



**Issue Date: 21 September 2017**

Case No.: 2014-FRS-00087

In the Matter of

**DIANE RICHARDSON**  
Complainant

v.

**LONG ISLAND RAILROAD**  
Respondent

Appearances:

Diane Richardson,  
*Pro Se* Complainant

Brian K. Saltz, Esq.  
Stephen N. Papandon, Esq.  
For Respondent

Before: Theresa C. Timlin  
Administrative Law Judge

**DECISION AND ORDER DISMISSING COMPLAINT**

This matter arises under the Federal Rail Safety Act (“FRSA,” or “the Act”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53. (Aug. 3, 2007). On April 30, 2014, this case was referred to the Office of Administrative Law Judges for a formal hearing, originally scheduled to take place on September 22, 2014. Subsequently, by Order dated January 15, 2015, the undersigned rescheduled the hearing. The rescheduled hearing took place on March 9, 2015 in New York City, at which time the Complainant tried her case in chief. Although initially represented, Complainant appeared at the hearing *pro se*. After Complainant rested, Respondent moved for a directed verdict and the parties presented oral argument.<sup>1</sup> On October 19, 2015, the undersigned issued a “Decision and Order Granting in Part and Denying in Part Respondent’s

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<sup>1</sup> Though Respondent uses the term “directed verdict,” Respondent’s request is actually a motion for Judgment on Partial Findings, pursuant to Federal Rule of Civil Procedure 52(c).

Motion for Judgement on Partial Findings.”<sup>2</sup> On November 23, 2015, the parties reconvened in New York City so that Respondent could present its defense. The undersigned has based the Decision and Order that follows upon an analysis of the record, the full arguments of the parties, and the applicable law.

## I. PROCEDURAL HISTORY<sup>3</sup>

In anticipation of the original September 22, 2014 hearing date, the undersigned scheduled the following procedural deadlines: August 22, 2014 for the close of discovery; September 2, 2014 for the submission of motions for summary decision; and September 5, 2014 for the submission of Pre-Hearing Statements. Respondent served Complainant with discovery demands on May 19, 2014, with responses due within thirty days. Respondent scheduled Complainant for a deposition on June 26, 2014. When Respondent did not receive discovery responses within the requested time, Respondent extended the time for Complainant to respond to July 9, 2014, and rescheduled Complainant’s deposition for July 17, 2014.

By letter dated July 14, 2014, Respondent’s counsel advised this office that he had not received Complainant’s discovery responses. Due to difficulties obtaining discovery from Complainant, the undersigned held a conference call with counsel for the parties on July 21, 2014. By Order dated July 22, 2014, the undersigned rescheduled the hearing for November 12, 2014. The July 2014 Notice of Rescheduled Hearing also set the following deadlines: October 10, 2014 for the deadline to exchange all documents the parties intended to submit at the hearing; October 17, 2014 for Pre-Hearing Statements; October 22, 2014 for the filing of motions for summary decision; and November 5, 2014 for the final pre-hearing telephonic conference.

By letter dated September 2, 2014, Respondent’s counsel requested an Order that Complainant provide discovery responses by September 10, 2014 and appear for deposition by September 23, 2014, or face potential dismissal of her complaint. Subsequently, Respondent’s counsel advised this office by letter dated September 18, 2014 that he had not received Complainant’s discovery responses. Respondent requested dismissal of the complaint since there was no longer time for Respondent to review discovery responses, if received, to conduct depositions, or to submit a motion for summary decision. A conference call with counsel for the parties took place on September 23, 2014 to discuss Complainant’s continued failure to submit responses to discovery. An Order dated September 25, 2014 instructed Complainant to submit discovery responses to Respondent no later than October 10, 2014, or face potential dismissal of her case; the Order also set November 21, 2014 as the deadline for submission of motions for summary decision, and cancelled the November 12, 2014 hearing.

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<sup>2</sup> The undersigned will hereinafter cite to the October 19, 2015 “Decision and Order Granting in Part and Denying in Part Respondent’s Motion for Judgement on Partial Findings” as “Partial Findings D&O” followed by the page number.

<sup>3</sup> For the sake of inclusivity and completeness, the undersigned has included summary of the entirety of the procedural history, rather than merely a summary of the events occurring after Partial Findings D&O.

By letter dated October 1, 2014, Complainant advised that she had discharged her attorney and would continue *pro se*; she also requested rescheduling the pre-hearing deadlines. By letter dated October 7, 2014, Complainant's counsel requested permission to withdraw as Complainant's representative. By Order dated October 30, 2014, the undersigned granted counsel's request. The Order dated October 30, 2014 denied Complainant's request to extend the November 10, 2014 deadline for discovery responses, but granted Complainant's request for the extension of all other deadlines set forth in the September 25, 2014 Order.

By letter dated November 8, 2014, Complainant advised that she would be unable to meet the discovery deadline without an extension of time due to difficulties obtaining her file from her former counsel.<sup>4</sup> By Order dated November 18, 2014, the undersigned granted Complainant's request to extend the discovery deadline to December 10, 2014. By letter dated December 9, 2014, Complainant filed Objections to Respondent's Requests for Production of Documents. By letter dated December 31, 2014, Respondent advised that it received documents from Complainant. Complainant responded to Respondent's letter on January 6, 2015, and offered an explanation regarding the documents she produced to Respondent. By letter dated January 6, 2015, Respondent submitted its Notice of Deposition to Complainant. After a January 8, 2015 conference call with the parties, the undersigned rescheduled the hearing for March 9, 2015 and set the following pre-hearing deadlines: February 9, 2015 for the exchange of copies of documentary evidence between the parties; February 13, 2015 for the submission of Pre-Hearing Statements; and February 20, 2015 for the submission of dispositive motions. See Order dated January 15, 2015.

On February 12, 2015, Complainant submitted her Pre-Hearing Statement and Respondent submitted its Pre-Hearing Statement and Motion for Summary Decision. By letter dated February 18, 2015, Complainant submitted an Amended Pre-Hearing Statement. On February 19, 2015, Complainant submitted her Motion for Summary Decision and Brief in Support ("Complainant's Motion"), in which she answered Respondent's Motion.<sup>5</sup> By letter dated February 25, 2015, Complainant requested clarification regarding procedural issues, which the undersigned addressed during the final pre-hearing teleconference on March 2, 2015.<sup>6</sup>

At the beginning of the hearing, the undersigned denied Respondent's Motion for Summary Decision, and advised that a written decision would issue in due course.<sup>7</sup> At the close

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<sup>4</sup> Complainant submitted an Amended Copy of her November 8, 2014 letter, which this office received on November 12, 2014.

<sup>5</sup> After reviewing Complainant's Motion and the respective dates of the parties' submissions, and recognizing that she is proceeding *pro se*, Complainant's Motion is more correctly considered a Response in Opposition to Respondent's Motion for Summary Decision.

<sup>6</sup> Via facsimile on March 2, 2015, this office sent Respondent a copy of Complainant's Pre-Hearing Statement, Complainant's Motion for Summary Decision and Brief in Support, and Complainant's February 25, 2015 letter.

<sup>7</sup> The undersigned issued the Decision and Order Denying Respondent's Motion for Summary Decision on March 30, 2015.

of the March 19, 2015 hearing, Respondent moved for directed verdict, and the parties gave oral argument on this issue. (Tr. 277–91.)

An Order issued April 29, 2015, explained that it may be appropriate for the parties to consider the effect, if any, of the decisions in Fordham v. Fannie Mae, ARB No. 12-061 (Oct. 9, 2014), and Powers v. Union Pac. R.R. Co., ARB No. 13-034 (Mar. 20, 2015; reissued with full dissent Apr. 21, 2015), on their arguments regarding judgment on partial findings.<sup>8</sup> Therefore, the undersigned invited (but did not require) the parties to submit supplemental briefs, strictly limited to discussing the evidence in this matter in light of Fordham and/or Powers. By facsimile dated May 6, 2015, Respondent requested an extension of two weeks to submit its supplemental response. An Order issued May 12, 2015 granted Respondent's request for an extension. Complainant submitted her supplemental response on May 14, 2015, and Respondent submitted its supplemental response on May 27, 2015. Complainant argued that the facts of her case are similar to those of Fordham. Respondent argued that its Motion for Directed Verdict should be granted based on the evidence Complainant submitted, because she could not show that her protected activity was a contributing factor in the adverse action.

On October 19, 2015, the undersigned issued the Partial Findings D&O. The undersigned discussed the procedural history of the case, summarized the parties' contentions, summarized the testimonial and documentary evidence of record, and made numerous findings. Specifically, the undersigned considered Respondent's argument that this tribunal should find Complainant judicially estopped from filing her complaint, because she did not include the current matter within her March 2010 bankruptcy petition. See Partial Findings D&O at 18–20. The undersigned denied Respondent's request, holding that Complainant did not intentionally mislead the bankruptcy court. Id. Also, the undersigned denied Respondent's argument that Complainant's Title VII and ADA complaints, and complaint before the New York State Division of Human Rights, barred her current complaint before this tribunal. Id. at 21–22. The undersigned further found that the General Release that Complainant signed in June 2010 did not preclude the instant matter. Id. at 22–23. Additionally, the undersigned made a finding of law that employees need not hold "safety related" jobs to warrant coverage under the Act. Id. at 23–24.

