



Issue Date: 12 January 2011

Case No.: 2010-NTS-00005

In the Matter of

MARC GREENBERG,
Complainant,

v.

NEW YORK CITY TRANSIT AUTHORITY,
Respondent.

DECISION AND ORDER
DISMISSING COMPLAINT

This proceeding arises under the employee protection provisions of the National Transit Systems Security Act of 2007, Pub. L. No. 100-53, § 1413, 121 Stat. 414 (codified at 6 U.S.C. § 1142 (West Supp. 2008)) (hereinafter “the Act” or “NTSSA”). The Act provides protection from discrimination to employees who report violations of federal law, rules, or regulations relating to transit safety or security; who report a hazardous safety or security condition; who refuse to work when confronted with a hazardous safety condition; or who refuse to authorize the use of any equipment in the belief that a hazardous safety condition exists. The pertinent provisions of the Act prohibit discharge, discipline, or any other discriminatory act against covered employees.

I. ISSUES

- A. Whether Complainant’s request for a hearing on objections to OSHA’s findings were timely filed
- B. Whether Complainant’s complaint of discrimination was timely filed; and if so,
- C. Whether Complainant was discriminated against in retaliation for filing safety complaints.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

On September 19, 2009, Marc Greenberg (“Complainant”) filed a complaint with the U.S. Department of Labor of Labor Occupational Safety and Health Administration (“OSHA”), alleging that he had been discriminated against by his employer, New York City Transit Authority (“Respondent”; “NYCTA”) when he was notified that he would be suspended for five (5) days. OSHA concluded that certain allegations in Complainant’s complaint were timely

filed, and an investigation into the merits was conducted. By letter issued April 2, 2010, OSHA dismissed Complainant's complaint.

By correspondence docketed on June 4, 2010, but postmarked May 17, 2010, Complainant requested a hearing before the Office of Administrative Law Judges ("OALJ"), and the case was assigned to me. By Notice issued June 15, 2010, I set a hearing to commence in the matter. I found that the matter had been timely filed, relying upon the post mark dated May 17, 2010. On June 24, 2010, Respondent filed a motion to dismiss the matter for untimeliness, noting that the postmark on Complainant's correspondence was more than thirty (30) days after the issuance of OSHA's findings. By Order issued July 22, 2010, I directed Complainant to provide in writing reasons for tolling the time within which his request for a hearing in his complaint should have been filed. In correspondence received on August 5, 2010, Complainant asked for a continuance of the hearing and by Order issued August 12, 2010, I granted Complainant's motion. On August 16, 2010, Respondent again moved to dismiss the complaint for Complainant's failure to respond to my Order. On August 17, 2010, I denied Respondent's motion, noting Complainant's request to attempt to secure counsel.

The hearing commenced on October 12, 2010 as scheduled. Complainant appeared *pro se*, and advised that he was unable to retain counsel. Respondent was represented by counsel. I accepted Respondent's proffered, though unmarked exhibits. I have since numbered those exhibits as set forth infra., below. Complainant proffered documentary evidence, and I agreed to review it and provide copies of the evidence to Respondent. I deferred ruling on Respondent's general objections to the admission of the evidence. Complainant testified, and agreed to the telephonic testimony of Employer's witness, which was held on October 27, 2010¹. By Order issued October 18, 2010, I made rulings on the proffered evidence, and admitted to the record exhibits identified as CX-1 through CX-14. Certain evidence was excluded. No additional evidence was submitted by the parties, but Complainant filed post-hearing written argument December 29, 2010. Respondent's verbal request on December 28, 2010 for additional time to file post-hearing argument was denied, and Respondent filed closing argument on January 3, 2011.

B. Factual Background

1. **Complainant's Testimony (Tr. at 20-79)**

Complainant began working for Respondent in June, 1978 in bus maintenance. In 1990, he was transferred to the security department. He worked full duty until he retired in December, 2009. His basic job duties involved clearing people to enter buildings and parking facilities.

