U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 October 2018

CASE NO.: 2018-STA-61

In the Matter of:

JUAN LLOYD,
Complainant

v.

THOMAS PETROLEUM,
Respondent

ORDER GRANTING SUMMARY DECISION AND CANCELLING HEARING SCHEDULED FOR OCTOBER 30, 2018

On September 20, I received Respondent, Thomas Petroleum's ("Respondent" or "Employer") Motion for Summary Decision. After extending the deadline once for then unrepresented Complainant, Juan Lloyd, ("Complainant") I received Complainant's Response to Motion for Summary Decision. For the reasons that follow, Respondent's Motion for Summary Decision is GRANTED, and the hearing scheduled to begin October 30, 2018 is CANCELLED.

A. Procedural History

Complainant, Juan Lloyd, filed a complaint with the U.S. Department of Labor (DOL), Occupational Safety and Health Administration (OSHA) under the employee protection provisions of the Surface Transportation Assistance Act (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 further governed by the implementing regulations at 29 C.F.R. Part 1978, on June 24, 2015. Following the DOL's investigation, on April 18, 2018, OSHA issued findings dismissing the complaint, finding that there was no "reasonable cause to believe that Complainant's protected activity caused/was a factor in Respondent's decision to terminate Complainant's employment." Complainant timely appealed and the matter was subsequently assigned to the undersigned administrative law judge (ALJ).

By Notice of Hearing and Initial Pre-Hearing Order, issued June 6, 2018, (NOH) certain pre-hearing deadline were established and the undersigned set this matter for hearing on October 30, 2018., the NOH set forth various dates and deadlines for discovery, conferences between parties, and various pre-hearing filings. For example, the parties were to file initial disclosures by June 27, 2018, discovery closed September 14, 2018, motions for summary decision were to be

filed by September 20, 2008, and prehearing disclosures and exchanges were to be filed by October 1, 2018. (*See* NOH June, 6, 2018).

Initially Complainant was not represented in these proceedings. As a result, the undersigned's attorney advisor called both parties as a courtesy to remind them of certain pre-hearing deadlines. Specifically, on August 13, 2018, the undersigned's attorney advisor provided a courtesy call to both Complainant and Respondent to remind them that initial disclosures were past due and nothing had been received from either party.[1] Subsequently, neither party submitted initial disclosures nor requested a continuance to do so. With discovery closed, on September 18, 2018, the undersigned's attorney advisor again provided a courtesy call to both Complainant and Respondent to remind them of upcoming filing deadlines, including any motions for summary decision and prehearing disclosures. She left a message for Complainant and spoke to Respondent's counsel, who indicated that he spoke to Complainant once.

On September 20, 2018, Respondent timely filed a Motion for Summary Decision. On the same date, Complainant called my office and spoke to my legal assistant indicating that he is attempting to find an attorney, requesting a list of recommended lawyers, and indicated that he may file a continuance. In light of Employer's filing for Summary Decision, on September 21, 2018, I issued an Order to Show Cause Directed to Complainant, Juan Lloyd, to inform him, as an unrepresented complainant at that time, about summary decision, including the text of the rule and the consequences of summary decision. The Order also indicated that Complainant's response was due October 1, 2018, and included a reminder that any documents filed with the ALJ must also be sent to Respondent's attorney. On October 1, 2018, I timely received Respondent's required Pre-hearing Statement, which was due the same date. I received no such pleading from Complainant.

By email dated October 2, 2018, at 5:49 PM and received by me on October 3, 2018, Complainant emailed me directly, requesting continuance and lawyer referral. The email did not appear to copy or otherwise include service to Respondent.[2] At my request, my legal assistant faxed a copy of the email to Respondent on October 3, 2018. I also received the substance of the email from Complainant by regular U.S. mail later in the day on October 3, 2018.[3] As it was not provided to Respondent, my legal assistant again faxed a copy to Respondent on October 4, 2018. The substance of both communications appears the same, although there were slight differences in email addresses and the time on both.

[1] She left a message for Complainant and spoke to Mr. Artz, Respondent's counsel. He indicated that he had tried unsuccessfully to contact Complainant.

