



Issue Date: 27 January 2012

**CASE NO.: 2009-NTS-00002
2010-NTS-00002**

In the Matter of:

**JOHN KODL,
Complainant,**

v.

**PACE SUBURBAN BUS DIVISION, REGIONAL
TRANSPORTATION AUTHORITY; and
FIRST TRANSIT, INC.,
Respondents.**

BEFORE: Pamela J. Lakes
Administrative Law Judge

**DECISION AND ORDER GRANTING
RESPONDENTS' MOTIONS FOR SUMMARY DECISION
AND DISMISSING COMPLAINTS**

This case involves claims under the employee protection provisions of the National Transit Systems Security Act of 2007, 6 U.S.C. § 1142 (“NTSSA” or “Act”), with implementing regulations at 29 C.F.R Part 1982. The NTSSA prohibits a public transportation agency—or a contractor, subcontractor, officer or employee of such agency—from discriminating or taking unfavorable personnel action against an employee for reporting hazardous safety or security conditions. Complainant, John Kodl (“Complainant”), alleges that First Transit, Inc.¹ and Pace Suburban Bus Division of the Regional Transportation Authority (“Respondents”) retaliated against him when they transferred him to a new position after he reported safety concerns to management. In addition, Complainant asserts that Respondent, First Transit, later discharged him in retaliation for an NTSSA complaint he filed based upon the change in his position.

The matters before me are Respondents’ Motions for Summary Decision, filed by First Transit, Inc. (“First Transit”) on August 17, 2010 and by Pace Suburban Bus Division of the

¹ First Transit, Inc. was previously known as Laidlaw Transit Services, Inc. The caption has been amended to reflect the full names of the parties.

Regional Transportation Authority (“Pace”) on August 20, 2010. For the reasons set forth below, Respondents’ motions for summary judgment are granted.

PROCEDURAL HISTORY

On October 9, 2008, Complainant filed a timely complaint with the United States Department of Labor’s Occupational Safety and Health Administration (“OSHA”) in Chicago, IL. (CX 40).² He alleged that Respondents, Pace and First Transit, transferred him from his position as a paratransit driver to that of a utility clerk in retaliation for reporting safety concerns to management.³ OSHA investigated the complaint, and on April 8, 2009, it concluded that there was no reasonable cause to believe that Respondents violated the NTSSA. Specifically, the Area Director determined that there was no evidence indicating that Complainant’s safety reports contributed to Respondents’ decision to remove him from his driving duties. On May 7, 2009, Complainant filed a timely objection and request for a hearing.

The complaint referred for a hearing consisted of an entry made by an investigator on a Case Activity Worksheet, indicating that a complaint was filed with him on October 9, 2008; the Allegation Summary indicated that Complainant alleged that he was removed from his position as a driver and was placed in an unsuitable position in retaliation for reporting safety concerns to management. The Administrator’s April 8, 2009 letter indicated that Complainant stated that he had reported issues concerning mechanical breakdowns of the vehicles he drove and brought up health and safety concerns during union negotiations. Although the file does not contain a written complaint, apart from the investigator’s annotation, Complainant’s May 4, 2009 appeal letter listed defects and transmission of pathogens that he allegedly “pointed out to Pace/First Transit.” As to the defects, that letter stated, “Topics of discussion biological agents, blood borne pathogens, asphalt fumes, hepatitis A, HIV/AIDS there [sic.] spread and [transmission], occupational dermatoses, diesel blowback, electrical shock protection, window glazing material, seating-restraint systems, lug nuts, MRSA/super bugs, these are all safety and health standards enforced by OSHA.”

The first case was assigned to me for disposition. A hearing was initially scheduled for July 30, 2009, by a notice of hearing of May 13, 2009, as amended on June 11, 2009.⁴ However, Respondents filed an unopposed motion for continuance, which was granted by Order of July 6, 2009. As Respondents also indicated that they planned to file summary decision motions and would be taking Complainant’s deposition, the Order also stayed proceedings until September 8, 2009 to allow Complainant to seek representation before his deposition was taken. At the end of the stay period, the parties were directed to jointly or separately provide a schedule for proceeding. Complainant did not, however, retain counsel.

² Unless otherwise specified, “EX” refers to the exhibits submitted by Employer First Transit with its Motion for Summary Judgment and “CX” references exhibits from Complainant’s deposition.

³ Approximately one year after Complainant was transferred to the position of utility clerk, in May 2009, he was suspended for fighting with a coworker, and two months later, in July 2009, he was terminated.

⁴ Complainant also submitted three communications dated 5-8-2009, 6-20-09, and 6-24-09 alleging workplace reprisal, all of which were filed on June 29, 2009. As there was no indication that copies had been served on opposing counsel, I provided them with copies and advised Complainant by letter of July 6, 2009 of the prohibition against ex parte communications under 29 C.F.R. §18.38. These reprisal allegations are within the purview of the second case, which involves allegations from the time of his reassignment to the date of termination.

Complainant filed a second series of timely complaints (collectively referenced as “second complaint”) against Respondent, First Transit, on June 2, 2009, June 24, 2009, and August 15, 2009 alleging that he was being harassed, had his duties and schedule changed, was suspended and sent home without pay, was threatened with discharge, and then was terminated by First Transit in reprisal for his previous NTSSA complaint and his decision to report safety concerns.⁵ On November 30, 2009, OSHA determined that the preponderance of the evidence indicated that Complainant’s protected activity was not a contributing factor to his termination or the other adverse actions. On December 16, 2009, Complainant filed a timely objection and request for a hearing with respect to the second set of complaints and the second case was assigned to me. The second appeal letter (dated December 15, 2009) complained of unspecified violations of OSHA regulations and asserted that “[t]hese practices need to be monitored and review[ed] now and in the future by random inspections for proper use of hazardous, [caustic], chemicals.” It also complained of commonplace leaks on buses and stated: “Skin, inhalation, [e]ye exposure is the worst I have ever seen, including improper handling, storage, and disposal of refrigerant 134-A used in Pace Paratransit vehicles.” Complainant alleged that these objections and the previous ones “prompted his discharge from [his] Drivers, Maintenance Technician positions in a retaliatory fashion.”

On January 6, 2010, I issued an order consolidating Complainant’s two cases and establishing a discovery and briefing schedule, including a date for the filing of dispositive motions. That Order advised Complainant that he could submit his own statement or statements of witnesses provided that they were notarized or included a declaration that they were made under penalty of perjury. The parties subsequently agreed to adjustment of the schedule, and I issued Orders amending the schedule on February 22, 2010, March 30, 2010, and May 14, 2010. The parties agreed to further adjustment of the schedule on June 25, 2010.⁶

Complainant then filed a Motion to Compel Discovery dated July 16, 2010 indicating that Respondents had objected to all of his requests for document production. In boilerplate objections that were not tailored to the requests, Respondents both maintained that the requests were vague, ambiguous, overbroad, and unduly burdensome; requested irrelevant and immaterial information; and were not reasonably calculated to lead to the discovery of admissible evidence.⁷

On August 17, 2010, Respondent, First Transit, filed a motion for summary decision, and on August 20, 2010, Respondent, Pace, likewise moved for summary decision. First Transit’s motion was supported by 25 exhibits, which are referenced herein as EX 1 through EX 25. EX 5

⁵ As I noted in my November 23, 2010 Order, there were some discrepancies in the dates listed in the Final Investigation Report cover sheet and the Secretary’s Findings; however, it is clear that the complaint filed on June 2, 2009 was amended to include subsequent events, including Complainant’s discharge.

⁶ Complainant’s deposition was initially taken on March 10, 2010 and reconvened on June 15, 2010. As directed, Complainant brought requested documents to the depositions.

⁷ First Transit attached a copy of the discovery requests (and its response) to its October 28, 2010 submission, filed on October 29, 2010. Some of the requests were overbroad or vague, or did not appear to seek relevant information. For example, the requests included #2a (seeking “List and source of all new, used, reconditioned parts which facilitated repairs on Par-Transit buses from January 2007”); #6 (“Copies of any Safety, Operations, Maintenance, M.S.D.S. docu[]ments s[]hredded or destroyed”); and #8 (“Purchase orders, storage plan, m.s.d.s. sheets, disposal recycling plan for all chemicals Haz-Mat, Fuels, kept on site.”)

consists of excerpts from Complainant's depositions. There were also six affidavits from Pace and First Transit employees that were limited in scope: EX 7 consists of the Affidavit of Tom Groeninger (Regional Manager, Paratransit/Van Pool at Pace) (with attachment A); EX 18 consists of the Affidavit of Doris Martin (General Manager at the Glenview facility of First Transit since April 26, 2009) (with attachments A through F); EX 20 consists of the Affidavit of Michael Liuzzo (Operations Manager at the Glenview facility of First Transit since December 17, 2008); EX 23 consists of the Affidavit of Melinda Metzger (Deputy Executive Director at Pace); EX 24 consists of the Affidavit of Michael Rademacher (Regional Director of Operations and formerly District Manager for First Transit); and EX 25 consists of the Affidavit of Shannon Borst (formerly O'Neill) (District Manager at First Transit since April 1, 2008).