Moving to the substance of Complainant's case, the undersigned found that Complainant engaged in protected activity when she notified her employer of her work-related illness. The undersigned recognized at least three instances of Complainant's protected activity. The first occurred in 2006 and 2007 when Complainant reported her chemical exposure to Roe Mitchell, her terminal manager, and William DeCarlo, her union representative. The undersigned also found that Complainant engaged in protected activity when she filed complaints in May 2008 to Mercedes Commodore, of Diversity Management; some of Complainant's January 2009 complaints also constituted protected activity. The undersigned, however, found that Complainant's April 2008 internal discrimination complaint and the FELA and NYSHRL/EEOC complaints she filed did not constitute protected activity. See id. at 25–27.

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<sup>8</sup> The undersigned, however, recognizes that the controlling ARB precedent is now Palmer v. Canadian National Railway/Illinois Central Railroad Company, ARB No. 16-035, ALJ Case No. 2014-FRS-154 (Sep. 30, 2016).

The undersigned found that Complainant suffered an adverse employment action because Respondent did not allow her to return to work until December 28, 2009, even though she had ostensibly fulfilled Respondent's requirements to obtain medical clearance as early as October 3, 2009. Her lost wages and vacation days constituted adverse employment action. See id. at 27–29. The undersigned also ruled that Complainant timely filed her complaint concerning the adverse employment action that occurred until December 28, 2009, but that she did not timely file her complaints about the adverse actions that allegedly occurred in 2007. Id.

The undersigned then turned to Complainant's burden to show the nexus between her protected activity and the Respondent's adverse action. The undersigned found that Complainant established the nexus between her protected activity and Respondent's adverse employment actions for some acts of protected activity, but not others. For example, Complainant was able to demonstrate the nexus between her complaints about chemical exposure and Respondent's adverse employment actions concerning Dr. Clarke and Mr. Nersesian's delay in allowing her to return to work. However, Complainant was unable to show the nexus between Respondent's shortage allegations and her protected activity.<sup>9</sup> See id. at 29–33.

On November 23, 2015, the undersigned reconvened the hearing so that Respondent could present its defense.

## II. THE PARTIES' CONTENTIONS

### Complainant's Post-Hearing Brief

Complaint asserted that "Respondent[,] including Dr. John Clarke and Michael Nersesian[,] intentionally delayed approving my return back to work as a form of retaliation," due to her filing of safety and health complaints in 2009. Complainant's Brief at 1. Complainant noted that Dr. Clarke was "the Respondent's Physician-in-Charge" at the time she filed her complaints and that Mr. Nersesian served as Respondent's Assistant Director of Employee Services at such time. Id.

Complainant stated that, concerning her January 2009 complaint to Helena Williams, Respondent's President, she received a response from Steven Drayzen, Respondent's Vice President of Labor Relations. Id. at 2 (citing CX G). Complainant quoted Mr. Drayzen's statement that, because of her complaint, Respondent had undertaken an investigation. Id. Complainant averred that Michael Chirilo, Respondent's Vice President of Labor Relations, and Michael Fyffe, Respondents' Director of Diversity Management, were both aware of the complaint. Id. In his response letter, Mr. Drayzen referred to Dr. Clarke as Respondent's "Physician-in-Charge." Id. Mr. Drayzen further assured Complainant that Respondent completed full investigations of her allegations concerning her supervisors. Id. "Mr. Drayzen, Mr. Chirilo and Mr. Fyffe," Complainant contended, "were all aware of issues I raised

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<sup>9</sup> The undersigned recognized that the burden fell to Respondent to show that it would have taken the same adverse employment actions but for Complainant's protected activity; however, the undersigned did not rule on this issue, pending Respondent's presentation of its defense.

concerning my treatment by various managers.” Id. Complainant further noted that she complained about the actions of Dr. Clarke and Mr. Nersesian within her complaint to Respondent’s president. Id. Complainant reasoned:

Since my contentions were thoroughly reviewed and investigated and complete investigations were conducted in each instance, then according to Mr. Drayzen, everyone I mentioned in my complaints was contacted and questioned. It’s impossible to thoroughly review and investigate contentions unless you contact and question those involved to see if there’s any merit to the complaint.

Id. Complainant summarized her argument that Dr. Clarke and Mr. Nersesian “were investigated” based on Mr. Drayzen’s statement, and therefore it was “impossible” that such individuals “were never notified of any of my complaints against them.” Id. at 3–4. Complainant concluded, saying, “Dr. John Clarke and Michael Nersesian were made aware of the complaints that were filed against them and they used the opportunity, when it arose, to retaliate against me.” Id. at 4.

#### Respondent’s Post-Hearing Brief

Respondent first argued that this tribunal should consider the testimony of Marianne DeRosa, a bankruptcy trustee, who testified about Complainant’s bankruptcy petition. See Respondent’s Brief at 5, 9–11 (citing Tr. at 298–305). Respondent reasoned that, because DeRosa was a neutral third party, she had no motive to be untruthful; Respondent further asked the undersigned to consider this principle with regard to the weight accorded to Complainant’s testimony. Id.

Respondent turned to the merits of Complainant’s complaint. Respondent argued that Complainant is unable to establish her prima facie case, due to the testimony of Michael Fyffe, Respondent’s Director of Diversity Management. Id. at 6. Mr. Fyffe testified that he received Complainant’s May 2008 and January 2009 letters, but did not provide Dr. Clarke or Mr. Nersesian with a copy of such letters. Id. (citing CX G; Tr. at 312–16).

Respondent maintained that Respondent never employed Dr. Clarke, so he had little reason to provide untruthful testimony. Id. at 7. (citing Tr. at 318–19). Dr. Clarke testified that he never read any of Complainant’s letters (in which she allegedly engaged in protected activity). Id. at 6 (citing Tr. at 319–20). Dr. Clarke, moreover, did not discuss such letters with any individuals. Id. at 6–7 (citing Tr. at 319–20). Respondent stated, “[i]t was not until approximately 2–3 weeks before his November 23, 2015 testimony that Dr. Clarke was even aware of [Complainant’s] allegation that he did not treat her properly or retaliated against her.” Id. at 7 (citing Tr. at 320). Likewise, Mr. Nersesian never saw or spoke with anyone about Complainant’s letters. Id. (citing Tr. at 329–32). Respondent additionally stated that Mr. Nersesian testified that he had no authority to decide whether and when employees may return to work. Id. (Tr. at 329, 332).

Further, Respondent noted Dr. Clarke's testimony that Dr. Brodsky's September 21, 2009 note on a prescription pad was "not enough" to warrant Complainant's return to work. Id. at 8 (citing CX C). According to Respondent, Dr. Clarke asked Dr. Brodsky to provide him with information concerning Complainant's treatment, but Dr. Clarke did not receive such a note until December 4, 2009. Id. (citing CX C; Tr. at 322–24). On December 11, 2009, a neutral arbitrator named Dr. Bernstein examined Complainant and found her fit to return to duty; however, Dr. Bernstein allegedly did not forward this finding to Respondent until December 28, 2009. Id. at 9 (citing CX C; CX I; Tr. at 341–42).

Respondent maintained its argument that Complainant did not engage in protected activity in 2008 or 2009. Id. at 12–13. Respondent noted that Complainant suffered chemical exposure in August 2006 and August 2007, and complained to Respondent at that time. Complainant also complained to Respondent about Dr. Clarke's and Mr. Nersesian's subsequent treatment of her. Id. at 12. Respondent argued that her complaints about Dr. Clarke and Mr. Nersesian did not constitute a "work related personal injury or work-related illness" under 49 U.S.C. § 20190(a)(4). Id.

The crux of Respondent's argument in its brief is that, in addition to proving the elements of protected activity and adverse employment action, the ARB requires complainants to prove that the individuals who took such adverse action were aware of the protected activity. Id. at 13 (citing Rudolph v. National Railroad Passenger Corp., ARB Case No. 11-037 (Mar. 29, 2013); Gary v. Chautauqua Airlines, ARB Case No. 04-112 (Jan. 31, 2006); Peck v. Safe Air International, Inc., ARB Case No. 02-028 (Jan. 30, 2004); Kuduk v. BNSF Railway Co., 768 F.3d 786, 791 (8th Cir. 2014)). Respondent averred that Mr. Fyffe, Dr. Clarke, and Mr. Nersesian each testified "without contradiction" that Dr. Clarke and Mr. Nersesian had no knowledge of Complainant's May 8, 2008, January 19, 2009, or January 20, 2009 complaints. Id. at 13–14.

Respondent further argued that Complainant's protected activity was not a contributing factor in Respondent's unfavorable employment actions, due to a lack of a temporal proximity between her protected activity in August 2006 and August 2007 and the adverse action, which occurred in late 2009. Id. at 14.

Finally, Respondent averred that it would have taken the same adverse employment action in the absence of Complainant's protected activity. Id. at 15–16. Specifically, Respondent argued that Dr. Clarke did not return Complainant to work in November 2009 because Dr. Brodsky did not respond to Dr. Clarke's request for more information until December 4, 2009. Id. at 16.

