U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 July 2019

CASE NO.: 2017-STA-00081

In the Matter of:

EMILY REYNEKE,
Complainant,

v.

NAVAJO EXPRESS TRUCKING,
Respondent.

Appearances: Emily Reyneke
Self-represented Complainant

Nadia H. Patrick, Esq.
Nickolas J. Erickson, Esq.
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER

This is an action under the employee protection (whistleblower) provision of the Surface Transportation Assistance Act, 49 U.S.C. § 31105, and its implementing regulations, 29 C.F.R. Part 1978. Complainant Emily Reyneke alleges that her former employer, Navajo Express Trucking, terminated the employment in retaliation for her refusing to falsify logs, reporting temperature problems in the truck cab, reporting an exhaust leak, and refusing to take her truck to Boise, Idaho, when it would be unsafe to do so. Navajo Express denies the allegations. The matter is before me for hearing *de novo*. *See* 29 C.F.R. § 1978.107(b).

Respondent Navajo Express Trucking moves (1) for summary decision, and (2) for a dismissal sanction. On summary decision, it contends that it did not subject Complainant to an adverse employment action in that Complainant resigned voluntarily and was not discharged. It argues that any would-be protected activity occurred after Complainant resigned and thus is not actionable. On the sanctions motion, Respondent contends that Complainant engaged in a pattern of not complying with the ALJ's orders or the applicable regulatory procedures for the litigation.

Complainant opposes both motions. In a cross-motion, she asks that I revisit an earlier-issued order setting the location of the hearing in Denver, Colorado.

I will dismiss the case because of Complainant's persistent, flagrant failures to comply with the ALJ's orders to prepare for the hearing and because of her vexatious litigation tactics.

Background and Facts

Complainant has represented herself throughout the litigation. Respondent has been represented by counsel of record.

At the outset of the litigation, this Office issued a Notice of Docketing. The Notice stated that this Office's Rules of Practice, at 29 C.F.R. §§ 18.10 through 18.95, apply to this case. It also informed the parties that these procedural rules are available to read through the OALJ website.

After the case was assigned to me, I followed with a notice of hearing and pre-trial order on October 12, 2017. I set the hearing for April 2, 2018, in Medford, Oregon. I repeated that the applicable procedures for the litigation were published at 29 C.F.R. Part 18, subpart A. I ordered that, if the parties had not made the initial disclosures that those procedural rules require, the parties make the disclosures within 14 days. I cited the parties to the rule involved, 29 C.F.R. § 18.50. The rule provides a specific list of what disclosures are required. I stated that the requirement of initial disclosures applies "in every case, including cases where a party does not have an attorney." Pre-Trial Order (Oct. 12, 2017) at 2, ¶ II.B. The pre-trial order required that the parties, no later than 30 days before the hearing, file and serve a pre-hearing statement with information specified in nine separate paragraphs.[1]

I advised the parties about the potential for sanctions, stating:

> Unless good cause is shown, parties will not be permitted to litigate issues, call witnesses, or introduce evidence they fail to disclose at the times and in the ways this order requires. Failure to comply with this Order subjects the offending party to sanctions. *See generally* 29 C.F.R. §§ 18.12(b), 18.35(c), 18.50(d)(2)&(3), 18.52, 18.87.

Notice of Hearing and Pre-Trial Order (Oct. 12, 2017) at 4, ¶ 6.[2]

[1] The required disclosures and information included, among other things, a statement of stipulated facts and of facts in dispute; a statement of the issues; a witness list with certain information about each witness; an exhibit list with certain information about each exhibit; and other similar information. The parties were also required to serve one another (but not the ALJ) with a copy of each exhibit on the exhibit list.

[2] This is not Complainant's first experience representing herself in a whistleblower claim at this Office under the Surface Transportation Assistance Act. After an adverse determination from OSHA, Complainant requested a hearing in *Reyneke v. May Trucking Co.*, OALJ Case No. 2017-STA-00039. In that case, Judge King notified Complainant about some of the same requirements for the litigation of STA claims at this Office. He advised Complainant that litigating these claims was challenging, that she could retain an attorney, and that the Act

The Pre-Trial Order also required that any motion for summary decision be filed no fewer than 40 days before the hearing. Nonetheless, a day after that deadline passed, Respondent filed a motion to allow a late-filed motion for summary decision. It argued that (1) Complainant had not served initial disclosures, and (2) Complainant had not agreed to a date on which she would give a deposition, so Respondent had noticed it for February 27, 2018, which was six days *after* any motion for summary decision had to be filed. Respondent detailed the efforts it had made to obtain Complainant's initial disclosures without the need for a motion and to arrange a mutually agreeable date for the deposition rather than notice a date unilaterally.

Describing its informal efforts, Respondent stated that the explanation Complainant gave for not serving initial disclosures was that, in Complainant's view, Respondent had failed to produce some documents with its disclosures. Respondent asked Complainant to identify what she thought was missing. Complainant did not provide the list until February 20, 2018. Respondent stated that it had already provided the requested additional documents and would provide them again within two days.

As to the deposition, Respondent offered declarations to the effect that Complainant stated that she would not testify for more than two hours and that she would not testify on weekdays. Respondent stated that the deposition would take at least seven hours, not just two, but it offered to take the deposition reasonably near Complainant's residence on a weekend. Complainant would not offer a weekend date or any other date for the deposition. It was at that point that Respondent noticed the deposition unilaterally for February 27, 2018.

Respondent had a process server personally serve Complainant with a notice requiring her to attend the deposition. Complainant emailed Respondent's counsel. She stated that the process server had a history of trespassing on her property and that, if Respondent used the same process server again, "[defense counsel] will be held criminally and civilly liable for any trespass."[3] She demanded—contrary to the applicable procedural rule—that, in the future, Respondent serve her by email and also by U.S. mail.[4]

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contained a fee-shifting provision. Transcript (Apr. 20, 2017) at 5-8, 15-17. He advised Complainant that a failure to comply with procedural requirements can result in sanctions, including a dismissal of the case. *Id.* at 6. Judge King warned Complainant that if she failed to meet deadlines for disclosure of witnesses, she "may be precluded from changing your mind in the future and trying to call people that you didn't identify before." *Id.* at 10. As to the civility expected, Judge King stated: "And to each of you, I will say that I expect that you will treat each other with respect and courtesy and respond to communications from the other, even if it's to say, "I'm sorry, but I have no interest in talking about [that] . . .'" *Id.* at 13. The matter was closed after Judge King approved a settlement requiring Respondent to pay $5,000 and to provide a neutral employment reference. (I take official notice of the files and records of OALJ.)

[3] Email, Feb. 21, 2018 at 6:16 p.m.

[4] The applicable rule does not require service to be achieved in two different ways; one is sufficient. *See* 18 U.S.C. § 18.30(a)(2).

Respondent's service of the notice of deposition was proper and sufficient. Service may be accomplished by (among other methods): "(A) Handing it to the person; [or] (B) Leaving it . . . (2) at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there." 29 C.F.R. § 18.30(a). Nonetheless, Complainant asserted that, despite having received the documents that the process server left with the resident manager at her dwelling place, she had not been properly served and would not attend the deposition as noticed.[5]

With the motion to late-file the motion for summary decision pending, Respondent moved to compel Complainant to attend and testify at the deposition, to serve initial disclosures, for sanctions, and to continue the hearing.

Given what Respondent contended were Complainant's failure and refusal to make initial disclosures and her refusal to attend and testify at a properly noticed deposition, Respondent argued that the case should be dismissed as a sanction, citing 29 C.F.R. §§ 18.57(c), (d) and 18.64. In the alternative, Respondent argued that Complainant should be ordered to make the disclosures and testify at a deposition, and it asked that the hearing be continued to allow time to complete discovery and to have a properly prepared motion for summary decision briefed and adjudicated.

I had scheduled what I intended as a telephonic pre-hearing conference for March 7, 2018. The parties' respective pre-hearing filings and exchanges were due five days before the conference and would be needed to make the conference meaningful. The pre-hearing filings would be my only indication of what the issues for the hearing would be and what the parties were planning to present at the hearing. But when the pre-hearing conference date arrived, neither party had filed any of the required pre-hearing materials.

The focus at the pre-hearing conference thus became the pending motions, the apparently stymied discovery, and the parties' mutual failure to submit the required pre-hearing filings. As it turned out, no party had taken any depositions or propounded any interrogatories, requests for production, or requests for admission. Complainant did not dispute that she had not produced any initial disclosures.