Claimant explained that Respondent had developed a process for employees to file "G-2 letters" to provide management information about safety and other issues. He recalled writing roughly sixty letters in a six month period, starting sometime in 2005 or 2006 regarding problems with defective radios. In addition, he raised complaints using "Safety Rule Dispute

¹ Complainant was not at the hearing at first because the telephone number that he provided yielded a message that suggested that all calls were being rejected. Eventually, Complainant contacted my office, and joined the conference. Mr. Sheehan repeated his testimony, and a copy of the transcript was provided to Complainant.

Resolution Forms” and on other Safety and Health complaint forms. Complainant explained that complaints were first filed with a local supervisor, who is supposed to provide the information to a superintendent. He testified that his complaints were addressed by management, and explained that eventually the radio issue was resolved when security personnel were provided cell phones that allowed direct contact with security centers.

Complainant explained that he usually worked alone, and experienced problems at times with the battery on his radio, which resulted in him not being able to call for assistance in an emergency, or for a replacement when he needed a bathroom break. His concerns were somewhat ameliorated by the cell phones, but there remained times when he was unable to get coverage from another security employee. Complainant estimated that 400 employees worked in his department. He generally worked at night at different locations, and typically worked an eight hour shift, five days a week.

Complainant stated that in addition to the radio problems, security people were provided safety vests that were defective, making the vests come loose. He complained that at times traffic arms did not work properly, and jeopardized people near them, as the arms had no eye to discern interference. In addition, security booths often had live wires in them. Complainant also was concerned that vehicles did not keep within the speed limit. He had no authority to ticket drivers. He recalled making these complaints in 2006, 2007 and 2008.

Complainant testified that in 2006, Respondent began to dock his pay, and he filed appropriate paper work to get his timesheets straightened out, but the situation remained unresolved as far as he was concerned. He recalled one incident in January 2007 where he was suspended for one day for disrespect in an incident where he called his supervisor “sleepy” during a telephone conversation. In February, 2008, Complainant was charged with failure to properly notify his supervisor that he was on duty. He tried to explain that his radio battery died and he could not respond promptly because of busy security duties, but his explanations were not credited and he was suspended for three days. The suspension was upheld by an arbitrator. Complainant associated the discipline actions to his ongoing safety complaints, noting that he had not been disciplined since 1991.

On July 20, 2009, Complainant was working in a busy building registering numerous visitors, when a woman left a purse behind. He did not have the opportunity to call her about the purse, but he stated that he advised his supervisor before he went home about the problem. He was aware that the purse contained money and that he left it unguarded. He believed he reported the incident as promptly as his duties allowed. Complainant alleged that he was “written up” for not reporting the purse immediately and for not documenting the event in the registry sheet. He noted that he had left his post for a bathroom break and failed to record that, which was his typical habit. He was reprimanded for not finding a replacement when he left for the bathroom, but maintained that no-one was available to replace him.

On September 26, 2009, Complainant was working in the transit museum, doing patrols. He encountered two boys who were running in violation of museum rules, and he told them to stop running. They continued to run, and Complainant told their mother to direct the children to follow the rules. The woman accused him of being impolite, and she subsequently sent a letter

complaining about Complainant's conduct during the incident. Complainant testified that he reported the incident to the museum manager, but he did not recall writing an incident report, as he did not believe that he was involved in an incident. He also subsequently filed a workers' compensation claim alleging that he was injured when the woman pulled his arm. Respondent proposed to discharge him for reporting the injury late and for being disrespectful to the woman at the museum.

Claimant explained that he had been previously injured and prescribed medication that prevented him from working. He experienced a recurrence of his injury, and had been prescribed the medication, but was not taking it when he reported the recurrence. He recalled receiving the prescription on November 2, 2009, and was relieved of his duties on November 14, 2009. He was unable to fill the prescription through workers' compensation. He was put on workers' compensation, but Respondent refused to pay his sick leave. Complainant felt physically unable to work, and he decided to retire on December 9, 2009.

