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Issue Date: 25 July 2019

OALJ No.: 2017-STA-00077
OSHA No.: 7-2260-17-003

In the Matter of:

BERNARD ZIEGENHORN,
Complainant,

v.

RUAN LOGISTICS CORP.,
Respondent.

APPEARANCES:

John A. Singer, Esquire
JohnPatrick Brown, Esquire
Winstein, Kavensky & Cunningham, LLC.
Rock Island, Illinois
For the Complainant

Deborah M. Tharnish, Esquire
Sarah K. Franklin, Esquire
Davis, Brown, Koehn, Shors & Roberts, P.C.
Des Moines, Iowa
For the Respondent

DECISION AND ORDER DISMISSING THE COMPLAINT

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

PROCEDURAL BACKGROUND

On October 11, 2016, the Occupational Safety and Health Administration ("OSHA") received a complaint filed by Bernard Ziegenhorn ("Complainant") alleging that Ruan Logistics Corporation ("Respondent") terminated his employment on October 7, 2016 in retaliation for raising hours-of-service concerns with management and for filing a complaint with the Federal Motor Carrier Safety Administration ("FMCSA"). (RX W). OSHA's Regional Supervisory Investigator issued findings dismissing the complaint on July 20, 2017. On August 14, 2017, Complainant filed objections to the findings and requested a hearing before the Office of Administrative Law Judges ("OALJ"). A de novo hearing was held in Davenport, Iowa on April 11, 2018. Complainant's Exhibits 1-24 and Respondent's Exhibits A-X were admitted into evidence.[1] (Tr. 5). Three witnesses testified, including Complainant. (Tr. 13-186). A telephonic supplemental session was convened on April 30, 2018 to receive testimony from two additional witnesses. (Tr. 196-225). The parties have filed post-hearing briefs and reply briefs.

LEGAL BURDENS OF PROOF

The STAA is governed by the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b). *See* 49 U.S.C.A. § 31105(b)(1); *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-71 (ARB May 18, 2017). To prevail, a STAA complainant must establish by a preponderance of the evidence that:

- the complainant engaged in a protected activity;
- the complainant suffered an unfavorable personnel action; and
- the protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint.

49 U.S.C.A. § 42121(b)(2)(B)(iii). If a complainant satisfies this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iii), (iv).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I base my decision on all of the evidence, relevant controlling statutory and regulatory authority, and the arguments of the parties.[2]

[1] The following abbreviations are used in this decision: "Tr." for the hearing transcript; "CX" for a Complainant's Exhibit; and "RX" for a Respondent's Exhibit. I admitted RX W over Complainant's objection. (Tr. 12).

[2] In *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curiam), the Administrative Review Board ("ARB") noted that an administrative law judge ("ALJ") need not include a summary of the record in the Decision and Order, as it is assumed that the ALJ reviewed and considered the entire record in making his or her decision. The ARB stated that what is more helpful for its review of whether the ALJ's findings of fact are supported by substantial evidence of record is a tightly focused set of findings of fact. Accordingly, in this Decision and Order I focus specifically on findings of fact pertinent to the issues in dispute. I have, however, reviewed and considered the *entire* record.

BACKGROUND

Unless otherwise noted, the following background information is not in dispute and constitutes findings of fact.

Respondent is a trucking company operating dedicated contract carriage, typically hauling products from customers' warehouses to distribution centers. (Tr. 180). Complainant began employment with Respondent on June 22, 2010 and worked through October 7, 2016. (Tr. 35:21-24). Complainant was principally engaged as a driver in a run from Muscatine, Iowa to South Bend, Indiana for one of Respondent's main customers, HNI Corporation (HNI) and its furniture brand HON Company (HON). (Tr. 51-52).

On April 16, 2015, Complainant made an ethics hotline call complaining generally about management and the dispatcher at the Muscatine facility. Mostly the complaint was about a run taken away from Complainant, but it included a generic concern about managers putting profits over safety. (CX 11).