Complainant asserted as an excuse for not making the initial disclosures that Respondent had not been "producing anything" and had delayed discovery with "several months of nothing." Transcript (Mar. 7, 2018) at 5. Complainant's assertion was without foundation. Even were it true, it is not an excuse for Complainant to refuse to meet her own disclosure requirements. Complainant's remedy would be a motion to compel and for sanctions. Complainant offered no excuse for failing to submit a pre-hearing statement.

[5] *See* Proof of service, signed by Michael Fisher, Alley Catz Process Services, certifying hand delivery to Complainant's address on February 14, 2017 at 7:45 p.m. Apparently, Fisher left the subpoena with the manager of the residential park at which Complainant was residing. Complainant stated that the manager was not authorized to accept service for her and that the subpoena therefore had not been served.

Respondent conceded that it also had failed to submit its pre-hearing statement. It agreed that discovery had been stymied. But, consistent with the record described above, Respondent rejected any contention that it had not "produce[d] anything."

Complainant suggested—again without foundation—that Respondent's motion for a continuance was a "stall tactic" that would create an opportunity for Respondent to engage in spoliation of the evidence. *Id.* At the same time, however, Complainant agreed that the parties needed more time to prepare for a hearing. *Id.* at 7. As there had been no previous continuances and as both parties were unready to go forward, I granted Respondent's motion for a continuance of the hearing.

I advised Complainant that she might do well to retain an attorney. I asked her if she was aware that, if she prevailed in the litigation, I would award reasonable fees that Respondent would have to pay her attorney. Complainant stated that she was aware of the fee-shifting but that Oregon lawyers wouldn't take cases without retainers and that she couldn't afford to pay a lawyer. *Id*. at 8-9.

I offered information about ways to look for attorneys (including those in other states) who specialized in whistleblower cases that truckers bring. I stated that, as Respondent was filing a motion for summary decision, it might be difficult for Complainant to oppose that motion successfully without counsel. Even if she successfully resisted summary decision, she likely would benefit from having an attorney to present her case at the hearing. *Id.* at 8-10. I added that, as there was going to be a continuance, Complainant would have additional time to search for an attorney. *Id.* at 10.

I provided Complainant with a lengthy statement about the applicable legal framework applicable to her case. I discussed both substantive and procedural requirements. Transcript (Mar. 7, 2018) at 11-14. I summarized the specifics of the initial disclosure requirements. *Id*. at 14-15. The same information had been available all along for Complainant to read had she looked at the rule that I cited to her; she knew that she could access those rules through the ALJ website. I ordered that Complainant comply with the initial disclosure requirements no later than 14 days after the conference. *Id.* at 15. I warned that I would consider imposing sanctions for any failure to comply, and I discussed what those sanctions might be. *Id*.[6]

The parties agreed that Complainant would give her deposition on April 2, 2018, and I ordered that it go forward on that date, consist of one day of seven hours, and that the date could be changed only on the agreement of the parties or by order of the ALJ. *Id.* at 18-19.

As to the parties' failure to submit the pre-hearing filings, I excused the failures because I was continuing the hearing date and essentially because sanctioning both parties by excluding their

[6] Because Complainant stated that Respondent had objected to producing certain information, I advised her that she could file a motion to compel. *Id.* at 16-17. She never did.

witnesses and exhibits at the hearing would result in a hearing with no evidence.[7] *Id.* at 22. I again described to the parties what the pre-hearing filings had to include. I warned the parties that, if they failed to disclose timely the witnesses whom they planned to call at the hearing, I would not allow them to call any witnesses. *Id.* at 23. I warned that, if a party failed to submit an exhibit list, I would not admit into evidence any exhibits the party offered at the hearing. *Id.* I concluded: "So don't neglect to do this. It will have consequences. If you can't call witnesses, it will be much harder to prove your case. And, you know, that's what's going to happen if you don't comply with this requirement." *Id*. I urged that, if Respondent wanted to file a motion for summary decision, it should file sooner rather than later, but in any event, it must file the motion no later than 40 days before the hearing. *Id*. at 24. Finally, I reset the hearing to begin in Medford on September 10, 2018. *Id.* at 25.[8]

I issued a written order on March 8, 2018, memorializing the rulings I had made during the conference call.[9] I included the following admonition: "I advised the parties [at the telephone conference] of the importance of complying with required pre-hearing filings, disclosures, and exchanges. I advised them of the consequences of any failure to comply with these requirements . . . ." Order (Mar. 8, 2018) at 2-3.

A week later, the parties contacted me because Respondent wanted to reschedule the deposition so that counsel could spend the Easter holiday with her daughter. Complainant would not agree to reschedule. I conducted a 75-minute telephone conference with the parties. I resolved the parties' dispute and rescheduled the deposition for April 30, 2018. During the conference, I admonished Complainant as follows:

> You must never miss a deadline without asking before the deadline for an extension. Because, if you miss a deadline, it has consequences. It's bad if you miss a deadline that's just part of the discovery rules, like you have to make a response within 30 days. But, when I've given you a direct order and you miss the deadline, you're exposed to sanctions. And they can be severe. So, be careful.

Transcript (Mar. 16, 2018) at 36-37.[10]

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[7] As the deadline for pre-hearing filings is pegged to the hearing date, the setting of a later hearing date had the effect of establishing a new (later) deadline for the submissions.

[8] I reminded Complainant that she could file a motion to compel additional initial disclosures and that, if she had evidence to back up her claims of spoliation, she could file a motion about that as well. *Id.* at 26. I gave her the citation for the procedure that applies to pre-hearing motions. *Id*. at 27. Complainant never filed either motion.

[9] As to Respondent's motion for summary decision, I wrote: "If Respondent files a motion for summary decision, it should do so as soon as practicable after Complainant has completed any relevant discovery she plans." Order, Mar. 8, 2018 at 2.

[10] I also reminded Complainant that the rules for discovery are at 29 C.F.R. §§ 81.50 through 18.65, and that the rule for depositions in particular is at 29 C.F.R. § 18.64. I took considerable time to describe for Complainant what a deposition is and how to handle disputes at a deposition. I intended this to head off any impasses between

As the hearing date approached, Respondent filed a pre-hearing statement. But, despite the explanations, directives, and warnings I'd given, Complainant again failed to file her pre-hearing statement.[11]

Respondent moved to change the location of the hearing to Denver. It served Complainant by mail.[12] Complainant failed to file a timely opposition. As Respondent's declarations in support of its motion met the regulatory standard to change the location of the hearing, *see* 29 C.F.R. § 18.40(b), I granted the unopposed motion and vacated the hearing set for Medford, which required a new hearing date in Denver.

The rescheduling of the hearing had the effect of giving Complainant more time to file a pre-hearing statement because the deadline would be pegged to the new hearing date. But to be certain that Complainant would not fail a third time to file timely the pre-hearing materials, I cautioned in the order:

> Complainant is advised that she must submit to this Office (and serve everyone listed on the service list attached to this Order) the pre-hearing statement required in the Pre-Trial Order (Oct. 12, 2017) (page 3 at III.C) no later than 30 days before the next scheduled hearing. If she fails to comply timely and completely with this requirement, I might impose sanctions after giving Complainant an opportunity to explain. As the Pre-Trial Order states: "SANCTIONS: Unless good cause is shown, parties will not be permitted to litigate issues, call witnesses, or introduce evidence they fail to disclose at the times and in the ways this order requires. Failure to comply with this Order subjects the offending party to sanctions." Pre-Trial Order (Oct. 12, 2017) (page 4 at VI) (citations omitted).

Order, Aug. 16, 2018 at 3. I then noticed a hearing to begin in Denver on February 25, 2019. *See* Notice, Oct. 26, 2018. That established a deadline for the pre-hearing filings of January 25, 2019.

Respondent next moved for a protective order, limiting the manner in which Complainant would be permitted to contact or communicate with defense counsel. Although there was a relevant

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Complainant and defense counsel that might occur during the deposition.

[11] Complainant late-filed a motion to extend her time to submit the pre-hearing materials. As I discuss in the text below, I changed the location and date of the hearing to a later date. This mooted Complainant's motion as she would have more time to file the pre-hearing materials prior to the next setting of the hearing. *See* Order, Oct. 30, 2018. But Complainant's motion to extend time was insufficient in that, without explanation, Complainant filed it after the deadline had run.

