UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

COVINGTON DISTRICT OFFICE

***Issue Date: 18 October 2023In the Matter(s) of*:**

BETH RIDDLE,
Complainant,

v.

UNITED PARCEL SERVICE,
Respondent(s),

CASE NO(S).: 2018-STA-65
2020-STA-46

PATRICK M. ROSENOW
District Chief Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the employee protective provisions of the Surface Transportation Assistance Act (STAA)[1] and the regulations promulgated thereunder.[2] The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

PROCEDURAL STATUS

Complainant filed her initial complaint with the Occupational Safety and Health Administration (OSHA) on 19 Feb 18, alleging that Respondent discharged her in retaliation for filing safety and health complaints with OSHA and filing multiple grievances against her supervisor. OSHA dismissed the claim as failing to establish any protected activity under the Act. On 17 Jan 18, Complainant, through counsel, filed her objection and request for a de novo hearing. After an initial scheduling conference call, Complainant filed these specific allegations:

1. She was employed by Respondent as a package car driver.
2. Part of her job was to transport packages containing human bodily fluids.

[1] P.L. 103-272 at 49 U.S.C. § 31105.
[2] 29 C.F.R. Part 1978.

3. On multiple occasions during June 2017, she encountered packages leaking urine and other bodily fluids.
4. She complained to OSHA that this was an unsafe condition.
5. Shortly after her communication with OSHA, her supervisor began a course of conduct that culminated in a retaliatory discharge on 28 Dec 17.
6. After her discharge, she contacted OSHA again but did not specifically allege a complaint under the Act.
7. OSHA dismissed that complaint.
8. She then hired counsel, who filed the instant complaint under the Act.
9. She was ultimately reinstated through a union grievance but suffered lost pay and other damages.

Respondent filed a Motion to Dismiss for failure to state a claim upon which relief could be granted.[3] I denied the motion, but instructed Complainant, to the extent she was able, to file a Bill of Particulars identifying the specifics of each protected activity and adverse action.

In response, Complainant simply refiled the identical allegations she had filed three months before, with no further explanation, detail, or statement of her inability to recall any further details, as directed by my order. Complainant did attach to her filing a photocopy of a photograph of a type of packaging and a cell phone photograph of a vehicle inspection report with no citation or explanation. Respondent renewed its Motion to Dismiss, citing Complainant's failure to comply with my order. I declined to dismiss for Complainant's failure to comply with my order, noting even the pro forma allegations were sufficient to state a cognizable claim. I also noted that implicit in her failure to provide any more details is a representation that she cannot recall those details.

Respondent then filed a Statement of Undisputed Facts and Motion for Summary Decision. It argued that Complainant would be unable to submit anything that could create a genuine issue of material fact that would allow for any finding of any of the requisite elements of a whistleblower claim. Complainant filed an opposition to the motion and submitted an affidavit addressing Respondent's Motion and Statement of Undisputed Facts. I denied the motion, finding that the record created a genuine issue of material fact as to all issues.

In the meantime, on 1 Apr 20, Complainant filed a second complaint with OSHA, alleging she had been terminated in retaliation for having filed her first complaint. OSHA denied the complaint so that Complainant could object and request a de novo hearing. The second OSHA complaint was referred to OALJ, and the two complaints were consolidated.

[3] 18 C.F.R. § 18.70(c); Fed. Rules Civ. Pro. 12(b)(6).

Following an extended period of discovery, the matter eventually went to a highly contentious hearing, which initially was conducted over six days and resulted in more than 1,000 pages of transcript. During the hearing, an evidentiary issue arose that involved the possible application of the attorney client privilege. Complainant's Counsel accused Respondent's Counsel of using the privilege to perpetrate a fraud and proffered that he was in possession of evidence that would so prove.

At the close of the last day of the hearing, I briefly summarized my view of the current state of the evidence and suggested counsel review with their clients the option of mediation. I also directed the parties to locate non-privileged evidence that would dispositively resolve one factual issue and consider what would be an appropriate timeline for submission of briefs on the privilege matter. I instructed both counsel to provide me with a status report within 30 days.

Eventually, Respondent submitted affidavits and documents stating that the possible non-privileged data was retained for only a limited period and no longer existed. Complainant continued to accuse Respondent of committing a fraud by fabricating evidence and suggested she should be allowed to examine Respondent's entire file on the matter.

I ultimately determined there was simply no substantial evidence in the record to support Complainant's allegation that Respondent was engaging in a fraud. I sustained the objections based on privilege and denied all of Complainant's related requests and motions. I ordered the parties to determine if they wanted to offer any more evidence before closure of the record and briefs. The parties agreed to close the record and submit briefs.

THE RECORD

On 10, 12-14 May and 2-3 Jun 23, I held a hearing at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs. My decision is based upon the entire record, which consists of the following:[4]

Witness Testimony of:

Jim Gardner	Tommy Driggers	Johnny Paul Reed	Michael Glisson
William Goodhue	Randall Pack	Justin Anderson	Complainant
Kim Loftin	Bryan Lenox	Joseph Robinson	Billy Childers
Raymond Battle	Tim Nichols	Christopher McCorkle	

[4] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

Exhibits:[5]

Respondent's Exhibits (RX) 1-6, 9-11, 13, 15, 17-19, 21
Complainant's Exhibits (CX) 1-23, 26, 28

Stipulations:[6]

Complainant was hired on 26 Mar 92. She has worked as a preloader and temporary cover driver out of Respondent's Fort Smith facility. Teamsters Local Union 373 represents the hourly employees out of the Ft. Smith location. Like other union employees, Complainant could file grievances through the union over any issues she had with the terms and conditions of the union contract such as work assignments, management performing work, seniority, and safety concerns, along with grieving any discipline or notices to terminate employment. Complainant has filed grievances related to seniority and other issues and had been disciplined by Respondent prior to 2017. Other employees also file such grievances on extra work or seniority. Grievances would be heard locally or at a panel. In September 2014, Kim Loftin started as the Business Manager at the Ft. Smith facility.