Complainant submitted a Response to Respondents' Motion on Discovery and Summary Disposition on August 31, 2010 and on September 21, 2010. Documentary support (submitted on August 31, 2010) consisted of an internet page relating to the NIOSH Health Hazard Evaluation Program and an excerpt from an air conditioning and heater manual relating to installation; however, Complainant did not explain the relevance of those items. Complainant suggested that his calendar could shed light on his work activities but did not offer it (or excerpts from it) as an exhibit.

Respondents Pace and First Transit filed reply memoranda on September 14, 2010 and October 15, 2010, respectively.

On October 25, 2010, Complainant filed a renewed Motion to Compel Discovery.⁸ First Transit responded on October 29, 2010, alleging that the documents Complainant sought to compel were irrelevant to the case at hand. Pace submitted a response on November 9, 2010, which joined and incorporated by reference the response submitted by First Transit.

On November 23, 2010, I issued an Order Concerning Discovery and Holding Motions for Summary Judgment in Abeyance, which is incorporated by reference. First, the Order granted Complainant's Motion to Compel Discovery (dated July 16, 2010 and renewed on October 16, 2010) in part, sustained Respondents' objections in part, and ordered that specific categories of documents relating to specific discovery requests be produced, as the requests were overbroad as drafted.⁹ Specifically, I ordered the production of documents relating to the claims based on the coolant leaks, the pathogen on the seatbelts, and mechanical problems with lug

⁸ In this motion, Complainant essentially renewed the prior motion of July 16, 2010, which was premature, as it was filed prior to the time that the discovery responses were due under 29 C.F.R. §§ 18.18(b), 18.19(d).

⁹ In granting the motion in part, I directed Respondents to provide Complainant with a complete copy of his personnel file; a full, unredacted copy of the contract between Pace and First Transit; copies of safety reports and maintenance records for Para-Transit buses at the Glenview location relating to air conditioning systems using 134a coolant, seatbelt maintenance and replacement, and lug nuts or wheel repair from January 2007 (four months before Complainant was hired) until his reassignment in April 2008; copies of all exposure incidents on Para-Transit buses relating to 134a coolant and pathogens on seatbelts, reporting documentation, and corrective action taken at the Glenview location from January 2007 to April 2008; vehicle inspection reports or summaries called "Quarterly High Risk" reports or reviews, if they addressed 134a coolant, seatbelt, and lug nut or wheel issues at the Glenview location from January 2007 to April 2008; copies of purchase orders, storage plans, and disposal plans for 134a coolant; and copies of safety audit documentation for Para-Transit buses if they addressed the 134a coolant, seatbelt, and lug nut or wheel issues at the Glenview location from January 2007 to April 2008.

nuts.¹⁰ Respondents were also directed to provide Complainant with a complete copy of the transcript of his deposition together with a complete copy of his personnel file and a full, unredacted copy of the contract between Pace and First Transit. Second, the Order held the motions for summary decision (Pace's Motion for Summary Judgment dated August 13, 2010 and First Transit's Motion for Summary Judgment dated August 16, 2010) would be held in abeyance for sixty days. Specifically, the Order provided that summary judgment would be inappropriate until (1) Complainant had received his discovery responses and (2) Complainant had been provided a fair notice of the summary judgment requirements, based upon *Hooker v. Westinghouse Savanna River Co.*, ARB No. 03-036, ALJ No. 2001-ERA-00016 (ARB Aug. 26, 2004) and its progeny (e.g., *Motarjemi v. Metropolitan Council Metro Transit Division*, ARB No. 08-135, ALJ No. 2008-NTS-00002 (ARB Sept. 17, 2010)). The Order also advised Complainant that (1) the factual assertions made in the affidavits, deposition excerpts, and documents supporting Respondents' motions would be accepted as true unless he contradicted them with counter-affidavits, other deposition excerpts, or other documentary evidence and (2) to defeat summary decision in Respondents' favor, he must set forth specific facts showing that there is a genuine issue of fact for the hearing, by submitting evidence or otherwise. Third, the Order provided that Complainant would have thirty days after the discovery responses and deposition transcripts were provided to him for submitting rebuttal to Respondents' summary decision motions.

On January 20, 2011, Complainant filed a second motion to compel in the form of correspondence, alleging that Respondents failed to comply with my November 23, 2010 order. In subsequent correspondence dated February 14, 2011, Complainant advised that he had not received the discovery required by my order, apart from a copy of his deposition transcript with exhibits and his personnel file. In correspondence dated December 29, 2010, January 26, 2011, and March 8, 2011, counsel for First Transit advised that the search for responsive documents was continuing. In addition, Pace advised that apart from the deposition transcript and one of the production requests to which First Transit would respond, it did not have any responsive documents.

On March 10, 2011, I issued a Second Order Concerning Discovery and Amending Schedule for Proceeding. In that Order, I denied Complainant's motion to compel without prejudice, finding that it was premature as the Respondents were making a good faith effort to reply. I held that Respondents should provide Complainant with documents responsive to the outstanding discovery by May 2, 2011; Complainant should file his response/rebuttal to the summary decision motions (accompanied by affidavits, deposition excerpts, documents, and other evidence) on or before June 6, 2011; and Respondents' reply briefs should be filed on or before July 6, 2011. I also required that any discovery motions be accompanied by a certification that, despite a good faith effort, the parties had been unable to reach an agreement.

¹⁰ Apart from those allegations, I found that "Complainant provide[d] only a jumbled account of his internal reporting to either First Transit or Pace supervisors" and that "[e]xcept for the three matters identified above, absent a more definite statement of facts, Complainant's pleadings have not articulated a factual narrative to support a finding that complainant made other safety complaints, that he reported them, and that he was demoted, suspended, and eventually terminated as a consequence of the reporting." I therefore determined that Complainant had not made a specific enough showing that his allegations concerning the heat and air conditioning (apart from leaks), proper fueling techniques, spill or body kits, glazing and sealing, or spraying with a pressure washer could qualify as protected activity under the Act.

On May 13, 2011, Complainant filed a third motion to compel, arguing that Respondents failed to comply with my orders of November 23, 2010 and March 10, 2011. Respondent, First Transit, asserted that it complied fully with my orders; on April 27, 2011, it sent Complainant a letter indicating that, despite a search, no documents responsive to discovery requests # 2b, 4, 5, 7, and 10 could be located. First Transit either previously or contemporaneously produced documents in response to requests # 1, 2, and 8.¹¹

On May 17, 2011, I issued a Third Order Concerning Discovery and Schedule for Proceeding. In that Order, I determined that there was nothing to indicate that Respondents did not make a good faith effort to locate documents responsive to Complainant's discovery request and therefore denied the motion to compel. I again directed Complainant to submit any rebuttal to the summary decision motions filed by Respondents on or before June 6, 2011 and for Respondents to file any reply briefs on or before July 6, 2011, subject to extension by stipulation.

On June 6, 2011, Complainant mailed a filing which stated the following:

During my employment [I] suffered age related discrimination, as well as termination related to my union involvement. As part of discovery [I] would additionally like to request copies of all new hires, as well as terminations from 2007-2009 from [F]irst [T]ransit.

Full-complete discovery is my right under C.F. Rules of procedure, 20 C.F.R. 18.40(c), your order concerning discovery Nov. 23, 2010 is a reference that will assist you in review.

If needed [I] would like the Chief A.L.J. to look at case charge no. 2009-NTS-00002/2010-NTS-00002 to clarify the equal rights of discovery for both respondents and complainants.

I have contacted the respondents attorneys, they have still withheld discovery, nor have they contacted me to resolve these matters.

On June 21, 2011, Respondent, First Transit, submitted a Reply in Support of its Motion for Summary Disposition and Response in Opposition to Complainant's Request for Discovery; it was supported by eight exhibits (A through H) relating to the discovery issue. On July 6, 2011, Respondent, Pace, submitted a Reply in Support of its Motion for Summary Disposition.

First Transit filed an additional reply in support of its motion for summary disposition on October 18, 2011, supported by additional excerpts from Complainant's deposition.