[12] Respondent satisfied the pre-filing meet-and-confer requirements by emailing a draft of the motion to Complainant. This had the effect of giving Complainant additional time to prepare an opposition to the motion; she knew in advance what Respondent's contentions would be. During meet-and-confer (which was by email), Complainant stated no more than the conclusory statement that she objected to the motion.

history that I discuss below, what prompted the motion was an email that Complainant sent Ms. Patrick in the early morning hours of January 10, 2019 (1:48 a.m.). The email states:

> Nadia,
>
> You need to recuse yourself immediately from the case against Navajo. It was just discovered that you have a complete conflict of interest in the case and that your husband has been intentionally derailing the Case from the [time of the OSHA] investigation.
>
> This will also be going to the Colorado state bar for professional misconduct for both you and your husband.

Complainant included a number of photos in the email. She had copied the photos from Ms. Patrick's and her husband's Facebook profiles. Pictured in the photos, in addition to defense counsel and her husband, were their two infant children, who were then 20 months old. In all, there are three separate photos that include the children.

Ms. Patrick took this as a threat to the safety of her children. Her concern increased because Complainant sent a copy of the email directly to Complainant's husband at this personal email address. Adding to the mix was that Ms. Patrick discovered court records that she construed to show allegations that Complainant had violated a restraining order in another case. In addition, Complainant was making allegations about Ms. Patrick's husband's "derailing" her case, yet Complainant offered no evidence of this and no statement of what counsel's husband allegedly did.

An affidavit that Ms. Patrick's husband signed shows that Complainant's contentions about a conflict of interest were unfounded. Complainant's husband was working for the Occupational Safety and Health Review Commission (OSHRC). The Commission is an adjudicative agency that hears cases the Occupational Safety & Health Administration brings against employers about violations OSHA finds when it inspects workplaces. OSHRC is an independent adjudicator and is not involved in whistleblower complaints under the Surface Transportation Assistance Act (such as the present case). It is OSHA that receives, investigates, and makes initial determinations of whistleblower complaints under the Surface Transportation Assistance Act. As Ms. Patrick's husband's employment was with OSHRC, not OSHA, there could be no conflict of interest, and Ms. Patrick's husband never had employment that would allow him an opportunity to "derail" Complainant's case.

Respondent offered evidence to show additional examples of Complainant's uncivil and at times threatening behavior:

- As I discussed above, Complainant threatened to pursue criminal and civil charges against Ms. Patrick if she again used Alley Catz Process Services to serve papers on Complainant.

Yet, nothing about the process server's conduct was unlawful, not to mention a basis for a criminal complaint against defense counsel.[13]

- Complainant made another allegation (on November 18, 2018) that Ms. Patrick had engaged in criminal misconduct and a violation of attorney ethics. She emailed Ms. Patrick's co-counsel the following:

> I have evidence that Nadia knowingly lied to the court in asking for the court to move the case back to Denver. I am going to be motioning the court this week to move it back to Medford.[14] Nadia also violate[d] the rules of professional conduct and federal rules which dictate that you cannot attempt to use witnesses who have no factual 1st hand evidence or testimony. When Nadia motion the court . . . Nadia only had one witness as reason for the move. That supposed witness, Heidi, had no 1st hand knowledge of anything. In addition, Nadia lied when she asserted that I said things in the deposition when in fact word-for-word I did not. I also have evidence that Nadia tampered with said supposed witnesses. Attorney client privilege does not apply when said attorney intentionally or recklessly or negligently commits a criminal act in the process. Suggesting or telling a witness to make certain statements in an affidavit is false testimony.[15]

Complainant's assertion about first-hand information is mistaken. First, there is no "federal rule" or ethical requirement that forbids an offer of evidence from a person lacking first-hand knowledge. There are evidentiary rules that might exclude such evidence if it is offered, but those rules do not forbid the offer. Evidentiary objections based on hearsay often are overruled because of the numerous exceptions to the hearsay rule.

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[13] Complainant repeatedly denied receiving delivery of items mailed to her. When defense counsel sent items by certified mail, Complainant refused them. Thus, when defense counsel wanted to be certain that Complainant received notice of her deposition—a deposition for which defense counsel had to fly from Denver to Oregon—she was left with no better option than to have her client pay the cost of in person service of the notice. In any event, leaving an item with the residential park's resident manager is not a trespass.

[14] Contrary to her statement, Complainant did not raise a motion that week to reconsider the order relocating the hearing. Rather, she filed a motion for that purpose four months later, on February 13, 2019, shortly before the third trial setting. As I am dismissing the claim for other reasons, I do not reach that motion. If I were to reach it, I would require further briefing. Most of Complainant's assertions are inconsistent with the record. But she does state, for the first time, that she cannot afford travel to Denver. As the "necessity" of the parties and witnesses is relevant to the location of the hearing, 29 C.F.R. § 18.40(b), I would ask the parties for evidence going to that question.

[15] Complainant followed up with a phone call to Mr. Erickson, asking to talk privately with him about Ms. Patrick's misconduct with witnesses and other evidence. She sent an additional email, stating that she was drafting a motion for sanctions against Ms. Patrick and to continue the hearing because of Ms. Patrick's actions. Mr. Erickson responded by stating that he was unavailable. He also asked Complainant where her pre-hearing statement was, as it was due served and filed four days earlier, on August 10, 2018.

Second, formal rules of evidence do not apply in claims under the Surface Transportation Assistance Act. *See* 29 C.F.R. § 1978.107(d). Hearsay is routinely admitted into evidence so long as it is not untrustworthy on its face.[16]

Complainant never did file a motion for sanctions or offer any evidence that Ms. Patrick had submitted a knowingly false declaration or that Ms. Patrick engaged in witness tampering.

- Complainant had written to Ms. Patrick that if Ms. Patrick continued to treat Complainant "like an idiot," Complainant would file a state bar charge against her. Email, Feb. 21, 2018.

- In another email (Aug. 11, 2018), Complainant wrote to Ms. Patrick: "You include new evidence yet try to say you weren't sent anything . . . did you actually pass law school or did you pay someone off?" (ellipsis in original).[17]

On January 23, 2019, I conducted a telephone conference on the motion for a protective order. Complainant explained that she only included pictures of defense counsel's infant children because (1) defense counsel had obtained information from Complainant's Facebook profile; (2) Complainant wanted to show proof that Complainant's husband was an OSHA employee; (3) Complainant used the Facebook pages of defense counsel and of her husband to demonstrate that they were married; (4) she did this by taking a screen shot that only coincidentally happened to include photos of the children (and their pet dogs); and (5) that if defense counsel had been professional enough to explain that her husband worked for OSHRC and not OSHA, Complainant would have looked into it and perhaps dropped her plan to file a bar charge. Complainant repeatedly stated that Ms. Patrick "talked down to" her. She stated that, on the charge that she had violated a restraining order, she had been exonerated. She objected that Ms. Patrick had accused her of criminal conduct, though she did not specify what Ms. Patrick was alleging.

[16] Of course, a declarant who states she has first-hand personal knowledge of a specific fact when she does not have first-hand knowledge has engaged in serious misconduct. An attorney who knows this and submits the false declaration would also have engaged in serious misconduct. But the record contains no evidence that this has occurred.

[17] Complainant also engaged in communications that were unnecessarily rude and insulting, though they did not allege culpable misconduct. On the same day as Complainant emailed about counsel paying off someone to get through law school, she wrote to counsel: "Just because you can't keep track of stuff you've received and then try to play stupid about not receiving doesn't eliminate your responsibility . . .. You need to open your eyes and start paying attention to detail." On the dispute about the deposition date's conflicting with the Easter holiday, Complainant wrote to Ms. Patrick: "Someone who is using modest intelligence, let alone someone having gone through law school who should know about being thorough, doesn't make blind assertions or commitments when it comes to serious matters such as this . . .. If you had a prior commitment that was soo [sic] important you would have said something during the phone hearing. You did not. Which shows you being sloppy and disorganized again to the detriment of the case and the court. It's not my fault nor this court's fault for the misjudgment, oversight, disorganization." Email, Mar. 14, 2018.

Respondent argued that Complainant could easily have copied and forwarded photos from counsel's and her husband's Facebook pages without copying the children's photos and that no one was accusing Complainant of committing a crime. Ms. Patrick denied any condescension. Respondent argued that, even if Complainant was exonerated on the violation of the restraining order, it remained that the restraining order had been issued against her.