On May 26, 2015, Respondent received an anonymous letter addressed to Respondent's Chairman, John Ruan III,[3] from an "insider" alleging mismanagement and misconduct by supervisors at Respondent's Muscatine facility. (RX E).[4]

On June 15, 2015, Complainant made an ethics hotline call complaining that Respondent's Director of Operations, Jesse Houseman, had obtained old photographs off Complainant's Facebook page, and reprimanded Complainant about cell phone usage while operating a company truck. The specific hotline complaint was that the photographs were obtained from Facebook illegally, and that the reprimand was timed deliberately the day before Complainant was to compete in a truck driving championship. Complainant denied taking photographs while driving and asked that the reprimand be removed from his file. (CX 11). Complainant was able to speak directly by telephone to Respondent's President about this reprimand, and as a result the discipline was modified to a written memorandum about company expectations for use of mobile devices. (Tr. 86-89; 145). This memorandum, dated June 30, 2015, was entitled "Reminder of Expectations." In the memorandum, Houseman informed Complainant that management believed that Complainant took pictures with a cell phone while operating a company truck in violation of Respondent's expectations that Complainant "will not use any mobile device while operating a company vehicle or while conducting any safety-sensitive task." (RX A).

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[3] In this decision, "Respondent" refers to Ruan Logistics Corp., and "Ruan" refers to Mr. Ruan as a person. In a few quotations, however, "Ruan" refers in context to the Ruan company rather than Mr. Ruan.

[4] As I noted at the hearing, Respondent's Exhibits E, G, I, J, L and N do not have dates or postmarks on their face. (Tr. 181-182). Respondent's witness, Ronald Hanson, testified that, as part of the trial preparation, he and counsel went through the documents to line up the chronology. Thus, the dates stated during testimony about these documents are "general" and perhaps not exact. (Tr. 183-184). This lack of precision is not ideal. However, Complainant did not cross examine Hanson on the chronology and did not raise it as an issue in post-hearing briefing. Thus, I find that the dates testified to for the receipt or transmission of RX E, G, I, J, L and N are generally accurate, but not necessarily precise.

By anonymous letter dated June 25, 2015 and addressed to Ruan, an allegation was made that Muscatine supervisors were engaged in misconduct. An example was given that a driver had been given a warning about a posting on Facebook. (RX F).

A letter was received by HON's Human Resources division on July 7, 2015 alleging sexual harassment by Houseman. The anonymous letter indicated that the author was a female employee. (RX G).

HON/HNI Human Resources received a letter dated July 9, 2015 which purports to be from a female co-worker of the person who made the July 7, 2015 complaint, indicating that she felt unsafe at work due to the behavior of Houseman. (RX H).

On July 20, 2015, Respondent's Director of Operations, Lucas Wolfe, sent an email to a human resources official at HON explaining Respondent's investigation of the letters. Wolfe stated that he and two other officials had met in Muscatine with 60 drivers, and all office staff except one, and although they had received some very good feedback, none of the issues or complaints were remotely related to the accusations made in the letters. Wolfe states that "[w]e have not been able to find any merit in what has been written in the letters." (RX P).

Nathan Schmidt, Respondent's Director of Human Resources, interviewed five drivers who ran the shuttle from Muscatine to South Bend sometime around July 21 or 22, 2015. Complainant was one of these five drivers. (RX O). During a one-on-one meeting with Schmidt, Complainant denied writing the letters. Schmidt told Complainant that the letters had to stop. (Tr. 41; 96-97; 121-122).[5]

A letter was received in April 2016 by HON's Director of Transportation from an anonymous insider alleging fraudulent billing of HON by Respondent, and naming several of Respondent's employees as those principally responsible. (RX I).

Complainant filed a complaint with the FMCSA on July 15, 2016 about an incident on July 8, 2016 in which he had been required to spot for about two to two and half hours before making the run to South Bend, and he had only made it back to Muscatine with 6 minutes left on his available hours of service. (CX 7; Tr. 58-60).

Complainant could not recall ever having hours of service violations prior to July 2016; when he was close to running out of hours he stopped driving and was never disciplined for that. (Tr. 75-76).

Anthony Batcheller, safety investigator with the FMCSA, conducted a ten day investigation of Respondent after the FMCSA received two hotline complaints, one from a motorist, and one from Complainant. (Tr. 197:1-24; 198:14-17). Batcheller did not disclose

[5] During cross-examination, there was some confusion about whether the one-on-one meeting between Complainant and Schmidt occurred in July of 2015 or 2016. Complainant's memory was July of 2016. (Tr. 96-97) (*See also* Tr. 29-30 – testimony of John Smock). I find, based on the dates of the emails in RX O, that July of 2015 is the more probable date of this meeting.

