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Issue Date: 25 September 2019

Case No.: **2017-STA-00085**
OSHA No.: **3-9340-15-053**

In the Matter of:

DARLA BADGER-TOPPING,
Complainant,

v.

U.S. XPRESS, INC.,
STEVE BOWER AND MATT OGONOWSKI,
Respondents.

DECISION AND ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act ("The Act" or "STAA"), 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and the implementing regulations at 29 C.F.R. Part 1978. On November 9, 2018, the parties filed a *Joint Motion to Continue [the] Hearing* ("*Motion to Continue*") scheduled for November 20, 2018. The undersigned granted the *Motion to Continue* during a conference call with the parties. The hearing has not yet been rescheduled.

BACKGROUND

Complainant alleges that her employer, U.S. Xpress Inc., Steve Bower, and Matthew Ogonowski (collectively, "Respondents"), retaliated against her in violation of the employee protection provisions of the Act by discharging her on July 7, 2015 for engaging in protected activity on June 24, 2015 and June 25, 2015. *See Amended Complaint of Darla Badger-Topping Pursuant to 49 U.S.C. § 31105* ("*Complaint*") at 1, 3–6. Specifically, Complainant alleges that on June 24, 2015, at approximately 12:15 p.m., she discovered "defective fuses in the 12-volt outlet of the cab of her assigned truck-tractor" during a pre-trip inspection. *Id*. at 3. Complainant called Respondents' "breakdown department, . . . inform[ing] them of the electrical defects, . . . [and] was instructed to have the fuses replaced by Travel Centers of America." *Id*. The fuse was repaired at approximately 5:45 p.m. *Id*. At approximately 7:00 p.m., while performing another pre-trip inspection, Complainant discovered that her assigned trailer had a flat tire. *Id*. Complainant again called Respondents' Breakdown Department, "and filed complaints alleging that [her assigned] trailer . . . had a defective tire, in violation of various

federal motor carrier safety regulations." *Id*. at 4. Complainant states that she then called Respondents' Tire Service Department at the instruction of the Breakdown Department. *Id*. The Tire Service Department dispatched a mechanic to repair the tire. *Id*. Complainant states that, while the tire was being repaired, she placed a call to her dispatcher, Matthew Ogonowski, and left a voicemail message informing him that the repair was causing a delay in her route. *Id*.

After Complainant's tire was repaired at approximately 11:15 p.m., she began driving towards Pittston, Pennsylvania, "a distance of approximately 264 miles, in order to complete her assigned dispatch." *Id*. At approximately 12:00 a.m. on June 25, 2015, Complainant pulled her vehicle over at Travel Centers of America in Wilmington, Connecticut to take "a mandatory break of ten hours or more, as required by 49 C.F.R. § 395.3." *Id*. Claimant states that, "[a]t th[at] time, approximately twelve hours had elapsed since Complainant went on duty on June 24, 2015. Complainant discontinued driving due to a reasonable apprehension that continuing could result in violation of 49 C.F.R. § 395.3, because parking was extremely scarce and there was road construction on her route." *Id*. at 4–5.

Claimant was discharged by Respondents on July 7, 2015 for a "service failure" resulting from her actions on June 24, 2015 and June 25, 2015. *Id*. at 6. Complainant alleges that her protected activities of June 24, 2015 and June 25, 2015 were contributing factors to her discharge, which constitutes retaliation in violation of the Act. *Id*.

On May 2, 2019, Respondents' counsel filed *Respondent's Motion for Summary Decision* ("*Respondents' MSD*"), stating that Complainant in fact "*failed* to notify her immediate supervisor of mechanical issues and resulting delays, even though she had been repeatedly warned that failing to notify her supervisor of delays could result in termination. Furthermore, Complainant's alleged complaints about her truck do not constitute protected activity that triggers STAA's protections." *Respondents' MSD* at 1 (emphasis in original). Respondents state that "OSHA's determination states that Complainant admitted that she knew that [Respondents'] policy required her to notify her supervisor of any delay, but that she failed to do so." *Id*. at 1–2 (emphasis omitted).

