U.S. Department of Labor

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Issue Date: 02 February 2016

OALJ Case Nos.: 2015-STA-00050 and 2015-STA-00063
OSHA Case Nos.: 7-7080-14-103 and 7-7080-14-104

In the Matter of:

TONY C. WILLIAMS,
Complainant,

v.

FIRST STUDENT, INC.,

and

NORTH AMERICAN CENTRAL SCHOOL BUS, LLC,
Respondents.

* * * * * * *

OALJ Case Nos.: 2015-STA-00049 and 2015-STA-00053
OSHA Case Nos.: 7-7080-14-105 and 7-7080-14-106

In the Matter of:

LATONYA L. GRIFFIN,
Complainant,

v.

FIRST STUDENT, INC.,

and

NORTH AMERICAN CENTRAL SCHOOL BUS, LLC,
Respondents.

* * * * * * *

ALJ Case No.: 2015-STA-00055
OSHA Case No.: 7-7080-14-094

In the Matter of:

MYRON K. HERRON,
Complainant,

v.

NORTH AMERICAN CENTRAL SCHOOL BUS, LLC,
Respondent.

DECISION AND ORDER GRANTING IN PART AND DISMISSING IN PART RESPONDENTS' MOTIONS FOR SUMMARY DECISIONS

This case arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("the Act" or "STAA") and implementing regulations set forth at 29 C.F.R. Part 1978. The pertinent provisions of the Act prohibit the discharge, discipline of or discrimination against an employee in retaliation for the employee engaging in certain protected activities.

I. Procedural Background

Complainant Williams

On February 26, 2015, the Secretary issued findings dismissing Complainant Williams's complaint against North American Central School Bus, LLC ("NACSB"). On March 2, 2015, the Secretary issued findings dismissing Complainant Williams's complaint against First Student, Inc. ("First Student"). In response, Complainant Williams wrote a letter, dated March 10, 2015, to the Directorate of Whistleblower Protection Programs. A copy of the letter was also sent here, to the Office of Administrative Law Judges ("OALJ"). The letter only refers to Respondent First Student and makes no mention of Respondent NACSB. The letter arrived at OALJ on April 20, 2015. The envelope had a postage stamp on it, but there was no sign of a postmark and no evidence of when it was deposited into the U.S. mail.

On May 14, 2015, I issued a Notice of Docketing and Pre-Hearing Order, and set the case for hearing on September 17, 2015.

On July 15, 2015, OALJ received a fax from Complainant Williams regarding Respondent NACSB. It stated: "this is tony Williams. I sent this appeal with my others and I don't know why you haven't gotten yet. can you please accept this please. case no#7-7080-14-104".

On July 15, 2015, I issued an order consolidating Complainant Williams's cases against both of the Respondents.

On August 3, 2015, NACSB submitted a Motion to Dismiss on timeliness grounds. On August 17, 2015, I issued an Order to Show Cause why the cases should not be dismissed for failure to file requests for hearings within 30 days of receipt of the findings and orders as required by 29 C.F.R. § 1978.106(a).

Complainant Griffin

On March 17, 2015, the Secretary issued findings dismissing Complainant Griffin's complaint against Respondent First Student. On March 20, 2015, the Secretary issued findings dismissing her complaint against Respondent NACSB. On April 4, 2015, Complainant Griffin submitted two letters, one for each of the Respondents, to OALJ requesting "an appeal and the opportunity to present any information or evidence that may have been omitted or over looked pertaining to my charges." OALJ received the letters on April 13, 2015. On May 14, 2015, I issued a Notice of Consolidation and Pre-Hearing Order consolidating Complainant Griffin's complaints against First Student and NACSB, and set a hearing for September 17, 2015.

Complainant Herron

On February 26, 2015, the Secretary issued findings dismissing Complainant Herron's complaint against Respondents First Student and NACSB. On March 10, 2010, Complainant Herron filed an appeal with The Directorate of Whistleblower Protection Programs. The appeal only referred to the claim against NACSB. At that time, Complainant Herron did not file an objection or a request for a hearing with OALJ. On March 24, 2015, a letter was sent to Complainant Herron from the Directorate of Whistleblower Protection Programs informing him that they were in receipt of his request for review and reminding him, as had been stated in the initial letter on February 26, 2015, that they did not handle STAA appeals and to contact OALJ to file an appeal and request a hearing. On May 6, 2015, Complainant Herron submitted a letter to OALJ requesting an appeal. He did not request a hearing. The letter only addressed his complaint against NACSB. On July 1, 2015, I issued a Notice of Docketing and Prehearing Order setting a hearing for September 17, 2015.

On August 17, 2015, I issued an Order to Show Cause why this case should not be dismissed for failure to submit a request for hearing within 30 days of receipt of the findings and order as required by 29 C.F.R. § 1978.106(a). On August 18, 2015, NACSB filed a motion to dismiss on timeliness grounds. On August 21, 2015, the Directorate of Whistleblower Protection Programs issued a decision on Complainant Herron's request for review of the prior decision. The review came to the same conclusion as before: NACSB made the decision not to hire Complainant Herron after a background check disclosed a felony conviction and there was no evidence he was subjected to disparate treatment. Complainant Herron was informed that this represented a final determination of the Secretary of Labor and that his case was closed.

Complainant Herron has not filed an appeal or requested a hearing on his claim against First Student. Complainant Herron referenced an initial complaint against First Student in his

response to my show cause order; however, he did not submit any evidence establishing that an appeal or request for hearing had in fact been filed.

