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Issue Date: 05 March 2020

CASE NO.: 2019-STA-00037

IN THE MATTER OF

MONZARLLO TAYLOR,
Complainant

v.

STONE TRANSPORTATION,

Respondent

ORDER GRANTING EMPLOYER'S MOTION FOR SUMMARY JUDGEMENT

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (hereinafter the "STAA" or the "Act"), and the applicable regulations. On May 16, 2019, the Occupational Safety and Health Administration ("OSHA") stated that Complainant requested that OSHA terminate its investigation and issue a determination. OSHA was unable to conclude at that time that Respondent had violated the Act. By letter received May 20, 2019, Complainant timely requested review of OSHA's findings.

An Amended Notice of Hearing and Pre-Hearing Order established a deadline to complete discovery by January 10, 2020, and reset the hearing date for February 12, 2020. On January 30, 2020, the undersigned cancelled the hearing in order to address Respondent's Motion for Entry of Default and Dismissal of Action due to Complainant's failure to respond to discovery requests, and Respondent's Motion for Summary Judgment. On February 20, 2020, I received Respondent's Motion to Strike discovery requests that Complainant served late.

Respondent Stone Transportation (also referred to herein as "the Company" or "the Employer") filed a Motion for Summary Judgment that this Office received on January 15, 2020. Complainant, who is self-represented, was ordered to respond to the Motion by February 28, 2020. Complainant filed a response to the Motion for Summary Judgment, which this Office received on February 10, 2020. For the reasons set forth below, Respondent's Motion is granted.

I. Legal Standard for Summary Decision

Under OALJ Procedural Rules, an administrative law judge ("ALJ") may grant a motion for summary decision if the pleadings, affidavits, evidence obtained by discovery, or other evidence shows that there is no genuine issue of material fact and that the moving party would

prevail as a matter of law. 29 C.F.R. § 18.72; Fed. R. Civ. P. 56(c). When considering a motion for summary decision, an ALJ does not assess credibility or weigh conflicting evidence, as all evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences made in his favor. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *see, e.g. Stauffer v. Wal-Mart Stores, Inc*., Case No. 1999-STA-21 (ARB Nov. 30, 1999) (under the Act and pursuant to 29 C.F.R. Part 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial).

A fact is material where it might impact the outcome of the case under the relevant legal authority. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247–48, (1986). A dispute is genuine if the evidence is such that a rational trier of fact could resolve the issue either way. *Id.*

The motion must be supported by citations to particular parts of the record, such as depositions, documents, electronically stored information, and affidavits or declarations, among other things. 29 C.F.R. § 18.72(c)(1)(i). An affidavit relied on in support of the Motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. *Id*. § 18.72(c)(4).

To show in response to such a motion that there is a genuine dispute over a material fact, Complainant must support any such assertion by:

> (i) Citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (ii) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

29 C.F.R. § 18.72(c)(1). Complainant may also show "by affidavit or declaration, that, for specified reasons, it cannot present facts essential to justify its opposition."[1] *See* § 18.72(d). [2]

II. Material Facts Not Genuinely in Dispute

In reaching the factual findings below, setting forth the material facts which are not genuinely disputed, I have considered all of the evidence submitted by each party, which constitutes material that would be admissible in evidence, and, with regard to affidavits and testimony, also reflects facts within the individual's personal knowledge and indications that the individual is competent to testify on the matters stated. 29 C.F.R. § 18.72(c).

[1] The undersigned's Order of January 30, 2020, brought the requirements of 29 C.F.R. § 18.72 to Complainant's attention.

Upon review of the evidence submitted, I have not considered some of the attachments to the Affidavit of Mike Strzelecki, including an email received by Mr. Strzelecki from dispatcher Ms. Shiring on September 11, 2018, which in turn contains a statement from mechanic Alberto Lopez, translated by Ms. Shiring from Spanish (Appx. A to Affidavit). The statement of Mr. Lopez describes events of September 11, 2018, including Complainant taking unit 20810 and acting angrily and aggressively when he returned it to the yard. Mr. Strzelecki attested to receiving the email, and Ms. Shiring testified to preparing it, and I note that generally speaking, an email may be an admissible business record. (Strzelecki Aff., ¶ 10; Appx. B, pp. 24-25). However, here, the email consists primarily of the statement of a third individual (Mr. Lopez), and Respondent has not sufficiently shown the application of a hearsay exception that would render that statement admissible.[3] As such, I have not considered the statement of Mr. Lopez contained in Appendix A to the Affidavit. For similar reasons, I have not considered the hearsay statement of Larry Hernandez attached as Appendix B to the Affidavit of Mr. Strzelecki.

I note that driver Clint Porter verified under oath that the contents of his statement dated September 11, 2018, were accurate and within his personal knowledge; therefore, I have considered his handwritten statement marked Appendix C to the Strzelecki Affidavit. (Porter Deposition, pp. 13-14; Appx. C). The Events Detail Report documenting Mr. Strzelecki's 911 call on September 11, 2018 (Appx. D), is considered as an admissible public record. 29 C.F.R. § 18.803(8). The Respondent's Driver Handbook excerpts (Appx. E) and report of Complainant's hours worked over 34 days between July 30 and September 8, 2018 (Appx. F), are considered as admissible business records. 29 C.F.R. § 18.803(6). However, the photos of damaged truck tires (Appx. G) are not adequately authenticated at this time to be admissible. 29 C.F.R. § 18.901.

Complainant submitted several unsworn personal "statements" in his Response to the Motion and attached many of the same documents submitted by Respondent. He also submitted text messages purported to be between himself and the dispatcher and with Mr. Strzelecki on September 7, 8, and 11, 2018. He submitted Driver Vehicle Inspection Reports (DVIR's) for 16 out of the 34 days that he worked for Respondent. The DVIR's are admissible public and/or business records. Complainant was required to cite to materials in the record such as depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, or interrogatory answers. 29 C.F.R. § 18.72(c)(1)(i). Although much of the information submitted by Complainant is not in the form of a declaration, deposition, affidavit or otherwise sworn or admissible evidence, I have incorporated below undisputed, material facts presented by Complainant.