Complainant's identity to Respondent. (Tr. 198:21-22). In fact, he actively concealed Complainant's identity and the fact that one of the complaints was from one of Respondent's drivers. (Tr. 209:6-21). One of the matters discussed by Batcheller with Respondent was the need to leave enough time for drivers to legally run routes through Chicago traffic, where delays are common, especially in the late afternoon. (Tr. 201:16-25 to 202:1-24). This discussion was essentially about the complaint filed by Complainant. (Tr. 202:23-25). Batcheller, however, did not write up any violations for the Muscatine route through Chicago. (Tr. 211-212). The close-out meeting on the investigation occurred on August 5, 2016 (Tr. 203:1-3) and the FMCSA report is dated that same day. (CX 7; CX 12, exhibit C). Batcheller did not provide the names of the individuals who filed the complaints, even when asked by Respondent. (Tr. 203:12-22). Batcheller testified that, in the big picture, Respondent has a fairly solid safety rating in comparison with other companies, but that he did not tell Respondent that it had a "clean bill of health." He noted that he later received a report from Respondent detailing the steps they were taking to address the issues. (Tr. 204:2-14). Batcheller felt that Respondent was cooperative during the investigation. (Tr. 206-207; 209-211).

Complainant called Respondent's Terminal Manager, Dave Hendricks, at 2:16 am on September 14, 2016 to voice his belief that Respondent needed to supply a truck for each driver. Hendricks was upset about being called at home in the middle of the night, after duty hours, about this issue. Both men raised their voices during the call. (RX D; CX 1; CX 13; Tr. 90-91). Wolfe declined to pursue formal disciplinary action against Complainant, although he talked with Complainant about the incident. (CX 1)

By letter postmarked September 23, 2016, and addressed to Ruan, an anonymous author complained about mismanagement and misconduct by Houseman. The letter is purportedly from a former employee. Unlike other letters submitted into the record at the hearing, this letter has a copy of the mailing envelope with a handwritten mailing address. (RX J).[6]

Ronald Hanson, Respondent's Senior Vice-President and Chief Administrative Officer, obtained handwriting samples from Complainant's personnel record. (Tr. 153). Hanson testified that after comparing the handwriting, his prior strong suspicion that Complainant had sent the letters was confirmed to such an extent that he was now almost certain that Complainant was responsible for the letters. Hanson testified that he thus decided it was time to terminate Complainant's employment. Whether Hanson testified truthfully on his motivation for the termination is contested, and is addressed below.

[6] The record contains additional similar anonymous letters sent to some of Respondent's customers after Complainant's discharge. *See* RX K – April 4, 2017 letter addressed to HNI Chairman/President/CEO alleging fraudulent billing by Respondents; RX L – letter purportedly from a former manager for Respondent sent to the Chairman of SPS Companies, Inc, alleging overbilling; RX M –July 17, 2017 letter to the President/CEO of A.M. Castle & Co. alleging overbilling. Additionally, an anonymous letter was sent to Ruan, apparently in March 2018, informing him that drivers at the Muscatine facility were forming a union because they were upset about working conditions and treatment by managers. (RX N; Tr. 54, 121). Such letters could have played no role in Complainant's termination, and Respondent made no argument in its post-hearing brief based on the existence of these post-termination letters.

Complainant's employment with Respondent ended on October 7, 2016. (CX 8; RX C). Whether this event was a discharge by Respondent or a "quit" by Complainant is contested, and is addressed below.

PROTECTED ACTIVITY

Respondent does not contest, and I find, that Complainant engaged in protected activity when he filed an anonymous complaint with the FMCSA on July 15, 2016 alleging hours-of-service violations caused by poor dispatching practices by Respondent. (EX 7). *See* 49 U.S.C.A. § 31105(a)(1)(A)(i).[7]

UNFAVORABLE PERSONNEL ACTION

The STAA prohibits a person from, *inter alia*, discharging an employee because the employee filed a complaint relating to a violation of commercial motor vehicle safety or security regulation. 49 U.S.C.A. § 31105(a)(1)(A)(i). Here, it is not in dispute that Complainant's employment with Respondent ended on October 7, 2016. What is in dispute is whether Complainant was discharged or whether he quit.

Both Complainant, and Hanson testified about the meeting that culminated in termination of Complainant's employment. Their testimony about the meeting is consistent and supported by contemporaneous documentation in the form of a termination letter and employment release agreement. I find that both Complainant and Hanson's testimony on the meeting is credible.

I find that on October 7, 2016, Complainant received a text to meet with the Transportation Supervisor in Muscatine for his load assignment. (Tr. 40:6-12). When Complainant arrived, Schmidt and Hanson were there, and Complainant was asked to join them in a conference room. (Tr. 40:14-17). Complainant was told that the purpose of the meeting was to discuss letters.

