



Issue Date: 08 April 2016

OALJ Case No. 2014-FRS-00153
OSHA Case No. 5-1260-14-035

In the Matter of:

LAURIE WILLIAMS,
Complainant,

v.

**UNION PACIFIC RAILROAD and
BRIAN M. HARRIS,**
Respondents.

**ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION
AND ORDER CANCELLING HEARING**

This proceeding arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 (the "Act"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and Section 419 of the Rail Safety Improvement Act of 2008 (the "Improvement Act"), Pub. L. No. 110-432, and the regulations issued at 29 C.F.R. Part 1982.

On January 15, 2016, I received Respondents' Motion for Summary Decision (the "Motion"), and attached Respondents' exhibits ("RX") A-K. On February 9, 2016, I received Complainant's Response to Respondents' Motion for Summary Decision (the "Response"), and attached Complainant's exhibits A-B ("CX"). On March 1, 2016, I received Respondents' Reply in Further Support of their Motion for Summary Decision (the "Reply").¹

As explained below, the Motion is granted, the complaint in this matter is dismissed, and the hearing currently set for April 18, 2016, is cancelled.

¹ The only exhibit attached to the Reply is the Deposition of Penny Lyons, previously submitted as CX B.

UNDISPUTED FACTS

The following facts are undisputed. Laurie Williams (“Complainant” or “Ms. Williams”) engaged in protected activity on June 13, 2011, when she reported an on-the-job injury. (Motion; Response. *See* RX A).

On June 5, 2013, Ms. Williams reported to Union Pacific Railroad’s (“Union Pacific”) Proviso Yard for her job as a car retarder operator (“CRO”). (Deposition of Laurie Williams, RX C at 14:4-6; 21:4-7). At about 11:15 a.m., one of the cars which Ms. Williams was responsible for “humping” derailed. (RX C at 24:14-24).

Two of the managers on duty at the Proviso Yard were Doug Johnson, the Manager of Yard Operations, who was responsible for “general supervision of all the operating employees in the facility” (RX D at 7:3-14), and Brian Harris, the Director of Terminal Operations, who was responsible for “manag[ing] directly the transportation team,” and to whom Union Pacific managers, including Mr. Johnson, reported. (RX I at 6:22-8:4). Mr. Johnson began investigating the cause of the derailment, and was the first manager to speak with Ms. Williams. (RX C at 27:16-18).

After her first conversation with Mr. Johnson, Ms. Williams returned to work. (RX C at 29:12-30:1). Mr. Johnson continued investigating the cause of the derailment (RX D at 17:2-17), and spoke to Ms. Williams again about an hour later. (RX C at 30:8-21; RX D at 17:16-21). Mr. Johnson did not tell Ms. Williams that she would be required to take a drug test during either conversation. (RX D at 24:1-7).

After his second conversation with Ms. Williams and after receiving authorization from Mr. Harris, Mr. Johnson called a drug tester just after 1:00 p.m., and stated that he had done so “in case we did need to drug test Ms. Williams.” (RX D at 25:1-23). Union Pacific’s policy on “Reasonable Suspicion and Reasonable Cause Drug and Alcohol Testing” states:

[a]n accident or incident in which drug and alcohol testing is not mandatory under [federal regulations] may require testing under Union Pacific authority. Union Pacific requires reasonable cause drug and alcohol testing of all employees . . . when . . . an employee’s acts or omissions result in the violation of any safety or operating rule which has the potential to . . . result in an accident and/or personal injury to self or others.

(Union Pacific Railroad Drug and Alcohol Policy § 9.1.3, RX F at 19).

Ms. Williams contacted her supervisor prior to “tying up,” *i.e.*, leaving the railyard, and asked if she could tie up; she stated that she called her supervisor because there had been a derailment, and that that she would not have contacted her supervisor prior to tying up if there had not been a derailment. (RX C at 33:13-36:15). Ms. Williams told her supervisor that her relief had arrived, and her supervisor told Ms. Williams that she could tie up. (RX C at 35:9-12). As Ms. Williams was leaving the railyard at approximately 2:20 p.m., Mr. Harris drove towards her and warned her that Mr. Harris believed that Mr. Johnson was “waiting” for Ms. Williams.

(RX C at 38:16-39:16). Ms. Williams stated to Mr. Harris that she needed to pick her son up from school at 2:30 p.m., and Mr. Harris warned Ms. Williams that if she left the railyard she would be refusing a drug test. (RX C at 39:17-40:5). Ms. Williams understood that refusing a drug test could result in her dismissal. (RX C at 40:6-11).