[3] Hearsay statements not admissible at trial must be disregarded on a motion for summary judgment. Respondent cites caselaw noting that reliance on hearsay is generally permitted in administrative proceedings, which is true in many cases. However, STAA regulations specify that hearings will be conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings, under which hearsay evidence is not admissible. 29 C.F.R. §§ 18.802, 1978.106(a); *Germann v. Calmat Co*., ARB No. 99-114 (Aug. 1, 2002) ("The ALJ erred when she informed the parties early in the hearing that hearsay would be permitted."). As to the application of FRE 804(a)(5), urged by Respondent, I am unable to conclude based on the information available at this time that the witness at issue (Mr. Lopez) is unavailable and that the hearsay statement is against the declarant's interest or concerns the declarant's personal or family history, or that other exceptions apply under Rule 804(b). *See* Fed. R. Evid. 804(a)(5), (b)(1)-(5); *United States v. Olafson*, 213 F.3d 435, 441 (9th Cir. 2001).

The following findings of material facts not genuinely in dispute thus rest mainly on the portions of the Affidavit of Mr. Strzelecki that attest to matters within his personal knowledge, the admissible attachments to Mr. Strzelecki's Affidavit discussed above, the deposition testimony of Complainant (Appx. A to Motion), the deposition testimony of dispatcher Claudia Shiring (Appx. B to Motion), the deposition testimony of truck driver Clint Porter (Appx. C to Motion), and Complainant's statements and attachments in Response to the Motion.

1. Stone Transportation is a multi-faceted truck company that is home-based in Saginaw, Michigan. Historically, the Company has engaged in commercial transportation of bulk commodities; the business has grown to include allied pursuits such as material handling and well services. The Company operates about 200 trucks overall. Its operations in the Denver, Colorado, area—the location at issue here—involved regular, dedicated truckload moves of waste from a consolidation point to the landfill. At this location, Respondent typically operated 10 trucks; it employed truck drivers, dispatchers, and on-site mechanics. (Strzelecki Aff. ¶¶ 3-4).

2. Drivers typically completed anywhere from two or three and up to five or six trips per day to dump loads of trash at the landfill or dump. Five or six loads were expected. Their loads were often heavy, weighing legally up to 97,000 pounds. (Shiring Deposition, pp. 6-7; Porter Deposition, p. 11).

3. Mike Strzelecki has been employed by Respondent for more than 25 years. His formal title is Vice President of Sales, and he served as the on-site manager for Respondent's operations in Denver until those operations ceased on February 4, 2019. Mr. Strzelecki was directly responsible for, and exercised managerial control over, the entire operation at the Denver location, including management, hiring and termination of employees. (Strzelecki Aff., ¶ 1).

4. Mr. Strzelecki hired Complainant Monzarllo Taylor on or about July 27, 2018, and Mr. Taylor's first day of work was July 30, 2018. (*Id.*, ¶ 5).

5. Respondent's Dispatcher, Claudia Shiring, assigned truck drivers to particular trucks. She noticed that Complainant caused damage to most of the equipment he operated, and he typically did not perform a pre-trip inspection to ensure that everything was working, including brake lights, emergency lights, mud flaps, and nets over the top of the load to keep trash from blowing out, and to check levels of gasoline, oil, and windshield and radiator fluid. On one occasion, she received calls from other drivers that Complainant was driving with a light that was off; she called Complainant to have him bring in the truck to fix the light. Ms. Shiring determined that Complainant had trouble loosening the brakes to handle the weight on the hilly Denver area, which would result in tires becoming thin and smoking. Driver Clint Porter observed Complainant driving on flat tires "repeatedly," even after the condition was brought to his attention, and like Ms. Shiring, noticed that Complainant typically did not conduct pre-trip inspections or check fluids. Mr. Porter saw Complainant driving too fast for the weight of his truckload and advised him to slow down. (Shiring Deposition, pp. 11, 25-29; Porter Deposition, pp. 9-11).

6. On Friday, September 7, 2018, Complainant reported to the dispatcher that his truck (20807) had broken down while on delivery of a load, and the dispatcher called a mechanic to come out to Complainant's truck twice that day, to address a flat tire and then to address brakes that had locked up. Complainant also texted Mr. Strzelecki that day. Mr. Strzelecki first gave Complainant instructions to "turn the key to off and take the key out. Go check your coolant level. If okay, put key back in and try it. Please advise outcome." The same day, Complainant asked Mr. Strzelecki by text, "I was wondering if you will have some extra time tomorrow to talk face to face?" Mr. Strzelecki responded the next day that he was out of town at a company function and would return on Tuesday. On Saturday, September 8, 2018, Complainant reported to the dispatcher that unit 20807's brakes were smoking and locking up again. She told him to bring the truck back to the yard and take another truck. He did so. (Complainant's Response to Motion for Summary Judgment).

7. Mr. Strzelecki was informed by his staff on or about Saturday, September 8, 2018, that Complainant had damaged several pieces of equipment due to rough or otherwise improper handling. While considering this information, Mr. Strzelecki told Complainant not to come into work on Monday, September 10, 2018, or Tuesday, September 11, 2018. (Strzelecki Aff., ¶ 8).

8. On September 11, 2018, Complainant came into work and took unit 20810, which Ms. Shiring, the dispatcher, had assigned to driver Larry Hernandez, not the Complainant. A night mechanic had told Complainant the day before he could take unit 20810,[4] but the morning mechanic on September 11 told him not to. When Ms. Shiring discovered Complainant had taken unit 20810, she contacted Complainant and asked him to return to the yard with that unit, as that truck had been assigned to a different driver. When Complainant returned, Ms. Shiring was on a call with Mr. Lopez and could hear Complainant screaming and cursing on Mr. Lopez's end of the call. Because Ms. Shiring kept hearing screaming over the phone, and mechanic Lopez expressed concerns about his safety due to Complainant's behavior, Ms. Shiring headed over to the yard. Complainant tried to take unit 20807 instead, but discovered it remained out of service for mechanical reasons. On September 11, Mr. Porter saw Complainant drive into the yard "very fast" and "dangerous" early that morning and was shocked at Complainant's speed through the narrow yard entrance, considering also that it was still dark and there are power lines at the yard entrance. A safer speed for the area is closer to 5 to 10 miles per hour. (Strzelecki Aff., ¶¶ 9-10; Shiring Deposition, pp. 6, 11-16; Porter Deposition, pp. 13-16; Complainant's Response to Motion, summary of events 9/11/18).

