



Issue Date: 26 April 2010

CASE NO.: 2009 NTS 3

In the Matter of
BRENDA D. GUMM
Complainant

v.

**PACE SUBURBAN BUS DIV. of
REGIONAL TRANSPORTATION AUTH.,
d/b/a PACE SOUTHWEST**
Respondent

Appearances: Ms. Brenda D. Gumm
Pro Se (representing herself)

Mr. Thomas G. Draths, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**DECISION AND ORDER –
DISMISSAL OF COMPLAINT**

This action arises under the provisions of the National Transit Systems Security Act of 2007 (“NTS” and “Act”), Title 6 United States Code Section 1142. Section 1142 provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of: a) providing information or assisting an investigation regarding conduct which reasonably constitutes a violation of any Federal law, rule, regulation regarding public transportation safety or security, or fraud, waste, or abuse of Federal grants or public funds intended to be used for public transportation and safety, b) refusing to violate a Federal law, rule, regulation regarding public transportation safety or security, c) reporting a hazardous safety or security condition related to performance of the employee’s duties, or d) refusing to work when confronted by a hazardous safety or security condition.

Procedural Background

On August 18, 2008, Ms. Gumm filed a complaint of alleged illegal discrimination by the Respondent, Pace Suburban Bus Division (“Pace”) based on the March 21, 2008 suspension of her employment. On June 26, 2009, after an investigation of Ms. Gumm’s complaint by the Occupational Safety and Health Administration (“OSHA”), United States Department of Labor

("DOL"), Regional Administrator dismissed the complaint. On July 15, 2009, Ms. Gumm appealed the adverse decision to the Office of Administrative Law Judges. Pursuant to a Notice of Hearing dated August 19, 2009 (ALJ I),¹ I conducted a hearing on October 6 and 7, 2009 in Chicago, Illinois. My decision in this case is based on the sworn testimony presented at the hearing and the following documents admitted into evidence: CX 1 to CX 3, CX 5 to CX 10, CX 12, CX 14 to CX 22, RX 1 to RX 9, RX 11 (except cover letter), and RX 12.

Complainant's Statement of the Case²

After first verbally expressing her safety concerns in December 2007 to her supervisor, on March 21, 2008, in compliance with the Employer's general safety rules, Ms. Gumm, a part-time bus driver for Pace, submitted a report to the company's safety manager about strange, abnormal, unusual, and suspicious activity that could have caused imminent danger and represented a potential unsafe security condition occurring within the public transportation system. The incidents involved motorists trying to side swipe her bus, cutting in front of her bus, repeatedly slowing down in front of her bus, and stopping in front of her bus after crossing an intersection in an attempt to have her run into them. Ms. Gumm presented the report out of concern for both bus passengers and bus operators. At least three supervisors and two managers, including Mr. Cedric Wright, were aware of her safety concerns.

In response, within two hours after she submitted report on March 21, 2008, Mr. Cedric Wright suspended Ms. Gumm indefinitely without any verbal or written warning, referred her to the Employee Assistance Program ("EAP"), and indicated she was being paranoid. Prior to the suspension, Ms. Gumm had an excellent attendance record and no driving violations; her yearly reviews were excellent.

After being referred to a psychiatrist selected by Pace, Ms. Gumm refused to take prescribed medication because the doctor did not conduct an evaluation and instead relied on statements from Pace. Subsequently, Ms. Gumm had several sessions with a psychologist who determined that she posed no danger to public safety and was ready to return to work.

The Employer refused the psychologist's recommendation. Consequently, Ms. Gumm's medical doctor referred her to an individual who had PhD and was an assistant professor in the Department of Psychiatry and Behavior Sciences at Northwestern University Medical School. This individual determined Ms. Gumm was capable of managing her work responsibilities and fit for duty. Again, the Employer refused to accept the recommendation and imposed a new requirement that the individual review Ms. Gumm's March 21, 2008 safety report.

¹The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

²Opening statement, TR, p. 24-37, and closing brief, December 29, 2009 (Ms. Gumm's closing brief appears to contain additional information about her case. As I indicated at the hearing, TR, p. 23-24, and 299-300, only sworn testimony presented at the hearing, as well as exhibits admitted during the proceeding, are in evidence before me).

In September 2008, Pace stopped paying its portion of Ms. Gumm's medical insurance and her medical benefits were terminated in November 2008. The company also appealed her unemployment claims.

Pace treated Ms. Gumm differently than another driver who threatened other Pace employees and yet was reinstated. That individual was not required to see a psychiatrist. Additionally, Mr. Cedric Wright never fully investigated her initial safety concerns.

As remedies, Ms. Gumm seeks full reinstatement, compensatory damages, including compensation for emotional pain and suffering, back wages with interest, and damages of \$100,000.³ In the absence of reinstatement, Ms. Gumm's claimed damages increase to \$250,000.

Respondent's Statement of the Case⁴

Ms. Gumm's complaint should be dismissed because she did not engage in a protected activity. Further, even Ms. Gumm engaged in a protected activity, Pace had a nondiscriminatory justification for the adverse personnel action based on a diagnosis of a mental health issue.

Starting in 2005, Ms. Gumm worked three days a week as a part-time bus driver. In mid-March 2008, Ms. Gumm prepared a written report claiming a conspiratorial organization of motorists was harassing her and trying to cause her to have an accident by slowing down her bus and making her angry.

Upon reading the report on March 21, 2008, Mr. Cedric Wright became concerned for Ms. Gumm's mental health and safety, as well as the safety of her passengers, decided to take Ms. Gumm out of service, and referred her to EAP for psychological evaluation. In turn, EAP referred Ms. Gumm to a psychiatrist who diagnosed paranoia and prescribed medication. However, Ms. Gumm refused to take the medication.

When Ms. Gumm requested a second medical evaluation, Pace agreed on the condition that Ms. Gumm give the individual a copy of her written report to Pace and the documents she sent to OSHA. Ms. Gumm eventually saw a PhD but never provided the documents required by Pace. She also redacted a portion of the PhD's report.

In light of Ms. Gumm's actions, Pace concluded she was noncompliant. Had she been compliant and later determined to be fit for work, her suspension would have been lifted. However, Ms. Gumm still refuses to comply and hasn't scheduled a job interview since March 2008.

Ms. Gumm did not engage in a protected activity since her report did not include any legitimate hazardous activities or safety issues. Specifically, Ms. Gumm's concerns were

³Ms. Gumm also states that her dog died prematurely because she could not provide proper veterinary care due to the loss of income.

⁴Opening statement, TR, p. 37-43., and closing brief, December 28, 2009.

nothing more than wild and unsupported conspiracy theories regarding systemized groups of vehicles and stunt drivers who gathered in parking lots, faked two funeral processions, placed people with canes on her bus, and had a woman have a spell on her bus. Significantly, Ms. Gumm's fantasy conspiracy theory persists. Considering that Ms. Gumm only drove a Pace bus three times a week and that each day she drove a different bus on a different route, and that no other Pace driver had reported any similar experiences, Ms. Gumm's report is not credible and completely unsubstantiated. Additionally, when asked to produce the notebook in which she recorded the license numbers, make, model and color of the vehicles adversely affecting her bus operation, she never showed the notebook to any one and claims it is now missing.

Even assuming Ms. Gumm engaged in a protected activity which contributed to her suspension, Pace had a legitimate reason for its suspension action. Ms. Gumm's unfounded conspiracy concern demonstrated mental issues which warranted suspension and medical referral. Based on the subsequent diagnosis of paranoia, Ms. Gumm's refusal to take prescribed medication for the ailment, and continued out-of-touch-with-reality assertions regarding the motorist group, Pace had a nondiscriminatory justification for the adverse employment action. As a result, Ms. Gumm may not obtain relief under the NTS employee protection provisions.⁵

ISSUES

1. Whether Ms. Gumm engaged in a NTS protected activity on March 21, 2008 which caused Pace to suspend her employment; and, if a NTS protected activity contributed to Ms. Gumm's employment suspension, whether Pace established by clear and convincing evidence that the company would have taken the same unfavorable personnel action in the absence of the protected behavior.
2. Whether Ms. Gumm engaged in a NTS protected activity between January and mid-February 2008 which caused Pace to suspend her employment; and, if a NTS protected activity contributed to Ms. Gumm's employment suspension, whether Pace established by clear and convincing evidence that the company would have taken the same unfavorable personnel action in the absence of the protected behavior.

⁵Pace's counsel also renews his objection to my questioning of, and hearing discussions with, Ms. Gumm on the basis that I was actually instructing a witness and my actions "bordered on advocacy." For the reasons previously stated at the hearing, TR, p. 82, the renewed objection is noted and overruled.

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

Sworn Testimony

Ms. Brenda D. Gumm
(TR, p. 81-313 and 393-395)

[Direct examination]⁶ When she decided to be a bus driver, Ms. Gumm went to Pace and received two weeks of training. Upon completion of the training in September 2005, Ms. Gumm worked as a part-time bus driver for Pace for up to 30 hours a week. She expected to be promoted to full-time status within three years.

On March 14, 2008, due to her concern for passenger and bus driver safety, Ms. Gumm wrote an eight page report, RX 11, Tab 2, for the Pace safety manager, Ms. Dillard. In the memorandum, she explained how organized groups of people were trying to cause accidents after she started a new shift in December 2007. On the new shift, which involved longer hours but fewer days, Ms. Gumm drove three days a week on various routes. Shortly thereafter, she noticed a lot more motorists trying to cut off her bus by slowing down and stopping in front of her bus. On previous runs on these routes, Ms. Gumm experienced only a few situations when a motorist interfered with her driving. However, in December 2007, Ms. Gumm noticed that one car drove near her bus four times throughout the day. She identified the car by color and a dent in the back center of the car. This car kept cutting in front of her bus and slowing down at the last minute; she almost hit the car a couple of times.

On subsequent days, she noticed other vehicles, like an old, red Chevy truck and a navy blue SUV doing the same thing – getting too close and staying in her lane. As a result, in January 2008, Ms. Gumm started paying more attention and looking at license plates. On occasion, she noticed a car engaging in these activities had the same license plate. After about three times, she wrote down the license plate number on a little piece of paper, a pad, because “you could see the same kind of vehicle around your bus several times, but not until you know it’s the same license plate.” Eventually, she wrote down “a nice amount” of license plate numbers. Ms. Gumm kept the pad with the license plate numbers in her car and brought it work. Over the next two and a half months, she recorded about five to seven license plate matches on a regular basis. She kept the pad in case Pace wanted the information.

On another occasion, Ms. Gumm wrote the license plate number of one car with unique welding/stain on its trunk due to an accident. When she saw the car the next day, it had a different “temporary” license plate. A couple weeks later, she saw the same car again.

