



Issue Date: 16 December 2020

Case No.: 2019-FRS-00081

In the Matter of

KENNETH ZACKERY

Complainant

v.

UNION PACIFIC RAILROAD

Respondent

DECISION AND ORDER

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). The Decision and Order that follows is based on an analysis of the record, including items not specifically addressed, arguments of the parties, and the applicable law.

I. PROCEDURAL HISTORY

Union Pacific Railroad (“Respondent”) terminated Kenneth Zackery’s (“Complainant”) employment on May 3, 2019 following an investigative hearing. On May 29, 2019, Complainant filed a complaint with the Occupational Safety and Health Administration (“OSHA”).¹

On June 12, 2019, the Secretary completed its investigation and found that Complainant engaged in protected activity, but that Respondent did not terminate Complainant’s employment because of this protected activity. On July 9, 2019, the Office of Administrative Law Judges received a letter from Complainant objecting to the Secretary’s findings, requesting a hearing, and explaining his case.

In August 2019, this matter was initially assigned to a different judge. On September 11, 2019, Complainant filed his complaint. On September 13, 2019, this matter was reassigned to the undersigned. Respondent filed its answer on October 2, 2019. On March 3, 2020, the Tribunal

¹ The following abbreviations are used in this Decision: “JX” refers to Joint Exhibits; “CX” refers to Complainant’s Document Exhibits; “EX” refers to Respondent’s Exhibits; and “Tr.” refers to the transcript of the August 4-5, 2020 hearing.

denied Respondent's Motion for Summary Decision. On March 17, 2020, the Tribunal continued this hearing due to the COVID-19 crisis and rescheduled the hearing for August 4, 2020.²

On April 8, 2020, the Tribunal received an email from Complainant advising that, as of April 6, 2020, Mr. H. Julian Frachtman would be representing him in this matter. On April 16, 2020, the Tribunal issued an Order Directing Filing of a Notice of Appearance. On April 23, 2020, both Mr. Frachtman and Ms. Stephanie M. Harp entered an appearance on behalf of Complainant. They thereafter participated in all matters in this case through completion of hearing testimony.³

On August 4, 2020, the Tribunal held a video-hearing in this matter. During the hearing, the Tribunal admitted CX 1 through CX 13, CX 15 – CX 18, CX 20, and CX 22-CX 26,⁴ and EX 1 to EX 15.⁵ The Tribunal heard testimony from Complainant, Mr. Joe Dominy (Complainant's supervisor), Mr. Mark Yost (a fellow employee)⁶ and Jason Rea (reviewing officer)⁷. The parties and their counsel were present during all phases of the video-hearing.

At the beginning of day two of the hearing, Complainant's counsel filed a Motion to Withdraw as Counsel due to irreconcilable differences that occurred after the first day of hearing. After asking Complainant if he wanted his counsel to withdraw (which he did not), the Tribunal denied Complainant's counsels' motion, but told counsel that they could renew their motion at the conclusion of testimony. Tr. at 256. During the hearing, counsel again moved to withdraw. Tr. at 271-72. The Tribunal denied the request, finding that Complainant proceeding without counsel at this late stage would prejudice him, and that further delaying the hearing would prejudice Respondent. Additionally, when asked, Complainant again indicated that he did not want his counsel to withdraw. Tr. at 274. Again, the Tribunal informed Complainant's counsel that it would consider a motion to withdraw after the hearing.⁸

² The rescheduled hearing was initially set to be an in-person hearing. However, on June 1, 2020, the Chief Judge issued Administrative Order and Notice, *In Re: Continued Suspension of In-person Hearings Due to COVID-19 National Emergency*, Case No. 2020-MIS-00008 (June 1, 2020). The Chief Judge noted that "all previously scheduled hearings are automatically converted to a telephone or video hearing and will convene on the same time and date as originally scheduled, unless ordered otherwise by the presiding judge." On June 2, 2020, the Tribunal held a teleconference with the parties and, after discussing the matter with them, the Tribunal informed the parties that the hearing would be held as a video-teleconference hearing. The Tribunal issued an order to that effect on June 2, 2020.

³ For a summary of events concerning Complainant's representation status during the period up to the hearing, see the Tribunal's August 10, 2020, Order Granting Counsel's Second Motion to Withdraw as Counsel for Complainant.

⁴ Tr. at 21. CX 25 and CX 26 are to be exhibits if necessary that address the attorneys' fee petition. There were not offered at the hearing but were to be admitted if Complainant would prevail. Tr. at 18. Additionally, CX 15 and CX 16 are merely extracts from CX 22. CX 16 are from CX 22 pages 13 to 28 and CX 15 are from CX 22 pages 30 to 43. Tr. at 13. See also *id.* at 336-37.

⁵ Tr. at 22 and 336.

⁶ Mr. Yost has worked for Respondent for 14 years. He has been a foreman, assistant foreman, truck driver and trackman. He and Complainant have worked on the gang together. Tr. at 259.

⁷ Mr. Rea has worked for Respondent since 1998. He started as a trackman and got into management in 2004 and progressed up through management. In 2018, he became the Assistant Vice President of track programs and construction. Tr. at 318-20.

⁸ In addition, before the hearing closed, the Tribunal asked Complainant if there was anything else that he

On August 6, 2020, the day following the hearing, Complainant's counsel renewed their motion referencing "irreconcilable differences" with their client.⁹ Counsel represented that Complainant had been presented with the motion and they advised him of his briefing deadlines. Counsel represented that Complainant opposed the motion but Respondent's counsel did not.

On August 7, 2020, the Tribunal received Complainant's Opposition to the Councils' [sic] Motion to Withdraw from the case.¹⁰ In his Opposition, Complainant expressed his frustration about his counsels' Motion to Withdraw and how they represented him. He indicated that the manner in which they represented him had led to a mischaracterization of his character. Complainant stated that he was prepared to write his own closing brief but requested that the Tribunal waive or reduce attorney fees due to the potential damage of his counsel withdrawing their representation. On August 10, 2020, the Tribunal granted Complainant's counsels post-hearing motion to withdraw.¹¹

On August 11, 2020, the Tribunal issued an Order Setting Briefing Dates. Complainant filed his initial brief on September 9, 2020 and reply brief on December 14, 2020. Respondent filed its brief on November 24, 2020.

II. SUMMARY OF THE PARTIES' POSITIONS

A. Complainant's Position

Complainant maintains that Respondent terminated his employment after he attempted to report a work-related illness. Br. at 1. He acknowledged that he may have "messed up or confused a couple of dates." Br. at 2. He believes Respondent viewed him as "damaged goods" after being diagnosed with bilateral carpal tunnel syndrome. He notes that his hand pain occurred during a seven-hour drive to his work site and that is why he missed work on that occasion. Br. at 2. Complainant maintains that he attempted to reach Mr. Dominy but he did not answer his phone so Complainant left him a brief voicemail. Br. at 2. Complainant asserts that his voicemail asked Mr. Dominy to call him back, which he did not do, even after Complainant missed three days of work. Br. at 3. Complainant notes that he provided proof on his diagnoses from a doctor's visit upon his return to work on March 19, 2019. Complainant asserts that once he returned to work, he met with Mr. Dominy in his office and asked to fill out a personal injury report, but Mr. Dominy told him that he did not know the proper procedure, as he had never filled one out. Br. at 4. In response to his injury, Mr. Dominy assigned Complainant to operate a different piece of equipment that was less stressful on the hands. Br. at 4-5. Complainant argues that it was Mr. Dominy's duty

wanted to tell the Tribunal before it closed the record. He said there was not. Tr. at 335.