### III. FINDINGS OF FACT

#### A. Stipulated Facts

At the March 9, 2015 hearing, the undersigned admitted Complainant's Pre-Hearing Statement as ALJX 1 and Respondent's Pre-Hearing Statement as ALJX 2, which contains the parties' stipulations. (See Tr. 12–13, 155.) The parties stipulated to the following:

- Complainant began employment with Respondent on September 25, 1996;
- Complainant first worked as an assistant conductor;
- Complainant began working as a ticket clerk in March 1998;
- Complainant was not required to undergo a medical or drug test prior to becoming a ticket clerk;
- Complainant signed a trial waiver dated April 25, 2002 and accepted a reprimand for violating Respondent's absence policy;
- Complainant signed a trial waiver dated May 12, 2005 and accepted a reprimand for violating Respondent's absence policy;
- Complainant signed a trial waiver on April 4, 2006 and accepted a fifteen-day suspension, with one day served and fourteen days held in abeyance, for failing to secure a cash box, in violation of Respondent's policies, on March 9, 2006;
- Complainant complained of chemical exposure in August 2007 due to brass cleaning chemicals in the lobby;
- Complainant was aware of Respondent's Passenger Services Department Topic 414, relating to payment of shortages;
- Complainant paid Respondent \$21.75 on November 17, 2008;
- Respondent held an internal hearing on March 27, 2009;
- Assistant General Manager Mitchell Menarchem found Complainant guilty of the charges on April 7, 2009, issued a ten day suspension, and deducted a \$14.32 shortage from Complainant's pay;
- Complainant is not aware of any other employees with more than a \$25.00 shortage who did not pay the full amount of the shortage;
- Complainant began her leave in or about May 2009, when her suspension ended;
- Complainant returned to work on December 31, 2009;
- Complainant's union filed a claim asserting that Complainant should have been paid from September 21, 2009 through December 31, 2009;
- Complainant filed a lawsuit related to injuries she claimed resulted from the chemical exposure in 2006 and 2007;
- Complainant filed a bankruptcy petition in the Bankruptcy Court for the Eastern District of New York on March 15, 2010; and
- Complainant filed the instant complaint with OSHA on April 15, 2010.

(ALJX 1; ALJX 2; Tr. 12–13, 17–20.)

B. Documentary Evidence<sup>10</sup>

At the hearings, the undersigned admitted the following Complainant Exhibits in their entirety:

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<sup>10</sup> For the sake of inclusivity and completeness, the undersigned has included summary of the entirety of the documentary evidence of record, even though some documents relate only to issues that remain undisturbed from the Partial Findings D&O. The following summary is substantially similar to the summary of the documentary evidence that appears in the Partial Findings D&O (see, pp. 7–14).

EX No.	EX Page No.	Description	Transcript Citation
CX A	1	Excerpt from the Act and the regulations	(Tr. 28–38)
	2–3	Excerpts from OSHA’s website	
	4	Complainant’s typed notes	
	5	Complainant’s “TOM – End of Tour Report” for October 1, 2006	
CX B	1	Corporate Safety & Training Notice issued December 11, 2013	(Tr. 39–41)
	2	“Workplace Security” advisory	
CX E	1	January 19, 2009 letter from Complainant to Stephan Gianoplus, copying the following individuals: Helena Williams; Kevin Fehn; Mitch Menarchem; James Compton; James Coumatos; Janet Merola; Kelly Valentin; Ronald Scardelletti; Arthur Maratea; and William DeCarlo	(Tr. 51–59)
	<b>“Instructions to Agents and Ticket Clerks” effective March 1, 2004:</b>		
	2–3	- Topic 414: Over and Short Accounts	
	5	- Topic 415: Ticket Seller’s Over/Short Review Report	
	4	- TOM Form – 6: Ticket Seller Correction Notice	
	6	- TOM Form – 8: Ticket Seller Over/Short Review Report	
	7	November 24, 2008 email from Julie Lam to Stephan Gianoplus regarding “RIC adjustments 08-3030 and 08-3019” and referencing Complainant’s “pending” trial	
	8	March 19, 2008 “Tour Balance Adjustment – Information Purposes Only: Control No. 08-3019”	
	9	Application for Ticket Refund: FORM TOM-10 (blank)	
	<b>February 4, 2008 “MTA Long Island Rail Road Specification For: Report of Seller Overages and Shortages” for Complainant:</b>		
	10	- From: January 1, 2008; To: January 31, 2008	
	11	- From: February 1, 2008; To: February 29, 2008	
	12–14	Handwritten note to Complainant from “Theresa” discussing “attached EOT & TOM 8 copies” and total money due for January and February	
	<b>“Delinquent [sic] CN’s 2008” report, listing Complainant:</b>		
	15	- “Entered into CSS 05/06/2008,” for the month February 2008, in the amount of \$36.07, “As Of 5/27/2008”	
	16	- “Entered into CSS 05/06/08,” for the month of February 2008, in the amount of \$36.07, “As Of 6/16/2008”	
	17	- “Entered into CSS 05/06/08,” for the month of February 2008, in the amount of \$36.07, “As Of 9/10/2008”	
	18	May 6, 2008 Ticket Seller Correction Notice for February 2008, in the amount of \$36.07, noting, “Your February shortage of \$16.10 has been added to your cumulative shortage of \$19.97,” and signed by Stephan Gianoplus, Assistant Manager – Passenger Services	

EX No.	EX Page No.	Description	Transcript Citation
	19	November 21, 2008 first Past Due Reminder – Past Due Correction Notice, in the amount of \$14.32, signed by Stephan Gianoplus	
	20	December 12, 2008 “Final Warning – Delinquent Correction Notice,” in the amount of \$14.32 for Correction Notice first issued on May 6, 2008, signed by Stephan Gianoplus	
CX I	1	April 4, 2006 Trial Waiver signed by Complainant, Mitchell Menarchem and William DeCarlo	(Tr. 88–90)
	2–5	National Mediation Board, Public Law Board No. 6988, Case No. 14, June 21, 2011 hearing date, findings and award, issued August 24, 2011	
	6–9	National Mediation Board, Public Law Board No. 6988, Case No. 11, January 28, 2010 hearing date, findings and denial, issued March 19, 2010	
	9–12	March 20, 2014 OSHA determination	
CX K	1	“Instructions to Agents and Ticket Clerks: Introduction”	(Tr. 97–104)
	2	Passenger Services Department Notice No. 2006-35 revised August 1, 2006	
	(submitted separately) <sup>11</sup>	Booklet entitled, “MTA Long Island Rail Road Corporate Safety Rules for Employees,” (admitted with the understanding that some of the policy revisions occurred in 2013 and 2014)	
		<b>“Instructions to Agents and Ticket Clerks” effective March 1, 2004:</b>	
	4–5	- Topic 101: Departmental Objective	
	8–9	- Topic 301: Safety	
	10	- Topic 804: Station Inspections	
	12	- Topic 1003: Dress Code	
	28–30	“Instructions to Agents and Ticket Clerks: Topic 212: Suspicious Persons & Unattended Packages” effective August 1, 2006	
	34	“Instructions to Agents and Ticket Clerks: Topic 302: Fire Extinguisher Servicing” effective June 1, 2007	
	33	“Ticket Agent & Ticket Clerk Instruction Manual: Topic 301: Safety” revised March 2013	
		<b>“Ticket Agent &amp; Ticket Clerk Instruction Manual” revised January 2014:</b>	
	6–7	- Topic 204: Security of Company Assets	
	31–32	- Topic 212: Suspicious Persons & Unattended Packages	
13–23	2006 MTA Chairman’s Safety Award: Passenger Services Department		
24	Office of Corporate Safety Bulletin No. 02-2015		

<sup>11</sup> The undersigned initially marked this booklet CX 14 at the beginning of the hearing, see Tr. 7; however, the booklet is actually part of CX K.

EX No.	EX Page No.	Description	Transcript Citation
	25	Office of Corporate Safety Bulletin No. 01-2015	
	26	Awards to Bulletin PS-02-2006	
	27	Awards to Bulletin PS-02-2007	
CX Q	1	TOM – End of Tour Report for January 2, 2008 and Remittance Report dated January 2, 2008, indicating “over/short” in the amount of \$17.25	(Tr. 162, 175)
	2	Ticket Seller Over/Short Review Report for Complainant, dated January 2, 2008, in the amount of \$17.25, undisputed	
	3	TOM – End of Tour Report for January 3, 2008 and Remittance Report dated January 3, 2008, indicating “over/short” in the amount of \$4.25	

In addition, the undersigned admitted portions of the following Complainant Exhibits:

