson had driven those routes many times before. (Tr. 501 – 503). It was not appropriate for Complainant to decline these dispatches in Mr. Watson's opinion. (Tr. 503). Even if he had run out of a time (under DOT regulations), Respondent would have asked Complainant to park the truck and would have sent a driver to pick up Complainant. (Tr. 504). He testified that it was appropriate to tell Complainant to leave the man camp when he was suspended, because "the man camp's a privilege." (Tr. 505). To his knowledge, Complainant was never suspended regarding a windshield issue, and testified that a driver would only be sent home over such an issue if there were no other trucks available.

(Tr. 505). Mr. Watson said that Complainant sometimes took over an hour to do his pre-trip inspection, which he said was more than the industry standard of 15 to 30 minutes. (Tr. 506).

Mr. Watson said that he first heard about the cattle gate incident from Troy Pruitt, at which time he did not have any idea who hit the gate. (Tr. 506 – 507). He instructed Troy Pruitt to investigate each truck to see if he could find any damage on the trucks. (Tr. 507). Mr. Watson testified that he was present when the trucks were inspected, and that there was no damage or green paint found on any of the trucks except Complainant's truck. (Tr. 508). He testified that Troy Pruitt went out to Complainant's truck in the Jal yard after Complainant reported that he had a flat tire, and that Troy Pruitt saw green paint on the utility box of Complainant's truck. (Tr. 509). Mr. Watson reviewed RX 48, "a picture of a utility box with green paint on it" and confirmed that this was the picture that Troy Pruitt sent to him. (Tr. 509 – 512). Mr. Watson said that after Complainant returned to the Jal yard, he began videotaping as Mr. Watson and Troy Pruitt were inspecting his vehicle. (Tr. 513). After doing the inspection, Mr. Watson went to the office. (Tr. 514 – 515).

On redirect, Mr. Watson was directed to RX 20, the correspondence between Complainant and the dispatcher. Mr. Watson confirmed that the dispatcher provided the "okay" for Complainant's request to bring the truck back in empty. (Tr. 516). Mr. Watson confirmed that the blown tire did not occur when Complainant was leaving the yard. (Tr. 517). Turning to the picture of the truck utility box, Mr. Watson confirmed that there were no impact dents visible in the picture, and that the cattle gate, which was made of light aluminum, was mangled and bent nearly to the ground. (Tr. 518 – 519). Mr. Watson testified that the records reflected that Complainant only took one to two loads per day during the months of October, November, and December 2015. (Tr. 520). He confirmed that the control sheet would show any issues that a driver faced on the road, and that, at times, there were unforeseen issues that could slow a driver down. (Tr. 520 – 521).

Troy Pruitt (Tr. 525-554)

Mr. Pruitt testified that he has worked for Respondent for four years, currently serving as a supervisor. (Tr. 526). He began working for Respondent as a truck driver until his promotion a year-and-a-half prior. (Tr. 526). Mr. Pruitt said that on January 26, 2016, he arrived at the Jal yard at around 3:00am, and was dispatching drivers out of the Jal yard at that time. (Tr. 527 – 528). He recalled that a number of others were there including Jeff Kruse, Kurt Grandsire, and Marty Young. (Tr. 528). He recalled that a number of drivers had left, and that Complainant left the yard before him, around 6:00am. (Tr. 528 – 531). He said that as he was leaving the yard around 6:30am and approaching the gate he noticed damage to it, at which time he called his supervisor, Ernest Watson. (Tr. 532). At the time Mr. Pruitt was driving an 18-wheeler truck to Monahans for repair, and Kurt Grandsire was traveling with him in a pickup truck. (Tr. 532). According to Mr. Pruitt, Ernest Watson told him to take pictures of the damaged gate. Mr. Pruitt testified that he did not know at the time who had damaged the gate. (Tr. 533). After reviewing RX 37-47, Mr. Pruitt confirmed that these were the pictures that he took of the cattle gate. (Tr. 533). He testified that gate was clearly damaged by an 18-wheeler truck given the tire marks, and that the truck would have been leaving the yard at the time it rolled over the gate.

(Tr. 535). After taking these pictures, Mr. Pruitt proceeded in his 18-wheeler truck to the Monahans yard. (Tr. 537).

Mr. Pruitt testified that on the way to Monahans, Ernest Watson called him and told him to investigate Complainant's truck, because Complainant reported a flat tire on the driver's side steer tire. (Tr. 537). Ernest Watson sent Mr. Pruitt to Complainant's location at the Apollo location, along with Jesse Lerma and Marty Young. (Tr. 537). When he arrived, the flat tire had already been changed and the mechanics had left. (Tr. 539). Mr. Pruitt noticed "mud or something" on the fender of Complainant's 18-wheeler truck. He said that he asked Complainant about it, but "he walked away. He didn't say a lot. He walked away." (Tr. 539). Then, Mr. Pruitt testified, he noticed green paint on the corner of the toolbox, located on the left side of the truck. (Tr. 539). After he noticed the green paint he testified that Complainant approached him, and that Mr. Pruitt said he had to make some emails, after which he called his supervisor, Ernest Watson. (Tr. 539). Mr. Pruitt reported to Ernest Watson that he had found the green paint on the truck, and Ernest Watson told him to follow Complainant to the offload area and take pictures of the green paint. (Tr. 540). Mr. Pruitt was referred to RX 48, and confirmed that this was a picture that he took of Complainant's truck at the Jal offload yard. (Tr. 540). He confirmed that he saw green paint in the picture, and that the green paint was in the same condition that he saw it when he viewed it at the Apollo site. (Tr. 540 – 541). He testified that he could tell that the picture in RX 48 was taken at the Jal offload because "you see a yellow post. That yellow post they run along the LACT unit so they unload the trucks there. They have them on each corner to keep you from hitting the LACT unit, so you stay away from it so you don't run over the LACT unit." (Tr. 541).