In February 2008, Ms. Gumm also called in the license plates on her bus radio after she had talked to the safety manager, Ms. Dillard, about the problem. She approached Ms. Dillard “hoping for her to make a suggestion, something that could help” with different motorists trying to cause accidents, which she hadn’t seen before. Ms. Gumm indicated she believed the incidents seem extreme and beyond normal. Ms. Dillard suggested writing down license plate numbers and Ms. Gumm indicated that she already had done that. Ms. Dillard also indicated that

⁶Over Respondent’s counsel’s objection, I asked Ms. Gumm questions during her direct examination.

years ago some motorists were trying to cause bus accidents by using a swoop and stop technique, which involves cutting a bus off and then suddenly stopping. Ms. Dillard told Ms. Gumm to call in on the radio. About two weeks later, Ms. Gumm made her first call about a car periodically stopping in front of her bus and reported the license plate number. She received no response from Pace.

Although Ms. Gumm later stopped by Ms. Dillard's office a couple of times, Ms. Dillard was not there. Ms. Gumm did not leave any note or try to call Ms. Dillard. She decided to give Pace some more time to figure out what to do.

About a week later, Ms. Gumm called in again about a car moving across three lanes, requiring Ms. Gumm to stop the bus to avoid a sideswipe. The dispatcher replied okay. A week later, she made a third radio call after another car tried to cut her bus off and cause an accident. This time, the dispatcher told her to write up an incident report. At the end of her shift, Ms. Gumm wrote an incident report.

When Ms. Gumm did not receive any response to her incident report, she prepared the detailed, eight page report with the intention of discussing it with Ms. Dillard. Ms. Gumm wanted Pace to "see what I had been noticing." She signed the report on March 14, 2008.

In the report, Ms. Gumm indicated she saw people wearing earpieces. It was possible they were listening to an ipod. She also reported that on one occasion when a group of vehicles was clustered around her bus, the vehicles turned off and moved away as the bus approached several police cars. Suddenly, no one was around the bus.

The motorists "appeared to be organized . . . it seemed like it was like two vehicles, two vehicles working together . . . one would be on one side of the bus, one would be in the front. And, they would, sometimes they would both be going like really slow." On another occasion, seven to eight cars in one lane cut in front of the bus, one after the other. She believed these cars were together because they were cutting off the bus in succession.

She also noticed these cars "would do this thing with their horns, you know, like blow their horn three times, blow the horn five times, and that, I don't know what that meant, but they would do like little things like that." While horn beeping is common in Chicago, hearing three beeps, then five beeps "constantly during your shift, that's, I mean, that's not normal."

In her report, Ms. Gumm reported particular circumstances about two funerals. The first time, noticing several cars with bright orange funeral signs in the windows, she stopped the bus to let a funeral procession pass. However, shortly later, "all of a sudden" three cars with funeral signs cut in front of her bus and slowed down. Because these cars reappeared so fast, Ms. Gumm believed the funeral procession was fake. The second time after Ms. Gumm stopped for another funeral procession, one of the cars with a funeral sticker came back quickly in the opposite direction, rather than staying for the burial. Although Ms. Gumm didn't think these incidents were safety issues, she believed they were "just some of the odd things that I was seeing, just to show them that, you know, I just think that they were really organized;"

Ms. Gumm also noticed that at times, when she started recording license plate numbers, drivers would become alarmed and turn away. Ms. Gumm also believed the motorists were communicating with beeping horns, flashing headlights, and on one occasion, hand signals.

Ms. Gumm also reported that some passengers on her bus were part of the organization because they tried to distract and delay her by claiming they were from out of town and asking questions, or by playing victim and not getting out of a bus seat. Ms. Gumm knew these passengers were part of an organization because some of them were in cars and then they got on her bus, "and vice versa." A passenger would get off the bus and then a little later Ms. Gumm would see the passenger in a car next to the bus. For example, one passenger asked a lot of questions before departing the bus causing Ms. Gumm to miss the traffic light twice. After Ms. Gumm looped around Orlando Square, while at a stop sign, she saw the same person in the car right next to her bus.

Another time, Ms. Gumm had to wait five minutes for a female passenger to get out of her seat because she was having some kind of spell. Because she believed the passenger's complaint was phony, Ms. Gumm considered this incident an example of "delay, distract, discredit, if they can distract me they can cause me to have an accident." Having to wait for the passenger to get out of her seat slowed down Ms. Gumm and caused her to be late. If she is late, Ms. Gumm doesn't get a break and going eight hours without having a break can cause a driver to miss things.

Ms. Gumm further noted that she had an abnormal amount of people walking against traffic without looking at her bus, hailing the bus from dangerous locations, and using canes. Regarding this later group, Ms. Gumm stated, "in the day, maybe the average norm would be you might pick up three people with a cane, okay, and I have like two or three occasions where it was like eight to ten people with a cane, that is not normal." These types of passengers were related to an organized group of motorists because Ms. Gumm had to lower the bus for passengers with canes, which slowed her down, made her "extremely late," and could have caused her to lose her break periods, leading to distraction. She believes they were "hoping that they can distract me enough so I don't know this car just cut me off." They also may have been trying to get her to react or become angry. These various passenger events happened on more than one occasion.

In her report, believing the situation was out of control, Ms. Gumm asked Pace for protection and some sort of back up system. She was hoping "they would send, have someone just not in uniform, maybe sit in the back of my bus to watch for a while." She wanted Pace to "just do something so this could stop." She felt harassed everyday in February and March 2008. She waited three months to report the harassment because she wanted to be sure "this is for real."

On March 10, 2008, a man at the Midway airport terminal took her picture as she was getting ready to drive off. She experienced a bright flash in her face. She reported the incident because "I don't like strangers taking my photograph, especially after, you know, knowing that, some of the things, I've been threatened, people trying to cause accidents, I just didn't like that, someone taking my photograph."

In March 2008, on two Mondays in a row, the same lady boarded her bus and threatened her, saying that Ms. Gumm had no idea who she was dealing with and that they were dirty men. She told Ms. Gumm to quit her job.

In the report's conclusion, Ms. Gumm asked how they could stop something so large because she felt that the people were organized and "it was more than I initially thought and seemed to be a large number."

Ms. Gumm waited a week to turn in the report so other people could read it. She continued to drive her bus. On March 21, 2008, Ms. Gumm gave her report to Ms. Dillard. After a training session, Ms. Gumm went out and drove her bus. However, Mr. Wright had a dispatcher replace her with another driver. She was instructed to return to the bus garage and see Mr. Wright, the division manager.

She met Ms. Dillard and Mr. Wright in his office. Mr. Wright asked Ms. Gumm if she remembered that when she first brought the issue about motorists trying to cause accidents to his attention in December 2007 he told her she was being paranoid. Mr. Wright then handed her a referral card to EAP and indicated that he was suspending her. He indicated that once she had dealt with EAP she could come back.

During this period, Ms. Gumm was being paid \$17.49 an hour. She received a paycheck biweekly, covering about 60 hours. Prior to her suspension, Ms. Gumm had been selected for another route which provided up to 79 hours of driving.

On March 24, 2008, Ms. Gumm went to EAP and saw Ms. Pat Jessie, who had already spoken to Mr. Wright. Ms. Jessie asked whether Ms. Gumm had ever seen a psychiatrist or been in any trouble. Later, Ms. Jessie informed Ms. Gumm that she was going to send her to a psychiatrist. She also indicated that Ms. Gumm had to sign a release form so the psychiatrist could talk to Mr. Wright. Ms. Gumm thought that would be a conflict but she signed the release in order to be compliant.

On March 31, 2008, Ms. Gumm saw Dr. Blount. She met with the doctor three times but he did not evaluate her. Her first visit lasted for five minutes. When she came back two weeks later, Dr. Blount simply indicated that he was prescribing medication. When Mr. Gumm asked why, Dr. Blount stated his decision was based on two things that Mr. Wright told him, but those two things were not in her March 2008 report. He indicated that he might give her a note to go back to work. When she returned the third time in April 2008, Dr. Blount handed her a prescription and said he couldn't help her with a return to work note at that time.

Subsequently, when Ms. Jessie asked whether Ms. Gumm had taken the medication, Ms. Gumm replied no because the psychiatrist hadn't evaluated her. Ms. Gumm asserted her "constitutional" right to get a second opinion from someone who had evaluated her. Ms. Jessie agreed.

In June 2008, Ms. Gumm met with Mr. Wright who wanted to know why she wasn't compliant. Ms. Gumm indicated that she had done everything requested, but she was not taking

the medication. He then sent her to Ms. Jessie who had two referrals, but the individuals never returned her calls.

In August 2008, when she saw Mr. Wright again, he tried to get her to resign. Mr. Wright indicated that if Ms. Gumm had taken the medication she would probably be back at work. He asked Ms. Gumm to take the medication, call Dr. Blount, and do what he instructed. But, Ms. Gumm indicated that she did not need to take the medication.

Then, Ms. Gumm started seeing Ms. Grazian for therapy for about eight sessions who referred her to Dr. Solomon. Dr. Solomon promised he wouldn't talk to EAP but he did. Feeling that her privacy had been violated, Ms. Gumm cancelled the appointment.

Ms. Gumm believed EAP was a subsidiary of a prescription drug research center and believed Ms. Jessie had conflict of interest in trying to get her to take medication. Ms. Gumm doesn't know whether Dr. Blount had any ties to the drug company.

Finding a psychiatrist was difficult because the doctors did not want to get involved with a back to work evaluation. Finally, Ms. Gumm turned to her primary doctor who gave her a referral to Dr. Ganellen. When she saw his business card, Ms. Gumm noted that he was a professor in the Department of Psychiatry. Yet, he was a clinical psychologist with a PhD. When she saw Dr. Ganellen in November 2008, he evaluated her.

Ms. Gumm has been out of work since March 2008. In addition to her medical situation, Ms. Gumm had to deal with Pace's appeal of her unemployment benefits through November or December of 2008.

To find re-employment, Ms. Gumm has been checking several newspapers and looking online at the state employment agency listings. Although she has a commercial driver's license, Ms. Gumm has not pursued work in that area because she wants to see what happens with Pace. Ms. Gumm also sent out many letters but she has not received any response. She has not had any interviews.

Ms. Gumm has a Bachelor of Science degree in textile science and applied design from Southern Illinois University. But, most of that type of work is in southern Illinois. After college, she worked in the fashion industry. For family reasons, Ms. Gumm does not want to relocate. She has worked in telecommunications and customer service.

Due to her loss of income, Ms. Gumm's financial situation is worse. She is just surviving but the financial problems are taking a toll. Emotionally, she feels badgered and depressed. However, she has not been ill or incurred any medical expenses. She has also been unable to help her family financially.