On August 18, 2015, I issued an order consolidating all five cases because they involved what appeared to be closely related facts and issues. The consolidated cases are:

1. *Williams v. First Student, Inc.*, (Case No. 2015-STA-00050),
2. *Williams v. North American Central School Bus, LLC*, (Case No. 2015-STA-00063),
3. *Griffin v. First Student, Inc.*, (Case No. 2015-STA-00053),
4. *Griffin v. North American Central School Bus, LLC*, (Case No. 2015-STA-00049), and
5. *Herron v. North American Central School Bus, LLC*, (Case No. 2015-STA-00055).

On August 25, 2015, I received motions for summary decisions in all of the cases from counsel for the Respondents. On August 31, 2015, I issued an order requiring the Complainants to show cause why their cases should not be dismissed. The Complainants had until October 2, 2015, to respond. In the show cause order, I postponed the September 17, 2015 hearing pending the outcome of Respondents' motions for summary decisions.

On September 1, 2015, I received Complainant Williams's response and on September 29, 2015, I received Complainant Herron's response. I did not receive a response from Complainant Griffin.

On November 5, 2015, I issued a Second Order to Show Cause to ensure the Complainants had "fair notice of [their] need to respond in kind with affidavits or 'other responsive materials.'" *Galinsky v. Bank of America, Corp.*, ARB No. 08-014, ALJ No. 2007-SOX-076 (Jan. 13, 2010).[1] On December 1, 2015, I received a request from Complainant Williams for additional time.[2] On December 3, 2015, I issued an order giving all of the Complainants until January 8, 2016, to respond. I received a response from Complainant Williams on January 8, 2016.

II. Factual Background[3]

Respondent First Student and Respondent NACSB are school bus operators that compete for contracts in the same geographic region.[4] Respondent First Student had a contract to provide

[1] Several federal circuits require that *pro se* litigants be given notice of the consequences of a summary judgment motion. *See U.S. v. Ninety Three Firearms*, 330 F.3d 414 (6th Cir. 2003) (collecting cases). While this is most often applied to *pro se* litigants who are incarcerated, at least two circuits extend this to non-prisoner litigants as well. *Jaxon v. Circle K Corp.*, 773 F.2d 1138, 1140 (10th Cir. 1985); *Williams v. Corporate Express Delivery Sys.*, 3 Fed. Appx. 36 (4th Cir. 2001) ((*citing Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir.1975)). The Administrative Review Board has applied *Roseboro* to whistleblower cases. *Hooker v. Westinghouse Savannah River, Co.*, ARB No. 03-036, Slip Op. at 8-9 (Aug. 26, 2004); *Charles v. Profit Investment Management*, ARB No. 10-071, ALJ No. 2009-SOX-040 (Dec. 16, 2011). The Eighth Circuit, which is where these cases arose, has expressly rejected this rule. *Mathis v. Mathes*, 170 Fed. App'x. 985, 985 (8th Cir. 2006) (citing *Beck v. Skon*, 253 F.3d 330, 333 (8th Cir. 2001)). However, in light of the remedial purpose of the STAA and the Board's adoption of *Roseboro*, I provided Complainants with a "*Roseboro* notice."

[2] Case No. 2015-STA-00050.

[3] This is based upon evidence the parties submitted in support of or opposition to the motions and is applicable only to this decision on the motions.

school bus services for the Ladue School District in Missouri.[5] First Student serviced the Ladue contract from its Pagedale location.[6] The employees at the Pageland location were represented by one of two unions; Amalgamated Transit Union (ATU) or Teamsters Local 610 (Teamsters).[7] The three Complainants worked for First Student driving school buses at the Pagedale location and were members of the Teamsters union.[8]

Complainants all said that First Student did not properly maintain its buses. Complainant Williams first expressed safety concerns in 2012.[9] He reported problems with the air brakes, tire tread, break peddles, emergency handles and metal showing through the cushions.[10] He said that he put his complaints into the Zonar system,[11] but management did not fix the problems.[12] Complainant Griffin claims that she reported safety issues to her manager around March of 2014.[13] She states that she complained about broken handles and latches, water coming into the buses when it rained, holes in the seats, rodents on the buses and heaters that did not work.[14]

On January 29, 2014, Complainant Herron was involved in an accident while children were on board his bus.[15] A semi-truck merged into the bus and then fled the scene.[16] Complainant Herron was unable to warn the semi-truck driver as the bus's horn was broken.[17] He had to contact the police via his personal cell phone because the bus radio did not work.[18] The accident attracted media attention and Complainant Herron spoke with the media regarding the accident.[19] When asked if the buses are safe he replied, "No, not at all."[20]

Complainant Williams reported that "I was on the news. I told her [the reporter] that the buses were unsafe, and First Student needed to fix it before the drivers and the kids get hurt."[21] In addition to talking with the news media, Complainant Williams states that he also provided pictures to the reporter.[22] Complainant Griffin also claims she talked with the news media.[23]

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[4] Mot. for Summ. Decis. at 2, Case No. 2015-STA-00049.
[5] Mot. For Summ. Decis. at 2, Case No. 2015-STA-00053.
[6] *Id*.
[7] *Id*.
[8] Mot. for Summ. Decis. at 2, Case No. 2015-STA-00053; Mot. for Summ. Decis. at 2, Case No. 2015-STA-00050; Request for Denial of Dismissal and Case Sustainability at 7, Case No. 2015-STA-00055; *see generally* Mot. for Summ. Decis. at 4, Case No. 2015-STA-00055.
[9] Mot. for Summ. Decis., Ex. K at 1, Case No. 2015-STA-00050.
[10] *Id.*
[11] "Zonar is a system which tracks pre-trip and post-trip inspections by drivers." Mot. for Summ. Decis. at 4, Case No. 2015-STA-00050.
[12] *Id*. at 1-2.
[13] Mot. for Summ. Decis., Ex. K at 1, Case No. 2015-STA-00053.
[14] *Id*. at 2.
[15] Request for Denial of Dismissal and Case Sustainability, Ex. F, Case No. 2015-STA-00055.
[16] *Id.*
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] Mot. for Summ. Decis., Ex. K at 2, Case No. 2015-STA-00050.
[22] *Id*.
[23] Mot. for Summ. Decis., Exhibit K at 2, Case No. 2015-STA-000053.