EX No.	Pages Admitted	EX Page No.	Description	Transcript Citation
CX C	1, 3–13	1	October 3, 2006 letter from Farid Shahkoochi, M.D. regarding his September 6, 2006 examination of Complainant	(Tr. 41–46)
		3	August 10, 2009 letter from Rita Legotti, Manager, Resource Management & Control	
		4	“LIRR Medical Clearance Instructions”	
		5	Note from Stanley Brodsky, M.D.	
		6	September 21, 2009 request to Dr. Brodsky regarding Complainant's clearance to return to work, signed by Dr. Brodsky on October 3, 2009	
		7	October 5, 2009 facsimile from John Clarke, M.D., Physician-In-Charge, to Dr. Brodsky, requesting additional information	
		8	November 3, 2009 facsimile from Dr. Brodsky to Michael Nersesian, Assistant Director of Employee Services, at Respondent’s Medical Office	
		9	December 4, 2009 letter from Dr. Brodsky to Dr. Clarke	
		10–13	December 11, 2009 psychiatric examination by Michael Bernstein, M.D., reporting May 15, 2009 as the “date of accident”	
CX F	1, 3–13, 15–20	1	April 4, 2006 Trial Waiver, citing “Improper Performance of Duty: Violation of Instructions to Agents and Ticket Clerks: Topic 204: Security of Company Assets” on March 9, 2006, signed by Complainant, William DeCarlo, Local Chairman, and Mitchell Menarchem, Assistant General Manager, Passenger Services Department	(Tr. 69–82)
		3–11	May 26, 2010 position statement submitted by Respondent’s counsel to OSHA investigator	

<b>EX No.</b>	<b>Pages Admitted</b>	<b>EX Page No.</b>	<b>Description</b>	<b>Transcript Citation</b>
		12	Excerpt from “Rule 51A: Americans With Disabilities Act” and “Rule 52: Discipline”	
		13	Complainant’s earnings statement regarding December 24, 2009 pay date	
		15	May 11, 2009 certified mail letter from Kevin Fehn, General Manager – Passenger Services, to Complainant	
		16	April 7, 2009 Notice of Discipline regarding “Improper Performance of Duty: Violation of Instructions to Agents and Ticket Clerks: Topic 414: Failure to Pay Shortage Within Five Days,” signed by Mitchell Menarchem, Assistant General Manager – Station Operations	
		17	February 2, 2009 Rescheduling Notice for trial regarding “Improper Performance of Duty: Violation of Instructions to Agents and Ticket Clerks: Topic 414: Failure to Pay Shortage Within Five Days,” signed by Janet Merola, Chief Trial Officer	
		18	March 25, 2009 letter to Complainant regarding her March 19, 2009 Freedom of Information Law (“FOIL”) request	
		19	May 5, 2009 letter to Complainant regarding her FOIL request	
		20	June 15, 2009 letter to Complainant denying her FOIL request	
CX G	2–29	2–3	Diversity Management “Internal Discrimination Complaint,” signed by Complainant on April 30, 2008	(Tr. 69–82; 310)
		4–6	May 8, 2008 letter from Complainant to Mercedes Commodore, regarding “Chemical Exposure – 2006”	
		7–9	May 8, 2008 letter from Complainant to Mercedes Commodore, regarding “Chemical Exposure – 2007”	
		10	December 3, 2008 letter to Complainant from Michael Fyffe, Manager, Diversity Management	
		11–17	January 19, 2009 letter from Complainant to Helena Williams, President	
		18–20	January 19, 2009 letter from Complainant to Kelly Valentin, Equal Employment Opportunity Officer	
		21	March 24, 2009 certified letter from Complainant to Janet Merola	
		22–24	January 20, 2009 letter from Complainant, titled “Chemical Exposure – 2006” to Helena Williams, President	
		25–27	January 20, 2009 letter from Complainant, titled “Chemical Exposure – 2007” to Helena Williams, President	

<b>EX No.</b>	<b>Pages Admitted</b>	<b>EX Page No.</b>	<b>Description</b>	<b>Transcript Citation</b>
		28–29	February 2, 2009 letter from S.M. Drayzen, Vice President – Labor Relations, to Complainant, regarding Complainant’s January 19, 2009 letter to Helena Williams	
		30–34	Complainant’s Federal Employer’s Liability Act (“FELA”) Complaint filed in U.S. District Court, Southern District of New York, stamped received on June 28, 2009.	

Complainant withdrew CX M. (Tr. 107.) The undersigned excluded the following Complainant Exhibits:

<b>EX No.</b>	<b>Transcript Citation</b>
CX D	(Tr. 46–50)
CX H	(Tr. 88)
CX J	(Tr. 90–97)
CX L	(Tr. 105–06)
CX N	(Tr. 162–64)
CX O <sup>12</sup>	(Tr. 162, 167)
CX P	(Tr. 162, 170–71)

Respondent offered the following Exhibits, which the undersigned admitted:

<b>EX No.</b>	<b>Description</b>	<b>Transcript Citation</b>
RX A	Complainant’s resume	(Tr. 121)
RX B	Ticket Clerk job description	(Tr. 122–24)
RX C	Notice of Discipline, issued reprimand, dated February 27, 1998, for “failure to cover your assignment . . . on February 17, 1998,” and trial waiver, signed by Complainant on February 27, 1998	(Tr. 178–79)
RX E	Passenger Services Department: Trial Waiver, dated April 25, 2002, regarding “Violation of the Absence Control Policy,” issued reprimand, signed by Complainant, James Coumatos, Director – Passenger Services Administration, and William DeCarlo, Local Chairman-TCU	(Tr. 180)
RX F	Passenger Services Department: Trial Waiver, dated May 12, 2005, for “Violation of the LIRR Absence Control Policy,” issued reprimand, signed by Complainant, Mitchell Menarchem, Assistant General Manager, Passenger Services Administration, and William DeCarlo, Local Chairman-TCU	(Tr. 181)

<sup>12</sup> Complainant withdrew CX O because it is a duplicate of CX C.

<b>EX No.</b>	<b>Description</b>	<b>Transcript Citation</b>
RX G	Passenger Services Department: Trial Waiver, April 4, 2006, for “Improper Performance of Duty: Violation of Instructions to Agents and Ticket Clerks: Topic 204: Security of Company Assets,” issued fifteen working day suspension, signed by Complainant, Mitchell Menarchem, Assistant General Manager, Passenger Services Administration, and William DeCarlo, Local Chairman-TCU	(Tr. 182–84)
RX H	Passenger Services Department: Trial Waiver, dated November 13, 2007, regarding “Violation of the Absence Control Policy,” issued reprimand, signed by Complainant, James Compton, Assistant General Manager – Passenger Services Administration, and William DeCarlo, Local Chairman-TCU	(Tr. 185–86)
RX I	January 16, 2009 Notice of Trial, regarding “Improper Performance of Duty: Violation of Instructions to Agents and Ticket Clerks: Topic 414: Failure to Pay Shortage Within Five Days”	(Tr. 207)
RX J	February 2, 2009 Rescheduling Notice regarding trial for “Improper Performance of Duty: Violation of Instructions to Agents and Ticket Clerks: Topic 414: Failure to Pay Shortage Within Five Days”	(Tr. 208)
RX K	February 18, 2009 Rescheduling Notice regarding trial for “Improper Performance of Duty: Violation of Instructions to Agents and Ticket Clerks: Topic 414: Failure to Pay Shortage Within Five Days”	(Tr. 209)
RX L	March 17, 2009 Rescheduling Notice regarding trial for “Improper Performance of Duty: Violation of Instructions to Agents and Ticket Clerks: Topic 414: Failure to Pay Shortage Within Five Days”	(Tr. 210)
RX M	(Duplicate of CX E at 2–3)	(Tr. 195–97)
RX N	(Duplicate of CX E at 18)	(Tr. 187–95)
RX Q	(Duplicate of CX E at 19)	(Tr. 201)
RX R	(Duplicate of CX E at 20)	(Tr. 206)
RX W	Transcript of March 27, 2009 trial for “Improper Performance of Duty: Violation of Instructions to Agents and Ticket Clerks: Topic 414: Failure to Pay Shortage Within Five Days”	(Tr. 146–50)
RX X	(Duplicate of CX F at 16)	(Tr. 134–35, 216–17)
RX Y	(Duplicate of CX F at 15, with the exception of a handwritten note at the bottom of the page)	(Tr. 135–37, 219)
RX Z	(Duplicate of CX I at 6–9)	(Tr. 224)

<b>EX No.</b>	<b>Description</b>	<b>Transcript Citation</b>
RX GG	Family and Medical Leave Act (“FMLA”) Request Form, requesting intermittent leave from March 2009 to March 2010, signed by Complainant on January 28, 2009	(Tr. 225)
RX HH	February 23, 2009 letter from Dan Driscoll, Director-Employee Services, to Complainant, advising that her FMLA request was approved	(Tr. 226)
RX KK	September 29, 2009 letter from Dr. Clarke to Complainant, advising of the requirements for her clearance to return to work full duty	(Tr. 233)
RX NN	(Duplicate of CX C at 8)	(Tr. 237)
RX PP	General Release signed by Complainant and notarized on June 7, 2010	(Tr. 132–34)
RX QQ	Voluntary Petition filed in the U.S. Bankruptcy Court for the Eastern District of New York	(Tr. 115, 120)
RX RR	April 15, 2010 letter from Complainant’s former counsel to OSHA investigator	(Tr. 128–30)
RX SS	New York State Division of Human Rights Complaint, regarding color, disability and race discrimination, and retaliation, signed by Complainant and notarized on April 29, 2009	(Tr. 121–28)
RX TT	New York State Division of Human Rights Complaint, regarding disability discrimination, signed by Complainant and notarized on April 8, 2010	(Tr. 130–32)

The undersigned did not admit RX O. (Tr. 198.) Respondent withdrew RX JJ and RX OO because these exhibits are duplicates of CX C and CX I, respectively. (Tr. 137–39, 240–41.)

