



**Issue Date: 16 July 2012**

CASE NO.: 2010-NTS-00001

*In the Matter of:*

**CEDRIC WINTERS,**  
Complainant,

vs.

**SAN FRANCISCO BAY AREA RAPID  
TRANSIT DISTRICT,**  
Respondent.

Appearances: Cedric Winters,  
Complainant *in pro per*

Thomas C. Lee, Esq.  
Victoria R. Nuetzel, Esq.  
for Respondent

Before: Steven B. Berlin  
Administrative Law Judge

### **DECISION AND ORDER**

This case arises under the employee protection provisions of the National Transit Systems Security Act of 2007,<sup>1</sup> and its implementing regulations.<sup>2</sup> Complainant is a former utility worker of Respondent San Francisco Bay Area Rapid Transit District (BART), a publicly-owned agency that provides public transportation in the San Francisco Bay Area. Complainant's job duties included cleaning passenger rail cars during and after regular daily service on BART's commuter lines. He alleges that BART violated the Act when it discharged him from employment in retaliation for engaging in activity that the Act protects. The alleged protected activity was: (1) objecting that BART required him to clean vomit on rail cars in an unsafe way, and (2) demanding that BART provide him with and allow him to wear personal protective equipment while cleaning vomit.

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<sup>1</sup> 6 U.S.C. §1142.

<sup>2</sup> 29 C.F.R. §1982.100, *et seq.*

On June 14, 2012, I issued an Interim Decision and Order. I found that Complainant had shown by a preponderance of the evidence that BART terminated the employment and that Complainant's engaging in protected activity was a contributing factor in BART's decision to terminate. I found that BART had failed to show by clear and convincing evidence that it would have terminated the employment even if Complainant had not engaged in protected activity. I held BART liable and ordered certain interim relief.

As the record stood, however, I was unable to determine what relief was required to make Complainant whole. Complainant had not presented evidence going to that question. Yet, in express statutory language, Congress made a make whole remedy mandatory once liability was shown.<sup>3</sup> In addition, I considered that Complainant is untrained in the law and representing himself. I therefore reopened the record to allow the parties to submit evidence going to remedies, including any mitigation issues. Both parties filed written submissions. I allowed the parties to request an evidentiary hearing on remedies; neither did.

(I have appended a copy of the Interim Decision and Order because its findings of fact and conclusions of law are the basis for the remedies provided in this Order.)

While the parties were preparing their submissions on damages, BART appealed the Interim Decision and Order. It would appear that the appeal is premature in that it is only with the present Order that I am concluding the adjudication at this level. It is not, however, within my responsibility to decide that question.<sup>4</sup>

Nonetheless, I reviewed BART's arguments as I would on a motion for reconsideration. I will make additional findings in the alternative on a single question for which there is little precedent and on which the Board or a Court might adopt a view different from the one I stated in the Interim Decision and Order. I begin with these alternative findings; then I turn to remedies.

#### I. Complainant Met Any Applicable Requirement to Show that BART Intended Its Adverse Action.

In the Interim Decision and Order, I found that BART was charged with knowledge of Complainant's protected activity despite the fact that its ultimate decision-maker, Mr. Baker, did not know of this activity. Under a "cat's paw" analysis, I found that Complainant's direct supervisor, Mr. Davis, did not participate in the decision to terminate, but he knew of the protected activity, was a proximate cause of the termination decision, and Complainant's protected activity was a contributing factor underlying his actions that proximately caused the termination. *See* Interim Decision and Order at 18-23. Based on this and other conclusions, I found BART liable.

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<sup>3</sup> *See* 6 U.S.C. §§1142(c)(3)(B), (d)(1), (2).

<sup>4</sup> Complainant has filed a motion before this Office that the Administrative Review Board delay its consideration of BART's appeal of the Interim Decision and Order. That motion is not properly filed with the Office of Administrative Law Judges; it must be filed with the Administrative Review Board. The motion is denied for lack of jurisdiction.

I reasoned from the Supreme Court's holding in *Staub v. Proctor Hospital*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1186, 1194 (2011). That case arose under the whistleblower protection provision of the Uniformed Services Employment and Reemployment Rights Act (USERRA), and analogous language in Title VII of the Civil Rights Act of 1964 (as amended). Much as here, the person acting for the employer in *Staub* was unaware of the plaintiff's protected activity. She acted on the complaint of Staub's direct supervisor, who did have knowledge of the protected activity; his knowledge motivated him to complain about Staub; and he made the complaint with the intent to have the plaintiff's employment terminated, although he could not and did not personally terminate the employment. The Supreme Court held that there could be more than one proximate cause of an adverse action. And despite the ultimate decision-maker's absence of knowledge, "if a supervisor performs an act motivated by [discriminatory] animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." *Id.*

To apply that holding in the present context, I concluded that some adjustment was required. Both USERRA and Title VII require a finding that the protected activity be a *motivating factor* in the adverse action, but the controlling statute in the present case requires only that it be a *contributing factor*. The Administrative Review Board has held that this is a lesser requirement. See *Lopez v. Serbaco, Inc.*, ARB No. 04-158, slip op. at 5 n.6 (Nov. 29, 2006); *Vander Meer v. Western Kentucky Univ.*, ARB No. 97-078, slip op. at 4 n.4. I concluded that to apply *Staub* to the present statute, a complainant need not show that the supervisor *intended* to cause an adverse action; rather a complainant need show only that Complainant's protected activity motivated supervisor Davis to act, and the action, regardless of intent, was a proximate cause of the adverse action. That is because a factor that motivates goes to state of mind, but a factor that merely contributes goes to the effect of the act, but not the actor's state of mind.

In its appeal of the Interim Decision and Order, BART argues that this was error, and that for Complainant to prevail, he must show that Davis acted with the intent of causing an adverse action. As the case law is little developed on the precise way in which the required showing of a contributing factor differs from a showing of a motivating factor, I will find in the alternative that Davis did intend to cause BART to take an adverse action against Complainant.

I begin with Davis' general lack of credibility on matters related to Complainant's employment. As I explain in detail in the Interim Decision and Order (at 12-16), although Davis candidly admitted that his memory was poor, his lack of candor and honesty went beyond mere memory lapses. I will not repeat here the details of his shifting narratives, his failing to reveal that he had a relevant document available in the courtroom but instead testifying that it was probably in his office, his (inaccurate) backdating of employment-related documents, his pretending that he kept contemporaneous records in a diary and then admitting that he wrote the contemporaneous notes on note paper and later put entries in the diary, and other similar evidence showing testimony that proved deceptive or misleading.

I found as well that Davis singled out Complainant for criticism that was pretextual and unbiased. He criticized Complainant for playing continuously on an electronic game device that he could not describe and when the evidence showed that Complainant was physically incapable of playing video games and had no video game device. He told Complainant and other employees

that they could carry their cell phones with them, advised them where it was best to make personal calls, and even complained on one occasion that he'd tried to reach Complainant by calling him on his cell phone and could not reach him. Yet, when Davis learned that Complainant had complained to Davis' boss after a dispute over safety issues, Davis went directly to Complainant and told him that he was not allowed to use a cell phone and then complained to management that Complainant was using a cell phone against BART policy. Davis repeatedly complained to BART about Complainant's performance, yet when directed to document actual performance deficiencies, he produced no documentation and then prevaricated about where such documentation might be. Questioned about the specifics of Complainant's performance deficiencies, Davis offered little of substance.

Davis knew that Complainant was a temporary, at will employee. Davis knew that his managers relied on him as their eyes and ears in the field when it came to monitoring the performance of these temporary workers. He and Complainant had disputes about safety matters from early on in their interactions, and Davis also began complaining to his management about Complainant almost from the beginning. Davis would not have singled out Complainant for these unbased complaints were it not for his intent that BART upper management take adverse action against Complainant. It was the entirely predictable result, given the tenuous nature of Complainant's employment. Part of the friction between Davis and Complainant that motivated Davis' complaints was Complainant's protected activity. The protected activity was therefore a contributing factor in actions in which Davis engaged with an intent that upper management impose adverse actions on Complainant.

I therefore conclude in the alternative that, even if the contributing factor analysis requires that the employer representative not only be motivated to act in part by the protected activity, but also that he act with the intent to cause an adverse employment action, Complainant showed that Davis did this. Complainant thus met his evidentiary burden for this additional reason. The remainder of the liability analysis is in the appended Interim Decision and Order.

## II. Remedies.

In the interim decision, I ordered BART to reinstate Complainant immediately and take certain other affirmative acts to make Complainant whole. I rejected any claim for punitive damages. I ordered that BART pay Complainant back wages with interest (less mitigation) and compensatory damages, including for special damages, according to the proof to be submitted.

To be certain that the record was as adequate as possible on the remedial issues, I also ordered the parties to include with their submissions certain evidence that I expected would be within their respective custody, control, or possession and relevant to the pending issues. I ordered BART to submit a copy of each wage statement it gave Complainant during his employment, and I ordered Complainant to submit a copy of his IRS Form W-2 from every employer for whom he worked in each of the following years: 2008, 2009, 2010, and 2011.

Complainant filed a number of briefs and some exhibits. Before turning to the more substantial issues, I will dispose of some preliminary matters raised in those filings.

- Complainant reargues that he should not be reinstated merely to the temporary, at will position from which he was terminated, but to a regular, full-time, union position. I rejected that argument because BART showed that it was not hiring for the regular, full-time job at the time of termination or for the next two years. Complainant's evidence that two years after the termination BART hired two people into regular, full-time positions is too speculative to establish that Complainant would have been given one of those jobs at that time.
- Complainant reargues punitive damages. This is not a punitive damages case for the reasons stated in the Interim Decision and Order.
- Complainant argues that he should be awarded front pay. The statute identifies the make whole remedy going forward as reinstatement. *See* 6 U.S.C. §1142(d)(2)(A). It does not provide expressly for front pay.

But in discrimination and retaliation cases arising under a variety of statutes, courts have allowed front pay in lieu of reinstatement under certain circumstances. For example, front pay may be an acceptable substitute for reinstatement, "whenever the antagonism between the plaintiff and her employer is such that it would be inappropriate to expect her to return to work." *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 512 (9th Cir. 2000) (Title VII and state law sex discrimination claim).

Complainant's arguments to the contrary notwithstanding, the record reflects little antagonism between Complainant and any individual at BART other than Davis. Nothing suggests that BART no longer employs temporary part-time utility workers or that Complainant is unqualified to do the work. I will amend the order of reinstatement to include that BART not assign Complainant to work under Davis' supervision. Otherwise, I find reinstatement adequate to make Complainant whole going forward.

- Complainant argues that he is entitled to lost fringe benefits. He is correct, but he offered no evidence as to what those benefits were or what they were worth. It is his burden to establish this loss. As he failed to do so, I am unable to award the value of lost fringe benefits.
- Complainant offered no evidence of litigation costs and therefore can be awarded none.