On 15 Mar 17, Complainant filed a grievance through the union complaining that Supervisor Reesie failed to post start time in a timely manner. Complainant also raised an issue about "a leaker as soon as sort started with no Union employee to respond. This response was done by Reesie." She filed another grievance on 16 Mar 17 complaining that the Ft. Smith center "failed to have a union hazmat responder in the building". In the grievances, she asked to be made whole and for Respondent to develop a "safe workplace totally OSHA compliant." Respondent's Ft. Smith facility did have trained designated responders, including Chris McCorkle and Deborra Rowlett.

Someone identified and wrote Loftin's name on the grievances, but he did not fill them out. He did not recall receiving the grievances at that time and did not remember being notified about preload not being staffed or an issue about a leaker on the sort line in the facility. Loftin did initial the grievance on 9 May 17, probably at the local level hearing to discuss the issue. However, he did not recall having any involvement in addressing this concern about leaking packages on the sort and not having a union employee to respond.

Complainant also filed a complaint with OSHA concerning urine samples leaking from packages. OSHA then sent a letter addressed to Loftin as the business manager at the facility. OSHA did not contact him about it otherwise, and he did not recall receiving the letter at the time. The matter would be handled by the District Health and Safety Manager,

[5] Counsel were cautioned that since a number of exhibits appeared to be *in globo* collections of records, counsel must cite during the hearing or in their post-hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision will be based. Tr. 8.

[6] After Respondent submitted 39 specific proposed findings of fact in its brief, Complainant addressed them in her reply and was able to stipulate to some of them.

and Loftin does not remember being involved in the response. Respondent's Health and Safety Manager for Central Plains, Bryan Lenox, was charged with investigating and responding to this OSHA complaint.

Lenox initially determined that the complaint was about diagnostic specimens coming into the Ft. Smith facility, breaking open and/or leaking, and getting on some employees on the sort line. In conducting his investigation, he visited Ft. Smith and interviewed several employees, some of whom did report that they had encountered such leaking packages in the facility a few times. However, Lenox did not find anyone that suffered an injury or illness from contact with leaking urine.

Lenox prepared a written response to OSHA that was submitted on 7 Jul 17. In the response, he explained the scope of his investigation into the complaint. He reported that the urine samples were in approved packaging, and he had not discovered any that were leaking. Lenox verified that he was having Respondent's Business Development group talk to customers to ensure they were using the packages properly to cut down on leaking. Lenox also confirmed that UPS would retrain management on blood borne pathogen post-exposure control measures if there was exposure to urine. After submitting the response, Respondent did not receive any citation or further response from OSHA, nor did it receive any more complaints about leaking urine packages at Ft. Smith. Complainant received a follow-up letter from OSHA dated 11 Jul 17 indicating that Respondent had investigated the alleged hazards and that OSHA believed the complaint items no longer presented a hazard to employees.[7]

On 26 Dec 17, Complainant was out on a delivery route and had an incident with a mailbox. She called her supervisor, Chris McCorkle, and reported that she was delivering to a house and, as she went to check a mailbox, the door just fell off. Complainant said she didn't crash into the mailbox but rather the door just fell off as she was checking it. Complainant also said that the customer was fine with it.

On 28 Dec 17, Complainant, Union Steward Robert Robinson, and Business Manager Kim Loftin met to discuss a dishonest act in lying about the incident and failing to report the accident. Respondent considers that a cardinal infraction as it prevents the company from properly investigating and addressing accidents and property damage and negatively impacts customer relations. Labor Manager Jim Gardner also reviewed the mailbox incident. Because of the severity of the violation and lack of honesty, it does not require prior progressive discipline. Respondent fired Complainant under Article 52 of the current labor agreement between UPS and IBT Local #373.

[7] Lenox returned to Ft. Smith around April 2018 to investigate a different OSHA complaint. On that visit, he met Complainant for the first time when he interviewed her. Lenox mentioned his previous visit, and Complainant told him that she was the one that had filed the complaint he investigated. Lenox had not been aware of that previously but said it was fine and moved on.

On 2 Jan 18, Complainant filed a complaint with OSHA alleging a violation of Section 11(c) of the OSH Act. Complainant asserted that she was terminated on 28 Dec 17 because she filed an OSHA complaint on 28 Jun 17. On 18 Jan 18, a Grievance Committee was convened to review Complainant's termination. After a hearing, the Grievance Committee decided to reduce her termination to a suspension. As part of the settlement of her grievance, Complainant was directed to serve an additional two-week suspension and return to work Monday, 5 Feb 18 to her primary job, but was suspended from all driving duties until Monday, 30 Jul 18.

Complainant then filed an STAA complaint with OSHA on 19 Feb 19, alleging that she was retaliated against and terminated by UPS for filing a safety and health complaint with OSHA and for filing multiple grievances against her supervisor. This complaint was dismissed after a preliminary investigation by OSHA found that during her interview Complainant did not make any complaints regarding commercial motor vehicle safety and thus did not engage in any "activity protected in accordance with STAA."

Loftin retired in August 2019, and Billy Childers became manager at the Ft. Smith facility in September 2019. Shortly thereafter, he had a meeting with Complainant and the labor department. Respondent agreed to withdraw all open disciplinary letters against her, and Complainant agreed to drop all grievances.