The undersigned has not considered the following exhibits that Respondent submitted in support of its Motion for Directed Verdict because Respondent never offered these exhibits at the hearing: RX D; RX P; RX S; RX T; RX U; RX V; RX AA; RX BB; RX CC; RX DD; RX EE; RX FF; RX II; and RX MM. Similarly, though Respondent discussed RX LL at the hearing, Respondent never moved this exhibit into evidence; consequently, the undersigned has not considered it.<sup>13</sup> (Tr. 258.)

Respondent proffered no new evidence during the November 23, 2015 hearing.

### C. Summary of the Testimonial Evidence<sup>14</sup>

<sup>13</sup> Respondent, further, did not move to admit these documents at the November 23, 2015 hearing when it presented its defense.

<sup>14</sup> For the sake of inclusivity and completeness, the undersigned has included summary of the entirety of the testimonial evidence of record, even though some testimony relates only to issues that remain undisturbed from the Partial Findings D&O. The summary that follows is the same or substantially similar to the summary of the testimonial evidence that appears in the Partial Findings D&O (see, pp. 14–18); however, it also includes summary of the November 23, 2015 hearing.

*1. Complainant's Presentation of her Case-in-Chief*

Complainant was the sole witness to testify at the March 9 and March 19, 2015 hearings; she testified to numerous issues, as follows. Regarding her job responsibilities, Complainant testified that customers relayed safety complaints to her or concerns about unsafe conditions, and that Respondent's safety policies required her to report these complaints to her supervisor and the Town of Hempstead Highway Department. (Tr. at 39.) Complainant also testified that Respondent's safety policies required her to report unsafe conditions on Respondent's property even when she was off the clock. (Tr. at 40.) Complainant was also involved in securing company assets, as she dropped off large sums of money at the bank each day as part of her job. (Tr. at 97–98.) Furthermore, Respondent's training manuals and policies state that all employees are involved in safety. (Tr. at 97–99.) Complainant observed that Respondent characterized the clerk typist job as a safety-sensitive position, while not characterizing the safety assistant job as safety-sensitive in the respective job descriptions. (Tr. at 99.) Complainant was also required to report suspicious activity, suspicious persons, and suspicious packages as part of her job, as reflected in Respondent's training manual and bulletins. (Tr. at 100.)

On cross-examination, Complainant stated that her resume (CX A at 1–2) and the description of the ticket clerk position (RX B) do not accurately reflect her safety-related job duties, but acknowledged that she did not have to take a medical or drug test before becoming a ticket clerk. (Tr. at 118–19, 121–22.) Complainant explained that she did not need to take a medical test before becoming a ticket clerk because she had previously worked as an assistant conductor. As an assistant conductor, Respondent required her to take the medical test; however, employees who begin working for Respondent as a ticket clerk are required to take medical and drug tests. (Tr. at 124–25.)

Complainant stated that she complained about a hazardous safety condition, and her resulting work-related injury, in September 2006 and again in August 2007, after her exposure to chemicals used to clean brass. (Tr. 29–30, 185.) The exposure to the chemicals caused Complainant to have an allergic reaction, including headaches, chest pain, dizziness, and asthma. (Tr. at 30, 34.) Complainant reported the 2006 incident to Roe Mitchell, who was the terminal manager, and William DeCarlo, her union representative, and she lost one week of pay because her reaction to the chemicals caused her to miss work. (Tr. at 30–31.) Complainant saw Dr. Clarke in 2006 after the first exposure, and Dr. Clarke refused to place her on leave; she requested an independent medical examination through her union and had to use disability sick time. (Tr. at 272.) Complainant testified that her doctor gave her a letter, which she then gave to Christopher Long, advising that she should not be exposed to chemicals after the 2006 incident; however, she stated that Respondent did not allow her to leave her post while the lobby was being cleaned. (Tr. at 34, 41.) Regarding her absences due to her adverse reaction to the chemicals, Complainant received a letter from Rita Legotti advising her that she needed to return to work. (Tr. at 42.) Complainant filed a complaint with Mr. Fyffe on April 30, 2008 because Respondent took no action to rectify the unsafe conditions after the second incident. (Tr. at 36, 43.) Complainant also filed an internal complaint with Mercedes Commodore on or about April 30, 2008, naming William DeCarlo and Dr. Clarke, among others. (Tr. at 70, 75, 272.)

Regarding the ticket shortages at issue, she testified that Stephan Gianoplus, manager of automated ticket sales, was one of the first individuals to tell Complainant that she needed to pay the two ticket shortages in April or May 2008, though she argued that these were auto spoil tickets. (Tr. at 51–52, 141.) Complainant explained that an auto spoil ticket is a ticket that results from the malfunctioning of a ticket office machine during a transaction, and the system does not account for the ticket; however, the customer paid for the ticket and this payment is reflected as an overage. (Tr. at 192.) Complainant had a conversation with Mr. Gianoplus on August 5, 2008 and sent him a letter, dated January 19, 2009, in which she stated that she had not received any documentation regarding the shortages. (Tr. at 51–52.) She testified that she never received any notification of shortages on her computer, and that she paid the shortage of \$21.75, though Respondent accused her of owing \$37.07, and specifically that Respondent “could never prove that [she] owed \$14.32.” (Tr. at 52.)

Complainant never had a problem following Respondent’s policies to pay shortages in the past, and she believed the \$14.32 shortage was possibly due to a malfunctioning of the ticket office machines, as reflected in the TOM 10 Form (CX I). (Tr. at 52, 141, 192.) Complainant stated that she did not receive the Correction Notice until November 24, 2008, though the shortage it referenced took place in January 2008. (Tr. at 53, 57–58.) Complainant received an email from Julie Lam after November 24, 2008, discussing Complainant’s “pending trial”; this email caused Complainant to become anxious because she was unaware of any shortages. (Tr. at 53–54, 200.) Complainant also discussed the shortage with Theresa Dorsey, who told Complainant that she needed to pay the shortage or face trial and a possible suspension. (Tr. at 57.) Complainant stated that she had no problem paying the shortage if Respondent gave her proof that she was responsible for it. (Id.) Complainant explained that Respondent should not have suspended her for the \$14.32 alleged shortage because she repeatedly requested documentation proving that it was a shortage and not an auto spoil ticket; furthermore, the TOM 10 Form shows that the employee is not responsible for paying auto spoil tickets. (Tr. at 152, 183, 200.) Moreover, this would have been her first violation of the shortage payment policy. (Id.)

On cross-examination, Complainant explained that the \$10.00 referenced on the January 2, 2008 TOM-8 Form (RX N at 3) was an overage, while the \$10.00 referenced on the February 27, 2008 TOM-8 Form (RX N at 4) was a shortage, which she did not dispute. (Tr. 194.) Complainant reiterated that per Respondent’s policies, ticket clerks are not responsible to pay for auto spoil tickets or uncollected tickets. (Tr. at 263.) On redirect examination, Complainant explained that her End of Tour Report shows an overage of \$14.32 for an auto spoil ticket. (Tr. at 263–64.)

Complainant addressed the previous trial waiver she received (CX F at 1) for leaving a cash box containing \$1,500.00 unattended. (Tr. at 59.) For this infraction of Respondent’s policy, Complainant received one working day suspension. (Id.) Complainant observed that she received a ten working days suspension in May 2009, later reduced to five days, for the \$14.32 shortage in dispute. (Tr. at 59, 108.) Complainant received notice of that suspension (RX X) on April 7, 2009. (Tr. at 135.) The suspension was reduced to five days by notice (RX Y) dated May 11, 2009. (Tr. at 136.) Complainant does not recall when she began to serve the five-day suspension, but stated that she served the suspension at some point during May 2009, but after

May 11, 2009. (Tr. at 136–37.) She also stated that the subsequent trial for the \$14.32 shortage was unfair because her union representative, William DeCarlo, did not support her and did not ask for evidence that Complainant owed the shortage; furthermore, no one referenced any policy that would justify Respondent’s disciplinary action. (Tr. at 60, 146–48, 253, 255.) Janet Merola, a labor relations manager, was the trial officer at the shortage trial. (Tr. at 71, 254.) Respondent also did not give Complainant the opportunity to file a grievance regarding the disputed shortage before the trial. (Tr. at 221.)

Complainant filed a FMLA request on January 28, 2009, seeking intermittent leave from March 2009 to March 2010 (RX GG). (Tr. 225.) Complainant stated that she did not immediately return to work after the suspension. (Tr. at 224.) Because of the suspension, she lost wages and became depressed; she could not perform the job for which she was trained, helping disabled individuals, due to her depression. (Tr. at 41.) Complainant’s anxiety and depression also rendered her unable to perform other job duties once she returned to work from the suspension. (Tr. at 42.) Complainant stated that her depression has also affected her husband and her children, and she believes that the suspension on her record will affect her ability to get another job. (Tr. at 113.)