*Back wages and interest.* On back wages, BART submitted a copy of Complainant's IRS Form W-2 for 2008. It shows Medicare wages and tips of \$11,883.26. Complainant worked for BART for 14 weeks. His weekly wage thus averaged \$848.80 at the time of termination. BART has submitted a table showing lost wages with increased rates in July 2009 and statutory interest added. The table demonstrates total lost wages through July 13, 2012 of \$172,558.04 and interest of \$12,570.56 for a total back wages and interest of \$185,128.60.

Complainant offers evidence of efforts to mitigate his lost wages by finding substitute employment. He failed to supply the IRS W-2 forms that he was ordered to include with his submission on remedies, but he admits that he had earnings of \$8,000 in 2010 (on a job he

started on October 8, 2010 and from which he was laid off on December 3, 2010) and \$32,000 in 2011. He does not state how many months he worked in 2011 to earn the \$32,000, nor does he suggest that he currently is unemployed.

Respondent does not assert that Complainant's efforts to obtain employment were inadequate or that he otherwise failed to mitigate. As Respondent has the burden on mitigation, I find that Complainant mitigated his lost wages by \$8,000 in 2010 and \$32,000 in 2011, and that he is continuing to earn at the rate of \$32,000 per year, or \$615.38 per week.<sup>5</sup> This puts his wages thus far for 2012 at approximately \$17,230.64. Total mitigation through July 13, 2012 is \$57,230.64. Back wages and interest less mitigation totals \$128,897.96.

*Compensatory damages.* Complainant seeks \$500,000 in compensatory damages. To support this, he states that BART terminated the employment at an especially bad time in that it was immediately before "the holidays." Claimant states that his inability to get replacement employment for over a year led him to exhaust his savings, pawn some of his assets, lose his home, lose custody of his son, become depressed, and gain sixty pounds. He says he received medical treatment but declines to be specific about it or submit any medical bills. He submitted a current prescription (May 3, 2012) for Prozac (Fluoxetine). He says that Davis' remonstrating with him in front of co-workers was humiliating.

"Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Hobby v. Georgia Power Co.*, ARB No. 90-30, slip op. at 31 (Feb. 9, 2001) (citations omitted). A key consideration is the amounts of compensatory damages allowed in other cases, but care must be taken not to freeze the amounts in time. *Leveille v. New York Air Nat'l Guard*, ARB No. 98-079, ALJ Nos. 94-TSC-3, 4 (Oct. 25, 1999).

Here, Complainant relies heavily on *Hobby*, in which the Board awarded \$250,000 in compensatory damages. The complainant there was an executive ("director" level) earning over \$100,000 in 1989 after more than 13 years with Georgia Power, when he was terminated from employment. He had a bachelor's degree and advanced training in nuclear physics, radiobiology, and radiochemistry. He was subjected to indignities prior to termination considerably more thoroughgoing and worse than was the present Complainant. The Administrative Review Board said of those indignities: "By themselves, these incidents probably would merit only a small award of compensatory damages." *Hobby*, slip op. at 32. Rather, as the Board continued:

But these small events were the precursor of more serious problems to come as Hobby experienced continuing difficulty finding work in his chosen profession, and experienced emotional distress tied to his depleted finances, repeated requests of friends and family for money, and the obligation to inform those responsible for his professional development that he had been fired from his job with Georgia

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<sup>5</sup> Absent proof to the contrary, I will assume that \$32,000 represents Complainant's earnings for work performed from January 1 through December 31, 2011. Back wages are not reduced during the time between Complainant's job in 2010 and his current job, which he started in 2011. This is because the evidence shows he was laid off, not terminated for cause.

Power. In terminating Hobby's employment because of his internal complaints, Georgia Power severely damaged Hobby's reputation. It is clear from the record that Hobby's career had been very promising up until his termination; afterward, that career was largely gone. In this context, we find the ALJ's recommended award of \$250,000 compensatory damages to be reasonable, and therefore adopt it.

*Id.* at 31-32 (fn. omitted).

*Hobby* does not support Complainant's demand for \$500,000 in compensatory damages or for the \$250,000 awarded in that case. A crucial distinction is that the complainant in *Hobby* was highly trained, rose through Georgia Power into an executive position earning a very handsome salary for the time, with (as the Board found) a "very promising" career ahead, and he lost all this.

The current Complainant was working in a temporary, part-time job. Although it had no set termination date, BART never described it as anything but temporary. Complainant only worked on the job for 14 weeks. It was not a job for which many years of highly specialized training are required, such that the worker cannot readily prepare for work in another industry at the same earning capacity. By comparison, Complainant's termination from a temporary semi-skilled job for no stated reason cannot be said to be a career-ending event.

Complainant was frustrated and demoralized in his efforts to get replacement employment. But the most likely reason for his difficulty finding employment was that the national economy was in its worst straits since the Great Depression of the 1930's. There is nothing to suggest that it was because of any loss of reputation. Nor is there anything to suggest that Complainant cannot retrain for other work that would pay as much. None of this negates that the loss of even a temporary job that a worker has held for just 14 weeks is generally upsetting, and more so when it is lost for reasons that Congress has made unlawful. But it cannot reasonably be the equivalent of the loss of a career developed after extensive education and many years of work on a job for which there is no replacement.

A closer case is *Burlington Northern v. White*, 548 U.S. 53 (2006). There, the employer did not terminate the employment; it suspended plaintiff for 37 days and then recalled her with full back pay. *Id.* at 58-59. The Court observed:

But White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship. And White described to the jury the physical and emotional hardship that 37 days of having "no income, no money" in fact caused. . . . ("That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. . . . I got very depressed").

*Id.* at 72. A jury awarded the plaintiff \$43,500 in compensatory damages, and the Supreme Court affirmed.

Here, the termination was not at the winter holidays as Complainant asserts; it was in September. But it threw Complainant into a very difficult job market. Complainant offers no evidence to link the extent of his depression to the loss of the BART job alone or even in combination with other factors, not to mention other events such as the loss of custody of his son. Yet there is no question that a long period of unemployment is a reasonably foreseeable result when an employer terminates employment during a severe recession, and when it does so for unlawful reasons, it bears responsibility for the result. I award Complainant \$60,000 in compensatory damages.

#### Order

BART violated its statutory obligations under the National Transit Systems Security Act when it terminated Complainant's employment on September 22, 2008. Accordingly,

1. BART will immediately reinstate Complainant to employment as a temporary, part-time utility worker, working no fewer than the average number of hours per week he was given prior to the termination and on the current pay schedule for such workers. The employment is at will for an indefinite term. That means that either party may terminate the employment at any time, with or without reason, but not for a reason that is unlawful, such as retaliation for filing this action.
2. BART will expunge Complainant's personnel file and any other record showing an involuntary termination or any negative references related to his prior employment.
3. BART will not assign Complainant to work under the supervision or direction of Samuel Davis.
4. BART will consider Complainant on any application for regular, full-time positions without regard to his having filed and pursued the present claim or to any negative information about his prior employment with BART.
5. BART will pay Complainant back wages with interest in the amount of \$128,897.96.
6. BART will pay Complainant compensatory damages of \$60,000.
7. Any claim for punitive damages is DENIED.
8. Any claim for front pay is DENIED.
9. As Complainant represented himself, he does not seek attorney's fees, and any award of fees is DENIED.

10. Costs of litigation are DENIED.

SO ORDERED.

**A**

STEVEN B. BERLIN  
Administrative Law Judge

**SEE INTERIM DECISION AND ORDER (JUNE 14, 2012) APPENDED.**

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

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, the Associate Solicitor, Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

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

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

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).

**The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board.** 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).

**U.S. Department of Labor**

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**Issue Date: 14 June 2012**

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Victoria R. Nuetzel, Esq.  
for Respondent

Before: Steven B. Berlin  
Administrative Law Judge

**INTERIM DECISION AND ORDER**

This case arises under the employee protection provisions of the National Transit Systems Security Act of 2007,<sup>1</sup> and its implementing regulations.<sup>2</sup> Complainant is a former utility worker of Respondent San Francisco Bay Area Rapid Transit District (BART), a publicly-owned agency that provides public transportation in the San Francisco Bay Area. Complainant's job duties included cleaning passenger rail cars during and after regular daily service on BART's commuter lines. He alleges that BART violated the Act when it discharged him from employment in retaliation for engaging in activity that the Act protects. The alleged protected activity was: (1) objecting that BART required him to clean vomit on rail cars in an unsafe way, and (2)

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<sup>1</sup> 6 U.S.C. §1142.

<sup>2</sup> 29 C.F.R. §1982.100, *et seq.*

demanding that BART provide him with and allow him to wear personal protective equipment while cleaning vomit.<sup>3</sup>

BART denies that the discharge was retaliatory. It disputes the underlying facts and says that it ended the employment legitimately based on Complainant's poor performance.

Complainant filed a timely complaint with the Occupational Safety & Health Administration.<sup>4</sup> On April 7, 2009, OSHA's Administrator issued "Secretary's Findings." He found that Complainant failed to show a sufficient nexus between the protected activity and the termination from employment. He therefore concluded that there was no reasonable cause to believe that BART had violated the statute. Complainant requested a hearing, and the case is before me *de novo*.

On March 28, 2011, I held a duly noticed hearing in San Francisco, California. Complainant represented himself; BART was represented by counsel of record.<sup>5</sup> Complainant testified on his own behalf. BART called Complainant's "Floorworker Supervisor" Samuel Ray Davis, Mr. Davis' first-line supervisor David Coggshall, and manager Jeffrey Baker.<sup>6</sup> I admitted numerous exhibits.<sup>7</sup> That completed the evidentiary record. The parties submitted post-trial briefs, which I have considered.

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<sup>3</sup> As I discuss at footnote 36, the analysis below will focus on Complainant's first theory (reporting a hazardous safety condition). I do not reach the second contention about personal protective equipment other than as it might pertain to Complainant's report of a hazardous condition.

<sup>4</sup> BART terminated Complainant's employment on September 22, 2008. Complainant filed his complaint with OSHA within the 180-day filing requirement on October 14, 2008. *See* 6 U.S.C. §1142(c)(1); 29 C.F.R. §1982.103(c), (d). *See* stipulation in trial transcript at 6.

<sup>5</sup> Complainant was aware of his right to retain counsel. I initially set a hearing for February 8, 2010. Complainant sought a continuance for, among other reasons, more time to find an attorney. I granted the continuance and reset the trial for June 24, 2010. At that time, I reminded Complainant that he was entitled to retain counsel (or a non-attorney representative), but that this Office would not provide counsel for him.

<sup>6</sup> BART's job titles can be confusing. Mr. Davis had a title of "Floorworker Supervisor" but lacked hire/fire and disciplinary authority and did not do formal performance evaluations. (Only temporary workers took direction from Davis, and BART doesn't provide formal performance reviews for temporary workers.) David Coggshall was Davis' first-line supervisor but was given the title, "Manager of Car Appearance." Jeffrey Baker was the highest ranking BART manager who testified and managed Coggshall, but his title was "Assistant Maintenance Supervisor." From the titles, it would appear that Davis was a supervisor, while Baker, who was two levels higher, was only an assistant supervisor, and Coggshall, who ranked below Baker, had a title of "manager," which suggested a higher position than Baker's.