¹¹ Because Respondent, Pace, had previously indicated that it had no documents responsive to requests 1, 2b, 4, 5, 7, 8, and 10, I found it was unnecessary to await a response from Pace. Pace subsequently filed a response indicating that it had informed Complainant by correspondence sent on December 22, 2010, January 20, 2011, and February 22, 2011 that it did not have any documents responsive to the aforementioned discovery requests.

On October 20, 2011, I issued a Fourth Order Concerning Discovery and Schedule for Proceeding, which denied Complainant's June 6, 2011 motion. That Order noted that Complainant's motion appeared to add a new claim based upon age discrimination and discrimination due to union activity but held that those matters were not before this tribunal and that, to the extent that the motion sought to reopen discovery by requesting new discovery related to those new claims, the suggested discovery was overbroad and did not appear to seek information that would be relevant to the summary decision motions. Because Complainant did not adequately respond to the summary decision motions, I directed Respondents to provide this tribunal with a complete, unredacted copy of the transcript of his deposition by November 15, 2011, which would be considered on his behalf. I also specified that by this date, Complainant could provide a further response to the summary decision motions, in accordance with the detailed instructions I previously provided him, at which point the record would be closed. I allowed the parties until December 15, 2011 to submit supplemental briefing.

On November 1, 2011, Respondent First Transit filed a complete, unredacted copy of Complainant's deposition transcript, including exhibits (which are referenced herein as CX 1 through CX 55).¹²

On December 16, 2011, Respondent, First Transit, filed an additional Reply in Support of its Motion for Summary Disposition, supported by the October 31, 2011 Notice of Filing the transcript of Complainant's deposition.

Complainant did not submit additional evidence or briefing.

FACTUAL BACKGROUND

Contract between Pace and First Transit

Respondent, Pace, is a suburban transit provider. Respondent, First Transit, is a private transportation company that provides a variety of busing services. (EX 3). In 2007, Pace awarded First Transit a contract to operate its paratransit transportation bus service in North Cook County. (EX 3, 4). Respondents maintain that a manual provision incorporated by reference in the contract (but not offered as an exhibit) allowed Pace to request the removal of an employee from service on the Pace contract. (EX 3; CX 46).

Complainant's Employment with First Transit/Pace as a Driver for Pace Buses

On April 20, 2007, First Transit hired Complainant as a driver for Pace buses pursuant to Respondents' contract. (EX 3; Kodl Deposition p. 39-42). Complainant stated that while employed as a driver for First Transit, the only buses he drove were ones owned by Pace. (Kodl Dep. p.41-42). During his employment, Complainant complains that he was retaliated against for his union activities and his raising of safety complaints. (Kodl Dep. p. 196-197, 355-357). Complainant testified at his deposition that during the course of collective bargaining, on or about January 10, 2009, he shared notes addressing safety concerns, entitled "A.T.U. Bargaining

¹² The exhibits to the deposition were apparently taken from documents that Complainant had brought with him to the deposition, some of which were obtained from OSHA. (Kodl. Dep p. 10-11.)

Points,” with Peter Briggs, whom he believed was counsel for Pace; the notes were also shared with Franco Williams and Shannon O’Neill [Borst] from First Transit. (Kodl Dep. p. 59-62, 387-89; CX 4). However, in her affidavit, Melinda Metzger, Deputy Executive Director at Pace, stated that Pace never engaged in collective bargaining with Complainant and has never employed a labor attorney by the name of Peter Briggs. (EX 23). She did not address whether there was any employee by that name.

At his deposition, Complainant testified that in July of 2007, he complained to Danielle Franklin, a project manager with First Transit, that the seatbelts in the buses were not being cleaned properly and that there was foreign material on them—possibly blood or pathogens. (Kodl Dep. p. 65-73). Complainant further testified that he relayed this information verbally. *Id.* He could not recall if First Transit shared this information with Pace; however, he remembered mentioning it in the collective bargaining discussions with Pace. *Id.* Complainant testified that the drivers, maintenance manager, and project manager discussed replacing the old belts with newer ones and that the issue was brought up in some of the Department of Transportation inspection reports by various drivers. (Kodl Dep. p.71). Complainant also stated that he made suggestions on how to properly clean the seatbelts but his suggestions were ignored; however, the situation more or less resolved by replacement of the old, worn, soiled belts with newer ones. (*Id.* at 71-72.) During the same period, he noted that some of the wheelchair restraints, lap belts, and seat belts were not working properly, but in most cases the problems were “corrected on a pretty timely basis” (*id.* at 72-73).

In August 2007, Complainant complained that he was overcome by 134a coolant fumes on Bus 5062 to Briggs and to Douglas Ball, Maintenance Manager, and Mike Liuzzo, Operations Manager of First Transit. (Kodl Dep. p.56-64). Complainant believed that he filed an incident report but could not locate a copy. (*Id.* at 58.) He also recalled he raised the issue with Briggs in union bargaining points and that Briggs shared the document with others in First Transit. *Id.* at 59-62. In his affidavit, Liuzzo denied that Complainant raised such concerns to him regarding Bus 5062 or any other Pace vehicles. (EX 20, Liuzzo Aff. ¶5).

According to Complainant, he raised his third concern (relating to lug malfunction) between December 2007 and July 2008 to a Pace inspector named Brian or Kevin and to Douglas Ball of First Transit. (Kodl Dep. p. 97-103, 391). Complainant testified that the rear wheels on the bus showed lug failure/fatigue, and on various occasions (involving other drivers) the lugs would fail, causing the wheels to come off the vehicles. (*Id.* at 97-98.) He did not indicate whether that ever happened while he was driving.

Complainant also testified that he raised a number of other concerns when he was employed as a driver, including the lack of air conditioning on buses and lack of heat on occasion (*id.* at 74); an issue about glazing and seals regarding the windshield, windows, and service door (*id.* at 98); an issue regarding the engine cover, which seals the engine from the passenger and driver compartment (*id.* at 98-99); failure of another driver to use spill kits or body fluid kits (*id.* at 139-52); and use of improper fueling techniques (*id.* at 299-300).¹³ In June

¹³ In her affidavit, Shannon Borst (O’Neill) advised that Complainant had never complained to her about improper fueling techniques. (EX25, Borst Aff. ¶5). She noted that First Transit does not provide on-site fueling and all fueling was done at designated gas stations. *Id.*

2007, Complainant complained about the lack of cooperation from dispatchers, who made insulting and sarcastic remarks to him, and in December 2007, he indicated that he resented having his professionalism challenged over unwritten procedures. (CX 5, 6; Kodl Dep. p.78-82, 84-87). At that time, he noted that “[s]ince the N.L.R.B. vote to certify the new local A.T.U. [his] access to additional over-time, or extra work assignments ha[d] decreased significantly.” (CX 6).

Between July 2007 and April 2008, Complainant also received eleven complaints about his driving and two verbal warnings. (EX 7, 7A, 10, 11; CX 14-28). Pace maintains records of customer complaints on Customer Assistance Forms (“CAFs”), which it keeps in the regular course of its business. (EX 7, Groeninger Aff. ¶5, 7A; Kodl Dep. p.118-19). The incidents underlying the complaints made to Pace are as follows:

- On July 2, 2007,¹⁴ a passenger complained that Complainant was rude and improperly extended the time for a very short ride to an hour and a half. (CX 14; EX 7A). The CAF noted, “[h]ad [Complainant] taken the passenger straight home the second passenger would not have been picked up in the window.” *Id.* When this complaint was brought to Complainant’s attention, he apologized and explained that he did not mean to be rude to the passenger. *Id.*
- On July 5, 2007, a customer complained that her pickup was late. (CX 15; EX 7A). When the bus arrived, Complainant informed the passenger that she was an “add-on,” and he travelled to a destination in the far northwestern part of the suburbs to pick up/drop off another passenger before dropping her off. *Id.* Complainant was told not to tell passengers they are “add-ons.” (CX 15; EX 7A).
- On August 7, 2007, a customer complained that it took the bus an hour to get to a park located five minutes away. (CX 17; EX 7A). Complainant explained that he thought dropping this passenger off first would cause him to be late in picking up his other passengers. *Id.* Complainant was reminded that it is against company policy to deviate from a route without first notifying dispatch. *Id.*
- On August 23, 2007, an individual called to say that he was driving slowly because of a bad storm when Complainant sped around him and cut him off. (CX 18; EX 7A). Complainant was reminded to follow traffic laws and reduce his speed in bad weather. *Id.* The CAF also noted that it was recommended that Complainant be subjected to field monitoring. *Id.*¹⁵
- On December 12, 2007, a passenger’s caregiver reported that Complainant was speeding. (CX 19; EX 7A). Complainant responded that he was not speeding. *Id.* The CAF on which the complaint was recorded notes, “[Complainant’s] AVL seems to support the claim that he was not speeding.” *Id.* Complainant explained during his deposition that “the buses are pretty much monitored in Lojak so they can determine point of speed, location and so on and so forth.” (Kodl Dep. p.174).
- On December 20, 2007, a passenger reported that Complainant was speeding, which almost caused his brother’s wheelchair to tip over. (CX 20; EX 7A). Complainant testified that he had no recollection of such an event and that the passenger shook his

¹⁴ The referenced dates are the incident dates, not the dates they were reported.