Respondents state that U.S. Xpress "services customers with strict delivery deadlines, and many of [U.S. Xpress] contracts subject it to fines and penalties if there is a 'service failure'—i.e., if a delivery is untimely." *Id*. at 3; *see also id*. Exhibit ("Ex.") 3 ¶ 6. Respondents state that its policy therefore "requires drivers to notify their Account Manager immediately if they anticipate that a load might be delayed." *Id*. at 3; *see also id*. Ex. 3 ¶ 7, Ex. 3A (emphasis omitted).

In support of its motion, Respondents cite several verbal and formal written warnings Complainant received as a result of previous failures to notify Respondents of service delays. *Id*. at 4–7.[1] Respondents state that Ogonowski considered terminating Complainant after he issued

[1] Respondents refer to the following instances of discipline assessed against Complainant: "[A] Written Employee Warning Notice in September 2011 because [Complainant] failed to contact her Account Manager (Ogonowski's predecessor) to inform him that she was having mechanical issues and that she was delayed[;]" verbal counseling for failure to contact Ogonowski prior to arriving three hours late to pick up a trailer at a T.J. Maxx warehouse in Worcester, Massachusetts on May 13, 2014; a counseling session "after yet more instances of Complainant's service

Complainant a "Final Employee Warning" in May 2015 for insubordination after she "refused an order from her direct supervisor," but decided to "cut her a break" due to her tenure with Respondents. *Id*. at 7.

Respondents argue that the events of June 24, 2015 and June 25, 2015 are not protected activity because "blown fuses in no way implicated vehicle safety" and she did not notify Ogonowski of the delay due to the blown tire and intention to stop for the night before proceeding to her destination. *Id*. at 8–11. Specifically, Respondents contend that "Complainant admitted under oath that the only effect of blown fuses was to disable one of the truck's 12-volt outlets so that Complainant allegedly could not charge her phone," which does not implicate a safety issue.[2] *Id*. at 14. Respondents state that "Complainant's report of a flat tire while on a warehouse parking lot – a mechanical issue that immobilized the truck on private property – does not implicate highway safety." *Id*. Respondents further argue that Complainant's "complaints are not protected [activity] because – as she admitted to OSHA – she never communicated them to her supervisor, but instead only reported them to [Respondents'] breakdown department." *Id*. at 15.

Respondents further argue that even assuming that Complainant engaged in protected activity on June 24, 2015 and June 25, 2015, "it is undisputed that what motivated Ogonowski to terminate Complainant was not her report of mechanical issues, but the fact that she failed to report those issues and the resultant delays to Ogonowski." *Id*. at 17–18. As such, Respondents argue that Complainant's actions were not contributing factors to her termination. *Id*. at 16. Similarly, Respondents state that even assuming that Complainant was capable of establishing a *prima facie* claim of retaliation under the Act, "her claim still fails as a matter of law because Respondents have proffered sufficient evidence that she would have been terminated in any event" due to previous instances of similar misconduct, which resulted in Complainant receiving a "Final Written Warning" only a few weeks prior to her June 24, 2015 and June 25, 2015 "violat[ions of Respondents'] Service Expectations and Accountability Policy." *Id*. at 18.

Respondents finally argue that Respondent Bower should be dismissed from this matter, because he had no role in the termination decision. *Id*. at 18–19.

Respondents conclude that the foregoing evidence establishes that summary decision is appropriate. *Id*. at 19.

On June 3, 2019, Complainant's counsel filed *Ms. Badger-Topping's Memorandum of Points and Authority in Opposition to the Motion of USX Inc. for a Summary Decision*

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failures and failing to keep her Account Manager in the loop[;]" a "Written Employee Warning from Ogonowski for not reporting a delay and for not following his instructions; a verbal reprimand for Complainant "not proactively" informing Ogonowski of late pickups and deliveries on March 31, 2015, April 13, 2015, and April 19, 2015; and a "Final Employee Warning" issued in May 2015 for insubordination after she refused to operate out of "fear[] that construction and the upcoming holiday would make traffic bad" despite "an order from her direct supervisor" to continue her route. *Respondents' MSD* at 4–7; *see also id*. Ex. 4A.