The letters were fanned out on a table in anticipation of going through them with Complainant. (Tr. 161:7-11). Hanson had only said a few sentences when Complainant stood up and said words to the effect: "That's it. I'm done. I'm done. I'm done." (Tr. 42:4-7)—or—"I'm done. I've heard enough about letters." (Tr. 161:19-25-162:1). Complainant began to leave, and when just outside the room, Schmidt asked him to return. (Tr. 42:7-9; Tr. 162:3-8). Complainant returned and sat down, at which point Hanson opened a folder and handed Complainant a one-page termination letter. (Tr. 42:20-22). Because of Complainant's reaction when confronted with the letters, Hanson decided not to attempt to further discuss them with Complainant, but "simply talk to him about the termination of his employment." (Tr. 162:8-12).

[7] Although Complainant's complaint filed with OSHA made reference to safety complaints to management, it is clear from Complainant's post-hearing briefing that his core allegation is that the proximate protected activity that contributed to his discharge was the filing of the FMCSA complaint. *See* Complainant's Post-hearing brief at 2 ("Bernard Ziegenhorn … filed this action, alleging that Ruan Logistics Corp. … unlawfully terminated his employment in retaliation for filing an hours-of-service complaint before the Federal Motor Carrier Safety Administration….").

Hanson had decided, prior to the meeting, to terminate Complainant's employment (Tr. 162:13-15) and had brought to the meeting the termination letter and a release agreement. (Tr. 162:16-19).

The termination letter, dated October 7, 2016 and signed by Hanson, states, in part: "As a result of the misconduct described to you during our meeting, your employment with Ruan Transport Corporation ('Ruan') is terminated effective today." (CX 8; RX C). Complainant was also provided with an "Employment Release Agreement" (CX 8; RX C) and given 21 days to sign the release. (Tr. 43:4-15). Complainant believed that signing this release would be a voluntary quit, and he never signed it. (Tr. 43-44). At no point during the meeting did Complainant say that he quit work. (Tr. 42:16-17; 44:21-22).

Based on the foregoing, I find that Respondent's clear intention on October 7, 2016 was to terminate Complainant's employment, and that is exactly what happened.

Respondent contends in post-hearing briefing that the OSHA investigator's notes show that Complainant's state of mind at the time he started to walk out of the meeting was that he was quitting at that moment. (Respondent's Posthearing Brief at 14-15, citing RX W). I find that what Complainant may have told the OSHA investigator later about his state of mind at the time he started to leave the meeting does not negate the testimony and evidence showing that Complainant returned to the conference room rather than leaving the premises, at no time articulated an intent to quit, and was then presented with letter firing him. This evidence clearly establishes that Complainant was fired. Moreover, in *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-26 (ARB Oct. 31, 2007) and *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19 (ARB Sept. 30, 2010), the ARB interpreted "discharge" to include the situation where the employment relationship "was ended by one-sided or perhaps mutual assumption by the parties – i.e., by means of behavior from which the parties deduced that the employment relationship was at an end." In the absence of an actual resignation by the employee, "an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee." *Minne*, ARB No. 05-005, slip op. at 14 (footnotes omitted). Here, even if Complainant was of a mind to quit during the October 7, 2016 meeting, the record clearly shows that Respondent was also of a mind to fire him. Thus, under the *Minne*/*Klosterman* precedent there was a "discharge" of Complainant, as there was, at a minimum, a mutual assumption by the parties that the employment relationship was at an end.

Respondent contends that Complainant's testimony that he three times stated "I'm done" supports a conclusion that he had quit. This statement, however, happened immediately upon Complainant being shepherded into a room, being told that the subject of the meeting was to talk about letters, seeing an array of letters fanned out on the table, and having previously been questioned about the letters by Schmidt. Moreover, the statement occurred prior to being presented with a termination letter. Complainant testified that he walked "because [he] was tired of hearing about letters." (Tr. 91). Thus, I find that the "I'm done" statement was not meant to convey "I quit my job," but rather a refusal to engage in a discussion of the letters.[8]

[8] I also note the testimony of John Smock, another driver assigned to the Muscatine terminal, who related that Complainant told him after the meeting that he had been fired. (Tr. 20-21).