Ms. Gumm believes she is being treated differently because when another Pace driver threatened to shoot several people in the break room, he was only suspended for nine days. And, he was only required to see a PhD. But, in her case, Pace won't accept the recommendation of the PhD she saw. And she has been out of work for a year and a half.

Ms. Gumm also indicated that she has testified at court proceedings since her suspension as a witness for Pace. She wonders why they would use her as a witness in their case if they thought “I was really out there.” The court result turned out favorable for Pace.

[Cross examination] As a part-time driver, Ms. Gumm had no guarantee of a specific amount of hours.

Ms. Gumm did not give her PhD a copy of the report she presented to Ms. Dillard and Mr. Wright.

The Pace driver who had made the threats was compliant with EAP’s requirements. EAP has informed Ms. Gumm that she is non-compliant because she will not take the prescribed medication.

Ms. Gumm no longer has the pad she used for the vehicles’ license plate numbers.

On one occasion, at least ten cars were in formation around her bus. Ms. Gumm indicated she believed: the cars were part of an organization; the organization was trying to cause accidents and slow her down on her route; the organization went so far as to fake two funerals. She does not know why they singled out her route. She also believed the funeral cars were trying to cause her problems. Ms. Gumm does not know whether the people using the canes needed them. But, she believes that sometimes they were members of the organization trying to get her angry and become distracted.

Most of her route was a four lane road. The only relief break Ms. Gumm could call in was a restroom break.

Although the harassment and problems occurred everyday, they were not constant such that if Mr. Wright followed her for 20 minutes looking for something to happen he might not see anything. Mr. Wright told Ms. Gumm that he had followed her.

The individual who took her picture at the airport appeared to be “Spanish.”

Ms. Gumm believed she needed protection leaving work for home because she saw a truck with someone in it sitting right outside the parking lot several times. The rack on the truck was dented and she thought she had seen the truck before. She wasn’t sure if the person in the truck was part of the organization.

Dr. Blount told Ms. Gumm that he was prescribing the medication for paranoia. She disagrees with that diagnosis. The medication was Geodon, which is an antipsychotic.

Ms. Gumm initially did not provide all the pages of Dr. Ganellen’s report because she felt the middle portions were personal and private. But, eventually she provided all the pages to the OSHA investigator.

When Ms. Gumm submitted her report to Ms. Dillard, Ms. Gumm was an employee of Pace. Both at the time she presented the report to Pace and at the hearing, Ms. Gumm believes that everything in the report is true. Ms. Gumm never had an accident with any of the vehicles she noticed.

According to Dr. Blount, he spoke with both Mr. Wright and Ms. Jessie. The doctor indicated that Mr. Wright said Mr. Gumm reported cars zigzagging in front of her and people were talking under their breaths. Ms. Gumm denied saying that in her report. She does not believe lane changing is the same as zigzagging.

Ms. Gumm believes members of the organization changed permanent license plates to temporary plates. She believes they may have noticed her writing down the license plate numbers. On at least one occasion, a motorist became alarmed and quickly sped away. Based on her observations, she believes some drivers who were trying to cause an accident were stunt drivers, while other members of the organization were part of the traffic and helped the stunt drivers execute their plan. No one told her of their plan, she just thought they had a plan to cause accidents. She reported her belief about an increase in manpower because the plan seemed more involved than she originally thought and they became more aggressive.

She gave Ms. Grazian an un-redacted copy of the report she presented to Pace in March 2008. Only OSHA received the redacted version. She didn't give Dr. Ganellen a copy.

The various names in the reports are car dealerships. When Ms. Gumm indicated in the report that she would provide a compiled list of the cars and license plates upon request, she still had the list. She no longer has the list. The list was missing, "when I went in my car, it wasn't in my car." According to Ms. Gumm, "it seemed like someone was in my car because my mirror was turned completely around and I don't turn my mirror completely around." Although she locks her car, on two occasions, she noted the disturbed mirror when her car was parked at the Pace parking lot. The car had been stolen twice "with the master key" before she worked at Pace. She did not report the missing list to the police. She didn't think the police could do anything. Ms. Gumm doesn't recall when the pad or list became missing. She knows that she had it on March 14, 2008 when she typed the report.

Regarding the woman who took a while to get out of her bus seat and her daughter, Ms. Gumm put them in her report because she thought they "possibly" could be connected to the organization.

Ms. Gumm believes the persons who asked a lot of questions about route details and times were part of the organization and attempting to delay and distract her. She noted that while they claimed to be out of town, "it was strange how someone from out of town, they'd know all the route numbers." She told Dr. Ganellen about these incidents.

On occasion, during the day, Ms. Gumm also noticed several people hailed her bus from non-service stop locations. She didn't stop for them. Instead, she stopped at the next designated service stop and waited for them, which made her late. She believes that sometimes these people

were part of the organization who purposely delayed her by hailing the bus from a non-service area.

Ms. Gumm also observed some people who had been driving or riding in vehicles around her bus then get on her bus as passengers.

When police cars were around or someone was standing on the bus with her, Ms. Gumm noticed that the cars gave her more room in traffic.

When Ms. Gumm testified at a hearing for Pace, the case involved a claimed injury associated with a vehicle door striking her bus.

Ms. Gumm did not report the passenger threats to either Pace or the police.

At various locations and times, Ms. Gumm saw gatherings of vehicles that she had seen earlier. She was concerned because “the ones that I’ve seen around my bus trying to cause accidents, now I see them together again at another location, sitting there, talking.”

Ms. Gumm believes she complied with EAP. She understands Pace has suspended her for non-compliance.

On occasions, sometimes at night, when the traffic should have been light, Ms. Gumm believed the organization’s cars were trying to manipulate the traffic to delay her, even though she was driving different buses on different routes. Ms. Gumm does not know how the organization knew which route she would be driving on a particular day.

Ms. Gumm has not incurred any medical bills associated with her anxiety or mental distress associated with her unemployment. She has not had any job interview since her March 2008 suspension.

[Redirect examination] Pace never asked her for her list of vehicles and license plate numbers.

Ms. Gumm did not report the threats she received because in Pace training she was advised to pass her concerns on to the dispatcher. She reported the threats to Pace.

She believes the higher flow of traffic may have been present to slow her down. She had worked the routes many times and noticed when there was more than the norm of traffic around her bus.

[Recross examination] When Ms. Gumm orally reported the threats, she did not complete an incident report.

[Redirect examination] Pace indicated that she could not return to work until they received a statement from a doctor that she was okay and indicating the current diagnosis and prognosis. She obtained that. They also asked for doctor’s statement indicating that she could

return to work. Pace never informed her that a doctor was required to review any specific document.

Although she understands Pace's position, she disagrees with it. She has requested Pace to provide something in writing. The only thing she didn't do was take the medication. Pace never told her that was one of the requirements. Ms. Gumm got a second evaluation and is cleared to go back to work. Dr. Ganellen provided that clearance. Her primary care doctor indicated that Dr. Ganellen was a psychiatrist even though he only has a PhD. She doesn't know for sure that he's a medical doctor.

Regarding the other employee who was in trouble and returned to work, Pace only required him to see a PhD. She has likewise seen a PhD.

She also doesn't understand why having a PhD review a document is important when the provider has administered a neuropsychological evaluation. She has not had a medical doctor administer that type of test.

[Recross examination] Ms. Gumm was aware that Pace wanted Dr. Ganellen to review the report about the organization that she submitted to Pace in March 2008. She did not give him a copy of that report. While she was seeing Dr. Ganellen, she did not let him speak with EAP.

[Redirect examination] Regarding the August 11, 2008 letter, Ms. Gumm indicates that Ms. Jessie told her she was non-compliant because Ms. Gumm was not returning her phone calls during a two week period. However, Ms. Gumm disagrees because she actually returned Ms. Jessie's phone calls.

[Cross examination] Ms. Jessie's letter to Mr. Wright does not indicate the reason Ms. Gumm was considered to be non-compliant.

Mr. Cedric Wright
(TR, p. 341-391)

[Direct examination] Mr. Wright is the manager for the Bridgeview Southwest Division of Pace. In that capacity, he is the direct supervisor of the employees in all three sections: operations, administration, and maintenance.

Ms. Gumm was a part-time bus operator. In that position, she was not guaranteed any specific number of work hours.

On March 21, 2008, Mr. Wright's safety manager, Ms. Brenda Dillard, brought him an eight page letter from Ms. Gumm, RX 11, Tab 2. When he read about her allegations of a conspiracy, and "collected endeavors to make her have an accident by unknown sources," he became alarmed. He was concerned about Ms. Gumm's ability to properly interpret what was happening on the street. He took the letter to his supervisor, Mr. Klafeta, who is the west region manager. After Mr. Klafeta read the letter, they decided to refer Ms. Gumm to EAP in order to

help her. Mr. Wright was unaware of any pattern of increased number of accidents on her bus route.

Ms. Gumm had previously expressed concerns to Mr. Wright in about mid-February 2008. She indicated that cars were trying to cut her off and cause accidents. Since she hadn't had any accidents, Mr. Wright told her she was doing a good job. He also indicated that it was not unusual for cars to cut in front of buses. "It's a common occurrence" and Pace trains its operators to anticipate for that type of situation. The back of Pace buses warn car drivers not to cut in front. A few days later, Mr. Wright followed Ms. Gumm in a department vehicle for about 20 minutes. He did not observe anything unusual. Ms. Gumm's average shift lasts about 8 hours.

In meeting around June 2008, Mr. Wright told Ms. Gumm that he did not see anything unusual when he followed her.

After the decision was made to refer Ms. Gumm to EAP, Mr. Wright brought her into his office. Ms. Dillard was also present. At that time, he instructed Ms. Gumm to call EAP. When Ms. Gumm asked why, he replied that it involved her letter. Mr. Wright's sole contact with EAP was Ms. Pat Jessie. Three days later, Ms. Jessie indicated that Ms. Gumm had an appointment with Dr. Blount. Mr. Wright never spoke to any of Ms. Gumm's doctors or PhD's, including Dr. Blount. Eventually, Ms. Jessie advised that Ms. Gumm was not complying and not cooperating with EAP recommendations.

Based Ms. Gumm's stated interpretation of events around her, Mr. Wright believed she needed help. He was concerned about her safety and the safety of Pace passengers. EAP is designed to help employees. Mr. Wright did not suspend Ms. Gumm because she expressed concerns about safety.

[Cross examination] Mr. Wright does not recall a meeting with Ms. Gumm in December 2007. He does not recall a conversation with her about phone complaints he had received. He also doesn't recall the three specific complaints. He believes Ms. Gumm first raised concerns about cars trying to cause accidents in mid-February 2008.

Mr. Wright only followed Ms. Gumm once because what she reported did not sound unusual and he didn't observe anything unusual. If Ms. Gumm had returned and reported the incidents over and over then he may have taken more action.