[2] Respondents aver that Complainant's "complaints regarding hours of service" may be a "typo" but, in any event, is "undisputed that Complainant took herself out of service – without notifying Ogonowski – when she had hours of driving time left." *Respondents' MSD* at 14 n.17.

("*Complainant's Opposition*"), arguing that Respondents' position is unfounded, and summary decision is not warranted. *Complainant's Opposition* at 1.

Complainant's counsel asserts that Respondents have not shown that it is undisputed that Complainant did not engage in protected activity. *Id*. at 5. Complainant asserts that "Respondents admit that the[] events [of May 21, 2015 and May 22, 2015] causally contributed to their decision to issue [Complainant] a 'final warning' on May 27, 2015" because Complainant expressed concern regarding an hours-of-service violation, a protected activity under the Act, to Fleet Manager Valerie Lambert. *Id*. at 6. Complainant states that "Respondent Ogonowski chose to call [Complainant] 'insubordinate' on this warning, while [Complainant] complained in response that she had refused to operate her vehicle out of concern of an hours-of-service violation, and she did not believe it was right for Respondent Ogonowski to report her as insubordinate for doing so." *Id*. Complainant's counsel argues that Respondents "raise a red herring in emphasizing that the fuses that [Complainant] complained about 'in no way implicated vehicle safety' . . . [because Complainant] reasonably would have not known whether the defects she detected only belied a problem with a cigarette lighter, or if they instead were symptomatic of a deeper problem with [her vehicle's] electrical system," thus implicating violations of commercial motor vehicle safety regulations. *Id*. at 6–7. Complainant's counsel raises the same argument regarding the flat tire, stating that Respondents' argument that "'a mechanical issue that immobilized the truck on private property—does not implicate highway safety' . . . is untenable as a matter of law because the STAA contains no such exception for immobilizing devices." *Id*. at 7. Complainant's counsel further states that Complainant regularly submitted "Driver Vehicle Inspection Reports[,]" i.e., "complaints," to Respondents, "and thus constitute protected activity under the STAA." *Id*. at 7–8.

Complainant's counsel argues that Respondents have not shown that Complainant's protected activity was not a contributing factor to her termination. *Id*. at 8. Complainant's counsel cites the insubordination charge stemming from the events of May 21, 2015 and May 22, 2015 as the "reason [Ogonowski] considered . . . to merit writing up [Complainant] and firing her." *Id*. at 9. Complainant's counsel further argues that terminating Complainant after receiving a final warning was only discretionary, rather than "required as a matter of company policy[,]" pursuant to Respondents' employee handbook. *Id*. Complainant's counsel states that Respondents:

> [C]ontend [that Complainant's] protected activities could not have contributed [to Respondents' decisions to take adverse actions against her] because no such protected activities existed in the first place. In contrast, when this issue is construed in the light most favorable to [Complainant], the activities she engaged [in] should be assumed to be protected. From that vantage point, Respondent Ogonowski chose to issue [Complainant] a "final warning" after she engaged in these protected activities, . . . and . . . then fired her because she had [] repeatedly been written up (by Respondent Ogonowski himself) for being "insubordinate." But for her protected refusal, [Complainant] would not have received a final warning that led to her termination.

Id. at 10.

Complainant's counsel avers that Respondents have not met their burden that they would have taken the same adverse action in the absence of the Complainant's protected conduct, stating that:

> It is undisputed that [Complainant] followed Respondents' instructions to have defective fuses in her assigned truck fixed, which would enable her to charge her cellphone and thereby be able to communicate with Respondents. Respondent Ogonowski states that he was so upset that [Complainant] follow[ed] Respondents' own instructions to repair this defect—so that she would be able to communicate—that he would have fired her for it because he considered it insubordinate, yet he also threatened to fire her if she ever failed to communicate "immediately."
>
> In other words, Respondent Ogonowski chose to put [Complainant] into a scenario where he would have fired her if she did not fix this issue (since she would not be able to text or call him with a dead phone), and where he did in fact issue a final warning because she did fix it—and undisputedly had it fixed at the instruction of Respondents. He therefore ensured that he would have reason to issue her a final warning and terminate her whatever she did (short of delivering on time "regardless of traffic"). This is strong evidence that Respondents are merely proffering pretext in blaming [Complainant] for not being sufficiently communicative.