While at the offload, according to Mr. Pruitt, on January 26, 2016, Complainant spoke with him, telling him that "he had some guys want to get together to sue the company for, for uniforms, being charged for uniforms." (Tr. 541 – 542). He said that he was shocked when Complainant asked him to join the lawsuit with him, and he told Complainant he had to go. (Tr. 543). Mr. Pruitt testified that Complainant did not see him taking pictures of Complainant's truck. (Tr. 543). Mr. Pruitt confirmed that RX 63 was a picture of the green paint on Complainant's truck at the Jal yard—the picture had the same distinct mud clump and identification on the box. (Tr. 544). Mr. Pruitt testified that Complainant then went to the Jal yard, and Mr. Pruitt went there too to begin checking in night drivers. (Tr. 545). After arriving at the Jal yard and proceeding to do his duties, Mr. Pruitt observed Complainant's truck being inspected at the fuel line in the Jal yard. (Tr. 546). It was Mr. Pruitt's understanding that all of the trucks were inspected in the Jal dispatch yard that evening. (Tr. 546).

Mr. Pruitt testified that he did not have conflicts with Complainant during Complainant's employment, and that Complainant never brought any safety concerns to him or any other employee. (Tr. 547).

On cross-examination, Mr. Pruitt confirmed that Ernest Watson, Andrew Tallichet, Don Shaw, Mike Buffy, Marty Young, and Jesse Lerma were in the Jal dispatch yard at the time that he arrived, which he said was around 2:00 pm. (Tr. 548). He confirmed that other trucks that had been dispatched early in the day were starting to come back into the yard. He testified that he did not speak with any of these drivers. (Tr. 548). He testified that his office responsibility is

"to dispatch out drivers … then I have to do time sheets, send reports off to FileZilla, which goes down south and they review them and stuff. And do a truck running report and a yard report. (Tr. 550 – 551). He said that he spoke with Marty the mechanic, who told him that he had asked Complainant "if everything was okay and that he was leaving." (Tr. 551). Turning to RX 48, Mr. Pruitt said that he did not test the green stripe on Complainant's truck to confirm that it was green paint, but said that "it appears to be green paint" because it was a straight, vertical green line on the box. (Tr. 552). Turning to CX 12, the picture of the damaged cattle gate, Mr. Pruitt confirmed that he saw tire marks on the damaged cattle gate, and that it looked "pretty mangled." (Tr. 553). He confirmed that the green paint was the only substance that he saw on Complainant's truck, and that he did not see any dents in that area of the truck. (Tr. 553).

On redirect, Mr. Pruitt said that the green line on Complainant's truck was the same color as the damaged cattle gate. (Tr. 554).

Andrew Tallichet (Tr. 555-587)

Mr. Tallichet testified that he has worked for Respondent since 2011, and that his present position is Operations Supervisor. (Tr. 556). Before this role, he worked for Respondent as a driver and supervisor. (Tr. 556). He confirmed that RX 65, 66, 67, 68, 70 were parts of Complainant's confidential personnel file maintained by Employer. (Tr. 557). He testified that RX 65 is a note regarding corrective action for the reckless driving incident October 21, 2015, written to Mr. Leal, a manager at the time. (Tr. 557 – 558). RX 66, 67, 68, and 70 were statements from Mr. Tallichet, Mr. Nombrano and Marty Young, Mr. Tallichet, and Mr. Dozier, respectively. (Tr. 558 – 559). He testified that all of these people had a business purpose in writing these statements. (Tr. 559). RX 68 related to the dispatch issue dated December 19, 2015; RX 66 related to the chair incident dated November 18, 2015. (Tr. 561). Mr. Tallichet testified that he was present when Complainant "tossed the chair" and said that he heard the chair as Complainant tossed it," and that the chair was "lying on its side, still open, not sitting up like a normal chair but laying down on its side." (Tr. 561 – 562). At the hearing, Mr. Tallichet used a chair that was brought from Respondent's office to demonstrate for the court the manner in which the chair was lying on its side. (Tr. 563). He said that in RX 67, Mr. Nombrano and Mr. Young were responding to Complainant's request that they fix the air leak in his truck. (Tr. 564 – 565). He then reviewed RX 79, a statement from Complainant in which he said that "Andrew Tallichet dismissed mechanics on duty knowing I needed my brakes inspected. Andrew proceeded to tell me, 'This is not a safety sens – this is not safety sensitive.' He then threatened me with a one-day suspension for failure to leave the yard." (Tr. 565 – 566). Mr. Tallichet said that this did not occur, that he never threatened Complainant was a one-day suspension for reporting a brake issue. (Tr. 566). Mr. Tallichet said that "getting out in the field" was a problem for Complainant because it "just took him extremely long to do a pre-trip." (Tr. 567). He recalled two occasions in which Complainant took a long time to leave the yard. (Tr. 566 – 567).

Mr. Tallichet testified that he remembers learning on January 26, 2016, about the gate being struck, and that did not initially know who had damaged it. (Tr. 568). He testified that he did not go out into the field to look at trucks but that he saw them as they were coming in at the end of the day, and that they looked at every truck that came in that day. (Tr. 568 – 569). He

turned to RX 23, which was a correction action written by Mr. Tallichet and given to Complainant in connection with the gate incident. (Tr. 569). He said that they examined all eight trucks and did not see any green paint on the other trucks; the last truck they examined was Complainant's truck. (Tr. 570). He testified that Complainant's truck did not normally have any green paint on it. (Tr. 570). He noted RX 63, a picture he had taken of the green stripe on the driver's side of Complainant's truck at the fuel island. (Tr. 570 – 571). Mr. Tallichet was shown the picture taken by Troy Pruitt of the same spot on Complainant's truck, and he noted that the pictures were similar because "the green paint's there. The mud's there." (Tr. 572). Turning to RX 49-56 and RX 63, Mr. Tallichet testified that these were all pictures taken by himself of Complainant's truck at the fuel island in the Jal yard on January 26, 2016; he noted the mud and green paint and more similarities between RX 53, 50, 63, and 48. (Tr. 572 – 573). He testified that RX 56 is a picture of what they thought were scratches in the aluminum of Complainant's truck after they wiped off the oil and mud from the truck. (Tr. 574). He testified that they then told Complainant that they were checking each truck as they were coming in because the cattle gate had been hit, after which Complainant retrieved his camera and began videotaping. (Tr. 575). He testified that Complainant was filming and narrating the scene while management was wiping the oil and mud off of the fender of Complainant's truck. (Tr. 576). He testified that prior to Complainant taking the video, neither Mr. Tallichet, Ernest Watson, nor Mike Crawford, had touched the box. (Tr. 576). He testified that he thought that Complainant had a rag and wiped it a little bit, and said that at one point complainant started scratching at the green paint. (Tr. 576). After this, members in management went into the office trailer to decide which actions to take next. (Tr. 579).