Given the history of Complainant's other communications such as those described above, I found (and continue to find) Complainant's explanation for her email and the photos unpersuasive. Complainant's pointing to defense counsel's accessing Complainant's Facebook profile as part of her explanation, to me, suggests that part of her motivation was retaliatory—aimed at demonstrating that if defense counsel could access Complainant's profile, Complainant could "one-up" her by accessing both defense counsel's profile and that of her husband. There was no basis to allege that counsel's husband was "derailing" Complainant's case. Nor could there be such evidence because he did not work for OSHA. There was no need to include a screen shot of counsel's and her husband's Facebook profiles and no need to include any photographs. There was thus no reason to involve defense counsel's infant children (or their household pets). Complainant could have simply written (without photos) that she had reviewed the Facebook profiles, that the profiles demonstrate that defense counsel and her husband are married, and that the profiles show that counsel's husband works at OSHA (if that's what Complainant believed despite the fact that the profile obviously does not say that). Rather than threaten a bar charge, Complainant could have asked for an explanation.

Yet, as Respondent had only asked for an order limiting the contacts from Complainant, I ruled on that request. The hearing was approaching; thus, the time during which Claimant and defense counsel would need to communicate was coming to an end. I concluded that slowing the pace of communication might allow Claimant to consider more carefully what she said before saying it. I limited communication between Complainant and defense counsel (regardless of who was originating the communications) to hard-copy writings sent by U.S. mail or a similar delivery service. Complainant and defense counsel were not to communicate with each other by telephone, email, or text messaging. They were to copy the ALJ on all communications with each other. To the extent that the parties were unable to resolve disputes after a single, good-faith effort, they were to file appropriate motions, not continue to dispute with one another. Transcript (Jan. 23, 2019) at 24-27.

Given defense counsel's reasonable apprehension about a possible threat against her family, I added that the order was without prejudice to any party seeking relief in another forum, such as Complainant's filing a state bar charge or Ms. Patrick's or her husband's seeking a restraining order in a civil proceeding.

Complainant moved for another continuance to allow her time to file a motion to reconsider the change of location of the hearing and for sanctions against Ms. Patrick. She was concerned that I would not have time to decide the motions before the hearing. Given the regulatory requirement

that the hearing "is to commence expeditiously," 29 C.F.R. § 1978.107(b), and my confidence that I could rule promptly on Complainant's planned motions, I denied the continuance.[18]

Perhaps most relevant here, I reminded the parties that the filing deadline on the pre-hearing statements was in two days, on January 25, 2019; that meant that the documents had to be on file at OALJ and served by that date. I repeated what was required to be in the pre-hearing statements. *Id.* at 34, 38-39. I acknowledged that Respondent had filed its pre-trial statement prior to the last trial setting and thus had satisfied the requirement. Respondent stated that it intended to file an update with minor changes.

Complainant, however, stated that she would not be able to meet the deadline. I asked how much additional time she needed. She stated that she could have the pre-hearing filing in the mail by January 25, 2019. *Id.* at 34-35. I granted Complainant the extension of time. Exactly as she requested, I required that her pre-hearing statement be postmarked on or before January 25, 2019. *Id.* at 35. I gave Respondent the same deadline for its update. *Id.* I confirmed all this in a written order that was served on Complainant and counsel by email. *See* Order, Jan. 24, 2019.

To be certain that Complainant yet again was fully advised of her obligations to file the pre-hearing materials timely, I stated in the phone conference:

> So it's very important you get that done and filed, you know, in the mail and postmarked on time, both of you. Because if you don't give me a witness list, and a witness is called who comes as a surprise, and the other side might object, and I might exclude them, including the exhibits.

Id. at 40. I explained that each party would benefit from preparing the pre-hearing filings because they would be better prepared for the hearing. *Id.* at 41. I advised Complainant that she might want to look at the pre-hearing submissions Respondent had previously filed for an example of what is required. *Id.*

Meanwhile, on January 23, 2019, Respondent purported to file a motion for summary decision. Just as on Respondent's earlier filing of a motion for summary decision, the deadline was 40 days before the hearing, a deadline that Respondent failed to meet the first time. Remarkably, Respondent again late-filed its motion; the filing deadline was January 16, 2019 (40 days before the February 25, 2019 hearing date). I ordered Respondent to Show Cause why its motion should not be stricken. *See* Order, Jan. 24, 2019.

But, with little time remaining to allow briefing and a ruling on summary decision before the hearing, I also ordered Complainant to show cause why the motion should not be granted. *See* Order to Complainant to Show Cause (Jan. 24, 2019). I explained what motions for summary

[18] Complainant never did move for sanctions against Ms. Patrick. I am not aware of any factual basis Complainant would have had to file such a motion. I have observed nothing in defense counsel's conduct that even arguably appears to be of questionable ethics.

decision were; that they could lead to a decision on the merits without a hearing; that Complainant could still retain counsel; what Complainant needed to do in opposition to the motion; that she needed to submit evidence, not mere allegations; that there were various forms the evidence she submitted might take (such as a declaration she could write under penalty of perjury); that she must address each of Respondent's arguments; that she could submit arguments in a brief; that, if she wanted to pursue a motion to compel further answers to discovery, I might give her more time to oppose the motion for summary decision; and that she could move for additional time for other reasons. *Id*.

I required Complainant to have her opposition to the motion for summary decision on file at this Office no later than 5:00 p.m. on February 14, 2019. I reminded Complainant, as I had before, that she must serve defense counsel with the opposition no later than when she sent the document to my Office for filing. I explained what a certificate of service required. Finally, I offered the following warning: "COMPLAINANT MUST TAKE NOTICE that, if she fails to oppose timely Navajo Express's motion for summary decision by filing papers in this Office (and serving opposing counsel and others on the service list) on or before 5:00 p.m. on February 14, 2019 (and fails to obtain an extension of time for the opposition), I might decide the case in favor of Navajo Express without a hearing."

Respondent mailed a timely update to its pre-hearing statement on January 25, 2019. It also filed a timely answer to the order to show cause why its motion for summary decision should not be stricken as untimely filed. Complainant, however, did not meet either of the deadlines that I had set.

At 4:05 p.m. on Friday, January 25, 2019, the day her pre-hearing statement was required to be postmarked, Complainant instead sent the following email to my legal assistant:

> After taking a short time to read your newest orders, my laptop computer failed this morning and I had to travel approximately 50 miles to Grants Pass to the nearest local library to completely rewrite my prehearing statement. I am concerned that I might not be able to get the envelopes postmarked today as I have about an hour of work left and it is now 4:03 p.m. May I have until tomorrow to get the prehearing statement and motions mailed out? I will not initially include Ms. Patrick so I remain in compliance until you tell me to forward this email to her.

I did not respond.[19] And Complainant did not mail her pre-hearing statement on the following day as promised.

[19] I understood Complainant's comment about including Ms. Patrick if I ordered it to refer to the order that neither Complainant nor defense counsel communicate with one another by email. But Complainant could have served defense counsel by sending her by U.S. mail as promptly as possible a copy of the email. Complainant did not need an order; I had numerous times reminded the parties that they must serve one another with anything they filed with OALJ. *See* 29 C.F.R. § 18.30(a) (generally "all papers filed with OALJ or with the judge must be served on every party); 29 C.F.R. § 18.14 (forbidding *ex parte* communications on the merits of a judge).

Three days later, on Monday, January 28, 2019, Complainant emailed the following to my legal assistant:

> I am having to send an email because my laptop is still down and the local library is closed on Mondays. I am emailing from my smartphone. I will include a copy of this email with the prehearing statement and motions that are sent to you and respondent's counsel.
>
> * * *[20]
>
> I will be taking my computer to a technician shortly and hope they can quickly fix the issue. It is my hope to be able to send required documents to you and respondent's counsel tomorrow (Tuesday) [January 29, 2019].

Complainant's explanation neglects that she could have mailed the pre-hearing statement on January 26, 2019, as she promised in the first email. She went to the nearest local library to use a computer. She wrote the first email at about 4:00 p.m. on the day the pre-hearing statement was due. She wrote that she had about an hour left to finish. According to its website, the library was open until 6:00 p.m. on that day. Complainant should have finished the pre-hearing statement on that day (January 25, 2019) and mailed it at the post office no later than the following day as she promised.