Id. at 11 (emphasis and internal citations omitted).

Complainant's counsel emphasizes that during Complainant's twelve years of service for Respondents, Complainant received only five warnings and that "[m]ost years of her employment with respondents, she did not receive a single warning." *Id*. at 12 (emphasis omitted). This is further evidence of "pretext[,] because they fired her shortly after she engaged in protected activities, since this temporal proximity raises the inference of retaliation." *Id*. at 12–13 (citations omitted). Complainant's counsel cites Respondents' inconsistent application of its "three strikes policy" as further evidence of "pretext to conceal the fact that [Respondents] fired her because of her protected activities. *Id*. at 13.

Finally, Complainant's counsel argues that summary decision as to Respondent Bowers is inappropriate, because there is a genuine dispute regarding whether he participated in the decision to terminate Complainant "with the knowledge that she engaged in protected activity under [the] STAA." *Id*. at 13–15.

Complainant concludes that the foregoing evidence raises genuine disputes as to material facts and, as such, *Respondents' MSD* should be denied. *Id*. at 15.

On July 1, 2019, Respondents' counsel filed *Respondents' Reply in Support of Their Motion for Summary Decision* ("*Respondents' Reply*"), stating that *Complainant's Opposition* "does nothing to change the fact that summary decision should be granted to Respondents."

Respondents' Reply at 3. At the outset, Respondents state that the "Additional Undisputed Facts" adduced in *Complainant's Opposition* misstate the evidence, are unsupported by the record, and are speculative. *Id*. at 3–5. Respondents argue that the discussion of the events of May 21, 2015 and May 22, 2015 exceed the scope of Complainant's *Complaint*, which only discusses the events of June 24, 2015 and June 25, 2015, and should, therefore, be disregarded. *Id*. at 5.

> The only protected activity discussed in the Complaints is Complainant's false claim that she notified her dispatcher, Matt Ogonowski, that she had a flat tire and was delayed. As one can see from the Secretary's findings and the transcript of OSHA's interview with Complainant, OSHA only investigated Complainant's allegation that her termination resulted from her alleged protected conduct on June 24–25, 2015.

Id. at 5–6 (emphasis and internal citations omitted). Accordingly, Respondents assert that these allegations are time-barred and should be disregarded.

Respondents' counsel further states that Complainant's counsel "appears to make an odd argument that [Respondents'] disciplinary policy is per-se illegal[but] . . . cites no legal support for this position." *Id*. at 7. Respondents' counsel, however, argues that Respondents' "standard progressive discipline policy" provides for supervisory discretion in issuing discipline, which benefitted Complainant. *Id*.

Respondents' counsel concludes that Complainant based her case on the falsehood of alleging "to OSHA and to this Tribunal that she complied with [Respondents'] call-in policy, and that USX's subsequent decision to terminate her was motivated by retaliatory animus[,] . . . an intentional misrepresentation. . . . Complainant seeks to change the subject. She invents evidence, engages in speculation, and injects new allegations into the case." *Id*. at 8. Accordingly, Respondents' counsel argues that summary decision is warranted. *Id*.

DISCUSSION

I. Legal Standards

A. Summary Decision

Pursuant to 29 C.F.R. § 18.72, any party "may move for summary decision, identifying each claim or defense—or part of each claim or defense—on which summary decision is sought." Summary decision may only be ordered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." *Id.* § 18.72(a); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990); *Maglione v. APM Terminals*, 50 BRBS 29 (2016);[3] *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013); *Morgan v. Cascade Gen. Inc.*, 40

[3] In *Maglione*, the Administrative Review Board held that the administrative law judge erroneously granted employer's motion for summary decision for reasons "independent of the motion," without first giving the parties notice and the opportunity to respond pursuant to 29 C.F.R. § 18.72(f). 50 BRBS at 35–36.