Witnesses reported that, on 23 Mar 20, there was an incident between Complainant and another pre-loader and that Complainant was the aggressor by elbowing Mr. Harris in the chest.

When Complainant came back to work it was the first time anyone was aware of an injury to her wrist/arm. She filed a workers' compensation claim which was denied so she was not eligible for light duty or temporary alternate work. She was able to come back to work around the middle of October 2020 after she got a full release from her physician. Complainant continues to be employed with UPS at the Ft. Smith facility as a pre-loader and air exception driver.

DISCUSSION

PROTECTED ACTIVITIES

Complainant alleges two general protected activities. The first involves multiple communications of her concern about packages coming in the sort facility that were leaking and a biohazard. She alleges (1) from March of 2017 through at least July 2017, she complained on multiple occasions to center manager, Loftin, about the leaking packages and told him that she would go to OSHA if the problem was not fixed and (2) on 29 Jun 17, she filed a formal complaint with OSHA. The second alleged protected activity is the whistleblower complaint she filed with OSHA after her December 2017 termination.[8]

[8] And before her union grievance and reinstatement.

Respondent first notes that Claimant never refused to drive and that her protected activity could only be under the Complaint Clause of the Act. However, it argues that none of the grievances or complaints about leaking packages and designated responders concerned the operation of commercial motor vehicles or related safety regulations. It emphasizes that she did not mention urine or complain about leaking packages in the vehicles and that her complaint did not implicate FMSCA or DOT regulations on packaging, labeling, or transporting hazardous materials. It concedes that complaints do not necessarily have to cite specific commercial motor vehicle safety standards but submits that the type of general complaints in this case provide nothing to demonstrate her reasonable belief that Respondent was engaged in a violation of a motor vehicle safety regulation. Respondent does concede the filing of a whistleblower complaint is a protected activity.

Complainant replies that while urine is not a hazardous material, packages coming from a laboratory could contain blood or other pathogens, which would be hazardous material. Consequently, she was reasonable in her concern that the packages could be leaking hazardous material.

The Act prohibits taking adverse action against an employee because:

> **(A)(i)** the employee, . . . 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
> **(ii)** . . . 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;[9]

The requirement that the communication be related to a violation of a commercial motor vehicle safety or security regulation standard or order has been broadly interpreted to extend to unsafe conditions in a maintenance shop.[10]

The record clearly establishes that some packages were leaking urine and Complainant reported that, along with communicating her concerns that Respondent had no properly trained employees to deal with the leaks. Given that the record shows Respondent did have such employees and the relatively small size of the facility, I do not find her communications about the absence of trained responders to be reasonable.

[9] 49 U.S.C. § 31105(a)(1).
[10] *Gay v. Burlington Motor Carriers,* 92-STA-5 (Sec'y May 20, 1992); *Jacobson v. Beaver Transportation, Inc.,* 92-STA-17 (Sec'y Aug. 31, 1992).

However, Complainant reasonably (and accurately) believed that that the packages were leaking urine.[11] She also reasonably believed that those facts would constitute a violation and hazardous condition, although she was incorrect in terms of the regulatory definition of hazardous materials. Under the Act, a complainant need only show that she reasonably believed she was complaining about the existence of a safety violation.[12]

Consequently, I find Complainant engaged in protected activity in her internal complaints and external reports to OSHA about leaking packages of urine and in her whistleblower complaint in February 2019.

ADVERSE ACTIONS

Complainant alleges Respondent took adverse action against her when it (1) did not assign her work that she had done for years and was entitled to by seniority and (2) terminated her in December 2017. She alleges that the adverse actions continued after her reinstatement. She submits her reduction in work was worse through 2018 with Loftin and continued with Childers, ultimately culminating with her termination.[13] Respondent does not dispute the terminations as adverse actions but denies that Complainant suffered any reduction in work assignments.

An adverse action is anything an employer does that could dissuade a reasonable worker from engaging in protected activity.[14] The implementing regulations prohibit an adverse action and make it a violation for an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]"[15]

Complainant briefly testified about her reduced work at hearing, explaining that:

> A Jobs that I had been doing for years were taken away from me.
> Q And in what year did you first notice a substantial decrease in hours?
> A It would be 2018.

[11] Respondent notes that Complainant never mentioned specifically that the packages were transported in trucks, but that ignores the reality of the essential nature of Respondent's business.

[12] *Bethea v. Wallace Trucking Co.*, ARB No. 07-057 at 8, ALJ No. 06-STA-23 (ARB Dec. 31, 2007); *Calhoun v. United Parcel Serv.*, ARB No. 04-108 at 11, ALJ No. 02-STA-31 (ARB Sep. 14, 2007); *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, ALJ No. 10-STA-41 (ARB Mar. 27, 2012). *See also Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1994)(specifically holding protected activity may include a reasonable mistake in the regulatory definition of hazardous).

[13] She alleges losing about 540 hours in 2018 and 2019.

[14] *Strohl v. YRC, Inc.*, ARB No. 10-116, ALJ No. 10-STA-35 (ARB Aug. 12, 2011), *recon. den.* (ARB May 7, 2012).

[15] 29 C.F.R. §§ 1978.102(b), (c).

Q About how many hours in 2018 do you think you missed?
A 2018, I lost about 500 hours.[16]

She also submitted pay statements reflecting her earnings history:[17]

Year	Hours worked
2015	2392.95
2016	2569.26
2017	2499.15
2018	2042.59
2019	2456.84

At the same time, Kim Loftin testified that he recalled Complainant filed some grievances related to work assignments and had eventually obtained additional payments from Respondent.