Even if Complainant found that she needed more than an hour to finish her draft on Friday, she could have had the statement in the mail on Saturday. According to its website, the library was open on Saturdays, including January 26, 2019. Complainant could have finished any incomplete work Saturday morning and mailed the statement on that day. But she didn't any of that. Instead, she waited until Monday and then wrote the email above, stating that the library was closed on Monday and that she hoped to mail the pre-hearing statement the next day, January 29, 2019. Again, however, she failed.

A week later, on February 5, 2019, Complainant sent a third email to my legal assistant, stating: "I will go into detail in motion for allowing late filing of Prehearing statement I will be filing tomorrow. In part because of computer issues and a back injury and now snow (currently I have no heat)."

Despite this representation, Complainant never filed a motion to allow late-filing of her pre-hearing statement. She mailed the pre-hearing statement to OALJ, not the next day as promised, but two days later on February 7, 2019. Although she filed with it a certificate of service that she had served defense counsel at the same time, Complainant later admitted that she had not. She

[20] I omit a variety of complaints that Complainant voiced about defense counsel sending her email and other communications in a manner not permitted under the protective order. None of these concerns the timing of the filing of Complainant's pre-hearing statement.

filed a "corrected" certificate of service, which showed that she did not mail the pre-hearing statement to defense counsel until four days later, on February 11, 2019.

On February 12, 2019, Respondent moved for a dismissal sanction (or, alternatively, a lesser sanction) because, despite multiple reminders and warnings, Complainant filed her pre-hearing statement 13 days late and served it 17 days late.

On February 13, 2019, Complainant filed a motion to reconsider the previous order locating the hearing in Denver rather than Medford. She did not file a motion to compel, a motion for sanctions against defense counsel, or a motion to allow her to late-file her pre-hearing statement (in which she explained the reasons as she said she would in her email of February 5, 2019).[21]

Thus, as of 12 days before the hearing (January 13, 2019), Complainant had just late-served her pre-hearing statement; two potentially case dispositive motions were pending (the motion for summary decision and the motion for a dismissal sanction); Complainant's oppositions were not due and not filed on either motion; and there was a motion to change the location of the upcoming hearing. Each of the motions needed to be decided before the hearing; had the hearing gone forward before the motions were considered, the relief sought in the motions would have become moot.

I concluded that the hearing could not go forward as scheduled.[22] I vacated the hearing. As there would be a new hearing date, that had the effect of establishing a later due date for the filing of motions for summary decision. I therefore granted Respondent's motion to late-file its motion for summary decision. I reminded Complainant that her opposition to that motion was due on or before February 14, 2019. As to the motion for sanctions, I considered that Complainant had first to oppose the motion for summary decision, and I allowed her additional time (until March 11, 2019) to brief the sanctions motion.

Finally, I issued an order to Complainant to show cause. I explained Respondent's motion for sanctions. I recited the history about my admonitions and warnings concerning the filing of the pre-hearing statement and the history of the late-filing as the events unfolded. I notified Complainant that she must offer evidence to support any explanation she might have for the late-filing. I stated that these could be documentary exhibits, a sworn declaration, or the like. I stated that Complainant could also argue that Respondent had misstated the law in its motion. I wrote that her argument would be stronger if she cited legal authority to support it. I suggested that she

[21] Although Complainant had previously argued against any continuance because the additional time would facilitate Respondent's spoliation of evidence, she never filed a motion about that either.

[22] Pre-hearing motions must be filed no fewer than 21 days before the hearing. *See* 29 C.F.R. § 18.33(c)(2). Complainant's motion to reconsider the location of the hearing could be denied on that basis. But Respondent's motion for sanctions could not have been filed earlier because the basis for the motion did not arise until February 11, 2019, when Complainant late-served her pre-hearing statements and trial exhibits. I could have shortened time for Complainant's response on the motion for sanctions. But that is a potentially case-dispositive motion, and Complainant is self-represented. I concluded that Complainant's time for an opposition should not be reduced.

might want to argue in the alternative that, even if I concluded that a sanction was appropriate, I should impose a lesser sanction than a dismissal, and that she should identify that sanction and explain why it would be sufficient. I repeated that it was not too late for Complainant could retain counsel. I advised her that, if she failed to oppose the motion timely and sufficiently, I might dismiss the claim in its entirety (or perhaps impose a lesser sanction). I stated that, if Complainant felt she needed more time, she should request it. The order was served by email (or fax) plus U.S. mail on February 13, 2019.

Complainant failed to file a timely opposition to summary decision. She did, however, file a single document on the following day, February 15, 2019, entitled "Complainant's Opposition to Respondent's Motion for Summary Decision and Motion for Sanctions." The entire text is one and one-half pages long. No exhibits or other evidence was submitted with the brief. The closest Complainant comes to offering evidence is to state that, in her pre-hearing statement, she "included evidence and facts that support that the Complainant engaged in protected activity and that she was subject to several adverse employment actions." More strikingly and despite the title of the document—which states that the document included Complainant's opposition to the motion for sanctions—Complainant presents nothing about why she filed her pre-hearing statement 13 days late and served it 17 days late; she never mentions Respondent's motion for sanctions.

Discussion

I. Respondent's Motion for Summary Decision Is Without Merit.

Legal requirements on summary decision. On summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.72(a) (2015); FED. R. CIV. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under FED. R. CIV. P. 50 and 56). To defeat summary judgment, the dispute as to a material fact must be genuine; bare assertions will not suffice. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1982). Nor will a mere "scintilla of evidence." *Anderson*, 477 U.S. at 251 (1986). Rather, the existence of a genuine dispute depends on whether there is sufficient evidence for a reasonable factfinder to rule for the non-moving party. *See Anderson*, 477 U.S. at 252.[23]

[23] A party asserting that a fact can or cannot be genuinely disputed must cite particular parts of the materials in the record. 29 C.F.R. § 18.72(c)(1)(i). "The judge need consider only the cited materials, but the judge may consider other materials in the record." 29 C.F.R. § 18.72(c)(3).

"Summary judgment is not a dress rehearsal or practice run; it 'is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.'" *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005); *see Anderson*, 477 U.S. at 257 (plaintiff must present evidence "even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery"); *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 (9th Cir. 1969) (a non-movant is "under a duty to show that he can produce evidence at trial, and is not entitled to a denial of that motion upon the unsubstantiated hope that he can produce such evidence at the trial"). Consistent with this, in the order to Complainant to show cause why Respondent's motion for summary decision should not be granted, I explained the requirements Complainant had to meet in her opposition. I emphasized that she needed to submit evidence and that allegations were insufficient.

In her late-filed opposition, Complainant included no evidence.[24] Even if I take her reference to her pre-hearing statement as incorporating by reference that statement into her opposition to summary decision, there is still no evidence to consider. The pre-hearing statement contains a list of disputed facts, an exhibit list, and a witness list.[25] The list of disputed facts contains only allegations. These are the facts that Complainant asserts she will be able to prove with evidence she will offer at the hearing. They are not evidence in themselves. The exhibit and witness lists contain some description of what the exhibits will show and what the witnesses will testify about at the hearing. Again, this is not evidence; it is snapshot of what Complainant anticipates the evidence will show.

But a failure of the non-moving party to offer any evidence—even when the motion for summary decision is aimed at elements of the claim on which the non-moving party will have the burden of proof at the hearing—is not a sufficient ground, standing alone, to grant the motion. As the Ninth Circuit has held:

> A moving party without the ultimate burden of persuasion at trial . . . has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact.
>
> If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would

[24] Complainant filed the opposition one day late. As I granted Respondent's motion to late-file its motion for summary decision, I similarly allow *sua sponte* Complainant to late-file her opposition.

[25] Complainant states in the pre-hearing statements that the parties did not stipulate to any facts.

> have the ultimate burden of persuasion at trial. In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything. If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense. If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment. But if the nonmoving party produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats the motion.

Nissan Fire & Marine Ins. Co, Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1102-03 (9th Cir. 2000) (citations omitted). I therefore review the evidence Respondent submitted and apply the relevant law.