[2] As the NOH indicates, communication was to be made by mail to the address on the letterhead, or with prior permission, by fax. The NOH further indicates that all filings must be also provided to the opposing party. The Complainant was additionally reminded of the requirement to provide Respondent with copies of filings in the Order to Show Cause issued September 21, 2018. Nevertheless, because Complainant was unrepresented, I accepted the email request.

[3] The letter was postmarked October 2, 2018.

More specifically, Complainant's email indicated that he spoke "with the woman who answers your office phone number," but did not indicate whether this referred to the September 20 call, or some other, and stated that he is attempting to find counsel. He also stated that he spoke once to Respondent's counsel to explain that he is seeking counsel. Finally, he reiterated his request for a list of attorneys and requested a continuance. The email however did not reference, acknowledge, respond to, or otherwise address Respondent's Motion for Summary Decision, my Order to Show Cause, or the Pre-hearing Statement, all of which were due on October 1, 2018.

Following Complainant's request, which I construed, in part, to request additional time to respond to Respondent's Motion for Summary Decision, and as Complainant was not represented at that time, I issued an Order Granting Claimant until October 19, 2018 to respond to Employer's Request for Summary Decision and Reserving Decision on Complainant's Request for a Continuance. I also included a copy of the Order to Show Cause Directed to Complainant I had issued September 21, 2018. Subsequently, Complainant obtained legal counsel and on October 19, 2018, Complainant's counsel filed a Notice of Representation and Complainant's Response to Motion for Summary Decision on behalf of Complainant.

B. Material Facts Not Disputed

Respondent, Thomas Petroleum, provides fuel, lubricants and chemicals to the energy, marine, mining and industrial markets and transports employees and materials across interstate highways in a business affecting interstate commerce. (Respondent's Motion for Summary Decision ("Resp. Motion") 2[4]; Complainant Juan Lloyd's Response to Motion for Summary Decision, ("Compl. Response") 2).

Complainant, Juan Lloyd, began working for Respondent in September 2014. (Compl. Response 1; Resp. Motion 2). Complainant worked as a driver, driving tanker trucks to transport loads to and from Respondent and its customers. (Resp. Motion 1; Compl. Response 2).

At the time Complainant was employed by Respondent, Respondent had a policy forbidding use of a cell phone to call or text while driving. (Letter from Lloyd to Chief Administrative Law Judge, signed May 17, 2018 ("Appeal Request"); Exhibit[5] ("EX") A). Complainant received a copy of the Respondent's handbook, which included its Cell Phone and Texting While Driving policy ("Cell Phone Policy") (Resp. Motion 3; Compl. Response 2). On September 22, 2014, Complainant signed the written Cell Phone and Texting While Driving Policy that states the policy forbidding texting and calling with a cell phone while driving and indicates that penalty for violation includes "discipline up to and including termination." (EX A).

On January 6, 2015, Complainant was involved in a rollover vehicle accident while driving during his regular duties. (Resp. Motion 3; Compl. Response 1). The accident took place

[4] Throughout this Order, the number refers to the applicable page number.

[5] "Exhibit" or "EX" as cited throughout this decision refers to the corresponding Respondent's Exhibit attached to Respondent's Motion for Summary Decision. "CX" as used throughout this decision, refers to the corresponding Complainant's exhibit attached to Complainant's Juan Lloyd's Response to Motion for Summary Decision.

between 6:00 AM and 6:30 AM. (EX C; EX E at 1; EX 3 at 3; Compl. Response 7). At the time of the accident, it was snowing and the road conditions were poor. (Resp. Motion 3; Compl. Response 2). Complainant was advised not to proceed up the road until conditions had improved, but he proceeded and his truck slid backward, rolled over and went into a ditch. (Resp. Motion 3; Compl. Response 2). Complainant was injured in the accident and received medical treatment. (Resp. Motion 3; Compl. Response 1).