Mr. Tallichet explained that whenever they get a complaint about a truck, "we'll take the keys and we have a pouch that we put them in with the duty RR and hand them to the mechanic. We don't dispatch trucks that are to be qualified, we want to make sure they're roadworthy and safe." (Tr. 581). He said that this is their policy because it guards the safety reputation of Respondent. (Tr. 581). He knew of no safety issues reported by Complainant with regard to the trucks he was driving, and that whenever they had an issue they dealt with it. (Tr. 582).

On cross examination, Mr. Tallichet said that the trucks usually drive on dirt roads during the day, and that he would expect rocks to kick up and get starches on the inside of the truck fender. (Tr. 583 – 384). He confirmed that he did not see Complainant run over the cattle gate in question, and he did not speak with anyone who saw Complainant run over the cattle gate. (Tr. 583 – 584). With regard to the chair incident, Mr. Tallichet said he did not know whether Complainant was angry at the time that he placed the chair in the middle of the room, and confirmed that Complainant put it back when asked to do so. (Tr. 584). Regarding CX 11, the corrective action for the dispatch incident, he confirmed that no other drivers dispatched that day were disciplined for failure to report an accident. (Tr. 585). He testified with regard to RX 79 that he never threatened Complainant with a one-day suspension for failure to leave the yard. (Tr. 586). He testified that other than the January 26, 2016 cattle gate incident, the other disciplinary incident of Complainant that Mr. Tallichet was involved with was the chair throwing incident. (Tr. 587).

Scott Marcotte (Tr. 588-622)

Mr. Marcotte testified that he worked for Respondent as an Assistant General Manager, having worked for Respondent since July 2014. (Tr. 588 – 589). He testified that he previously served for 25 years in law enforcement in the City of Lufkin. (Tr. 589). With regard to Complainant's testimony that Respondent obtained coerced statements from employees, Mr. Marcotte said he did not know anything about that, and that no one told him that their statements were coerced. (Tr. 590). Mr. Marcotte was referred to RX 15-19, statements from Jesus Talavera, Moises Alivez, Complainant, Richard Dozier, and Marty Young regarding the parking lot altercation in early December 2015. (Tr. 590 – 591). His understanding from Moises Alivez was that Moises Alivez was preparing to park his work truck in a designated spot when Complainant improperly parked his truck behind Moises Alivez's truck, which upset Moises Alivez. (Tr. 591 – 592). He testified that Complainant's account of the encounter was that Complainant "parked back there and he had to honk to keep from getting run over. That Moises was traveling at a high rate of speed. And then once he parked his vehicle close to where Jordan was parked, got out, banged on his window. Jordan told me that he was in fear of his life at that particular time from Mr. Moises." (Tr. 592). Mr. Marcotte testified that he was concerned about what Complainant alleged against Moises Alivez because it involved workplace violence, and that he interviewed Complainant at length. (Tr. 592 – 593).

Mr. Marcotte was directed to RX 75, an audio recording in which Complainant was having a discussion with Mr. Marcotte and Ernest Watson. Mr. Marcotte testified that he told Complainant that they had a picture of him waving his breakfast while talking to Moises Alivez, and that Complainant did not seem to be in fear as he had suggested. (Tr. 594). He was directed to RX 62, an image that Moises Alivez had taken of Complainant during the altercation, and testified that it showed Complainant "smiling, he's waiving, and he's holding oatmeal. (Tr. 595). Mr. Marcotte testified that "I in no way believe, nor do I think any reasonable person would believe that as a result of this incident he was in fear of his life." (Tr. 595). Returning to the audio in RX 75, Mr. Marcotte testified that the discussion concerned "where it was permissible to park and where not to park," and he told Complainant that "if I can keep [Complainant] parking where he should park properly that these two incidents wouldn't have occurred. There would have been no flare-up with Mr. Talavera or with Moises." (Tr. 596). Mr. Marcotte testified that Complainant did not receive any discipline as a result of his statement or the statements from Moises Alivez and Jesus Talavera. (Tr. 596). He testified that Complainant was argumentative during their conversation in the RX 75 audio, but that by the end of the conversation "I believe [Complainant] finally, finally said that he will no longer park there." (Tr. 597). He noted that Moises Alivez accused Complainant of using expletives toward Mr. Alivez. He testified that during the audio discussion, Complainant did not raise any safety issues, and did not suggest that the statements by Moises Alivez and Jesus Talavera were coerced. (Tr. 600). He testified that during the audio discussion he had no knowledge at the time of any OSHA complaint filed by Complainant, and that Complainant never mentioned an OSHA complaint, or that Complainant had been bullied on the job. (Tr. 601).

With regard to the windshield incident, Mr. Marcotte described the DOT safety regulations for windshields. (Tr. 597 – 598). He said that when windshield is cracked in a fashion that makes in inoperable under DOT regulations, the mechanics are supposed to fix the

windshield. (Tr. 598). In the meantime, the driver will wait until the truck is operable, or will be given a different truck to drive. (Tr. 599). If none of these are possible, then the driver will be sent home without pay. (Tr. 599). He turned to RX 72, the Safety Measurement System scores for Respondent, and RX 80, the safety report that he sees as a corporate member of Respondent. He testified that both are essentially "the Department of Transportation letting us know how we're doing compared to other, other carriers." (Tr. 602). Mr. Marcotte described the different elements of the safety rating. (Tr. 603). Based on this rating Mr. Marcotte said that the company is in the third percentile of ranking, "meaning that we're better than 97 percent of the other carriers in that safety vendor." (Tr. 604). He noted that the company is the 38th percentile in crash indicator, meaning they are "62 percent better than the other carriers." (Tr. 604 – 605). The company was in the 19th percentile for hours of service, meaning they are better than 81 percent of other carriers in this category. (Tr. 606). He went through several other safety ratings including out-of-service rate, vehicle maintenance, and controlled substance and alcohol. (Tr. 606 – 608). Mr. Marcotte explained that the company achieves these good marks by seeking to exceed safety minimum regulations. (Tr. 608). He also testified that drivers for Respondent will enter a PIN number that determines whether they've had proper rest, and that drivers have a positive exchange with a supervisor before receiving the keys to a truck. (Tr. 609). He described the training videos that drivers with Respondent must watch in order to train them in proper safety as well as other procedures they undertake to ensure safety. (Tr. 609 – 614).