Complainant testified that he has been discriminated against by being disciplined for conduct that other people engage in without consequences. He also believed that he was subjected to the harshest of disciplines without prior warning. Complainant recalled a conversation in March, 2008 with a supervisor that he alleged demonstrated that the supervisor was at a gym on company time and suffered no negative consequences. The conversation concerned Complainant's inability to be relieved in time to return to another duty station.

Complainant acknowledged that he was not disciplined for being late on March, 2008, or being AWOL on April 15, 2008, when he was confused about his schedule. He did not consider a verbal reinstruction by a supervisor to be discipline. In May, 2008 he was given a three day suspension for disrespect to a supervisor over the phone. Complainant served a one-day suspension in 2008 for calling his supervisor sleepy. He served a three day suspension in February 2008 for the incidents of January, 2007. The incident involving the woman's purse occurred in July, 2009, and the discipline was proposed close in time to the incident. However, Complainant retired before the review of that proposed discipline could take place.

Complainant testified that he wanted his record cleared and wanted the payroll department to straighten out the payroll discrepancies that he believed developed through underpayment of 34 hours. He said he would come back to work if his doctor approved his return to work.

2. Vincent Sheehan's Testimony

Mr. Sheehan has been Respondent's Senior Director of Security, Labor Relations Unit since January 2008. His responsibilities include representing Respondent in disciplinary investigations, grievance hearings and internal investigations involving department employees. Mr. Sheehan described the processes by which employees may report safety violations or other concerns. He said that supervisors are tasked with recommending a resolution that employees may accept or reject. If the resolution is rejected, another manager would attempt to resolve the issue.

Mr. Sheehan was familiar with a disciplinary action recommended against Respondent for an incident involving his failure to properly deal with a woman's purse. Complainant failed to immediately notify a supervisor about the found property, and he did not forward it to Respondent's Lost and Found division. The purse and wallet containing money were left unsupervised when he left his station for a bathroom break, and Complainant did not notify the Department of Security manager about the purse until the end of his shift. Mr. Sheehan observed that the manager's office was located approximately twenty feet away from Complainant's worksite. Mr. Sheehan's unit initiated a disciplinary hearing, which was held after notice to Complainant. After the hearing, the charges against Complainant were upheld and disciplinary action was recommended. Complainant declined to accept the penalty and the case was then slated for a second step hearing. However, he retired before the hearing could be held.

Mr. Sheehan recalled an incident involving Complainant's conduct while working at the Transit Museum. He explained that his unit investigated a complaint from a visitor to the museum about Complainant's treatment of her and her disabled children. Mr. Sheehan explained that Complainant was charged with making a false claim of an injury relating to that incident. Approximately one month after the incident, Complainant alleged that his neck and back were injured when the woman grabbed his arm. The woman and other witnesses denied any physical contact with Complainant. Respondent recommended that Complainant be dismissed because of the late-filed false claim of work-related injury. At the first step hearing on the proposed discipline, Complainant testified that he was taking medication that prevented him from representing himself, and Respondent gave Complainant time to provide documentation of his incapacity. Complainant retired before action on the proposed discipline could be taken.

Mr. Sheehan denied that Complainant was not paid properly. He attributed discrepancies in Complainant's recorded hours of work on Mr. Greenberg's election to work as an "extra" at consecutive work sites that required travel to reach. Mr. Sheehan believed that the payroll department reconciled his disputes about pay.

Mr. Sheehan was personally not aware of any complaints of safety violations filed by Complainant during Mr. Sheehan's tenure in the Labor Relations Department. The witness acknowledged that any of the thirty (30) supervisors in the Safety Department could receive safety dispute forms and had authority to resolve them. Mr. Sheehan was aware that Complainant had filed complaints relating to Respondent's radio system, and he believed that those complaints were resolved. Mr. Sheehan was also familiar with Respondent's policy regarding security personnel who need to leave their station for a comfort break. He explained that the employee should document his leaving and returning to his post. Mr. Sheehan explained that at the time of the hearing, Respondent had implemented a policy whereby employees could use a dedicated phone line to report to a supervisor that they need a comfort break, so that relief personnel could be dispatched.