BRBS 9 (2006); *Buck v. Gen. Dynamics Corp.*, 37 BRBS 53 (2003). Rule 18.72 of the OALJ's Rules of Practice and Procedure parallels Rule 56 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 56; *see generally Buck*, 37 BRBS 53. "A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). The primary purpose of summary decision is to isolate and promptly dispose of unsupported claims or defenses. *Buck*, 37 BRBS 53.

The moving party bears the initial burden of demonstrating there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. The burden of showing the absence of a material fact is a heavy one. *Pitts v. Shell Oil Co.*, 463 F.2d 331 (5th Cir. 1972). A party opposing a summary decision motion may not rest upon the mere allegations or denials of the pleading, but rather "must support the assertion [that a fact is genuinely disputed] by: (i) Citing to particular parts of materials in the record . . . ; or (ii) Showing that the materials cited do not establish the absence . . . of a genuine dispute . . . ." 29 C.F.R. § 18.72(c)(1); *see also id.* § 18.72(d) (*When facts are unavailable to the nonmovant*).[4] Where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to her case, and on which he will bear the burden of proof at trial," there is no genuine issue of material fact, and the moving party is entitled to summary decision. *Celotex*, 477 U.S. at 322–23. The genuineness of the issue of fact cannot be shown merely by statements of the non-moving party that it will discredit the moving party's evidence at trial. Rather, that party must produce at least some "significant probative evidence tending to support" the party's position. *Morgan*, 40 BRBS 9 (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)). No genuine issue of material fact is raised when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In determining whether a genuine issue of material fact exists, the evidence must be viewed in the light most favorable to the non-moving party. *Matsushita*, 475 U.S. at 587. Accordingly, the administrative law judge must draw all inferences in favor of the non-moving party. *O'Hara*, 294 F.3d at 61; *Morgan*, 40 BRBS 9. The party opposing the motion for summary decision must "establish the existence of an issue of fact which is both material and genuine, material in the sense of affecting the outcome of the litigation, and genuine in the sense of there being sufficient evidence to support the alleged factual dispute." *Buck*, 37 BRBS at 54 (citing *O'Hara*, 294 F.3d at 61); *see also Reddy v. Medquist, Inc.*, No. 04-123 (ARB Sept. 30, 2005). If it is necessary to weigh evidence and/or to make credibility determinations, the administrative law judge cannot grant summary decision. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000); *Walker*, 47 BRBS 11 (*citing Matsushita*, 475 U.S. 574); *Morgan*, 40 BRBS 9. Accordingly, summary decision should be entered only when no genuine dispute of material fact exists that must be litigated. *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962).

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[4] 29 C.F.R. § 18.72(d) provides that if the nonmovant shows that "it cannot present facts to justify its opposition," the ALJ may: "(1) Defer considering the motion or deny it; (2) Allow time to obtain affidavits or declarations or to take discovery; or (3) Issue any other appropriate order."

B. Unlawful Retaliation Under the Act

The STAA provides, in pertinent part:

> . . . (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –
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> > (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or
> >
> > . . . .
> >
> > (B) the employee refuses to operate a vehicle because –
> >
> > > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
> > >
> > > (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.

49 U.S.C. § 31105(a).

To establish unlawful retaliation under the STAA, the complainant initially must show by a preponderance of the evidence that his or her safety complaint, a protected activity under the Act, was a "contributing factor" in the alleged adverse personnel action. *See Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-00020/00021 (ARB May 13, 2014). A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision." *Id*. (citing *Evans v. Miami Valley Hosp*., ARB Nos. 07-118/121, ALJ No. 2006-AIR-00022, slip op. at 17 (ARB June 30, 2009)). The Administrative Review Board ("ARB") has stressed that contribution is a minimal amount of causation, requiring only a showing that the protected activity played some role. An administrative law judge may consider all evidence relevant to the issue, but must avoid weighing reasons for the adverse action and must not require that the complainant show that the protected activity was a substantial, significant, motivating, or predominant factor—a contributing factor is simply any role given to a protected activity. *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-036, ALJ No. 2014-FRS-00154, slip op. at 14–15, 51–51 (ARB Sept. 30, 2016; reissued Jan. 4, 2017) (en banc).