¹⁵ This complaint notes that the bus had A/C problems, which substantiates Complainant’s allegations that some of the buses suffered from lack of A/C. However, Complainant has not explained how the lack of air conditioning affected public transportation safety or security (or otherwise constituted protected activity under the NTSSA).

hand upon exiting. (Kodl Dep. p.176). Complainant was retrained on December 26, 2007 on how to properly secure a wheelchair and how to deal with passengers. (CX 21; EX 9).

- On January 3, 2008, an individual reported that Complainant cut him off. (CX 22; EX 7A). When Complainant was identified as the driver and was informed of this on January 22, he said he had no recollection of the event and denied that he would drive like that. *Id.* Complainant was reminded to adhere to all safety rules and that unsafe driving practices would not be tolerated. *Id.*
- A driver complained that on March 21, 2008, she turned into what she thought was the farthest right lane during a snow storm; however, it was difficult to tell, as the snow was covering the dividing line. (CX 23; EX 7A). After she turned, she alleged that Complainant sped next to her car, cut in front of her, then switched back into the other lane. *Id.* She thought the bus driver was trying to scare her or harm her vehicle, hoped that Pace realized the seriousness of the incident, and stated she was “quite shaken” for the 60 minute drive home. *Id.* A manager response of April 2, 2008 asked that this matter be investigated and the full name of the driver identified. *Id.* An annotation of April 24, 2008 indicated that the driver was Complainant and he was currently pulled from revenue service due to two other CAF’s under investigation. *Id.*
- On March 25, 2008, a blind passenger complained that she requested to be dropped off by the stairs of a bank so that it would be easier for her to find her way; however, Complainant dropped her off at a ramp, which resulted in her almost getting lost. (CX 24; EX 7A). An employee of the bank told the passenger that Complainant was beeping his horn at her to try and get her on the right path. *Id.* It was again noted that Complainant had been pulled from revenue due to the investigation of the other incidents [the two incidents that occurred on April 16, 2008, discussed below]. *Id.*
- On April 16, 2008 (6 a.m.), a passenger reported that every time Complainant picked her up, he was never at the right location and she either had to walk outside or walk around the back of the building to look for him. (CX 25; EX 7A). In addition, she complained that he was “rude and very sarcastic” to her. *Id.* Complainant filled out an Accident/Incident Report in response and he complained that she insulted him with profanity, and he resented the bad treatment. (CX 26). In addition, he stated that the passenger suggested he jump a high curb and cut in front of standing vehicles to pick her up, which was an unsafe maneuver. (Kodl Dep., p.209-10; CX 26). An annotation of April 22, 2008 to the CAF indicated that Complainant had been pulled from service and sent for retraining. (CX 25).
- Also on April 16, 2008 (1 p.m.), a passenger reported that Complainant forced her to walk down an alley with her walker and refused to secure her walker once she was in the bus. (CX 27; EX 7A). She complained that upon exiting the bus, he again refused to help her unsecure her walker, and he screamed that it was not his job to do so. *Id.* She “[w]as fearful of this driver” and “feared for her life.” *Id.* Complainant filled out an Accident/Incident Report indicating that he complied with Pace approved procedures “by the book” and complaining that the passenger was abusive and threatening and used profanity. (CX 28; EX 14). He reported that he informed her that paratransit drivers are prohibited from personally assisting customers. *Id.* He further stated that he “resent[ed] being insulted by this customer and object[ed] to being subject to complaints of this

nature.” *Id.* Complainant was pulled from Pace service pending an investigation of this event and the previous one. (CX 9, 23; EX 7, Groeninger Aff. ¶ 4; EX 7A, 13).

During this time period, Complainant also received two verbal warnings from his supervisors at First Transit (EX 10, 11):

- On January 29, 2008, Complainant received a verbal warning for insubordination after he yelled at a supervisor [Valiary [sic] Griffin] and failed to comply with the check-in process prior to starting his bus route. (EX 10). This was recorded on a First Transit Employee Discipline Form. *Id.*
- On January 31, 2008, Complainant received another verbal warning after a Road Supervisor [Rolando Javier] observed him going over railroad tracks without stopping completely. (EX 11; CX 29, 32). This was recorded on a First Transit Employee Discipline Form. (EX 11; CX 29, 30). Complainant testified this did not occur but, as only a verbal warning was involved, he essentially accepted it voluntarily. (Kodl Dep. p.219-20). Complainant was retrained on the Smith System and Railroad Crossing Procedure on February 4, 2008. (CX 30, 32; EX 12).¹⁶

On April 18, 2008, Pace requested that Complainant be removed from his position as a driver for Pace buses and he was pulled from Pace service on the same date. (CX 9, 45; EX 7, 15). Complainant was informed by Liuzzo that there were alleged CAF complaints and that he was being taken out of service pending an investigation, and he understood that he “would never drive for Pace ever again period.” (Kodl Dep. p. 105). On May 12, 2008, following a meeting with the vice president of its union, the General Manager (Franco Williams) of First Transit decided to bring him back on a non-revenue basis to wash the buses and perform other duties as assigned.¹⁷ (CX 45). According to counsel for First Transit (in a letter to OSHA), Complainant accepted the position of Service Assistant at the same rate of pay on June 5, 2008 and First Transit agreed to pay him eighty hours of retroactive pay. (EX 3). Complainant testified that his new position involved less overtime than his previous one, and the maintenance department did not have a union like the driver’s department. (Kodl Dep. p. 107-09).

On June 6, 2008, Complainant filed a grievance with his union (ATU Local 1733) complaining that Pace removed him from driving because of his efforts to organize the branch; he did not, however, accuse First Transit of this action. (EX 16; CX 10). There was no mention in the grievance of his having raised safety concerns. *Id.* In a memorandum of July 31, 2008 to Complainant, O’Neill (Borst) offered to reinstate his driving privileges if he were willing to transfer to a location that did not have a relationship with Pace, if he was qualified for an available opening; she also confirmed that First Transit had paid him for lost wages until his title was officially changed to Utility Clerk. (CX 46). O’Neill also indicated that First Transit did not have copies of ten of the thirteen alleged complaints against him. *Id.*

¹⁶ The contract between Pace and First Transit specifies, “[t]he contractor shall perform random on the road monitoring of drivers employed in providing service described in this Contract.” (EX 4, Exhibit B p.15)

¹⁷ Doris Martin replaced Franco Williams as General Manager of the Glenview facility on April 26, 2009. (Martin Aff. ¶2.)

Complainant's Employment with First Transit as a Utility Clerk

During the period of time that he worked as a Utility Clerk, Complainant's coworkers in the maintenance department and drivers complained about him and he also complained about them. On October 10, 2008, shortly after filing his first OSHA complaint, Complainant noted in an Accident/Incident Report that Mike Liuzzo, Operations Manager of First Transit, had informed him that a number of drivers were complaining that he was telling them what to do, and that it was not his job to give them directions; however, he complained that horseplay and "close calls" in the garage were getting out of hand.¹⁸ (EX 19; see also CX 14 p. 3).

Complainant submitted multiple Accident/Incident Reports complaining of his coworkers¹⁹ and he also complained about his supervisors. (CX 7, 33, 44). In January 2009, Complainant reported that "Mike Liuzzo engaged in an unsafe[] activity by backing at [him] in a threatening manner and nearly hitting [him] with the project manager[']s car" (CX 7; Kodl Dep. p. 94-96). At the same time, he stated that he had advised Mike Liuzzo, Vallery [sic] Griffin [Smith], and Pat Raatz of "horse play, close calls in the facility for example cell phone usage, lack of caution operating buses in and around the building" and he stated that, as his union-labor activities were protected, "none of these three managers should restrict my conversation from speaking with other employees, tell [sic] I can't take breaks, or how to do my maintenance work." (CX 7).