Mr. Sheehan testified that he considered the incident at the museum to be one that should have been documented by Complainant. The civilian manager on duty at the time denied that Complainant had reported the incident to him.

Mr. Sheehan was not familiar with cases of discipline against employees that were taken prior to his starting his job in January, 2008. He agreed that before 2008, Complainant had a good disciplinary record. Mr. Sheehan believed that the recommendation to terminate Complainant's employment following the incidents involving the incident at the museum was warranted, as he filed a false complaint about an injury. Mr. Sheehan was careful to note that the discipline was not taken because Complainant retired. He believed that Complainant's actions demonstrated the need for progressive discipline, and Mr. Sheehan believed that Respondent's recommended discipline actions were warranted.

3. Documentary Evidence

- CX 1 Payroll records from 8/07/06 to 11/25/06
(although not every pay period is represented)
- CX 2 Investigation Narrative dated 9/29/08
- CX 3 Requests for Registry, response and registry sheets (various dates)
- CX 4 Incident report dated 7/7/08 from Complainant
- CX 5 Equal Employment Opportunity Policy from President NYT April 2009
- CX 6 Complainant's DAN History
- CX7 Notices of Alleged Safety or Health Hazards (various dates)
- CX8 Memoranda of safety/job concerns from Complainant (various dates)
- CX9 Safety Rule Dispute Resolution Forms (various dates);
sample reverse page
- CX10 Report of Workplace Inspection dated August 27, 2008
- CX 11 Page 11 of the Union-Management Contract
- CX 12 Notice of Employee Responsibility regarding workplace injury
- CX 13 Employee Rules and Regulations pages 2, 7, 8, 12, 13,
- CX 14 Copy of safety rules at NYT museum

- RX-1 Arbitration Decision of February 11, 2009
- RX-2 Grievance Form of January 29, 2008
- RX-3 Memorandum of August 5, 2009 regarding lost purse
- RX-4 Standard Operating Procedures
- RX 5 Post Activity Log for period from July 1, 2009 to July 22, 2009
- RX-6 Notice of Discipline Action regarding incident of July 20, 2009
- RX-7 Minutes of Step 1 Hearing upholding proposed suspension
- RX-8 Complainant's DAN history
- RX-9 Office of Inspector General notice; complaint against Complainant
and post activity log
- RX-10 Memoranda involving incident of September 26, 2009 and
proposed discipline
- RX-11 Complainant's Workers' Compensation claim
- RX-12 Union-Management Agreement provisions regarding grievances
- C. Legal Standards

1. Timeliness of Complaint and Request for Hearing

OSHA promulgated procedures for the handling of retaliation complaints under the National Transit Systems Security Act and the Federal Railroad Safety Act, by Interim Final Rule, 75 Fed. Reg. 53522 (Aug. 31, 2010), published at 29 C.F.R. Part 1982. The regulations provide in pertinent part that “an employee who believes that he or she has been retaliated against by an employer in violation of NTSSA. . . may file, or have filed by any person on the employee’s behalf, a complaint alleging such relations”. 29 C.F.R. §1982.103(a). The regulations establish that the complaint must be filed within 180 days after an alleged retaliatory action. 29 C.F.R. §1982.103(d). Timeliness shall be ascertained as follows: “The date of the postmark, facsimile transmittal, email communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the dated of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.” 29 C.F.R. §1982.103(d).

The regulations further provide for the filing of objections to OSHA’s findings, directing parties to file an objection and request for hearing in writing within thirty (30) days of receipt of the findings. 29 C.F.R. § 1982.106(a). The regulations state that “[t]he date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt...” 29 C.F.R. § 1982.106(a). If no timely objection is filed, then OSHA’s findings will become the final decision of the Secretary, not subject to judicial review. 29 C.F.R. § 1982.106(b).