Elements of the claim. The Act imports from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121, the burdens applicable to each party. *See* 49 U.S.C. § 31105(b)(1). Those burdens require that, to establish a *prima facie* case, a complainant must show: (1) that she engaged in activity that the statute protects; (2) that Respondent imposed an adverse employment action against her; and (3) that the protected activity was a contributing factor in the adverse action. *See Powers v. Union Pacific Railroad Company*, ARB No. 13-034, slip op. at 9 (Jan. 6, 2017) (applying same burdens under the Federal Rail Safety Act, 49 U.S.C. § 20109(d)(2)(A)). If she establishes those elements, the burden shifts to Respondent, which may evade the imposition of a remedy if it shows by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. *Id.*

Here, for purposes of the motion, Respondent concedes that Complainant engaged in protected activity. It does not assert the affirmative defense that it would have taken the same adverse action absent protected activity. Rather, it contends: (1) that it did not impose an adverse employment action because Complainant resigned her employment voluntarily, and (2) that Complainant's protected activity could not have contributed to any adverse action because it occurred after the employment terminated.

Facts. As Complainant submitted no evidence, I look only to the evidence Respondent submitted. As I must view the evidence in the light most favorable to Complainant (as the non-moving party), drawing all reasonable inferences in her favor, not evaluating her credibility or weighing the evidence, I conclude that Respondent's evidence fails to establish either of its contentions.

Complainant worked as a long-haul truck driver for Respondent for only about six weeks (from December 7, 2016 to January 15 or 16, 2017) . E.Ex. B; E.Ex. F at 26:27-48.[26] During that time, she spoke with supervisors Winkenhofer and Hale on three occasions about how problems with

[26] "E.Ex." refers to Respondent's exhibit.

the way her truck idled were causing sub-freezing temperatures in the cab. E.Ex. A at 40:16-23; E.Ex. F at 6:00-7:00. She made these complaints before any resignation from employment.

The employment ended during a run Complainant made from Windsor, Colorado to White City, Oregon beginning on January 14, 2017. E.Ex. A at 63:3-7; E.Ex. D at 1:5. Complainant contacted Respondent's "breakdown department" during the night of January 14-15, 2017, to make her third complaint about the truck's failure to maintain temperature in the cab. E.Ex. F at 19:51-20:00.[27]

On the afternoon of January 15, 2017, Complainant called Russell Shea, the weekend operations director. She raised her voice during that call and a second call that followed. Among other topics in the first call, Complainant told Shea she wouldn't have enough hours to reach her next destination (Boise, Idaho) consistent with applicable rules and orders. E.Ex. C at 12:45-13:20.[28] He disagreed and said that she had time to reach Boise without exceeding the regulatory limit.

On the second call, Complainant stated that she was going to drive Respondent's truck to her home in Oregon. E.Ex. C at 15:22-15:39; 15:50-15:57. Perhaps of greater importance to this motion, Complainant stated that she wanted to resign. E.Ex. E at 9:20-9:37.[29]

Shea (and another supervisor who was present) directed Complainant to drop the truck in Boise. E.Ex. C at 15:40-15:50; E.Ex. E at 7:30-7:58. Complainant refused and stated that the truck was having problems and that she would bring it to a Department of Transportation location for inspection. E.Ex. C at 16:40-17:00. Shea told Complainant that Boise was the nearest location that could address any issues Complainant had with the truck. *Id*. at 17:00-17:10. As the dispute continued, Shea (and the other supervisor) told Complainant that they accepted her resignation. *Id*. at 17:00-17:35; E.Ex. E at 12:34-1320; E.Ex. F at 24:05-24:15. Respondent then sent a message to confirm it accepted Complainant's resignation. E.Ex. G.

Even having resigned, Complainant had to drive the truck to an appropriate location to end her trip. Five hours after Shea and the other supervisor accepted Complainant's resignation, Complainant messaged them that her truck had an exhaust leak. E.Ex. H. Respondent arranged

[27] The parties dispute whether Respondent addressed the temperature issue. That could be relevant if Complainant's claims concerned a refusal to drive the truck because of an unsafe condition, the condition was corrected, and Complainant continued to refuse to drive. But I understand Complainant's allegation to be that Respondent retaliated against her for reporting the unsafe condition, not for a refusal to drive the truck because of the temperature in the cab. Respondent does not dispute for this motion that Complainant engaged in protected activity. This was one of the protected activities. The question is whether her protected activity was a contributing factor in an adverse employment action. In any event, Complainant testified that Respondent ignored the temperature problem; this is therefore a fact genuinely disputed for purposes of the present motion.

[28] That communication likely is protected activity.

[29] At her subsequent deposition, Complainant admitted that, before the second call, she'd emailed a written resignation but accidentally sent it to the wrong address. E.Ex. F at 2:40-2:43; 22:20-24:38. Shea was unaware of the email. E.Ex. C at 42:32-42:52.

for the truck to be towed to its terminal in Boise on the following day (January 16, 2017). E.Ex. F at 25:50-26:00.

That day, January 16, 2017, Complainant spoke with another supervisor, Jordan Hale, about her resignation. *Id*. at 26:04-26:27. Hale told Complainant that he was comfortable with her staying in Respondent's employ, and the two agreed that Complainant was going to continue her employment. *Id*. But soon afterward, Hale contacted Complainant at the direction of his manager (Russell Meyer) and said Respondent was accepting the resignation after all. *Id*. at 26:27-48.

Analysis. First, I reject for purposes of summary decision Respondent's argument that there was no adverse employment action. Seen in the light most favorable to her, Complainant did resign, and Respondent did accept the resignation. But a supervisor with authority over Complainant agreed to reinstate her and Complainant accepted. I construe Respondent's next contact with Complainant—in which Respondent stated that it was accepting her resignation after all—as an involuntary termination of the reinstated employment. A discharge is an adverse employment action. *See* 49 U.S.C. § 31105(a)(1); 29 C.F.R. § 1978.102(a).

Second, there is sufficient evidence based on which a reasonable factfinder could conclude that Complainant's protected activity was a contributing factor in the discharge from employment. At the outset, I reject Respondent's contention that any protected activity occurred after a voluntary resignation. Complainant engaged in protected activity, such as complaints about problems with the idle and temperature control in the cab, before any resignation. Moreover, as I have concluded that Respondent discharged Complainant, the argument fails as to the exhaust leak.

Drawing every reasonable inference in favor of Complainant as the non-moving party, I find that the proximity in time between the protected activity and the discharge is sufficient to raise a genuine issue as to contributing factor.

> "Causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (Title VII); *see also*, 29 C.F.R. §1979.104(b)(2) (temporal proximity relevant at investigation stage). It is an example of relevant circumstantial evidence. *Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-052, (ARB Sept. 30, 2011), slip op. at 13 (citing *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123 (May 25, 2011), slip op. at 27)).

Here, the discharge occurred on the heels of Complainant's report of an exhaust leak in her truck. It happened soon after her three reports of problems with the truck's idle. That is sufficient to get to hearing on the issue of contributing factor.

Accordingly, Respondent's motion for summary decision is denied as without merit.

II. Respondent's Motion For Sanctions Demonstrates That A Dismissal Is Appropriate.

"'A pro se litigant' cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance.'" *Witbeck v. CH2M Hill Ltd.*, ARB No. 15-077 (Mar. 15, 2017), slip op. at 6, quoting *Pik v. Credit Suisse AG,* ARB No. 11 -034, slip op. at 4-5 (May 31, 2012). "Thus, although an ALJ has some duty to assist pro se litigants, a judge also has a duty of impartiality and must refrain from becoming an advocate for the pro se litigant. In the end, pro se litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel." *Id*.

When a party fails to comply with an administrative law judge's orders and fails to show good cause for such failure, the judge has discretion to dismiss the case. 29 C.F.R. §§ 18.12(b)(7), 18.57(b)(1)(v); *see also*, 5 U.S.C. § 556. "'If an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as dismissal or default judgments must be available when parties flagrantly fail to comply.'" *Matthews v. Labarge, Inc.*, ARB No. 08-038 (ARB Nov. 26, 2008), slip op. at 2 (affirming dismissal when complainant failed to comply with order compelling discovery and with order requiring pre-hearing submission), quoting *Yarborough v. U.S. Dep't of the Army*, ARB No. 05-117, slip op. at 6 (ARB Aug. 30, 2007) and citing cases at fn. 7.

"ALJs have 'inherent authority' to 'manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Walia v. The Veritas Healthcare Solutions, LLC*, ARB No. 14-002 (ARB Feb. 27, 2015) (affirming dismissal after prosecuting party failed to comply with order compelling discovery and requiring attendance at a deposition and, despite warnings of sanctions including dismissal, failed to respond to an order to show cause), quoting *Newport v. Fla. Power & Light, Co.*, ARB No. 06-110, slip op. at 4 (ARB Feb. 29, 2008); *see also, Butler v. Anadarko Petroleum Corp.*, ARB No. 12-041 (ARB June 15, 2012), slip op. at 3 (affirming dismissal based on Complainant's repeated and contumacious failure to appear for her own deposition); *In re Supervan, Inc.*, ARB No. 00-0008, (ARB Sept. 30, 2002), slip op. at 7 (affirming default judgment against self-represented party for failure to comply with two orders compelling discovery).