<sup>7</sup> I admitted Complainant's exhibits (C.Ex.) 2 through 14 and 16, and Respondent's exhibits (R.Ex.) 1-11. During trial, the parties stipulated that C.Ex. 9 and R.Ex. 9 should be withdrawn, and I accepted the stipulation. I admitted C.Ex. 18, but later granted Complainant's motion to withdraw it. Tr. 195. C.Ex. 4 was admitted provisioned on Complainant's showing relevance. Complainant satisfactorily showed relevance, and C.Ex. 4 is admitted. *See* Transcript ("Tr.") 17-26, 161-62, 181-83, 192-95.

On March 30, 2011, Complainant moved that his Exhibits 9 and 18, both of which he'd withdrawn, be re-admitted. BART opposed. The motion is denied: Complainant withdrew these exhibits before Respondent began its case-in-chief at trial. That means that Respondent tried the case relying on these exhibits not being in evidence. Respondent did not question any witness about the exhibits. It would unfairly prejudice Respondent to allow the exhibits to be admitted under these circumstances.

## Issues

1. Was Complainant's dispute over the manner in which he was to clean vomit on BART's rail cars a contributing factor in BART's decision to terminate the employment? Yes. Complainant and his "Floorworker Supervisor" Davis had a working relationship characterized by ongoing friction, part of which was about Complainant's cleaning vomit. The overall friction, including the component related to Complainant's protected activity, contributed to BART's decision to terminate.
2. Has BART shown by clear and convincing evidence that it would have terminated the employment absent Complainant's engaging in protected activity? No. It is possible that the friction between Complainant and Davis at some point would have resulted in the termination of the employment absent the protected activity. But any suggestion that the termination would have occurred anyway or the date that might have happened would be speculative. It would not approach the required standard of clear and convincing evidence.
3. What is the proper "make-whole" remedy, and is it necessary to reopen the record? On a finding of liability, make whole relief is mandatory. 6 U.S.C. §§1142(c)(3)(B), (d)(1). BART must reinstate Complainant and expunge his personnel file of negative references. It must consider any application he makes for regular, full-time employment without regard to his having pursued this claim. As the parties did not develop an adequate record on monetary relief, as this relief (except punitive damages) is mandatory, and as Complainant is unrepresented, I will reopen the record to allow the submission of evidence going to backpay and compensatory damages (including allowable costs, if any). Punitive damages are denied.

## Findings of Fact

BART is a public transportation agency within the meaning of the Act.<sup>8</sup> Tr. 5. As Complainant was an employee of BART, the Act's employee protection provisions extend to him.<sup>9</sup> *Id.* BART hired Complainant as a temporary, part-time utility worker on or about June 9, 2008. R.Ex. 1. It ended the employment less than four months later, on September 22, 2008. Tr. 5-6.

BART hires temporary utility workers on an at will basis without a promise of either continued employment or an eventual conversion to a unionized, regular, full-time job. *See* R.Ex. 2; Tr. 197-98, 246-48. Some of the temporary hires are for particular projects or to replace a particular employee who is on leave. BART lays off these temporary employees when the project ends or when the regular worker returns. But BART also hires temporary workers without a specified duration of employment. Tr. 10; Tr. 245-46. BART hired Complainant in the second of these categories, as an at will employee for an indefinite term. Tr. 10, 247-48. That means that, as one

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<sup>8</sup> BART admits that it is a publicly owned operator of public transportation eligible to receive federal assistance under 49 U.S.C. chapter 53. Tr. 5. *See* 29 C.F.R. §1982.101(i).

<sup>9</sup> *See* 29 C.F.R. §1982.101(d) ("*Employee* means an individual presently or formerly working for . . . a public transportation agency . . .").

of BART's managers admitted at trial, Complainant's employment did not simply end because the temporary contract ran its course; rather, the employment ended when BART actively decided to terminate it. *Id.*; Tr. 218. BART concedes that the discharge was an adverse action within the meaning of the Act. Tr. 12.<sup>10</sup>

*Scope of work.* Generally, utility workers maintain the cleanliness of the trains, including picking up trash; cleaning hard and soft surfaces, windows, floors, and carpets; vacuuming; changing out seats; removing graffiti; and cleaning biohazards and vomit. Tr. 250. Utility workers' job duties vary according to the location to which they are assigned. Tr. 98.

At first, BART assigned Complainant to its Richmond Yard. Tr. 47. His work was to strip out carpets and cloth from some of the rail cars. Tr. 63. In the two or three weeks he worked at the Richmond Yard, one of his supervisors complimented him as a good worker who worked hard and followed instructions; no supervisor complained about him. *Id.*; Tr. 62-63.

Because several employees at the end-of-the-line facility at Dublin-Pleasanton Station were on leave, on July 7, 2008, BART transferred Complainant there and assigned him to the 6:00 p.m. shift. Tr. 43, 47, 98, 184. It was the work at Dublin-Pleasanton that led to the discharge.

Complainant's work at Dublin-Pleasanton was different from what he'd been doing at the Richmond Yard. At Dublin-Pleasanton, he and the other utility workers removed debris and paper from the rail cars and cleaned the sides of the trains. Tr. 98-99. When trains went into overnight storage, the utility workers vacuumed, mopped the floors, and sometimes cleaned the walls. *Id.* As needed, they cleaned vomit and, on occasion, could be called upon to clean biohazards.<sup>11</sup> Tr. 99-104.

BART had no standard technique for cleaning vomit; methods varied from yard to yard. Tr. 138, 220 (no written policies, no procedures, or training videos). Floorworker supervisors provided training on how to do it, although some workers used their own techniques. Tr. 103-04. Complainant's floorworker supervisor Davis described in detail the methodology he advised utility workers to follow. Tr. 138-44. The equipment for cleaning vomit was set up on the platform at the beginning of each shift. *Id.* It included two mop buckets, two dust pans (short- and long-handled), rags, a T-broom for sweeping the vomit into a dust pan, gloves, and Lysol spray. Tr. 101-04.

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<sup>10</sup> BART seemed to imply that, because the employment was "temporary," it would have terminated on its own but for BART's ongoing decisions to extend it. For example, BART argues in its pre-trial brief that, rather than terminating the employment, "BART elected not to renew Complainant's contract . . . ."

There is no evidence that BART made ongoing decisions to continue the employment or to "renew" any employment contract. Nothing suggests that, absent such "renewals," the employment would have ended. Regardless of how BART characterizes it, this was routine employment at will for an indefinite term.

<sup>11</sup> The parties and witnesses frequently referred to vomit left on passenger cars as "hot lunches." Although floorworker supervisor Davis described cleaning vomit as a task that generally came up daily, Complainant said he encountered vomit only three or four times in the two and one-half months he worked at Dublin-Pleasanton Station. Tr. 91, 104. Ultimately, the difference in testimony is inconsequential: there is no question that cleaning vomit was part of the job, and I will find that Davis and Complainant repeatedly disagreed about what was needed to accomplish the task safely.

As BART defines them, biohazards contain blood; BART management does not consider vomit to be a biohazard because BART assumes that vomit does not contain blood.<sup>12</sup> Tr. 99-101, 201-02. At trial, Complainant testified that he never encountered blood while working at BART. Tr. 84-85. But he questioned the distinction between “biohazards” and vomit because, in his view, vomit might contain blood that isn’t visible, something that BART’s managers conceded. Tr. 136-37, 223-24.

BART gave Complainant a classroom-type presentation on the hazards of blood-borne pathogens.<sup>13</sup> Tr. 82; R.Ex. 5. His floorworker supervisor Mr. Davis was supposed to train him on techniques for cleaning biohazards, but that never happened because, as Davis explained, in his view Complainant wasn’t experienced enough to clean biohazards.<sup>14</sup> Tr. 150. (Davis apparently didn’t know that Complainant was more experienced than Davis at cleaning public transport vehicles. *See* Tr. 150-51.)

Complainant was familiar with the general equipment BART provided for cleaning, including the mop and other equipment for cleaning vomit, but the personal protective equipment in the biohazard kit was not included with the routine cleaning equipment. Tr. 55-57. A separate biohazard kit contained a face mask, eye protection, a scooper, a chemical disinfectant, a suit to protect the whole body (including shoe covering), disposable hand wipes, and a disposable bag.<sup>15</sup> Tr. 99-101, 105, 200-02. No one told Complainant where the biohazard kit was kept, and Complainant didn’t know where it was.<sup>16</sup> Tr. 56, 91.

*Complainant’s work history.* Complainant had eighteen years’ experience cleaning transportation vehicles by the time he began working for BART. Tr. 45-47. He cleaned company cars for Pacific Gas & Electric for about five years, beginning in 1990. Tr. 45. He was a shop steward for two of those years. *Id.* He worked in Oakland for AC Transit cleaning buses for nine years, four or five of them as a lead. Tr. 45-46. As lead, he coordinated the work of more than fifteen employees, who serviced some 300 buses, including cleaning, maintenance, fueling, and checking equipment; he also ordered supplies. *Id.* Complainant left AC Transit

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<sup>12</sup> BART offered no explanation for its narrow definition of a biohazard. Surely anthrax in an envelope is a biohazard that does not contain blood. As I discuss biohazards for these purposes, however, I refer to BART’s use of the term.

<sup>13</sup> BART also provided other safety training, although Complainant contends the presentations were cut short. Tr. 82. Complainant knew that BART had a Safety Department, but BART did not tell him that he could make complaints to that department; he was told that he should make any complaints to a supervisor. Tr.82, 214-15. That’s why, as discussed below, when he had a complaint about his floorworker supervisor Mr. Davis, he contacted Davis’ supervisor, Mr. Coggsall. Although BART required safety meetings, Tr. 202-03, Davis was not providing them when Complainant started. By the time Davis began having the meetings, Complainant only got to attend three before BART terminated his employment. Tr. 82-83.

<sup>14</sup> Davis elsewhere testified that generally he didn’t train Complainant because Complainant didn’t stay at BART long enough to get the training done. Tr. 109.

<sup>15</sup> Complainant said that, although BART provided training on biohazards, it never defined a biohazard as containing blood in those trainings. Tr. 84-85.

<sup>16</sup> According to Complainant, there wouldn’t have been time to put on coveralls, gloves, and a face shield, get the bucket with soapy water, and brush and clean the vomit in the five to ten minutes the train was stopped. Tr. 55-57.

because there was no opportunity for advancement unless he trained as a mechanic, something he did not want to do. Tr. 47.

*Floorworker supervisor Davis' work history.* Samuel Davis, Complainant's floorworker supervisor at Dublin-Pleasanton, had somewhat less cleaning experience than Complainant and far less experience leading cleaning crews. BART initially hired Davis years earlier as a temporary worker. Tr. 97. He cleaned train cars for a year at BART's car wash until BART laid him off. *Id.* In 1996, BART hired him for "shop utility." Tr. 97-98. It was several years later (in 2008) and only a few months before Complainant started that BART gave Davis the floorworker supervisor job.<sup>17</sup> Tr. 98.