A statutory time period may be tolled where: (1) a claimant has received inadequate notice; (2) a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted on; (3) the court has led the plaintiff to believe that he had done everything required; (4) affirmative misconduct on the part of a defendant lulled the plaintiff into inaction; or (5) a claimant actively has pursued his judicial remedies by filing a defective pleading during the statutory period. Spearman v. Roadway Express, Inc., 92-STA-1 (Sec’y Aug. 5, 1992), citing Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (per curiam); Irwin v. Veterans Administration, 498 U.S. 89, 112 L.Ed.2d 435, at 444 and n.3 (1990).

2. Standard of Analysis for Complaints of Discrimination

The burdens of proof that apply to allegations of discrimination under Title VII of the Civil Rights Act of 1964 have been adapted to the determination of whether violations of whistleblower protections have occurred. McDonnell Douglas Corp. v. Green, 411 .S. 792 (1973). Accordingly, whistleblowing employees are required to show that they engaged in protected activity, that there was an adverse employment action taken against them, that their employer knew they engaged in protected activity, and that there was a relationship between the adverse action and the employer’s knowledge of the protected activity.

Under the McDonnell-Douglas framework, the complainant has the initial burden of establishing a prima facie case of retaliation. By establishing a prima facie case, a complainant creates an inference that the protected activity was the likely reason for the adverse action. McDonnell Douglas Corp. v. Green, supra. In instances where a full hearing has been held, there

is no need to determine whether the employee presented a *prima facie* case and whether the employer rebutted that showing. United States Postal Service Board of Governors v. Aikens, 460 U.S. 709, 713-14 (1983); Pike v. Public Storage Companies, Inc., 98-STA-35 (ARB July 8, 1998). The focus of inquiry should be whether the respondent establishes a nondiscriminatory justification for the adverse employment action. Carroll v. J.B. Hunt Transportation, 91- STA-17 (Sec’y June 23, 1992). However, where Complainant at hearing fails to demonstrate protected activity or adverse action, then he has failed to establish a *prima facie* case and dismissal is appropriate. Smith v. Sysco Foods of Baltimore, ARB No. 03-134, ALJ No. 2003-STA-32 (ARB Oct. 19, 2004).

Respondents bear a burden of production to articulate a legitimate, nondiscriminatory reason for their employment decision. Mc-Donnell Douglas Corp. v. Green, *supra*. The respondent need only articulate a legitimate reason for its action. St. Mary’s Honor Center v. Hicks, 509 U.S. 502 (1993). If the respondent’s reason rebuts the inference of retaliation, then a complainant must demonstrate by a preponderance of the evidence that the stated legitimate reasons for the adverse action were a pretext. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer’s explanation is not credible. Hicks, *supra* at 2752-56. In addition to discounting the employer’s explanation, “the fact finder must believe the [complainant’s] explanation of intentional discrimination.” *Id.* However, “[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a ‘dual motive’ analysis.” Mitchell v. Link Trucking, Inc., ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

D. Analysis

1. **Claimant’s objection to OSHA’s findings and request for hearing was timely filed**

On April 2, 2010, the Secretary of Labor issued findings and a preliminary Order dismissing Complainant’s complaint against Respondent. On June 4, 2010, OALJ docketed Complainant’s undated request for a hearing. As I have noted, the regulations provide that the date of the postmark shall be considered the date of filing. The envelope containing Complainant’s objection and request is postmarked May 17, 2010. Therefore, I find that Complainant filed his objection and request for a hearing on May 17, 2010.

By Order and Notice issued June 15, 2010, I erroneously deemed the instant matter to have been timely filed, allowing for additional days for Complainant’s receipt of the Secretary’s letter pursuant to the Rules of Practice and Procedure Before OALJ (“the Rules”). The Rules provide in pertinent part that “[d]ocuments are not deemed filed until received by the Chief Clerk at the Office of Administrative Law Judges. However, when documents are filed by mail, five (5) days shall be added to the prescribed period.” 29 C.F.R. § 18.4(c). Therefore, even providing for the

additional mailing time, Claimant would have needed to file his objection by May 7, 2010², to meet the regulatory time constraints. In addition, Complainant failed to comply with the regulatory mandate to serve notice of his objection on Respondent. Accordingly, I find that Complainant's objection and request for hearing before OALJ did not appear to be timely filed.