An accident statement by Respondent's employee, Mark Renze, completed January 6, 2015, states that he received a call from Complainant at 6:25 AM and while on the phone he heard Complainant "yelling and screaming, 'Oh my god oh my god please god please god no' and then there was nothing," and he called Beth and said it sounded like he wrecked the truck. (EX 3 at 3; EX G at 1). Beth Carpenter, a one of Respondent's dispatchers, confirmed that Complainant wrecked the truck. (EX 3 at 4; EX G at 1; Compl. Response 2).

Respondent conducted an investigation of the accident involving Complainant. (EX G; EX 1). Respondent terminated Complainant's employment in mid-February 2015. (Resp. Motion 3; Compl. Response 1). Respondent informed Complainant that he was being terminated for cell phone use while driving, in violation of the Cell Phone Policy. (Resp. Motion 3; Compl. Response 2-3). The Separation Notice for Juan Lloyd indicated that his termination date is February 13, 2015, his last day worked was January 6, 2013 [sic], he is not eligible for rehire, and he is being let go involuntarily for a major policy violation, with "driving while texting and talking on a cell phone" as the specific comments. (EX I). It also indicates that Howard Sircus provided the management approval for Complainant's termination on February 13, 2015. (EX I).

The DOL OSHA Whistleblower Case Activity Worksheet filed July 17, 2015, states that "from September 2014 through December 2014, Complainant made monthly complaints to Respondent Terminal Manager Howard Sircus about being fatigued while driving and being required to drive while sick." It also states "during the month of December 2015 [sic], Complainant complained to Sircus weekly about driving in excess 14 hours a day and that Complainant was fatigued while driving." (DOL OSHA Whistleblower Case Activity Worksheet filed July 17, 2015).

Complainant sent select text messages complaining about hours worked and being tired to Respondent dispatchers, Charlene and Laura, and to its Terminal Manager, Sircus. (CX 3B). Complainant's records shows that on Monday, November 10, 2014, he texted "Thomas Petro How," Howard Sircus, "But the one thing I told John when he asked me 'what would make me, as a driver not want to work with Thomas.. [sic] was being pushed to drive tired…" and " If my body is too tired to wake up, after 45 minutes of alarms ringing in my ears .. [sic] it's too tired to drive." (CX 3B). There is no response to the text from Sircus. (CX 3B). On December 24, 2014 the texts show that Mr. Sircus stated that "It's valid 16 hr rule being you were stuck," following Complainant's text that he worked 14 hours, three of which were waiting on a pad for an escort. (CX 3B).

Complainant also texted "Dispatch Charlee," Charlene, a dispatcher, on November 29, 2014, that he "repeatedly asked to have a reasonable work day.. [sic] but your dispatchers and your company continues [sic] to schedule 14-16 hour work days for me." (Compl. Response 4-5;

CX 3A). There is no response from "Dispatch Charlee" included in the texts submitted by Complainant.

Complainant also texted "T Disp Night Laura*" and "w Laura (Thomas P…)," Laura, a dispatcher, on an unknown date at 3:48 AM, and Laura stated "between u and i [sic] howard [sic] has been having us watch u, u know. [sic] For like a week on Peoplenet." Complainant replied, indicating that he is planning to file an OSHA claim against Employer "for trying to force me to drive tired.. [sic] Which is illegal… and a lot the 16 hour days I've done since I been [sic] here.. [sic]. Complainant also stated that he planned to talk to a whistleblower attorney on Monday to start building his case against Employer. (CX 3B). There is no response from "Laura" to Complainant's last text provided. (CX 3B).

C. Parties' Arguments

1. Respondent

Respondent moves for summary decision to dismiss Complainant's Complaint, "pursuant to 29 CFR §§ 18.40 and 18.41" [sic].[6] It argues in its Motion for Summary Decision that Complainant's claim fails first because he did not engage in protected activity. Second, Respondent states that it has no knowledge or record of Complainant's alleged complaints and Complainant did not file a complaint or initiate any proceedings until after his discharge. Third, it argues that if Complainant engaged in protected activity, the activity was not a contributing factor in his termination. Next Respondent states that there are no facts in the record to show that its actions in terminating Complainant's employment were motivated by anything other than Complainant's violation of the Respondent's Cell Phone Policy. Finally, Respondent argues that it would have terminated Complainant's employment even if he did not engage in any purported protected activity. Further, any protected activity does not insulate Complainant from discipline for violating company policy.