Respondent notes that the HireRight DAC[9] report shows that Complainant quit. Respondent also noted that the OSHA investigator's notes indicate that Complainant told the OSHA investigator not to call HireRight to have the report changed because he wanted to report he quit so he could find new employment. Respondent contends that these circumstances support a finding that Complainant quit rather than was fired. (Respondent's Posthearing Brief at 15, citing RX W and Tr. 122:9-21). At one point in his testimony, Complainant denies saying this to the investigator (Tr. 92-94), but later it appears that the subject did come up and that Complainant asked the investigator not to call HireRight to have the entry changed. (Tr. 122). I find that Complainant's motives for deciding not to ask HireRight to change the DAC report were based on his belief that a "quit" makes it easier to find new employment. (*See* Tr. 122:9-25, 123:1-2). Even assuming that Complainant considered himself to have quit during the October 7, 2016 meeting, under the *Minne*/*Klosterman* precedent there still was a "discharge" of Complainant, as there was a mutual assumption by the parties that the employment relationship was at an end.

Based on the foregoing, I find that the preponderance of the evidence establishes that Respondent discharged Complainant on October 7, 2016.

CONTRIBUTING FACTOR CAUSATION

As noted above, a STAA complainant must establish by a preponderance of the evidence that the protected activity was a contributing factor in the unfavorable personnel action. A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008). The trier of fact considers all relevant evidence in determining whether there was a causal relationship between a complainant's protected activity and the adverse employment action alleged. *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, slip op. at 21 (ARB Jan. 6, 2017), *aff'd Powers v. U.S. Dep't of Labor*, 723 Fed. Appx. 522 (9th Cir. May 22, 2018) (unpub.); *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curiam) (emphasizing that the *Powers* decision allows the trier of fact to consider all relevant evidence at the contributory factor causation stage).

The parties have dramatically different views of what motivated Respondent to fire Complainant, largely focusing on whether Respondent's articulated reason for discharging Complainant – its belief that Complainant had sent a series of accusatory and defamatory letters to management and to Respondent's customers – was the real reason for the discharge. Complainant argues that he was discharged because he had filed a complaint with FMCSA on July 18, 2016 based on "concern about Ruan's dispatch practices that sometimes forced him to speed or occasionally exceed hours-of-service regulations." (Complainant's post hearing brief at 1). Although he was not discharged until October 7, 2016, Complainant argues that Respondent considered Complainant to be a problem employee because of his engagement in his employment and his willingness to be vocal about concerns. Thus, according to Complainant,

[9] "DAC" is an abbreviation for "Drive-A-Check." A Drive-A-Check report is a consumer report describing a truck driver's employment history. *Maverick Transportation, LLC v. U.S. Dep't of Labor, Adm. Review Bd.*,739 F.3d 1149, 1152, n.1 (8th Cir. Jan. 17, 2014).

once Respondent discovered that Complainant had filed the FMCSA complaint, it concocted a ground for firing Complainant to cover a true motive to retaliate for the FMCSA complaint, and seized on the letters as a justification. (Complainant's reply brief at 3).

In contrast, Respondent argued that Hanson, a senior executive, had been investigating the source of the defamatory letters since May 2015, and suspected early on that Complainant had been the author. Respondent thus argues that it began its investigation regarding the letters a year before the FMCSA complaint, and that the investigation had continued after the FMCSA concluded its investigation and issued its report on August 5, 2016. Respondent contends that the FMCSA complaint was not a factor in the decision to discharge Complainant. Rather, according to Respondent, the decision to discharge Complainant was only made in September 2016 when handwriting on a defamatory letter was compared to handwriting from Complainant's personnel file that led Hanson to believe almost certainly that Complainant was the source. (Respondent's posthearing brief at 2-3). Respondent focused on the fact that the decision to discharge Complainant was made more than 8 weeks after the FMCSA completed its investigation and 12 weeks after Complainant made the FMCSA complaint. (*Id*. at 3).

Temporal proximity

Evidence of proximity in time between protected activity and the adverse employment action can raise an inference of causation. Temporal proximity is not a dispositive factor, but just one piece of evidence for the trier of fact to weigh. *See Spelson v. United Express Systems*, ARB No. 09-063, ALJ No. 2008-STA-39, USDOL/OALJ Reporter at 3, n.3 (ARB Feb. 23, 2011). Even with evidence of temporal proximity, the complainant still has the burden of establishing the causation element by a preponderance of the evidence. *Id*. An inference of causation may be broken by an intervening event or by lack of knowledge of the protected activity by the decision-maker. *See Dho-Thomas v. Pacer Energy Marketing*, ARB No. 13-051, ALJ Nos. 2012-STA-46, 2012-TSC-1 (ARB May 27, 2015); *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-37 (ARB Oct. 17, 2012); *Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062 (ARB June 17, 2019) (per curiam) (causal inference based on temporal proximity diminished by intervening events showing a reasonable concern by employer that complainant was charging official time while engaged in personal activities).