Two or three days after the derailment, Union Pacific determined that the derailment was caused by “ballast rock” “getting caught between the switch points that prevented the switch from locking up properly.” (RX D at 17:22-18:2).

Union Pacific conducted an investigative hearing on July 5, 2013, into Ms. Williams’s alleged refusal to take a drug test. (CX A). Ms. Williams was terminated by letter dated July 9, 2013, for refusing to take a drug test administered in accordance with Union Pacific’s Drug and Alcohol Policy. (RX J). The termination letter was signed by General Superintendent Neil Scott. (RX J).

DISCUSSION

Summary Decision Standard

29 C.F.R. § 18.72(a) states:

[a] party may move for summary decision, identifying each claim or defense—or the part of each claim or defense—on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion.

FRSA Whistleblower Standards

Under the FRSA, a railroad carrier “may not discharge . . . or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act” involving one of various statutorily protected activities. 49 U.S.C. § 20109(a); 29 C.F.R. § 1982.102(b). The protected activities include “notify[ing], or attempt[ing] to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee.” 49 U.S.C. § 20109(a)(4); *see also* 29 C.F.R. § 1982.102(b)(1)(iv).

Section 20109 incorporates the procedures enacted by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”). 49 U.S.C. § 42121(b); 49 U.S.C. § 20109(d)(2)(A). To prevail, a complainant must establish by a preponderance of the evidence that: (1) she engaged in a protected activity, as statutorily defined; (2) she suffered an adverse personnel action; and (3) the protected activity was a contributing factor in the adverse action. 49 U.S.C. § 42121(b)(2)(B)(iii). *See Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, OALJ No. 2010-FRS-030 (ARB Apr. 21, 2015). If a 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 adverse action in the absence of the complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1982.109(a)-(b).

Here, Respondents do not dispute that Complainant engaged in protected activity, or that Complainant suffered an adverse action. Rather, Respondents argue that Complainant cannot establish that her protected activity was a contributing factor in her termination. (Motion at 7-10). A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 5 (ARB Feb. 29, 2012) (quoting *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011)). Complainant may establish that the protected activity was a contributing factor either directly or indirectly through circumstantial evidence. *DeFrancesco*, slip op. at 6-7; *Powers*, slip op. at 11.

Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.

DeFrancesco, slip op. at 7.

A Genuine Dispute Exists Regarding Respondents' Actual or Constructive Knowledge of Complainant's Protected Activity

Implicit in the contributing factor analysis is whether a respondent had actual or constructive knowledge of a complainant's protected activity when it decided to take the adverse action. See *Bobreski v. Givvo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 17 (ARB June 24, 2011) ("The issue of knowledge is a necessary part of the single question of causation and similarly requires that the evidence be considered as a whole.") The Benefits Review Board has held that "proof that an employee's protected activity contributed to the adverse action does not necessarily rest on the decision-maker's knowledge alone Proof of a contributing factor may be established by evidence demonstrating 'that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity.'" *Rudolph v. National R.R. Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 15-16 (ARB Mar. 29, 2013) (citing *Bobreski*, slip op. at 14). "Conversely, the evidence as a whole may demonstrate that none of the decision-makers knew about the employee's protected activity and thereby break the causation chain between the protected activity and the final adverse action." *Bobreski*, slip op. at 14.

Respondents first argue that Complainant cannot establish that her protected activity was a contributing factor in her termination because no "decision maker at Union Pacific knew or suspected, actually or constructively" that Ms. Williams engaged in protected activity in 2011 when she reported her on-the-job injury. (Motion at 7). Respondents state:

[n]either Harris nor Scott worked at Proviso in 2011 when Claimant reported her personal injury, and Johnson was employed in an entirely different capacity, without supervisory authority. In addition, none had knowledge of Claimant's report of personal injury or illness prior to the investigation into the June 5, 2013 derailment, the ordering of the drug test, the disciplinary charge, or the determination that Claimant should be terminated.

(Motion at 7). That is, Respondents argue that if no decision-maker was aware of Complainant's protected activity before Respondents began investigating Complainant's refusal to take a drug test, that the protected activity could not have contributed to Complainant's termination.