*Initial friction between Davis and Complainant.* The relationship between Davis and Complainant was characterized by friction from the outset. When Davis was training him, Complainant told Davis that he wasn't doing it right. Tr. 45, 47. He said that BART should supply coveralls and launder them; that had been his experience at both PG&E and AC Transit. Tr. 47-48. When it came to removing vomit, the two men gave different renditions at trial of their workplace interaction, but there is little doubt that their discussions were contentious.

According to Complainant, he told Davis early on that there was a problem when vomit was on carpeted areas or on cloth seats. Tr. 48. In those instances, he had to use a scrub brush; mopping was ineffective because of the textured surfaces. *Id.* Complainant found that when he used a scrub brush, particles of vomit sprayed upward toward his face. *Id.*

Complainant testified more specifically that, on August 3, 2008, he was in the break room next to Davis' office, expressing concern to a co-worker about how they cleaned vomit. Tr. 48. Davis appeared and told him to address concerns directly to him, not to co-workers. Tr. 49. Complainant's response was to object to Davis' training on how to clean vomit. *Id.* He said that he'd tried Davis' technique, but that particles of vomit were "popping up" on his arms and toward his face and that he needed to wear personal protective equipment (something to cover his clothes, arms, and face).<sup>18</sup> *Id.*; Tr. 95-96. According to Complainant, as Davis responded, he yelled, used profanity, and took this as an opportunity to tell Complainant that his performance was inadequate. Tr. 51, 116-17, 119; R.Ex. 10.<sup>19</sup>

Davis, however, flatly denied that Complainant voiced any concerns about how vomit was cleaned. Tr. 110. (As I explain below, I do not credit the denial.)

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<sup>17</sup> As a floorwalker supervisor, Davis had no authority to hire/fire, evaluate employee performance, or recommend or impose discipline. Tr. 125-27. He reported to supervisor Coggshall on night-to-night operations. Tr. 198. He gave assignments to the temporary utility workers, did scheduling, monitored attendance, monitored the cleanliness of the trains, counseled employees (and kept records of counseling), and "coordinate[d]" with management on discipline. Tr. 98, 125-27. Davis' "coordination" on discipline consisted of reporting performance deficiencies to Coggshall, investigating at Coggshall's direction, and discussing further after Coggshall personally observed the worker to form his own opinion. Tr. 204-05.

<sup>18</sup> By personal protective equipment, Complainant said he meant a face shield, overalls, gloves, "all of that" "to cover my entire body." Tr. 94-95.

<sup>19</sup> Generally BART didn't give formal performance evaluations to temporary workers. Tr. 203-04. For temporary utility workers, the floorworker supervisor would give "feedback." *Id.*

*Involvement of BART management.* Because of what Complainant characterized as yelling and profanity, he called Davis' supervisor, Mr. Coggshall, and reported the incident. Coggshall did not directly supervise the temporary workers; he delegated that to floorworker supervisors like Davis. Tr. 198. Coggshall typically would visit two or three different work sites each evening; he generally got to Dublin-Pleasanton Station about twice weekly on random evenings. Tr. 198-99. Sometimes he happened to see Complainant while there. *Id.*

The floorworker supervisors reported to Coggshall about day-to-day operations, including any performance problems. Tr. 198, 204. When he got reports of performance problems, Coggshall would ask the floorworker supervisor to get more information, and he'd go out personally to observe the worker. *Id.* He'd then discuss his observations with the floorworker supervisor. *Id.*

Unbeknownst to Complainant, at some point before he called Coggshall about the interaction with Davis on August 3, 2008, Davis had already told Coggshall that Complainant was having performance problems. Tr. 204-06, 211-12. He'd said that Complainant didn't keep pace with the others; wasn't detail-oriented enough and left debris behind; and lacked initiative. Tr. 204-05. Coggshall had gone to Dublin-Pleasanton to observe Complainant's work. *Id.* According to Coggshall, he'd seen Complainant not keeping pace and leaving debris behind. *Id.* On two occasions he'd seen Complainant not wearing the disposable gloves all utility workers are required to wear for safety reasons when they pick up debris. *Id.*<sup>20</sup>

It is unclear when this happened. Coggshall couldn't recall at trial when he made the observations. Tr. 224-25. Complainant didn't start at Dublin-Pleasanton until July 7, 2008, and Davis said he made these observations before Complainant's August 3, 2008 call. Coggshall's visit had to have happened between those two dates.

The timing is significant because Complainant admitted that he was a little slow ("sluggish") during his first week at Dublin-Pleasanton. Tr. 288-89. He said this was because, while the utility workers there clean the cars, the trains move, "constantly jerking back and forth." Tr. 288-89. As Complainant said, he had to get his "sea legs" to work on a moving car. *Id.* In addition, during Complainant's two preceding weeks at the Richmond Yard, BART had assigned him to work three different shifts each week, and he was tired from the shift changes. *Id.*

At trial, Davis confirmed that he found Complainant's performance deficient. He testified that Complainant disrespected Davis and followed procedures he learned from others rather than those Davis recommended; played with a hand-held game device at work; walked past vomit once and didn't clean it until Davis directly ordered him to do it;<sup>21</sup> and used his cell phone while on the platform, usually while standing by a train (against BART policy) but also at other locations. Tr. 122-24, 149-50, 153-57, 163-64. Davis also reported that Complainant's pace lagged behind his co-workers'.

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<sup>20</sup> Coggshall did not see Complainant using a cell phone. *Id.*

<sup>21</sup> Davis testified that when he directly ordered Complainant to clean the vomit that he'd passed by, Complainant complied and said nothing about refusing because he wanted personal protective equipment. Tr. 173-80.

When Complainant testified, he insisted that his pace picked up after the first week at Dublin-Pleasanton, once he had adjusted. Tr. 289. Although inconsistent with Davis' testimony, Complainant's reports can be reconciled with those of Coggshall: Coggshall could readily have observed Complainant during his first week or two, while he was still adjusting; it certainly was in the first four weeks. He would have seen Complainant at a time Complainant concedes he was slow. As I will find Davis generally not credible, I accept Complainant's testimony that his pace was slow only initially; Coggshall's testimony does not rebut this.

In any event, it was set into this background that Complainant called Coggshall about the interaction with Davis on August 3, 2008. He complained to Coggshall about Davis' yelling and profanity. Tr. 52; R.Ex. 10. He also reported Davis' remark about Complainant's supposedly inadequate performance.

Coggshall had previously told Complainant that he was doing a good job. Tr. 63-65. Irrespective of any conversations he might have had with Davis about Complainant's performance as well as whatever observations he'd made, he said nothing critical of Complainant's performance in this August 3, 2008 phone call and assured Complainant that he'd heard nothing negative. He advised Complainant to follow Davis' directions and that, if he didn't understand an instruction, to ask Davis for clarification. Tr. 52, 226; R.Ex. 10. He told Complainant that he'd follow up with Davis on the profanity. Tr. 226.

Complainant testified at trial that he responded to Coggshall that he would not clean vomit the way Davis had directed, but Coggshall denied any other mention of personal protective equipment, vomit, or biohazards. *Id.*; Tr. 207-08, 215. As Coggshall explained, had any utility worker asked for more safety equipment, he'd get it; other utility workers wear face masks or coveralls throughout their work periods. Tr. 206-07. Also, Coggshall emailed his manager Jeffrey Baker about the phone call with Complainant. R.Ex. 10. The email says nothing about any request for personal protective equipment, and as Coggshall testified, if Complainant had said anything about personal protective equipment, Coggshall would have included that in the email. Tr. 209-11.

Coggshall spoke to Davis, who denied using profane language, but otherwise did not dispute Complainant's report. Apparently Coggshall didn't entirely believe Davis: he counseled Davis about profanity. He also directed Davis "to document any performance issues and issue documentation to [Complainant] as needed."<sup>22</sup> R.Ex. 10; Tr. 211-12, 218-20. Of course, given this conversation, Davis knew that Complainant had called Coggshall to complain about him.

I cannot entirely accept Coggshall's testimony about his two telephone conversations (one with Complainant and the other with Davis). Complainant's call was a complaint about Davis; Davis raised no complaints about Complainant on this occasion. Why then would Coggshall take this incident as a trigger to direct Davis to document performance issues about Complainant? Coggshall testified that it was not an ordinary procedure to document performance issues for temporary employees. There likely was more to the conversation. But, if nothing else, it is

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<sup>22</sup> Generally, floorworker supervisors didn't provide temporary workers with documentation on performance issues, Tr. 218-20, but Coggshall's email directed Davis to do so with Complainant "as needed." R.Ex. 10.

certain that, by this time, Coggshall became aware that there was a conflict between Davis and Complainant.

Whatever Coggshall's purpose might have been in directing Davis to document any performance issues, Coggshall admitted at trial that Davis never followed up with any documentation that Coggshall saw. Tr. 218-20.

Curiously, nothing on the record shows that Davis disputed the merit of Complainant's contentions on how to clean vomit. On the contrary, Davis admitted at trial that Complainant was correct about vomit "popping up," especially if the utility worker was stooping or on his hands and knees to scrub with a scrub brush. Tr. 143. He also agreed that even small particles of vomit popping up could contain blood-borne pathogens. *Id.* Although he added that this is why there was protective equipment available on the platform, *id.*, this neglects that no one told Complainant where the equipment was, it wasn't always there, he wasn't trained on its use, and there wouldn't have been time for him to put it on (unless he wore it all the time as Coggshall said others did).<sup>23</sup>

Following Coggshall's call, Davis went back to Complainant and told him he shouldn't be using a cell phone. Tr. 64-65. Complainant explained that he'd only used it to call Coggshall. *Id.* This is the only time Davis counseled Complainant about his use of electronic devices.<sup>24</sup> Given that Davis generally knew that workers used cell phones, advised workers on where best to use them, and acknowledged at trial that he knew most workers carried cell phones and that this was acceptable, Davis' purported "counseling" was nothing more an extension of the hostilities he'd exchanged with Complainant earlier in the evening. Tr. 53-54, 106-09. Coggshall had just finished directing Davis to document any performance issues, but Davis didn't document Complainant's supposed misuse of a cell phone. I infer from Davis' "counseling" that, at least at that time, he was hostile to Complainant because of Complainant's call to Coggshall. It is implicit in the timing and the absence of any legitimate reason for the "counseling."

Later that night, Coggshall emailed his manager, Jeffrey Baker, about the calls. R.Ex. 10. He spoke to Baker the next day, August 4, 2008. Tr. 213. Coggshall told Baker that Complainant found Davis' instructions confusing and had complained that Davis was using profanity. Tr. 254-55. Coggshall said he'd told Complainant to take instruction from Davis and had cautioned Davis against profanity. *Id.* Nothing in the email mentions anything about safety concerns or anything that amounts to protected activity, and both Baker and Coggshall testified that in the call they discussed nothing about safety. Tr. 255-56.

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<sup>23</sup> Consistent with this, Davis admitted that, when there was vomit, the worker must move quickly to get it cleaned. Tr. 105.