Mr. Wright is unaware of radio calls Ms. Gumm placed to the dispatchers about cars trying to cause accidents. He only saw one incident report by Ms. Gumm concerning a car trying to cause an accident. He didn't talk to Ms. Gumm about it because he didn't see anything "truly unusual" in the report and no accident occurred.

Normally, when a bus driver is suspended pending an investigation or referral to EAP, a union representation is not called to be present. The suspension in Ms. Gumm's case was not considered a disciplinary action because at that point the suspension was not being placed on her record.

Mr. Wright does not recall any conversation with Ms. Gumm about taking her medication.

[ALJ examination]⁷ Within her eight page letter, Ms. Gumm raised safety issues. Although she has remained a Pace employee, since her March 21, 2008 suspension, Ms. Gumm has not been paid as a bus driver.

[Redirect examination] Ms. Gumm did not file a grievance about her suspension. Respondent's exhibit 5 indicates that Ms. Gumm reported to a dispatcher that a car purposely cut her off. No damage or contact with the car was reported.

[Recross examination] Mr. Wright met with Ms. Gumm in mid-June 2008. He can't really say whether a security person was present. But, Mr. Wright had some concerns about safety since Ms. Gumm was not complying with EAP.

Mr. Wright is unaware if Ms. Gumm had a conversation with the union president about filing a grievance.

[Redirect examination] The union president, and not Pace, decides whether a grievance will be filed.

Mr. Mark J. Klafeta
(TR, p. 382-391)

[Direct examination] Mr. Klafeta is the manager for the west region of Pace and oversees its three operating divisions, including the Southwest Division in Bridgeview. Ms. Gumm was a part-time bus driver in his region.

On March 21, 2008, Mr. Klafeta decided to suspend Ms. Gumm after talking to Mr. Wright and reading her letter. Based on what he read, Mr. Klafeta had concerns about the reasonableness of the claims she was making. Although he is not a doctor, Mr. Klafeta "had serious concerns for Ms. Gumm's mental health." He believed it was best to refer her to EAP for professional evaluation.

Under EAP, if an employee is compliant and deemed able to return to work, then Pace allows the employee to return even if they are still undergoing some sort of program or therapy. Ms. Gumm was provided at least two opportunities to be in compliance with EAP and failed to do so.

Pace did not have a problem with relying on Dr. Ganellen's evaluation. However, Pace "wanted to be assured that this doctor had seen the initial correspondence that she provided to us." Her job performance was not an issue in the suspension action. Mr. Klafeta did not talk to any of Ms. Gumm's treating professionals or EAP directly.

⁷Again, over Respondent's counsel's objection, I questioned this witness.

Mr. Klafeta did not suspend Ms. Gumm because she presented safety concerns. Instead, he “had serious concerns about her mental well-being, and as a public agency, we had concerns about people that ride on our bus and the people that drive around her bus and pedestrians, the general public as a whole.”

Regarding the employee who made threats, he was placed out of service and referred to EAP. When the employee complied with EAP, he was allowed to return to work.

Mr. Klafeta became aware of the paranoia diagnosis during the OSHA investigation and continued to have concerns about Ms. Gumm’s ability to return to work in light of the first physician’s determination. Based on EAP documentation, Ms. Gumm did not comply with the first physician’s directions. Ms. Gumm is currently an inactive Pace employee and subject to termination. EAP is “very serious” about maintaining employee confidentiality.

Mr. Klafeta is unaware of any unusual pattern of accidents in the Southwest Region. They have received no other reports similar to Ms. Gumm’s report.

[Cross examination] Mr. Klafeta is aware that Ms. Gumm first presented her report to Ms. Dillard.

Documentary Evidence

Union Agreement – June 2009 &
Drug and Alcohol Policy – October 2003
(CX 1, CX 2, and RX 12)

Assistance available under EAP is provided for psychological/emotional problems. According to the agreement between Pace Southwest Division and Local #1561, EAP services are made available to part-time employees with more than two years of continuous service who voluntarily request assistance or are first time rule violators under Part B. Under Part B, an employee may be referred for blood and alcohol testing if the person is involved in an accident or suspected of being impaired due to drugs or alcohol based on objective and reasonable criteria. In order to promote a drug and alcohol-free environment, Pace has established and encourages the use of its EAP. Rehabilitation is initiated through either voluntary self-referral or managerial referral.

Pace Employee Rule Book – December 1991
(CX 3)

Any incident involving a Pace vehicle or passenger must be reported to the dispatcher and immediate supervisor immediately. An incident report must also be complete prior to departure from the Pace garage on the day of the incident. Written reports “must be made for every accident . . . incident, or unusual occurrence which involves Pace.”

Neuropsychological Report⁸
(CX 5, RX 7,⁹ and RX 9¹⁰)

On November 10, 2008, Dr.¹¹ Ronald J. Ganellen, PhD, a clinical psychologist and associate professor in the Department of Psychiatry and Behavioral Sciences, Northwestern University Medical School, administered a neuropsychological test to Ms. Gumm and forwarded the report to Dr. Valeria Yashina. Ms. Gumm was referred for evaluation of her current cognitive and memory functions. She reported being forgetful during a stressful period of time associated “with a supervisor at work which led to her taking leave from her position as a PACE bus driver.”

Ms. Gumm had been a Pace bus driver for the last three years and received positive job performance feedback until recent tension developed with her supervisor. Ms. Gumm advised her supervisor that: a) she had been threatened by a passenger more than once; b) on several occasions, drivers pulled in front of her bus, cutting her off or stopping suddenly; c) she believed the drivers may have been trying to cause an accident. In response, her supervisor suspended her and referred her to an EAP counselor. Ms. Gumm believed the supervisor thought she was paranoid. Ms. Gumm has not returned to work. Ms. Gumm did not have a positive interaction with the counselor. She also met twice with a psychiatrist who did not know anything about her situation or case; instead the doctor relied on what her supervisor said. The doctor recommended anti-psychotic medication but Ms. Gumm was not satisfied with his explanation for the medication.

Ms. Gumm manages her daily living activities without difficulty. She has not experienced any change in driving skills. She manages her own finances but has problems paying bills on time due to her unemployment. Ms. Gumm reports being more forgetful since her suspension, misplacing items and having difficulty recalling names. Ms. Gumm believes she is able to return to work as a Pace bus driver but is doubtful about success if she has to work for the same supervisor.

Due to her unemployment, Ms. Gumm has been upset and sad. She worries about her mother’s health. She remains interested in activities and involved with her church. Other than hypertension, her medical history is unremarkable.

Dr. Ganellen noted that Ms. Gumm was alert, times 3. She was aware of current events and cooperated with his evaluation. After administering several tests, Dr. Ganellen rendered several determinations. First, Ms. Gumm’s speaking, reading skills, mental tracking, cognitive flexibility, and psymotor processing were intact. Second, her premorbid and current intellectual functioning were in the average range. Third, Ms. Gumm’s immediate and delayed memory

⁸While recognizing the sensitivity of mental evaluations and respecting individual privacy, I nevertheless conclude a detailed summary of the assessments offered by both parties is necessary in this particular case.

⁹RX 7 contains the first and fifth pages of Dr. Ganellen’s assessment which Ms. Gumm initially provided to Pace.

¹⁰RX 9 contains pages 2, 3, and 4 of Dr. Ganellen’s report later provided by Ms. Gumm.

¹¹For clarification, I note that Dr. Ganellen holds a PhD and is not a medical doctor like Dr. Blount.

recall were intact. Fourth, her perception of spatial relationships and basic sensory-perceptual abilities were intact. Fifth, in terms of personality, Ms. Gumm was careful, cautious, and defensive about the tests due to her concern about the consequences of the evaluation. She emphasized “the positive features of her current adjustment” and tried “to downplay, minimize, or gloss over difficulties.” According to Dr. Ganellen, her response “may have limited what could be learned about her during the evaluation.” Sixth, Ms. Gumm had limited self-awareness and “may not realize how her actions and words come across to others.” She may not realize the role her behavior has in her interactions with others. Consequently, “she may conclude that she has been criticized, judged, or treated unfairly.”

Based on his evaluation, Dr. Ganellen concluded that Ms. Gumm’s cognitive and memory abilities were intact. In his opinion, “from a neuropsychological perspective, she is able to manage her usual responsibilities at home and at work.” He found “no indications of significant psychological difficulties.” If she continued to experience difficulties, Dr. Ganellen recommended psychotherapy to assist Ms. Gumm dealing with conflicts.

Arbitration Hearing – June 26, 2009

(CX 6)

Ms. Gumm was scheduled to appear as a witness for Pace in an arbitration hearing regarding an accident in which a driver opened his car door and struck her bus as she was passing by the vehicle.

Health Insurance Termination

(CX 7)

Ms. Gumm’s health insurance through Pace was terminated effective November 2, 2008.

Correspondence

(CX 8 and CX 9)

On September 2, 2009, Ms. Gumm requested that Pace provide a complete copy of her personnel record. On September 11, 2009, Ms. Gumm advised Pace that several items were missing from her copy, including attendance records, incidents reports, and service reports.

Personnel Actions – Ms. Gumm

(CX 10, CX 15, RX 1 to RX 4, RX 8, and RX 11 (Tabs 3, 4, 6, 7))

On March 21, 2008, Mr. Wright suspended Ms. Gumm from service “until further notice due to her correspondence, dated March 14, 2008.” Ms. Gumm was directed to contact an EAP counselor for an evaluation and instructed to comply with EAP’s recommendations. Mr. Wright advised that failure to comply might lead to further disciplinary actions, up to and including termination.

On May 28, 2008, Ms. Pat Jessie, EAP counselor, advised Mr. Wright that Ms. Gumm was in non-compliance with EAP referrals recommendations and no longer an EAP participant.

On June 6, 2008, Mr. Wright directed Ms. Gumm to report to his office on June 12, 2008.

On June 12, 2008, Mr. Wright continued Ms. Gumm's March 21, 2008 suspension from service due to her "non-compliance with the EAP." She was instructed to again contact an EAP counselor and comply with EAP's recommendations. Mr. Wright advised that Ms. Gumm's "continued failure to comply with these instructions, including contacting, cooperating, and complying with the EAP's recommendation will result in the termination of your employment."

On August 4, 2008, Ms. Jessie again advised Mr. Wright that Ms. Gumm was in non-compliance with EAP referrals recommendations and no longer an EAP participant.

On August 11, 2008, Mr. Wright again instructed Ms. Gumm to report to his office on August 19, 2008.

On September 15, 2008, Mr. Wright placed Ms. Gumm on Pace's inactive roster effective September 19, 2008 due to her absence for a period of 182 days without being able to return to work. He advised that in order for Ms. Gumm to retain her health coverage she had to pay the full cost of the insurance at a monthly rate of \$381.00.