On cross-examination, Mr. Marcotte testified that he interacted with drivers at the Jal yard about once every couple of months. (Tr. 616). He testified that he did not have much interaction with Complainant prior to Complainant's termination on January 26, 2016. (Tr. 616). He said that he was not in West Texas or New Mexico at the time that Complainant was terminated, and that Mike Crawford called him and told him about the gate incident and that they would be inspecting the trucks for paint. (Tr. 618). He testified that he did not personally speak with Complainant or any of the employees who provided statements before Complainant was terminated. (Tr. 618). He affirmed that Respondent did not terminate Complainant for any of the incidents that happened prior to January 2016, and that neither the parking lot altercation nor the chair incident played into his termination. (Tr. 618 – 619). He also confirmed that, were a crack in a driver's windshield to grow over the course of the day, this could potentially pose a safety hazard to the driver. (Tr. 620 – 621).

On redirect, Mr. Marcotte testified that the company's open door policy means that "any time a driver or an employee have any kind of issue they can feel free to give us a call or come by, talk to us about different things." (Tr. 621). He testified that he has received calls from drivers regarding safety issues, and when this happens he investigates the complaint. (Tr. 622). He testified that he never received a call, text or email from Complainant regarding a safety complaint. (Tr. 622).

FINDINGS OF FACT

Respondent is a transportation company that transports crude oil and liquid nitrogen.

Complainant began working for Respondent on August 24, 2014, and operated commercial vehicles on the highway hauling crude oil.

Complainant was supervised by Michael Crawford.

Respondent has a progressive disciplinary policy.

Respondent has a progressive discipline policy and has a policy that an individual can be terminated from employment for failure to report an accident.

On February 15, 2015, Respondent received a complaint alleging that Complainant was driving recklessly on the Harrison Ranch. Respondent investigated but did not discipline Complainant at that time other than to prohibit Complainant from driving on that ranch in the future.

On October 3, 2015, Complainant complained to Respondent's mechanics about an air leak in his truck brakes. Raul Nombrano made a statement, dated November 19, 2015, regarding Complainant's request to fix an air leak the brakes of his truck.

On October 21, 2015, Respondent received a second complaint of Complainant driving recklessly on public highways. The complaint was received through its "1-800" line. After investigation, Respondent concluded that Complainant had been driving in the area and disciplined him with a letter of warning and a one-day suspension.

On November 19, 2015, Respondent disciplined Complainant with a letter of warning and three-day suspension for safety and insubordination concerns involving a chair during a meeting.

Complainant filed a whistleblower complaint with OSHA on November 20, 2015.

Complainant reported a cracked windshield on December 3, 2015. A large crack on a driver's windshield could pose a safety hazard.

Ms. Flores received Complainant's OSHA complaint on December 4, 2015.

On December 19, 2015, Complainant received a third letter of warning and a seven-day suspension because Respondent found he violated company policy by self-directing his truck rather than following the directive of the dispatcher.

In an email dated January 19, 2016, Complainant accused Respondent of creating a hostile work environment.

On January 26, 2016, a cattle guard gate at Respondent's Jal Dispatch Yard was found badly damaged. Respondent conducted an investigation to determine how the gate was damaged and ultimately determined that it was Complainant who damaged the gate while driving on of Respondent's trucks.

Complainant denied damaging the cattle guard gate thus did not report an accident to Respondent regarding the gate.

Respondent terminated Complainant's employment for failure to report an incident – i.e., the cattle gage – as required by Respondent's policy.

The decision to terminate Complainant was made by Mr. Crawford, Ernest Watson, Scott Marcotte, and Jenny Flores.

Mr. Crawford knew of previous disciplinary actions against Complainant when he and management made the decision to terminate Complainant's employment with Respondent, but was not directly involved in any disciplinary action against Complainant except his termination.

Respondent terminated another employee in October 2016 for failure to report running over the same cattle gate.

DISCUSSION

Legal Burdens of Proof

The Administrative Review Board summarized the legal burdens of proof in an STAA whistleblower case in *Mauldin v. G & K Services*, ARB No. 16-059, ALJ No. 2015-STA-54 (ARB June 25, 2018):

> Under the STAA, an employer may not discharge, discipline, or discriminate against an employee because the employee has engaged in certain protected activities. STAA complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).
>
> To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action. If the employee does not prove one of these requisite elements, the entire claim fails. The employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

Mauldin, ARB No. 16-059, slip op. at 4 (footnotes omitted).

A hostile work environment complainant is required to prove:

1) protected activity; 2) intentional harassment related to that activity; 3) harassment sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) harassment that would have detrimentally affected a reasonable person and did detrimentally affect the complainant.

Knox v. National Park Service, ALJ No. 2010-CAA-002, ARB No. 10-105, at 3-4 (ARB Apr. 30, 2012).

Protected Activity

Complainant asserts that he engaged in three instances of protected activity: (1) complaining about faulty brakes and a lack of brake inspection when requested; (2) filing an OSHA complaint; and (3) reporting that the windshield of his assigned truck was broken to the point that he was unable to safely drive the vehicle.

As stated above, the STAA prohibits covered employers from taking adverse employment action in retaliation for an employee's protected activity. Protected activity includes filing a complaint or testifying about "a violation of a commercial motor vehicle safety or security regulation, standard, or order." 49 U.S.C. § 31105(a)(1)(A). Under § 31105(a)(1)(A), a complainant is not required to prove a reasonable apprehension of injury, an actual violation, or that the complaint has merit.[2] I will look at each allegation of protected activity in turn.

Brake Inspection Complaint

I find the evidence convincing that Complainant did complain to the mechanics on October 3, 2015, about a suspected air leak in his truck brakes. Complainant submitted a recording of what he described as a "persisting air leak." (CX 19). Respondent also submitted a statement by Raul Nombrano dated November 19, 2015, regarding Complainant's request to fix an air leak the brakes of his truck. (RX 67). I find that the evidence is sufficient to show that Complainant did, in fact complain of an air brake leak, that the safety complaint constitutes a protected activity, and that Respondent had actual knowledge of this protected activity

OSHA Complaint

It is clear that Complainant filed an OSHA complaint for whistleblower protection on November 20, 2015. Complainant's OSHA complaint is admitted into evidence. (CX 13). In its closing brief, Respondent agreed that "Complainant did engage in protected activity; principally, he complained to OSHA on November 20, 2015, when he filed his online complaint." (Respondent's Brief at 6). Ms. Flores confirmed in her testimony that she received Complainant's OSHA complaint on December 4, 2015. (Tr. 439). I therefore find that Complainant engaged in protected activity when he filed a whistleblower complaint with OSHA on November 20, 2015, that the filing of said complaint constitutes a protected activity, and that Respondent had actual knowledge of this protected activity.