⁹ Counsel cited to 29 C.F.R. § 18.36(g)(1). However, no such reference exists. The Tribunal suspects that counsel intended to reference 29 C.F.R. § 18.22(e).

¹⁰ In his Opposition, Complainant indicated that he has served his counsel and Respondent's counsel with the Opposition.

¹¹ In this Order the Tribunal informed Complainant that he should seriously consider obtaining new counsel to further assist him and that the briefs to be filed are essentially closing arguments that explain to the Tribunal why he believes that he should prevail, and that it a brief normally contains citation to facts from the record and case law.

to ensure that he had the correct forms to fill out, and the supervisor was “the only person who can access such forms.” Br. at 6.

Complainant contends that the following day, Mr. Dominy pulled him aside, presented him with the waiver, and told Complainant that he had to either sign the waiver or Mr. Dominy would pull him out of service. Br. at 6. Complainant states that he signed the waiver without a chance to consult with a union representative because he could not afford to miss work, having already missed three days during that work week. Br. at 6-7. Complainant believes that Mr. Dominy wrongly issued him an unauthorized absence violation because he was seeking medical treatment at the time. Br. at 7.

Complainant asserts that because gang workers travel such long distances to work sites, Respondent’s employees are allowed a grace period if they show up late due to unforeseen troubles en route. Br. at 8. On April 16, 2019, Complainant had vehicle trouble during his ten-hour drive to the work site. Br. at 8. Complainant contacted Mr. Dominy to let him know of his issue. Complainant says he arrived a few minutes late after his 9.5-hour drive. Br. at 8. Complainant was ready and able to work, but Mr. Dominy marked him as tardy. Complainant believes that Mr. Dominy did this because Complainant had requested to report a work-related illness just prior to this event, and maintains Mr. Dominy is lying about the events that occurred. Br. at 9. He contends that Mr. Dominy has created a false paper trail to “cover up his wrongful unlawful actions.” Br. at 10. Complainant pointed to the evidence he presented: a medical record showing a diagnosis and return to work statement; his testimony about reporting his condition to Mr. Dominy as soon as he returned to work on March 19, 2019; and the similarity of his and Mr. Dominy’s recollections of the conversation that occurred in Mr. Dominy’s office following his return to work. Br. at 11. He argues that Mr. Dominy failed to follow Respondent’s procedure when reporting an employee’s injury and that this failure could lead to Respondent disciplining Mr. Dominy. Br. at 12-13.

Complainant notes that his unauthorized absence violations were adverse actions and, in both his first and second offenses, he was denied the opportunity to consult with a union representative before waiving his rights. Br. at 13-14.

Complainant alleges that his reporting his hand injury was a contributing factor to the adverse actions he received. He noted his lack of prior reports of injury. Br. at 14-15.

Complainant maintains that Respondent cannot prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of his protected activity. Br. at 17. He asks the Tribunal to consider the transcript of the third violation hearing (EX 2), and Mr. Dominy’s own words that workers are given a fifteen minute grace period to report to work. Br. at 18 (citing EX 2 at 25-26).

For damages, Complainant seeks reinstatement, back pay with interest, vacation, 401(k) recoupment, reinstatement of his health benefits and expungement of his record of all alleged violations. Br. at 21-22. Complainant also hopes that Mr. Dominy would be punished for his treatment of Complainant. Br. at 22.

In his reply brief, Complainant maintained that Respondent terminated his employment for failing to report to service on April 16, 2019 after Mr. Dominy allegedly marked a false unauthorized absence, when he was in fact present at the job briefing that day. Complainant asserts that this was done to cover up his supervisor's and Respondent's true intentions, which was retaliation for him reporting a work-related illness. He argued that Respondent has failed to prove that it had no motive to wrongfully terminate him and it failed to prove that he had attendance issues.¹² Complainant maintained that tardy and unauthorized absence "are two completely difference offenses/charges." Compl. Reply Br. at 5. He reiterated that Mr. Dominy never gave him the form to file his injury report. He noted that he was only a few minutes late after driving close to ten hours to the job site. Compl. Reply Br. at 8. He denies ever being warned about being late as Respondent claimed. Compl. Reply Br. at 9. Concerning mitigation of damages, Complainant noted that we are currently in the middle of a pandemic and he has a duty to protect his family and this explains, in part, why he has not sought work. Compl. Reply Br. at 10. He requested that Respondent purge his alleged absence records, he be compensated for pain and suffering, the Tribunal impose punitive damages, and that some type of disciplinary action be taken against Mr. Dominy. Compl. Reply Br. at 11-12.

B. Respondent's Position

Respondent argues Complainant's evidence falls short of meeting his burden that it retaliated against him by dismissing him from service because he had reported a personal injury. It maintains that Complainant failed to prove that he engaged in protected activity or that he reported a personal injury, or that it even knew that Complainant engaged in protected activity or that he had reported a personal injury. It claims that Mr. Dominy is the more credible witness and that Complainant has given conflicting versions of relevant events. In particular, Respondent cites to Complainant's complaint that was sent to it following the investigation and Complainant's dismissal. Resp. Br. at 18. It notes that during his investigatory hearing, Complainant testified that his absence was due to him attending to his wife's health struggles and he makes no mention of going to a doctor's appointment for a hand injury. Resp. Br. at 17. Respondent cites to other examples of inconsistent statements made by Complainant that it argues undercuts Complainant's credibility. Respondent maintains that Mr. Rea, the decision-maker, did not know or suspect that Complainant engaged in protected activity by reporting a personal injury. Resp. Br. at 22 and 26-27. Finally, Respondent asserts that it demonstrated by clear and convincing evidence that it would have terminated Complainant's employment because of his pattern of missing work. Resp. Br. at 23-24.

III. ISSUES

- A. Did Complainant Timely File his Claims?
- B. Did Complainant Engage in Protected Activity?
- C. Did Complainant Suffer an Adverse Action?
- D. Did Complainant's Protected Activity Contribute to the Adverse Action?
- E. Would Respondent Have Taken the Same Action in the Absence of Complainant's Protected Activity?

¹² Complainant lists several items that "Respondent failed to prove." However, the Tribunal notes that Respondent need not prove anything until Complainant establishes by the preponderance of evidence his initial burden of proof.