Complainant was still out of work as of June 26, 2009. (Tr. at 79.) When she was ready to return to work on September 21, 2009, Complainant stated that she and her psychiatrist complied with everything that Dr. Clarke requested in order for her to receive clearance to return to work. (Tr. at 42, 227.) Complainant stated that Dr. Clarke refused to see her in October 2009, even though she had scheduled an appointment. (Tr. at 110.) After Dr. Clarke expressed concern regarding Complainant’s prescription for a controlled substance, Complainant’s psychiatrist changed her medication on October 3, 2009, and notified Dr. Clarke of this change on November 3, 2009.<sup>15</sup> (Tr. at 43, 234–35.) Complainant explained that she mentioned Dr. Clarke in her complaint to Mr. Fyffe. (Tr. at 43.) Complainant stated that Mr. Nersesian, the director of the medical office, also refused to see her and did not return her calls for about a week. (Tr. at 110.) Complainant requested an independent medical examination, which Dr. Bernstein conducted on December 11, 2009. The examining psychiatrist agreed that she was fine to return to work. (Tr. at 43.) However, Respondent did not contact her about returning to work until December 28, 2009, and she went back to work on December 31, 2009 as a ticket clerk. (Tr. at 111.)

On cross-examination, Respondent’s counsel questioned Complainant about filing for bankruptcy. (Tr. at 114.) Complainant filed for bankruptcy twice, most recently on March 12, 2010. (Tr. at 114–115.) Complainant agreed that the events giving rise to her OSHA whistleblower complaint took place in March 2010, and that she filed the OSHA whistleblower complaint on April 15, 2010. (Tr. at 115–16.) Complainant testified that she mentioned her allegations against Respondent during the interview with the bankruptcy trustee, and stated that her bankruptcy attorneys were also aware of her whistleblower complaint. (Tr. at 116.) She stated that the attorneys and trustee told her that the complaint filed against Respondent was not

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<sup>15</sup> At the hearing, counsel for Employer explained that Dr. Clarke’s facsimile to Dr. Brodsky (CX C at 7) should have been dated November 5, 2009, instead of October 5, 2009. (See Tr. 235–37.)

reportable income. (Tr. at 117–18.) She also stated that the bankruptcy petition would be ending in March 2015. (Tr. at 120.)

Regarding the complaint she filed in April 2009 with the EEOC, which was also automatically filed with the New York State Division of Human Rights, Complainant explained that her whistleblower complaint addressed different issues. (Tr. at 125–28.) With regard to her complaints of retaliation in the instant matter, Complainant clarified that it covers “the retaliation that was brought on as a result of [her] filing internal and external complaints, in regards to an injury and unsafe hazardous working conditions.” (Tr. at 125.) Specifically, her retaliation complaint in the instant matter relates to the complaints she filed with diversity management and Respondent’s president regarding the subsequent retaliation for reporting her workplace injuries due to the exposure to cleaning chemicals and the unsafe conditions. (Tr. at 126–28.) Although Complainant referenced the shortages in her EEOC and New York state filings, Complainant clarified in her OSHA whistleblower complaint that upon further consideration, she believed the shortage issue was actually retaliation, not discrimination. (Tr. at 129.) She also clarified that her EEOC and state complaints allege that Respondent discriminated against her by not allowing her to return to work, while her complaint under the Act alleges that Respondent retaliated against her by not clearing her to return to work, in addition to the accusations of retaliating by suspending her for the alleged shortages. (Tr. at 131–32.)

Regarding the general release (RX PP), Complainant testified that she signed it and had her signature notarized. (Tr. at 134.)

Regarding prior discipline, Complainant received a notice of discipline on February 27, 1998, indicating a reprimand for her failure to cover her assignment (RX C); Complainant does not believe this discipline was fair. (Tr. at 178–79.) Complainant also received a reprimand by notice of discipline dated April 25, 2002 for violation of Respondent’s absence policy; this notice of discipline also constituted a trial waiver. (Tr. at 180.) Complainant received another reprimand and trial waiver on May 12, 2005 (RX F). (Tr. at 181.) Complainant also received a reprimand and trial waiver on April 4, 2006, but does not believe Respondent fairly disciplined her. (Tr. at 182.) Complainant received a reprimand and trial waiver on November 13, 2007 (RX H), relating to a violation of the absence policy, and acknowledged that this took place after she filed the second complaint regarding the chemical exposure. (Tr. at 185.)

## 2. Respondent’s Presentation of its Defense

On November 23, 2015, the parties reconvened in New York City for a continuation of the hearing. Complainant continued to represent herself, *pro se*; Respondent had the assistance of counsel. (Tr. at 296.)

Respondent called its first witness, Marianne DeRosa. (Tr. at 298–306.) DeRosa is a “standing Chapter 13 trustee in the Eastern District of New York.” (Tr. at 298.) DeRosa reviewed RX QQ, which she stated represented Complainant’s “Chapter 13 petition and related papers.” (Tr. at 300.) DeRosa had no specific recollection of any conversation she had with Complainant, especially concerning the instant matter. (*Id.*) DeRosa reviewed RX RR,

Complainant's OSHA filing, and stated that if Complainant "believed she had a claim, she should [have] scheduled it" in her subsequent bankruptcy proceeding. (Tr. at 303-04.)

Respondent called its second witness, Michael Fyffe. (Tr. at 306-18.) Respondent has employed Mr. Fyffe since 2005. Mr. Fyffe has served as Respondent's "Manager of Diversity Management," since January 2009. (Tr. at 307.) In this role, Mr. Fyffe investigates complaints concerning "Equal Employment Opportunity harassment and discrimination." (Id.) According to Mr. Fyffe, CX G, pages 4-9, contains Complainant's letters dated May 8, 2008 titled "Chemical Exposure 2006" and "Chemical Exposure 2007." (Tr. at 311.) Mr. Fyffe never spoke to Dr. Clarke about Complainant's letters; according to Mr. Fyffe, Complainant never provided Dr. Clarke the letters. (Tr. at 312.) Further, Mr. Fyffe never spoke to Mr. Nersesian about Complainant's letters; Complainant also never provided Mr. Nersesian with the letters. (Tr. at 312-13.) Respondent never created an investigative file as a result of Complainant's letters. (Tr. at 314.) Mr. Fyffe never spoke with Dr. Clarke or Mr. Nersesian concerning CX G, pages 11-17, Complainant's April 30, 2008 letter. (Tr. at 314-15.)

Respondent called its third witness, Dr. John Clarke. (Tr. at 318-29.) Dr. Clarke is currently employed with Con Edison. Prior to this, Respondent contracted with Dr. Clarke's then-employer, Take Care Health Systems, and Dr. Clarke "work[ed] at the Long Island Rail Road." (Tr. at 318.) Respondent never directly employed Dr. Clarke, but Dr. Clarke worked at "the Long Island Rail Road facility." (Tr. at 318-19.) Dr. Clarke testified that he never saw or spoke with anyone about the following documents: CX G, pages 4-9; CX G, pages 11-17; or CX G, pages 22-27."<sup>16</sup> (Tr. at 319-20.) Dr. Clarke testified that the first time he received notice about Complainant's claim against Respondent occurred two or three weeks prior to the November 23, 2015 hearing. (Tr. at 320.) Prior to then, Dr. Clarke was not aware of Complainant's allegations against Dr. Clarke. (Id.)

Dr. Clarke reviewed CX C, page 5, which contained a September 21, 2009 note from Dr. Stanley Brodsky written on a prescription pad. (Tr. at 321.) Dr. Clarke testified that such a note was "absolutely not" the type of evidence that would allow an employee to return to work after an extended absence. (Id.) Dr. Clarke explained that such a note "doesn't really give you any concrete information regarding the person's condition, stability, or treatment for the condition . . . [T]his would never be acceptable." (Id.) Assuming Complainant were taking a controlled substance, Dr. Clarke stated that Dr. Brodsky's note would not constitute sufficient evidence to allow Dr. Clarke to clear Complainant's return to work, because such drugs have side effects and are drugs of abuse. "So the very fact that she was on a controlled substance," Dr. Clarke continued, "we would always try to get additional information to truly establish if she's safe and stable to work." (Tr. at 322.) According to CX C, page 8, Dr. Brodsky prescribed Complainant Clonazepam from September 5, 2009 to October 3, 2009, and then substituted Buspar for Clonazepam. (Tr. at 323.) CX C contained no indication as to when Dr. Clarke received Dr. Brodsky's letter. (Id.) CX C, page 7, is a letter Dr. Clarke wrote to Dr. Brodsky concerning the change in Complainant's medication. Dr. Clarke further stated that he did not deliberately fail to gather more information from Dr. Brodsky, because of the complaints Complainant made against

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<sup>16</sup> To reiterate, these documents contained Complainant's safety complaints against Respondent.

Dr. Clarke. (Tr. at 324.) Dr. Clarke did not recall receiving a request from Complainant to meet prior to December 4, 2009; Dr. Clarke never ignored Complainant's request. (Tr. at 324–25.)

CX C, pages 10–13, contains a December 11, 2009 letter from a third party doctor—Dr. Michael Bernstein—concerning Complainant's ability to return to work. Dr. Clarke testified that he did not delay Complainant's return to work based on Dr. Bernstein's letter. (Tr. at 325.) Dr. Clarke noted that, although Dr. Bernstein's letter was dated December 11, 2009, there was no indication concerning when Respondent received the letter. (Id.) Dr. Clarke hypothesized that he would have followed through with Dr. Bernstein's recommendation, if he had access to it. (Id.) Dr. Clarke reiterated that none of his decisions concerning Complainant were made in light of the complaints she made against Dr. Clarke, or her 2006 or 2007 work-related complaints. (Tr. at 326.)