On January 29, 2009, Mr. Wright requested that Ms. Gumm provided Pace a complete copy of Dr. Ganellen's report.¹²

Misdemeanor Complaint
(CX 12)

On November 11, 2006, Ms. Gumm filed a misdemeanor complaint against a bus passenger for allegedly breaking the rear door window of her bus with his fist.

Ms. Gail E. Grazian, LCSW
(CX 14 and CX 21)

On July 9, 2008, Ms. Grazian indicated that she was Ms. Gumm's psychotherapist. Ms. Gumm voluntarily contacted Ms. Grazian to obtain a second opinion regarding her employment issues and Ms. Grazian conducted an "individual assessment" on June 10, 2008. Additionally, Ms. Grazian and Ms. Gumm have "ongoing, weekly psychotherapy sessions." Ms. Gumm was cooperative, compliant, willing to work, and "very diligent about public safety." Ms. Gumm desired to return to work and Ms. Grazian opined that "she appears to not display any danger to public safety."

According to Ms. Gumm, she had eight psychotherapy sessions with Ms. Grazian between June 10 and August 25, 2008.

¹²Ms. Gumm complied with Mr. Wright's request on February 5, 2009 (*See* RX 9, postmark).

OSHA Correspondence
(CX 16 and CX 22)

On November 12, 2008, an OSHA area director requested Ms. Gumm to provide a medical update from her medical doctor.

Ms. Gumm has completed an OSHA training course in construction safety and health.

Incident Report
(CX 17 and RX 5)

On March 1, 2008, Ms. Gumm reported to a dispatcher that at 79th Street/Lacrosse, a silver vehicle had purposely cut off the bus in traffic. In the associated incident report, Ms. Gumm indicated a Chevy van “hovered around my bus for awhile, got into position, and then cut my bus off, almost causing me to hit him.” The van then proceeded on without making a right turn. A passenger in the van had been in her bus and she saw the van on and off throughout the day, “along with some other vehicles also cutting me off.” The van had hovered around her bus on other occasions. The license plate has a wheelchair on it and its number was 232 751.

Personnel Action – Pace Employee
(CX 18, CX 19, CX 20, and RX 6)

In mid-June 2007, Mr. Wright suspended a Pace employee who declared in the bus driver break room that if he had a gun he’d shoot everyone. The employee was referred to EAP for evaluation. Since the employee completed the EAP sessions, a PhD determined the employee was not a dangerous to himself or others and recommended return to duty, and upon the condition that he continue with five aftercare sessions, the employee returned to work on June 26, 2007. EAP subsequently reported that the employee had successfully completed all its recommendations.

Ms. Gumm’s Statement – September 2008
(RX 11, Tab 1)

Ms. Gumm asserted that she is entitled to whistleblower protection because she suffered retaliation after providing correspondence to the company’s safety manager and her division manager. Ms. Gumm had noticed individuals trying to cause accidents with her bus using a swoop and stop method. Twice she reported to Pace her belief that her life was in danger.

On March 21, 2008, prior to boarding her bus, Ms. Gumm gave a report about the incidents to Ms. Dillard, the safety manager, who indicated that she would give it to the division manager, Mr. Cedric Wright, after she read it. Later, Mr. Wright pulled Ms. Gumm out of service. He told her she was being paranoid and directed her to EAP. Mr. Wright also had Ms. Gumm sign a document indicating that she was being suspended until EAP evaluated her.

During her initial contact with the EAP counsel, Ms. Jessie, Ms. Gumm attempted to go to another EAP office, but Ms. Jessie became unkind and indicated that she was located in the

only EAP office, even though Ms. Gumm was aware of two other locations. When Ms. Gumm met with EAP, the individual did not ask her about the threats or suspicious activities. She was then referred to a psychiatrist.

When Ms. Gumm met with the psychiatrist, he asked why she had been sent. Ms. Gumm told him that she was concerned and mentioned her report. The psychiatrist indicated that he would contact Mr. Wright. Ms. Gumm indicated that she was not comfortable with the psychiatrist sharing information about their sessions with Mr. Wright. The doctor indicated he would work with her on that and he indicated they could work out what was shared. Since Ms. Gumm wanted to return to work, she signed the release authorization.

In mid-April 2008, the psychiatrist prescribed medication without further evaluation. During her return visit, the psychiatrist was “not very friendly.” The doctor indicated that he was unaware that Ms. Gumm did not have a disability and was not a full time employee. He seemed disorganized as he looked for paperwork and was “very nervous.” The psychiatrist stated the only treatment was medication. When she asked what the medication was for, he replied paranoia based on her statements that people were talking under their breaths and zigzagging in front of her bus. Ms. Gumm told the psychiatrist “that was not in the document that I typed up. This sounded like something Cedric would say and apparently he did not read what I wrote.” Ms. Gumm indicated that she would not sign off on the medication and stated that she would see someone else for a second opinion.

In May 2008, EAP determined Ms. Gumm was being non-compliant for not taking the medication. Ms. Gumm insisted on a second opinion. She then obtained a second opinion from a psychotherapist who determined Ms. Gumm was not a danger to public safety. However, EAP insisted on a psychiatrist’s second opinion. When Ms. Gumm attempted to obtain an appointment, most psychiatrists indicated they did not do return-to-work evaluations.

Finally, noting that she had not threatened anyone, Ms. Gumm observed that two other Pace employees had threatened co-workers and yet were allowed to come back to work after no more than a two week suspension.

Ms. Gumm’s Letter – March 14, 2008
(RX 11, Tab 2)

For the safety of Pace passengers and bus operators, Ms. Gumm decided to report her experiences and findings based on observations since December 2007 because “it no longer appeared to be random behavior, but more so, targeted behavior.”

Ms. Gumm noticed three trends. First, “the same type of vehicles always around my bus.” She associated the vehicles by color, make, and models, as well as imperfection, dents, and stickers. License plate numbers also were becoming familiar.

Second, Ms. Gumm noted “structured groups” of vehicles. Specifically, “a group of vehicles was systemized to ride in one direction (half a trip) of a route (383 southbound to Oak Forest Hospital).” According to Ms. Gumm, “they structured another group to ride on the return

trip (383 northbound). But, then I would see some of the vehicles from the (383 southbound) later that day on another route of mine or I would see them around another bus.” At other times, some vehicles were around her bus at intervals throughout her run. Further, vehicles would appear at four particular intersections with traffic lights that take longer to cycle to green. Most of the drivers in these various vehicles “wear earpieces or headphones (they usually have wires hanging from their ears).” At the same time, a “drastic change in traffic” would occur if someone was standing next to Ms. Gumm while she was driving, a few police cars were around, or if a Pace employee were on the bus. Those events cause “most of the traffic to turn off the street in less than five minutes.” Ms. Gumm believed that “at least one person in the grouping observes and gives other drivers signals using their lights/high beams and other methods. Some drivers are used to cause the actual accident, while others are just to be a part of the traffic, and/or help the stunt driver execute their plan.”

Third, Ms. Gumm observed “these groupings of cars waiting” at several specific locations, including a church parking lot and two gas stations.

Ms. Gumm described numerous “driving stunts” by various vehicles. The vehicles would try to side swipe the bus, cut in front of the bus by making a right turn in front of the bus without sufficient space, stopping in front of the bus even though the traffic was not stop and go. At other times, the vehicles would try to run the bus off the road by “a gradual but continuous process moving into your lane.” Some cars would back up on a main street. Other cars would stick out into in the main street or obstruct her lane “trying to get me to swerve to the left, so I can hit one of their cars set up on the middle lane (left of the bus).” The vehicles temporarily blocked her from making a left turn. At other times, some vehicles would go only 15 mph in front of her bus. Further, usually on a specific bridge, “a multiple of cars” would make a right turn in front of her bus, while cutting her off. Other vehicles “faked two funerals that I know of, causing me to sit for a few minutes.” Ms. Gumm concluded, “these are just some of the stunts that are being pulled.”

Ms. Gumm also noticed that when she started recording license plate numbers, a driver would become “extremely alarmed and immediately making a right turn.” While she hoped that recording license plates would “discourage them into leaving me alone, it didn’t, instead they have increased their manpower.” Based on these license plate numbers, Ms. Gumm noticed that when less traffic was present, sometimes late at night, “this Organization would basically be the traffic. Manipulating how my bus flowed, detaining by [sic] bus and sometimes delaying me at a point where it caused me to be late.” Additionally, while most of the vehicles had regular license plates, Ms. Gumm noted several cars bearing temporary license plates from four specific car dealerships. When she started recording license plates numbers, “they started changing their license plates to other regular plates or to temporary plates.” Ms. Gumm offered to provide a complied list of the vehicle identifications upon request.

Ms. Gumm recorded several behaviors of passengers “who are a part of this organization.” These people would board her bus asking the same questions several times, or claim to be out-of-towners and “ask about several routes and a multitude of other questions,” or play victim by creating a scene, such when as a “lady couldn’t move out of her seat for 5 minutes, when it was her stop.” At other times, Ms. Gumm would observe situations throughout

the day when there would be an abnormal amount of people with several pedestrians walking against traffic, never looking at the bus. Other examples included “a multitude of people who hail the bus from dangerous locations or from across a wide street” and “a multitude of people with canes.” Finally, Ms. Gumm saw “some of the same people driving or riding as passengers in the different vehicles that hover around my bus. They also get on my bus and ride.”

In conclusion, Ms. Gumm was “crying out to Pace for Help!” In her opinion, the “situation is totally out of control.” She was being harassed daily and felt uncomfortable since she was “very vulnerable to those boarding my bus, who is [sic] part of this organization.” She was finding her duty to protect her passengers everyday more difficult. “These people have gotten so bold that I’ve seen them close to the Pace Southwest Garage and on my way home from the garage” These people even took her picture at Midway airport. On two specific occasions, the same passenger threatened her. Specifically, a female passenger advised Ms. Gumm that “some very dirty men get on my bus and that I don’t know whom I’m dealing with;” the passenger advised Ms. Gumm to quit her job. A few days later, the same female passenger told Ms. Gumm that her life was at stake and then “that evening I saw her in a[n] SUV in the passenger seat around my bus on my unscheduled, back to the garage on 95th street (westbound).” In light of these circumstances, Ms. Gumm requested protection, especially when she leaves the garage going home, and a back up system, with people placed in strategic locations. She wanted to feel safe driving the bus and not having to look over her shoulder. Ms. Gumm asked whether Pace can “put a stop to this” and wondered “how do you put a stop to something so large.” According to Ms. Gumm, Pace’s response could save the company a lot of money if “it was known that a certain % of accidents with Pace were caused by these people belonging to this organization.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Witness Credibility

As a preliminary matter, I need to address the respective credibility of the witnesses in this case. Based on his hearing demeanor, direct answers, candor, consistency within his testimony, and absence of confusion or equivocation, I found Mr. Klafeta to be credible witness.