On April 5, 2009, Susie Raatz, DDS Manager, wrote a memorandum noting that Complainant ignored her when she asked him move a mop bucket that was in front of a van. (EX 18A). Raatz also noted that Complainant was improperly telling other drivers that they did not have permission to use his broom. *Id.*

In addition, Victor Hernandez submitted an Accident/Incident report noting that on April 30, 2009, he was backing a vehicle into the garage below the speed limit when Complainant jumped in front of him and told him to go slower. (EX 18B). Complainant allegedly threatened to write Hernandez up, at which point they got into a verbal altercation until another employee pulled Hernandez aside. *Id.* Complainant filed his own report of the incident, in which he asserted that Hernandez spoke to him in a disrespectful manner, used profanity, and came close to hitting him twice in three days; he stated that Hernandez was "angry and out of control." (CX 43). He subsequently filed another report complaining about Hernandez' actions on April 28 and May 1.²⁰ (CX 43, 44).

¹⁸ The report was submitted for the purpose of complaining about a driver, Leticca Duncan, for offensive language and behavior; he acknowledged that he had admonished Duncan for using a sweeper in his area and interfering with his work activity. (CX 14; EX 19).

¹⁹ Complainant complained that Cynthia Vaughn was engaging in horseplay and stopped to use the vending machine when parking a bus on September 16, 2008; Tomika Loyd did not yield to him when he was in the garage and made improper remarks to him on December 3, 2008; and Driver Kamal interrupted his work and threatened him with hand gestures on December 22, 2008. (CX 33). On May 4, 2009, Complainant alleged that Victor Hernandez did not follow the proper procedures when backing up a bus on April 28, 2009 and on May 1, 2009 "he would not use caution, hazard, horn, with slow rate of speed, as well he used improper language in a threatening manner in open area of lunch room." (CX 44).

²⁰ See footnote 19 above.

On May 4, 2009, Shanterricka Hughes reported that Complainant was mopping the floor in the garage, and when she said “excuse me,” he told her to go around. (EX 18C). When she replied that she was going to her desk through the door, he allegedly told her “you are so ignorant.” *Id.*

On May 5, 2009, Wayne Boi reported that he was walking towards the trash can to throw his coffee away when Complainant, who was mopping the entry way near the bathroom, deliberately bumped into him. (EX 18E). Boi alleges that he told Complainant to leave him alone but that Complainant was “right on top of [him]” and told Boi he was going to write him up. *Id.* Coworker, Darrell Dorsey, largely substantiated Boi’s claim. *Id.* Dorsey reported that Boi was walking towards the bathroom when Complainant told him he was walking on his floor. *Id.* Dorsey reported that as Boi ignored him, Complainant bumped into him then grabbed an incident report and asked Dorsey and another coworker if “[they] want to be next.” *Id.*

On May 7, 2009, Constance Reynolds submitted an Accident/Incident Report relating to a similar incident, which occurred when she was in the break room with Darrell Dorsey and Kevin Quinones and Complainant walked into Quinones. (EX 18F). Reynolds alleges that Complainant started to write Quinones up and asked Reynolds and Dorsey if they “want to be next.” *Id.*²¹

On May 7, 2009²², Dorsey reported that Complainant was spotting a bus that was backing up when Wayne Crumpton crossed in front of it. (EX 18E). Complainant allegedly questioned Crumpton as to why he was walking in front of the bus and Crumpton turned around and said “what.” *Id.* Dorsey alleged that Complainant then approached Crumpton and grabbed his shirt, at which point Dorsey broke them up.²³ *Id.* Dorsey reported that Crumpton told Complainant never to touch him again and that Complainant responded by giving him the middle finger. *Id.* Tamika Loyd and Diane Roberts also submitted Accident/Incident Reports from that day in which they noted that Complainant approached Crumpton in a menacing manner and the two started to exchange words until Dorsey intervened. *Id.* Shanterricka Hughes and Wayne Boi also reported that they saw the two men arguing. *Id.* In a handwritten statement dated May 7, 2009, Crumpton alleged that he and a coworker were walking behind a bus Complainant was spotting when Complainant said, “you think this is funny?” Crumpton alleged that he said “who are you talking to?” and Complainant then approached him and pushed him. *Id.*

General Manager Doris Martin investigated the accident on May 8, 2009 and at that time, she interviewed Complainant, as well as Dorsey, Boi, Loyd, and Roberts. (EX 18E). When interviewed by Martin, Complainant reported that he was spotting a driver when Crumpton and another coworker walked in the path of the bus. (EX 18E). Complainant said that he warned them to move quickly and Crumpton then gave him the middle finger. *Id.* When Complainant responded “excuse me?,” Crumpton allegedly approached him and shoved and possibly even

²¹ Although the report is dated May 7, 2009, it is unclear when this incident took place.

²² Although the incident reports recounting this event state that it occurred on May 7, 2009, Complainant’s Notice of Disciplinary Action seems to mistakenly state that the fight took place on May 8, 2009.

²³ In his initial (May 7, 2009) version, Dorsey said that Complainant pushed Crumpton; however, the 5-8-09 version stated that Complainant “got in his face” and grabbed his shirt. (EX 18E).

kicked him. *Id.* Complainant gave essentially the same account at his deposition. (Kodl Dep. p.317-22).

Martin reported that Complainant “was very difficult and wanted to argue with us” during their meeting. (EX 18E). Martin suspended Complainant pending a full investigation. *Id.*

Complainant received a Notice of Disciplinary Action with a final written warning on May 27, 2009. (CX 53). The Notice stated, inter alia, that the “investigation of the incident that occurred on 5/8/2009 (sic) during which both [Complainant] and Wayne Crumpton engaged in a verbal and/or physical altercation on First Transit property” was concluded and it was “discovered that [Complainant] had been engaging in intimidating behaviors towards coworkers and on one occasion made physical contact with a fellow employee,” which constituted inappropriate behavior for the workplace. *Id.* The warning stated:

GOING FORWARD, YOU ARE CAUTIONED THAT, UNLESS YOUR CONDUCT AND PERFORMANCE AS AN EMPLOYEE BECOMES SATISFACTORY IMMEDIATELY, YOU WILL BE SUBJECT TO MORE SEVERE DISCIPLINE, UP TO AND INCLUDING DISCHARGE, AS WARRANTED BY THE CIRCUMSTANCES AND/OR EVENTS.

Id. The Notice was signed by Complainant’s immediate supervisor and the Director, and Complainant also signed it, acknowledging that he read and understood the action. *Id.* Complainant apparently went back to work at that time.

On May 8, 2009, Martin wrote a memorandum to the human resources office involving an altercation between Complainant and another employee from a few weeks prior. (EX 18D). Martin alleged that on April 27, 2009, Complainant and another employee, Fernando, got into an argument because Complainant would not allow him to use the floor scrubber. (EX 18D). When Operations Manager, Mike Liuzzo, told Complainant to give Fernando the keys to the floor scrubber, Complainant complied. *Id.*

On June 20, 2009, Martin wrote “Notes” explaining that she observed Complainant pulling cleaners from the shelf and writing information from each bottle on a pad of paper. (EX 18D). Martin reported that she asked Complainant about his note pad.²⁴ *Id.* She noted that when she asked Complainant what he was cleaning, he would say he was working, and when she asked where he was working, he would respond that he was cleaning. *Id.* Martin wrote that although Complainant had just cleaned the bathroom, there was trash on the floor and no toilet paper or paper towels. *Id.* Complainant recalled the incident but felt that Martin was harassing him; he stated that she followed him into the bathroom, which he thought was inappropriate, but

²⁴ In a letter sent to this tribunal on the same day, Complainant alleged that Martin asked him to give her copies of his notes on anything OSHA related and threatened to fire him if he did not comply. (CX 48; Kodl Dep. p.148). Complainant noted in his deposition that Martin had objections to him keeping notes and that “[s]he assumed [he] was – [he] was taking OSHA complaints or something to that effect.” *Id.* at 137. In addition, he alleges she asked him if he was looking at certain MSDS material and that she pulled him from procurement rights in the maintenance department after he started reviewing the safety of a product they were purchasing. *Id.* at 138.

he did not file a complaint. (Kodl Dep, p. 331-344). Complainant also stated that she kept on pushing him for information and she threatened him with termination if he did not “let go of Pace issues.” (*Id.* at 333-34, 339).

Finally, on July 17, 2009, Mike Liuzzo, Operations Manager, sent Complainant home from work “due to his insubordinate behavior.” (EX 20, Liuzzo Aff. ¶ 9). Liuzzo reported the incident to Doris Martin the same day. *Id.* According to his contemporaneous report to Martin, a dispatcher had informed him that a driver, Constance Reynolds, was at the dispatch window stating that Complainant would not give her the bus assigned to her route because he was washing it. (EX 20A). Liuzzo explained that he walked up to Complainant, who was soaping the bus, and told him not to worry about cleaning the bus because Reynolds needed it for her route. *Id.* Complainant then proceeded to ignore him and continued soaping the bus. *Id.* Liuzzo alleged that he repeated himself twice more and Complainant continued to ignore him. *Id.* Liuzzo then called over another employee to rinse the bus with a pressure washer, at which point Complainant put his hand up and said “No, wait!” *Id.* Liuzzo ordered the employee to continue. *Id.* Complainant testified that he acknowledged Liuzzo but Liuzzo did not hear him because they were in a noisy area and that it took him time to move because of his equipment. (Kodl Dep. p.358-67). Diane Roberts and Susie Raatz submitted memoranda substantiating Liuzzo’s account. (EX 20A). Complainant also stated that he injured his left eye when he was sprayed in the face by the pressure washer on July 17, 2009. (CX 49).