Cracked Windshield Report

I find the evidence supports Complainant's assertion that he reported a crack in the windshield on December 3, 2015. Complainant submitted a transcript of a conversation between himself and Marty Young regarding a crack in the windshield of Complainant's truck. (CX 3).

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[2] *Pittman v. Goggin Truck Line, Inc.*, 1996-STA-25 (ARB Sept. 23, 1997); *Lajoie v. Environmental Management Systems, Inc.,* 1990-STA-31 (Sec'y Oct. 27, 1992); *Barr v. ACW Truck Lines, Inc.,* 1991-STA-42 (Sec'y Apr. 22, 1992); *Yellow Freight Systems, Inc. v. Martin,* 954 F.2d 353 (6th Cir. 1992).

In this conversation, as Complainant also testified, on December 3, 2015, he noted that he had "a severely damaged windshield to the point where I was almost unable to see out of it. It shattered and cracked badly." (Tr. 234). I note that none of the other witnesses in this case had first-hand knowledge of Complainant's windshield complaint. However, Mr. Marcotte testified that a large crack on a driver's windshield could pose a safety hazard. (Tr. 621 – 622). I find the audio evidence to be compelling to corroborate Complainant's hearing testimony, and Mr. Marcotte's testimony indicated that cracked windshield could pose a valid safety concern. I therefore find that Complainant did complain of a crack in his truck windshield, that such a complaint constituted protected activity, and that, through its agent Marty Young, Respondent had constructive knowledge of this protected activity.

Adverse Employment Action

Having established that he engaged in protected activity on three occasions (October 3, 2015, November 20, 2015, and December 3, 2015), Complainant must also prove that he was the subject of an adverse action taken by Respondent. Complainant argues that he was the victim of several adverse employment actions, including receiving suspensions on multiple occasions; being subject to a hostile work environment; and eventually being terminated by Respondent.

The STAA prohibits an employer from taking adverse action against an employee in retaliation for the employee engaging in protected activity. 49 U.S.C. § 31105(a)(1). Adverse action includes discharging or otherwise retaliating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in protected activity. 29 C.F.R. § 1978.102(a). Adverse action may also include intimidating, threatening, restraining, coercing, blacklisting, disciplining, harassing, suspending, or demoting an employee. 29 C.F.R. § 1978.102(b). Complainant's bears the burden of establishing by a preponderance of the evidence that Respondent took at adverse action against him. 29 C.F.R. § 1978.109(a).

Undisputed adverse actions

The parties do not dispute that adverse action was taken against Complainant. In his closing brief, Complainant argues that he experienced an adverse employment action when he was suspended without pay in December 2015 and when he was terminated on January 26, 2016. (Complainant's Brief at 12). Respondent also admits in its closing brief that it took adverse employment actions against Complainant, "as he was written up no less than three times prior to her termination on January 26, 2016." The parties have submitted evidence documenting Complainant's "write-ups" and eventual termination. (RX 10, 14, 22). I therefore find that Respondent took adverse employment actions against Complainant when it suspended him on October 21, 2015, November 19, 2015, and December 21, 2015, and when it terminated his employment on January 26, 2016.

Disputed adverse actions

Complainant alleges that he was subjected to a hostile work environment and that Respondent created the hostile work environment in which he was subject to "further targeting" and "retaliation." Other than an email dated January 19, 2016, in which he accused Respondent

of creating a hostile work environment, Complainant has presented no documentary or testimonial evidence to demonstrate how he was subjected to a hostile work environment, or that he frequently complained of a hostile work environment to his superiors. Ms. Flores testified that Complainant never sent any harassment complaints to her about being bullied on the job or being retaliated against for safety complaints. (Tr. 434 – 435). Mr. Watson testified that he vaguely remembered a text message Complainant sent him on November 20, 2015, but that he did not recall any other communications with Complainant regarding retaliations, whether by email, text message, or verbal communication, (Tr. 471 – 474). He testified that Complainant never told him that he was being harassed or bullied or retaliated against by Respondent. (Tr. 493). Mr. Marcotte testified that he had no knowledge of whether Complainant had been bullied on the job. (Tr. 601). None of the remaining witnesses corroborated Complainant's account.

Based on the facts before me, I do not find that Complainant suffered from a hostile work environment. Although Complainant complained of a hostile work environment on a couple of occasions, and there were minor incidents between Complainant and colleagues alleged (where one might equally determine Complainant was the aggressor), there was no evidence put forward that any action taken by Respondent or its employees was so severe or pervasive that it altered Complainant's employment or created an abusive or hostile environment. I find that the incidents with the other employees were not at all motivated by a retaliatory intent or even a general animus present in the work environment because of any retaliatory intent; and that a reasonable person would not have been detrimentally affected, nor was Mr. Thiery detrimentally affected. I further find that any disciplinary actions taken against Complainant did not create a hostile work environment.

Contributing Factor[3]

Complainant has the burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in his suspension and firing. "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. It just needs to be a factor; the protected activity need only play some role, and even an 'insignificant' or 'insubstantial' role suffices. If the ALJ believes that the protected activity and the employer's non-retaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question." *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-00030, at 11 (Jan. 6, 2017) (internal citations omitted).

Complainant alleges that his protected activity was a contributing factor to his suspension in December 2015 and his termination on January 25, 2016. (Complainant's Brief at 14). I will discuss each of Complainant's four adverse employment actions in turn.