Local media uncovered a memo by First Student showing that shop managers received bonuses for reducing costs in their maintenance shops.[24] An inference could be drawn that this created an incentive to avoid needed repairs. A spokesman from First Student's parent company stated that "the internal memo you referenced was an incentive for shop managers to maximize the efficiency of their maintenance shops . . ."[25]

First Student made some repairs to the buses after the media attention.[26] However, Complainant Williams claims that they did not repair the heat on all of the buses.[27] Complainant Williams reported the heat issues personally and through the Zonar system.[28] Complainant Williams stated that management told him he should not be bothered by the cold.[29]

A few months after the bus accident, the Ladue School District rebid its school bus contract and First Student was not among the district administration's recommended vendors.[30] The contract was instead awarded to NACSB.[31] When First Student lost the Ladue School District contract, ATU had exclusive rights to the remaining bus routes.[32] Employees who were represented by the Teamsters could no longer drive routes from the Pagedale location.[33] Each member of the Teamsters received a layoff notice during the week of May 19, 2014.[34] Complainants had the option to transfer to another location and continue working for First Student or to no longer work for the company.[35] Any employee that did not inform management of his or her choice was administratively discharged effective June 6, 2014.[36]

NACSB held an open house to recruit drivers from First Student as those drivers were familiar with the bus routes, schools and students.[37] Two of NACSB's employees who previously worked for First Student culled the application pool and removed from consideration those they believed were poor performers.[38] After the initial open house and culling process, NACSB invited applicants still under consideration to a mass hiring event.[39] Applicants were interviewed, completed health and drug screenings, and were fingerprinted for a criminal history check.[40] It was NACSB's policy not to hire drivers with unexpunged felony convictions on their records. This eliminated eight of the Pagedale drivers from further consideration, including Complainants Williams and Herron.[41]

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[24] Request for Denial of Dismissal and Case Sustainability, Ex. F, Case No. 2015-STA-00055.
[25] *Id*. at 9.
[26] Mot. for Summ. Decis., Ex. K at 2, Case No. 2015-STA-00053.
[27] *Id*. at 3.
[28] *Id*.
[29] *Id*.
[30] Denial of Dismissal and Case Sustainability, Ex. H, Case No. 2015-STA-00055.
[31] Mot. for Summ. Decis. at 2, Case No. 2015-STA-00049.
[32] Mot. for Summ. Decis. at 2, Case No. 2015-STA-00053.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] Mot. for Summ. Decis. at 3, Case No. 2015-STA-00049.
[38] *Id*.
[39] Mot. for Summ. Decis. at 4, Case No. 2015-STA-00063.
[40] *Id*.
[41] Mot. for Summ. Decis. at 4, Case No. 2015-STA-00063; Mot. for Summ. Decis. at 4, Case No. 2015-STA-00055.

Complainant Griffin was interviewed on June 25, 2014, for a dispatcher position, but NACSB informed her she was not qualified to be a dispatcher.[42] Complainant Griffin states she applied for manager, dispatcher and driver positions.[43] NACSB states that Complainant Griffin only applied for a dispatcher position – and they were not hiring a dispatcher – and that she advised them she was medically unable to drive a school bus due to a back injury.[44]

Complainants contend that they were not hired by NACSB due to First Student blacklisted them because of the safety complainants they raised.[45] Complainant Williams further alleges that Respondent First Student made a deal with the Teamsters to no longer provide him with representation.[46] Complainant Williams alleges that First Student moved him to a work location 20 to 30 miles from his home as retaliation for his safety complaints when they had work locations closer to his home where he could have worked.[47]

III. Issues

The following issues are in dispute:

(1) Whether Complainant Williams timely filed his request for a hearing.
(2) Whether Complainant Herron timely filed his request for a hearing.
(3) Whether the Complaints engaged in protected activities.
(4) Whether NACSB was aware of the protected activities.
(5) Whether First Student and/or NACSB took adverse employment actions that were, in part, because of the Complainants protected activities.

IV. Discussion

A. Timeliness of Hearing Requests

Under the STAA regulations, if the Secretary concludes a violation has not occurred then the Complainant must file his or her objections and request a hearing in writing within 30 days of receipt of the findings. 29 C.F.R. § 1978.106. The date of filing is the date "of the postmark, facsimile transmittal, or electronic communication transmittal." *Id*. If a party does not file a timely objection to the findings they become final and are not subject to judicial review. § 1978.105(b)(2).

The statutory limitations period is not jurisdictional and, therefore, is subject to tolling on equitable grounds. *McCrimmons v. CES Environmental Services*, ARB No. 09-112, ALJ No. 2009-STA-00035 (ARB Aug. 31, 2009). The Administrative Review Board follows the tolling

[42] Mot. for Summ. Decis., Ex. K at 3, Case No. 2015-STA-00053.
[43] *Id*.
[44] *Id*. at 4.
[45] Mot. for Summ. Decis., Ex. K at 4, Case No. 2015-STA-00053; Mot. for Summ. Decis., Ex. K at 4, Case No. 2015-STA-00050; *see generally* Request for Denial of Dismissal and Case Sustainability at 7, Case No. 2015-STA-00055.
[46] Complainant Williams's response to my Second Order to Show Cause, Case No. 2015-STA-00055.
[47] *Id*.

principles set forth in *School District of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981). *Elias v. Celadon Trucking Services, Inc.*, ARB No. 12-032, ALJ No. 2011-STA-00028 (ARB Nov. 21, 2012). *Allentown* allows tolling when: "(1) the defendant has actively misled the plaintiff respecting the cause of action, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *Id*. The Administrative Review Board recognized a fourth equitable principle in 2010, "where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights." *Hyman v. KD Resources*, ARB No. 09-076, ALJ No. 2009-SOX-00020 (ARB Mar. 31, 2010).