Respondent called Michael Nersesian to the stand as its fourth witness. (Tr. at 329–36.) Mr. Nersesian is the current HR Business Director for the Respondent. (Tr. at 329.) In 2008 and 2009, however, Mr. Nersesian served as the Assistant Director of Employee Services. (Id.) Mr. Nersesian was required to manage “the overall operation of the medical department, as well as the employee assistance program.” (Id.) Mr. Nersesian never made decisions regarding whether an employee out on medical leave was able to return to work. (Id.)

Mr. Nersesian testified that he never saw or discussed with anyone the letter from Complainant to Mercedes Commodore, contained in CX G, pages 4 through 9, wherein Complainant complained of her exposure to chemicals. (Tr. at 329–30.) Mr. Nersesian also never saw or spoke with anyone concerning the letter dated January 19, 2009 from Complainant to the president of the railroad, contained in CX G, pages 11 through 17. (Tr. at 330.) The same is true of the January 20, 2009 letter located at CX G, pages 22 through 27. (Id.) Mr. Nersesian testified that he would have no role in determining whether Complainant or any other employee “was being prohibited from returning to work due to medical reasons.” (Tr. at 332.) Mr. Nersesian's purview began after an employee was cleared to return to work. (Id.) Mr. Nersesian never spoke with Complainant; she never tried to speak with Mr. Nersesian. (Tr. at 333.) Mr. Nersesian did not supervise Dr. Clark. (Id.) Discussing CX G, page 8, Mr. Nersesian stated that he has no specific recollection of any conversation he had with Complainant wherein she sought her medical records. (Tr. at 333–35.)

Respondent called Michael Chirriolo as its last witness. (Tr. at 336–44.) From 2008 to 2009, Mr. Chirriolo served as Director of Labor Relations for Respondent. (Tr. at 336.) Steven Drayzen served as Mr. Chirriolo's supervisor at the time relevant to Complainant's claim. (Tr. at 337.) Mr. Chirriolo stated that CX G, page 28, was a letter from Mr. Drayzen to Complainant in response to her letter to the president of the railroad concerning her IME and “some issues concerning various managers” and a pending disciplinary trial. (Id.) Mr. Drayzen did not copy Mr. Nersesian or Dr. Clarke on his response. (Tr. at 338.) Mr. Chirriolo never spoke with Dr. Clarke or Mr. Nersesian about the contents of Mr. Drayzen's response. (Id.) Concerning RX OO (a document identical to CX I), Mr. Chirriolo's name was on the letter but he did not draft the contents of the document; the neutral members of the arbitration panel drafted the document. (Tr. at 339–40.) Mr. Chirriolo read the contents of RX OO into the record. Mr. Chirriolo stated that Dr.

Bernstein's letter was forwarded to the carrier on December 28, 2009, and that Complainant returned to work on December 31, 2009. (Tr. at 342.)

#### IV. DISCUSSION

To prevail on an FRSA claim, the complainant must establish the following elements by a preponderance of the evidence: (1) she engaged in protected activity, as statutorily defined; (2) she suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. Henderson v. Wheeling & Lake Erie Ry., ARB No. 11-013, slip op. at 10 (Oct. 26, 2012) (citing 49 U.S.C.A. § 42121(b)(2)(B)(iii)).<sup>17</sup> If the complainant meets her burden of proof, “the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant’s protected behavior.” Id. (citing 49 U.S.C.A. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)–(iv)).

Complainant has elected to proceed without the assistance of counsel. See, e.g., Tr. at 296. The Board requires fact finders to construe liberally a *pro se* litigant’s complaints and papers “in deference to their lack of training in the law and with a degree of adjudicative latitude.” Jenkins v. CSX Transp., Inc., ARB No. 13-029, slip op. at 10–11 (May 15, 2014) (internal quotation marks omitted); see Wyatt v. Hunt Transport, ARB No. 11-039, slip op. at 2 (Sep. 21, 2012); Williams v. Nat’l R.R. Passenger Corp., ARB No. 12-068, slip op. at 3 (Dec. 19, 2013). The undersigned has considered the Board’s mandate throughout the entirety of the adjudication of Complainant’s complaint.

At the November 23, 2015 hearing, the undersigned gave notice to the parties concerning the outstanding issues requiring adjudication in light of the October 19, 2015 Decision and Order. In that Order, the undersigned found that Respondent undertook an adverse action, “but it was only on the issue of the relation between her safety and health complaint in 2009 and the delay by Dr. Clarke and Mr. Nersesian in approving her return to work.” (Tr. at 348.) The undersigned told the parties that their briefs should concern whether the Respondent severed the “causal relationship” between Complainant’s protected activity and the actions of Dr. Clarke and Mr. Nersesian. (Tr. at 348–49.) “So all we’re talking about,”<sup>18</sup> the undersigned continued, “is the delay in approving your return to work and whether or not . . . [such a delay] was because of your protected activity.”<sup>19</sup> (Tr. at 349.)

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<sup>17</sup> Whistleblower protection action brought under the FRSA is governed by the burdens of proof set forth at 49 U.S.C.A. § 42121(b). Henderson, ARB No. 11-013, slip op. at 9–10; Palmer v. Canadian National Railway/Illinois Central Railroad Company, ARB No. 16-035, ALJ Case No. 2014-FRS-154 (Sep. 30, 2016).

<sup>18</sup> On review of the Partial Findings D&O, the undersigned notes that another outstanding issue is whether Complainant is able to show circumstantially that Dr. Clarke and Mr. Nersesian undertook prejudicial employment actions based on an inconsistent application of Respondent’s policies. See Partial Findings D&O at 32–33.

<sup>19</sup> The undersigned reiterates that summaries of the entirety of the testimonial evidence and documentary evidence are included herein—notwithstanding that the resolution of many issues remains undisturbed from the Partial Findings D&O—for the sake of completeness and inclusivity.

The discussion that follows assumes as true—but does not affirmatively hold—that, in light of Respondent’s case in chief, the preponderant evidence continues to demonstrate that Complainant engaged in protected activity and that Complainant suffered an adverse employment action.<sup>20</sup> The focus of this Decision and Order is whether Respondent acted with discriminatory intent due to Complainant’s alleged protected activity when it decided to undertake any unfavorable personnel action. The central issue is whether the individuals who allegedly took an adverse employment action against Complainant—here Dr. Clarke and Mr. Nersesian—had knowledge of Complainant’s alleged protected activity. See, e.g., Fredrickson v. The Home Depot U.S.A., Inc., ARB Case No. 07-100, p.8–9 (May 27, 2010) (dismissing a case where the complainant did not dispute that the management officials responsible for his termination had no knowledge of the complainant’s protected activity); Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432, 450–51 (denying a motion for summary judgment because one of the individuals responsible for a plaintiff’s termination was aware of the plaintiff’s protected activity knowledge (citing to Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011) for the proposition that whistleblower protection applies even when a supervisor has knowledge of alleged protected activity, but the ultimate decision maker has no such knowledge)); Bechtel v. Competitive Technologies, Inc., OALJ Case No. 2005-SOX-00033, slip op. at 33–34 (Oct. 5, 2005), *aff’d* Bechtel v. Competitive Technologies, Inc., ARB Case No. 09-052 (Sep. 30, 2011) (“There is no evidence to contradict [c]omplainant’s contention that Respondent’s Chief Financial Officer” knew of the claimant’s protected activity.) Complainant must prove the causal connection between her alleged protected activity and Respondent’s adverse employment action by a preponderance of the evidence. See Wignall v. Union Pac. R.R. Co., ARB No. 10-103, slip op. at 4–5 n.1 (Feb. 22, 2012) (explaining that, for claims before OALJ, a complainant must prove the causal connection between the alleged protected activity and the adverse employment action by a preponderance of the evidence; raising an “inference” of such a connection can only sustain a complaint for purposes of maintaining and furthering an OSHA investigation). Proving such a causal connection is “an essential element” of a SOX complaint. Fredrickson, ARB Case No. 07-100 at 9.

A review of the totality of the evidence presented demonstrates that Complainant is unable to show the “essential element” that Respondent took an unfavorable employment action against Complainant *because of* her alleged protected activity; Dr. Clarke and Mr. Nersesian had no knowledge of Complainant’s alleged protected activity. Therefore, Dr. Clarke and Mr. Nersesian were unable to take prejudicial employment actions against Complainant.

However, in the October 19, 2015 Partial Findings D&O, the undersigned concluded that Complainant “offered sufficient circumstantial evidence” to prove that Dr. Clarke and Mr. Nersesian refused to meet with her or act on Dr. Bernstein’s December 11, 2009 letter, due to her protected activity. See Partial Findings D&O at 32–33. The undersigned relied exclusively on

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<sup>20</sup> Likewise, the undersigned will not disturb its findings within the D&O concerning ancillary matters discussed in Employer’s Brief, such as whether Complainant’s complaint is estopped because she did not disclose it on her bankruptcy petition, See Employer’s Brief at 9–12, or whether Complainant’s Title VII complaint, ADA complaint, or the June 2010 release she signed precludes Complainant’s continued prosecution of her complaint. See Partial Findings D&O at 21–23.