9. Complainant next went to the office where he also raised his voice at Mr. Strzelecki, accusing him of being a racist and discriminatory and having terrible equipment. Mr. Strzelecki told Complainant to leave the worksite, to go elsewhere to calm down, and come back later. When Mr. Strzelecki reached out by text to ask Complainant when he

[4] It is not disputed that Complainant did not work on September 10, 2018. Respondent allowed Complainant and his family to use a small trailer at Respondent's terminal facility for housing so that Complainant and his family did not have to live in a car. (Strzelecki Aff., ¶ 6; Shiring Deposition, p. 15).

could come over and speak, Complainant replied 1:00 p.m. When Complainant returned, Mr. Strzelecki notified him of his termination. Mr. Strzelecki terminated Complainant as a result of Complainant disregarding instructions, engaging in conduct threatening to the safety of other employees, and damaging company equipment, in violation of Respondent's Driver Handbook requiring compliance with company safety rules and procedures and refraining from unprofessional, disorderly, or insubordinate behavior. Mr. Strzelecki called 911 to request police assistance in getting Complainant to leave the worksite. (Strzelecki Aff., ¶¶ 7, 14, 15, 16, 17, 18; Shiring Deposition, pp. 16, 18-22; Complainant's Response to Motion, summary of events 9/11/18).

10. The Separation Notice states that Complainant "violated a company rule or policy" and that the "final incident" resulting in discharge was "problems with attitude." It is signed by Dean Koch, HR Manager on September 24, 2018. (Separation Notice attached to Complainant's Response).

11. In an email Mr. Strzelecki sent at 1:07 p.m. on September 11, 2018, to Dean Koch and two other individuals, whose role within the Company is not specified, Mr. Strzelecki advised that Complainant had been terminated, effective that day, and his last day worked was September 8, 2018. Mr. Strzelecki described Complainant has having "continuing issues with road rage when things don't go his way, also will not pre trip or post trip a truck"; he is "extremely hard on equipment, broke down with three different trucks last Saturday"; that morning he "tried to take two different trucks other than assigned even after repeated warnings that he is only to take equipment that his dispatcher Claudia or I assign him"; and Complainant had a "tantrum in the yard this morning, tear around in a tractor in the dark, putting himself, our mechanics and other drivers at risk." Lastly, it was noted that Complainant was not eligible for re-hire. (Email attached to Complainant's Response).

12. During his employment with Respondent, Complainant did not refuse to operate a motor vehicle due to any issues of the vehicle's safety, whether a violation of a regulation, standard or order concerning vehicle safety or health or whether due to a reasonable apprehension of serious injury to Complainant or to the public because of a vehicle's unsafe condition. (Strzelecki Aff., ¶¶ 22, 23).

13. During Complainant's employment with Respondent, there was no issue concerning the accurate report of his hours on duty. Nor did Mr. Strzelecki believe Complainant was cooperating with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board. (*Id*., ¶¶ 27, 28; Complainant Deposition, pp. 74-75).

14. During Complainant's employment with Respondent, Mr. Strzelecki was not aware of any complaint filed by Complainant or any proceeding relating to a violation of a commercial motor vehicle safety or security regulation, standard, or order, nor any testimony regarding same. (Strzelecki Aff., ¶¶ 24, 31).

15. The only complaint that Mr. Strzelecki was aware of concerned Complainant's threat to file a complaint with OSHA and/or other agencies and authorities after Mr. Strzelecki notified Complainant that he was fired on September 11, 2018. (*Id*., ¶ 25; Complainant Deposition, pp. 74-75).

16. The DVIR's submitted by Complainant show the date of work performed, time Complainant started and ended work, the tractor/truck number, a checklist of tractor/truck parts, the trailer number, a checklist of trailer parts, a space for remarks (the form states to "check any defective item and give details under remarks"), a space for the driver to check whether the condition of the vehicle was satisfactory, a place for the driver's signature, and a place for the mechanic to note whether any noted defects were corrected and/or whether defects need not be corrected for safe operation of the vehicle. (DVIR's attached to Complainant's Response).

17. The DVIR's in evidence were signed by Complainant. They reflect that some problems or defects were noted under "remarks" on certain days when Complainant operated truck units 20806 and 20807. For example, Complainant noted a coolant leak on 8/2/18; a broken trailer door latch, trailer door chain short, and A/C not working in tractor on 8/8/18; the "engine need[s] blow out" on 8/29/18 and 8/30/18; a flat tire, missing mud flap and engine needing blow out on 9/4/18; missing mud flap on 9/5/18; and the next day 9/6/18, the same truck (20807) was noted to have no problems or defects. On each form there is a checkmark next to the driver's statement that "condition of the above vehicle is satisfactory." Whenever defects or problems were noted under remarks, a mechanic's signature is also present underneath with a checkmark next to the statements "above defects corrected" and/or "above defects need not be corrected for safe operation of vehicle." (DVIR's attached to Complainant's Response).

III. The Parties' Positions

In its Motion for Summary Judgment, Respondent argues that Complainant has failed to state a claim on which relief may be granted or, in the alternative, that there are no material facts in dispute and thus Respondent is entitled to judgment as a matter of law. Respondent argues that Complainant did not engage in protected activity; that Respondent has also articulated a reasonable and legitimate business reason for Complainant's termination; and that Respondent is entitled to summary judgment on the issue of economic damages, given Complainant's failure to participate in discovery on issues of economic loss and he also failed to mitigate his alleged losses.