2. Complainant

Complainant argues in his Response to Motion for Summary Decision that he engaged in protected activity when he made multiple complaints about being required to work more than 14 hours, in violation 49 C.F.R. § 395.1(b) which guides the number of permissible hours of service and related exceptions for drivers under the STAA. He states that the Terminal Manager and Dispatchers were aware of Complainant's complaints about violations of the 14 hour time limits. He argues that his termination was an adverse employment action. Complainant also argues that the protected activity was a contributing factor in his termination. He argues that Respondent's articulated reason that he was dismissed for failing to comply with the Cell Phone Policy is inaccurate; instead phone records show Complainant called after the accident and another employee, "Bill," was terminated prior to Complainant's hiring by Respondent for violating the Cell Phone Policy and Bill was later rehired. Finally, Complainant states that he was informed of

[6] Respondent incorrectly cited 29 CFR §§ 18.40-18.41 which provide for Notice of Hearing and Continuances and changes in place of hearing, respectively. The correct rule under the Rules of Practice and Procedure For Administrative Hearings before the Office of Administrative Law Judges, effective June 18, 2015, is at 29 CFR §§ 18.72.

his dismissal in July, retroactive to February, days after requesting a notebook in which he alleges that he logged violations of the FMCSA. He argues that circumstantial evidence including inconsistencies in policy, shifting explanation and temporal proximity establish that Complainant's complaints were contributing factors in his termination.

D. Applicable Law

1. Summary Decision Standard

The standard of review for summary decision is the same as the standard for summary judgment in the federal courts, Rule 56 of the Federal Rules of Civil Procedure. *Fredrickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, ALJ No. 2007-SOX-013, slip op. at 5 (ARB May 27, 2010); *Hasan v. Burns Roe Enter., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001). The Rules of Practice and Procedure for Administrative Hearings before the OALJ provide that an ALJ "shall grant summary decision 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." 29 C.F.R. § 18.72(a).

The party moving for summary decision must show that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Then, the burden shifts to the non-moving party, who must present affirmative evidence beyond the pleadings to show a genuine issue of material fact exists for hearing. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). If the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact and that the party is therefore entitled to summary decision as a matter of law, the ALJ may enter summary decision for either party. 29 C.F.R. § 18.72(a); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB Jun. 28, 2011); *see Catrett*, 477 U.S. 317. The ALJ may consider both the materials cited in the Motion for Summary Decision and other materials in the record. 29 C.F.R. § 18.72(c)(3).

A material fact is a fact whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact is a fact that if resolved, "could establish an element of a claim or defense and, therefore, affect the outcome of the action." *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046 slip op. at 4 (quoting *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003). A genuine issue exists when a reasonable fact-finder could rule for the non-moving party, based on the evidence presented. *Id*. at 252. Sufficient evidence is any significant probative evidence. *Id*. at 249 (citing *First Nat'l Bank of Ariz. V. Cities Serv. Co.*, 391 U.S. 253, 290 (1968). However, mere allegations are insufficient to defeat a motion for summary decision. *Anderson*, 477 U.S. at 257; *Cante v. New York City Dept. of Ed.*, ARB No. 08-012, ALJ No. 2007-CAA-004, slip op. at 9 (ARB July 31, 2009) citing *Webb v. Carolina Power & Light Co.*, No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 14, 1995); *Henderson v. Wheeling & Lake Erie Ry.*, ARB Case No. 11-013, ALJ Case No. 2010-FRS-012 (Oct. 26, 2012).

In considering a motion for summary decision, an ALJ must consider the facts in the light most favorable to the non-moving party, here, Complainant. *Anderson*, 477 U.S. at 255. The ALJ

must draw all reasonable inferences in favor of the non-moving party and may not weigh evidence or make credibility determinations. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed. R. Civ. P. 50 and 56). If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his 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. *Catrett*, 477 U.S. at 322-23. Respondent must prove that there is no genuine issue to any material fact and it is entitled to summary decision.