<sup>24</sup> Later, on August 10, 2008, Davis held a training session at which he told the workers that "radios, televisions, tape or CD players, or other electronic media devices or headsets of any kind" were prohibited. R.Ex. 8. Cell phones were not on the list, and Complainant testified that he didn't think the prohibition extended to cell phones. Tr. 83-84. He thought it was about media-players such as for listening to music with headsets. *Id.* Given Employer's note on the subject of the training session (R.Ex. 8), which is consistent with Complainant's testimony, I accept Complainant's description of the prohibition as not extending to cell phones.

*Continued friction between Davis and Complainant.* At trial Davis described his interaction with Complainant through the August 3, 2008 incident in the following testimony:

Q. What did you observe about his job performance?

A. I noticed that his job performance – he came with the attitude that he – as though he’s been there for a long period of time. He – he immediately developed bad habits. And he didn’t work as though he was pursuing a career. He worked as though he has been there for a number of years. I didn’t see any motivation within him. He – I didn’t see him go over and beyond as a new – as a temp would do with anticipation of possibly coming on [as a regular, full-time employee]. I didn’t see any ambition in him and in his work.

Tr. 110. Although Davis thus had been asked a question about job performance, his answer focused on Complainant’s “attitude,” which in Davis’ view was that he knew as much as an experienced worker and wasn’t trying to impress his new supervisor. More than anything, Davis’ answer reflects the antagonism that was developing between them because Davis felt that Complainant disrespected him and his position as a floorworker supervisor. As Davis later testified,

Q. And why did you feel at that time [August 3, 2008] that he would be in trouble if you were being asked to evaluate him?

A. Because he wasn’t – he – he was not performing at the level he needed to be –

Q. And what was –

A. – at that time.

Q. – what deficiencies did you note in his performance?

A. Well, I noticed it before. First – first noticing a disrespect – disrespecting and following procedures of other people [rather than those that Davis showed Complainant]; I observed that.

Tr. 122-24 (citing other deficiencies).

About three weeks later, at a meeting for utility workers on August 24, 2008, Davis and Complainant resumed their dispute about cleaning vomit. Tr. 51. Davis was showing the workers a spray bottle, apparently with Lysol or equivalent to spray on the vomit. Tr. 70-71. Complainant argued that the spray might kill “what’s on top” but not “what’s underneath.” *Id.* Complainant suggested that he’d clean the vomit with a broom, but Davis demurred, stating that vomit would get into the broom. Tr. 71. Complainant testified that he then told Davis he wouldn’t get on his hands and knees and scrub with the vomit particles “popping.” *Id.* Davis denied this and said that Complainant never refused to clean vomit. *Id.* But even at trial, I observed the continuing contentiousness between the two men on the subject of cleaning vomit:

Complainant was still disputing Davis' instructions on how to do it and devoted a considerable part of his cross-examination of Davis to argue with him about who was right. *See, e.g.*, Tr. 136-44.

During or around the time of the meeting on August 24, 2008, Davis arranged for Complainant to have longer gloves for cleaning vomit.<sup>25</sup> Tr. 6-8, 51, 86. Complainant testified that this was the response to his request for personal protective equipment, including something to cover his arms, clothes, body, eyes, face, and mouth. Tr. 86-87, 90. Davis, however, said that Complainant never asked for full personal protective equipment but only requested the longer gloves. Tr. 110-11. He added that Complainant never made any other request for personal protective equipment at any time. Tr. 111, 124. Of course, as mentioned above, Davis also testified that Complainant never expressed any concern about how vomit was cleaned. Tr. 110. (As I will discuss below, I do not credit Davis on this point.)

To the contrary, Complainant testified that there were still other occasions on which he'd requested personal protective equipment. Tr. 89-90. He said that on one such occasion, Davis told him that the trains pulled out too fast to put on the personal protective equipment. Before the termination, Coggshall knew about Complainant's request for longer gloves, but he denied hearing anything about any request for other personal protective equipment. Tr. 8, 214.

*The discharge.* As the highest ranking manager involved, Baker made decisions whether to discharge temporary utility workers, including the decision to discharge Complainant. Tr. 244-45, 248. The department that makes the hire decision also makes the discharge decision. Tr. 10. Thus, Baker was also the manager who hired Complainant in June 2008. Tr. 251. Baker generally based discharge decisions on reports he got from supervisors and floorworker supervisors. *Id.*; Tr. 252. He also considered the "needs of the District." *Id.*

Here, Baker relied all but exclusively on Coggshall and, indirectly through Coggshall, on Davis. Tr. 215-16, 252-53. Baker did not discuss any of the termination-related issues with Complainant; the two never had any substantive discussions. Tr. 93-94, 256-57. For that matter, Coggshall had no substantive discussions with Complainant either, apart from the August 3, 2008 phone call, when Complainant complained about Davis. Tr. 213. Baker was aware from Coggshall's email that Complainant had complained about Davis, but Baker never discussed this with Davis. Tr. 254-57. Nor did he talk to Davis about his observations or opinions. Tr. 125. Davis made no disciplinary recommendations. Tr. 215-16. Baker did not ask Complainant's supervisors at the Richmond Yard about his performance there; he felt he had enough information to decide on the termination without that. Tr. 257, 263-64.<sup>26</sup>

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<sup>25</sup> All utility workers wore shorter "tech" gloves routinely while cleaning train cars. Tr. 84. The longer gloves offered protection for the forearm as well as the hands and wrists. The employee who got the gloves for Complainant left the platform to get them. Tr. 144. Davis testified that this worker got the gloves on the platform, but when confronted with his earlier testimony to the contrary, he admitted that she left the platform to get the gloves. Tr. 144-46. Thus, the indication is that the gloves were not available on the platform for workers' use. (Davis suggested that Complainant was given longer gloves in late July 2008, not in August. As discussed elsewhere, Davis' testimony on dates was unreliable.)

<sup>26</sup> Demetria Campbell, who filled in as floorworker supervisor on Davis' days off, knew of an incident in which Complainant failed to clean vomit, but she never reported it directly to Coggshall. Tr. 90, 234, 278-780; C.Ex. 12. She wrote a statement about it, but not until December 3, 2008, more than two months after the termination. C.Ex.

What Baker did have was Coggshall's observations (from some time before August 3, 2008) that Complainant wasn't keeping pace and wasn't wearing routine tech gloves. Tr. 215-16, 252-53. Through Coggshall, he had Davis' opinion that Complainant wasn't keeping up the work pace and the disputes about cell phones and the like. *Id.* He had Coggshall's impression that there had been "an excessive back and forth [between Davis and Complainant] about . . . what was allowable and what was not allowable about both cell phones, newspaper use, and the such."<sup>27</sup> Tr. 252. Baker had Coggshall's impression that Complainant wasn't someone whom BART would want to retain, given such problems as his not wearing tech gloves. Tr. 215-16, 252-53.

Both Baker and Coggshall insisted that the decision to terminate had nothing to do with cleaning vomit. Tr. 214, 234, 253-54, 267. Baker denied knowing that Complainant had requested longer gloves to clean vomit, made any complaint about how vomit was cleaned, made any complaint about not getting personal protective equipment, or refused to clean vomit for safety reasons. Tr. 253-54, 267. Baker denied that at any relevant time Coggshall said anything related to safety issues involving Complainant. Tr. 255-56.

BART discharged Complainant on September 22, 2008. Tr. 5-6. Baker had reached the decision to terminate "a number of days" earlier. Tr. 252, 259-60. It was Coggshall who delivered the message to Complainant. Tr. 215-16. He gave Complainant no reason. Tr. 61. Through the time of trial, no BART manager explained why or how the question of termination or discipline in any form arose in mid-September 2008.

*Credibility.* Davis was not credible. For the most part, his criticisms of Complainant had little or no basis. For example, his testimony on Complainant's use of a cell phone and possibly a second hand-held electronic device for playing games proved to be unfounded. The rule about cell phones in theory was supposed to be that, while on duty, employees were not to use cell phones for personal use or play video games. Tr. 250-51. But BART offered nothing to show that it told Complainant of this rule until August 3, 2008, when Davis criticized Complainant about using a cell phone. At trial, Davis admitted that he was aware that many of the workers carried cell phones, and he had no problem with it. BART contends that use of cell phones was the subject of a safety meeting on August 10, 2008, but as discussed above, that meeting wasn't about cell phones as Complainant used his,<sup>28</sup> and in any event, according to Davis and Coggshall, they already were dissatisfied with Complainant's performance (partly per Davis because of cell phone use) before August 3, 2008 (*i.e.*, before any mention to Complainant of a rule against cell phones). Tr. 105-06; R.Ex. 8.

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12; Tr. 234, 264-65 (Baker denies reading the statement prior to the termination). In it, Campbell states that Complainant asked whether it was part of his duties to clean vomit; she told him it was, and she offered to show him how to do it; and that on one occasion, he "missed" some vomit or "passed" it by, and she had to clean it. C.Ex. 12.

<sup>27</sup> Baker also got a report from Campbell that Complainant was "missing things" as he cleaned and wasn't keeping up with the other workers. *Id.* Tr. 278-80. She said nothing about Complainant's requesting personal protective equipment or complaining about how vomit was cleaned. Tr. 280.

<sup>28</sup> The discussion at the August 10, 2008 safety meeting was that workers should not use media devices to listen to music while wearing headphones. Tr. 83-84; *see fn. 24, supra.* Complainant used his cell phone to make calls and read news while on breaks on waiting between trains.

Contrary to Davis' criticism of Complainant's use of cell phones, Complainant was carrying his phone in part because of Davis' instructions, and other employees used their phones as Complainant did without facing discipline. In particular, Complainant's preference was to leave his cell phone in the break room because he was concerned that he'd bump or drop it if he kept it with him while he worked. Tr. 55. At some point, he was off the platform, working "in the back," and Davis tried to reach him on his cell phone. *Id.*; Tr. 135-36. Employees were to carry BART-provided radios for communication, but the radios weren't working. *Id.* For this reason, Davis asked Complainant to start keeping his cell phone with him, and Complainant complied.<sup>29</sup> *Id.*; Tr. 135-36. In short, Complainant only carried a cell phone because Davis asked him to. Other employees carried cell phones too, and Davis knew it. Tr. 135-36. Far from enforcing any ban on personal cell phone calls, Davis advised Complainant that the best place to make the calls was a few feet back from the platform, near the elevator area, where it was quieter. Tr. 54. And that's what Complainant did for his occasional calls. *Id.* The only time Davis actually counseled Complainant about cell phone use was immediately after Davis learned that Complainant had used his phone to call Coggshall and complain about Davis.

Complainant credibly denied BART's contention that he was continually playing games on an electronic device. Tr. 54. He explained that he'd had two surgeries on each of his wrists and could not use his thumbs as required for video games. Tr. 54, 67. He added that this was one of the reasons he left AC Transit: the work required too much use of his thumbs. Tr. 67-68.