A complainant can provide either direct proof of contribution or indirect proof through circumstantial evidence. *See id*. (citing *Clark v. Pace Airlines, Inc*., ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006)). Circumstantial evidence may include temporal proximity, pretext, inconsistent application of policies, an employer's shifting or

contradictory explanations for its actions, antagonism or hostility toward a complainant's protected activity, or a change in the employer's attitude toward the complainant after he or she engages in protected activity. *See id*. (citing *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13, 28 (ARB Sept. 30, 2011)); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011).

If a complainant meets this initial burden, the burden then shifts to the employer to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected conduct. *See Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5–6 (ARB Jan. 31, 2011) (citing 49 U.S.C. § 42121(b)(2)(B)(iv)). Clear and convincing evidence is evidence that shows "that the thing to be proved is highly probable or reasonably certain." *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015). To prevail, the respondent must show that its factual contentions are highly probable. "Clear and convincing evidence" is a burden of proof residing in between "preponderance of the evidence" and "proof beyond a reasonable doubt." *See Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013) (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)); *Addington v. Texas*, 441 U.S. 418, 525 (1979)). Evidence is clear when the employer has presented an unambiguous explanation for the adverse action. It is convincing when based on the evidence the proffered conclusion is highly probable. *DeFrancesco,* ARB No. 13-057 at 7–8.

II. Analysis

A. Claimant's Alleged Protected Activity

Respondents' counsel asserts that Complainant's report of the blown fuse was not protected activity because its only effect was to regain power to one of her vehicle's 12-volt outlets to charge her cell phone, which Complainant recognized did not implicate vehicle safety in any way. *Respondents' MSD* at 8, 14. Similarly, Respondents argue that a flat tire that immobilized her truck on private property does not implicate highway safety. *Id*. at 14. Respondents further argue that Complainant's "complaints are not protected [activity] because – as she admitted to OSHA – she never communicated them to her supervisor, but instead only reported them to [Respondents'] breakdown department." *Id*. at 15. Complainant's counsel, while largely focusing on events that precipitated the "Final Employee Warning" issued in May 2015 for insubordination, events occurring outside the scope of Complainant's *Complaint*, states that Complainant's complaints are protected activity because she would not have known whether a blown fuse was "symptomatic of a deeper problem with [her vehicle's] electrical system" and that the Act contains no exception for immobilized vehicles on private property. *Complainant's Opposition* at 5–7; *see also Respondents' MSD* at 7.

Respondents' counsel's argument regarding the June 24, 2015 malfunctioning 12-volt outlet is convincing. Complainant's counsel offers no documentary nor testimonial evidence to support Complainant's assertion that she "reasonably would not have known" whether the defective outlet implicated highway safety. *Complainant's Opposition* at 6–7, 11. The uncontroverted evidence clearly establishes that Complainant was not concerned about an

underlying electrical issue that implicated highway safety concerns. *See Klosterman v. E.J. Davies, Inc.*, No. 12-035, 2007-STA-00019, slip op. at 5–6 (ARB Dec. 18, 2012; reissued Jan. 9, 2013) (affirming the administrative law judge's finding that the "protection [49 U.S.C. §] 31105(a)(1)(B)(i) affords also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined") (quoting *Assistant Sec'y & Bailey v. Koch Foods,* ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 9 (ARB Sept. 30, 2011)). Indeed, Complainant testified that the sole basis for her concern regarding the malfunctioning outlet arose from her desire to charge her cell phone and refrigerate her food. *See Respondents' MSD* Ex. 2 at 10–11.