I deny Respondents' Motion based on this ground for two reasons. First, as a matter of law, even if Respondents could point to uncontroverted evidence that no decision-maker knew of Complainant's on-the-job injury report at the outset of the investigation into her refusal to take a drug test, there would not be a sufficient basis to grant the Motion because Respondents may have become aware of Complainant's prior protected activity during the course of the investigation but before her termination. *See Rudolph*, slip op. at 15-16; *Bobreski*, slip op. at 14 (holding that an ALJ is to determine whether a causal connection existed between the "protected activity and the *final* adverse action") (emphasis added). To the extent that Respondents argue for dismissal of the complaint because no decision-maker knew of Ms. Williams's protected activity prior to the investigation—but not prior to Ms. Williams's termination—I reject that argument as a matter of law.

Furthermore, a genuine dispute exists regarding at what point the decision-makers had actual or constructive knowledge of Ms. Williams's protected activity. Mr. Scott swore in his affidavit that he reviewed the transcript of the July 5, 2013 investigative hearing before terminating Ms. Williams's employment (RX K, ¶ 5), and the transcript contains several references to Ms. Williams's protected activity (CX A at 23:26-24:13; 100:1-12; 109:15-110:2). Mr. Harris testified at his November 6, 2015 deposition that although he was not aware that Ms. Williams reported the June 13, 2011 injury, that he did have access to employee personnel files, and stated that these files included reports of on-the-job injuries. (RX I at 8:5-9:12). Mr. Johnson stated that he had access to employee personnel files, and that at some point after June 5, 2013, he became aware that Ms. Williams reported an on-the-job injury, although he did not "recall the exact date that I became aware" of Ms. Williams's protected activity. (RX D at 7:15-8:16). Because a genuine dispute exists as to whether the decision-makers actually or constructively knew about Ms. Williams's protected activity prior to her termination, Respondent cannot "break the causation chain between the protected activity and the final adverse action." *Bobreski*, slip op. at 14.

A Genuine Dispute Exists as to Whether Complainant's Protected Activity Was a Contributing Factor in Complainant's Termination

While the temporal proximity between Complainant's protected activity and her termination does not evidence a causal link between the two, and while Union Pacific has not provided shifting explanations for her termination that could evidence a contributing factor, there is a genuine dispute as to whether Union Pacific inconsistently applied its drug testing policies to

Ms. Williams. Viewing the evidence in the light most favorable to Ms. Williams, this creates a disputed material fact concerning the contributing factor prong of her prima facie case. I address each of these issues in turn.

Temporal Proximity Does Not Evidence a Causal Link Between Complainant's Protected Activity and Her Termination

Respondents also argue that Complainant cannot establish that her protected activity was a contributing factor in her termination “where two years separate her protected activity from her unfavorable personal [sic] action.” (Motion at 9). The Board has held that the length of time between a protected activity and an adverse action can indirectly evidence a causal link between protected activity and an adverse action:

[o]ne of the common sources of indirect evidence is “temporal proximity” between the protected activity and the adverse action. While not dispositive, the closer the temporal proximity is, the stronger the inference of a causal connection. This indirect or circumstantial evidence can establish a causal connection between the protected activity and adverse acts.

Warren v. Custom Organics, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 11 (Feb. 29, 2012) (citing *Reiss v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010)). Here, I find that, by itself, the two-year span between Complainant's injury report and her termination is too long a period of time to demonstrate a causal connection by a preponderance of the evidence, without additional evidence that Complainant's protected activity was a contributing factor in her termination.

A Genuine Dispute Exists as to Whether Union Pacific Inconsistently Applies Its Drug-Testing Policies to Ms. Williams

Complainant argues that there is additional “circumstantial evidence of inconsistent application of an employer's policies.” (Response at 10). Complainant argues that Union Pacific inconsistently applied its reasonable cause testing policies by:

- attempting to test Ms. Williams after the 2013 derailment, but not testing or attempting to test Ms. Williams after a 2004 derailment;
- not removing Ms. Williams from service on June 5, 2013, after the derailment;
- not conducting Ms. Williams's drug test “as soon as possible” after the derailment; and
- offering Ms. Williams “leniency”—*i.e.*, enrollment in a drug rehabilitation program—although leniency “is against [Union Pacific's] policy.”

(Response at 10).