2. The STAA

The Surface Transportation Assistance Act (STAA) and its implementing regulations protect employees from discharge, discipline and other forms of discrimination for filing a complaint or testifying in a proceeding about commercial motor vehicle safety, or refusing to operate a vehicle because operating it would violate a federal safety rule or when employee reasonably believes it would result in serious injury to the employee or the public. 49 U.S.C. § 31105. The STAA provides that a person may not discharge, discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because (A) the employee or another person at the employee's request filed a complaint, began a proceeding, or will testify in a proceeding related to a violation of a commercial motor vehicle safety regulation, (B) the employee refuses to operate a commercial vehicle when the operation violates a U.S. commercial motor vehicle health, safety or security rule or the employee has a reasonable apprehension of serious injury to the employee or public because of the vehicle's hazardous condition, (C) the employee accurately reports hours on duty, (D) the employee cooperates or is perceived to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, of the National Transportation Safety Board, or (E) the employee provides information to the same agencies listed in (D) or to any federal, state or local regulatory or law enforcement agency relating to an commercial vehicle accident or incident that results in injury, death or property damage. 49 U.S.C. § 31105 (a).

Under the STAA, a complainant must show that he or she engaged in protected activity, the employer knew he or she engaged in the protected activity, he or she was subject to adverse employment action, and then demonstrate by a preponderance of the evidence that the protected activity was a contributing factor in the alleged adverse action by the employer. 49 U.S.C. § 42121(b)(2)(B); *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20 and 21, 8 (ARB May 13, 2014); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR-11, slip op. at 3 (ARB June 29, 2007). If the complainant meets this burden of proof, the burden then shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. *Beatty*, ARB No. 13-039; *Sacco v. Hamden Logistics, Inc.*, ARB No. 09-024, ALJ 2008-STA-00043 and ALJ 2008-STA-00044, slip op. at 4 (ARB Dec. 18, 2009). The "clear and convincing" standard is an "intermediate burden of proof, in between 'preponderance of the evidence' and 'proof beyond a reasonable doubt." *Id*. at 9. Clear and convincing evidence is evidence demonstrating that the thing to be proved is "highly probable or reasonably certain." *Beatty*, ARB No. 13-039 (citing *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013)).

E. Summary Decision under the STAA

1. Protected Activity and Respondent Knowledge of Protected Activity

A complainant must show that he or she engaged in protected activity. 49 U.S.C. § 31105(a); *Beatty,* ARB No. 13-039. Protected activity includes filing a complaint about motor vehicle safety to supervisors. *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-37 (ARB Dec. 31, 2002), citing *Dutkiewicz v. Clean Harbors Envtl. Servs., Inc.,* ARB No. 97-090, ALJ No. 95-STA-34, slip op. at 3-4 (ARB Aug. 8, 1997). Complaints may be oral and may be unofficial. *Id*.

Here, Complainant asserts that text messages regarding the number of hours worked and him being tired, made to several persons employed by Respondent, show he engaged in protected activity. Complainant provided screen shots of text messages with "Dispatch Charlee," "w Laura (Thomas P…)," "T Disp Night Laura*," who Complainant states are dispatchers Charlene and Laura, as well as with "Thomas Petro How," who Complainant states is Howard Sircus, Terminal Manager. (Compl. Response 5-6).

Complainant texted several times to Mr. Sircus. His text shows that on Monday, November 10, 2014, he texted "Thomas Petro How," Howard Sircus, "But the one thing I told John when he asked me 'what would make me, as a driver not want to work with Thomas.. [sic] was being pushed to drive tired…" and "If my body is too tired to wake up, after 45 minutes of alarms ringing in my ears .. [sic] it's too tired to drive." (CX 3B). There is no indication as to why Complainant sent the text or any response. On December 24, 2014 the texts show that Mr. Sircus stated that "It's valid 16 hr rule being you were stuck," following Complainant's text that he worked 14 hours, three of which were waiting on a pad for an escort. (CX 3B).

He also texted "Dispatch Charlee," Charlene, a dispatcher, on November 29, 2014, that he "repeatedly asked to have a reasonable work day.. [sic] but your dispatchers and your company continues [sic] to schedule 14-16 hour work days for me." (Compl. Response 4-5; CX 3A). There is no response from "Dispatch Charlee" included in the texts submitted by Complainant.