One-day suspension

To determine whether Complainant's protected activity was a contributing factor to his one-day suspension on October 21, 2015, I have considered Claimant's protected activity that

[3] I note that Complainant's burden of proof is extremely low and further note that whether Complainant met his burden was a close decision.

occurred prior to October 21, 2015. In this case, Complainant's October 3, 2015 complaint that his air brakes were leaking is the only instance of the three instances of protected activity that took place prior to his one-day suspension on October 21, 2015. In his OSHA complaint filed in November 2015, Complainant said that on October 3, 2015, Andrew Tallichet "dismissed mechanics on duty knowing I needed my brakes inspected. Andrew proceeded to tell me this is not safety sensitive. He then threatened me with a one-day suspension for failure to leave the yard." Given the temporal relationship between Claimant's protected activity and his one-day suspension, I find that the Claimant has met the low burden of providing evidence that his protected activity was a contributing factor in his receiving a one-day suspension.

Three-day suspension

Complainant was suspended for three days on November 19, 2015, for insubordination. I have considered Complainant's protected activity that I have found occurred prior to or contemporaneous with his three-day suspension. The only protected activity that occurred prior to November 19, 2015, was the reporting of brake issues on October 3, 2015, approximately a month and a half prior to his three-day suspension. While I have already found the October 3, 2015 protected activity could have been a contributing factor to his one-day suspension on October 21, 2015, I also find that this event is of close-enough proximity to meet the low burden of a contributing factor to Complainant's three-day suspension on November 19, 2015.

Seven-day suspension

Complainant's seven-day suspension occurred on December 21, 2015, and I will therefore consider protected activity that occurred prior to or contemporaneous with his suspension. I have found that Claimant's report concerning a broken windshield on December 3, 2015, constituted protected activity. Moreover, Complaint's OSHA complaint was filed on November 20, 2015, and was known to Respondent at the time the time Complainant received a seven day suspension on December 21, 2015. Given the temporal proximity between the brake report on October 3, 2015, the windshield report on December 3, 2015, the filing of the OSHA complaint on November 20, 2015, and his seven-day suspension on December 21, 2015, I find that Complainant has demonstrated sufficient evidence to meet the low burden that his protected activity on October 3, 2015, November 20, 2015, and December 3, 2015, could have been contributing causes to his seven-day suspension on December 21, 2015.

Termination

Finally, Complainant argues that his protected activity was a contributing factor to his termination by Respondent. Respondent argues that Complainant's protected activity was not a contributing factor in his termination and that he was terminated for failure to report damage to the green cattle gate. In his closing brief, Complainant makes no positive argument that his protected activity contributed to his termination. Rather, he attacks the integrity of Respondent's investigation that found him responsible for damaging the cattle gate, which will be discussed in more detail below.

Complainant's termination occurred on January 26, 2016. Accordingly, I have considered Complainant's protected activity that occurred prior to his termination date. In this case, all three of Complainant's protected activities occurred before his termination date: complaining about faulty brakes on October 3, 2015; Filing his OSHA complaint on November 20, 2015; and refusing to drive with a broken windshield on December 3, 2015. I find that this chain of three protected activities are in close-enough temporal proximity to meet the minimum requirement of a contributing factor to Complainant's January 26, 2016 termination. I therefore find that Claimant has met the low burden of demonstrating that his protected activity was a contributing factor to his termination on January 26, 2016.

I. **Respondent's Affirmative Defense**

To avoid liability where a complainant has established that his or her protected activity was a contributing factor in an unfavorable personnel action, the employer must show by clear and convincing evidence that it would have taken the same personnel action absent the protected activity. 49 U.S.C. § 42121(b); 49 U.S.C. § 31105(b); 29 C.F.R. § 1978.109(b)(1). It is not enough to show that the employee's conduct constituted a legitimate independent reason justifying the adverse personnel action, or that the respondent *could have* taken the personnel action in the absence of the protected activity. *See Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13–074, ALJ No. 2005–ERA–006, slip op. at 11 (ARB Apr. 25, 2014); *Pattenaude v. Tri–Am Transport, LLC*, ARB No. 15–007, ALJ No. 2013–STA–037, slip op. at 15–16 (ARB Jan. 12, 2017). Instead, the employer must show that it *would have* taken the same adverse action absent the protected activity through either direct or circumstantial evidence. *Speegle*, ARB No. 13–074, slip op. at 11. The employer's affirmative defense "is a fact–intensive assessment that requires a determination, on the record as a whole, how clear and convincing [the respondent's] lawful reasons were [for the unfavorable personnel action]." *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16–033, ALJ No. 2014–STA–061, slip op. at 12 (ARB Sept. 27, 2017). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Williams*, ARB No. 09–092, slip op. at 5, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04–037, ALJ No. 2002–AIR–008, slip op. at 14 (ARB Jan. 31, 2006) (citing Black's Law Dictionary at 577). The employer can meet its burden through direct or circumstantial evidence; circumstantial evidence can include evidence of the temporal proximity between the non–protected conduct and the adverse actions, the employee's work record, statements contained in relevant office policies, evidence of other similarly situated employees who suffered the same fate, and the proportional relationship between the adverse actions and the bases for the actions. *Speegle*, ARB No. 13–074, slip op. at 11.

Respondent has presented evidence for its affirmative defense for each instance of adverse employment action. I will analyze each in turn.

One-day suspension

Respondent asserts that Complainant was suspended for one day due to the reckless driving incident on October 21, 2015, and not due to any of his protected activity. In support of its assertion, Respondent put forth the following evidence.

The corrective action form for the reckless driving incident indicates "[Complainant] received a call in for reckless driving on Hwy 128. 2 counts were reported. This is [Complainant's] 2nd time he has been called in for excessive speed. 1st time was on Harrison ranch." (RX 10). Respondent asserted that Complainant was being suspended for one day "for violating company policy as it pertains to use of a commercial vehicle." (RX 10). Pat Leal provided a statement describing a report from an individual named "Ray" who described complained driving recklessly on October 21, 2015. (RX 9). A written noted dated October 21, 2015 said that Ray had to slam on the brakes to avoid Complainant driving recklessly. (RX 65). Mr. Crawford testified that the driver called Respondent's 1-800 number to report that Complainant was driving in a reckless manner on the public roads. (Tr. 103 – 110).