Initially, I note that Union Pacific's drug testing was not prescribed by federal regulations, including those set out at 49 C.F.R. Part 219, but by Union Pacific's internal “Railroad Drug and Alcohol Policy.” (*See supra.*) Penny Lyons, who is Union Pacific's senior

manager of drug and alcohol testing, testified at her deposition that Union Pacific performed drug testing after a derailment if on-site managers determined that there had been a potential rules violation, and that it was possible that a test would not be performed if on-site managers determined that there was not a potential rules violation. (*See* CX B at 34:25-36:2; 37:16-38:14). Mr. Harris testified that a derailment could trigger a reasonable cause drug test “if the employee was in proximity to the derailment or had some type of control where they could have caused or contributed to the derailment or could not have been eliminated as causing or contributing to the derailment, that employee would be subject to a reasonable cause drug test.” (RX I at 11:5-14). Mr. Johnson testified, similarly, that Union Pacific’s policy for reasonable cause drug tests was to attempt to eliminate employee fault before ordering a test: “[i]f you can find the cause of the derailment or the incident and that cause allows you to rule out any potential employee that was involved in that incident, you would not be required to drug test them because they were not at fault for the incident.” (RX D at 14:4-8).

A Genuine Dispute Exists as to Whether Respondent Inconsistently Tested Respondent Following Derailments

Ms. Williams testified that she was not required to take a drug test following a derailment in “July or August of 2004.” (RX C at 26:18-27:11). Respondent notes that Ms. Williams was tested on September 13, 2004 (*see* RX H), and argues that this drug test was related to the 2004 derailment. (Reply at 8). Thus a genuine dispute exists as to whether Union Pacific did conduct a reasonable cause drug test in 2004 related to Ms. Williams’s derailment in that year, and that issue is material insofar as Union Pacific’s inconsistent testing of an employee following derailments pre- and post-protected activity could function as circumstantial evidence that Ms. Williams’s protected activity was a contributing factor in her termination.

Allowing Ms. Williams to Continue Work After the 2013 Derailment Was Not Inconsistent with Union Pacific’s Policy

Ms. Lyons testified that Union Pacific’s policy regarding removing employees from service differed from federal regulations. 49 C.F.R. § 291.203 requires railroads to “make every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident,” and states that while employees who are tested are not “inhibit[ed]” “from performing in the immediate aftermath of the accident or incident,” “where practical, the railroad must utilize other employees to perform such duties.” Ms. Lyons testified that, in contrast, that under Union Pacific’s internal policy for reasonable cause drug testing:

[t]he only time that it becomes imperative that an employee cannot operate any longer is if we see signs or symptoms. Then you must stop that employee from working and test them immediately. If we have a reasonable cause test and we don’t see signs and symptoms, we do not have to stop them from working right away.

(CX B at 27:16-23). She testified that although this policy was unwritten, that Union Pacific managers were trained that “[i]f there is work that needs to be done and the employee can do that

while we're waiting on a collector or someone to arrive, that is acceptable." (CX B at 29:6-30:7).

Complainant argues that a genuine dispute exists as to whether Union Pacific inconsistently applied its policy to her, because she testified at her September 29, 2015 deposition: "[t]hat's not how you handle . . . drug testing. You don't work for three hours and then the manager tell[s] you to go take the drug test." (Response at 4. *See* RX C at 45:4-7). Ms. Williams's statement is conjecture, however, as there is no evidence that establishes that as a policy employees were removed from work for a reasonable suspicion or reasonable cause drug or alcohol test, or that Ms. Williams's treatment was atypical. Because it is conjecture, Ms. Williams's testimony does not create a genuine dispute as to Union Pacific's policy for removing employees prior to testing. *See Williams v. Nat'l R.R. Passenger Bd.*, ARB No. 12-068, ALJ No. 2012-FRS-016 (ARB Dec. 19, 2013); 29 C.F.R. § 18.72.

Therefore, the fact that Ms. Williams was allowed to continue working after the 2013 derailment is not inconsistent with Union Pacific's policies, and does not function as circumstantial evidence that Ms. Williams's 2011 protected activity was a contributing factor in her termination.

The Delay in Ms. Williams's Drug Test Was Not Inconsistent with Union Pacific's Policy

Complainant calculates a roughly three-hour period between the derailment and Ms. Williams leaving the Union Pacific railyard before the drug tester arrived, and a roughly two-hour period between the derailment and the authorization of the drug test: the derailment occurred at 11:15 a.m., Mr. Johnson ordered the drug test shortly after 1 p.m., and the drug tester had not arrived when Ms. Williams departed at 2:20 p.m. (Response at 1-3). Complainant agrees with Respondents that between the derailment and contacting the drug tester, Mr. Johnson was engaged in "investigat[ing]" the derailment. (Response at 2. *See* RX D at 20:13-27:15).