Davis' attempts at trial to dispute this testimony were unpersuasive. Initially, he said that he'd seen Complainant with two devices: a cell phone and another device, and that he'd observed Complainant constantly playing a game on one of the devices. On cross-examination, however, he admitted that he couldn't recall whether there actually were two different devices. Tr. 151-52. He was unable to describe the device (or devices) despite his contention that he'd seen Complainant with them daily, using them constantly. *Id.*

As Coggshall had instructed Davis on or about August 3, 2008 to document any occasion on which he observed Complainant's performance to be inadequate, Complainant asked Davis at trial if he'd documented any of the occasions on which he'd observed Complainant on a cell phone. Tr. 153. Davis said that he had. Tr. 153. Complainant asked Davis if he'd turned his documentation over to BART's attorneys for production in the litigation. Tr. 153-54. Davis evaded the question and stated only that he'd turned over whatever documentation he had about Complainant's activities. Tr. 154. But he soon changed his story and admitted that he'd only turned over a note about the safety meeting, apparently referring to the meeting at which he'd advised the employees that they couldn't use media devices while on duty.<sup>30</sup> *Id.* Inconsistent with this, he then said that he'd documented some dates on which Complainant had engaged in improper activity. *Id.* With this, he shifted his testimony and finally admitted that he didn't give that documentation to the attorneys for production in the litigation. Tr. 154-55. Asked why, he stated:

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<sup>29</sup> Davis denied telling Complainant that he was *required* to carry a cell phone but admitted that, because of the problems with the radios, he told the workers that they could carry cell phones in the back storage area so long as at least one of them had a radio. Tr. 106-09.

<sup>30</sup> *See* R.Ex. 8.

Some of the – some of the things that I had on you as far as – the – the – the documents that I did turn over to them, they have the documents already. And the ones that I didn't turn in, there aren't any. I only turned – they only have what I turned in. And that's all I can say about that. I'm not going to – I – I don't have – I can't produce what I don't have. I turned in what I have. What they don't have, I don't have it so I can't produce it.

Tr. 155 (Complainant's interjections omitted). It appears from this that Davis' answer was that he didn't turn over these documents because, by the time the attorneys requested them, they were gone. But that too turned out to be untrue.

In particular, by this point in the trial, it had already surfaced that Davis had maintained work-related notes in a calendar or diary kept at his office and that he had not produced these notes to BART's attorneys during discovery. Tr. 117-19. I asked Davis whether he'd be able to locate the diary in his office. Tr. 119. He said that he doubted he could locate the particular note about his conversations with Complainant because it just read, "Spoke to Winters," not what they'd spoken about. Tr. 119-20. At that point, I ordered BART to serve a discovery response within 10 days, in which it stated whether Davis' office diary existed and, if so, to produce it for Complainant's inspection and possible supplementation of the record. Tr. 120-21.

Surprisingly, however, it turned out that the diary was not so difficult to locate and the entries in it not so vague. After a short break in Davis' testimony, BART miraculously produced the diary right then and there in the courtroom. Tr. 167. There were notes that related to Complainant on three pages, entitled respectively "July 5," "July 24," and "September 1." Tr. 182. But even this proved misleading.

Having reviewed the notes, Complainant pointed out that Davis had entered a note about him for July 5, 2008, yet Complainant didn't even start working at Dublin-Pleasanton until two days after that, on July 7, 2008. Tr. 184-85. Davis had to admit that he must have got the date wrong. Tr. 185-86. The next note, dated July 24, 2008, shows a conversation with Complainant on a Thursday, yet Complainant didn't work on Thursdays.

Eventually, Davis admitted – in yet another shifting revelation – that he hadn't written the notes in the diary contemporaneously; there were actually additional notes that, in all this testimony, he hadn't mentioned. When he wanted to document something, his practice was to note it on a sheet of paper and only later, on weekends, transcribe it in the diary. Tr. 188.

Yet somehow he needed to modify again:

Actually, with – actually, with temps, I didn't really keep necessarily – I wouldn't have to keep notes necessarily, but I always have to, you know, keep in – how things are progressing. And after the incidents that occurred, then I started documenting incidents that did occur.

*Id.* As it was not until about August 3, 2008 that Coggshall directed Davis to start documenting performance issues with Complainant, I asked Davis if it was after August 3, 2008 that he wrote the entries for July 5 and July 24, 2008. He admitted that is likely what he'd done. That means

he didn't write the July 5, 2008 until a month later, when his memory could well have faded. *See* Tr. 190.

As to Complainant's allegedly playing with an electronic game device, Davis seemed to infer this simply because he saw Complainant's hands moving on some device. Tr. 164. As Complainant explained, however, what he was doing was scrolling as he read the news on his cell phone. Tr. 286-88. He read during the 15- to 20-minute intervals between arriving trains. *Id.* At these times the employees were just sitting around. *Id.* Some read the paper; some used an iPhone; some read a book; some stood and talked; some went down the escalator to talk on the phone where it was quieter. *Id.* There is no persuasive evidence that Complainant was playing video games.

Baker was the highest ranking managerial employee who testified for BART. At trial, he addressed some of the performance issues that Davis raised. He confirmed, for example, that reading the news on a cell phone was acceptable when the next train wasn't expected for twenty minutes (so long as it was done discretely, consistent with a professional appearance). Tr. 250-51, 272-73. It amounted to a break. Tr. 250-51. Baker agreed that, when outdoors, it's easier to read the news on a cell phone than from a newspaper if the wind is blowing and that reading a newspaper would be more noticeable to patrons than reading the news on a cell phone. Tr. 271.

What remains of Davis' criticism is really not performance; it is as Davis characterized it, his opinion that Complainant exhibited an "attitude" of disrespect for Davis and that Complainant didn't try to impress Davis with his ambition and willingness to go beyond the job requirements. It was Davis' perception that Complainant had the temerity to act as though he'd been a long-term BART employee who knew a lot. Tr. 109-10.

To some extent, of course, Davis wasn't taking into account that, although Complainant's experience was not at BART, he did in fact have extensive relevant experience, including more experience than Davis, not just in cleaning vehicles used in public transportation, but also in being a lead. Davis couldn't have considered Complainant's work history because he didn't know it and didn't ask Complainant about it. *See* Tr. 150-51.

Perhaps Davis summed up the reliability of his testimony best in the following interchange:

Q. One last question. Do you have any disability or issue where you can't recall a lot of things?

A. Well, I'll be 60 next month so that could – it's a possibility, you know.

Tr. 165. While there is no reason to imagine that people aged sixty years generally have inadequate recall, Davis is conceding that his testimony might be unreliable. And Davis' concession about his memory doesn't explain his shifting, inconsistent testimony. I conclude that much of what Davis reported to Cogshall was exaggerated, distorted, incomplete, or flatly unfounded. Despite express direction, he documented nothing after August 3, 2012 to support

performance deficiencies between then and the termination decision on September 22, 2012.<sup>31</sup> He offered next to no credible evidence to support his reports to BART management that Complainant's job performance was lacking.

Given that Davis generally is not credible, I credit Complainant over Davis on the subject of Complainant's telling Davis that BART's methods for cleaning vomit were unsafe and that more protective equipment was needed. I find that Complainant reported these safety concerns to Davis at the least on August 3, 2008 and August 24, 2008, if not more often.

While I do not question Coggshall's or Baker's credibility, their decision making process relied almost exclusively on Davis' reports. They failed to conduct an adequate independent investigation of Complainant's performance. Coggshall could have done more observation, could have interviewed Complainant and other workers, and could have asked Davis for the documentation he was supposed to have been maintaining on Complainant's performance. Baker could have talked to Complainant's supervisor at the Richmond Yard. Instead, other than for one short personal observation early on, Coggshall relied entirely on Davis, a relatively inexperienced floorwalker supervisor with whom Coggshall knew that Complainant was having friction.<sup>32</sup> Baker in turn relied on Coggshall in making the decision to terminate the employment.

### Discussion

As the National Transit Systems Security Act provides:

A public transportation agency . . . or an officer or employee of such agency, shall not discharge . . . an employee for

(A) reporting a hazardous safety or security condition; [or]

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties . . . .

6 U.S.C. §1140(b)(1).<sup>33</sup> "A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint." 29 C.F.R. §1982.109(a).<sup>34</sup>

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<sup>31</sup> Davis conceivably could have written one note in his calendar on or about September 1, 2008, but the note is not on the record, and Davis' dating of his notes was entirely unreliable.

<sup>32</sup> Coggshall knew of the friction from the August 3, 2008 telephone calls, first with Complainant, and then with Davis.

<sup>33</sup> A refusal to work under subsection (B) is protected if "the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee; a reasonable individual in the circumstances . . . would conclude that (i) the hazardous condition presents an imminent danger of death or serious injury; and (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and the employee, where possible has notified the public transportation agency of the existence of the hazardous condition and the intention not to perform further work . . . ." 6 U.S.C. §1142(b)(2).

<sup>34</sup> The preponderance standard is met when "it is more likely than not that a certain proposition is true." *Fischl v. Armitage*, 128 F. 3d 50, 55 (2d Cir. 1997).

“If the complainant has satisfied [that burden], relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior.” *Id.* §1982.109(b).<sup>35</sup>

Here, there is no dispute that BART is a public transportation agency within the Act and that Complainant was a BART employee, whom BART discharged.

I. Complainant’s Protected Activity Was a Contributing Factor in the Discharge.

To show that he engaged in a protected activity that contributed to his employer’s taking an employment action adverse to him, an employee must show:

- (1) The employee engaged in a protected activity . . .;
- (2) The respondent knew or suspected, actually or constructively, that the employee engaged in the protected activity . . .;
- (3) The employee suffered an adverse action; and
- (4) The circumstances were sufficient to raise the inference that the protected activity . . . was a contributing factor in the adverse action.

29 C.F.R. §1982.104(e)(2).

A. Complainant Engaged in Protected Activity.

As discussed above, I credit Complainant over Davis on Complainant’s reporting that BART’s methods for cleaning vomit were unsafe and that more personal protective equipment was needed. Complainant made the reports on August 3, 2008 and August 24, 2008, if not more often. Those reports were protected under the Act. *See* 6 U.S.C. §1140(b)(1)(A).

B. BART Knew of the Protected Activity Prior to the Decision to Discharge.

I have found that Complainant reported his safety concerns to Davis; Davis therefore knew of the reporting that constitutes the protected activity. Complainant testified that, in his August 3, 2008 telephone call with Coggshall, he also reported that the training Davis was giving on how to clean vomit was inadequate. If true, this was also protected, and Coggshall knew of it. But Coggshall denies that Complainant raised this safety concern with him in the telephone conversation or at any time.

Although it is a close question, I accept Coggshall’s testimony. As Coggshall stated, he sent an email to Baker to report the dispute between Davis and Complainant, and if Complainant had raised a safety issue, Coggshall would have included it in the email and discussed it with Baker.

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<sup>35</sup> The Act is modeled on the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121. *See* Joint Explanatory Statement of the Congressional Conference Committee, H.R. CONF. REP. NO. 110-259, at 340 (2007).