Ms. Flores testified that in her phone conversation with Complainant regarding this reckless driving incident, he did not raise any safety complaints with her. (Tr. 431). She asserted that Complainant's primary concern in the phone call was that the caller was lying and that Complainant was not in the location described. She testified that the company looked at Complainant's trip activity report to compare the routes that Complainant would have taken that day, and determined that he was in the place described at the time. (Tr. 431 – 432). In giving Complainant a one-day suspension, Ms. Flores said the company was seeking to "bring to his attention that we take safety very seriously. We want him to drive safe and follow our rules of safety." (Tr. 433). Respondent received a complaint on October 21, 2015 from a driver regarding a reckless driver. The number of the truck matched the truck that Complainant was driving that day. Complainant's corrective action form for the one-day suspension lists the reason was for the reckless driving incident. Mr. Crawford, Ms. Flores, Mr. Watson, and Mr. Tallichet all agreed that Complainant was suspended for one-day due to reckless driving. Complainant has previously been reported for reckless driving, but was not disciplined, in line with Respondent's progressive discipline policy.

Based on the facts before me, it is clear that Respondent was following its enumerated safety protocols and that Complainant's protected activity did not play a role in its decision to suspend Complainant. Accordingly, I find that Respondent has proved by clear and convincing evidence that it would have taken the same personnel action absent Complainant's protected activity of reporting the air brakes on October 3, 2015.

Three-day suspension

Respondent asserts that Complainant was suspended for three days on account of the chair incident, and not due to any of his protected activity. In support of its assertion, Respondent put forth the following evidence:

The corrective action form for the three-day suspension indicates that Complainant was being suspended because he "engaged in actions that were unprofessional, disruptive and destructive." (RX 14). Richard Dozier, Judy Pruitt, and Andrew Tallichet provided statements indicating Complainant threw or placed a chair in the middle of the room. (RX 12, 13). Mike Crawford detailed a corrective action involving Complainant throwing a chair in a meeting at the Jal yard, after which they decided to take statements from any employees present at the time, and reported the incident to the H.R. manager Jenny Flores. (Tr. 116 – 118).

Mr. Crawford testified that he was unaware that Complainant had filed an "OSHA complaint" immediately following the chair-throwing incident," and he also did not know about an earlier complaint regarding uniforms. Ms. Flores testified that Complainant received this suspension for throwing a chair into the middle of a meeting room. (Tr. 436). She said that two individuals said that Complainant had "tossed" the chair into the middle of the room and refused to pick it up and "argued with them and he finally did move it." (Tr. 437). She testified that Complainant was given three days suspension for this event "because of the safety issues involved and insubordinations of refusing initially to pick up the chair and place it out of harm's way." (Tr. 437).

Ms. Flores testified that at the time she did not know of any safety complaints, videos, text message, or emails from Complainant. (Tr. 437 – 438). She said that company was seeking to convey the message to Complainant "that we take safety seriously for all of our employees. And you have to follow the rules to what the supervisors ask you to do, as long as it's not unsafe, illegal, or immoral." (Tr. 438). Ms. Flores said she hoped this action "would correct his actions and turn out to be a good employee." (Tr. 438).

Ernest Watson testified that he was involved in the chair-tossing suspension, in which he gathered information from Richard Dozier to give to H.R. Andrew Tallichet said that he was present when Complainant "tossed the chair" and said that he heard the chair as Complainant tossed it," and that the chair was "lying on its side, still open, not sitting up like a normal chair but laying down on its side." (Tr. 561 – 562). Mr. Tallichet used a chair that was brought from Respondent's office to demonstrate for the court the manner in which the chair was lying on its side. (Tr. 563).

Mr. Crawford, Ms. Flores, Mr. Watson, Mr. Tallichet, and Mr. Marcotte all testified that they heard Complainant had tossed a chair into the middle of the floor during a meeting and had initially refused to pick it back up when asked to do so. Complainant was previously suspended for one day suspension, and therefore a three-day suspension was in line with Complainant's progressive discipline policy.

I find that Respondent had sufficient reason to suspend Complainant in response to the chair incident, and that this was in-line with Respondent's progressive discipline policy. I find that Respondent's actions were not pretextual. Based on the facts before me, I find that Respondent has proved by clear and convincing evidence that it would have taken the same personnel action regardless of Complainant's protected activity of reporting the air brakes on October 3, 2015.

Seven-day suspension

Respondent asserts that Complainant was suspended for seven days on account of his failure to accept a dispatch on December 19, 2015, and not due to any of his protected activity. In support of its assertion, Respondent put forth the following evidence:

A statement from Respondent indicates that Complainant was suspended for seven days in response to the dispatching incident. (RX 22, 61). A statement from Erica Otiveroz, a dispatcher with Respondent, described Complainant's refusal to accept the dispatch. (RX 20). Andrew Tallichet also provided a statement regarding the dispatching incident. Also, several of Respondent's employees testified with regard to the dispatching incident. Mike Crawford described the dispatching incident on December 19, 2015, in which Complainant declined to drive to two locations required by the dispatcher. (Tr. 124 – 128). Complainant was written up for this event. (Tr. 128).

Mr. Crawford testified that there was no excuse for Complainant not to take a dispatch, and indicated that if a driver did not have enough hours in his shift to complete a job, a "fresh driver" would be dispatched to take over the job for the driver. (Tr. 129 – 131). (Tr. 128 – 129).

Ms. Flores recalled that she was a party to a phone call in which Stephen Greak spoke with Complainant regarding his suspension in December 2015 for refusing the dispatch. (Tr. 417 – 418). She confirmed that this suspension took place after Complainant filed his whistleblower complaint. (Tr. 419). Ms. Flores confirmed that Complainant was suspended for seven working days without pay for this incident. (Tr. 443). She said he was not terminated because "we were trying to show him that we believed in him, trying to get him to follow the rules, follow safety." (Tr. 444). She said that she was unaware of any videos, text messages, or emails from Complainant concerning safety issues. She recalled that Complainant disputed the corrective action, saying that "the dispatcher had told him 10-4 when he said he was just going to bring it to the yard, meaning "okay." But we have our dispatchers to not argue with a driver. Take it up, take the matter to your supervisor or the manager on duty." (Tr. 445).

Mr. Watson testified that he knew that Complainant could have driven to either the Apollo 7 or Endurance dispatch sites in a timely fashion, because Mr. Watson had driven those routes many times before. (Tr. 501 – 503). It was not appropriate for Complainant to decline these dispatches. (Tr. 503). Even if he had run out of a time, Respondent would instruct Complainant to park the truck and would have sent a driver to pick up Complainant. (Tr. 504). Mr. Watson testified that Complainant sometimes took more than an hour to do his pre-trip inspection, which he said was more than the industry standard of 15 to 30 minutes. (Tr. 506). Mr. Watson confirmed that the dispatcher provided the "okay" for Complainant's request to bring the truck back in empty. (Tr. 516).