As the Ninth Circuit stated of dismissal sanctions in the district courts:[30]

> District courts have inherent power to control their dockets. In the exercise of that power they may impose sanctions including, where appropriate, default or dismissal. Dismissal, however, is so harsh a penalty it should be imposed as a sanction only in extreme circumstances. We have repeatedly upheld the imposition of the sanction of dismissal for failure to comply with pretrial procedures mandated by local rules and court orders. However, because dismissal is such a severe remedy, we have allowed its imposition in these circumstances only after requiring the district court to weigh several factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.

Thompson v. Housing Authority of City of Los Angeles, 782 F.2d 829, 831 (9th Cir. 1986) (affirming dismissal when plaintiff failed to prepare for pre-trial conference and for trial despite being warned that another failure would result in a dismissal).

I must consider two areas of conduct when determining what sanction, if any, is appropriate. First, there is the Complainant's failure to comply with deadlines that are aimed at allowing the hearing to go forward consistent with due process and in a manner that is not unfairly prejudicial to either party. Relevant considerations include the cost to Respondent of filing motions that should be unnecessary and the waste of judicial resources. Second, there is Complainant's repeated threats against defense counsel of filing a criminal complaint or a state bar charge (or both) when there is no colorable basis for either.

This Office took care to inform both parties of the procedural requirements that would apply to this matter and how to access those procedures. The pre-trial order reminded the parties, including self-represented parties, of their obligation to make initial disclosures. Complainant refused to comply despite repeated requests from defense counsel. Respondent was put to the cost of a motion to compel, which I granted. Complainant's refusal to comply with the disclosure requirement was without substantial justification.

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[30] It appears most likely that the Ninth Circuit is controlling. The Act allows appeals to the federal courts in "the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the violation." 49 U.S.C. § 31105(d); 29 C.F.R. § 1978.112 (same). As best I am able to discern, Complainant resided in Oregon at the time of the termination. She stated during her final trip for Respondent that she was going to drive the truck to her home in Oregon. As to the location where the violation occurred, it appears that Complainant was in Boise, Idaho when she heard from Hale that the employment was at an end. Both Complainant's residence in Oregon and the location of the violation in Idaho are in the Ninth Circuit, I conclude that the Ninth Circuit is controlling. I acknowledge, however, that Hale was in Denver at the time of the discharge, which could site the violation at that location. As Denver is in the Tenth Circuit, that raises the possibility that an appeal to that Circuit would be permissible under the Act.

Respondent paid their lawyers to make repeated efforts to schedule a deposition of Complainant at a location relatively convenient to her (while defense counsel would travel about 1,000 miles at Respondent's expense, including for attorney time). To convenience Complainant, Respondent offered to set the deposition on a weekend. Complainant would not agree to any date. When Respondent's counsel unilaterally set a date and served Complainant through a process server, Complainant threatened counsel with a criminal prosecution if she used the process server again. Respondent had to pay for another motion to compel, which I granted. Complainant's opposition to the deposition and the motion to compel it were without substantial justification.

When Respondent's counsel asked Complainant if she'd agree to reschedule the deposition to accommodate a personal, religion-related need of counsel, Complainant was not satisfied by simply refusing. Instead, she took it as an occasion to send emails insulting defense counsel. Respondent sustained the cost of another motion, which I granted.
It was a proper investigative step for defense counsel to review Complainant's public profile on Facebook. The profile could contain information relevant to the case such as whether Complainant found replacement employment, and if so, where.

But, when defense counsel did this, Complainant was irritated and decided to retaliate. She accessed, not a webpage of Respondent (the company she was suing), but the Facebook profiles of defense counsel, and worse, of defense counsel's husband. She misconstrued whatever she saw, made baseless allegations of a conflict of interest, and threatened state bar charges. Without proper purpose, Complainant took a screenshot of the profiles that included photos of defense counsel's infant children and emailed it, not only to counsel, but to her husband's personal email account. Especially for a person with a record of a prior restraining order, conduct such as this reasonably left defense counsel feeling threatened. The result: Respondent had to undertake the cost of another motion, which I granted.

As these motions progressed, I repeatedly advised that Complainant and counsel must make good faith efforts to communicate effectively (if not amicably). I reminded Complainant that defense counsel had a duty to provide her client with zealous representation (within ethical limits), and that it was Navajo Express Trucking, whom she was suing, not defense counsel.

All this was to no avail. Late in the litigation, when required to oppose Respondent's motion for summary decision and motion for sanctions, Complainant chose to file a "brief" that addressed neither in any substantive way. This was despite the effort I'd expended to provide Complainant with detailed, explicit instruction on what was needed to oppose these motions. Instead, Complainant focused on her grievances with defense counsel. The result was that Complainant essentially abandoned her opportunity to make a substantive response on these motions in favor of another chance to criticize defense counsel.

In the nearly two years that this litigation has been ongoing, Complainant has failed to meet every applicable deadline. Many of those failures cost Respondent money to file the motions described above and required me to expend this Office's resources.

Complainant's three-time failure to file a timely pre-hearing statement, in addition to requiring motions, resulted in the greatest obstacle to getting the case to a hearing. Two of the three times, Complainant filed no pre-hearing statement whatever. On the first, I faulted Respondent equally: Respondent did not file a pre-hearing statement either. On the second, Respondent filed a timely pre-hearing statement; Complainant filed none. On the third, Respondent filed a timely update, and—after an extension of time to a date Complainant selected—Complainant did not file the pre-hearing statement timely; she did not serve it on Respondent until 17 days late.

Despite her promises, Complainant never explained the 17-day delay. Assuming that her laptop failed as she stated, I accept her explanation for a 1-day delay. She should have mailed the pre-hearing statement no later than January 26, 2019. Her few remaining excuses neglected that she had time to finish her drafting on January 25, 2019, that the library was open on Saturday, January 26, 2019 (giving her additional time to finish), and that she failed to substantiate any further delay to explain why she did not mail and serve the statement on January 26, 2019 (as she promised), and did not serve it until February 11, 2019. At the least, Complainant could have served defense counsel on the same day she mailed the statement to this Office for filing; that would have provided the statement to the defense four days earlier.

I explained with care in an order to show cause that Complainant needed to file an explanation for the late-filing and late-service, and that she needed to support her explanation with evidence. I gave her substantial additional time to answer the order to show cause, given the seriousness of the motion for sanctions. I warned Complainant that, if she failed to answer timely and sufficiently, I might dismiss the case. But, nonetheless, Complainant filed (for the first time) an early supposed response that, as it turned out, said nothing about the motion for sanctions.

The pre-hearing statement is an essential part of the preparation for a hearing. It discloses the issues, witnesses, and exhibits with which each party will try the case. Each party's disclosures allow the other parties to prepare so that the hearing is more meaningful and efficient. The disclosures assist the ALJ in preparing so that she is best able to understand the exhibits, the testimony of the witnesses, and the arguments of counsel and the parties. The exchange of pre-hearing statements allows the ALJ to conduct a more useful pre-hearing conference, where the issues are narrowed and where the list of witnesses to be called may be honed for efficiency and clarity. Without the pre-hearing statements, it is unlikely that much can be accomplished at a pre-hearing conference.

While the ALJ and defense counsel should have had Complainant's pre-hearing materials for 30 days to prepare for the hearing, in the end, Complainant's late-service gave defense counsel a week. The pre-hearing statement demonstrated that Respondent had much to prepare before it would be ready for the hearing. Complainant's statement contained a long list of witnesses and exhibits. Complainant estimated that it would take about 16 hours of trial time for her to present her own case-in-chief. This was not going to be a short, half-day trial for which the defense could prepare in two or three days. Yet another continuance was needed.

A dismissal is proper under the applicable factors. In the Order to Show Cause I stated that Complainant might wish to argue that, if any sanction should be imposed, a lesser sanction than dismissal was sufficient. Complainant offered no such argument. Nor did she offer any argument that I should not dismiss the case. Nonetheless, I will consider the Ninth Circuit's factors in *Thompson, supra*.