At the hearing, Complainant testified under oath that he had been away from home in the early part of April, but retrieved OSHA's letter at his local post office on April 19, 2010. Tr. at 14-18. If that were the case, Complainant's objection and request for hearing would be deemed timely filed, since it was filed within thirty (30) days of the alleged receipt of OSHA's findings. I deferred ruling on Respondent's motion to dismiss the case for untimely filing of Complainant's objection. Complainant asserted that he had signed an acknowledgement of the receipt of the letter by certified mail Subsequent to the hearing I contacted OSHA by letter to attempt to secure verification of Complainant's assertion, but OSHA did not respond to my letter. Complainant offered no other reason for deeming his objection timely.

I accord the benefit of the doubt to Complainant and find that he timely filed his objection with OALJ.

2. Timeliness of Complaints Before OSHA

On September 8, 2009, Complainant filed a complaint with OSHA alleging that he was unfairly subjected to discipline measures for reporting a faulty radio system to Respondent, beginning in 2006. In addition, Complainant maintains that he filed a number of safety-related complaints with supervisors, and he alleged that in July, 2009, he was advised that Respondent had proposed that he be suspended for five days.

I find that any allegation of discrimination for engaging in protected activity before March 8, 2008 (180 days before his complaint with OSHA) is time-barred. The regulations establish that the complaint must be filed within 180 days after an alleged retaliatory action. 29 C.F.R. §1982.103(d). Complainant has presented no evidence in support of tolling the regulatory time limitation for adverse actions taken before March 8, 2008, including a suspension that was upheld by an arbitrator in February, 2009. See, RX-1. In addition, Complainant has not presented sufficient evidence of specific losses of pay during the 180 day period preceding his complaint to OSHA. He alleged that he has experienced losses over a long period of time. The Supreme Court has made it clear that a complaint must be made on every allegation of discrimination of a continuing nature within the regulatory or statutory time period. National R.R. Passenger Corp. v. Morgan, 563 U.S. 101 (2002).

Accordingly, I am limited to examining those allegations of discrimination that occurred within the 180 days before Complainant's complaint with OSHA. Those allegations involve the incident of July 20, 2009, concerning Complainant's conduct with respect to a misplaced purse and the incident of September 26, 2009, concerning a complaint about Complainant's conduct at

² May 2, 2010 represents thirty (30) days from the date of OSHA's findings on April 2, 2010. When five (5) additional days are added to allow for the receipt of mail, Claimant's objections would need to have been postmarked by May 7, 2010.

Respondent's museum and his subsequent workers' compensation claim. I also shall address, in a limited fashion, whether recent alleged loss of pay constitutes an adverse action.

Merits of Timely Complaints of Discrimination

Although a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the complainant must still carry the burden of proving the necessary elements of discrimination. Flener v. H.K. Cupp, Inc., 90-STA-42 (Sec'y Oct. 10, 1991). In instances where a full hearing has been held, there is usually no need to determine whether the employee presented a *prima facie* case and whether the employer rebutted that showing. United States Postal Service Board of Governors v. Aikens, 460 U.S. 709, 713-14 (1983); Pike v. Public Storage Companies, Inc., 98-STA-35 (ARB July 8, 1998). An examination of whether Complainant established the elements of a *prima facie* case is not useful where Respondent establishes a legitimate, nondiscriminatory reason for the adverse action taken against a Complainant. White v. Maverick Transportation, Inc., 94-STA-11 (ARB February 21, 1996).