Complainant Williams

The Secretary issued findings on February 26, 2015, on the complaint against NACSB. On March 2, 2015, the Secretary issued findings on the complaint against First Student. In each case the Secretary found that there was no adverse employment action. The Secretary's letters provided Complainant Williams with the relevant procedures to contest the findings: First, within 15 days, he could submit an appeal to the Directorate of Whistleblower Protection Programs, and second, within 30 days he could file objections and request a hearing before an Administrative Law Judge (ALJ).[48]

a. Respondent First Student

In a letter dated March 10, 2015, Complainant Williams filed an appeal with the Directorate of Whistleblower Protection on his claim against First Student, and he mailed a copy of the letter to OALJ. The letter itself was not addressed to OALJ and it did not request a hearing. Giving Complainant Williams the benefit of the doubt and construing his letter broadly, I will consider the letter as a request for a hearing before an ALJ.

The letter did not arrive at OALJ until April 20, 2015. Under § 1978.106, a party has 30 days from receipt of the findings and preliminary order to request a hearing and, if the request is sent by mail, the date the envelope is postmarked is determinative. § 1978.106(a). However, for unexplained reasons, the envelope Claimant Williams sent contained a U.S. postage stamp, but it did not contain a postmark. As the envelope has no postmark, the letter is dated March 10, 2015, and there is no evidence that sheds light on the matter, I find that Complainant Williams's request for a hearing on his complaint against First Student was filed in a timely manner.

b. Respondent NACSB

On July 15, 2015, OALJ received a fax from Complainant Williams regarding NACSB stating: "this is tony Williams. I sent this appeal with my others and I don't know why you haven't gotten yet. can you please accept this please. case no#7-7080-14-104".

[48] The appeal that can be submitted to the Directorate of Whistleblower Protection Programs is not based on statute or regulation, but instead is based on long-standing OSHA policy. See OSHA Whistleblower Investigations Manual, Dir. No. CPL 02-03-005, pgs. 4-7/8 (available at http://www.whistleblowers.gov/regulations_page.html). The appeal and hearing before an ALJ is based on the Surface Transportation Assistance Act and implemented by regulations at 29 C.F.R. Part 1978.

On August 17, 2015, I issued an Order to Show Cause why this case should not be dismissed for failure to file a request for a hearing within 30 days of receipt of the Directorate's findings as required by 29 C.F.R. § 1978.106(a) and 49 U.S.C. § 31105. Complainant Williams responded in an undated letter that OALJ received on September 21, 2015, saying all of his appeals were filed on time. He said that he sent out eight letters initially then two more to the Chief Administrative Law Judge. He says he waited to receive a response in the mail, but the only response he received was the notice in the NACSB case. He says that he called OALJ and was advised that OALJ had not received anything from him regarding First Student. His letter states that he was advised to write to me and tell me about the situation. Presumably this refers to a fax dated July 15, 2015 that Complainant Williams sent that references the case number for his complaint against NACSB.

Complainant Williams is mistaken in his chronology of events. I first issued a Notice of Docketing and Pre-Hearing Order on May 14, 2015 that only named First Student as a respondent. I issued the notice that named NACSB as a respondent on July 15, 2015, after I received Complainant's fax. To date, Complainant Williams has offered no evidence that he made a timely request for a hearing on his NACSB complaint. He only states that he initially mailed eight letters, and then two more to the Chief Administrative Law Judge. He does not state when the eight letters were mailed, to whom they were sent, or what they concerned. Likewise, he does not state when the two letters were mailed to the Chief Administrative Law Judge or what they contained. He has not offered any evidence that establishes he submitted a timely request for a hearing on his NACSB complaint.

The fax Complainant Williams sent on July 15, 2015 is the first time there is any record of OALJ receiving notice he that he was contesting the dismissal of his complaint against NACSB. Therefore, I find that the request for a hearing was not filed in a timely manner. Additionally, even if Complainant Williams had submitted a request for a hearing in a timely manner, his complaint against NACSB would be dismissed for other reasons as explained later.

Complainant Griffin

Complainant Griffin's filings were timely. The Secretary issued findings on March 17, 2015, for her complaint against First Student, and on March 20, 2015, for her complaint against NACSB. On April 6, 2015, Complainant Griffin mailed a request to OALJ requesting an appeal and the opportunity to present any information or evidence.[49] Complainant Griffin included separate letters for each of her two complaints. I find her requests were timely under 29 C.F.R. § 1978.106.

Complainant Herron

a. Respondent First Student

On February 26, 2015, the Secretary issued findings on Complainant Herron's complaint against First Student. There is no record he filed a request for a hearing or an appeal with the

[49] The letters are dated April 4, 2015, and postmarked two days later. Case No. 2015-STA-00049.