The parties focused on the termination(s) as the primary adverse actions. They submitted only very brief arguments on the work assignments, citing only limited (and in Respondent's case, virtually no) evidence in support of their positions. Nonetheless, Complainant carried her burden of proof to establish that she had less favorable work assignments in 2018. While Respondent may dispute the reason for that diminution, it does not appear to suggest that a reduction in hours would not otherwise be an adverse action.

Accordingly, I find Complainant established adverse actions in the form of her terminations and reduction in hours.

CONTRIBUTING FACTOR

In the absence of any real dispute over the existence of at least some protected activity and adverse action, most of the parties' attention was focused on whether the protected activity was a contributing factor to the adverse action. A great deal of time was spent on whether the events cited by Respondent as justification for the adverse actions were merely a pretext intended to conceal the real reasons for its actions.

Complainant argues that circumstantial evidence establishes the adverse action decisionmakers were aware of Complainant's protected activity and direct evidence establishes their general animus toward whistleblowers. She then cites temporal nexus as circumstantial evidence of a causative connection between her protected activity and the adverse actions. Finally, she goes to great length to discredit Employer's proffered reason for the adverse actions as no more than a pretext, citing its failure to conduct proper

[16] Tr. 225.
[17] CX-9.

investigations into the background facts and the absence of any consistent actions in other similar cases.

On the other hand, Respondent argues there is no evidence to support a finding that any protected activity played a contributing factor in the decision to take adverse action against Complainant. Respondent emphasizes that it had no knowledge of her leaking urine package complaints when it investigated her incident with the mailbox and decided to terminate her.[18] Respondent also points out that the record shows management[19] could be rude and difficult with many employees, particularly those who were serial grievance filers, regardless of whether they raised concerns about safety. It notes that many of Complainant's grievances had nothing to do with protected activity under the Act. It also addresses temporal nexus as circumstantial evidence but argues the length of time between the protected activity and the adverse action is far too long to take an inference that it was a contributing factor. Finally, Respondent notes that Billy Childers' attempt to give Complainant a fresh start would be inconsistent with a retaliatory mindset.

Complainant answers Respondent's suggestion that the decisionmakers were unaware of the protected activity by noting that if they relied on recommendation or information from someone else, and that person was aware of the protected activity, Respondent remains liable. Complainant spins Respondent's argument about Childers' attempted restart to suggest that it would not have been necessary in the absence of retaliatory adverse action. She also reverses her prior temporal nexus argument by pointing out that a delay in taking adverse action can be evidence of pretext and circumstantial evidence of a contributory factor. Complainant also points out both of the termination adverse actions were withdrawn or reversed, indicating they were taken for pretext.

To prevail on her claim, a complainant must prove by a preponderance of the evidence that she engaged in protected activity, that the respondent took an adverse employment action against her, and that her protected activity was a contributing factor in the unfavorable personnel action. The specific decision maker need not have knowledge of the protected activity if he relies on others who do have knowledge.[20] A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[21] It may be proven indirectly by circumstantial evidence such as:

> temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity

[18] It also notes the obvious conclusion that her subsequent whistleblower complaint could not have had any role in her first termination.
[19] Kim Loftin in particular.
[20] *See, e.g., Warren v. Custom Organics,* ARB No. 10-092, ALJ No. 09-STA-30 (Feb. 29, 2012).
[21] *Williams v. Domino's Pizza,* ARB No. 09-092 at 5, ALJ No. 09-STA-52 (ARB Jan. 31, 2011).

> of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.[22]

If the complainant proves by a preponderance of evidence that her protected activity was a contributing factor in the unfavorable personnel action, a respondent may 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 activity.[23]

In this case, Complainant maintains and Respondent denies the circumstantial evidence establishes contributing factor by focusing on a number of themes:

- Respondent submits the people taking the adverse actions knew nothing about the protected activity.
- Complainant submits:
  - The people taking the adverse actions had an animus against whistleblowers.
  - Respondent's proffered reasons for the protected activity:
    - Were simply not true and came from "rigged" or unfair investigations.
    - Did not result in similar adverse actions in the case of other employees.
- Both sides argue the timing between the protected activity and adverse action is circumstantial evidence supporting their position.

KNOWLEDGE

If the decisions makers had no knowledge of the protected activity,[24] the protected activity could not have been a contributing factor.

Internal Complaint & Grievance

The parties stipulated that in March 2017, Complainant raised an issue about a leaker and the absence of a union employee responder and, on 16 Mar 17, she filed a

[22] *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 09-FRS-09 (ARB Feb. 29, 2012). *See, e.g.*, *Bobreski v. J. Givoo Consultants, Inc*, ARB No. 09-057 at 13, ALJ No. 08-ERA-03 (ARB Jun. 24, 2011).
[23] 75 Fed. Reg. 53545, 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii); *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, ALJ Nos. 08-STA-12, 08-STA-41 (ARB Sep. 15, 2011).
[24] Either direct or imputed by reliance on others with knowledge.

grievance complaining that there was no union hazmat responder in the building. Complainant testified that she complained to Loftin about the matter from March to June and told him she was going to report the problem to OSHA. However, the parties further stipulated that, while someone identified and wrote Loftin's name on the grievances, he did not fill them out, did not recall receiving the grievances at that time, and did not remember being notified about preload not being staffed or an issue about a leaker on the sort line in the facility. Finally, they stipulated that although Loftin initialed the grievance on 9 May 17, he did not recall having any involvement in the matter. Loftin testified that he was not aware of Complainant filing any grievances about leaking packages. McCorkle similarly testified that he was not aware of any complaints by Complainant about leaking packages.