On July 22, 2009, the Human Resources Director of First Transit, Amy Therien, sent Complainant a letter informing him that his refusal to follow Liuzzo’s instructions was a violation of company policy as well as a violation of the Notice of Disciplinary Action he received on May 27, 2009. (EX 22). Therien advised him that his employment with First Transit was terminated effective immediately and he did not have permission to come onto First Transit’s or Pace’s property. *Id.*

Despite efforts to obtain other employment, Complainant was unable to do so and was unemployed at the time of his deposition. (Kodl Dep. p. 370-71). He did, however, receive unemployment benefits. (*Id.* at 372.)

COMPLAINANT’S SAFETY AND RETALIATION COMPLAINTS

On October 9, 2008, a few months after he was transferred to the position of utility clerk, Complainant filed a complaint with OSHA alleging that Respondents changed his position in retaliation for his decision to report safety concerns to management. Complainant alleges that he raised safety concerns to individuals at Pace and First Transit on numerous occasions. In my November 23, 2010 order, I found that only the complaints regarding pathogens on seatbelts, 134a coolant fumes, and lug fatigue were sufficiently definite and implicated safety clearly enough to be cognizable, and the remaining allegations of protected activity were too vague to be cognizable under the Act or they could not reasonably qualify as protected activity. Complainant was advised that if he wished to elaborate on any of these allegations of protected activity, he must make a detailed factual statement, made under penalty of perjury or notarized, in support. As he failed to do so, I reviewed the Complainant’s deposition transcript and the other evidence

of record and I still reach the same conclusion, that only the three allegations are sufficiently specific and related to safety or health to be potentially cognizable under the Act.

Complainant filed a second complaint or series of complaints dated from June 2009 through August 2009 against First Transit which addressed subsequent allegedly retaliatory actions and his July 22, 2009 termination. That case is also before me. Although Complainant apparently complained about the unsafe manner in which his coworkers performed their jobs, Complainant did not articulate additional protected activity in the second complaint, apart from that alleged in the first complaint. However, as discussed below, Complainant's filing of the initial complaint raising cognizable claims under the NTSSA is, in and of itself, protected activity.

LEGAL STANDARD

Summary Judgment Standard

An administrative law judge may enter summary decision or judgment for a party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there are no genuine issues as to any material fact and that the party is entitled to summary decision. 29 C.F.R. § 18.40(d). The moving party has the initial burden of demonstrating that the non-movant cannot make a showing sufficient to establish an essential element of his case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 325 (1986). The burden then shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At this stage, the non-movant may not rest upon mere allegations, speculations, or denials in his pleadings but must set forth specific facts for each issue upon which he would bear the ultimate burden of proof. *See* 29 C.F.R. § 18.40(c). If the non-movant fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact; a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23. All evidence and reasonable inferences are considered in the light most favorable to the non-movant. *Gillilian v. Tennessee Valley Authority*, 1991-ERA-31 (Sec'y Aug. 28, 1995); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

"The issue of causation is generally a difficult issue to resolve by summary disposition because it often involves factual questions of motivation and intent." *Hasan v. Enercon Services, Inc.*, ALJ No. 2004-ERA-022, ARB No. 10-061 (ARB July 28, 2011), slip op. at 2. However, it is also true that "[t]he moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant's claim." *Hasan*, slip op. at 4.

NTSSA Standard

The employee protection/whistleblower provisions of the NTSSA prohibit public transportation agencies, or a contractor or subcontractor of such an agency, from discharging or otherwise retaliating against an employee because he reported a hazardous safety or security condition. 6 U.S.C. § 1412(b)(1)(A); 29 C.F.R. §1982.102(a)(2)(i)(A). To make out a *prima*

facie case so as to warrant an investigation, the complainant must show: 1) he engaged in protected activity; 2) the employer knew or suspected the employee engaged in protected activity; 3) the employee suffered adverse action; and 4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor to the adverse action. 29 C.F.R. § 1982.104(e)(2). To prevail at the hearing stage, a complainant must demonstrate by a preponderance of the evidence that his protected activity was a contributing factor to the unfavorable personnel action. 29 C.F.R. § 1982.109(a). However, even if the complainant does so, he cannot prevail if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action even absent the protected activity. 29 C.F.R. §1982.109(b).

DISCUSSION

Whether the Parties are Subject to the NTSSA

Respondent, Pace, argues that it is entitled to summary judgment because Complainant was an employee of First Transit and not Pace. Pace emphasizes Complainant's testimony in which he admitted that First Transit gave him his work schedule, was in charge of his day-to-day activities, and handled disciplinary issues. (Kodl Dep. p. 46-52; 391-97).

Since Pace submitted its Motion for Summary Judgment, the Department of Labor has issued implementing regulations for the NTSSA, which define an "employee" as²⁵:

An individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by a public transportation agency or a railroad carrier, or a contractor or subcontractor of a public transportation agency or a railroad carrier.

29 C.F.R. § 1982.101(d).

The regulations go on to define a public transportation agency as "a publicly owned operator of public transportation eligible to receive Federal assistance under 49 U.S.C. chapter 53." 29 C.F.R. § 1982.101(i). The contract between Pace and First Transit includes Section B, "FTA/IDOT/RTA Requirements," which states:

2. Financial Assistance Contract – This contract is subject to the provisions of the financial assistance contracts between Pace and other sponsoring agencies which are identified in the Invitation for Bids as FTA (Federal Transit Administration), IDOT (Illinois Department of Transportation), and RTA (Regional Transportation Authority).

(EX 4, p.13).

²⁵ The Department of Labor issued these regulations on August 31, 2010, approximately two weeks after Pace submitted its motion for summary judgment. However, Pace submitted two replies in support of its motion for summary judgment on September 14, 2010 and July 6, 2011. In its first reply, it renewed its argument that Complainant was not an employee of Pace. (Reply in Support of Motion for Summary Judgment by Pace Suburban Bus Division, p.1-2). In its second reply, Pace did not address this issue further.

Based on this language, it is clear that Pace receives federal assistance and is, thus, a public transportation agency. Likewise, as a contractor with Pace, First Transit also falls within the purview of the NTSSA.

Furthermore, as discussed above, Respondents agree that the contract between Pace and First Transit enabled Pace to require the removal of an employee from working on the Pace contract, and when it requested Complainant's removal from the contract, First Transit promptly did so. (EX7, Groeninger Aff. ¶ 4, 6; EX 3, 7A; CX 46). Accordingly, Complainant was clearly an "individual whose employment could be affected by a public transportation agency." 29 C.F.R. § 1982.101(d). In fact, Complainant was removed from his position as a driver after Mary Beth Clark of Pace sent an email to Mike Liuzzo of First Transit requesting that Complainant be pulled from service pending an investigation. (EX 15). As such, Complainant and Pace are both subject to the NTSSA.

In contrast to Pace, First Transit does not dispute being covered by the Act. As a contractor of a public transportation agency, it is clearly covered as well.

Elements of the Present Claim

Pace (First Complaint Only)

Having determined that Pace is covered by the Act, I must determine whether it is entitled to summary decision on the basis that Complainant cannot make a showing sufficient to establish an essential element of his case. The only allegations pertinent to Pace are those raised in the first complaint.

Protected Activity and Notice. Initially, I find that there are material factual issues concerning the protected activity and notice elements of the claim so as to preclude summary decision in Respondents' favor on those elements. Complainant alleges that he raised concerns regarding the coolant fumes and foreign material on seatbelts with Peter Briggs of Pace during bargaining discussions. (Kodl Dep. p.58-60; CX 4). Melinda Metzger, Deputy Executive Director of Pace, claims that Pace never employed a labor attorney by the name of Peter Briggs nor did it engage in bargaining discussions with Complainant. (EX 23). However, Complainant has submitted into evidence bargaining points from January 10, 2008, which note "[b]us sanitation/ultraviolet/steam cleaning to remove exposed blood, bodily fluid, germs, bacteria." (CX 4). Complainant stated during his deposition that he was fairly confident the document was submitted to Briggs during bargaining negotiations. (Kodl Dep. p.61). This document corroborates Complainant's testimony to the effect that he raised safety concerns during collective bargaining discussions with Pace. Likewise, there are material factual issues concerning Complainant's allegations about coolant leakage that defeat summary decision.²⁶

²⁶ Complainant's testimony about his reporting of safety concerns relating to lug nuts is ultimately too vague to constitute protected activity. Although he stated that he reported problems with the lug nuts to a Pace inspector named Brian or Kevin and to Douglas Ball of First Transit, it is unclear whether he was reporting problems on the vehicles he drove or whether he was raising concerns based on second hand accounts. (Kodl Dep. p. 97-103, 391).