IV. APPLICABLE LAW¹³

The purpose of the FRSA is to “promote safety in every area of railroad operations and reduce rail-road-related accidents and incidents.” 49 U.S.C. § 20101. Section 20109(a) of the Act, in pertinent part, prohibits a railroad carrier, a contractor or subcontractor of a railroad carrier, or an officer or employee of a railroad carrier, from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because (s)he: (a) provided information regarding any conduct the employee reasonably believes constitutes a violation of any federal law, rule, or regulation relating to railroad safety, or security, if the information is provided to a person with supervisory authority over the employee; or a person with authority to investigate, discover, or terminate the misconduct; (b) refused to violate any federal law, rule, or regulation regarding railroad safety or security; (c) filed a complaint related to the enforcement of provisions of the Act; or (d) notified the railroad carrier or the Secretary of Labor of a work-related personal injury or work-related illness of an employee.

Additionally, Section 20109(b) prohibits a railroad carrier, or an officer or employee of a railroad carrier, from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because he: (a) reported in good faith a hazardous safety or security condition; (b) refused to work when confronted by a hazardous safety or security condition related to the performance of the employee’s duties, provided the refusal was made in good faith and no reasonable alternative to refusal was available, and a reasonable person in the circumstances then confronting the employee would conclude that the hazardous condition presented an imminent danger of death or serious injury, and the urgency of the situation did not allow sufficient time to eliminate the danger without refusal, and the employee, where possible, notified the railroad carrier of the existence of the hazardous condition and his intention not to perform further work, or not authorize the use of the hazardous equipment, track, or structures unless the condition is corrected immediately, or the equipment, track, or structures are repaired properly or replaced; or (c) refused to authorize the use of any safety-related equipment, track, or structures if the employee believes they are in a hazardous safety or security condition, subject to the same qualifying provisions just discussed above.

Finally, Section 20109(c) of the Act prohibits a railroad carrier, or an officer or employee of a railroad carrier, from disciplining or threatening to discipline an employee for requesting medical or first aid treatment, or for following the order or treatment plan of a treating physician. However, a railroad carrier’s refusal to permit an employee’s return to work following medical treatment shall not be considered a violation of the Act if the refusal is made pursuant to Federal Rail Administration medical standards, or the carrier’s medical standards for fitness for duty.

Section 20109(d)(2) of the FRSA incorporates the investigatory proceedings and structure of the burdens of proof of AIR 21, 49 U.S.C. § 42121. Under AIR 21 and the FRSA, a complainant must establish by a preponderance of the evidence that he engaged in protected activity, the employer took an adverse action, and the protected activity was a “contributing factor” that

¹³ All of the events occurred in the State of Texas. Accordingly, the Tribunal will rely upon guidance from the Fifth Circuit in addition to the Administrative Review Board’s case law.

motivated the respondent's adverse employment action. 49 U.S.C. § 121(b)(2)(B)(i), (iii). *See Palmer v. Canadian National Railway / Illinois Central Railroad Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154, DOL Rptr. at 16 (Sept. 30, 2016). Thereafter, a respondent can only rebut a complainant's *prima facie* case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1982.109; *see also Palmer*, ARB No. 16-035, US DOL Rptr. at 56-57.

V. FACTUAL BACKGROUND AND TESTIMONIAL EVIDENCE

A. Stipulated Facts¹⁴

1. At all times material, Respondent Union Pacific Railroad Company ("Union Pacific") was a railroad carrier within the meaning of 49 U.S.C. §§ 20109 and 20102.
2. At all times material, Union Pacific was engaged in interstate commerce within the meaning of 49 U.S.C. § 20109.
3. Kenneth Zackery was employed with Union Pacific Railroad Company from August 16, 2006 through May 3, 2019.
4. Complainant was subject to and agreed to follow the Union Pacific Railroad Operating, Supply, and Executive Department Attendance Policy, effective September 15, 2015.
5. Complainant, Mark Yost, and Michael Durrant were members of Union Pacific work crew designated "Gang #9167" during the period between March 16, 2019 and April 16, 2019.
6. Complainant's direct supervisor from mid-February 2019 through April 16, 2019 was Joe Dominy.
7. Union Pacific supervisors are obligated to provide Form 52032 to any employee that informs them of a personal injury or work-related injury.
8. On March 19, 2020, Joe Dominy issued a "Notice of Investigation – Second Offense Attendance" relating to Complainant.
9. On March 20, 2019, Complainant signed a waiver presented to Complainant by Joe Dominy.
10. On April 18, 2019, Complainant was issued a "Notice of Investigation - Third Offense Violation".
11. On April 24, 2019, Union Pacific held a hearing to investigate the charges made against Complainant.
12. On May 3, 2019, Jason Rea issued a "Notification of Discipline Assessed" to Complainant notifying him that the charges made against him had been sustained and dismissing him from service with Union Pacific.

B. Additional Findings of Fact

¹⁴ *See Stipulation of Facts*. At the beginning of the hearing, the Tribunal read these stipulations into the record. Tr. at 6-7.

Respondent is a “railroad carrier” and Complainant is a covered “employee” within the meaning of 49 U.S.C. § 20109(a).

On May 14, 2018, Complainant was issued his First Notice of Investigation for an attendance violation. CX 5; *see also* EX 3. When he received this Notice, it included both the front and back of the document. Tr. at 121. A supervisor presented this to him after the work shift. Tr. at 122 and 126. On the Employee waiver statement, which Complainant signed, it provides that the employee accepts responsibility with the charges (failure to report for work on 5/14/18) and the policy violation assessment. CX 5 at 2; EX 4 at 2; Tr. at 156-57. Signing a waiver means that the employee “admits to his violation of the attendance policy, and he can go and continue working.” Tr. at 282.

Complainant started working for Respondent in August 2006 as a trackman, and since then he has worked in many gangs and on many machines. Tr. at 99. On February 1, 2019, he arrived at Gang 9167 as a machine operator. Tr. at 99. From February 1, 2019 until March 19, 2019, he worked as a spike gauge operator.¹⁵ On March 19, 2019, he was moved to being an anchor squeezer operator and he worked as an anchor squeezer operator until his termination of employment.¹⁶ Tr. at 93 and 115. Complainant initially worked for a different supervisor. This supervisor had a “one-on-one” meeting with Complainant about procedures (CX 4), but Complainant denied that this meeting occurred. Tr. at 99 and 158; *see also id.* at 72-74. After four days, Mr. Dominy became the Gang 9167 supervisor. Tr. at 101.

Mr. Joe Dominy is a manager for Respondent. He is a supervisor of Respondent’s mechanics and takes care of equipment that is on a tie gang. He is the mechanic supervisor of Gang 9167,¹⁷ which Complainant was a part of until his discharge. Tr. at 32. From mid-February until mid-May 2019, Mr. Dominy was given temporary supervisory authority over the entire Gang 9167. Prior to that time, Mr. Dominy had no direct contact with Complainant. Tr. at 33, 57. Although Mr. Dominy worked in the same gang, he was the supervisor of equipment, not the supervisor of the gang itself.