Concerning protected activity, Respondent cites the deposition testimony of Complainant who admitted that he did not tell Mike Strzelecki, Respondent's manager, that he reported or intended to report to any government agency complaints of alleged unsafe conditions or violations until after Mr. Strzelecki terminated the Complainant. (Motion, pp. 7-9). Respondent further submits that the reasonable and legitimate business reason for terminating the Complainant was that he was very hard on Respondent's equipment and also because his behavior on September 11, 2018, was aggressive, unreasonable and against Company policy. (*Id*., pp. 11-18). Lastly, Respondent argues that partial summary is due, at a minimum, on the

issue of economic damages because Complainant has not responded to discovery requests seeking the basis for Complainant's request for relief. Additionally, Respondent argues, Complainant was either employed by other employers since his termination by Respondent or he has been inactive in the job market for reasons not attributable to Respondent. (Id. at 18). Respondent cites Complainant's deposition testimony that he went to work for another truck company less than one month after leaving Respondent; he continued that employment until December 15, 2018, when he elected to quit and move his family to Missouri; and he chose not to look for work as a truck driver in Missouri, preferring instead to get out of the industry. (Id. at 19). In lieu of working as a truck driver, Complainant has worked as a regional manager for Cedar's Meditteranean, handling warehouse and distribution services for retail products. (*Id*.). Respondent also submits that its Denver operations ceased completely on February 4, 2019, and layoffs occurred in the preceding months depending on the employee's seniority. Thus, if Complainant had not been fired, he would have been an early layoff in November 2018, due to his short seniority. For all of these reasons, Respondent argues that reinstatement is not available and by November 2018 or February 4, 2019, at the latest, economic damages would not be available to Complainant. (*Id*. at 21-22).

As noted above, Complainant submitted unsworn personal "statements" in his Response to the Motion, and attached many of the same documents submitted by Respondent. He asserts that he was hired as a driver to deliver loads from a recycle field to a landfill. Sometime in the middle of August 2018, Complainant states that Mr. Strzelecki asked him to "deliver 5 loads instead of my usual 4 loads." Complainant told Mr. Strzelecki he would try his hardest to do so. One day, Complainant says he got a "ticket for being overweight" when trying to deliver 5 heavy loads and he presented the ticket to Mr. Strzelecki. The cost of the ticket was taken out of Complainant's pay. "After that incident," Complainant states he "didn't feel comfortable doing the 5 heavy loads a day." He did not want to pay "another $1,200 ticket for being overweight." Complainant does not assert, or submit any evidence to indicate, that he complained about the safety of hauling five loads per day or that he refused to do so on any occasion. Complainant contends that Mr. Strzelecki started to find fault with him when he noticed Complainant was not doing 5 loads per day. Complainant does not state that he and Mr. Strzelecki had any verbal or written conversation regarding Complainant's concerns about hauling five loads. Even so, Complainant believes Mr. Strzelecki started "digging around" in Complainant's past for cause to terminate him. On August 24, 2018, Mr. Strzelecki discovered an accident in Complainant's past (on September 9, 2015), when working for Kiesel Company, which did not show up on Complainant's DAC report.[5] On September 5, 2018, Complainant told Mr. Strzelecki that he could not talk about this incident, because it was "confidential" and "off the record books," and this purportedly made Mr. Strzelecki "furious."

In his Response to the Motion for Summary Judgment, Complainant submits the following timeline of the events of September 7, 8, 9 and 11, 2018:

[5] Complainant submitted the information from Kiesel Company, which indicated that he was employed as a truck driver 4/15/15 to 9/23/15, was discharged and not eligible for re-hire, and had an accident 9/9/15 "driving to[o] fast in the rain went around curve to[o] fast … went off road and end upside down in the ditch." When asked "Was he/she a safe and dependable driver?" The answer was "careless."

Friday, September 7, 2018: Complainant loaded truck 20807, did a daily check before starting the day, and the truck brown down while at "the tower to drop off a load from the truck." Complainant told the dispatcher the truck was broken down, and she called a subcontractor mechanic to come out twice. The first time, the mechanic changed a flat tire. The second time, the mechanic addressed brakes that had locked up. Complainant says he had to drive back to the Respondent's yard "without any brakes." When Complainant arrived back at the yard, he texted Mr. Strzelecki and asked to speak with him about the situation that had just occurred. In the text that Complainant attached to his Response, Complainant asked, "I was wondering if you will have some extra time tomorrow to talk face to face?"

Saturday, September 8, 2018: Complainant operated truck 20807. Halfway through the first stop, the brakes "started to smoke and lock up again." Complainant contacted the dispatcher to report it, and she told him to bring that truck back in and take a different one. Complainant did "one drop" with the other truck and clocked out. Complainant says he heard back from Mr. Strzelecki that he was out of town at a company function and would not be back until September 11, 2018.

Sunday, September 9, 2018: Mr. Strzelecki texted Complainant to not come in on Monday, because truck 20807 was down due to mechanical issues.

Monday, September 10, 2018: Head Mechanic "Ray" told Complainant he would be driving a back-up truck (20810) because 20807 was still down due to mechanical issues. Complainant put his belongings in truck 20810 to be ready for his route the next day.

Tuesday, September 11, 2018: Complainant says he arrived for work at 4:30 a.m. and went to truck 20810. Even though mechanic "Alberto" told him not to drive that truck, Complainant continued to use that truck because "Ray" had told him the day before he could. While Complainant was at the recycling yard, dispatcher Ms. Shiring contacted him (at 5:42 a.m.) stating the truck 20810 was for a different driver so Complainant would need to bring it back to the yard. When Complainant went to operate the other truck, he discovered it was still not working due to mechanical issues. He called the dispatcher, who told him to clock out and go home. Some minutes passed, and Complainant saw Mr. Strzelecki

arrive. Complainant was about to tell him what happened that day when Mr. Strzelecki told him he would talk to him later. Complainant left and sometime later received a group text message from Mr. Strzelecki that included Ms. Shiring, asking what time was best to meet. Complainant responded by saying 1:00 p.m.