Given Complainant's penchant for filing grievances, it seems likely Loftin would not recall their subject matter. Thus, the evidence shows that while he would have likely been aware of Complainant's conversations with him about leakers and responders, the same was not true of the fact that she had filed a grievance about the same thing.

OSHA Complaint

The evidence clearly shows that Complainant filed a 29 Jun 17 complaint with OSHA concerning urine samples leaking from packages, that Complainant indicated she wished to remain anonymous, and that OSHA subsequently confirmed it had not revealed her identity to Respondent.[25] Complainant testified that even after she secretly filed her complaint with OSHA, she continued to warn Loftin she was going to complain to OSHA. The parties stipulated that while OSHA sent a letter addressed to Loftin as the business manager at the facility, they did not contact him about it, and he did not recall receiving the letter at the time or being involved in the response. That is consistent with Loftin's testimony that Complainant never told him she was going to report to OSHA, he did not know who had communicated with them to lead to the investigation, and he was on vacation during the investigation.

The parties also stipulated that Bryan Lenox, who was charged with investigating and responding to the OSHA complaint did not know Complainant was the source until April 2018. Justin Anderson similarly testified he did not know who had filed the OSHA complaint when the investigation was conducted. While Jim Gardner agreed with Complainant's Counsel's passing observation that that it was hard to keep a secret working for Respondent, he corroborated Loftin and McCorkle in his testimony that as he was doing his review of the mailbox incident neither Loftin nor McCorkle mentioned anything about Complainant having filed grievances or an OSHA complaint about leaking packages. Finally, Billy Childers testified that when he arrived in September 2019, he was not aware

[25] CX-3.

that Complainant had filed any grievances or OSHA complaints about leaking packages or any incident with a mailbox, although he was aware that she had a lot of grievances pending.

The stipulations and weight of the testimony show that Complainant's anonymous complaint to OSHA remained that way, at least through her first termination and subsequent initial whistleblower complaint.

First Whistleblower Complaint

Obviously, Respondent was aware of Complainant's first whistleblower complaint. Childers testified that he really couldn't recall when he found out Complainant had filed a whistleblower complaint for her first termination, but thought it was probably early 2020 and wouldn't dispute that Complainant may have told him about it during that period.

ANIMUS

Complainant alleges that Respondent and its managers' animus toward whistleblowers provides an evidentiary inference that her protected activity was a contributing factor to her adverse actions.

Complainant testified that Loftin began to retaliate against her in job assignments immediately after she filed her OSHA complaint by refusing to recognize her seniority. She described the work environment as the most hostile, adversarial relationship possible. She characterized Loftin as extremely hostile, rude, ill mannered, disrespectful, and unable to have a cordial relationship, even with his own supervisors. She noted that if someone crossed Loftin, he would make that person's life miserable. She reported an incident in which his harassment of her coworker Walker was so unreasonable they had a meeting about it.

On the other hand, Loftin testified that he never "poked" Complainant or tried to prevent her from taking any job assignments. He explained he treated her the same as everyone else and was just trying to make sure they were doing their job. He denied ever telling managers or supervisors to prevent Complainant from doing a particular job or targeting her for any OSHA or internal safety complaints. When she complained about not being allowed to work the SPA position, he would step in and say she has to be allowed to do it based on seniority. He similarly denied ever telling Complainant that she could not do a particular job. He addressed her complaint about having to have her responder PPE near her, by explaining the importance of having the PPE stored in DMP area, so they could quickly address leaking packages. However, he testified that neither he nor any other supervisor ever told Complainant she had to wear her PPE the entire time while working. He denied anyone threatened to walk Complainant out if she didn't have on her PPE and repeated that she was not treated differently than other responders.

Complainant testified that when Lenox returned on a different matter in February 2019, he said they should expect things to break and fall and that basically they should not file OSHA complaints. She added he was very threatening and told them to turn a blind eye or life was going to get difficult. However, Lenox testified that he has never discouraged OSHA complaints.[26]

Raymond Battle[27] testified that he had been Kim Loftin's supervisor and Loftin had a tendency to take grievances personally, even having recommended terminating another driver with an otherwise good record after an accident because the driver filed a lot of grievances. He added that had told his bosses about that problem and not to transfer Loftin out of his supervision, but they didn't listen. He didn't think Loftin should have been involved in looking into the mailbox incident because of his bias against Complainant.

James Robinson testified that when he filled in as a manager in June to August of 2019, Complainant, along with other employees, voiced concerns about the previous management style. Complainant had criticisms about how the facility was run, including HAZMAT equipment. Indeed, the evidence clearly shows that Complainant repeatedly filed grievances about a wide variety of issues, the wide majority of which involved complaints that her seniority was not being properly honored. Robinson also testified that he also worked closely with Complainant to address any issues she raised such as making sure they had enough PPE for responders and making sure that she had her seniority for the SPA position. He added that he never tried to prevent her from being on the facility's safety committee.

The parties stipulated that Complainant had been disciplined by Respondent prior to 2017 and had filed grievances related to seniority and other issues. Jim Gardner testified that Complainant was in the state's top five for filing grievances.

The parties stipulated that Childers had a meeting with Complainant in which Respondent agreed to withdraw all open disciplinary letters against her and Complainant agreed to drop all grievances. Gardner also described the meeting and reported Childers had the idea of trying to get a fresh start with both sides withdrawing their grievances/disciplinary letters. Childers explained that he did the same with other employees, but they had fewer grievances. He also testified that he was hoping they could have a fresh start and establisher

[26] Complainant's brief mis-cites the location (Tr. 602) by 10 pages, but more problematic is that her representation of the testimony is the exact opposite of the actual testimony in the transcript. Tr. 612.