Viewing the evidence in the light most favorable to Complainant, the non-movant, I find there is a genuine issue of material fact as to whether Complainant engaged in protected activity. Furthermore, based upon the supporting document and Complainant's testimony, I find there is a genuine issue of material fact as to whether Pace was aware of Complainant's protected activity.

Adverse Action. Likewise, Respondents cannot prevail on the third, adverse action, element. Adverse action occurs when a complainant can show he suffered a tangible job consequence. *Shelton v. Oak Ridge Nat'l Labs*, ARB No. 980100, ALJ No. 980 CAA-19, slip op. at 8. (ARB March. 30, 2001) (citing *Oest v. Illinois Dep't of Corrections*, 240 F.3d 605, 612-13 (7th Cir. 2001).) To be actionable, the alleged adverse employment action must involve a tangible job detriment (such as dismissal, failure to hire, or demotion) or it may take the form of harassment that is sufficiently pervasive as to alter the conditions of employment and create an abusive or hostile work environment. *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 (ARB Feb. 29, 2000). Here, Pace requested that Complainant be removed from his position as a driver in April 2008. (CX 9, 45; EX 7). In response, First Transit temporarily suspended Complainant pending an investigation then offered to transfer him to the maintenance department at the same rate of pay and with retroactive pay for the time he was suspended. (EX 3; CX 45, 46). The NTSSA makes clear that suspension and discharge constitute adverse action. 6 U.S.C. § 1142(b)(1). Although First Transit made the decision to suspend Complainant, and it ultimately retained him in a different position, Pace effectively terminated its employment relationship with Complainant when it requested that he be removed from his position as a driver on the Pace contract. Accordingly, I find that Pace engaged in adverse action when it requested that Complainant be pulled from service as a driver, which resulted in his suspension and transfer.

Causation. However, turning to the fourth element, the issue of causation, I find that Complainant has failed to present or even allege facts that would support a finding that his protected activity contributed to the adverse action. Respondent Pace has articulated a valid, nondiscriminatory basis for the decision to request his removal from the contract; in response, Complainant has merely offered speculation to connect his protected activities with the removal that led to his reassignment.

The evidence reflects that Pace received eleven customer or public complaints involving Complainant's activities as a driver between July 2007 and April 2008, when Pace requested that he be pulled from service.²⁷ (EX 7A; CX 14-28). Customer complaints (and complaints brought by members of the public) were recorded on Customer Assistance Forms ("CAFs"), which Pace states are kept in the ordinary course of business when individuals report complaints concerning a driver of a Pace vehicle. (EX 7, Groeninger Aff. ¶ 5). Although a few of these complaints were apparently investigated only after Complainant had been suspended (and Complainant was not identified as the driver until that time), he was actually notified about most of them, yet he did not contemporaneously deny that they occurred. Tom Groeninger, Regional Manager

It is unnecessary to determine whether there are material factual issues concerning the lug nut claim as I have already found material factual issues relating to the coolant fumes and seatbelt pathogen complaints.

²⁷ Three of the complaints were brought by members of the public who were driving and claimed that a driver (who was later identified as Complainant) had cut them off.

Paratransit/Van Pool for Pace, stated that Pace relied upon these CAFs when it requested that Complainant be removed from driving Pace vehicles. (EX7, Groeninger Aff. ¶ 6).

Complainant suggested that Al Lopez and Mary Beth Clark of Pace fabricated these customer complaints in order to target him. (Kodl Dep. p.185-92). However, when asked what evidence he had that Clark was targeting him, Complainant testified, “None. Just my belief.” (*Id.* at p.192.) With respect to Lopez, Complainant stated that unnamed customers and possibly employees of Pace told him that Lopez was out to get him. (*Id.* at 187-89.) Upon further questioning, he was unable to provide specifics.²⁸ (*Id.* at 189.) Complainant also testified that although he could not corroborate or verify it, he believed that Lopez had been reprimanded for “filing inappropriate complaints through customers.” (*Id.* at 191-92.) This is mere speculation.

As evidence that he was being treated disparately because of his protected activity, Complainant alleges that other drivers with worse records than his were retained by Pace and First Transit as drivers. (Kodl Dep., p.126; CX 12). However, when questioned about the three drivers whom he alleged received better treatment, Complainant acknowledged that two of the three drivers were removed from service. (*Id.* at 130-36.)

Complainant’s own testimony is based on his subjective belief that he was being retaliated against for his protected activities. Yet even Complainant’s testimony indicates that he believed he was being targeted primarily for his union activities. (Kodl. Dep. p. 196-97, 355-57). The grievance he filed claimed that he had been removed from driving due to his efforts to organize the branch and did not mention safety or health issues. (EX 16; CX 10).

Although all evidence and reasonable inferences must be considered in the light most favorable to the non-movant, Complainant may not rest upon mere allegations, speculations, or denials in his pleadings. *See* 29 C.F.R. § 18.40(c). Rather, Complainant must set forth specific facts for each issue upon which he would bear the ultimate burden of proof. *Id.* Complainant has proffered nothing more than speculation that Pace fabricated these complaints to get rid of him in retaliation for his protected activity. Indeed, Complainant was questioned concerning some of these incidents and, while not accepting that he was at fault, he did not contemporaneously deny that they occurred. With respect to the two incidents of April 16, 2008 that caused him to be pulled from service, Complainant stated that he resented the way the customers treated him and their use of profanity. In the last of these incidents, which precipitated the investigation leading to his reassignment, the passenger expressed actual fear of Complainant. Furthermore, although Complainant alleges that drivers with worse records were retained as drivers for Pace vehicles, his testimony suggests that most, if not all, of these drivers were ultimately pulled from service. Accordingly, I find that Respondent, Pace, is entitled to summary decision on the basis that Complainant has not proffered any evidence suggesting that his protected activity contributed to their decision to pull him from service.

²⁸ Although Complainant suggested at various points in his deposition that additional information about these individuals would come out during discovery, he did not seek discovery relating to Lopez, Clark, or anyone else in his discovery requests (aside from requesting his own personnel records, which were provided). (*E.g.*, Kodl Dep. 191-92),

First Transit (First Complaint)

Complainant also alleges in the first complaint that First Transit retaliated against him when it transferred him to the maintenance department. However, as discussed above, First Transit acted at Pace's behest. Furthermore, just as Complainant failed to present any evidence suggesting that his protected activity influenced Pace's decision, Complainant has not presented any evidence suggesting that First Transit suspended and transferred him because of his protected activity. The evidence discussed above with respect to Pace establishes that the removal leading to the suspension was made at Pace's request and, as Complainant was not eligible to work on the Pace contract, he had to be reassigned, either to a driver position at another location not involved in the Pace contract or at his current location in another capacity. His reassignment (at a job with the same base pay, with restoration of his pay during the suspension period) was the direct result of the conduct that precipitated Pace's request for his removal from its contract. Complainant has pointed to no facts or alleged facts that would implicate any other basis for his reassignment. When asked (concerning the Customer Assistance Forms) whether anyone from First Transit had targeted him, he merely expressed his belief that Mike [Liuzzo], Valerie [Griffin Smith], Doris Martin, and Shannon [O'Neill/Borst] did not like him or "would live without" him. (Kodl Dep. p. 191). He did not explain or point to facts connecting their dislike with either his protected activity or his suspension and reassignment. Accordingly, I find that First Transit is also entitled to summary judgment with respect to Complainant's first retaliation complaint.

First Transit (Second Complaint)

In addition to the aforementioned complaint, Complainant also alleges in a second complaint (directed only against First Transit) that, while he was employed in maintenance, he was harassed, had his duties and schedule changed, was suspended a second time, and ultimately was terminated from his position as a utility clerk in retaliation for reporting safety and health concerns and for filing his previous OSHA complaint. For the reasons set forth below, I also find that First Transit is entitled to summary decision on the second complaint.