Complainant's—at that time—unrebutted testimony to demonstrate that Respondent took adverse employment actions against Complainant due to her alleged protected activity. See id. (citing Tr. at 41–42, 79, 110, 224–25, 272).

As discussed below, the undersigned finds credible the testimony of Dr. Clarke and Mr. Nersesian that they had no knowledge of Complainant's alleged protected activity; therefore, Dr. Clarke and Mr. Nersesian could not have acted with discriminatory intent. In other words, the testimony of Dr. Clarke and Mr. Nersesian is sufficient to sever the connection that Complainant putatively made within her case in chief. See, e.g., Partial Findings D&O at 32–33. In light of the evidence proffered within Respondent's case in chief, the undersigned holds that Complainant is unable to establish the “essential element” of proving the nexus between her putative protected activity and Respondent's allegedly adverse employment action. For the reasons set forth below, therefore, this tribunal must dismiss Complainant's complaint.

Dr. Clarke testified to his general lack of knowledge concerning Complainant's alleged protected activity. See, e.g., Tr. at 318–29. Specifically, Dr. Clarke testified that he never read the contents of Complainant's letters containing her alleged protected activity; Dr. Clarke also never spoke with anybody about the content of such letters. See Tr. at 319–20 (referring to Complainant's letters alleging protected activity contained in CX G). Dr. Clarke opined that the first knowledge he had concerning Complainant's alleged protected activity occurred two or three weeks prior to the November 23, 2015 hearing. (Tr. at 320.) As discussed above, to establish that Complainant's protected activity—here the letters contained in CX G—caused Respondent to take adverse employment actions against her, Complainant would have to prove, by a preponderance of the evidence, Respondent's actions were taken as a result of her protected activity. Dr. Clarke's credible testimony that he had no knowledge of Complainant's alleged protected activity preponderates against Complainant's burden to establish the contributing factor element.

Mr. Nersesian's similar testimony further weighs against Complainant's burden. Like Dr. Clarke, Mr. Nersesian also testified to his general lack of knowledge concerning Complainant's alleged protected activity. See, e.g., Tr. at 329–36. Specifically, Mr. Nersesian never read nor otherwise had knowledge of the letters contained in CX G containing Complainant's alleged protected activity. See Tr. at 329–30, 333. Similar to her burden to establish that Dr. Clarke's actions were due to her protected activity, here, Complainant must prove by a preponderance of the evidence that Mr. Nersesian conducted his alleged adverse employment action due to her purported protected activity. Mr. Nersesian's credible testimony demonstrates that he did not have the requisite knowledge of Complainant's alleged protected activity for Complainant to establish the contributing factor element.

Respondent called two other witnesses that corroborate the statements of Dr. Clarke and Mr. Nersesian concerning their lack of knowledge. Michael Fyffe testified that he never spoke with either Dr. Clarke or Mr. Nersesian concerning Complainant's letters. See Tr. at 314–15. Michael Chirilo was involved in coordinating Respondent's response to Complainant's letters. Respondent's response came in the form of Steven Drayzen's letter. Mr. Chirilo credibly testified that he never copied Dr. Clarke or Mr. Nersesian on Respondent's response; Mr. Chirilo further did not speak with Dr. Clarke or Mr. Nersesian about the contents of

Respondent's response. See Tr. at 338. The undersigned finds that the testimony of Mr. Fyffe and Mr. Chirilo corroborates the testimony of Dr. Clarke and Mr. Nersesian concerning their lack of knowledge of Complainant's alleged protected activity. The corroborative nature of such testimony supports the undersigned's finding that Dr. Clarke and Mr. Nersesian credibly testified to their lack of knowledge of Complainant's purported protected activity.

In contrast to the convincing testimony contained in Respondent's case in chief, Complainant relied on logical inference to assert her point that Dr. Clarke and Mr. Nersesian had knowledge of her alleged protected activity. In her brief, Complainant asserted, "Dr. John Clarke and Michael Nersesian were made aware of the complaints that were filed against them and they used the opportunity, when it arose, to retaliate against me." See Complainant's Brief at 4. Complainant raised Mr. Drayzen's letter, which stated in part, "[y]our contentions have been thoroughly reviewed and investigated by the Diversity Management staff." From this statement, Complainant reasoned:

[s]ince my contentions were thoroughly reviewed and investigated, and complete investigations were conducted in each instance, then, according to Mr. Drayzen, everyone I mentioned in my complaints was contacted and questioned. It's impossible to thoroughly review and investigate contentions unless you contact and question those involved to see if there's any merit to the complaint.

Complainant's Brief at 2. Although Complainant deduced the apparent knowledge of Dr. Clarke and Mr. Nersesian, based on Mr. Drayzen's letter, the undersigned finds that Complainant's conclusion relied principally on logical inference concerning the knowledge that Dr. Clarke and Mr. Nersesian possessed at the time they undertook their alleged adverse employment actions. See Wignall, ARB No. 10-103, slip op. at 4-5 n.1 (stating that, at the OALJ level, a Complainant must show more than an inference that the protected activity was a cause of the adverse action, and that temporal proximity is one way to establish the causal connection between the two elements). The undersigned gives less weight to Complainant's reasoning, which relied on inference alone, than the undersigned accords to Respondent's evidence, which relied on the credible testimony of Dr. Clarke and Mr. Nersesian. See Fredrickson, ARB Case No. 07-100 at 9 (holding that "mere allegations" that Respondent was aware of a complainant's protected activity are "insufficient" to defeat a motion to dismiss).

Additionally, Respondent's evidence sufficiently negates this tribunal's prior finding that Complainant had proven the contributing factor element based on circumstantial evidence of pretext, as demonstrated in Dr. Clarke and Mr. Nersesian's supposed inconsistent application of Respondent's policies. See Partial Findings D&O at 32-33. The undersigned based her prior holding, in part, on the presumed fact that Complainant was fit to return to duty on December 11, 2009—the date of Dr. Bernstein's letter—but "Respondent did not contact her about returning to work until December 28, 2009." Partial Findings D&O at 33. The undersigned recognizes Dr. Clarke's testimony that, although the letter from Dr. Bernstein is indeed dated December 11, 2009, there is no indication that Dr. Clarke or anyone else associated with Respondent received or otherwise had knowledge of the existence of Dr. Bernstein's December 11, 2009 letter until later in December 2009. See Tr. at 325-26. Compare CX C at 8 (including a fax cover sheet indicating the date in which Dr. Brodksy sent his December 4, 2009 letter to Mr. Nersesian),

with CX C at 10–13 (lacking any information concerning the date of transfer and addressee of Dr. Bernstein’s December 11, 2009 letter). Furthermore, the August 29, 2011 decision of the National Mediation Board, titled “Award No. 14 (Case No. 14),” states that Respondent<sup>21</sup> did not receive Dr. Bernstein’s letter until December 28, 2009. See CX I, p. 4 (holding that due to the “unique circumstances of the dispute” Claimant deserved compensation from the time of Dr. Bernstein’s letter until her return to service). The evidence that Dr. Clarke and Mr. Nersesian did not know about Dr. Bernstein’s letter until some date after December 28, 2009—chiefly Dr. Clarke’s credible testimony—outweighs Complainant’s argument that Respondent committed a prejudicial adverse employment action when it did not return her to work immediately after Dr. Bernstein’s December 11, 2009 letter.

Therefore, the undersigned holds that, in light of the totality of the evidence, Complainant is unable to establish the causal relationship between her purported protected activity and Respondent’s alleged adverse employment action through an inconsistent application of Respondent’s policies. In other words, the undersigned does not maintain the holding in the Partial Findings D&O that Complainant has proven the contributing factor element based on circumstantial evidence of pretext. See Partial Findings D&O at 32–33.

## V. CONCLUSION

In summary, the totality of the evidence demonstrates that Complainant is unable to establish the causal relationship between her purported protected activity and Respondent’s alleged adverse employment action. At the March 19, 2015 hearing, Respondent presented compelling evidence that Dr. Clarke and Mr. Nersesian did not know of Complainant’s complaints, so they did not have the requisite knowledge to undertake a prejudicial employment action. Such evidence outweighs Complainant’s argument, which the undersigned found logical but lacking support in the evidentiary record. Moreover, the undersigned has not maintained her finding that Dr. Bernstein’s December 11, 2009 letter is evidence of the inconsistent application of Respondent’s policies sufficient to demonstrate disparate treatment and circumstantial evidence of pretext. For all of these reasons, the undersigned holds that Complainant is unable to establish, by a preponderance of the evidence, the causal relationship between her purported protected activity and the alleged adverse employment action. Because Complainant is unable to satisfy this “essential element,” Fredrickson, ARB Case No. 07-100 at 9, of a FRSA claim, the undersigned must **DISMISS** Complainant’s complaint.

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<sup>21</sup> Throughout the August 29, 2011 document, the National Mediation Board referred to Respondent as “Carrier.” See CX I at 2 (“Public Law Board No. 6988 . . . finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act.”).

SO ORDERED.

**THERESA C. TIMLIN**  
Administrative Law Judge

Cherry Hill, New Jersey

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

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

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

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve

the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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

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

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).