Mr. Dominy recalled that the first time he interacted with Complainant as his supervisor was on March 7 or 8, 2019.¹⁸ Tr. at 61. Complainant had called him a day prior saying that he had a family emergency and had to leave work. Tr. at 61. Mr. Dominy exercised his managerial discretion to allow Complainant to use vacation time for his absence.¹⁹ Tr. at 61-62.

¹⁵ A spike gauge operator sits in an exposed seat and uses a joystick similar to one used in a video game to control the machine. Tr. at 89.

¹⁶ Apparently an anchor squeezer operator’s duties are similar in exertion to a spike gauge operator, but the operator works from a cab. Tr. at 92.

¹⁷ Apparently there are several sub-groups within Gang 9167. Mr. Dominy worked in the mechanics gang subgroup of Gang 9167. Other subgroups are the surfing gang, switch gang, and crossing gang. Tr. at 69 and 95. Each of these groups had a foreman.

¹⁸ Mr. Dominy testified that Complainant showed up late for work on March 1, 2019. He did not charge him with an attendance violation but could have. He indicated that he warned Complainant at that time he cannot show up late and this was his “first and last chance” with him. Tr. at 294.

¹⁹ According to Mr. Dominy, an employee is supposed to give his supervisor seven-days notice to get approval to use vacation days. The manager is under no obligation to approve vacation days requested in less time than that. Tr. at 42.

EX 1 depicts Employer's attendance policy during the time period of this case. Tr. at 34-35. If an employee simply fails to show up for work, it is recorded as an unauthorized absence on the attendance report.²⁰ Tr. at 35. If an employee is tardy for work, the manager can mark them tardy and allow him to keep working or mark them absent and not let them work. That decision is left to the manager.²¹ Tr. at 36-37. In his 13 years as a supervisor, Mr. Dominy has seen a few occasions in which a supervisor sent someone home when they were late but arrived in time for the job briefing. However, he has not seen a supervisor put an employee on the bus if they arrive without going through the proper job and safety briefing. Tr. at 38. Once the manager enters the employee as having an unauthorized absence, Respondent's computer system automatically generates an offense notice to the employee. Tr. at 40. The Notice of Investigation that is generated comes to the manager that day and the manager then gives that document to the employee the next time he comes in contact with him. Tr. at 64.

Complainant was on his way to work when he was experiencing pains in his hand, so he decided to turn around and go home.²² He then went to sleep. He testified that once he got up, he called Mr. Dominy to leave a brief voicemail message stating that he was not going to come to work that day, he was going to seek medical attention, and that if Mr. Dominy had any questions to call him back. Tr. at 105-07. Mr. Dominy denies ever receiving a voicemail from Complainant that day.²³ Tr. at 75 and 282-83. However, on Mr. Dominy's cell phone bill, there is a call from for the morning of March 16, 2019 that lasted one minute and corresponds to Complainant's telephone number. Tr. at 107-08; *Compare* CX 24 with EX 13. Complainant testified that he did not call Mr. Dominy when he decided to go home because Mr. Dominy's number was not saved in his cell phone. Complainant had a job briefing paper in the trunk of his vehicle, but he testified that he was "just trying to get home safe," so he waited until he got home to get the job briefing paper from the trunk and then call him.²⁴ Tr. at 106.

Complainant did not report for work from March 16 to March 18, 2019. Tr. at 158; EX 5. Complainant testified that, on those days, he rested at home and took over-the-counter medication to help with the pain in his hands. Tr. at 108. However, he did not call Mr. Dominy again because he had left him a voicemail on the sixteenth. Tr. at 109. On March 18, 2019, Complainant testified that he obtained a same-day appointment with an orthopedic specialist at Methodist Hospital who diagnosed him with carpal tunnel syndrome and prescribed him anti-inflammatory medications and two splints. Tr. at 109-110. After the appointment, Complainant testified that he tried to call

²⁰ An unauthorized absence is for a single period of time that an employee is missing from work. Whether the employee is absent one day or eight days in a row, it counts as one unauthorized absence, not multiple absences. Tr. at 65.

²¹ However, Mr. Yost testified that in his approximately 14 years with Respondent, if someone shows up tardy but they are still there for the job briefing, he had never seen them sent home and not allowed to work. Tr. at 261.

²² Complainant testified that the drive "was in the middle of the night and I didn't – didn't feel safe pulling on the side of the road" to call Mr. Dominy about the problem he was experiencing. Tr. at 159.

²³ EX 13 reflects Mr. Dominy's telephone log for his company cell phone and there is no record of Complainant calling that number. Tr. at 94. Complainant stipulated to this fact as well. Tr. at 95.

²⁴ The Tribunal infers from Complainant's testimony that this job briefing paper contained Mr. Dominy's telephone number.

Mr. Dominy,²⁵ but this call went straight to voicemail so he hung up. He then packed up and went to work, which was about a seven and one-half to eight hour drive away. Tr. at 111. Complainant left around 12:30 a.m. and he was to be at work at seven.²⁶ Tr. at 113.

This testimony is different than what he provided to Respondent during his hearing on April 24, 2019 concerning his tardiness on April 16, 2019, described below. During that hearing, he testified as follows:

My wife's been ill for like the last year now. And the medicine that they give her is- it's too strong and sh- and it knocks her out, and I have to fend for the kids. Like, I- I don't have no help, as far as the grandparents. Her- her- her mother just had a brain aneurism, I believe about two years ago. And my mother had a stroke about the same, about two years ago. So we don't have any help. It's just really mainly us. And if she's down- I mean- I- I've got to stay with the kids.

EX 2 at 33; Tr. at 192.²⁷ There is no mention during that hearing that Complainant had suffered an injury en route to work or had seen a doctor for that injury. Tr. at 195.

Complainant's and Mr. Dominy's version of events on March 19, 2019 differ. According to Complainant, when he arrived at the site he went straight to Mr. Dominy's truck where Mr. Dominy was talking on the phone. Tr. at 114. Complainant presented Mr. Dominy his back-to-work excuse and his diagnosis. They then walked towards the job briefing trailer and once there Complainant requested to fill out an injury report.²⁸ According to Complainant, Mr. Dominy told him that he had never done that before and Mr. Dominy wanted to make a couple of telephone calls and he would get back with him. Tr. at 114. Complainant also testified that he "got accommodated to from the spiker gauges to the anchor squeezer." Tr. at 115. Thereafter, Complainant received a "quick rundown" on how to operate the anchor squeezer gauge and he went to work. Tr. at 115.

According to Mr. Dominy, he saw Complainant arrive to work after roll call and while Mr. Dominy was standing at the job briefing. This was approximately 35 minutes after he was supposed to be at work. Tr. at 87. Mr. Dominy pulled Complainant into his office and asked him

²⁵ Complainant admits that this telephone call does not show up on his telephone bill.

²⁶ The Tribunal notes that accepting these times as true, the Complainant left with insufficient time to reach his work site on time. If he left at 12:30 a.m. and it was a 7 ½ to 8 hour drive, he would have arrived at 8 or 8:30 a.m., but his work was scheduled to begin at 7 a.m.