According to Complainant, "I arrived at Stone Transportation for the meeting at 1:00 p.m., and was greeted by Mike Strzelecki and dispatcher (Claudia). I proceed to sit down in his office to discuss what had happened the last couple of days, and that's when Mike [Strzelecki] told that that I [was] terminated because I broke the equipment. That's when I proceed to tell Mike [Strzelecki] that I will be reporting him and Stone Transportation to OSHA, D.O.T., and EEOC about poor work conditions, and for the safety of myself and for the other drivers. Mike Strzelecki proceed to call the police and make false allegations." Complainant left after police told him he had 15 minutes to retrieve his belongings and leave.

IV. Discussion

In relevant part, the employee protection provision of the STAA provides as follows:

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because:

(A) (i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or
(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

(B) the employee refuses to operate a vehicle because—

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

(ii) the employee has a reasonable apprehension of

> serious injury to the employee or the public because of the vehicle's hazardous safety or security condition[.]

49 U.S.C. § 31105(a)(1)(B).

To prove a STAA violation, the complainant must show by a preponderance of the evidence that his safety complaints to his employer were protected activity, that the company took an adverse action against him, and that his protected activity was a contributing factor in the adverse action. *See Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). *See also* 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010) ("It is the Secretary's position that the complainant [in an STAA case] must prove by a 'preponderance of the evidence' that his or her protected activity … contributed to the adverse action at issue."). If the complainant does not prove one of these requisite elements, his or her entire claim fails. *West v. Kasbar, Inc./Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

"[O]nce an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity." *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101 and 06-159, ALJ No. 2005-STA-63, slip op. at 7 (ARB June 30, 2008); *see also Williams v. U.S. Dep't of Labor*, 157 F. App'x. 564, 2005 WL 3087895 (4th Cir. 2005) (teacher's whistleblowing activities initially protected but lost their protected status after resolution of her safety complaints); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, ALJ No. 1996-STA-020 (ARB Nov. 12, 1996) (finding that when employer fully responded to his safety concerns, employee's continued complaints about them not protected).

Complainant here is self-represented. A litigant's *pro se* status is given some consideration on matters of procedure. *See e.g*., *Pike v. Public Storage Companies, Inc*., ARB No. 99-072, ALJ No. 98-STA-35 (ARB Aug. 10, 1999) (*pro se* litigants may be held to a lesser standard than legal counsel in procedural matters). However, *pro se* complainants do not have a lesser burden of proving the elements necessary to sustain a claim of discrimination. *See Flener v. H.K. Cupp, Inc*., Case No. 90-STA-42 (Sec'y Oct. 10, 1991).

If the complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the adverse personnel action, the employer can avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected behavior. [6] *See* 49 U.S.C. § 42121(b)(2)(B)(iv); 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010).

Here, Complainant has not alleged, pursuant to subsection (B) of section 31105(a)(1), that he ever refused to operate a vehicle due to an alleged unsafe condition. I also note that subsections (C) through (E) of the statute are not implicated, as Complainant has raised no issue

[6] The 2007 amendments to the STAA adopted the legal burdens of proof and framework imposed by the Wendell H. Ford Aviation Investment and Reform Act, Pub. L. No. 106-181, 114 Stat. 61 (Apr. 5, 2000) ("AIR21"). *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-020, 2008-STA-021 (ARB May 13, 2014).

regarding reporting of hours as set forth in subsection (C), participation in a safety or security investigation as described in subsection (D), or the furnishing of information as described in subsection (E).

Rather, Complainant's claims arise under subsection (A) of section 31105(a)(1), which prohibits retaliation when an employee files a complaint about a violation of a commercial motor vehicle safety regulation. "Internal complaints to management about safety regulation violations constitute protected activity under this subsection." *See Hilburn v. James Boone Trucking*, ARB No. 04-104, ALJ No. 2003-STA-45, slip op. at 4 (ARB Aug. 30, 2005) (citing *Regan Nat'l Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5 (ARB Sept. 30, 2004)); *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 5 (ARB Dec. 31, 2002) (An "internal complaint to superiors conveying [an employee's] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA."). *See also Barr v. ACW Truck Lines, Inc.*, ARB No. 91-STA-42 (Sec'y Apr. 22, 1992) ("Any complaint 'related' to a safety violation made by an employee to his employer constitutes protected activity" under the STAA) (citations omitted).

Protected Activity

Respondent focuses on the absence of any evidence that Complainant reported, or threatened to report, alleged safety violations to any government agencies or authorities until after he was notified of his termination. Complainant does not dispute this. (Complainant's Response to Motion, summary of events of 9/11/18). Thus, to the extent protected activity here would consist of reports to government agencies or authorities, Respondent is entitled to summary decision because any such activity arose only after Claimant was informed of his termination. *See Harris v. Allstate Freight Systems*, ALJ No. 2004-STA-17 (July 25, 2005), *aff'd* ARB No. 05-146 (Dec. 29, 2005) ("Complainant admitted that [Respondent] discharged him before he was able to express any concerns about violating the hours of service regulation, and therefore Respondent was unaware of any protected activity Complainant may have engaged in.").

However, internal complaints may also be protected activity under the STAA. *See Hilburn, Harrison, Barr, supra*. Therefore, I have also considered whether Complainant has presented a genuine issue of material fact as to whether he engaged in protected activity due to internal complaints to Respondent about motor vehicle safety violations. *See Chapman v. Heartland Express of Iowa*, ARB No. 02-030, ALJ No. 2001-STA-35 (ARB Aug. 28, 2003) (STAA whistleblower protection extends beyond complaints related to federal motor vehicle safety regulations to include any relevant motor vehicle regulation, standard or order).