Complainant also texted "T Disp Night Laura*" and "w Laura (Thomas P…)," Laura, a dispatcher. On an unknown date at 3:48 AM, Complainant texted Laura and Laura stated "between u and i [sic] howard [sic] has been having us watch u, u know. [sic] For like a week on Peoplenet." Complainant replied, indicating that he is planning to file an OSHA claim against Employer "for trying to force me to drive tired.. [sic] Which is illegal… and a lot the 16 hour days I've done since I been [sic] here.. [sic]. Complainant also stated that he planned to talk to a whistleblower attorney on Monday to start building his case against Employer. (CX 3B). There is no response from "Laura" to Complainant's last text provided, nor is there any indication why Laura sent the initial text to Complainant.

Complainant maintains that these texts show he engaged in protect activity because they reveal that he complained about his hours worked and being tired while driving. While the texts are somewhat incomplete and do not include "full conversation" or names, considering the facts

most favorably to Complainant, Complainant's texts to dispatchers, Laura and Charlene, and terminal manager, Howard Sircus, stating that he is "too tired to drive," "trying to force [him] to drive tired]" and his text stating that he plans to talk to a whistleblower attorney constitute protected activity because they are oral complaints regarding commercial vehicle safety and/or related violations of regulations. (CX 3B). While there are no responses to certain complaints made by Complainant to the purported dispatchers, Howard Sircus responded to at least one instance and was therefore aware of at least one of Complainants safety complaints. (CX 3B). Howard Sircus also signed Complainant's separation notice on behalf of Respondent. (EX I). Drawing all inferences most favorably to Complainant, I find that Complainant engaged in protected activity and given Mr. Sircus' response to one of Complainant's complaints, Respondent was aware of the protected activity.

2. Adverse Action

A complainant must establish that he or she suffered an unfavorable personnel action. *Araujo*, 708 F.3d at 157. The STAA states that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. 49 U.S.C. § 31105(a)(1). It is undisputed that Complainant's termination on February 13, 2015 was and adverse employment action. (Resp. Motion 8; Compl. Response 5). Accordingly, Complainant has established that he suffered an unfavorable personnel action.

3. Contributing Factor

A complainant must also demonstrate by a preponderance of the evidence that the protected activity was a contributing factor in the alleged adverse action by the employer. *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20 and 21, 8 (ARB May 13, 2014). The ARB has described a "contributing factor" as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the adverse personnel decision." *Beatty*, ARB No. 13-039 at 8 (quoting *Araujo*, 708 F.3d at 158). A complainant may prevail by proving that a respondent's reason for its adverse actions is only one of the reasons for the conduct and the complainant's protected activity is another contributing factor. *Beatty*, ARB No. 13-039 at 8.

A complainant may provide direct or indirect proof of contribution. *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008). Direct evidence "conclusively links the protected activity and the adverse action" without relying on inference. *Williams*, ARB No. 09-092 at 6 (citing *Sievers*, ARB No. 05-109). Indirect, circumstantial evidence includes factors such as "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." *Beatty*, ARB No. 13-039 at 9, fn. 55 (citations omitted).

Close proximity in time can be considered evidence of causation, but it is not necessarily dispositive and may not be sufficient alone to demonstrate that a protected activity was a

contributing factor in an adverse employment action. *White v. The Osage Tribal Council*, ARB No. 99-120, slip op. at 4 (Aug. 8, 1997) *aff'd sub nom Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. DOL*, 187 F.3d 1174 (10th Cir. 1999), *aff'd White v. The Osage Tribal Council*, ARB No. 00-078 (Apr. 8, 2003); *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6 (Apr. 28, 2006). An ALJ is "permitted to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity." *Palmer v. Canadian Nat'l Railway/Illinois Central Railroad Co.*, ARB Case No. 16-035, slip op. 56, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016). However, the ALJ must also believe that it is more likely than not that protected activity was a contributing factor in the adverse personnel action, after considering all the relevant, admissible evidence. *Id.*

Complainant argues that the temporal proximity between his termination and the text messages, as well as his request for a notebook purportedly containing notes logging violations of the FMCSA, demonstrate a causal connection establishing that the complaints were contributing factors in his termination. However, Complainant provides only unsubstantiated allegations that the complaints were a contributing factor. No facts of record support that his complaints contributed to his termination and no information of record is sufficient to allow such an inference.