Protected Activity. Initially, I reject First Transit's assertion that Complainant has not proffered any evidence suggesting he engaged in protected activity. Specifically, Respondent emphasizes that Complainant has no evidence beyond his testimony that he reported safety concerns. However, Complainant's testimony is accepted as true for purposes of summary disposition and, to the extent that it contradicts other evidence on material matters, there would be material factual issues that preclude summary disposition. Although First Transit highlights the fact that Complainant never filed a safety complaint with OSHA aside from his retaliation claim, that is of no significance. In addition to protecting employees who raise safety concerns, the NTSSA protects employees who "file a complaint or directly cause to be brought a proceeding" related to enforcement of the employee protection provisions of the Act. 6 U.S.C. § 1142(a)(3). Complainant filed his initial retaliation complaint with OSHA on October 8, 2008, over nine months before he was terminated. Thus, irrespective of whether Complainant raised safety concerns with First Transit, he engaged in protected activity when he filed his initial OSHA complaint.

Notice. It is also clear that Respondent, First Transit, was aware of some if not all of Complainant's protected activity. Complainant alleges that he reported concerns regarding 134a coolant fumes to Mike Liuzzo of First Transit, yet Liuzzo denies this. (Kodl Dep. p.57-58; EX 20). Complainant also stated that he believed an incident report existed; however, he did not have a copy, and he suggested it may have been shredded. (Kodl Dep. p.58).²⁹ Even assuming First Transit was not contemporaneously aware of these alleged safety complaints, it was served with notice of Complainant's initial retaliation complaint on October 23, 2008, approximately nine months before his employment was terminated on July 22, 2009. (EX 1, 22). Accordingly, First Transit was clearly aware that Complainant engaged in protected activity.

Adverse Action. In addition, it is clear that First Transit's decision to suspend Complainant while he was employed in maintenance and then to terminate Complainant's employment constitutes adverse action.³⁰ 6 U.S.C. §§ 1142(a)-(b). However, I do not find other allegations in the second complaint (relating to his alleged harassment, duty and schedule change, and threat of termination during his employment in maintenance) to rise to the level of an adverse action, as Complainant has not asserted facts sufficient to make out a claim based upon hostile work environment. *See, e.g., Berkman, supra* (requiring harassment to be sufficiently pervasive as to alter the terms of employment). The key, then, is whether Complainant has raised a genuine issue of material fact suggesting that his protected activity contributed to the decisions to suspend him and then terminate him.

Causation. Complainant has failed to assert a factual predicate that would connect his suspension or his termination to his protected activity, either with respect to his initial safety and health complaints or his filing of his first complaint. To counter First Transit's explanation of the basis for his termination, Complainant has relied upon little more than speculation.

The evidence reflects that Complainant was suspended and received a final written warning in May of 2009 after he got into a physical altercation with Wayne Crumpton, a coworker. (CX 53). Although Complainant disputes some of the details, he admits that he and Crumpton got into an altercation, and numerous other employees corroborated this. (EX 18E; Kodl Dep. p.317-22). Complainant's written warning made clear that he could be terminated if his conduct did not improve. (CX 53). The warning noted that based on an investigation into the incident with Crumpton, "[First Transit] discovered that [Complainant] [has] been engaging in intimidating behaviors towards coworkers and on one occasion made physical contact with a fellow employee." *Id.*

Despite receiving this warning, the evidence reflects that Complainant was involved in another incident in which a supervisor found him to be insubordinate. In July of 2009, Mike Liuzzo alleged that Complainant ignored his repeated requests to stop cleaning a bus so that the driver could leave for her scheduled route. (EX 20). Two coworkers corroborated Liuzzo's

²⁹ Complainant alleges that he witnessed Mike Liuzzo, Valerie Griffin Smith, and Susie Raatz—all managers at First Transit—frequently shredding documents during his employment there. (Kodl Dep., p.16-38). Complainant alleges he told Shannon O'Neill Borst that these managers were shredding documents. (*Id.* at 24.) He alleges that the documents shredded included incident reports pointing out safety violations on the buses. (*Id.* at 27.)

³⁰ Complainant was suspended twice: once, when he was a driver, when the complaints relating to his driving were being investigated, prior to his reassignment; and a second time, when he was in maintenance, following his altercation with another employee. After that second suspension, he was returned to duty but then terminated.

story. *Id.* Although Complainant disputes that he ignored his supervisor or neglected to get out of the way, he admitted that the incident occurred, that Liuzzo did not hear him, and that he moved slowly. Complainant was terminated a few days later.

Complainant was ultimately terminated for insubordination, considered in the context of his altercation with Crumpton and intimidating behavior toward other coworkers. His termination letter stated that he was being terminated because his refusal to follow Liuzzo's instructions was a violation of company policy as well as a violation of the Notice of Disciplinary Action he received in May. (EX 22).

Complainant has failed to provide specific facts suggesting that his protected activity contributed to First Transit's decision to terminate his employment. Rather, the evidence establishes that there was a valid, nondiscriminatory basis for the discipline imposed upon Complainant.

To support his allegation of retaliation, Complainant suggested that Doris Martin was directed by her superiors to terminate him for his "overall coordination of safety and health and welfare standards and practices vis-à-vis OSHA." (Kodl Dep. p.196-97). He also indicated that, on June 20, 2009, Martin threatened to fire him if he did not "let go of Pace issues." (Kodl. Dep. at 333-34, 339). In a report made on that date, Martin acknowledged that she asked Complainant about notes he was taking on cleaning products; however, she indicated that he was supposed to be cleaning and had failed to pick up trash on the floor or replace paper products in the bathroom (18D). Martin stated that she was never told by her supervisors to "get rid" of Complainant; however, she stated that she had witnessed his insubordinate behavior toward his supervisors and inappropriate conduct toward other employees on multiple occasions. (EX 18, Martin Aff. ¶7, 8). When Complainant was asked what evidence he had that Martin had targeted him, he responded:

Well, my dealings with her were – were of the nature where she wanted to make me compliant and I believe once she realized she couldn't corral me or manipulate me or make me compliant she was determined to get rid of me and she so much as mentioned that to me not in so many words but definitely through her actions.

(*Id.* at 194). Complainant's testimony is consistent with Martin taking action to deal with an insubordinate employee.

Complainant also alleges that Shannon Borst³¹, District Manager, was told to make an example out of him. However, when asked what evidence he had of this, he responded that he did not have any direct or indirect evidence, but rather "[t]hat's my belief." (*Id.* at 198). Borst stated that she was never directed to make an example of Complainant. (EX 25, Borst Aff. ¶ 7).

With respect to the incident with Crumpton, which led to his suspension, and the incident with supervisor Liuzzo, which led to his termination, Complainant has offered no evidence whatsoever that would establish a causal nexus with his protected activity. Complainant admitted that he fought with Crumpton at the workplace; however, he blamed Crumpton. This

³¹ Shannon Borst was formerly known as Shannon O'Neill.

incident was a serious matter that was part of the basis for his termination. Although under his version of the events preceding his termination, he did not ignore Liuzzo, he admitted that a misunderstanding occurred, and he has made no showing that Liuzzo's actions were related to his protected activity.

Based upon the two specific incidents that directly led to Complainant's suspension and termination, considered in the context of the numerous complaints submitted by Complainant's coworkers and his supervisors, First Transit has met its initial burden of demonstrating that there was a valid, nondiscriminatory basis for its actions. In response, Complainant has failed to make a showing sufficient to establish a nexus between his protected activity and his suspension and eventual termination. Rather, Complainant relies upon mere speculation, alleging that managers at First Transit were ordered to get rid of him. In view of Complainant's failure to directly or inferentially support a causal nexus between his protected activity and the adverse actions taken against him, this complaint must fail. Accordingly, I find that First Transit is also entitled to summary judgment with respect to Complainant's second retaliation complaint.

CONCLUSION

The Administrative Review Board has previously held that, "[a]lthough a *pro se* Complainant cannot be held to the same standard of pleadings as if he were represented by legal counsel, Complainant must allege a set of facts which, if proven, could support his claim of entitlement to relief." *Saporito v. Exelon Corp.*, ARB No. 10-049, ALJ No. 2009-ERA-10 (ARB Sept. 30, 2011) (citing *Grizzard v. Tennessee Valley Auth.*, 1990-ERA-052, slip op. at 4, n.4 (Sec'y Sept. 26, 1991)). Here, Complainant has not presented any facts to suggest that his protected activity contributed to Respondents' decision to change, suspend, and eventually terminate his employment. Accordingly, I find that Respondents, Pace and First Transit, are entitled to summary judgment with respect to both retaliation complaints.

ORDER

IT IS HEREBY ORDERED that Respondents' Motions for Summary Judgment be, and hereby are, **GRANTED** and Complainant's complaints in Case Nos. 2009-NTS-0002 and 2010-NTS-0010 be, and hereby are **DISMISSED**.

A

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.