[27] Battle also explained how he hired Complainant's Counsel to represent him in an age discrimination lawsuit against Respondent that they won, considers Complainant's Counsel to be his friend, and would never hire any other lawyer. While I do not question his commitment to tell the truth, I found Battle's testimony to be not particularly credible, given that his observations, impressions, and opinions would be tinted by his clear predisposition to help his former lawyer show Respondent's true colors and vindicate another client.

a friendlier working relationship. While that happened for a couple of weeks, things got gradually worse and worse in terms of Complainant filing grievances related to her seniority and work assignments. The parties stipulated that many employees filed similar grievances.

Childers testified that in his time as business manager position since September 2019, Complainant has taken the position that her seniority entitles her to work wherever she wants based solely upon her seniority with no regard for the operational needs of the management team to run the business as efficiently as possible. When she doesn't get her way, she claims that the management team is discriminating against her, which is not the case, because they treat every employee fairly with dignity and respect. Childers expressed frustration that Complainant uses discrimination verbiage to further possible legal proceedings when she is not allowed to do what she wants.

Union Steward Reed testified that it was as if when Complainant wants to do something, management goes out of their way to make sure she doesn't do it. He added that they even threatened to walk her out over personal protection equipment, even though they didn't do anything to another worker. He recalled that Loftin started mistreating Complainant after she complained about the leaking packages. He admitted they did not work the same shift. Reed also agreed that employees have been fired for not reporting accidents and conceded he did not see what happened between Complainant and Harris.

Union Business Agent Tim Nichols testified that he had never heard of Complainant until her counsel called him late the previous evening. He agreed that some managers for Respondent were angered by employees filing grievances and hold it against them but said there is an equal number who did not and view it as just part of the job. When Complainant's Counsel observed that he should "take back" some of the things had had said to Nichols about Gardner, Nichols testified he had the utmost respect for Gardner and found him to be "a very fair, honest, compassionate person." He added that while he knew nothing about Complainant or her investigations, he had handled a number of other grievances with Gardner and Gardner never presented any false information or facts. Nichols said he believed that if Gardner would conduct an investigation into an employee's alleged violation of company policies to the best of his ability to ensure a proper and complete investigation.

The reliable evidence shows that Complainant filed many grievances and did not necessarily get along with her supervisors or coworkers. It reveals Complainant to be outspoken in the workplace anytime she believed she was the victim of Respondent's noncompliance with the collective bargaining agreement or other rules. She was persistently assertive in using the union grievance to demand redress for any perceived wrongdoing, particularly if her seniority was not recognized in assignments the way she thought it should be.

Her grievances cost time and caused trouble, and not surprisingly her actions did not endear her to her managers, Loftin in particular. Similarly, Childers wanted to try to have a good relationship with Complainant and believed he could change their relationship from confrontational to cooperative. However, after a short time, he discovered that was not the case. That led him to make the statement that Complainant cites as a prime example of animus against her.

However, lost in Complainant's argument is the differentiation between animus about constant complaining and filing grievances in general and animus about protected activity. The overwhelming majority (with only a couple of exceptions) of Complainant's grievances did not involve protected activity. In those very limited instances where grievances involved protected activity, Complainant failed to show that Respondent harbored any animus against protected activity or employees who engage in it.

Finally, I note Union Agent Nichols testified very credibly that Respondent has managers who hold a grievance against the filer and those who don't. He added that he knew nothing about Complainant or the investigations but was very clear about Gardner's fairness and dedication to conducting fair investigations. Again, even Nichols' testimony does not account for the difference between animus toward grievance filing and animus toward whistleblowers, but nevertheless was instructive as to the absence of a companywide cultural animus toward grievance filing.

In sum, the evidence falls short of establishing the type of personal or cultural animus that would provide an inference that Complainant's protected activities were a contributing factor to the adverse action taken against her.

PROFFERED REASONS AS PRETEXT

Complainant argues that she was not culpable in either of the incidents cited by Respondent for her terminations. She maintains she neither struck nor failed to honestly report the incident with the mailbox and was not the aggressor in the workplace violence incident. Moreover, she submits that the irregular and unfair way both were investigated demonstrate that Respondent intended to use them as a pretext to retaliate against her for her protected activity.

Mailbox

Neither side disputes that Complainant did something that resulted in a customer mailbox post breaking in half and falling to the ground. Complainant maintains it happened after she opened and closed the mailbox door. Respondent argues that she struck the mailbox with her vehicle and failed to honestly report it, leading to her termination. There

was a significant amount of time spent litigating what actually happened. However, the real question is not whether Respondent was ultimately wrong, but whether it was so wrong in its conclusions or investigation that it allows an inference that it was merely a pretext for the adverse action.

Complainant submitted a written statement that said she walked up to a group of mailboxes to check on an address. She opened a flap to check and when she closed it, it shifted and dropped off. After she dropped the package off at address 707, she talked to a man at 705 who said it was fine and turned down her offer to call her supervisor.

McCorkle testified that Complainant called him one evening to say that she was making a delivery to a house and she pulled open the flap on the mailbox to make sure she was at the correct house. She told him that when she shut the lid, the mailbox fell over. She said the wooden post was rotten and she did not hit it. McCorkle's written statement on 27 Dec 17 reports that Complainant called him the day before at 6:38 PM and the first words out of her mouth were, "I did not hit anything." She then explained that as she was walking up to a customer's house, she passed a mailbox that was surrounded by trash and closed the mailbox door. When she did that the mailbox post, which was rotten, fell over. She reported that to the customer who said the post was rotten and not to worry about it.