Directorate of Whistleblower Protection Programs or OALJ. Complainant Herron did reference the OSHA case number in his response to my Order to Show Cause, but he did not request a hearing. The heading on his document clearly states that his motion was regarding the matter with NACSB. To date, OALJ has not received a request for a hearing on the complaint against First Student; accordingly, there is no case pending before me regarding Complainant Herron and First Student.

b. Respondent NACSB

On February 26, 2015, the Secretary issued findings on Complainant Herron's complaint against NACSB. Complainant Herron filed a timely appeal with the Directorate on March 10, 2015, but he did not submit a request to OALJ until May 6, 2015, some 69 days after the findings. I issued an order to Complainant Herron to show cause why his complaint should not be dismissed for failure to submit a timely request for a hearing. In response to my order, Complainant Herron submitted a Request for Denial of Dismissal and Case Sustainability dated September 15, 2015. In it, Complainant Herron quotes parts of the letter he received from OSHA dismissing his complaint and then he states "I've followed this outline completely and filed my appeal papers with the Director of Whistleblower Protection . . . It was typed, signed and mailed on 03/10/2015."[50]

Complainant Herron further contends that the

> secretary findings specifically states whom to file the appeal to and only after the review is completed by the Directorate of Whistleblower Protection, if it is also dismissed according to previous findings should the complainant file objections to the receipt of these findings within (30) days of Whistleblower Protection regarding the appeal.[51]

However, this is not what the letter states. The letter states:

> Under the Act, this case will be closed unless Complainant files an appeal by sending a letter to:
>
> Director
> The Directorate of Whistleblower Protection Programs
> . . .
>
> To be considered an appeal [it] must be postmarked within 15 days of receipt of this letter. If this finding is appealed, the Director of the Directorate of Whistleblower Protection Programs will review the case file to ascertain whether the investigation dealt adequately with all factual issues and the investigation was conducted fairly and in accordance with applicable laws.

[50] Request for Denial of Dismissal and Case Sustainability at 3, Case No. 2015-STA-00055.
[51] *Id.*

> Under STAA, Respondent and Complainant have 30 days from the receipt of *these* Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. (Emphasis added).

Nowhere did the letter direct Complainant Herron to file objections and a request for a hearing "only after the review is completed by the Directorate." The letter stated that he had 30 days from the receipt of "these" findings to object and request a hearing. I understand a *pro se* litigant might find it confusing that there were two potential avenues to obtain further review – a request for review of the decision by the Directorate and a hearing before an ALJ. These processes are independent of each other, and each request must be submitted to the respective office within the applicable time limit after receipt of the Secretary's findings. The Directorate attempted to clarify this upon receipt of Complainant Herron's letter when they notified him on March 24, 2015, that:

> Additionally, as explained in the Secretary's Findings you received, this office does not process Surface Transportation Assistance Act (STAA) appeals. Please contact the office below to file your STAA appeal and request a hearing.
>
> Office of Administrative Law Judges
> United States Department of Labor
> Suite 400 North
> 800 K Street, NW
> Washington, DC 20001-8002

Despite this explicit notice, Complainant Herron did not send any correspondence to OALJ until May 6, 2015, some 69 days after the Secretary's findings and 43 days after the additional notice. Complainant Herron said that his May 6, 2015 letter was prompted by Complainant Williams advising him that he needed to get his letter to OALJ as soon as possible.

I find that under 29 C.F.R. § 1978.106 Complainant Herron did not file a timely request for a hearing on his complaint against NACSB.

Tolling on Equitable Grounds

As referenced above, there are circumstances that may justify tolling the 30-day period based on the equitable tolling principles found in *Allentown* and *Hyman*. Two such principles require some acts on the part of NACSB that misled Complainant Herron or lulled him into foregoing prompt attempts to vindicate his rights. *Hyman*, ARB No. 09-076. Complainant Herron presented no evidence that NACSB caused or contributed in any way to his untimely filing. Accordingly, I find that neither one of these equitable principles apply in this case.

Another equitable principle that might excuse the untimely filing is if Complainant Herron was prevented from filing a request in a timely manner because of an extraordinary circumstance. There is, however, no evidence that this principle applies since not understanding the filing requirements does not qualify as an extraordinary circumstance. *Hillis v. Knochel*

Brothers, Inc., ARB Nos. 03-136, 04-081 and 04-148, ALJ No. 2002-STA-50 (ARB Mar. 31, 2006) (being "unfamiliar with the filing requirements … is not grounds for equitable tolling.").

Complainant Herron also finds no relief in the equitable principle in *Allentown* where a "plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *Elias v. Celadon Trucking Services, Inc.*, ARB No. 12-032, ALJ No. 2011-STA-00028 (ARB Nov. 21, 2012). Here, Complainant Herron properly filed an appeal with the Directorate of Whistleblower Protection Programs. Even assuming that the filing with the Directorate was the precise statutory claim just filed in the wrong forum – which it was not – the request for a hearing with OALJ was still untimely. The clock is tolled only for the days a complainant is unaware that he has filed in the wrong forum and the clock resumes running once he is aware of the mistake. *Hillis*, ARB Nos. 03-136, 04-081. Accordingly, at most this principle would toll the clock until March 24, 2015 when the Directorate advised Complainant Herron that they did not handle STAA appeals and gave him the OALJ address. Armed with that information, Complainant Herron still did not submit anything to OALJ until his letter of May 6, 2015, which was 43 days later.

I find that Complainant Herron failed to timely request a hearing with OALJ making the Directorate's findings final and his claim no longer subject to OALJ review. § 1978.106(b). Accordingly, North American Central School Bus, LLC's Motion for Summary decision and request to dismiss the complaint by Complainant Myron K. Herron will be granted.

B. Motions for Summary Decision

In cases before this tribunal, the standard for summary decision is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure. *Frederickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 5 (ARB May 27, 2010). An ALJ may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact and that the party is therefore entitled to summary decision as a matter of law. 29 C.F.R. § 18.72(a); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB Jun. 28, 2011). "A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation." *Frederickson*, ARB No. 07-100, at 5-6 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The primary purpose of summary decision is to isolate and promptly dispose of unsupported claims or defenses. *Catrett*, 477 U.S. at 323-24.