Weight Limit

Complainant alleges that around the middle of August 2018, Mr. Strzelecki asked him to deliver five loads instead of four per day and that this caused him to be over the weight limit for his loads. Respondent presented the testimony of the dispatcher Ms. Shiring that drivers were expected to deliver five to six loads per day, and thus the evidence does not reflect that Complainant was singled out or treated differently in this regard. Complainant does not present

evidence of being overweight on any particular day that he worked, such as evidence that any loads he ran exceeded the 97,000 pounds that Respondent's evidence shows was legal to transport, or evidence supporting a reasonable belief in being over a weight limit. (*See* Porter Deposition, p. 11). Moreover, Complainant did not allege or submit evidence that he complained verbally or in writing, internally or otherwise, about the safety of delivering five loads or being overweight. Complainant does not reference any purported violation of a particular motor vehicle safety regulation, standard or order, whether federal or otherwise, or a reasonable belief such a violation occurred. He also has not demonstrated that he was ever perceived as having made such a complaint or that he expressed refusal to deliver five loads.

The DVIR's that Complainant submitted make no mention of weight or defective items on the vehicle due to weight. In fact, Complainant told Mr. Strzelecki he would try his hardest to deliver five loads and then he changed his mind after receiving a ticket that was docked from his pay. Complainant states that he "didn't feel comfortable doing the 5 heavy loads a day" and did not want to pay another ticket for being overweight. But he does not allege that he ever communicated any of these concerns to the Employer, much less any safety-related concerns. Rather, Complainant's stated reason for being uncomfortable with five loads was not wanting to incur the cost of another ticket. Rather than pointing to communication of any safety-related complaint, Complainant alleges only that he believes Mr. Strzelecki noticed at some point that Complainant was not delivering five loads. He does not present evidence of any such knowledge, such as a comment by Mr. Strzelecki or conversation with him. A mere, conclusory allegation is insufficient to create a genuine issue of material fact. *See Latigo v. ENI Trading & Shipping*, ARB No. 16-076, ALJ No. 2015-SOX-031 (ARB March 8, 2018).

Being over a weight limit alone does not constitute protected activity within the Act without communication of an objection, complaint and/or refusal to operate the vehicle. *See, e.g., Assistant Sec'y & Bigham v. Guaranteed Overnight Delivery*, ARB No. 96-108, ALJ No. 95-STA-37 (ARB Sept. 5, 1996) (employee established protected activity where dispatcher instructed employee to transport loaded trailer, employee believed trailer was overweight, employee refused to drive the load, and employee expressed concerns about the load to safety director and dispatcher); *Shoup v. Kloepfer Concrete Company*, Case No. 95-STA-33 (Sec'y Jan. 11, 1996) (same). Complainant here has not created an issue for trial as to whether he engaged in protected activity about exceeding a weight limit.

Driver Vehicle Inspection Reports

A vehicle inspection report may serve as a complaint to an employer regarding a vehicle defect. *See Green v. Creech Brothers Trucking*, Case No. 92-STA-4, Sec'y Dec. 9, 1992); *see also Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 7-8 (ARB Feb. 29, 2012) (complaint of unsafe vehicle conditions established by employee who verbally complained about the safety of vehicles and also completed checklist that the employer established as a procedure for employees to report safety complaints). However, the existence of a vehicle defect alone noted on an inspection report does not always constitute protected activity within the meaning of the Act unless a commercial motor vehicle safety violation is not implicated. *See, e.g., Gage v. Scarsella Brothers, Inc.*, ARB No. 05-095, ALJ No. 05-STA-21 (ARB Aug. 31, 2006) (driver inspection report identifying bent bumper did not constitute

evidence of complaint to employer about a violation of a commercial motor vehicle safety regulation, standard, or order and employee never refused to operate vehicle).

Complainant has not identified which, if any, of the defects he reported in remarks on the DVIR's constituted protected activity. In fact, his allegations do not rest on alleged protected activity based on these reports. Further, on any DVIRs listing defects, Complainant always checked that the condition of the vehicle was satisfactory and signed the form, and a mechanic checked either that the condition was corrected or did not need to be corrected for safe operation of the vehicle, which reflects a reasonable response by Respondent. *See Dalton v. Copart, Inc.*, ARB No. 01-020, ALJ No. 99-STA-46 (ARB July 19, 2001) (employee refusal to drive not reasonable where employer explained why condition was not unsafe and also completed repairs before putting trucks back in service). Also, any activities initially protected lost their characterization as protected activity once defects were resolved by Respondent. "[O]nce an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity." *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101 and 06-159, ALJ No. 2005-STA-63, slip op. at 7 (ARB June 30, 2008); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, ALJ No. 1996-STA-020 (ARB Nov. 12, 1996) (finding that when employer fully responded to his safety concerns, the employee's continued complaints about them were not protected). Accordingly, Complainant has not created a genuine issue of material fact regarding any protected activity based on daily inspection reports.

Calls to the Dispatcher

As noted herein, Complainant alleges in his Complaint that driving with the weight of five loads purportedly led to his vehicle breaking down in September 2018. In his Response to the Motion for Summary Judgment, Complaint does not repeat this allegation or present evidence to support a relationship between vehicle weight and defects. In his Response to the Motion, Complainant described his vehicle problems in September 2018, as a flat tire and brakes that locked up and smoked, which he reported verbally to the dispatcher. In each instance, Complainant described the dispatcher as addressing the problems he reported by sending a mechanic and by advising Complainant to return the vehicle to the yard and take a different vehicle instead. He does not contend, or present evidence, that his reports of vehicle defects to the dispatcher reflected violations of DOT regulations or standards, or a reasonable belief such violations occurred. Notably, Complainant also does not show that his reports were ignored or that he was instructed to continue driving a vehicle with a safety-related defect. Therefore, to the extent Complainant is deemed to have engaged in protected activity by reporting the flat tire and brake problems on September 7 and 8, 2018, the undisputed evidence reflects that his concerns were addressed and resolved. Thus, his reports also lose any designation as protected activity.