Baker and Coggshall both deny any discussion of Complainant's raising safety issues. Based on the overall testimony, I find that Complainant never raised a safety issue directly with Coggshall.

Baker is the BART official who made the decision to terminate the employment. There is no evidence that he knew at any relevant time that Complainant engaged in protected activity.

In all, I find that, although Davis had knowledge of Complainant's protected activity, neither Coggshall (who participated in the termination decision) nor Baker (who made the decision) had actual knowledge of the protected activity. Davis did not recommend termination or any discipline and did not participate directly in the termination decision. That means that no one directly involved in the termination decision had actual knowledge of Complainant's protected activity.<sup>36</sup>

But BART's knowledge may be constructive as well as actual. *See* 29 C.F.R. §1982.104(e)(2). In this context, does Davis' actual knowledge give BART constructive knowledge that Complainant engaged in protected activity?

A similar question has arisen in so-called "cat's paw" liability under Title VII and other employment discrimination statutes. Most recently, in a case arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Supreme Court analyzed a similar issue and found the employer liable. *Staub v. Proctor Hospital*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1186 (2011). The Court held that, "if a supervisor performs an act motivated by [discriminatory] animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." *Id.* at 1194. This is the rule when the supervisor influences, but does not make, the ultimate employment decision. *Id.* at 1189. For this purpose, "intent" means "that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Id.* at 1194 n.3.<sup>37</sup>

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<sup>36</sup> In its pre-trial filings and at the outset of the trial, BART conceded that both Coggshall and Davis knew of Complainant's requests for personal protective equipment. Tr. 8-9. In its post-trial brief, BART argued that it only meant to concede that both knew Complainant had asked for long gloves, nothing more, and that BART had given Complainant the long gloves. Post-trial, Complainant moved to strike any testimony from defense witnesses that they did not know about his requests for personal protective equipment.

Ultimately, I do not reach the issue of a refusal to provide personal protective equipment. I need not decide Complainant's post-trial motion to strike or construe BART's concession that Coggshall and Davis knew that Complainant requested personal protective equipment. This is because Complainant met his burden to prove that he engaged in protected activity by reporting a hazardous safety condition (the techniques used for cleaning vomit). *See* 6 U.S.C. §1142(b)(1)(A) (reporting a hazardous safety condition is protected activity). I therefore need not reach any contention that Complainant's request for safety-related equipment was a separate protected activity. *See* 6 U.S.C. §1142(b)(1)(C) (forbidding discharge related to the use of safety equipment). Nor need I reach any contention that Complainant refused to clean vomit for safety reasons. *See* 6 U.S.C. §1142(b)(1)(B) (forbidding discharge for refusing to work when confronted with a hazardous safety condition). Having engaged in protected activity by reporting a hazardous safety condition, Complainant came within the Act's protection.

<sup>37</sup> The Court notes that "under the traditional doctrine of proximate cause, a tortfeasor is sometimes, but not always, liable when he intends to cause an adverse action and a different adverse action results." *Id.* at 1192 n.2.

Thus, in *Staub*, when a human resources manager decided to terminate the plaintiff's employment based on a complaint from a supervisor, and when the supervisor was acting out of anti-military animus for the purpose of getting plaintiff discharged, the employer was liable despite the human resources manager's lack of anti-military animus and ignorance of the fact that such an animus was motivating the supervisor. As the Court explained, there can be multiple proximate causes, the supervisor and the human resources manager can both be proximate causes of the termination, and thus the supervisor's motive and actions can render the employer liable even when the ultimate decision-maker is unaware.<sup>38</sup>

In its treatment of the "cat's paw" issue, the Supreme Court described USERRA as "very similar to Title VII," in which a violation occurs when a protected classification (*e.g.*, race, sex, or national origin) "was a motivating factor for any employment practice, even though other factors also motivated the practice." *Staub*, 131 S.Ct. at 1191 (quoting 42 U.S.C. §§2000e-2(a), (m)).<sup>39</sup> As the Court explained, "the central difficulty in this case is construing the phrase 'motivating factor in the employer's action.'" *Id.*

There is a difficulty when applying the Supreme Court's teaching in *Staub* to the present case. The standard for establishing liability under the National Transit Systems Security Act differs from that under Title VII and USERRA. Unlike Title VII and USERRA, where the central concern is on whether a discriminatory animus is the *motivating* factor, the controlling statute here (NTSSA) requires a complainant to show that his protected activity was a *contributing* (not a motivating) factor. The different language results in a different requirement concerning intent.

To establish liability on a *Staub* analysis, I would have to find that Davis *intended* to get Complainant discharged (or at least intended some kind of adverse action). *See Staub*, 131 S.Ct. at 1194. It is Title VII and USERRA's requirement that discrimination be a "motivating factor" that led the Supreme Court in *Staub* to require that the non-deciding supervisor intend the adverse action. Although they are not identical, motive, purpose, and intent are of a piece in their requirement of a particular state of mind.

In comparison, the "contributing factor" standard applicable here requires no particular state of mind. The act could be unintentional or inadvertent and yet contribute to the result. The focus is on the effect of the act, not the actor's intent, motive, or purpose. Consistent with this, the term "contributing factor" is "a lesser standard than the . . . 'motivating' . . . factor standard sometimes articulated in case law under statutes prohibiting discrimination."<sup>40</sup> Thus, to apply *Staub* to the NTSSA or other whistleblower statutes that require only that the protected activity

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<sup>38</sup> The Court remanded for a determination whether the instructions to the jury were sufficient to allow judgment to be entered on the jury's verdict, or whether a new trial was required. *Id.* at 1194.

<sup>39</sup> *See Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977) (A Title VII plaintiff has "the burden . . . to show that his conduct was . . . a 'substantial factor' or to put it in other words, that it was a 'motivating factor' in the [adverse action]").

<sup>40</sup> *See Lopez v Serbaco, Inc.*, ARB No. 04-158, ALJ No. 04-CAA-5, slip op. 5 n.6 (Nov. 29, 2006) ("A complainant must prove more when showing that protected activity was a 'motivating' factor than when showing that such activity was a 'contributing factor'"); *accord, Vander Meer v. Western Ky. Univ.*, ARB No.97-078, ALJ No. 1995-ERA-38, slip op. at 4 n. 4 (ARB Apr. 20, 1998) (Energy Reorganization Act of 1974).

be a contributing factor to the adverse action, the question must be whether the non-deciding supervisor's acts contributed to the adverse action as a proximate cause irrespective of intent.<sup>41</sup>

I will analyze Davis' contribution to the termination decision below. The point here is that, if Davis was a proximate cause of the decision to terminate, his knowledge of Complainant's protected activity is sufficient to render BART liable.

### C. Complainant Suffered an Adverse Action.

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<sup>41</sup> *Staub* expressly reserves the question of whether an employer would be liable under a "cat's paw" analysis for the act of a co-worker rather than a supervisor. *Id.* at 1194 n. 4. There is no dispute that Davis was a supervisor for the present purposes. BART concedes the point. As it argues in its closing brief, "Complainant was assigned to the Dublin/Pleasanton Station under the supervision of Samuel Davis beginning July 7, 2008." R. Closing Brief at 6:3-4. But beyond BART's concession, I find that "cat's paw" responsibility extends to Davis' act in any event for two more reasons.

First, by telling Complainant and other similarly situated temporary utility workers that Davis was a supervisor, BART clothed Davis with apparent authority to act as its agent. Crucial to the *Staub* Court's analysis is that agency law is part of the "general principles of law . . . which form the background against which federal tort laws are enacted." *Staub*, 131 S.Ct. at 1191. The Court thus relied on agency law when construing Title VII and the USERRA under a "cat's paw" analysis. To the extent that those statutes create federal torts, the statute at issue here, the National Transit Systems Security Act, does as well.

Under principles of agency law, apparent authority is "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Restatement (Third) Of Agency § 2.03, (2006). When BART gave Davis a title of "supervisor," it created the appearance that he in fact had supervisory authority to act for BART. That makes BART responsible for Davis' acts within the course and scope of his employment, including the reports he made to Coggsall about Complainant's performance.

Second, the National Transit Systems Security Act extends liability more broadly to the acts of a transportation agency's "employees," not limited to the acts of managerial employees, so long as the employee is in a position to discriminate against the protected worker. As the statute provides in relevant part:

A public transportation agency, or a contractor or a subcontractor of such agency, or an officer *or employee of such agency*, shall not discharge . . . or in any other way discriminate against an employee for reporting a hazardous safety or security condition . . . .

6 U.S.C. §1142(b)(1) (emphasis added).

For this purpose I need not determine whether this language creates "cat's paw" liability for the acts of peer co-workers because Davis was more than that. BART chose to rely on him as its eyes and ears in the field and its source of information about temporary workers' performance and conduct. The extent of the reliance was substantial. True, Coggsall personally observed Complainant working at Dublin-Pleasanton at least once and formed some conclusions on his own. But this was about two months before the decision to terminate and could not alone have motivated the termination; otherwise, the termination would have occurred earlier. Beyond this, Coggsall relied entirely on Davis. And Baker relied all but entirely on Davis through Coggsall.

This is therefore not a case of a worker who complains about an ordinary co-worker. When an employer chooses to rely on an employee all but exclusively as its source of information about worker performance, the employer has delegated a managerial function to that employee. The delegation might not be enough to bring the employee within a "supervisor" category for purposes of some statutes (*e.g.*, National Labor Relations Act or the Fair Labor Standards Act). But it is enough to make the employee an agent when she discharges her job duty of reporting on work performance and conduct. That brings such employees within the National Transit Systems Security Act, which expressly extends liability to the discriminatory acts of "employees." See 6 U.S.C. §1142(b)(1). It was Davis' exercise of this function that contributed to the termination.

It is undisputed that BART terminated the employment. As discussed above, the occasion for the termination was not that a temporary appointment simply ran its appointed term. Rather, Complainant was an at will employee hired for an indefinite term. The period of employment did not end under its own terms; rather, BART made an active decision to terminate the employment and did so.

#### D. The Protected Activity Was a Contributing Factor in the Discharge.

A “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way” the decision concerning the adverse personnel action. *Marano v. U. S. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (quoting sections of the Congressional Record pertaining to the Whistleblower Protection Act). In *Marano*, the Court considered the same “contributing factor” language in the Whistleblower Protection Act and explained that, by amending previous provisions to include this language, Congress was

Substantially reducing a whistleblower’s burden to establish his case, and “send[ing] a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing.” \* \* \* Indeed, the legislative history of the WPA emphasizes that “any” weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the “contributing factor” test.

2 F.3d at 1140.

“Causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (Title VII); *see also*, 29 C.F.R. §1980.104(b)(2). As the Ninth Circuit stated in *Villiarimo*:

We have recognized previously that, in some cases, causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity. *See Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000) (noting that causation can be inferred from timing alone); *see also Miller v. Fairchild Indus.*, 885 F.2d 498, 505 (9th Cir. 1989) (prima facie case of causation was established when discharges occurred forty-two and fifty-nine days after EEOC hearings); *Yartzoff [v. Thomas]*, 809 F.2d 1371, 1376 (9th Cir. 1987)] (sufficient evidence existed where adverse actions occurred less than three months after complaint filed, two weeks after charge first investigated, and less than two months after investigation ended).