If the party moving for summary decision demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact that might affect the outcome of the case and that is supported by sufficient evidence. *Miller v. Glenn Miller Prods.*, 454 F.3d 975, 987 (9th Cir. 2006). The non-moving party may not rest upon the mere allegations of his or her pleadings, but must instead set forth "specific facts" showing that there is a genuine issue of fact for hearing. 29 C.F.R. § 18.72(c); *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. Where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there is no genuine

issue of material fact, and the moving party is entitled to summary decision. *Catrett,* 477 U.S. at 322-23. In assessing a motion for summary decision, an ALJ must consider the record in the light most favorable to the non-moving party and draw all inferences in favor of the non-moving party. *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. The ALJ is not to weigh conflicting evidence or make credibility determinations. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, Dec. & Ord. of Remand, slip. op. at 6 (ARB Nov. 30, 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)).

Whistleblower Protection Under the STAA

Congress amended the STAA on August 3, 2007, to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b). *Smith v CRTS International, Inc*., No. 11-086, 2013 WL 2902809, *2 fn 1 (ARB Jun. 6, 2013); 49 U.S.C. § 31105(b). Because these complaints were filed after 2007,[52] the post-2007 standards of proof apply.

The employee protection provisions of the STAA provide in relevant part:

> (a) Prohibitions:
>
> > (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because:
> >
> > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;
>
> 49 U.S.C. § 31105(a).

The "Complaint" clause of the STAA protects an employee who has "filed a complaint or begun a proceeding related to a violation of a regulation, standard, or order, or has testified or will testify in such a proceeding." 49 U.S.C. § 31105(a)(A)(i). The statute covers internal complaints to supervisors as well as external complaints to government officials. *See Nix v. Nehi- RC Bottling Co., Inc.*, 84 STA-1 (Sec'y Jul. 13, 1984); *Davis v. H.R. Hill, Inc.*, 86-STA-18 (Sec'y Mar. 19, 1987); *Harrison v. Roadway Express, Inc*., 1999 STA 37 (ARB Dec. 31, 2002). An employee's complaints cannot be too generalized or informal. *Calhoun v. U.S. DOL*, 576 F.3d 201, 213-14 (4th Cir. 2009). If the "internal communications are oral, they must be sufficient to give notice that a complaint is being filed." *Jackson v. CPC Logistics*, ARB No.07-006, ALJ No. No 2006-STA-4 (ARB Oct. 31, 2008); *see Clean Harbor Env't Servs., Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (finding that a driver "filed a complaint" when he sent letters to his superiors explaining various safety precautions he had been taking in an attempt to

[52]Complainant Williams filed his complainants against Respondents with OSHA on July 28, 2014. Case Nos. 2015-STA-00050 and 2015-STA-00063. Complainant Griffin filed her complaints against Respondents on July 30, 2014. Case Nos. 2015-STA-00049 and 2015-STA-00053.

explain his slow pick-up times). All complaints, whether internal or external, must "relate to" safety violations. Courts have construed "relate to" broadly to encompass violations of both federal and state laws. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992). However, in order to qualify for protection, the complaint must be based on a "reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation." *Calhoun*, 576 F.3d at 213.

The STAA prohibits an employer from discharging or discriminating against an employee because the employee has engaged in certain protected activity. 49 U.S.C. § 31105(a)(1). To prove a STAA violation, a complainant must show by a preponderance of evidence that: (1) he engaged in protected activity, (2) that employer took an adverse employment action against him, and (3) that his protected activity was a contributing factor in the adverse action. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). If a complainant proves by a preponderance of evidence that his or her protected activity was a contributing factor in an adverse personnel action, the respondent can avoid liability by demonstrating by clear and convincing evidence that the same adverse action would have been taken in any event. *Id.* at 5 (citing 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). Protected activity is a contributing factor if "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." 77 Fed. Reg. 44127 (Jul. 27, 2012); *Benjamin v. Citationshares Management, LLC*, No. 12-029, 2013 WL 6385831 (ARB Nov. 5, 2013). "If the employee does not prove one of these elements, the entire complaint fails." *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013).

Respondents will not be held to have violated the STAA if they establish by clear and convincing evidence that the adverse employment actions were the result of events or decisions independent of protected activity. "Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain." *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013), quoting *Warren v. Custom Organics*, No. 10-092, 2012 WL 759335, *5 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, No. 12-035, 2013 WL 143761 (ARB Jan. 9, 2013).

a. Protected Activity

Complainant Williams

First Student claims that Complainant Williams did not engage in protected activities. First Student contends that his complaints did not relate to a commercial motor vehicle safety regulation, but instead reflected a personal preference for warmer heat.[53] First Student states that Complainant Williams reported that the heat "was not warm enough."[54] However, Complainant Williams said, in his statement to OSHA, that "[t]here was no heat on the busses."[55] Later in his statement he again said, "I told Kevin . . . there was no heat on the buses . . ."[56] The State of

[53] Mot. Summ. Decis. at 4, Case No. 2015-STA-00050.
[54] *Id.*
[55] Mot. Summ. Decis., Ex. K at 1, Case No. 2015-STA-00050
[56] *Id*. at 2.

Missouri is required to reject any school bus when "[a]ny part of the heating or defrosting system fails to function properly or ha[s] leakage." MO. CODE REGS. ANN. Tit. 11 § 50-2.320(6) (2015).[57] Additionally, Complainant Williams reported that because of a lack of heat on the bus the windows would fog up and management advised him to use paper towels to wipe them off.[58] Therefore, I find that there is a genuine issue of material fact on whether Complainant Williams engaged in protected activity.