In the instant case, Complainant filed the FMCSA complaint on July 15, 2016. (CX 7). FMCSA issued its report on August 5, 2016. (CX 7). Although FMCSA did not reveal to Respondent that Complainant was one of the complainants, the record shows that by mid-September 2016, certain of Respondent's mid-level managers and supervisors knew or suspected that Complainant had filed the FMCSA complaint. *See* Tr. 62:16-19 – Complainant was told by Wolfe that Respondent knew it was Complainant who filed the complaint; CX 1; EX 13 – email string showing that some Respondent executives were concerned on September 14, 2016, that Complainant was threatening to "call his friends at DOT and report us for un safe FMCSA Laws" and that Complainant would "call DOT again"; Tr. 73 – Complainant's testimony indicating that he may have revealed to Hendricks during the angry 2:00 am phone conversation that he had filed the FMCSA complaint. Complainant was fired on October 7, 2016.

Thus, I find that there was temporal proximity between the timing of Complainant's FMCSA complaint and his discharge. Moreover, there was an even closer proximity in time between the date at least some Respondent executives came to believe that Complainant had been one of the complainants and the discharge.

Intervening event and other factors

Although I find that there was temporal proximity between Complainant's FMCSA and Respondent's suspicion that Complainant was behind the complaint, other factors undercut the weight to be given this temporal proximity.

First, there was even closer temporal proximity between the date of Hanson's conclusion from handwriting analysis confirming his suspicion that Complainant had been the source of the accusatory and defamatory letters and the discharge. Second, the handwriting analysis incident was an intervening event that took place after the FMCSA investigation had wrapped up. The timing of this incident supports a conclusion that new evidence in an ongoing internal investigation into the source of the defamatory letters was the proximate cause of Complainant's discharge. Moreover, Hanson testified that he was the sole decision-maker on Complainant's discharge and that the sole reason for discharging Complainant was his belief that Complainant was behind the defamatory letters. Although Hanson himself suspected Complainant had made the FMCSA complaint, his testimony indicates that his role had long been to investigate the defamatory letters and that the FMCSA complaint was not a relevant factor in his decision to terminate Complainant's employment. (Tr. 177-178).[10]

As noted above, Hanson was Respondent's Senior Vice-President and Chief Administrative Officer. (Tr. 139). Hanson oversaw human resources, among other matters (Tr. 139) but he was not typically involved in disciplinary actions of specific drivers. (Tr. 140). Hanson first became aware of Complainant through an ethics hotline voice mail message. (Tr. 140). Hanson referred the message to Schmidt, who – as noted above – was Respondent's Director of Human Resources. (Tr. 141). The first anonymous letter to Ruan at Exhibit E was of concern because it alleged drinking on the job by a manager and other negative working conditions. (Tr. 142-143). Hanson did not know who sent the letter, but he suspected Complainant because it followed so closely Complainant's ethics hotline call. (Tr. 143). Hanson asked HR to look into the allegations. (Tr. 143). Hanson also asked HR to look into the letter with the Facebook reference. Hanson was aware of the Facebook issue because Complainant had called the company president, and the president had lowered the discipline. (Tr. 145).

After June 25, 2015, Respondent learned of the other letters directed to HON. The letters were of great concern as the company had a 20 year plus relationship with HON, one of its largest customers, also an Iowa company. The CEOs of Respondent and HON are also friends. (Tr. 146-148).

[10] I note that the FMCSA investigator testified that he never met or interacted with either Hanson or Schmidt. (Tr. 207:3-9).

Hanson and Schmidt thus came up with a plan to address the letters. First was to meet with HON/HNI, and then to investigate on Respondent's side. (Tr. 148).

There then was a gap in time in the letters. The next letter was received by HON in April 2016. (Tr. 149; RX I). The letter, supplied to Respondent by HON, contained very serious allegations that Respondent's Muscatine facility was defrauding the customer. (Tr. 150) Both Respondent and HON did audits; nothing came of it. (Tr. 151). Hanson had thought because of the gap in time, there would be no more letters; but now there was a concern that more would be coming. (Tr. 151-152).