1. Protected Activity

Subsection (b)(1)(A) of the Act identifies "reporting a hazardous safety or security condition" among protected activities. "While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event." Leach v. Basin 3Western, Inc., ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003), citing Clean Harbors Env'tl. Serv. v. Herman, 146 F.3d 12, 19-21 (1st Cir. 1998). Although it does not 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 and 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 subjective belief of the complainant is not sufficient, and the standard involves an objective assessment of whether the allegation constitutes protected activity. Kesterson v. Y-12 Nuclear Weapons Plant, 95-CAA-12 (ARB Apr. 8, 1997).

The record demonstrates that Complainant frequently filed "Safety Dispute Resolution Forms" to advise supervisors of circumstances that he believed concerned safety conditions. He also filed Safety and Health Hazards Reports. On March 16, 2009, Complainant advised that traffic arms presented a hazard to vehicles and pedestrians because they had no eye, and therefore could not automatically raise or lower to prevent a collision. On March 12, 2009 he advised that a remote button on an arm did not operate correctly. On September 16, 2009, Complainant reported a violation of Respondent's smoking policy. It is undisputed that he made many complaints about defective radios, which resulted in a change of equipment. Complainant initiated a safety investigation by the New York State Department of Labor Division of Safety and Health ("the State") concerning the lighting in the area near a guard booth. CX 10. I find that these complaints concern safety conditions and therefore constitute protected activity. I note that it is has been determined that the fact that safety complaints are subsequently resolved or

found to be unsubstantiated does not negate their status as protected activity or provide animus for retaliatory action. Stack v. Preston Trucking Co., 86 STA-22 (Sec’y Feb. 26, 1987).

I find that Complainant’s complaints about delayed personnel replacement in response to his requests for a comfort break do not objectively concern safety conditions. Complainant’s reports to the State regarding the distance between bathrooms and assigned security posts do not relate to safety. CX 10.

2. Adverse Employment Action

Under the Act, employers are not to “discharge, demote, suspend, reprimand, or in any other way discriminate” on the basis of protected activity. § 1142(b)(1). It has been determined that an adverse action occurs when complainant has shown that he suffered a “tangible job consequence”. Shelton v. Oak Ridge Nat’l Labs, ARB No. 980100, ALJ No. 980CAA-19, slip op. at 8. (ARB March. 30, 2001), citing Oest v. Illinois Dep’t of Corrections, 240 F.3d605, 612-613 (7th Cir. 2001). The key consideration in evaluating whether an employer’s action constitutes material adversity is whether the action is “likely to dissuade employees from complaining or assisting in complaints about discrimination.” Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 70-71 (2006).

Complainant alleges that he was subjected to adverse employment actions when he was suspended in August, 2008, effective September, 2008, and when his termination was proposed in September, 2008. I find that both of these actions constitute adverse employment action. In the first instance, Complainant stood to lose pay, and the suspension remained on his record during the grievance process. See, RX 6; RX 7. Similarly, the threat of discharge constitutes an adverse action. I find that both proposed discipline actions would likely dissuade an employee from making complaints. I reject Respondent’s suggestion that because the proposed suspension and dismissal were not effective, they do not constitute an adverse action. I find that written notices informing Complainant that management intended to suspend and then remove him from his job constitute a tangible job consequence.

I do not find that Complainant’s retirement before the resolution of the proposed termination constitutes constructive discharge. Complainant testified that he retired because of pain due to injuries. He did not state that he retired to avoid the termination action.

I also am unable to conclude from the record before me that Complainant suffered an adverse action with respect to his pay. Although Complainant has alleged that his pay frequently did not reflect that he was compensated for all of his work time, the record establishes that Respondent’s payroll department resolved all of his complaints by verifying his hours. Complainant has failed to produce support for his allegation that he was not properly paid.