More specifically, Complainant contends that his phone records show calls at 6:23 AM and 6:24 AM, and that the accident he was in occurred at 6:20 AM. As a result, according to Complainant, the phone records demonstrate that he was not on the phone at the time of the accident and implies that Respondent's stated reason for dismissing him is a pretext. However, the undisputed evidence of record shows the accident occurred between 6:00 AM and 6:30 AM, rather than at an exact time.[7] (EX C; EX E; EX G; EX H). No evidence of record demonstrates precisely the time of the accident or the time of the calls, however, the undisputed evidence of record shows that Complainant was in the middle of a call to Mark Renze when the truck crashed and accident occurred. (EX E at 3-4).

Regardless of the precise timing of the accident, and even looking at the facts in the light most favorable to Complainant, the undisputed facts do not demonstrate that Complainant's safety complaints (his protected activity), contributed to his termination. Rather the undisputed facts show that Complainant was on a call with Mark Renze during the accident and

[7] An email from Respondent employee, Joseph Biondo, Incident Review Board, dated January 6, 2015, 9:02 AM, indicates that an incident happened January 6, 2015 at 6:00 AM. An incident report form completed January 7, 2014[7] [sic] indicates that the incident was January 6, 2014 [sic] at 6:20 AM. (EX C; EX G). An accident statement completed by Respondent employee, Mark Renze, on January 5, 2015, the same date as the accident, states that Complainant called at 6:25 and while on the call, Mr. Renze heard Complainant "yelling and screaming, 'Oh my god oh my god please god please god no' and then there was nothing," and he called Beth to inform her that he thought Complainant wrecked the truck. (EX E at 3-4). Handwritten, unsigned notes submitted by Respondent state that "Mark" (presumably Renze, based on Mr. Renze's own accident statement) called at 6:28 following a call with Complainant where Complainant started saying "oh no, oh no, etc." and then he lost contact and was unable to reach Complainant. (EX H at 2). The same notes show at 6:30 the author reached Complainant and Complainant stated the truck wrecked and he was injured. (EX H at 2). While these handwritten notes do not indicate who wrote them, when, or for what purpose, I note they lend some further support for Mr. Renze's accident statement that he was on the phone with Complainant at the time of the accident.

consequently in violation of Respondent's Cell Phone Policy.[8] The undisputed facts further show that the accident occurred between 6:00 AM and 6:30 AM on January 6, 2015, and Complainant's phone records show he made calls between those times. The reason stated on his termination letter is "driving while texting and talking on a cell phone." (EX I). Nothing of record shows, or can be inferred, as an alternate reason for Complainant's termination. Thus, I find that the direct evidence shows Complainant was terminated for violating Respondent's Cell Phone Policy and Complainant has not established that his protected activity contributed in any way to his termination.

Complainant also argues that Respondent's treatment of a different employee supports Complainant's argument that he was dismissed in retaliation for making safety complaints. Complainant included a text with Laura on an unknown date at 2:43 AM that stated in August 2014, prior to Complainant beginning work with Employer, another employee, "Bill," was caught talking and driving.[9] (CX 5). Complainant heard "Bill" was suspended and then an hour later he was fired, but was later rehired. (CX 5). First, the information in this text is unreliable at best – an employee who worked for Respondent prior to Complainant's start date had a similar incident and was fired, also prior to Complainant's start date, but later rehired at an unidentified time. It is also speculative. Moreover, contrary to Complainant's argument that this shows inconsistently applied policies, this anecdote, if true, actually lends support that Respondent equitably enforces its Cell Phone Policy. In this anecdote, a different employee who was talking on the phone while driving was also fired, similar to Complainant here. Whether "Bill" was later rehired does not change the fact of his dismissal following cell phone use while driving, in violation of Respondent's written Cell Phone Policy. Thus, if true, this anecdote does not demonstrate that Complainant's protected activity was a factor in his dismissal.