Complainant Griffin

First Student also claims that Complainant Griffin did not engage in protected activities. First Student states that she was on "an unpaid leave of absence due to health reasons from August 1, 2013, through the layoff in June 2014."[59] In support of this, First Student submitted a doctor's note from Breakthrough Pain Relief Clinic.[60] The note itself is not dated, but the facsimile is time stamped 11:35 a.m. on April 4, 2014.[61] The note does not state anything about Complainant Griffin's work status. Additionally, First Student submitted two "Change Profile" forms, and both forms state that effective August 1, 2013, Complainant Griffin was on a medical leave of absence.[62] The forms are dated March 20, and April 8, 2014.[63] These forms conflict with Complainant Griffin's statement that she reported safety complaints around March of 2014. It also conflicts with her statement that she spoke with the media at First Student's Pagedale location after a co-worker's accident around March of 2014.[64] However, in ruling on a motion for summary decision an ALJ does not weigh the evidence or determine the truth of the matters asserted. *Samsel v. Roadway Express, Inc.*, ARB No. 03-085, ALJ No. 202-STA-46 (ARB Jun. 30, 2004) (*citing Stauffer, supra*). Accordingly, I find that Complainant Griffin has raised a genuine issue of material fact on whether she engaged in protected activity.

b. Respondents' Knowledge of Protected Activity

Complainants Williams and Griffin claim they made their complaints directly to First Student. First Student does not deny that they were aware of Complainant Williams's safety complaints. Respondent First Student disputes that Complainant Griffin made safety complaints. However, as Complainant Griffin claims that she made complaints directly to First Student, there is a genuine issue of material fact.

NACSB asserts that the individuals that made the decisions not to hire the Complainants had no knowledge of their protected activities.[65] NACSB supports this with an affidavit by NACSB's Regional Recruiter who attests that she was unaware Complainants had engaged in any protected activity.[66] However, an affidavit from Adrienne Morris states that she worked for

[57] STAA encompasses violations of both federal and state laws. *Martin,* 954 F.2d at 356-57.
[58] Mot. Summ. Decis., Ex. K at 3, Case No. 2015-STA-00050.
[59] Mot. Summ. Decis. at 4, Case No. 2015-STA-00053.
[60] Mot. Summ. Decis., Ex. G, Case No. 2015-STA-00053.
[61] *Id.*
[62] Mot. Summ. Decis., Ex. H, Case No. 2015-STA-00053.
[63] *Id.*
[64] Mot. Summ. Decis., Ex. K at 2, Case No. 2015-STA-00053.
[65] Mot. Summ. Decis. at 5, Case No. 2015-STA-00049; Mot. Summ. Decis. at 5, Case No. 2015-STA-00063.
[66] Mot. Summ. Decis., Ex. B at 2, Case No. 2015-STA-00049.

Respondent NACSB during the time period in question, and she overheard management discussing what had happened at First Student and the workers that had put First Student in the news.[67] Ms. Morris's statement is sufficient to show that there is a genuine issue of material fact.

c. Protected Activity Contributed to an Adverse Employment Action

Complainants Williams and Griffin contend that First Student blacklisted them and, as a result, NACSB did not hire them. "[B]lacklisting may be the adverse action in a STAA complainant." *Timmons v. CRST Dedicated Services, Inc.*, ARB No. 14-051, ALJ No. 2014-STA-009 (ARB Sep. 29, 2014) (citing *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056, 02-059, ALJ No. 2001-ALJ-018, Slip op. at 9 (ARB Nov. 28, 2003)). "Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment." *Id.* To prevail on a blacklisting allegation there must be evidence that a specific act of blacklisting occurred, and some form of detriment to the complainant. *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056, 02-059, ALJ No. 01-CAA-18 (ARB Nov. 28, 2003). "Thus, there must be some objectively manifest personnel or other injurious employment-related action by the employer against the employee . . ." *Id.*

Complainant Williams

First Student states that safety concerns Complainant Williams raised were corrected.[68] The fact that the safety concerns were fixed, presumably at least in part because of the media coverage, does not negate the possibility of retaliatory action. First Student also states that there was no adverse employment action taken as Complainant Williams is still employed by the company and works at its Rockdale location.[69] Complainant Williams, however, states that First Student did retaliate against him.

First, Complainant Williams says First Student made him work at a site a long distance from his home when there were other locations much closer.[70] He states that he attempted to go to Riverdale, a location that First Student said was available to Teamsters members, but his effort was unsuccessful.[71] This alleged adverse action was not raised in the complaint to the Directorate of Whistleblower Protection Programs and was mentioned for the first time in Complainant Williams's written statement submitted on January 8, 2016 in response to First Student's Motion for Summary Decision.[72] The Board has said that "ALJs should liberally grant whistleblower complainants leave to amend their complaints." *Cobb v. FedEx Corporate Services, Inc.*, ARB No. 12-052, ALJ No. 2010-AIR-24 (ARB Dec. 13, 2013); *Evans v. United States Environmental Protection Agency*, ARB No. 08-059, ALJ No. 2008-CAA-3 (ARB Jul. 31, 2012). While I will permit Complainant Williams to amend his complaint to include this alleged retaliatory adverse action, I will also give First Student an opportunity to respond since they have

[67] Affidavit of Adrienne Morris, Case No. 2015-STA-00050.
[68] Mot. Summ. Decis. at 4, Case No. 2015-STA-00050.
[69] *Id.* at 3.
[70] Complainant Williams's response to my Second Order to Show Cause.
[71] Mot. Summ. Decis. at 2, Case No. 2015-STA-00050.
[72] Complainant Williams's response to my Second Order to Show Cause.

not had a chance to address the timeliness or substance of the allegation. *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010) (a respondent is entitled to notice of the theory on which a complainant will proceed and opportunity to respond).