The public's interest in expeditious resolution of litigation. This factor must be given additional weight. Most whistleblower cases come to trial at this Office within a year after OSHA refers the matter. But in cases under the Surface Transportation Assistance Act, the Secretary's regulations require the hearings to "commence expeditiously." 29 C.F.R. § 1978.107(b). Complainant requested a hearing on August 18, 2017. I vacated the third trial setting nearly 18 months later, on February 13, 2019. Basically, at that time the parties were no closer to a hearing than they had been at the time of the second setting, which was to occur five months earlier, on September 10, 2018. Looking to the record as a whole, I discern a pattern of Complainant's recalcitrance on every step of the disclosure process and failure to meet every deadline, all of which has led to repeated delay in getting the matter to hearing. A fourth trial setting would not be consistent with the regulatory requirement of an expedited hearing.

The court's need to manage its docket. It will come as no surprise that the press of cases at this Agency has increased significantly while resources have decreased. Twenty years ago, the San Francisco District Office of OALJ had twice as many ALJs with a total caseload for all the judges together far smaller than the present total caseload. Today's cases involve remedies to widows and orphans of civilian contractors killed in the nation's war efforts. They include workers who report nuclear hazards, air and rail safety hazards, risks to safe drinking water, shareholder fraud, and other serious safety and security concerns affecting thousands of people, and are then terminated from employment allegedly in retaliation. This Office adjudicates cases arising under more than 80 federal statutes.

While this Office and I make special effort and take extra time to inform self-represented litigants about our procedures, about what is required of parties, and about how our hearings work, we cannot become advocates for self-represented parties, advising them what motions to file or what evidence to present. That would defeat the central requirement that judges be neutral. The pressing caseload must be managed by devoting the necessary and appropriate time to cases and not more; otherwise, other litigants will suffer delays because of excessive effort spent on a single litigant.

In addition to the many orders that Complainant's recalcitrance have required, I have had to conduct repeated on-the-record telephone conferences with the parties. Just those conferences required some 3 1/2 hours of ALJ time, plus preparation for the conferences and time to draft orders after the conferences. That was time that could have been directed to other pending cases.

The risk of prejudice to the defendants. The Secretary's implementing regulations for the Surface Transportation Assistance Act expressly provide that "proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office

of Administrative Law Judges, codified at subpart A of part 18 of [29 C.F.R.]." 29 C.F.R. §§ 1978.107(a). Those procedures include the requirements for initial disclosures and a discovery regime that allows for depositions. *See* 29 C.F.R. §§ 18.50(c), 18.64. They also include requirements for pre-hearing statements. *See* 29 C.F.R. § 18.80. The ALJ can alter those requirements, and I did so in the Pre-Hearing Order, which I served on both parties.

It was costly and thus prejudicial to Respondent to have to file repeated motions to obtain initial disclosures and discovery to which it was entitled. But, despite filing motions, Respondent was unable to obtain a pre-hearing statement at all for the first two trial settings or until too late to be useful in the third setting. In my view, given the regulation concerning pre-hearing statements, it would deny Respondent due process to have required it to go to hearing without sufficiently timely service of a pre-hearing statement.

I view as at least equally prejudicial Complainant's incessant harassment and threats directed toward defense counsel. I repeatedly advised Complainant that, if she could not resolve disputes with defense counsel, she should file motions. The insults lacking basic civility and are of concern. But threats of filing criminal complaints and state bar charges—when there is no colorable basis for such steps—goes well-beyond the basic civility that we expect in litigation. It was costly to Respondent because motions were required. But it prejudices the appearance and reality of fair process when an attorney has to receive emails at 1:48 a.m. that she could—and did—reasonably perceive as threatening to her infant children and her husband.

The public policy favoring disposition of cases on their merits. Of course this factor, in every case, tends to weigh against a dismissal. But nothing about the present case suggests that any additional weight be given this factor here than would be given in any ordinary case.

A desire to reach the merits informed my orders described above. Despite the seriousness of some of the defense contentions, I have been reluctant to impose sanctions that would affect Complainant's ability to put on a full case on the merits at a hearing. I did not, for example, exclude all her witnesses and exhibits for failure to file a timely pre-hearing statement at the second trial setting. Instead, I have expended considerable time and resources to educate Complainant on the process, to urge her to obtain counsel, to let her know what was required of her on the various motions and disclosures, to urge her to be civil, and to warn her about the consequences that I would impose for continued failures to comply. I am unable to allow yet more laxity when applying the regulatory process. Moreover, Complainant's threatening and uncivil behavior counsels against allowing the process to continue. As I stated above, "'A pro se litigant' cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance.'" *Witbeck, supra*.

The availability of less drastic sanctions. I find no useful option among the list of sanctions allowed or similar sanctions. That list is:

> (i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;

(ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) Striking claims or defenses in whole or in part;

(iv) Staying further proceedings until the order is obeyed;

(v) Dismissing the proceeding in whole or in part; or

(vi) Rendering a default decision and order against the disobedient party.

29 C.F.R. § 18.57(b)(1).
Sanctions (i), (ii), and (iii) as applied to these facts would effectively result in a decision for Respondent and against Complainant; there would be no real difference from a dismissal. This is because Complainant's failure to comply with requirements most recently took the form of a materially late-filed pre-hearing statement. As I had repeatedly warned, the sanction that logically would have to follow from this would be the exclusion of Complainant's witnesses and exhibits. But Complainant has the burden of production going forward to establish a *prima facie* case. Without witnesses and exhibits, I would have to dismiss her claim at the close of her (very brief) case-in-chief. I would allow her to object to defense evidence and to cross-examine defense witnesses, but the process would never go that far; I would dismiss before the defense began its case.

Similarly, I cannot strike a part of Complainant's claim. This is not like a civil case with multiple alleged causes of action, some of which might be separable from others. Essentially, Complainant has a single claim of retaliatory discharge. I cannot strike part of it without striking all of it. Even were that possible, I would have no way of knowing what must be stricken, as Complainant pre-hearing statement concerned her entire claim.

Sanction (vi) – a default decision – applies to a defendant or respondent; it is not available here. If it applied, it would be the same as a dismissal.

That leaves as an alternative to dismissal only the possibility of a stay, which is sanction (iv). A stay in a case arising under these statutes raises a conflict with the implementing regulation that I cited above: 29 C.F.R. § 1978.107(b). The regulation requires cases to proceed to hearing expeditiously absent good cause or the agreement of the parties. *Id.* This is consistent with the urgency associated with issues that whistleblower statutes address; generally these involve safety or security concerns potentially affecting co-workers and the public at large or at least a significant number of people. A party who has failed to comply with an ALJ's disclosure orders and has thereby caused repeated delay, cannot be said to have good cause for further delay. And Respondent has not agreed that Complainant somehow is entitled to a delay.

Moreover, I have no confidence that a stay would prompt Complainant to comply with future orders I will issue or to proceed to a hearing without the need for more motions and orders. This Agency's responsibility to decide cases expeditiously and manage its dockets cannot support an open-ended stay of proceedings.

Weighing the factors. I find almost nothing that weighs against a dismissal. Complainant's recalcitrance and obstruction has affected the entire course of the litigation in a case that she chose to bring. Since requesting a hearing, she has not complied with a single one of her obligations under the applicable statutes and regulations until ordered to do so. She has frustrated the Secretary's mandate that cases of this kind be heard expeditiously. She has created a persistent burden on this Office's crowded dockets. Her failures have been prejudicial to the defense. They have been costly to the defense in a way that was unnecessary and useless. The have been a burden on the limited resources of this Office. If Complainant was permitted to go to hearing without making the required pre-hearing disclosures on time to allow Respondent to prepare, she would have succeeded in depriving the defense of due process; at the least, she would have put Respondent at a disadvantage inconsistent with the applicable procedural regulations and contrary to the ALJ's orders. Complainant's threats of criminal and state bar complaints and her conduct concerning defense counsel's infant children and husband are a separate source of burden to the process; I cannot countenance them. I have made repeated and extensive efforts to allow Complainant to reach the merits. Additional accommodations and concessions would be inconsistent with an ALJ's obligation to manage a case in fairness to the parties and to decide cases expeditiously.

Conclusion and Order

For the foregoing reasons, Respondent's motion for a dismissal sanction is GRANTED. This case is DISMISSED. Complainant shall take nothing by reason of her complaint.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen 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 waive 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, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *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).