²⁷ During his closing argument at the April 24, 2019 hearing, Complainant again represented to the hearing officer that his absence was due to matters concerning his wife and children's care, and his failure to communicate those issues with his supervisor. EX 2 at 37.

The Tribunal notes that as part of Complainant's response to Respondent's Motion for Summary Decision, Complainant submitted to the Tribunal a statement that he felt that the second Notice of Violation was because he reported "my work-related illness to [Mr. Dominy] on March 19, 2019 and requested to fill out an injury report on several occasions." EX 14 at 1. There is a medical record of Complainant seeking medical attention on March 18, 2019 for bilateral and right shoulder pain as well as a note from the doctor that he could return to work the following day with no restrictions. CX 18.

²⁸ Complainant acknowledged on cross-examination that after he asked Mr. Dominy for the form, he did not ask anybody else for an injury report form so he could complete it. Tr. at 163.

why he did not call him for three days. Tr. at 76-79. Complainant told Mr. Dominy that his wife was sick.²⁹ Tr. at 284. Mr. Dominy understood and told him that there was assistance that can be provided but advised Complainant to notify him if he was not going to come to work. Tr. at 76 and 207; EX 2 at 26 and 33. Mr. Dominy also notified Complainant that this was his second offense and that he could not get another. Tr. at 289. Complainant did not inform Mr. Dominy about a doctor's appointment on March 18 for carpal tunnel syndrome. Tr. at 78, 284 and 306. Complainant also did not discuss an injury report with Mr. Dominy at any time after that meeting.³⁰ Tr. at 78 and 287. The first time that Mr. Dominy saw Complainant's doctor's note (CX 18) was during litigation.³¹ Tr. at 285. Finally, Mr. Dominy disputed that he was unfamiliar with how to file a personal injury report, noting that he receives yearly training on how to complete it. Tr. at 288.

Complainant's and Mr. Dominy's versions of the events that happened on March 20, 2019 diverge as well. According to Complainant, he reported for work, went through the job briefing, got on the bus, and went to his machine. In the morning, Complainant asked Mr. Dominy if he had heard anything about the injury report and Mr. Dominy told him no and to remind him in the afternoon. Tr. at 117. Mr. Dominy later arrived and waved Complainant over to his truck. According to Complainant, Mr. Dominy presented him with the only waiver page of a Notice of Investigation – Second Offense Attendance. CX 9 at 2; *see also* EX 5. Mr. Dominy gave him “an ultimatum, sign this or get pulled out of service.” Tr. at 118. Complainant knew that he was waiving his rights to a hearing. Tr. at 118 and 164-66. Complainant says he first saw the first page of his second Notice of Investigation at his deposition. Tr. at 119. Complainant acknowledged that when he signed this second waiver, he knew that under Respondent's attendance policy another violation could result in his dismissal. Tr. at 173 and 206. However, he maintained that if he did not sign the waiver, he could not keep working, so he signed the waiver as “that's the only way that employees can still get paid and still work.” Tr. at 205. Complainant believes that he was discriminated against because he sought medical treatment and because Mr. Dominy failed to report Complainant's injury when Complainant tried to report it to him. Tr. at 144 and 235-36.

Mr. Dominy provided a different summary of the events that happened that day. He testified that his meeting with Complainant occurred in the office trailer, not outside along the

²⁹ *See also* EX 2 at 26-27.

³⁰ Per Respondent's General Code of Operating Procedures, if an employee reports an injury or occupational illness, the supervisor is obligated to get an injury form for him and the employee to complete and return within 24 hours. Failure to do so can result in the supervisor being disciplined. Tr. at 87-88. Complainant initially testified an employee can only get this injury form from their supervisor and cannot obtain a copy to complete even from a union representative. Tr. at 250. However, on day two of the hearing, counsel recalled Complainant to explain that he did talk to a gang foreman about his request to fill out an injury report requested to Mr. Dominy. Tr. at 275. Further, Mr. Dominy testified that any employee can access this form by logging onto Respondent's website using their login ID and the form at issue is located under the webpage “forms” link. Tr. at 316.

³¹ Mr. Dominy further testified that there would be no reason for him not to report Complainant's injury if Complainant had reported it to him. Complainant's injury was bilateral carpal tunnel syndrome, which is an occupational injury that is not a reportable injury under the Federal Railroad Administration and would not be counted against the gang, and there would be no reason to interfere with Complainant's report of a personal injury. Tr. at 286-87.

track. The meeting lasted no more than 15 minutes. Mr. Dominy told Complainant that by signing the waiver, Complainant was admitting a violation of the attendance policy, that this was his second offense, and that a third offense could result in him being fired. He also told Complainant that he could continue working. Complainant opted to sign the waiver. Tr. at 290-91. Mr. Dominy acknowledged that he moved Complainant that day from operating the spiker gauger to the anchor squeezer. Tr. at 291. However, the reason for this change was that Complainant was a better anchor squeezer operator and he wanted to be more productive. Mr. Dominy knew Complainant was qualified to operate the machine³² and had heard that Complainant was quick on the anchor squeezer – “and he was.” Tr. at 291. The move had nothing to do with accommodating pain Complainant said he had in his wrist. Tr. at 292.

Mr. Dominy provided the information to an administrative person to make the entries in Respondent’s computer system that generated this Notice. Tr. at 47-48. Complainant waived his right to a hearing concerning this violation on March 20, 2019. EX 6.

EX 13 reflects telephone calls to Mr. Dominy’s phone numbers during the period from March 16 to 18, 2019. This log’s telephone number was the telephone number that employees would use to reach him while he was the supervisor during the period of February through April 2019. Tr. at 52-55.

Complainant admitted that on April 1, 2019, he showed up “some minutes” late for work.³³ Tr. at 127. However, he was able to scan in, get a job briefing paper, finish the job briefing, and get on the bus to get to the work site. Tr. at 127. At the time he arrived for work, the exercise portion of the beginning of the work day had just begun.³⁴ Tr. at 127. Complainant worked from April 1 to 4, 2019 and then asked Mr. Dominy to take vacation to attend a funeral occurring out of state. Tr. at 128. Mr. Dominy approved Complainant’s vacation for April 5 to 8, 2019.

Complainant’s next scheduled work day after April 8, 2019 was April 16, 2019. Tr. at 128. Complainant was to report at 2 a.m. Central Time, but according to Complainant, he arrived “shortly after.” Tr. at 129; EX 2 at 27-28. Complainant testified that on the morning of April 15, 2019, he sent Mr. Dominy a text message that he was having car troubles and might be a few minutes late. He said that Mr. Dominy sent him a text back saying “be here at 2 a.m. with a bunch of exclamation marks.” Tr. at 134. Complainant replied that he was on his way. Mr. Dominy admits to receiving that text. EX 2 at 23.

³² Mr. Dominy explained that he can use a computer to look at an employee’s qualifications by putting in their employee ID number. Tr. at 291-92.