Another letter was received, postmarked September 23, 2016, directed to John Ruan. (Tr. 152; RX J). This one was different because it had handwriting on it. It was also similar, as it reiterated many of the allegations made in the prior letters. Not long thereafter, Hanson obtained handwriting samples from Complainant's file because Hanson suspected Complainant – everything seemed to Hanson to flow right out of the complaints made in Complainant's ethics hotline call. (Tr. 151-152). Although Hanson felt strongly, even before receipt of the September 23, 2016 letter, that Complainant was behind the letters, he did not want to take action until he felt almost certain. (Tr. 153). Hanson found similarities between the handwriting. (Tr. 154-55). He conceded that he is not a handwriting expert. (Tr. 165-166). He did not review the handwriting of other drivers or employees. (Tr. 168). After reviewing the handwriting, Hanson's belief that Complainant was responsible for the letters became almost certain. (Tr. 166).

Hanson made the decision to fire Complainant. He had no input from Hendricks or the dispatcher who had been named in the defamatory letters – in fact he has never spoken to either of those individuals. (Tr. 155-156). The reason Hanson had for terminating Complainant's employment was his conclusion that Complainant "had violated the most fundamental principles of the employment relationship" by having "made false statements of the most outrageous kind, not only in the company but outside the company." (Tr. 156-157; *see also* Tr. 166 – Hanson considered defamatory letters a fireable offense). Hanson flatly denied making the decision to terminate Complainant because of the DOT complaint, indicating that such a reason for firing someone would offend his sense of right and wrong. (Tr. 158-159). Hanson was not aware that prior to October 7, 2016, Complainant had made complaints about driving in excess of hours of service limitations, or that on one occasion he had exceed those limitations. (Tr. 178).

I find that Hanson was a credible witness. His testimony was precise, and was not embellished. He conceded in a non-evasive way when his memory was not good. His testimony was consistent with the timeline of events and with the documentary evidence of record. His testimony well explained that the accusatory letters were considered a very serious matter – they began by presenting allegations of internal misconduct, but progressed to an attempt to damage Respondent's relationship with very important clients. The seriousness of the matter explains why the letters got the direct attention of Hanson, a senior vice president who normally was not directly involved in this type of investigation. Hanson explained well why he suspected Complainant. In short, I find Hanson to have been a thoroughly credible witness. I find that Hanson's sole concern was finding the source of the letters and putting a stop to them. There is no evidence that he was concerned at all with investigating the source of the FMCSA complaint.

He was the decision maker from Headquarters on a very serious matter of business reputation, and did not have local managers influence him.

Against Hanson's precise testimony, Complainant offers only speculation. Complainant points to evidence that Respondent considered his past vocal raising of workplace concerns made him, in the eyes of Respondent's management, a "problem" employee, and argues that the handwriting incident was only pretext for getting rid of him due to protected activity. Based on a review of the entire record, I find some circumstantial evidence suggesting that *plausibly*, Complainant's past activities, and specifically Respondent's conclusion that he was behind the FMCSA complaint investigation, contributed to the decision to discharge him. An STAA complainant's burden of proof on contributory factor causation, however, is not plausibility – it is a preponderance of the evidence. Having a merely plausible theory of motivation is insufficient to carry Complainant's burden of establishing contributory factor causation by a preponderance of the evidence.[11]

Relevancy of adequacy of investigation into who sent the defamatory letters

At the hearing in this case, a great deal of the testimony revolved around how Hanson evaluated the handwriting and whether his evaluation was sufficient to conclude that Complainant was responsible for the defamatory letters. Complainant argues that Respondent failed to conduct a thorough enough investigation to establish that Complainant was the actual source of the defamatory letters, as for example, by failing to engage a handwriting expert or failing to compare the handwriting to those of other employees. The law is clear, however. It is not the role of the ALJ to act as a super-personnel "department that reexamines an entity's business decisions." *Jones v. U.S. Enrichment Corp.*, ARB Nos. 02-093, 03-010, ALJ No. 2001-ERA-021, slip op. at 17 (ARB Apr. 30, 2004) (citations omitted). Rather, the relevant inquiry is the respondent's perception of its justification for the discharge. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 230 (6th Cir. 1987). A complainant cannot prove contributory factor causation primarily based on a respondent's inability to prove the appropriateness of a disciplinary charge. A respondent does not have the burden of proving the correctness of a disciplinary charge, but rather that protected activity did not cause the discipline in whole or in part. *Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062, slip op. at 12 (ARB June 17, 2019) (per curiam).

Here, I find that Hanson credibly testified that the handwriting confirmed his earlier strong suspicions that Complainant was responsible for the defamatory letters, and that this was the sole reason for Complainant's discharge. This testimony is supported by the fact that Complainant had been a prime suspect in regard to the internal investigation of the source of the defamatory letters long before Complainant filed the FMCSA complaint, that Respondent took no action against Complainant until after it felt it had conclusive proof of Complainant's involvement with the letters, and that there is no evidence in the record that supervisors or other personnel from the Muscatine facility influenced Hanson's decision to discharge Complainant.