In opposing a motion for summary decision, the nonmovant supports an assertion that a fact is genuinely disputed by "[c]iting to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials; or . . . [s]howing that the materials cited do not establish the absence . . . of a genuine dispute." 29 C.F.R. § 18.72 (c)(1)(i)–(ii). Complainant has failed to support its position regarding the malfunctioning 12-volt outlet, and has not "show[n] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." *Id.* § 18.72(d). Accordingly, I find that Complainant's complaints regarding a malfunctioning 12-volt outlet do not constitute protected activity under the Act.

Conversely, Complainant's counsel's contention that Respondents' argument that "'a mechanical issue that immobilized the truck on private property . . . does not implicate highway safety' . . . is untenable" has merit. *Complainant's Opposition* at 7. There is indeed no exception for immobilized vehicles in the Act, and a refusal to drive a truck with a flat tire—even one that is immobile and originates on private property—implicates highway safety concerns if it is a commercial motor vehicle, that is, a vehicle principally used to transport cargo in interstate commerce and has a gross weight rating of at least 10,001 pounds. 49 U.S.C. § 31101(1); *see also Respondents' MSD* Ex. 2 at 6 (confirming that the vehicle Complainant operated on June 24, 2015 and June 25, 2015 "had a gross vehicle rating of over 10,001 pounds"); *Klosterman*, slip op. at 5–7 (affirming the complainant's argument that a refusal to drive a truck under the reasonable belief that it had a flat tire constitutes protected activity). Accordingly, I find that Complainant's complaint to Respondents' Breakdown Department constituted protected activity under the Act.

B. Contributing Factor

Respondents argue that its motivation to terminate Complainant was her failure to report the flat tire and resultant delays to Ogonowski in light of Complainant's prior violations of Respondents' policies, including receiving a Final Written Warning only a few weeks prior to the June 24, 2015 and June 25, 2015 incidents. *Respondents' MSD* at 17–18. Complainant's counsel fails to adequately address whether Complainant's complaint of a flat tire was a contributing factor to her termination. *See Complainant's Opposition* at 9–10. Rather, Complainant's counsel cites Complainant's insubordination charge arising from previous incidents of alleged misconduct as contributing factors to her termination. *Id.* at 9.

Complainant's counsel suggests that termination after receiving a Final Written Warning was discretionary rather than "required as a matter of company policy" to support its position. *Id*. Complainant's counsel's focus on events occurring outside the scope of Complainant's *Complaint* as contributing factors to Complainant's termination rather than the incidents at issue in this matter is misplaced.

Complainant testified that she had only three hours left in her 14-hour shift after her tire was repaired on June 25, 2015 and expressed concern for violating shift requirements set by federal motor carrier safety regulations. *Respondents' MSD* Ex. 2 at 14; *see also* 49 C.F.R. § 395.3(a)(2) (setting a maximum driving time of 14 hours without first being off-duty for 10 consecutive hours). While Complainant's concern that continuing to drive could have resulted in a violation is valid, she never communicated either the flat tire or decision to take her 10-hour rest period before continuing to her destination. Respondents' Driver Handbook is clear on this issue:

> In the event you are not able to service a load, it is your responsibility, to the company and to the customer, to communicate to your on duty dispatch immediately upon discovering you cannot service the load. *Dispatch will then determine the course of action to avoid the service failure*. . . .
>
> If you are assigned a load and agree to service the load, then the expectation is that you will deliver on time. *If you are late due to your own negligence*, then . . . *disciplinary actions will be taken*.

Respondents' MSD Ex. 3A at 9 (emphasis added).

Complainant acknowledged receipt of and duty to familiarize herself with Respondents' Employee Handbook on February 26, 2003. *Id*. at 1. Respondent Ogonowski, Complainant's Account Manager at the time of the June 25, 2015 incident, confirmed that Respondents' policy "require[s] drivers to notify their Account Manager immediately if they anticipate[] that a load might be delayed. This . . . allow[s] the Account Manager to make alternate arrangements for a timely delivery, such as substituting another driver or tractor, or to give the customer advance notice of the late delivery." *Id*. Ex. 4 at 1; *see also id*. Ex. 3 at 2 ("Statement of Stephen Bower," regional Operations Manager for Respondent, stating the same). Respondent Ogonowski stated that Complainant "had [his] cell number" during the June 24, 2015 and June 25, 2015 incidents, but he did not receive a call.[5] *Id*. Respondent Ogonowski further testified that he was unaware of any issues with her trailer or delays until the morning of June 25, 2015:

> The following morning when I came into work and . . . was assigning loads, and looking at [Complainant's] locator to see where her truck was to see . . . how far out of [her destination] she had made it the night before, and . . . noticed that she was still showing in Connecticut. That's when I found out she had run into issues and she hadn't pickup and service failed the load.