Finally, Complainant argues that he learned of his termination in July 2015, retroactive to February 15 [sic], 2015, several days after he requested a small spiral bound notebook from Mr. Sircus by text, and the proximity of this request to notification of his dismissal shows it contributed to his dismissal. (Compl. Response 7-8). Complainant asserts that the notebook contained a "log of violations of the FMCSA," however, this notebook or any other information about it is not of record. (Compl. Response, 7-8). Nor is there any evidence that Respondent or any employee of Respondent was aware of its contents. Rather, a text of record shows that on February 10, 2015, Complainant asked Howard (presumably Howard Sircus) about a small spiral-bound notebook with a fluffy puppy on the cover that Complainant had in his truck, but did not mention the contents of the notebook. (CX 3B). Howard replied, "Not sure what notebook you are referring to," and that he would check the bag containing Complainant's belongings from his truck and let him know. (CX 3B).

[8] In the appeal of his OSHA Complaint submitted May 17, 2018, Complainant stated that his phone automatically dialed Mr. Renze during the accident when it was flipped over, "a function of technology" whereby a phone, with no actions by a person, automatically dials the last person called when it is turned over, as it was during the accident. As no evidence was provided that can establish this function in Complainant's phone, it is an allegation unsupported by any evidence. I also note it directly contradicts his later statement in his affidavit provided in Compl. Response, completed October 18, 2018. (CX 1).

[9] "Bill" is identified as William Rigby by Complainant. (Compl. Response 2-3). No further information about Mr. Rigby or his employment is of record.

While I understand the close proximity in time between Complainant's request for the notebook and his termination may be suspect, even drawing all reasonable inferences in a manner most favorable to Complainant, the text about the notebook could not contribute to Complainant's termination because the text does not discuss the contents of the notebook, does not indicate that Mr. Sircus even knew of the notebook until he received Complainant's text request, and does not show whether Mr. Sircus ever found or reviewed the contents of the notebook. Likewise, there is no evidence the notebook was related to any protected activity by Complainant, even considered in a light most favorable to Complainant. Nor is the notebook itself, or its contents, of record. The response to the text further demonstrates that Mr. Sircus did not appear to know of the notebook and there are no further texts regarding the notebook. Therefore, Complainant's request for his spiral bound notebook from his truck does not demonstrate any protected activity or that the activity contributed to his termination.

In sum, there is no genuine issue of material fact that Complainant's protected activity, consisting of a few incomplete texts complaining about the number of hours worked and being tired, did not contribute to his dismissal by Respondent. Drawing all reasonable inferences in a manner most favorable to Complainant, Complainant's complaints and his request for his notebook were not a contributing cause or contributing causes to Complainant's termination. Accordingly, I find the undisputed facts reveal Complainant's protected activity was not a contributory cause to the adverse employment action, his violation of Respondent's Cell Phone Policy was the direct cause of his termination and Respondent is therefore entitled to summary decision as a matter of law.[10]

F. Conclusion

Considering the facts in the light most favorable to the Complainant, Complainant established that he engaged in protected activity, Respondent was aware of the protected activity, and Complainant suffered an adverse employment action. The undisputed material facts however reveal Complainant's protected activity was not a contributing factor in his dismissal by Respondent. Therefore, Respondent is entitled summary decision as a matter of law. Accordingly, Respondent's Motion for Summary Decision is GRANTED.

ORDER

Based on the foregoing,

1. Summary Decision is GRANTED in favor of RESPONDENT and the Complainant's Complaint in this matter is DISMISSED;

2. The hearing scheduled for October, 30, 2018 is CANCELLED;

[10] As I found there is no genuine issue of material fact that Claimant's protected activity was not a contributing factor to his termination and grant summary decision as a matter of law in favor of Respondent, I need not address whether Respondent would have taken the same action absent Complainant's protected activity.

3. Complainant's pending Request for a Continuance is DENIED as MOOT.

SO ORDERED.

NATALIE A. APPETTA
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 24 hours every day. No paper copies need be filed.

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-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 for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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