Mr. Harris, who testified that he had authorized the drug test (*see* RX I at 32:14-16), testified that "[i]deally . . . you want to administer the test as closely in proximity as possible." (RX I at 11:18-19). He testified that he did not recall at what time he authorized the test, but he stated that "there's a gap between when you call and when the drug would show up, so I would say [authorization] would be done fairly early on in the [investigative] process." (RX I at 33:13-16). Ms. Lyons testified that drug testing was to be conducted "as quickly as possible," but that:

when you talk about doing it as quickly as possible . . . the managers have to figure out [] whether they want the test in the first place. That takes a little bit of time. And then they have to call the collector when they make that determination. And then we have the wait time of the collector arriving on site.

(CX B at 36:11-20).

Complainant has not pointed to any specific evidence that Union Pacific did not follow its internal policy for reasonable cause drug tests. Indeed, the undisputed evidence supports a

finding that Mr. Johnson and Mr. Harris followed company policy by first attempting to rule out employee involvement, which would have obviated the need for a drug test.

Although Union Pacific's Leniency Was Inconsistent with Its Official Policy, Respondents' Leniency Is Not Circumstantial Evidence that Ms. Williams's Protected Activity Was a Contributing Factor in Her Termination

Ms. Williams testified at her September 29, 2015 deposition that David Wells, the Chairman of Ms. Williams's union (*see* CX A), informed Ms. Williams that she had been offered, via a letter that she was shown, the opportunity to “say that I was, I guess, on drugs, and I'd go through a program to get my job back.” (RX C at 51:10-21). She testified that she made the decision not to accept this offer. (RX C at 51:24-52:6; RX C at 60:18-61:2).

Ms. Lyons testified that although employees who tested positive for drugs or alcohol might receive a “waiver” and have the option of seeking treatment and keeping their job, that “a refusal would be a dismissal with no chance of returning, if the policy was followed,” and that it would be “highly unusual to get a waiver with a refusal.” (CX B at 32:9-33:9). Union Pacific's written policy, on the other hand, states that reinstatement may be available to “[a]n employee dismissed because of a non-negative test result or a refusal” (RX F at p. 39, § 22.1.1)—but Union Pacific's policy also states that “[e]mployees dismissed for refusal will not be allowed to take part in the Employee Assistance Program for the purpose of reinstatement.” (RX F at p. 30, § 16.3.9).

When viewed in the light most favorable to the Complainant, this evidence suggests that Union Pacific, by offering Ms. Williams the opportunity to enroll in a rehabilitation program, did act inconsistently with its policy, and in a “highly unusual” way. But while the “inconsistent application of an employer's policies” can be circumstantial evidence of a contributing factor, this standard cannot be applied mechanically, and the fact that Union Pacific offered leniency to an employee who engaged in protected activity does not suggest that protected activity contributed to an adverse action. *Cf. Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 8 (ARB May 31, 2013). In *Hutton*, respondent acted with more stringency than its policy required: respondent terminated complainant after complainant failed to attend an investigative hearing; complainant argued that the company's collective bargaining agreement prohibited termination for such an absence if an employee attempted to postpone the hearing. *Id.* The Board remanded the case to OALJ to “address this discrepancy” between the collective bargaining agreement's postponement procedure and employer's refusal to accommodate a postponement. *Id.* Here, in contrast to *Hutton*, Respondent treated Complainant with more leniency than its official policy dictated. I find that offering Complainant the opportunity to keep her job despite company policy to the contrary is not circumstantial evidence that Complainant's protected activity contributed to Respondents' decision to terminate Complainant. In fact, it tends to show the opposite: that Union Pacific's disciplinary proceedings were motivated solely by Ms. Williams's refusal to take the drug test, not in retaliation for her protected activity.

Union Pacific Has Not Provided “Shifting Explanations” that Are Circumstantial Evidence of a Contributing Factor