Ms. Gumm and Mr. Wright were also generally credible, and Mr. Wright's testimony regarding the adverse personnel actions and the basis for management's decisions were corroborated by Mr. Klafeta's credible testimony. However, two main conflicts emerged in the testimonies of Ms. Gumm and Mr. Wright.

Ms. Gumm states that she first raised safety concerns about her bus route with Mr. Wright in December 2007 while discussing some purported complaints against her. During that conversation he indicated that she was being paranoid. Mr. Wright testified that Ms. Gumm first told him about the unsafe drivers in mid-February 2008 and he doesn't recall a conversation about customer complaints. Upon consideration of the record, I believe this discrepancy is attributable to imperfect memory rather than a lack of candor by either Ms. Gumm or Mr. Wright and does not adversely affect their respective credibility.

Ms. Gumm also testified that Dr. Blount told her that he had spoken with Mr. Wright. Mr. Wright denies that he spoke with any of the doctors or health care providers, including Dr. Blount, in this case. In assessing this testimonial conflict in terms of credibility, I first note Ms. Gumm's version is based on hearsay. As a result, its accuracy could be independently assessed since Dr. Blount was not called as a witness. Additionally, in her September 2008 statement, RX 11, Tab 1, Ms. Gumm states that when Dr. Blount provided the rationale for his prescription, his reasons "sounded like something Cedric (Mr. Wright) would say" which appears to reflect an assumption by Ms. Gumm that Dr. Blount spoke with Mr. Wright. Consequently, I conclude this discrepancy in testimony does not adversely affect the credibility of either Ms. Gumm or Mr. Wright.

NTS Employee Protection and Affirmative Defense

The employee protection provision of the NTS, 6 U.S.C. § 1142, prohibits the discriminatory treatment of employees who have engaged in certain activities related to public transportation safety and security. Specifically, 6 U.S.C. § 1142(a) prohibits a public transportation agency, its contractors and subcontractors, and its officers and employees from discharging, demoting, suspending, reprimanding, or in any other way discriminate against an employee for engaging in NTS protected activities. As one of the NTS protected activities, 6 U.S.C. § 1142(b)(1)(A) designates the reporting of a hazardous safety condition.

According to 6 U.S.C. § 1142(c)(2)(B)(iii), to establish that an employer has committed a violation under 6 U.S.C. § 1142(b), a complainant must prove by a preponderance of the evidence that an activity protected under NTS was a contributing factor in the adverse or unfavorable personnel action alleged in the complaint. Courts have defined "contributing factor"

as “any factor which, alone, or in connection with other factors, tends to affect in any way” the decision concerning the adverse personnel action, *Marano v. U.S. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

Thus, based on these principles, to establish a violation of the NTS employee protection provisions, a complainant must prove three elements: 1) protected activity; 2) adverse or unfavorable personnel action; and 3) causation in terms of a contributing factor.

In the event that a complainant proves the case in chief by a preponderance of the evidence, a respondent may still avoid liability for the discrimination through a statutory affirmative defense. According to 6 U.S.C. § 1142(c)(2)(B)(iv), a complainant may not obtain relief under the Act if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. In asserting this affirmative defense, the burden of proof at the clear and convincing level rests with the respondent. Although there is no precise definition of “clear and convincing,” that evidentiary standard falls above preponderance of the evidence and below a reasonable doubt. *See Yule v. Burns International Security Service*, 93-ERA-12 (Sec’y May 24, 1995). Where evidence demonstrates that other employees, similarly situated, did not receive the same adverse personnel action, the employer may fail to carry its burden to show it would have discharged the complainant even if he had not engaged in protected activity.

In seeking whistleblower protection, Ms. Gumm has asserted that she engaged in two separate protected activities. First, in December 2007, she reported to her supervisor that she was experiencing hazardous safety situations on her bus route involving vehicles cutting in front of her bus. Second, in March 21, 2008, Ms. Gumm presented an eight page report to the Pace safety manager, detailing numerous hazardous situations she had experienced as a Pace part-time bus driver over the course of a few months due to the targeted behavior by an organization. Since the parties focused on the March 21, 2008 correspondence during the course of their litigation, I will first address whether Ms. Gumm may invoke the NTS employee protection provisions based on the report she submitted on March 21, 2008. Then, I will render a similar determination regarding her first report of hazardous safety conditions along her bus route.

Issue No. 1 - March 21, 2008 Written Report

In considering the three elements that Ms. Gumm must prove to invoke whistleblower protection for her submission of a written report on March 21, 2008, two elements, causation and unfavorable personnel action, are established; whereas, the remaining element, protected activity, and the Respondent’s affirmative defense, are the principal aspects of this litigation.

Causation and Unfavorable Personnel Action

Based on the events that occurred on March 21, 2008, I find Ms. Gumm has demonstrated that she suffered an unfavorable personnel action due to the submission of her report on March 21, 2008. Specifically, as Mr. Wright testified, within a few hours after Ms. Gumm presented the report to Ms. Dillard, after he read the report, and with the concurrence of Mr. Klafeta, Mr. Wright pulled Gumm off her bus route and indefinitely suspended her duties as

a part-time Pace bus driver pending an evaluation by EAP and subsequent compliance. Mr. Wright also specifically told Ms. Gumm that she was being suspended due to her correspondence. Although several of her entitlements remained in place for a while, Ms. Gumm did not receive any pay during her suspension. As a result, Mr. Wright's suspension of Ms. Gumm's bus driving duties adversely affected the terms and conditions of her employment with Pace and represents a significant unfavorable personnel action.

Protected Activity

Principals¹³

A requisite element to establish illegal discrimination against a whistleblower is the existence of a protected activity. The Secretary, U.S. Department of Labor, ("Secretary") has broadly defined "protected activity" as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it doesn't matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations." *Minard v. Nerco Delamar Co.*, 92 SWD 1 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998), citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). In other words, the complainant's concern must at least "touch on" the subject matter of the related statute. *Nathaniel v. Westinghouse Hanford Co.*, 91 SWD 2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and *Dodd v. Polysar Latex*, 88 SWD 4 (Sec'y Sept. 22, 1994). Additionally, the standard involves an objective assessment of reasonableness. The subjective belief of the complainant is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95 CAA 12 (ARB Apr. 8, 1997).

Internal complaints are generally covered under the employee protection provisions. *Carson v. Tyler Pipe Co.*, 93-WPC-11 (Sec'y Mar. 24, 1995). According to the Secretary, an internal complaint should be a protected activity because the employee has taken his or her concern first to the employer to permit a chance for the violation to be corrected without government intervention. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec'y Apr. 27, 1987) (order of remand). The report may be made to a supervisor, or through an internal complaint or quality control system, or to staff member responsible for the subject matter. *Williams v TIW Fabrication & Machining, Inc.* 88-SWD-3 (Sec'y June 24, 1992); *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34 (Sec'y Sept. 28, 1993); and, *Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec'y Jan. 13, 1993).

Turning to the specifics of the NTS, as previously discussed, one of the employee activities protected under NTS is the reporting of a hazardous safety condition. Accordingly, in this case, an NTS protected activity under 6 U.S.C. § 1142(b)(1)(A) has three components. First, the employee's information must involve a purported hazardous safety condition. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the

¹³Although these principles were developed in environmental whistleblower cases, the underlying purpose for whistleblower protection and associated principles are readily adaptable to NTS cases.

complainant must communicate her information to a supervisor or a staff member responsible for public transportation safety.

Hazardous Safety Condition and Communication

For this claimed March 21, 2008 protected activity, two of the three components, hazardous safety condition and communication are established.

In her March 21, 2008 report, Ms. Gumm reported the existence of an organization that on multiple occasions was interfering with the safe operation of her Pace bus by a) placing passengers on her bus to distract and delay her, and b) having drivers dangerously operate their vehicles in an attempt to cause an accident by sideswiping her bus and swooping in front of her bus and suddenly stopping. Such allegations clearly relate to hazardous safety conditions along Ms. Gumm's bus routes.

On March 21, 2008, Ms. Gumm presented her report about the perceived safety hazards along her bus route to Ms. Dillard, the Pace division safety manager, who in turn gave the report to Mr. Wright, Ms. Gumm's immediate supervisor.

Objective Reasonableness

The remaining element concerning objective reasonableness remains as a significant issue. Consequently, for the purpose of assessing the objective reasonableness of Ms. Gumm's March 21, 2008 report, RX 11, Tab 2,¹⁴ a detailed review of her specific assertions is warranted.

As set out in her March 21, 2008 eight page letter, RX 11, Tab 2, Ms. Gumm stated that due to her concern for passenger and bus driver safety she decided to report events had been occurring since December 2007 as part of "targeted behavior" by an "Organization." While standing alone a few of the incidents she provided to support her concern involve hazardous safety conditions as previously discussed, such as erratic driving behavior around her bus, Ms. Gumm presented all the individual events as evidence of a collective action by an "Organization." As a result, I must assess the reasonableness of her March 21, 2008 letter in its entirety.

Based on her credibility as a witness, I have no doubt that Ms. Gumm subjectively believes she was exposed to hazardous situations due to an orchestrated effort by an organization of vehicles and bus passengers. However, having reviewed her letter in detail and considered her additional explanations at the hearing, and for the reasons set out below, I conclude that Ms. Gumm's March 21, 2008 written report of an organized group of drivers and passengers targeting Ms. Gumm for the purpose of trying to cause her to have an accident as a Pace bus driver was not objectively reasonable.

On multiple occasions, based on license plate numbers and other vehicles characteristics, Ms. Gumm believed the same cars persistently engaged in erratic behavior around her bus and

¹⁴Although Ms. Gumm signed the letter on March 14, 2008, I will use the date she presented the document to Pace officials for reference.

she determined these cars were actually acting in concert because they communicated by flashing headlights and “most of the drivers wear ear pieces or headphones.” Further, though some vehicles were used to interfere with traffic, the organization used a “a stunt driver to execute their plan.” At the hearing, Ms. Gumm explained the cars in this organization would try to cut off her bus, then slow down and stop in front of her bus. Ms. Gumm also noted that the vehicles also communicated by honking car horns in a set number of beeps. She acknowledged that she had no idea how the organization knew what route she’d be driving on any particular day since her assigned routes varied; nevertheless, Ms. Gumm concluded this group was purposefully manipulating traffic around her bus and driving in a manner to cause an accident with her bus.