*Id.* Similarly, a lengthy gap in time between the protected activity and the adverse action, absent other evidence, can refute causation.<sup>42</sup>

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<sup>42</sup> *See Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009-10 (7th Cir. 2000) (finding that a one-year interval between the protected expression and the employee’s termination, standing alone, is too long to raise an inference of discrimination). Depending on the surrounding circumstances, temporal proximity might support an inference of retaliation but fall short of being dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 03-

The question for the present case is whether Davis' reports on Complainant's performance contributed to the decision to terminate in the sense of proximate causation. *See Staub* and discussion above. I find that they did.

Baker's decision to terminate was relatively close in time to Complainant's second major interaction with Davis about safe ways to clean vomit. That interaction was on August 24, 2008, and the decision to terminate occurred "a number of days" before September 22, 2008, about three weeks later. Three weeks might be sufficient time for other events to intervene and cause a decision to terminate, but BART offered no evidence of any such intervening event. It thus appears that the temporal proximity of the events in August 2008 to the termination in September 2008 suggests a causal link. But there is considerably more.

Although I do not doubt that Davis complained to Coggshall about various aspects of Complainant's performance, I find Davis' credibility so impaired and the evidence to support his allegations so inadequate, that I conclude most of those complaints were pretextual. Coggshall directed Davis to document any performance failure after August 3, 2008, and Davis documented none.<sup>43</sup> Davis' recollection of the notes in his calendar went beyond poor memory to impeach his veracity. Davis admitted that he couldn't describe the separate device for playing video games despite supposedly seeing it often, and Complainant testified that the condition of his thumbs precludes him from playing such games. Davis' counseling of Complainant about using a cell phone was prompted by Complainant's calling Davis' boss (Coggshall) about their disputes and was inconsistent with Davis' knowingly allowing all of the workers to use cell phones, advising them where the best reception was, and urging them to carry cell phones when they were working "in back." When asked about use of a cell phone as Complainant was using one (reading the news and making occasional calls while waiting between trains), Baker conceded that this kind of use was permitted. Complainant was candid when he admitted that he wasn't keeping up the pace with his co-workers at the time he started at Dublin-Pleasanton, but there is little to demonstrate that this was a continuing problem.

What the record demonstrates is escalating friction between Davis and Complainant that led to Davis' complaints to Coggshall, supposedly about Complainant's performance. Other than the bogus reports about pace, cell phones, and video games, Baker explained the termination as occasioned by what "seemed to be an excessive back and forth about, you know, what was allowable and what was not allowable" about these items. Tr. 252. That is the kind of friction to which I refer, and it was that friction that Baker had in mind when he terminated the employment. The core issue around which the friction arose and festered was how to clean

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AIR-22, slip op. at 9 (ARB Nov. 30, 2005). For example, when an independent intervening event could have caused the adverse action, it would be illogical to rely on temporal proximity to establish causation. *See Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001). Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

<sup>43</sup> Only one note in the diary was dated after Coggshall directed Davis to document any performance failures, and that note is not on the record. Coggshall testified, however, that Davis did not provide him with any documentation of performance issues with Complainant. Tr. 218-19.

vomit safely.<sup>44</sup> It is the same friction to which Davis himself testified when he characterized Complainant's would-be performance failures as disrespect for Davis and acting as though he knew as much as an experienced utility worker. Most of the areas about which Davis complained to Coggshall were pretext; the only consistent, ongoing area of dispute between the two men beyond "attitude" was the hazard of cleaning vomit using the techniques that Davis had instructed.

The standard for contribution requires less than this. Arguably, even if a dispute over how to clean vomit was only a relatively minor motive for Davis' making unfounded complaints about Complainant's performance, that would still have contributed to Baker's decision to terminate the employment. *See Marano, supra*. But this was more. Davis' protected reports of safety hazards were a focal point in the ongoing friction leading to Davis' complaints to Coggshall, which in turn set in motion the decision to terminate. Baker reached that decision with very little more than what Davis told Coggshall. That is proximate causation within *Staub*, and it is enough for "cat's paw" liability. Thus, Complainant's protected activity was a contributing factor in the discharge within the meaning of the Act.<sup>45</sup>

## II. BART Did Not Demonstrate That It Would Have Terminated the Employment Absent Complainant's Protected Activity.

BART's only stated reason for the termination was performance. Tr. 263. There is nothing on the record to suggest, not to mention prove by clear and convincing evidence, that BART would have terminated the employment had Davis not reacted as he did to his disputes with Complainant about how to clean vomit. I could speculate that the relationship between Davis and Complainant would have been sub-ideal even without a dispute about a hazardous safety condition. I could speculate that the friction between them would have ultimately led to a termination at some point in time, regardless of the protected activity. But nothing on the record demonstrates this even by a preponderance of the evidence (not to mention clear and convincing evidence); it is pure speculation.

## III. Remedy.

Congress mandated that, on a finding of liability, the Secretary must order the employer to take "affirmative action to abate the violation" and must make the complainant whole with reinstatement (without loss of seniority); backpay with interest; and compensatory damages, "including litigation costs, expert witness fees, and reasonable attorney fees." 6 U.S.C. §§1142 (c)(3)(B), (d) (1), (2).

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<sup>44</sup> Other areas of dispute were relatively minor, such as whether BART should supply and launder coveralls.

<sup>45</sup> I do not reach the question whether Davis intended Complainant's termination. It could be speculated that Davis was so inexperienced that he didn't realize his complaints could (or even were likely to) result in the termination of the employment. Perhaps Complainant, who was more experienced, and especially so with regard to working as a lead, intimidated Davis to the point that Davis criticized Complainant to Coggshall more to defend himself as a floorworker supervisor than to get Complainant fired. But, as the statute requires only that the protected activity be a contributing factor and not a motivating one, I make no findings about Davis' intent.

To make Complainant whole, BART must expunge any negative information from his personnel file (including any record of a termination or any involuntary separation) and amend the file to show that Complainant is eligible for rehire.<sup>46</sup> It must reinstate Complainant immediately. As Complainant's employment was temporary, part-time, and at will, to be effective, the reinstatement must be to at least as many hours per week as Complainant was working before the termination, it must be at current pay rates for the job, it must not be terminated because Complainant has pursued this action, and it must have the same opportunity for advancement into a regular, full-time position as any other worker in a temporary, part-time position such as Complainant's at BART.

Indeed, Complainant contends that he is entitled to be hired into a regular union job as a remedy. He contends that, absent retaliation for protected activity, BART would have given him one of those jobs. But I reject this argument for the reasons that follow.

Although Complainant applied for a regular, full-time union job shortly before BART terminated the employment, the undisputed evidence on the record shows that BART had decided to terminate the employment before Complainant made his application. *See* Tr. 36-38, 216-17. Moreover, there were no openings at that time or for nearly the next two years to come (June 2010). Tr. 217, 248-50. There was a hiring freeze for economic reasons. *Id.* BART has therefore shown by clear and convincing evidence that, absent protected activity, it would nonetheless not have hired Complainant into a regular, full-time union job.

The parties did not offer evidence going to the remaining remedies that the statute makes mandatory. Generally, it is the Complainant's burden to demonstrate the amounts of any remedies to which he might be entitled. *See* 5 U.S.C. §556(d). As Complainant failed to meet that burden, it could be correct to deny him monetary relief.

Nonetheless, as Complainant was not represented by counsel; as these remedies are mandatory; and as BART will not be unfairly prejudiced, I will reopen the record to allow the parties to submit written evidence and argument going to the amount of any remedy owed Complainant under the statute's make whole mandate. The parties may submit written evidence of the amount BART was paying Complainant at the time of termination, the number of hours he was working, and any routine pay raises accorded to workers generally in his job category since that time. Both parties may include any other written evidence they choose going to the mandated remedies. In addition to documentary exhibits, the evidence could include discovery responses, declarations, affidavits, and the like. If either party believes that a limited evidentiary hearing is necessary for a fair and proper consideration of the evidence going to these remedies, that party may file a written request for a hearing at the same time as it files the written evidence.

What remains is an area of permissive relief: punitive damages not to exceed \$250,000. *See* 6 U.S.C. §1142(d)(3). Complainant offers no argument that he is entitled to punitive damages, and I find that he is not. Although BART might have placed too much reliance on an inexperienced floorworker supervisor, there is insufficient evidence to suggest knowing complicity among BART's managers. BART assigns the floorworker supervisors the responsibility to train the

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<sup>46</sup> Soon after the termination, Baker marked Complainant's personnel file "do not rehire." Tr. 258-60.

temporary workers about biohazards; makes personal protective equipment available; has a Safety Department that is charged with accepting safety-related complaints. Although BART failed to train Complainant about much of this, Complainant offered no evidence to suggest, let alone establish, that BART has a conscious disregard for its statutory obligations. Federal and state regulators have not found fault with BART's safety measures related to the issues here. I find no basis for the imposition of punitive damages.

#### Initial Order

BART violated its statutory obligations under the National Transit Systems Security Act when it terminated Complainant's employment on September 22, 2008. Accordingly,

11. BART will immediately reinstate Complainant to employment as a temporary, part-time utility worker, working no fewer than the average number of hours per week he was given prior to the termination and on the current pay schedule for such workers. The employment is at will for an indefinite term. That means that either party may terminate the employment at any time, with or without reason, but not for a reason that is unlawful, such as retaliation for filing this action.
12. BART will expunge Complainant's personnel file and any other record showing an involuntary termination or negative references related to his prior employment.
13. BART will consider Complainant on any application for regular, full-time positions without regard to his having filed and pursued the present claim or to any negative information about his prior employment with BART.
14. BART will pay Complainant backpay with interest consistent with the proof that the parties may offer. The record is reopened for the purpose of establishing the amount of backpay owing plus interest, less mitigation. Within 21 days after the date of this Initial Decision, each party may submit written evidence going to remedies as described in the discussion above, including interest calculations. *See* 26 U.S.C. §6621(b)(3) (applying Internal Revenue Code section 1274(d) plus three percent to calculate interest). The parties may also submit evidence of Complainant's earnings since the time BART terminated the employment or other similar mitigation evidence. If within the party's possession, custody, or control, BART will submit a copy of each wage statement it gave Complainant during his employment, and Complainant will submit a copy of his IRS Form W-2 from every employer for whom he worked in each of the following years: 2008, 2009, 2010, and 2011. If either party seeks a limited evidentiary hearing on these monetary remedies, that party will request a hearing (explaining its reasons) at the same time as he or it files the written submission on backpay.
15. BART will pay compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, according to proof submitted at the same time as the parties submit the evidence of backpay owed.
16. Any claim for punitive damages is DENIED.

Once the additional evidence on remedies is filed, I will close the record, take the matter under submission, and issue a Decision and Order.

SO ORDERED.

STEVEN B. BERLIN  
Administrative Law Judge