³³ Tr. at 177-78. Mr. Dominy acknowledged that Complainant had sent him a text message on April 1 about his vehicle overheating and that he might be late. EX 2 at 22. Complainant acknowledged that tardiness is a violation of Respondent’s attendance policy and Mr. Dominy could have charged him with an offense on this occasion, but did not. Tr. at 174.

³⁴ According to the testimony, the sequence of events at the beginning of a shift is: a ten minute foreman meeting, a ten minute meeting addressing protection and safety issues, ten minutes for the foreman to talk about objectives, five minutes for the supervisor to talk and five minutes for the exercises. Tr. at 87; *see also id.* at 80-82.

Complainant arrived while the job briefing was occurring.³⁵ Mr. Yost recalled seeing Complainant after he got off the bus from his foreman meeting.³⁶ Tr. at 262-63. Complainant admitted in a text that he was 23 minutes late that day.³⁷ EX 8; Tr. at 178-80. He knows this was the amount of time because that was reflected on his vehicle's clock when he went back to it.³⁸ Tr. at 180; *see id.* at 221-23. He tried to scan in for work, but the scanner was not working so he grabbed a job briefing sheet and walked to the back of the group and proceeded with the job briefing. Complainant recalled that he joined the briefing when they were discussing the mile posts which concerned the protection section of the briefing. Tr. at 129. According to Complainant, Mr. Dominy approached him during the exercise portion of the job briefing and asked him to come to the side and meet with him. Tr. at 131. Mr. Yost recalled that during the job briefing, Mr. Dominy asked Complainant to see him after the job briefing. Tr. at 263. Mr. Dominy testified that when Complainant arrived at the end of the job briefing, Mr. Dominy met Complainant in the parking lot and told him to go home for the day, as he was not going to allow him to work. Tr. at 297-98. Mr. Dominy told him to try again tomorrow. Complainant did not bring up the injury form at that time and left the work site. Tr. at 131.

Complainant attempted to report to work the next day. Complainant tried to scan in and Mr. Dominy stopped him and pulled him to the side and he told Complainant that he marked him as tardy, that Omaha³⁹ had "picked it up" and he had to pull Complainant out of service. Tr. at 132.

On April 24, 2019 Respondent held a hearing about Complainant's April 16, 2019 tardiness violation. Tr. at 186; EX 2. Included in this hearing were discussions about Complainant's past attendance history. EX 2 at 13-14 and 17-20; Tr. at 190 and 301-02. *See also* EX 10. Complainant was present at that hearing and had union representation. Tr. at 134 and 185-87; EX 2 at 7-8.

During the hearing, Complainant did not give a doctor's appointment as a reason for missing work on March 16 to March 18, 2019. Tr. at 190 and 305. According to Complainant, his union representative withheld that evidence from being submitted at the April 24, 2019 hearing. Tr. at 190; *see also id.* at 224-39. Complainant contended that the union representative told him that they were only there for the April 16 violation, not the March 16 to 18 violation, and therefore the union representative told him not to mention his carpal tunnel injury or to present his evidence about it. Tr. at 190, 224 and 227-34. However, Complainant had an opportunity to question Mr. Dominy about the testimony presented at that hearing. Tr. at 194; EX 2 at 28. Furthermore,

³⁵ Other gang members observed him being present for the briefing. *See* CX 20.

³⁶ Mr. Yost testified that the foreman's meeting begins promptly at the hour and takes about 10 to 15 minutes. Tr. at 268.

³⁷ Complainant alleged that there was a "grace period" for arriving to work. Tr. at 240-42. However, the Tribunal was provided no other document or statement that this was Respondent's policy. However, there was evidence presented of an accepted practice that a manager could exercise their discretion on whether to record an employee as not arriving to work on time. *See* Tr. at 281, 311-14 and 325.

³⁸ Mr. Yost agreed that 23 minutes late for work would place an employee near the end of the job briefing. Tr. at 267.

³⁹ The Tribunal inferred from the testimony that Omaha was a higher authority in Complainant's chain of command.

Complainant was given an opportunity to make a closing statement and he did not raise the issue of his carpal tunnel injury at that time either. EX 2 at 37; Tr. at 195.

In Complainant's response to Respondent's Motion for Summary Decision, he wrote "[t]he company knew about my protective activity also as I even stated it in a written complaint dated 4/20/19 that was sent to the company by mail before the hearing and before I was terminated." CX 12 at 4. RX 15 is the written complaint that Complainant was referring to in that statement. Tr. at 208. This document was written by Complainant's wife, but he signed it. Tr. at 245. During his cross-examination he acknowledged that his hearing occurred on April 24, 2019 and that his dismissal was effective May 3, 2019. Complainant could not explain how he was able to draft a letter on the April 20, 2019 referencing his termination when his hearing did not even occur until four days later.⁴⁰ Tr. at 210-11. On redirect, Complainant's counsel attempted to rehabilitate Complainant, and Complainant agreed that "it could be true" that the 4/20/19 complaint letter that he submitted to the Tribunal could not have been sent to Respondent prior to his April 24, 2019 hearing. Tr. at 217. Further, Claimant's counsel stipulated that they had no evidence to offer the Tribunal that Respondent had received this letter prior to the day Complainant was terminated. Tr. at 211-12.

Mr. Rea was Respondent's reviewing official concerning Complainant's third attendance violation. Tr. at 320-21. He was the one to make the final decision as to whether the charges against Complainant were sustained. Tr. at 321. Mr. Rea printed out the April 24, 2019 transcript, read it, and determined that Complainant violated the attendance policy for the third time. Tr. at 321-23. On May 3, 2019, Mr. Rea issued a Notice of Discipline stating that Complainant had committed a third offense and was therefore dismissed from Respondent's employ. EX 11. Prior to his decision, Mr. Rea was not aware that Complainant had reported a personal injury, and even if he had, that would not have changed his decision to terminate Complainant's employment. Tr. at 326-27.

VI. CREDIBILITY OF WITNESSES

In deciding the issues presented, this Tribunal considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, this Tribunal has taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record. *See Frady v. Tennessee Valley Authority*, Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying,

⁴⁰ On re-direct, Complainant's counsel attempted to explain this discrepancy by asking Complainant, who was self-represented at the time of the submittal, if he could have been confused about the date. Tr. at 217.

the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence.⁴¹ *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-024 (Jan 31, 2007); *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 14, n.5 (3d Cir. 1975).

This Tribunal finds Complainant's credibility wanting. In the light most favorable to Complainant, he made inconsistent statements both about events that occurred during his hearing with Respondent on April 24, 2019 and about the facts he presented to this Tribunal. The Tribunal does not doubt that Complainant waived his right to the second violation hearing because he wanted to continue to work. However, it begs credibility for Complainant to assert that he did not know how to obtain an injury report form or to even report his injury to a union representative when a manager did not provide it to him. Further, the Tribunal questions how Complainant could drive home after experiencing an injury, and then not contact his supervisor to ensure that he was aware of the reason for his absence from work. Complainant states that he left a message on Mr. Dominy's voicemail but the evidence does not support this. Finally, Complainant's explanation that he gave at his termination hearing for why he missed work on March 15 to 18 is in stark contrast to his explanation to this Tribunal. One is a misrepresentation and undermines Complainant's credibility. Finally, the Tribunal is troubled by the representation about the letter Complainant provided as evidence that purportedly was written and given to Respondent prior to his hearing. The contents of the letter itself demonstrate that it was written after his termination. The representation of when this letter was written undermines Complainant's candor to the Tribunal. In short, Complainant's version of events seemed to ebb and flow depending on which way the evidentiary winds were blowing.