Upon consideration of these observations, I first note that repeated runs on bus routes at set periods of time may reasonably explain why Ms. Gumm on occasion observed the same cars. Additionally, in normal traffic, a bus driver might observe flashing headlights or hearing beeping horns, even in sequence. And, as Ms. Gumm acknowledged, vehicle drivers wearing earpieces/headphones may be listening to an ipod. Such individuals might also be using cell phones to communicate with people other than other drivers in an organized group. Similarly, sudden moves and erratic maneuvers by vehicles does not provide a reasonable reason to conclude that they are being driven by organized stunt drivers. As Mr. Wright noted in response to Ms. Gumm’s March 1, 2008 incident report of a silver van hovering around her bus and attempting to cut her off, CX 17 and RX 5, such an incident is not an uncommon or unusual occurrence for Pace bus drivers. Consequently, none of those factors provide reasonably objective evidence of an organized group.

I have considered that, as definitive means to establish that structured group of vehicles existed and to demonstrate that the same cars were surrounding her bus, Ms. Gumm indicated that she documented the license plate numbers of the organization’s vehicles on a regular basis on a notepad which she then kept in her car after work. However, at the hearing, Ms. Gumm was unable to produce that contemporaneous license plate documentation. Although Ms. Gumm states she possessed the documentation in March 2008, she does not remember when the notepad went missing but, based on the displaced position of her rearview mirror, Ms. Gumm suspects that on at least two occasions since March 2008 while her car was in the Pace parking lot, some unauthorized person must have been in her car. I also note Ms. Gumm reported in a March 1, 2008 incident report, CX 17 and RX 5, that a silver van had hovered around her bus and then cut her off in traffic.

Ms. Gumm believed that she was dealing with a nefarious organization of drivers in part because on occasion the traffic would change when police were around and license plates were being changed. Ms. Gumm subsequently explained that the organization vehicles would turn away when she approached police cars and the drivers would change the license plates on the vehicles after she started recording the license plate numbers.

Again, the first stated reason is not objectively reasonable since a driver’s decision to turn away from her bus may be motivated by numerous concerns unrelated to the presence of police. Ms. Gumm’s second basis lacks sufficient specificity to conclude either she was accurately

observing a change in license plates on the same vehicles or that such license plate changes were in response to her action of recording license plate numbers.

As additional examples of collusion among the drivers, Ms. Gumm noted the same vehicles engaged in the following “stunts”: driving in an erratic manner around her bus attempting to sideswipe the bus, blocking traffic, moving into her lane to run the bus off the road, backing up on main street, driving unusually slow, gathering in parking lots, and lining up in succession to make multiple right turns in front of her bus, usually on a bridge. The organization also “faked two funerals” which caused her to be delayed for several minutes. Regarding the two funerals, Ms. Gumm explained that she concluded they were fake because vehicles with funeral stickers associated with the procession reappeared quickly around her bus. She included the funeral incidents in her safety report to show “they were really organized.”

Again, considering that Ms. Gumm was operating a bus in a major metropolitan city, her characterization of these events as “stunts” conducted by an organized series of vehicles is not objectively reasonable. Her additional emphasis on two funeral processions is particularly unreasonable since the sudden reappearance of a funeral vehicle out of an entire funeral procession certainly does not reasonably support Ms. Gumm’s conclusions that the funeral procession itself was “faked” and that the organization of vehicles interfering with the operation of her bus orchestrated the fake funeral processions.

To further show the extent of the organization’s enterprise, Ms. Gumm asserted that at times passengers with canes who were “part of the this organization” boarded her bus. Ms. Gumm later explained that these passengers boarded her bus in unusual numbers, greater than the average of three a day, to cause multiple delays associated with kneeling the bus to facilitate their entry and egress. These cumulative delays were designed to force Ms. Gumm to miss her rest breaks, thereby increasing her fatigue and making her more vulnerable to having an accident.

Ms. Gumm’s conclusion that some of the passengers with canes were connected with the vehicle organization appears to be primarily based on an increased number of such passengers above the average with the associated additional delay. That fact does not reasonably establish that these individuals were working both together and in concert with an organized swarm of vehicles around her bus to delay her so that she might later have an accident.

Similarly, Ms. Gumm identified three other categories of passengers who were part of the vehicle organization. First, claiming to be from out of town, some passengers would delay Ms. Gumm by asking an excessive amounts of questions. Next, on some days an “abnormally more” number of pedestrians would cross in front of her bus without looking and a “multitude of people” would hail her bus from dangerous locations. The third type of the organization’s passengers were people who played “victim to create a scene,” for example, a lady who took five minutes to get out of her seat because she had a spell. Ms. Gumm later indicated that because the people asking her questions were aware of bus route numbers she doubted they were out-of-towners. Ms. Gumm noted that she was forced to wait for the hailing pedestrians while they reached the next service location. She believed the lady’s spell was “phony.” And, she also noticed that some of these people later appeared in cars near her bus.

Even though Ms. Gumm had suspicions about the out-of-towners, she believed the lady's spell was phony, and she later observed some of these people in cars, the common characteristic for her focus on these types of passengers was that their actions caused delays in her operation of the bus. Again, the fact that some passengers would cause additional delays on a particular day does not provide a reasonable basis for concluding that they were acting together as part of a vehicle organization to delay her in order that she would miss her breaks and become fatigued.

Finally, members of the organization had become so bold that Ms. Gumm has seen "them close to the Pace Southwest Garage and on my way home from the garage." A female passenger also threatened Ms. Gumm two Mondays in a row by telling her there were very dirty men on her bus, indicating that she didn't know who she was dealing, advising her to quit, and stating her life was at stake." Additionally, "they" took her photograph on her route at Midway airport. At the hearing, Ms. Gumm indicated that as she was getting ready to drive off at Midway airport a flash went off in her face and she didn't like strangers, such as this "Spanish" individual, taking her picture. She had also noticed a person in a truck sitting outside the bus garage parking lot several times and believed she had seen the truck before.

Understandably, these events may have been individually disturbing to Ms. Gumm. However, she has provided no reasonable basis for her conclusions that the person in the pick-up truck outside the Pace garage, the person taking her picture at Midway airport, and the woman passenger who warned her about very dirty men on the bus were working together as part of the same, and emboldened, conspiracy.

In summary, I recognize Ms. Gumm delayed her report for three months to make certain what was going on was "real." Nevertheless, upon cumulative consideration of all aspects of Ms. Gumm's March 21, 2008 letter, with particular focus on her assertions of fake funerals, stunt drivers, excessive numbers of passengers with canes, and a person taking her photograph, I find that her report of being targeted by a large "nearly unstoppable" organized group of vehicles and bus passengers who were creating hazardous safety conditions around her bus was not objectively reasonable. Consequently, Ms. Gumm has failed to establish that that her March 21, 2008 letter was a protected activity under NTS.

Conclusion

Ms. Gumm suffered a significant unfavorable personnel action through her suspension due to her submission of her written report on March 21, 2008. However, although Ms. Gumm demonstrated a genuine subjective belief that she was being harassed by an organization of vehicle drivers and bus passengers, her March 21, 2008 report of that purported conspiracy was not objectively reasonable and thereby did not constitute a protected activity under NTS. Accordingly, since Ms. Gumm has failed to prove a requisite element of entitlement, her complaint of discrimination under the NTS employee protection provisions based on her submission of the March 21, 2008 report must be dismissed.

Affirmative Defense

Although I have determined that Ms. Gumm did not engage in a NTS protected activity, thereby failing to satisfy all three requisites for employee protection under the Act, for the sake of completeness, I will also address whether Pace is able to invoke the affirmative defense under 6 U.S.C. § 1142(c)(2)(B)(iv). That is, whether Pace has presented clear and convincing evidence that Ms. Gumm would have been suspended for an EAP evaluation and would still be under suspension for non-compliance absent her protected activity.

Initial Suspension

As previously discussed, certain portions of Ms. Gumm's March 21, 2008 report standing alone, such as cars swooping in front of her bus and suddenly stopping, relate to hazardous safety conditions. However, at least two aspects of her correspondence provide more than a sufficient number of non-discriminatory reasons for Pace's unfavorable personnel action. First, without an objectively reasonable basis for her conclusion, Ms. Gumm asserted that she was being targeted by a "nearly unstoppable" organization of both vehicle drivers and bus passengers. Second, Ms. Gumm expressed an apparently sincere, but extraordinary, belief that: a) stunt drivers were being used by the organization, b) a group of bus passengers with canes were working in concert with the organization, c) a woman who took five minutes to get off the bus also was working with the organization, and d) the organization was so effective that it was able to fake two funeral processions.

Ms. Gumm's presentation of unrealistic allegations about an organization and some of its elaborate efforts, clearly raised a valid concern about whether Ms. Gumm was realistically interpreting and evaluating the events occurring around her bus. These portions of her March 21, 2008 report definitely call into question her mental fitness to drive a Pace bus and transport Pace passengers. These portions of her report fully support the credible testimony of: a) Mr. Wright that he did not suspend Ms. Gumm because she raised safety concerns and that her letter's assertions of collective efforts by a conspiracy was the basis for his concern about her ability to properly interpret what was happening around her, and b) Mr. Klafeta that he did not suspend Ms. Gumm due to her safety concerns, but instead directed Ms. Gumm's temporary suspension due to his concern about the reasonableness of her conspiracy assertion, which raised a question about her fitness to serve as a Pace bus driver. While Ms. Gumm understandably emphasizes the safety aspects of the March 21, 2008 report in her NTS employee discrimination complaint, her intertwined assertions about the existence of a large organization and its sinister schemes directed against her, coupled with her supervisor's credible testimony about the basis for their suspension decision, provide clear and convincing evidence that Mr. Wright and Mr. Klafeta had a non-discriminatory basis for the adverse personnel action and would have temporarily suspended Ms. Gumm for an EAP evaluation, even absent the hazardous safety concerns she also reported in her March 21, 2008 correspondence.

Continued Suspension¹⁵

Pace has also established by clear and convincing evidence that Ms. Gumm's continued suspension was predicated on non-discriminatory reasons, a diagnosis of paranoia, her failure to take prescribed medication, and the absence of a return to work recommendation from a mental health care provider who had reviewed Ms. Gumm's March 21, 2008 correspondence.

In assessing the evidentiary record regarding Ms. Gumm's continued suspension, I first turn to Dr. Blount's assessment. In the absence of his treatment notes, I can not fully assess the reasonableness of Dr. Blount's medical diagnosis of paranoia and corresponding prescription. However, although Dr. Blount did not conduct a mental evaluation, and while some conflict in evidence exists on the source of his information, Dr. Blount was apparently aware of both Ms. Gumm's allegation of unsafe drivers and the conspiratorial tone of her complaint. Additionally, even though Ms. Gumm indicated the physician appeared nervous at times, the record contains no evidence that Dr. Blount colluded with EAP and Pace in rendering his diagnosis and medication decision. Consequently, within the contexts of their understanding of Dr. Blount's evaluation, both EAP and Pace were justified in continuing Ms. Gumm's suspension based on her refusal to take medication prescribed by a psychiatrist who had diagnosed paranoia.