[5] No evidence suggests that Complainant could not contact Ogonowski because she had no battery remaining in her cell phone or could not charge it.

Id. Ex. 7 at 21–22.

Complainant also testified that another motivation for refusing to operate on June 25, 2015 concerned violating hours requirements set by federal motor carrier safety regulations. The undisputed evidence, however, demonstrates that she violated Respondents' Driver Handbook by not informing Ogonowski of the resulting delay. *See Respondents' MSD* Ex. 2 at 13–14; *see also* 49 C.F.R. § 395.3(a)(2) (setting a maximum driving time of 14 hours without first being off-duty for 10 consecutive hours). Complainant acknowledged that she did not contact Respondent Ogonowski, stating that, rather, "breakdown had notified him." *Id*. at 16. The record, however, contains evidence that Respondent Ogonowski was unaware of any issues until the next morning. Furthermore, Respondents' policy required Complainant, rather than the Breakdown Department, to "immediately" communicate delays to Account Managers, who will then "determine the course of action to avoid the service failure." *Id.*, Ex. 3A at 9. As a result, Respondent was unable to make alternative arrangements for a timely delivery due to the overnight delay. *Id*., Ex. 4 at 1, Ex. 7 at 21–22. In light of Complainant's history of committing similar violations, including a "Final Employee Warning" on May 27, 2015, only a few weeks prior to the June 24, 2015 and June 25, 2015 incidents, Complainant was discharged for a "service failure" on July 7, 2015. *Respondents' MSD* at 7, Ex. 4A at 7; *Complaint* at 6. Because Complainant again violated Respondents' policy by failing to report any delay to her Account Manager on June 25, 2015, I find that Complainant's complaints that led to her service failure on June 25, 2015 were not contributing factors to her termination.

C. Respondents' Burden

Although not necessary, I find that Respondents would have taken the same adverse action against Complainant even if I found that her protected activity of reporting a flat tire and concerns over exceeding maximum service hours were contributing factors to her termination. Complainant's counsel argues that Respondents' inconsistent application of its "three strikes policy" as further evidence of "pretext to conceal the fact that [Respondents] fired her because of her protected activities." *Id*. at 13. To the contrary, Respondents cited Complainant on at least five occasions for violating Respondents' policies, several of which were for failing to notify her Account Manager of delays. *See Respondents' MSD* at 4–7, Ex. 4A. Respondents "cut [Complainant] a break" after being cited for insubordination in May 2015, only a few weeks prior to the incidents at issue here. The evidence clearly and convincingly establishes that Respondents terminated Complainant not for reporting a safety issue with her vehicle, but rather for her failure to report the safety issue and resulting delays.

D. Conclusion

As the moving party, Respondents bear the burden of establishing that no genuine issue of material fact exists. Complainant's counsel did not argue that additional discovery is necessary to develop material evidence, and the evidence clearly demonstrates that Complainant's complaint regarding the malfunctioning 12-volt outlet is not protected activity contemplated by the Act and Complainant's complaint regarding a flat tire and violating hours of service regulations, while protected activity, were not contributing factors to her termination. Viewing the evidence in light most favorable to Complainant, I find that Respondents have met their burden.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that *Respondents' Motion for Summary Decision* is **GRANTED**.

LARRY S. MERCK
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 (14) days** of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request ("EFSR") system. The EFSR for electronic filing ("eFile") permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible twenty-four 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. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See id.*

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 600-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See id.*

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 **thirty (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, then only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within **thirty (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, then 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, then 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. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within **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. §§ 1982.110(a) and (b).