McCorkle testified that the next morning he received a customer concern stating that a female had hit his mailbox. Respondent's records indicate it received a complaint from customer Larry Reynolds on 27 Dec 17 at 1226, alleging that a driver had smashed a mailbox. A subsequent phone call to the customer indicated that a witness, Justin Powell, had seen a female driver strike the mailbox and then come to the door.

McCorkle testified that he went with Loftin to investigate on 27 Dec 17, but by then the mailbox was replaced. At the time, they determined the car she had been driving had scratches that matched the mailbox and concluded telemetry data for the car would be consistent with the car backing up, although testifying now, he is not sure they had the same vehicle.

Loftin testified that he and a supervisor went to the house of the person that called in the complaint, but they weren't there, so they went across the street where the mailbox was laying in the yard. Then a woman told them her husband wasn't available, so they left their card and asked her to ask him to call. They ended up getting his statement but never told him what to say.

Powell's statement is dated 26 Dec 17 at 8:30pm and reports that Complainant backed up and broke his mailbox post and then told him she had done so mentioning calling her officials about it. (Union Representative Driggers testified that he later called Powell, who admitted he had not actually seen Complainant strike his mailbox.)

Gardner testified that as he recalls, Complainant called McCorkle and reported that when she opened the mailbox, it fell over and she never hit it. He further testified that the evidence indicated Complainant did back up, strike the 4x4 mailbox post, which then broke in half and fell into the yard. Gardner also testified that he went out to take a picture of the mailbox and concluded that the damage to the car matched the impact point on the mailbox post, although he conceded he could not be one hundred percent sure. He said he felt that Complainant was generally a good employee who didn't always get along with her coworkers or managers. However, once they looked into the incident with the mailbox, while they couldn't be sure, they concluded she probably backed into the mailbox and broke it.

On the other hand, Raymond Battle[28] testified that he had done hundreds of investigations like the one related to the mailbox. He conceded he had not talked to anyone involved and had no first-hand knowledge about what happened in this investigation. However, he noted he had received and reviewed the investigation and grievance documents the day before testifying. Based on that review, he called the investigation fraudulent and said whoever was responsible had committed an integrity violation. He cited inconsistent dates on the customer complaint and Loftin's response and testified that it is "quite obvious" to him that that Respondent actually solicited the customer complaint and was rushing to get to a predetermined result. He was also concerned about the fact that there were questions about which vehicle was used, since it should have been taken out of service to document the obvious damage that would have resulted from the alleged incident. Battle testified that the telemetry data would have shown Complainant backing up, but it did not. He believes she would have had to hit the post with the bumper to cause it to break and cannot imagine how that would have happened, since telemetry shows Complainant was essentially parallel parking and any contact while she was doing that would have left all kinds of damage on the car.

Complainant makes much of what, she says, was a change in Respondent's allegation as to the mailbox incident. She argues that Respondent started by charging she failed to report anything, but then, discovering that was not true amended the allegation to lying about the incident. However, the record shows there was never any dispute that Complainant reported the mailbox fell over, only the mechanism by which it happened.

[28] Battle's testimony was largely based on a very short time to review the documents. His conclusions and allegations of fraud appear to rely heavily on his relationship with Complainant's Counsel and their shared deep-rooted contempt for Respondent. That level of contempt may be warranted based on their experience but is not based on anything in this evidentiary record. It tainted his testimony, particularly his opinions, with an almost opaque level of bias and gutted them of any real probative value. See n.26, supra.

She similarly points to inconsistencies in the time and date Respondent received the customer written statement. Indeed, Battle cites that as evidence that Respondent solicited the complaint as part of its fraudulent investigation. However, witnesses testified that there was no such solicitation. It appeared far more likely that the customer complaint cited the incident date, rather than the date the statement was completed. Battle and Complainant also believe the telemetry data contradicts Respondent's allegations, but that data is ambiguous in its probative value and amenable to a number of explanations. Complainant's observations about the inconsistencies and ambiguities in the identification of the vehicle are well-founded and certainly diminish any probative value given to evidence about damage to the vehicle or paint transfer.

I find that the evidence shows more likely than not that Complainant did not simply open and close the mailbox door, causing the 4 x 4 post, albeit pre-rotted, to snap in two. Of course, it is possible that the events happened as Complainant suggests, or somewhere in between. Even Gardner concedes as much in his testimony that they could not be sure. However, the evidence does not support a finding that Respondent conducted an improper charade of an investigation intended to create an excuse to take adverse action against her. Right or wrong, the evidence of Respondent's investigation and conclusions do not support the inference of pretext. I do not find Respondent's actions about the mailbox to be so unreasonable or unjustifiable such as to support an inference of pretext.[29]

Complainant's Tiff with Harris

Similarly, neither side disputes that something happened between Complainant and Rashad Harris. Respondent maintains that it properly investigated the incident, determined Complainant was the aggressor, and took appropriate adverse action. Complainant insists she was the victim and Respondent is using the incident as an excuse to fire her for her whistleblowing. Based on the observations of the third-party witness, it may be that there was no clear aggressor but a mutual fray. Again, the critical analysis is not which employee is right, but whether Respondent's reaction was so unreasonable or unusual to allow an inference that it had a secondary motive.