Texts

Complainant's texts with Mr. Strzelecki and/or the dispatcher, which Complainant attached to his Response, on their face contain no complaint qualifying as protected activity and shed no helpful light on the nature of his intended, future communication with Mr. Strzelecki. Viewing the evidence submitted in the light most favorable to Complainant, the texts of September 7, 2018, establish only that the dispatcher and Mr. Strzelecki were aware that

Complainant's "truck broke down." Mr. Strzelecki told Complainant to "turn the key to off and take the key out. Go check your coolant level. If okay, put key back in and try it. Please advise outcome." No further exchange about the operation of the truck is indicated in the evidence. No refusal to drive is indicated, and no complaint is raised about the safe operation of the truck. Complainant acknowledged that that the dispatcher sent him a mechanic twice on September 7, 2018. As noted herein, the existence of a defect alone is insufficient to constitute protected activity. *See Gage, supra*. Moreover, the undisputed evidence reflects that the Company's mechanics, Mr. Strzelecki, and the dispatcher addressed and resolved defects Complainant brought to their attention.

Complainant requested by text on or about September 7, 2018, "I was wondering if you will have some extra time tomorrow to talk face to face?" and Mr. Strzelecki responded that he was out of town for a company function so it would need to wait until Tuesday (September 11, 2018). Complainant's very general inquiry about scheduling time to talk in the future is not itself protected activity. There is no indication that a verbal complaint relating to vehicle safety was lodged, there is no written complaint contained in the text communication, and no evidence that the recipient perceived a complaint or a threatened complaint. In contrast, Respondent has presented evidence that Mr. Strzelecki was unaware, during all of Complainant's employment with Respondent, of "any complaint filed by Complainant or any proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, nor any testimony regarding same." (Strzelecki Aff., ¶¶ 24, 31). In his Affidavit, Mr. Strzelecki did not limit his lack of awareness to a complaint filed with a government agency. In response to that evidence, Complainant did not submit contradictory evidence to create a genuine issue of material fact as to whether he engaged in protected activity.

Complainant's summary of events on September 9 and 10, 2018, likewise do not contradict Respondent's evidence, in that they merely summarize Complainant being told not to work Monday, September 10, 2018, because truck 20807 was down due to mechanical issues, and that Head Mechanic Ray told Complainant he would be driving unit 20810 the next day, with unit 20807 out of service.

Events of September 11, 2018

Viewing the facts in the light most favorable to the non-moving party, the events of September 11, 2018, reflect that Complainant took a truck (unit 20810) that the head mechanic told him the day before was his to operate, but the dispatcher had not assigned that truck to Complainant to operate that day. Complainant does not dispute that the dispatcher had not assigned unit 20810 to him. Respondent identified Complainant's unprofessional, dangerous and disruptive behavior when asked to return unit 20810, as a motivating reason for terminating Complainant. Complainant has not disputed the description of his behavior set forth in the evidence submitted by Respondent. More importantly, Complainant has not identified engaging in any protected activity that day, until his threat to file complaints with certain agencies only *after* he was notified of his termination.

In *Barr v. ACW Truck Lines, Inc*., the ARB affirmed the decision of the ALJ to dismiss the *pro se* complainant's complaint because he failed to establish a *prima facie* case of retaliation

and specifically failed to show that his complaint constituted protected activity under the Act. *See* ARB No. 91-STA-42 (Sec'y Apr. 22, 1992). The complainant had requested that his employer no longer assign him to make long runs anymore, but evidence did not reflect that complainant ever complained that the long runs were in violation of DOT regulations or safety concerns, or that complainant ever refused a run either before or after making his request. It was not disputed that complainant continued to accept the long runs, including runs in violation of DOT regulations, without objection or complaint after his informal request to make shorter runs. The ARB agreed with the ALJ that the complainant did "not allege that he communicated any safety-related concern to Respondent, only that he expressed his preference for shorter runs due to his inability to continue making the long runs like he could as a younger man. Complainant's testimony never contradicts [the supervisor's] testimony that he has no recollection of any safety related complaint from Complainant." As such, the complainant failed to establish protected activity under the STAA. *Id.*, slip op. at 2-3.

After construing the facts in the light most favorable to Complainant here, and applying liberal construction to his arguments because of his self-represented status, Complainant nonetheless fails to present evidence of protected activity to create a genuine issue of material fact. Though self-represented, Complainant is not relieved of the usual burden of proving the elements necessary to sustain a claim of discrimination. *See Flener, supra.* Here, like the complainant in *Barr*, Complainant has not presented evidence of an objection or complaint to operating Respondent's commercial motor vehicles because of safety concerns or because it would violate motor vehicle safety regulations, standards or orders. If Complainant believed running five loads per day was unsafe and in violation of motor vehicle safety regulations, he has not presented evidence that he communicated this belief or complaint. If Complainant believed that any operational defects or repairs noted on daily inspection reports or reported verbally to the dispatcher or by text, such as flat tires or locked or smoking brakes, made his vehicle unsafe in violation of motor vehicle safety regulations, he again did not present evidence that he communicated any such complaint or objection, particularly after reports of defects were addressed and resolved by Respondent. As such, Complainant has not presented evidence to dispute Respondent's evidence that no such safety-related complaint or objection was communicated. Therefore, Complainant has not identified a genuine issue of material fact as to whether he engaged in protected activity.

I noted some disputes that are not material to the outcome. Complainant alleges that his truck broke down and had operational defects because it was overweight; Respondent alleges that Complainant was hard on the equipment resulting in defects and break downs. The conflict need not be resolved to conclude that Complainant has not presented evidence of protected activity to create a genuine issue for trial. Complainant also speculates that Mr. Strzelecki was "furious" over Complainant's omission of a prior accident in his employment history, which was not appearing on a report of his prior accidents. Complainant has not shown how this incident, if true, creates a genuine issue of material fact regarding protected activity. Complainant's theory is that Respondent began looking for reasons to terminate him, and discovered the prior accident, because Complainant was not delivering five loads. However, Complainant must first present some evidence of a protected activity about the delivery of five loads, and he has not done so. Also, Complainant alleges that Mr. Strzelecki called 911 before their meeting on September 11, 2018, set for 1:00 p.m., because the Event Details Report shows a first call at 12:52 p.m. and

police arrival at 1:01 p.m. However, Complainant has not shown that a dispute over the timing of the 911 call has any relevance to the issue of his protected activity. Finally, Complainant challenges the relevance of Respondent's black and white photos of tire damage that was purportedly caused by Complainant's driving on September 11, 2018. Because the photos were not adequately authenticated, I have not considered them in rendering this decision.