3. Employer’s Knowledge of Protected Activity

Complainant must prove by a preponderance of the evidence that those responsible for adverse action against him were aware of the alleged protected activity. Mace v. Ona Delivery Systems, Inc., 91 STA-10 (Sec’y Jan. 27, 1992). Although Mr. Sheehan personally was not

aware of Complainant's protected activity, supervisors responded to his reports of safety conditions on Safety Dispute Resolution Forms. See, CX 9. In addition, the record demonstrates that Complainant's complaints about radio equipment were resolved when Respondent replaced the equipment with phones. A report of the State's investigation into Complainant's safety complaint reflects that the investigation involved representatives from Respondent's Safety and Security Divisions. I find that Respondent was aware of Complainant's protected activity.

4. Protected Activity as a Contributing Factor to Adverse Employment Action

Adverse personnel actions taken against a complainant in temporal proximity to his protected activity give rise to an inference of causation. Ertel v. Giroux Brothers Transportation, Inc., 88 STA 24 (Sec. Feb. 15, 1989), at 15; Stone & Webster Engineering, Inc. v. Herman, 115 F.3d 1568 (11th Cir. 1997). Accordingly, the critical inquiry is whether retaliatory animus motivated any of the adverse actions. Frechin v. Yellow Freight, 96 STA 24 (ARB, Jan. 13, 1998). The protected activity must only "tend to affect in any way the outcome of the [adverse personnel] decision." Marano v. Department of Justice, 2 F.3d 1137 at 1140 (Fed. Cir. 1993).

I find no temporal proximity between any of Complainant's protected activities and Respondent's decisions to suspend him and then discharge him. I find no evidence that Complainant's protected activities were a contributing factor in Respondent's adverse actions. However, assuming arguendo that Complainant's protected activities were a contributing factor, the burden shifts to Respondent to present clear and convincing evidence of a legitimate, non-discriminatory business reason for its decision, and to show that it would have taken the same unfavorable action in the absence of his protected activity.

5. Legitimate Business Reason for Adverse Actions

Respondent suspended Complainant because he failed to follow proper procedures regarding reporting and safekeeping a purse that was left behind. Money that had been in the purse was found missing after Complainant left the purse unguarded. A memorandum prepared in temporal proximity to the incident reflects that Complainant did not follow standard operating procedures regarding lost and found property, and further failed to comply with procedures regarding a comfort break. RX 3, RX 4, RX 5.

Respondent proposed Complainant's discharge because an investigation into a complaint about Complainant's conduct revealed that he had falsely claimed a work-related injury and failed to file a report about the incident that purportedly led to his injury.

I find that Respondent's stated reasons support a legitimate business purpose.

6. Whether Respondent's Stated Reasons are Pretext for Discrimination

A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. Hicks, supra. at 2752-56. In addition to discounting the employer's explanation, "the fact finder must believe the

[complainant's] explanation of intentional discrimination.” Id. The complainant must show that the reason for the adverse action was his protected safety complaints.” Pike v. Public Storage Companies Inc., ARB No. 99-071, ALJ No. 1998 STA-35 (ARB Aug. 10, 1999). “When a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a ‘dual motive’ analysis.” Mitchell v. Link Trucking, Inc., ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

Complainant has presented no evidence to establish a relationship between his protected activity and Respondent’s adverse actions. I find Respondent’s explanation for the adverse actions credible. Complainant has failed to establish that Respondent’s adverse actions against him were motivated by discriminatory reasons. I further find that Respondent’s rationale for Complainant’s suspension and subsequent discharge were not pretextual.

III. Conclusion

Complainant has established that he engaged in protected activity under the Act, and that he suffered adverse employment actions. However, Respondent has articulated legitimate, nondiscriminatory reasons for its actions against Complainant and Complainant has failed to establish any discriminatory motive for the adverse actions. Complainant has failed to establish any nexus between his protected activity and the adverse actions, and therefore, he has failed to establish that he was discriminated against in violation of the act.

ORDER

The relief sought by MARC GREENBERG is DENIED, and the complaint filed herein is DISMISSED.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If no Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).

In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party’s legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

Accordingly, parties **MUST** carefully review the Notices of Appeal Rights found at the end of ALJ decisions to ensure that they understand the ARB's procedures and requirements for filing of appeals and appellate briefs.