The Tribunal found Mr. Dominy's testimony credible. His testimony was consistent with the contemporaneous documents in the record as well as his prior testimony during Complainant's third violation hearing. The Tribunal also found the testimony of Mr. Rea credible. Finally, the Tribunal found the testimony of Mr. Yost generally credible. He largely corroborated the testimony of Mr. Dominy. However, it was also clear that Mr. Yost disagreed with Mr. Dominy's decision to mark Complainant tardy, for he did not view Complainant's lateness to be of significance.

VII. TIMELINESS

The FRSA allows a complainant to file a complaint with OSHA within 180 days of the alleged violation. *See* 49 U.S.C. § 20109(d). The Board has made it clear that a FRSA claim must be filed within 180 days after the discrete adverse act occurred. *Williams v. Nat'l R.R. Passenger Corp.*, ARB No. 12-068, slip op. at 5 (Dec. 18, 2013). Complainant filed his original complaint with OSHA on May 29, 2019. Therefore, any alleged violations that he became aware of **prior to**

⁴¹ Based on the unique advantage of having heard the testimony firsthand, this Tribunal has observed the behavior, bearing, manner, and appearance of witnesses which have garnered impressions of the demeanor of those testifying. These observations and impressions also form part of the record evidence.

December 1, 2018 are untimely pursuant to 49 U.S.C. § 20109(d), unless Complainant can successfully argue that the statute of limitations should be equitably tolled.⁴² However, Complainant makes no such argument.

Two of Complainant's charged unauthorized absences occurred during this time, his March 16 to 18, 2019 absence and his April 16, 2019 late arrival. Accordingly any allegations surrounding these adverse actions are timely filed.

VIII. COMPLAINANT'S PREPONDERANCE OF EVIDENCE CASE

Actions brought under FRSA are governed by the burden of proof structure set forth in the employee protection provisions of AIR 21. *See* 49 U.S.C. § 20109(d)(2)(A)(i). In addition to demonstrating that the complainant and the employer are covered under the Act,⁴³ the complainant must also demonstrate the following elements in order to prevail: (1) he engaged in protected activity, as statutorily defined⁴⁴; (2) he suffered an unfavorable personnel action⁴⁵; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); *De Francesco v. Union R.R. Co.*, ARB No. 10-114, slip op. at 6 n.20 (Feb. 29, 2012) (citing *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 5 (Jan. 31, 2011)); *see also Clemmons v. Ameristar Airways Inc.*, ARB No. 05-048, (June 29, 2007). The term "demonstrate," as used in AIR 21 and FRSA, means to prove by a preponderance of evidence. Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes a preponderance of evidence case, Respondent may avoid liability only if it can prove by "clear and convincing evidence" that it would have taken the same unfavorable personnel action in the absence of Complainant's protected activity. *See* 49 U.S.C. §§ 20109(d)(2)(A)(i); 49 U.S.C. 42121(b)(2)(B)(iii)-(iv).

A. Protected Activities

The FRSA unambiguously protects railroad employees from being disciplined in any fashion when notifying the railroad of a work-related personal injury or requesting medical or first-aid treatment. 49 U.S.C. §§ 20109(a)(4) and (c)(2).

Complainant makes the allegation that he was retaliated against because he requested to report his carpal tunnel syndrome. The evidence to support his contention are his own statements

⁴² "Equitable tolling should be applied sparingly and only when exceptional circumstances prevented timely filing through no fault of the plaintiff.... Only exceptional circumstances, not garden variety claim[s] of excusable neglect, allow us to toll the statute of limitations." *Bohanon v. Grand Trunk Western Railroad*, ARB No. 16-048, ALJ No. 2014-FRS-003, slip op. at 3 (Apr. 27, 2016).

⁴³ Here, there is no dispute that Respondent is a "railroad carrier" and Complainant is a covered "employee" within the meaning of 49 U.S.C. § 20109(a).

⁴⁴ By its terms, FRSA defines protected activities to include acts done "to notify, or attempt to notify, the railroad carrier or Secretary of Transportation of a work-related personal injury or work-related illness of an employee."

⁴⁵ The term "unfavorable personnel action" includes making charges against an employee in a disciplinary proceeding and suspending, terminating, placing on probation or making notes of reprimand on an employee's record.

and a copy of a doctor's note that he alleges he provided to Mr. Dominy on March 19, 2019. However, the Mr. Dominy adamantly denies that he was ever informed of Complainant's injury and maintains that he did not even see the doctor's note Complainant allegedly provided to him until litigation had begun in this case. Complainant alleges that it was his hand impairment that prevented him from reporting to work from March 16 to March 18, 2019. What is telling is that he made no mention of this impairment at his hearing in April when given the opportunity. Instead, he mentioned during that hearing that it was his wife's illness that caused his absence. Further, Complainant could have explained himself when offered the opportunity on March 20, 2019 to participate in a hearing to address his absence. Instead, he opted to waive that opportunity. Thus, there is no credible evidence that Respondent was ever placed on notice that Complainant had a work-related injury. Therefore, it was not possible for Respondent to take any action against Complainant because it was unaware of his injury.⁴⁶ Of note, Complainant was able to work after March 20, 2019. His difficulty appears to have been less with his hands and more with his punctuality.

Being tardy or absent from work is not protected activity. Respondent has every right to expect—nay, demand—that its employees report to work at the scheduled time. While this Tribunal might disagree with the harshness in which Respondent imposed discipline for tardiness in this case, especially given Complainant's personal matters, it is ultimately a decision within Respondent's discretion.

B. Adverse Action

An adverse employment action must affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l R.R. Passenger Corp. (AMTRAK)*, ARB No. 09-142, slip op. at 3-4 (Oct. 16, 2009); *see also Simpson United Parcel Service*, ARB No. 06-065 (Mar. 14, 2008); *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-155, slip op. at 4 (Nov. 30, 2005). In *Melton v. Yellow Transp., Inc.*, ARB No. 06-052 (Sept. 30, 2008), the ARB determined that the deterrence standard established by the U.S. Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), was applicable in whistleblower cases adjudicated by the U. S. Department of Labor. Under the *Burlington Northern* standard, the test is whether the employer's action could dissuade a similarly situated, reasonable worker from engaging in protected activity. *See Jenkins v. United States Environmental Protection Agency*, ARB No. 98146, slip op. at 20 (Feb. 28, 2003) (an action must constitute a tangible employment action, *i.e.*, a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits).