Childers testified that normally, he talks to the employee when there is a workplace violence allegation. He explained he did not do that in this case, because as soon as he was made aware of the situation, Complainant had already denied it. He added that she was asked about it, but not by him, before he decided to take her out of service. He agreed that eventually there were witnesses saying Harris was the aggressor. He explained that he contacted HR, but they said to wait and get Gardner's advice, which ultimately was to take

[29] See *Muzyk v. Carlsward Transp.*, ARB No. 06-149, slip op. at 7 n.31, ALJ No. 05-STA-60 (ARB Sep. 28, 2007), *quoting Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1507-08 (5th Cir. 1988)) ("[S]tatute cannot protect employees 'from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated.'").

her out of service pending an investigation. He noted that at that point they had witnesses reporting that Complainant had elbowed Harris in the sternum and Harris had filed a police report, which was sufficient to justify an investigation. He explained that they did then ask Complainant to write a statement, but she declined. Childers did not have a problem with her refusal since Harris had filed a criminal complaint. Childers further stated that in any event, Complainant did eventually write a statement. Neither he nor any other managers were there at the time, and he ultimately based his decision on Harris's and the other witness statements that he did have. Childers denied that management suggested that Harris should file a complaint or what the witnesses should say in their statements.

Gardner testified that Childers called him and reported they had an issue of Complainant committing unprovoked violence by elbowing or shoving Harris. Childers told him there were three witnesses plus Harris giving consistent versions of what happened. They decided to take Complainant out of service pending an investigation and eventually did terminate her. Gardner added that while they were waiting for a panel review, Union Steward Driggers informed them some of the witnesses were recanting and brought him a statement from Brad Cobb.

On 1 Jun 20, Brad Cobb wrote a statement saying he was the closest employee to Harris and Complainant and did not see anyone hit, elbow, or strike anyone else. Rather, he described the interaction as a tug-of-war over a plastic tub. Cobb further reported that immediately after that, Jimmy Jones told Harris, "She elbowed you in the sternum", even though there was no way Jones could have seen what was going on. Cobb added that Jones and another coworker encouraged Harris to file assault charges against Complainant. Complainant testified that one of her coworkers lied about the incident between her and Harris in hopes of getting her job.

Gardner testified that they decided to rescind the termination.

The evidence in this incident is far more ambiguous and makes it very difficult to determine with any certainty what actually happened between Harris and Complainant. However, once again, the question is not whether Complainant was the aggressor but whether Respondent's investigation and conclusions were so unreasonable or unusual as to allow an inference that it had a secondary motive. Notwithstanding Complainant's allegations, there is no evidence that Respondent prompted Harris to make his allegations and Complainant concedes in her testimony that Harris lied to Respondent. Nor is there any suggestion that Gardner knew about the recantations until enlightened by Driggers. Moreover, Respondent's withdrawal of the adverse action when presented with exonerating evidence is inconsistent with pretext.

As with the mailbox, I find the evidence related to Respondent's investigation of and conclusions about the incident between Complainant and Harris falls short of establishing any inference of pretext.

INCONSISTENT DISCIPLINE

Complainant also argues that even if some of the allegations cited by Respondent as justification for the adverse actions against her are true, Respondent's reaction was so far from the norm that it is evidence that there is some other reason behind the adverse action. In short, she suggests that Respondent did not take the same action against other similarly situated employees for the same alleged misconduct.

Complainant cited Joseph Robinson's testimony that he was unclear as to the definition of a cardinal infraction, Respondent is consistently inconsistent as to some applications of cardinal infraction policies, and the panel decisions can be a crapshoot. Robinson added that as Respondent has transformed, its standards have become increasingly unclear and there are employees who have falsified their timecards.

Jim Gardner testified about and gave examples of Respondent terminating other employees for not reporting accidents, but at the same time conceded he could give 50 examples of unreported accident violations and falsified forms about conducting safety training that did not result in termination. On the other hand, Driggers similarly acknowledged that it is "pretty commonplace" for Respondent to discharge employees for a cardinal infraction where there's damage to a customer's property that can't be explained away. Robinson likewise testified that he has terminated other drivers for not reporting accidents.

Battle testified that Respondent was equally inconsistent in its workplace violence enforcement and did not fire a manager who told another employee that he would "slap the black off of you."

All of the witnesses agreed that Respondent was inconsistent in its selection of discipline for various offenses. Indeed, it is the consistent inconsistency cited by Complainant that counters her very suggestion that any inconsistency in her case has probative value from which to infer Respondent's decision to terminate her must be attributable to her protected activity. The record does not contain any persuasive evidence from which to infer that the discipline or adverse actions selected by Respondent were so unreasonable or inconsistent as to justify an inference that her protected activity was a contributing factor.[30]

[30] The purpose of the STAA employee protection provision is specific to retaliation because of protected activity. *See Bettner v. Crete Carrier Corp.*, ARB No. 06-013, slip op. 14-15 & n.83, ALJ No. 04-STA-18 (ARB May 24, 2007), citing *Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000) ("[this] court does not sit as a super-personnel department" and will not second-guess an employer's decisions); *Bienkowski*, 851 F.2d at 1507-1508 (discrimination statute "was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers").

TIMING

There is no factual dispute over the timing of the various protected activities and adverse actions. I find those extended periods to provide no circumstantial inference that would link the two.[31]

CONCLUSION

Consistent with the foregoing, I find Complainant has failed to prove that her protected activity more likely than not was a contributing factor to adverse actions taken by Respondent against her. Moreover, had I found that her protected activity was a contributing factor in Respondent's decision to take adverse action, the record establishes by clear and convincing evidence that it would have taken the same adverse actions, even in the absence of that protected activity.

The complaint is dismissed.

SO ORDERED.

PATRICK M. ROSENOW
District Chief Administrative Law Judge

[31] See *Withers v. Johnson*, 763 F.3d 998, 1005 (8th Cir. 2014) (temporal proximity between protected activity and adverse action not sufficient to create genuine issue of material fact particularly where proffered non-discriminatory reason for termination arose in the same window of time).