[11] *See Rookaird v. BNSF Ry. Co.*, 908 F.3d 451 (9th Cir. Nov. 8, 2018) (at the merits stage, an FRSA complainant must show by a preponderance of the evidence that the protected activity was a contributory factor in the adverse action, not just that circumstances would permit that inference).

Conclusion

The record contains temporal proximity between the date that some of Respondent's officials knew or suspected that Complainant filed the FMCSA complaint and Complainant's discharge. The record contains direct evidence that some of Respondent's officials considered Complainant to be a problem employee. However, I find that this evidence is insufficient to show that Hanson was lying during his testimony that the sole reason he made the decision to discharge Complainant was his conclusion – upon reviewing the handwriting evidence – that Complainant was responsible for a series of defamatory letters sent internally to Respondent and externally to one of Respondent's most important customers. Complainant's speculation as to Hanson's motives is just that – speculation. Contributory factor causation is not a high burden for a complainant. However, in this case, the scant evidence supporting Complainant's version of events does not outweigh the other evidence of record supporting Hanson's credible and unambiguous testimony that his investigation of the defamatory letter campaign was independent of, and not impacted by, any suspicion that Complainant had filed a FMCSA complaint. I thus determine that Complainant has not established by a preponderance of the evidence that protected activity contributed to the decision by Respondent to discharge Complainant from employment.

RESPONDENT'S AFFIRMATIVE DEFENSE

Because I find that Complainant's protected activity did not contribute to Respondent's decision to discharge Complainant, Respondent is not required to establish by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the Complainant's protected activity.

Assuming arguendo that Respondent's suspicion that Complainant was the source of the FMCSA complaint was a contributing factor in his discharge, I find that clear and convincing evidence establishes that Complainant would have been discharged based on the belief that he was the source of the accusatory and defamatory letters even in the absence of the protected activity.

Respondent had launched its investigation into the letters long before Complainant filed the FMCSA complaint. Respondent took the matter very seriously. It got the direct attention of Hanson, a senior vice president and the CAO from Respondent's corporate headquarters. Certain management officials meet with all drivers and most of the other staff at the Muscatine facility. The investigators found no merit to the accusations contained in the letters. By July of 2015 Respondent had narrowed it suspicions as to the source of the letters down to five drivers in the Muscatine facility in Terminal 458, one of whom was Complainant, and each of whom were given a one-on-one interview. (Tr. 19-20; 29-31; RX O). The letters stopped for about a year, but in April of 2016 a letter to HON raised very serious allegations that Muscatine personnel had fraudulently overbilled HON. In September of 2016, an anonymous letter was sent to Respondent's chairman. This letter, unlike the others, contained a handwritten address on the mailing envelope. The handwriting appeared to match handwriting from Complainant's personnel file, causing Hanson to conclude that his strong suspicion of Complainant had been confirmed and that Complainant must be fired. No employer could tolerate an employee making

false charges about managers, supervisors and co-workers both internally and to customers. Nor could an employer tolerate an employee writing to customers falsely charging the employer with defrauding the customer. Although Hanson's handwriting analysis may not have been conducted to a point of forensic certainty, and Complainant has consistently denied being involved with the letters, ample evidence in the record indicates that Hanson's conclusion that Complainant was involved in the letter campaign was an honestly held belief.[12] Thus, I find that the hearing record provides clear and convincing evidence that Respondent would have fired Complainant based on its belief that he was responsible for the letters even if Complainant had not filed the FMCSA complaint.

ORDER

Because Complainant did not establish by a preponderance of the evidence that protected activity contributed to Respondent's decision to discharge him, Complainant has not established a necessary element of his FRSA retaliation claim. Moreover, I find that Respondent established by clear and convincing evidence that it would have discharged Complainant in the absence of the Complainant's protected activity. Accordingly, **IT IS ORDERED** that the complaint is **DISMISSED**.

STEPHEN R. HENLEY
Chief Administrative Law Judge

[12] *See Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curiam) (even if the complainant sincerely believed that she was not stealing, it would not change the effect of the supervisor's belief that there had been a theft when making the determination to fire the Complainant); *Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062 (ARB June 17, 2019) (per curiam) (respondent met its affirmative defense based on investigation determination that complainant was abusing company time; complainant would have been censured for such misconduct even if he had engaged in FRSA protected activity).

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

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(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. §§ 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).