"[A]fter adequate time for discovery and upon motion," summary decision is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Complainant bears the burden of establishing that he engaged in protected activity, and here, he has not shown that there is a genuine issue for trial on the question of protected activity.

Respondent's Burden

I further find there is no genuine issue of material fact that the Respondent would have taken the same adverse action against Complainant, even if I were to find that he engaged in protected activity that was a contributing factor leading to termination. Respondent presented clear and convincing evidence that the reasons for terminating Complainant had nothing to do with alleged protective activity but instead were due to his conduct on September 11, 2018, as well as Complainant taking equipment not assigned or authorized to operate and being hard on Respondent's equipment.[7] These non-retaliatory bases for the termination are supported by Mr. Strzelecki's Affidavit, which was further corroborated by the deposition testimony of Ms. Shiring, the deposition testimony of Mr. Porter, the separation notice, and the Events Detail Report of the 911 call. I have considered whether Complainant identified any materials in the record—whether depositions, documents, affidavits, declarations or otherwise—to dispute the evidence of his conduct giving rise to his termination and found none. Complainant's description of the events of September 11, 2018, omits reference to his own language or behavior and is thus silent in the face of Respondent's evidence. (*See* Complainant's Response to Motion for Summary Judgment). Complainant acknowledges that the dispatcher did not assign him to operate vehicles on September 11, 2018. The testimony of Ms. Shiring and Mr. Porter establish Complainant drove with problems like flat tires that he ignored when brought to his attention. The Separation Notice and the email Mr. Strzelecki sent on September 11, 2018, to Human Resources are consistent with Mr. Strzelecki's Affidavit describing the grounds for Complainant's termination. Complainant also admits that Respondent told him he was "terminated because I broke equipment" (Response to Motion, summary of events 9/11/18). It is not necessary to weigh the evidence on the matter of Respondent's burden, which would indicate summary decision is inappropriate; rather, the undisputed evidence supports that Respondent would have taken the same action to terminate Complainant absent any alleged protected activity. Having entered the above findings and conclusions, I have not reached the question of whether Respondent is entitled to partial summary judgment regarding Complainant's damages.

[7] I need not resolve conflict over whether Complainant was hard on equipment or whether equipment problems were due to being overweight, as the undisputed evidence reflects that Respondent viewed Complainant as hard on equipment, regardless of whether their perception was accurate. (Shiring Deposition, pp.11, 25-29; Porter Deposition, pp. 9-1; Strzelecki Aff., ¶ 8; 9/11/18 Email from Strzelecki to Koch, attached to Complainant's Response).

Finally, I note that Complainant was given ample opportunity first to allege the elements necessary to support a *prima facie* case and also to present evidence in response to Respondent's Motion for Summary Judgment. By Notice of Hearing and Pre-Hearing Order dated June 20, 2019, Complainant was ordered to file a Complaint by July 17, 2019. When Complainant failed to do so, Respondent moved for entry of default. On August 7, 2019, I issued an Order to Show Cause requiring Complainant to present reasons why his case should not be dismissed for failure to file a Complaint and also ordering him to file a detailed Complaint by August 23, 2019, if he wished to pursue his case. Complainant was directed to page 2 of the June 20, 2019, Pre-Hearing Order for instructions regarding those Complaint details. Although Complainant responded to the Order to Show Cause on August 15, 2019, with a two-page letter generally describing problems with Respondent's trucks, the response omitted important Complaint details he had been instructed to include,[8] despite giving his letter liberal construction. Giving Complainant all benefit of doubt, due to his self-represented status, I issued a Second Order to Show Cause on August 26, 2019, re-stating the requirements for filing a Complaint and giving Complainant until September 6, 2019, to do so. On September 3, 2019, Complainant filed an adequate response setting forth a summary of events from his date of hire and specifically from September 7, 8, and 11, 2018, which Complainant later incorporated into his Response to the Motion for Summary Judgment.

As noted above, Respondent filed its Motion for Summary Judgment on January 15, 2020. On January 30, 2020, I issued an Order setting a deadline for Complainant to respond to the Motion by February 28, 2020, thus providing Complainant ample opportunity to address Respondent's evidence and arguments. The Order also generally set forth the procedural rules applicable to filing and responding to motions for summary decision. In order to fully consider the merits of Respondent's Motion and Complainant's Response, the hearing originally scheduled for February 12, 2020, was rescheduled for May 7, 2020, depending on the parties' availability. As with his Complaint, Complainant was dilatory responding to Respondent's discovery requests, only doing so after Respondent moved for entry of default and after this Court issued a third Order to Show Cause; Complainant also served discovery requests to Respondent after the deadline for completing discovery established by the amended Pre-Hearing Order. Accordingly, Complainant has been given more than sufficient opportunity to allege the elements of his claim, engage in discovery to support and/or defend his allegations, and respond to Respondent's Motion for Summary Judgment.

For the reasons set forth above, Respondent's Motion for Summary Judgment is **GRANTED**, and the Complaint is **DISMISSED**. The hearing scheduled for May 7, 2020, is cancelled. Respondent's Motion for Entry of Default and Motion to Strike late discovery responses are **DENIED AS MOOT**.

[8] Complainant's August 15, 2019, letter did not include a list of alleged protected activity, a list of alleged adverse actions, a list of each type of relief sought, or state a good faith effort to reach stipulations and identify facts remaining in dispute.

ORDERED this 5th day of March, 2020, at Covington, Louisiana.

ANGELA F. DONALDSON
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 waive any objections you do not raise specifically. See 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, 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. § 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(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. § 1978.110(b).