Second, Complainant Williams claims that First Student disseminated damaging information to NACSB that resulted in him not being hired. Assuming that the allegation First Student conveyed information to NACSB is true, it is clear that it did not contribute to the adverse action. NACSB was prohibited from hiring Complainant Williams by the Ladue School District. NACSB received a letter from the Assistant Superintendent for Human Resources at Ladue Schools dated June 24, 2014, stating: "We have received . . . [the] results of the FBI/Missouri Highway Patrol Fingerprint Check on your prospective employee, Tony Williams. Tony Williams is **not eligible** to work in the Ladue School District."[73] Complainant Williams contends that any prior criminal record is irrelevant. To support this claim he submitted a copy of Article 23-A, "Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses," which states that employment shall not be denied based on a previous conviction.[74] Article 23-A, however, is a state law from the State of New York. N.Y. Correction Law § 752 (2015). New York state law has no bearing on hiring practices in the State of Missouri. Additionally, Missouri state law requires criminal background checks for school bus drivers, including drivers employed by a transportation company under contract with a school district. MO. REV. STAT. § 168.133(1) (2015).

Viewing the evidence in the light most favorable to Complainant Williams and drawing all inferences in his favor, I find that there was no adverse employment action taken against him by NACSB as a result of protected activity. Complainant Williams was eliminated from consideration for a position with NACSB because the Ladue School District informed NACSB he was not eligible to work in the district. Therefore, even if Complainant Williams had timely requested a hearing, which he did not, his complaint against NACSB would still be dismissed pursuant to NACSB's Motion for Summary Decision. Similarly, even if First Student provided information to NACSB concerning Claimant Williams it did not contribute to him not getting hired; that was the result of the Ladue School District notifying NACSB that he was ineligible to work in the district.[75]

Complainant Griffin

Complainant Griffin contends that First Student disseminated derogatory information to NACSB in retaliation for her making safety complaints. First Student and NACSB deny that this occurred.[76] However, the declaration by Ms. Morris states that the management at NACSB discussed applicants' workers compensation claims and the employees that had caused First Student to get news media attention.[77] If Ms. Morris's statement is true, then it is plausible that NACSB may have obtained such information from First Student. As I do not weigh or assess the

[73] (Emphasis in original). Mot. Summ. Decis., Ex. G, Case No. 2015-STA-00063.
[74] Complainant Williams's response to Resp't Mot. Summ. Decis., Ex. K, Case No. 2015-STA-00050.
[75] Had Complainant Herron filed timely requests for hearings he would have encountered the same impediment as he was ineligible for employment in the Ladue School District due to his criminal record.
[76] Mot. Summ. Decis. at 5, Case No. 2015-STA-00049; Mot. Summ. Decis. at 4, Case No. 2015-STA-00053.
[77] Affid. of Ms. Morris, Case No. 2015-STA-00050.

credibility of the evidence in ruling on a motion for summary decision, Complainant Griffin has raised a genuine issue of material fact.[78]

V. Conclusion

***Williams v. First Student, Inc.*, Case No. 2015-STA-00050**

For the reasons stated above, I find that Respondent First Student is entitled to a decision in its favor as a matter of law on the allegation that it blacklisted Complainant for engaging in protected activity which caused him not to get hired by Respondent North American Central School Bus. Accordingly, First Student's Motion for Summary Decision is **GRANTED** and that part of the complaint is **DISMISSED**.

Complainant Williams raised a new allegation in the written statement he submitted in response to First Student's Motion for Summary Decision. He claims that First Student assigned him to a work location 20 to 30 miles from his home when closer work locations were available as punishment for engaging in protected activity. Since Respondent First Student has not had notice of this allegation and an opportunity to respond, it has until Friday, March 4, 2016, to file a response, if it chooses to do so.

***Williams v. North American Central School Bus, LLC*, Case No. 2015-STA-00063**

For the reasons stated above, I find that Complainant Williams did not file a timely request for a hearing with OALJ, nor did he raise a genuine issue of material fact. Accordingly, North American Central School Bus's Motion for Summary Decision is **GRANTED** and the complaint against it is **DISMISSED**.

***Griffin v. First Student, Inc.*, Case No. 2015-STA-00053**

For the reasons stated above, I find that the evidence Complainant Griffin has submitted raises a genuine issue of material fact. Accordingly, First Student's Motion for Summary Decision is **DENIED**.

***Griffin v. North American Central School Bus, LLC*, Case No.: 2015-STA-00049**

For the reasons stated above, I find that the evidence Complainant Griffin has submitted raises a genuine issue of material fact. Accordingly, North American Central School Bus's Motion for Summary Decision is **DENIED**.

***Herron v. North American Central School Bus, LLC*, Case No.: 2015-STA-00055**

For the reasons stated above, I find that Complainant Herron did not file a timely request for a hearing with OALJ. Accordingly, North American Central School Bus's Motion for Summary Decision is **GRANTED** and the complaint against it is **DISMISSED**.

[78] *Samsel*, ARB No. 03-085.

VI. Summary

I will defer setting a date for a hearing in *Griffin v. First Student, Inc.*, (Case No. 2015-STA-00053) and *Griffin v. North American Central School Bus, LLC*, (Case No. 2015-STA-00049) until First Student has an opportunity to respond to the new allegation raised in *Williams v. First Student, Inc.*, (Case No. 2015-STA-00050).

SO ORDERED.

Digitally signed by MORRIS D. DAVIS
DN: CN=MORRIS D. DAVIS, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

MORRIS D. DAVIS
Administrative Law Judge

Washington, D.C.