Next, as a second opinion, Ms. Gumm offered the statement from her psychotherapist, Ms. Grazian, CX 14 and CX 21. Although Ms. Grazian had more contact with Ms. Gumm than Dr. Blount, the rejection by EAP and Pace of Ms. Grazian's statement as a basis for terminating Ms. Gumm's suspension was not unreasonable. Significantly, Ms. Grazian's statement does not contain any discussion about Ms. Gumm's March 21, 2008 assertions that she was being targeted for an accident by a conspiracy. Similarly, Ms. Grazian did not express any awareness of some of the specific events Ms. Gumm associated with the organization. Consequently, Ms. Grazian's conclusion that Ms. Gumm did not display any danger to public safety has diminished probative value. Since Ms. Grazian's assessment did not directly address the basis for Ms. Gumm's suspension, her endorsement of Ms. Gumm's willingness to return to work EAP did not overcome Dr. Blount's diagnosis and prescription.

Based on extensive testing and analysis, Dr. Ganellen provided a probative assessment of Ms. Gumm's mental capabilities which warrants some consideration. However, although Dr. Ganellen was aware of Ms. Gumm's perception about hazardous safety conditions along her bus route caused by "individuals," he neither read the March 21, 2008 letter nor discussed with either Mr. Wright or Mr. Klafeta their reasons for suspending her employment. Consequently, while his testing demonstrated the Ms. Gumm's cognitive memory abilities were intact and she had no significant psychological difficulties, and he was aware that Ms. Gumm felt threatened by passengers at times and unsafe drivers, Dr. Ganellen never mentioned any reference of an organization by Ms. Gumm. More importantly, he did not address what may have caused Ms.

¹⁵Although I am treating Ms. Gumm's continued suspension as a separate adverse personnel action for the purposes of the affirmative defense analysis, as explained in this discussion, the reasons for her continued suspension relate to actions and inactions that occurred after the submission of the March 21, 2008 report. In other words, Ms. Gumm would have difficulty proving the submission of the March 21, 2008 itself was the basis for her continued suspension.

Gumm to conclude an organization was working against her or believe that stunt drivers and bus passengers with canes were working in concert to interfere with her bus driving responsibilities.

Dr. Ganellen's silence on those issues is directly related to Ms. Gumm's decision not to give Dr. Ganellen a copy of her March 21, 2008 report and her refusal to permit contact with any of her supervisors. Instead, Dr. Ganellen's understanding of what occurred from December 2007 to March 2008 on Ms. Gumm's bus route and the contents of her March 21, 2008 report was based solely on what Ms. Gumm chose to tell him. While Ms. Gumm believes that she has valid reasons to keep her March 21, 2008 letter from Dr. Ganellen, Pace's insistence that a mental health care provider who is recommending her return to work as a Pace bus must have considered the exact allegations in her March 21, 2008 letter which serves as the basis for her suspension, and its corresponding rejection of Dr. Ganellen's report as a basis to end Ms. Gumm's suspension, are more both reasonable and responsible actions.

Finally, I have considered two additional factors Ms. Gumm presented to show that her continued suspension violates the NTS employee protection provision. First, Ms. Gumm emphasizes that other Pace employees, and in particular a bus driver who threatened to kill everyone in the break room if he had a gun, were permitted to return to work after brief suspension and not required to see a psychiatrist; whereas, she has suffered an indefinite suspension but never threatened anyone and has been required to see a psychiatrist.

Disparate treatment of employees may provide evidence of discriminatory motive if the employee claiming whistleblower protection has been treated differently than other similarly situated employees. However, the situation involving the Pace employee who made threats in the break room was significantly different such that Ms. Gumm and the other employee were not similarly situated. While the threats by the other Pace bus employee appear to have involved anger management issues, Ms. Gumm's March 21, 2008 letter expressed concerns about a conspiracy directed against her and raised legitimate questions about her ability to realistically interpret events occurring along her bus route which provided a foundation for EAP's referral of Ms. Gumm to a psychiatrist rather than a psychologist. Additionally, and notably, Mr. Klafeta indicated that a recommendation from Dr. Ganellen, a psychologist, might be acceptable provided he reviewed Ms. Gumm's March 21, 2008 letter. Finally, as Mr. Klafeta also testified, the other employee's personnel record, CX 18, CX 19, CX 20, and RX 6, reflects, and Ms. Gumm acknowledged, the employee who made the break room threats successfully completed all the EAP recommendations for treatment. In contrast, Ms. Gumm remains in noncompliance with EAP recommendations, having declined to take prescribed medication and refused to provide Dr. Ganellen a copy of March 21, 2008 statement.

As a second concern, based on her problems with EAP and Ms. Jessie's insistence that she take medication, Ms. Gumm questions the motivation of EAP and its counselors, claiming EAP is a subsidiary of a prescription drug company. In that regard, Ms. Gumm's suspicions about EAP's recommendations being affected by an alleged connection with a prescription drug company has little probative value considering that the prescription for medication came from Dr. Blount.

In summary, through the hearing date, the record contains an un-refuted medical diagnosis of paranoia, with Ms. Gumm continuing to hold a steadfast belief that she was targeted by a sinister organization of drivers and bus passengers. Ms. Gumm has refused take medication for treatment of the diagnosed ailment, remaining in noncompliance with EAP. And, due to Ms. Gumm's choice, Pace does not have a return to work recommendation from a mental health care provider who has reviewed her March 21, 2008 correspondence which formed the basis for Pace's suspension of Ms. Gumm's bus driving duties. Accordingly, I find that Pace has provided clear and convincing evidence of non-discriminatory justification for her continued suspension and that Ms. Gumm's suspension would have continued in the absence of the hazardous safety conditions aspects of her March 21, 2008 report.

Conclusion

Pace has presented clear and convincing evidence that Ms. Gumm was suspended on March 21, 2008 due to her expressed belief in the existence of an organization targeted against her and specific details she provided about the organization's efforts, rather than her report of safety hazardous conditions. Pace has also established by clear and convincing evidence that Ms. Gumm's continued suspension is due to her continued non-compliance and the absence of a return to work evaluation and certification from a mental health care provider who has reviewed her March 21, 2008 correspondence, rather than the hazardous safety conditions raised in her report. Accordingly, under the provisions of 6 U.S.C. § 1142(c)(2)(B)(iv), Ms. Gumm may not obtain relief under the NTS employee protection provisions.

Issue No. 2 – December 2007/mid-February 2008¹⁶ report

Between December 2007 and mid-February 2008, Ms. Gumm advised Ms. Dillard and Mr. Wright that she was experiencing hazardous driving conditions along her route due to erratic drivers.

Protected Activity and Unfavorable Personnel Action

Applying the three requisite elements for whistleblower protection to this report, Ms. Gumm has established both protected activity and adverse personnel action. Specifically, as previously discussed, the sudden movements by drivers around and in front of Ms. Gumm, while perhaps ordinary events, nevertheless relate to the safe operation of a public transportation vehicle. And, the unfavorable personnel action remains her March 21, 2008 suspension.

Causation

Conflicting evidence exists on whether Ms. Gumm's report in December 2007/mid-February 2008 caused or contributed to her March 21, 2008 suspension. The temporal proximity between her report and suspension within three months provides some circumstantial evidence

¹⁶As previously discussed, Ms. Gumm indicates that she raised her concerns about unsafe drivers to Mr. Wright in December 2007. Mr. Wright believed he first heard of her concern in mid-February 2008. Since the Mr. Wright's knowledge is the key consideration, I will proceed as though he became aware of Ms. Gumm's report of erratic drivers sometime between December 2007 and mid-February 2008.

that this report was a factor in the adverse employment action she suffered. However, for several reasons, I find the preponderance of the remaining evidence outweighs the circumstantial evidence of temporal proximity. First, Mr. Wright credibly testified that in response to Ms. Gumm's report, his sole action was to drive behind her bus one day for about 20 minutes. When he did not observe any unusual problems, and since her report of erratic drivers did not seem to be an unusual occurrence for Pace bus drivers, he took no other action. As a result, no change in Ms. Gumm's terms or conditions of employment immediately followed her oral report and she continued to work as a part-time Pace bus driver through March 21, 2008. Second, the credible testimony of Mr. Wright and Mr. Klafeta clearly establishes that Ms. Gumm's March 21, 2008 suspension was a direct consequence of the written report that she filed that day. Third, both Mr. Wright and Mr. Klafeta credibly denied that any safety concerns raised by Ms. Gumm led to their suspension determinations. Accordingly, I find that Ms. Gumm has failed to establish by a preponderance of the evidence that her December 2007/mid-February 2008 oral report of unsafe drivers caused or contributed to the adverse personnel action.

Conclusion

Ms. Gumm's December 2007/mid-February 2008 oral report of unsafe drivers represents a protected activity and she suffered a significant unfavorable personnel action through her suspension on March 21, 2008. However, the preponderance of the probative evidence fails to establish that her report caused, or contributed to, her suspension of employment as a part-time bus driver on March 21, 2008. Since Ms. Gumm has failed to prove a requisite element of entitlement, her complaint of discrimination under the NTS employee protection provisions based on her December 2007/mid-February 2008 report must be dismissed.

CONCLUSION

Ms. Gumm's March 21, 2008 report of a conspiracy of vehicle drivers and bus passengers attempting to cause her to have a bus accident was not objectively reasonable and thus was not a NTS protected activity. Even if the March 21, 2008 report had been an NTS protected activity, Ms. Gumm would still not be entitled to NTS employee protection because Pace has demonstrated by clear and convincing evidence that Ms. Gumm would have been suspended on March 21, 2008 and her suspension continued even absent the protected activity. Finally, Ms. Gumm has failed to prove by a preponderance of the evidence that December 2007/mid-February 2008 oral report of unsafe drivers caused or contributed to her March 21, 2008 suspension. Accordingly, Mrs. Gumm's NTS discrimination complaint must be dismissed.

ORDER

The discrimination complaint of MS. BRENDA D. GUMM against PACE SUBURBAN BUS DIVISION brought under the employee protection provisions of NTS is **DISMISSED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: April 26, 2010
Washington, DC

NOTICE OF REVIEW: Review of this Decision and Order is by the Administrative Review Board pursuant to ¶ 5.c.28. of Secretary's Order, 75 Fed. Reg. 3924 (Jan. 25, 2010) (effective Jan. 15, 2010). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the National Transit Systems Security Act of 2007. Accordingly, this Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210. See generally 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.