Based on the evidence before me, and discussed above, it is clear that Respondent had a legitimate reason to discipline Complainant for his failure to accept a dispatch. The evidence and testimony demonstrated that Complainant's self-dispatch to the Jal yard on December 19, 2015, violated Respondent's policy. Complainant himself admitted that he miscalculated the distance to the two locations the dispatcher gave him. Even if he were unable to reach those locations, Mr. Crawford indicated that Respondent would have sent a driver to relieve Complainant, and that Complainant had no excuse to self-dispatch back to the Jal yard, because Respondent, had a policy in place to ensure that drivers did not drive longer than legally required. Moreover, Mr. Watson described what he believed was a habitual issue with the amount of time Complainant took to complete runs and inspections.

Complainant testified that he thought he received authorization from the dispatcher to return to the Jal yard empty when the dispatcher responded "okay." However, Ms. Flores testified that Respondent has a policy to not argue with drivers when they refuse a dispatch. While Complainant may have thought he was receiving authorization, he was clearly violating Respondent's policy, for which Respondent disciplined him.

Considering the evidence and testimony, as well as Respondent's progressive disciplinary policy, I find that Respondent has met its burden to demonstrate by clear and convincing evidence that it would have taken the same personnel action absent Complainant's protected activity of reporting the air brakes on October 3, 2015, or the filing of the OSHA complaint on November 19, 2015.

Termination

At the hearing in this case, a great deal of the testimony revolved around whether or not Complainant was responsible for damaging the cattle guard gate on January 26, 2016. Complainant "urges the Court to review the testimony (as cited herein) that none of Respondent's management who allegedly investigated the incident spoke with any other drivers as to the incident, nor did they actually see [Complainant] hit the gate." Respondent's Brief at 15. Complainant, in sum alleges that the investigation was merely a pretext for an unlawful termination based on retaliation. The law is clear, however, that it is not the role of the ALJ to act as a super-personnel "department that reexamines an entity's business decisions." J*ones v. U.S. Enrichment Corp*., ARB Nos. 02-093, 03-010, ALJ No. 2001- ERA-021, slip op. at 17 (ARB Apr. 30, 2004) (citations omitted). Rather, the relevant inquiry is the respondent's perception of its justification for the discharge. *Moon v. Transport Drivers, Inc*., 836 F.2d 226, 230 (6th Cir. 1987). A respondent does not have the burden of proving the correctness of a disciplinary charge, but rather that protected activity did not cause the discipline in whole or in part. *Wevers v. Montana Rail Link, Inc*., ARB No. 2016-0088, ALJ No. 2014-FRS-00062, slip op. at 12 (ARB June 17, 2019) (per curiam).

Respondent asserts that it terminated Complainant's employment due to the cattle gate incident on January 26, 2016. Complainant's termination letter, indicates that Complainant was being terminated for "Violation of Company Policy(s)/Rules."[4] (RX 1). A corrective action form dated January 26, 2016, indicated that Complainant was being terminated because he "failed to report a vehicle accident and, or property damage." (RX 23). There is a transcript of a conversation between Mike Crawford and Complainant in which Mr. Crawford told Complainant that he was being terminated for not reporting the damage to the cattle gate. (RX 78).

Mr. Crawford explained that the Jal yard is leased by Respondent, and the cattle gate is a common exit to Highway 28 that Respondent shares with several other companies. (Tr. 133). He said that Respondent has a policy that an individual can be terminated from employment if

[4] Although Respondent asserts that it based its decision to terminate Complainant based on his failure to report the cattle gate accident, I find that the record is full of instances showing Respondent acted a as a reasonable employer that offered Complainant many chances to improve his behavior and abide by Respondent's policies. The fact that Complainant continued to violate Respondent's policies bolsters that Respondent was reasonable in using progressive discipline, and eventually terminating Complainant's employment.

they do not report an accident. (Tr. 134). Ms. Flores also testified that there are occasions where an employee is immediately terminated without progressive discipline, including failure to report an incident, failure to follow company policies, insubordination, and on-road accident. (Tr. 423). Both Mr. Crawford and Ms. Torres described an instance that took place after Complainant's termination, in October 2016, in which another driver ran over the same cattle guard gate at the Jal yard and failed to report it, resulting in an investigation and the driver's termination – a driver who had no previous disciplinary issues. (Tr. 135 – 138; Tr. 427).

In the instant matter, I find no evidence to support Complainant's assertion that the investigation as to who ran over the cattle guard gate was pretextual. Respondent's witnesses were entirely credible in this regard and testified in considerable detail the investigation into how the cattle gate was damaged and how they came to the conclusion that it was Complainant who damaged it and failed to report it. I conclude that it was reasonable for Respondent to come to this conclusion. Moreover, weighing credibility, I find the testimony of Respondent's witnesses more forthright than that of Complainant. Considering the evidence and testimony, as well as Respondent's disciplinary policy, I find that Respondent has met its burden to demonstrate by clear and convincing evidence that it would have terminated Complainant absent his protected activity of reporting the air brakes on October 3, 2015, the filing of the OSHA complaint on November 19, 2015, and the reporting of a cracked windshield on December 3, 2015

Conclusion on Respondent's affirmative defense

I find that Respondent has demonstrated with clear and convincing evidence that it would have taken the same adverse employment actions against Complainant had he never engaged in any of the protected activity identified. Respondent has therefore successfully presented its affirmative defense that it would have taken the same adverse employment action against Complainant in the absence of Respondent's protected activity.

CONCLUSION

Complainant has demonstrated by a preponderance of the evidence that he engaged in protected activity, that he experienced and adverse action, and that a causal relationship existed between his protected activity and the adverse actions. I find, however, that Respondent has demonstrated by clear and convincing evidence that it would have taken the same adverse employment action against Complainant had he not engaged in protected activity.

ORDER

Accordingly, it is hereby **ORDERED** that the Complainant's complaint against Respondent is **DENIED** and the case is hereby **DISMISSED**.

SO ORDERED.

CARRIE BLAND
District Chief Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it.

See 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).
If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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