Complainant also argues that Respondents have provided “shifting explanations for its actions”: namely, “Scott’s affidavit that says he had no knowledge of Williams’s 2011 injury, despite [his] having reviewed the disciplinary hearing transcript.” (Response at 10). Mr. Scott’s affidavit is inconsistent, in that Scott swore he had reviewed the transcript of the investigative hearing but “was not aware of Laurie Williams’s June 13, 2011 report of personal injury when I made my determination,” despite references to that report in the transcript. (RX K, ¶¶ 5-6). But this inconsistency is not a “shifting explanation” for the adverse action. *See Speegle v. Stone & Webster Constr., Incorp.*, ARB No. 06-041, ALJ No. 2005-ERA-006 (Sept. 24, 2009) (finding substantial evidence of a shifting explanation when respondent stated during an OSHA investigation that complainant was terminated for “insubordination and foul language” but stated during a subsequent regulatory investigation that the complainant was terminated for refusing to follow company procedures); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB Dec. 30, 2004) (finding substantial evidence of shifting explanations when supervisors offered “conflicting testimony” regarding the reason for an employee’s transfer). In contrast to *Speegle* and *Negron*, between the termination letter sent by Mr. Scott to Ms. Williams dated July 9, 2013 (RX J “Notification of Discipline Assessed”), and his affidavit (RX K), Mr. Scott consistently stated that Ms. Williams’s employment was terminated because she refused to take a drug test. Viewed in the light most favorable to Complainant, the inconsistency only evidences that Mr. Scott had actual or constructive knowledge of Ms. Williams’s protected activity (*see supra*)—but not that Mr. Scott shifted his stated reason for terminating Complainant.

Respondents Have Shown by Clear and Convincing Evidence That They Would Have Terminated Complainant Absent Her Protected Activity

Although a genuine dispute exists regarding whether the Union Pacific decision-makers who terminated Ms. Williams had actual or constructive knowledge of her protected activity, and regarding whether Union Pacific inconsistently applied its Drug and Alcohol Policy by not testing Ms. Williams after the 2004 derailment but requiring a test after the 2013 derailment, there is no dispute that Respondents would have terminated Ms. Williams regardless of whether she engaged in protected activity. Accordingly, Respondents have met their burden to establish the affirmative defense by clear and convincing evidence.

Union Pacific’s policy regarding drug testing refusal states: “[a]n employee who refuses to provide breath or body fluid specimen(s) when required, or fails to remain available after an accident or incident, is considered insubordinate under Union Pacific rules.” (EX F at p. 29, § 16.3.2). The policy further states: “[i]f it is determined that an employee violated this drug and alcohol policy the employee will be subject to discipline, up to and including dismissal.” (EX F at p. 31, § 17.2). It is undisputed that Ms. Williams left the railyard after Mr. Harris informed her that she needed to remain available for a drug test. Union Pacific did not immediately terminate Ms. Williams’s employment, but held a formal investigative hearing on July 8, 2013; during the hearing Mr. Harris, Mr. Johnson, Ms. Williams, and Mark Petersen, Union Pacific’s Manager of Training and Attendance, testified. (CX A). The hearing was adversarial in nature,

and Ms. Williams was represented by her union's Chairman, Mr. Wells. (CX A). Furthermore, Union Pacific offered to reinstate Ms. Williams if she enrolled in a drug rehabilitation program. Thus, it is undisputed that Ms. Williams violated Union Pacific's drug testing policy, that Union Pacific investigated her violation via a formal hearing, that Union Pacific offered Ms. Williams leniency, and that Union Pacific only terminated Ms. Williams after she refused the offer. This sequence of events provides clear and convincing evidence that Respondents were not motivated to discipline Ms. Williams because of her protected activity, but instead acted because of her refusal to take the drug test, and establishes by clear and convincing evidence that Respondents would have terminated Ms. Williams for refusing to take the drug test in the absence of her reporting her on-the-job injury in 2011.

CONCLUSION

1. A genuine dispute exists as to whether Respondents had actual or constructive knowledge of Complainant's protected activity.
2. A genuine dispute exists as to whether Respondents inconsistently applied Union Pacific's drug testing policies to Complainant by not requiring her to submit to a drug test following a 2004 derailment (before she engaged in protected activity in 2011), but by requiring a drug test following a 2013 derailment (after she engaged in protected activity). This dispute is material insofar as it may function as circumstantial evidence that Complainant's protected activity was a contributing factor in Complainant's termination.
3. There is no other evidence that Complainant's protected activity contributed to her termination.
4. Although a genuine dispute exists as to whether Respondents inconsistently applied Union Pacific's drug testing policy to Complainant in 2004 and in 2013, Respondents have demonstrated by clear and convincing evidence that they would have terminated Complainant in the absence of her protected activity.

Accordingly, Respondents' Motion for Summary Decision is **GRANTED**. The hearing scheduled for April 18, 2016, is hereby **CANCELED**, and the complaint in this matter is **DISMISSED**.

SO ORDERED.

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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.

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 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).