In *Vannoy v. Celanese Corp.*, the Board observed, "An adverse action...is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis." ARB No. 11-044, slip op. at 13-14

⁴⁶ Had the Tribunal concluded that Complainant had actually asked Mr. Dominy to submit an injury report, the Tribunal would have found that to be a protected activity. *Thorstenson v. BNSF Railway Co.*, ARB Case Nos. 2018-0059, -60, ALJ Case No. 2015-FRS-00052, slip op. at 6 (Nov. 25, 2019). *See generally, Walls v. Union Pacific Railroad Co.*, ARB No. 2018-0015, ALJ No. 2016-FRS-00069 (Mar. 17, 2020). There is no evidence Respondent denied, delayed, or interfered with Complainant's medical treatment.

(Sept. 28, 2011); *see also Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005, slip op. at 14 (Sept. 13, 2011) (explaining that use of the “tangible consequences standard,” rather than the standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), was error). However, the Board clarified “that *Burlington’s* adverse action standard, while persuasive, is not controlling in AIR 21 cases,” but that it is “a particularly helpful interpretive tool.” *Menendez*, ARB Nos. 09-002, 09-003 at 15.

Applying the standard to whistleblower statutes in the context of AIR 21, the Board held “that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions.” *Menendez*, ARB Nos. 09-002, 09-003 at 17 (citing *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 10-11 n.51 (Dec. 29, 2010)).⁴⁷ The Board elaborated, “Under this standard, the term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Id.* at 17 (internal quotation marks omitted). Ultimately, an employment action is adverse if it “would deter a reasonable employee from engaging in protected activity.” *Id.* at 20.⁴⁸ Accordingly, the Board views “the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline.” *Williams*, ARB No. 09-018 at 10-11. The Board further observed that “even *paid* administrative leave may be considered an adverse action under certain circumstances.” *Vannoy*, ARB No. 11-044 at 14 (emphasis in original) (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, ALJ Case No. 1995-ERA-078, slip op. at 4-5 (Apr. 20, 1998) (holding that “although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by

⁴⁷ “Evaluating the respective statutory language of SOX, AIR 21, and FRSA, we conclude that the *Williams* definition of adverse personnel action also applies to FRSA claims. FRSA, which prohibits discharg[ing], demote[ing], suspend[ing], reprimand[ing], or *in any other way discriminat[ing]* is virtually identical to the relevant broad statutory language in SOX (*in any other manner discriminat[ing]*) and even broader than that of AIR 21.” *Fricka v. Nat’l Railroad Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (Nov. 24, 2015) (emphasis added)(internal quotes omitted).

⁴⁸ *See also Williams*, ARB No. 09-018, slip op. at 15, definitively clarifying the adverse action standard in AIR 21 cases:

To settle any lingering confusion in AIR 21 cases, we now clarify that the term “adverse actions” refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term “discriminate” is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress.

his removal from campus.”). However, this does not mean that every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.

Complainant lists his termination of employment as the alleged adverse action involved in this case. The Tribunal agrees and finds that terminating Complainant’s employment was an adverse action. Similarly, it finds that Complainant’s receiving his second and third attendance violations were also adverse actions.

C. Contributing Factor

Finally, Complainant bears the burden of demonstrating that Respondent undertook the adverse action, “in whole or in part,” because of the complainant’s protected activity. 42 U.S.C. § 20109(a); *see also* 29 C.F.R. § 1982.109(a). The Board has held that 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.” *Williams v. Domino’s Pizza*, ARB 09- 092, slip op. at 5 (Jan. 31, 2011). The Board has also explained, “that the level of causation that a complainant needs to show is extremely low,” and that an ALJ “should not engage in any comparison of the relative importance of the protected activity and the employer’s nonretaliatory reasons.” *Palmer*, ARB. No. 16-035, US DOL Rptr. at 15. Therefore, the complainant “need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent’s reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected activity.” *Hutton v. Union Pac. R.R.*, ARB No. 11-091, slip op. at 8 (May 31, 2013). Put another way, “did the protected activity play a role, any role whatsoever, in the adverse action?” *Palmer*, ARB No. 16-035, US DOL Rptr. at 21 (emphasis in original).

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, slip op. at 6-7 (Feb. 29, 2012). Factors of circumstantial evidence that may be considered include:

[T]emporal 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.

Cain v. BNSF Ry. Co., ARB No. 13-006, slip op. at 13 (Sept. 18, 2014).

Though “[t]emporal proximity between protected activity and adverse personnel action ‘normally’ will satisfy the burden of making a *prima facie* showing of knowledge and causation,” and “may support an inference of retaliation, the inference is not necessarily dispositive.” *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, slip op. at 7 (Dec. 31, 2007); “The ALJ is thus permitted to infer a causal connection from decision-maker knowledge of the protected activity and reasonable temporal proximity.” *Palmer*, ARB No. 16-035, USDOL Rptr. at 56 (emphasis in original).

However, “where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee’s burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.” *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6-7 (Apr. 28, 2006).

Here, Complainant has failed to establish that he engaged in any protected activity. As there is no protected activity, by definition, protected activity could not have contributed to his adverse action. Accordingly, Complainant has failed to meet this element necessary to establish his *prima facie* case.

D. Conclusion- Complainant’s *Prima Facie* Case

Respondent and Complainant are subject to the Act. Complainant timely filed his complaint. Complainant suffered an adverse action when Respondent terminated his employment. However, Complainant has failed to demonstrate by a preponderance of evidence that he engaged in any kind of protected activity. As there is no protected activity, it could not have contributed to his termination of employment. Accordingly, Complainant has failed to meet his burden of proof by the preponderance of evidence and his complaint fails. Accordingly, Complainant’s complaint is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

SCOTT R. MORRIS

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 the administrative law judge’s decision.

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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and 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).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the Board has implemented a new eFile/eServe system (“EFS”) which is available at <https://efile.dol.gov/>. If you use the Board's prior website link, dol-appeals.entellitrak.com (“EFSR”), you will be directed to the new system. Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

Filing Your Appeal Online

Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at login.gov (if they do not have one already). Second, users who have not previously registered with the EFSR system will then have to create a profile with EFS using their login.gov username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at <https://efile.dol.gov/system/files/2020-11/file-new-appeal-arb.pdf> and the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>.

Establishing an EFS account under the new system should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at <https://efile.dol.gov/contact>.

If you file your appeal online, no paper copies need be filed. **You are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

You may, in the alternative, including the period when EFSR and EFS are not available, file your appeal using regular mail to this address:

U.S. Department of Labor
Administrative Review Board
ATTN: Office of the Clerk of the Appellate Boards (OCAB)
200 Constitution Ave. NW
Washington, DC 20210-0001

Access to EFS for Non-Appealing Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are located at:

<https://efile.dol.gov/support/boards/request-access-an-appeal>

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered users of EFS will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail. At this time, EFS will not electronically serve other parties. You are still responsible for serving the notice of appeal on the other parties to the case.