



**Issue Date: 09 March 2016**

CASE NO.: 2014-NTS-00004

*In the Matter of:*

LEAH IBALE,  
Complainant,

v.

ALASKA MARINE HIGHWAY SYSTEM,  
Respondent.

### **DECISION AND ORDER DENYING COMPLAINT**

This claim arises under the whistleblower provisions of the National Transit Systems Security Act ("NTSSA"), 6 U.S.C. § 1142, and the implementing regulations found at 29 C.F.R. Part 1982. A formal hearing occurred in San Francisco, California, on June 18, 2015. Complainant was self-represented and appeared in person. William Milks, Attorney at Law, represented Respondent and appeared telephonically.

At the hearing, the following exhibits were admitted into evidence: Complainant exhibits ("CX") 1 through 8, 10 through 17, and 18, pages 1 through 20, A-1, B through I, and L through R; and Respondent's exhibits ("RX") A through W. Hearing Transcript ("TR") at 8, 11, 15, 103, 114. CX 9, a jurisdictional letter, was not admitted into evidence but was retained in the record so that Complainant could preserve her position on jurisdiction. TR at 8. The parties agreed not to submit closing briefs, and the record closed at the conclusion of the hearing. TR at 114-15.

For the reasons stated below, Complainant's request for relief is denied.

#### **I. ISSUES IN DISPUTE**

The sole issue in this hearing is whether Respondent violated the NTSSA by retaliating against Complainant on April 8 or April 15, 2012, for engaging in protected activity in March 2012.<sup>1</sup>

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<sup>1</sup> Complainant raised issues related to the jurisdiction of the Alaska Department of Labor and U.S. Coast Guard to investigate Respondent's ships, an Alaskan whistleblower statute, and a state workers' compensation claim filed by Complainant. TR at 12-13, 36, 38; Record of Pre-Hearing Conference Held Telephonically at 25-27 (June 15, 2015) ("PHC"). I denied her request to hear those claims because I do not have jurisdiction over the Alaska Department of Labor or U.S. Coast Guard, or claims arising under state whistleblower or workers' compensation statutes.

Complainant has the burden to prove by a preponderance of the evidence that she engaged in protected activity in March 2012 and that the protected activity was a contributing factor in the April 8 and April 15, 2012, adverse actions alleged in her complaint.<sup>2</sup> 29 C.F.R. § 1982.109(a). Complainant must show that: (1) she engaged in protected activity by reporting a hazardous safety or security issue on Respondent's ship the *M/V Columbia*; (2) that Respondent was aware of the protected activity; (3) that she suffered an adverse employment action on either or both of April 8 or April 15; and (4) that the protected activity was a contributing factor in the adverse action.

If Complainant proves her case, Respondent may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant's protected activity. 29 C.F.R. § 1982.109(b).

## II. FACTUAL FINDINGS

1. Complainant was born August 17, 1956, and was 58 years old at the time of the hearing. RX E at 1. She was employed by Respondent, a public transportation agency, as a cashier and steward in Ketchikan, Alaska. CX C; CX 18 at 5; RX O at 1.

2. On March 19, 2012, Complainant was assigned to the *M/V Columbia*, which was in the shipyard for overhaul and returned to active status on April 1, 2012. TR at 82, 98-99. Complainant was on the yard schedule, which she explained was different from the normal crew schedule. TR at 54, 56. The yard schedule is assigned when a ship is in overhaul or lay-up status, does not have an A or B crew, and does not have a published crew list. TR at 98. When a ship is put on overhaul or lay-up status, the crew who last sailed the ship is placed on yard status until the first crew change after the ship returns to active service. *Id.* The *M/V Columbia* was crewed by A and B crews, which would switch out on a weekly basis when the ship was active, and the rotation began with Crew A on April 8, 2012. TR at 80. Complainant was assigned to Crew B for the *M/V Columbia*. TR at 51. Crew B took over the operation of the ship at 7:00 a.m. on April 15. TR at 32, 51; RX G at 1-4.

3. Complainant was a member of the Inland Boatman's Union ("IBU") and her dispatches on the *M/V Columbia* were covered under the IBU Collective Bargaining Agreement ("CBA"). TR at 78-79; RX C at 37. Under the CBA, when a worker becomes unfit for duty, they are considered unfit for the remainder of a scheduled assignment and need to be replaced for that assignment. TR at 81; RX C at 37.

4. On March 27, 2012, Complainant and another employee, Rafael Soto, were ordered to clean the forward lounge. TR at 17. When Complainant arrived at the lounge, she saw a sign warning of asbestos, a worker wearing a respirator, plastic sheeting, and a plastic "glove bag" over an open ceiling. TR at 17, 18-19. Complainant told the chief steward, Rex

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<sup>2</sup> At the prehearing conference, and for the first time, Complainant alleged additional retaliation on April 29, 2012, that was not presented in her complaint to OSHA or at any time prior to the prehearing conference. Respondent objected to the April 29 claim and said it was the first time that date had been raised. I denied Complainant's request to hear claims from April 29 because they were not properly before me and Respondent had not had time to respond to the claims. PHC at 34-35.

Roldan, that there was ongoing asbestos work in the lounge, and waited in the chief steward's office while Mr. Roldan went to investigate the situation. TR at 18. Within an hour, Mr. Roldan returned and told Complainant and Mr. Soto to return to cleaning. TR at 18-19.

5. When Complainant got back to the forward lounge, the asbestos sign and sheeting had been removed and the lounge had been cleaned, but the ceiling was still open and there was a standing ladder. TR at 18, 20. Complainant and Mr. Soto called their union director, Pete Lapinsky, to verify that cleaning would be safe. TR at 18. Mr. Lapinsky, as well as the chief mate, Kevin Dickman, assured Complainant that it was safe to work. TR at 20. Relying on the statements that the area was safe, Complainant and Mr. Soto vacuumed and dry mopped the room, and removed protective sheets from furniture. TR at 21. There was a great deal of dust since the ship had not been running for six months, and the dust was dark in color. *Id.*

6. Complainant and Mr. Soto were assigned to clean the forward lounge again on March 28, 2012, and Complainant asked Tatiana Feldman, who was in charge of the cleaning equipment, for a respirator. TR at 22. Ms. Feldman could not find a respirator, and also told Complainant that Mr. Dickman had said that they could not use respirators. *Id.* Complainant covered her face with a towel, but Ms. Feldman told Complainant she did not need protection. TR at 22-23. Around 3 or 4 p.m., Complainant felt stinging in her eyes, developed a runny nose with some blood, had breathing trouble, and began sneezing. TR at 23. Complainant told Mr. Roldan that she was sick, and she filled out an injury report which Mr. Soto turned in. *Id.*; CX C. Complainant then left the boat because her work day was finished. TR at 24. At a Safety Committee meeting for B Crew held on April 5, 2012, an exposure to asbestos on March 28, 2012, was reviewed. CX D.

7. On March 29, 2012, Complainant saw Dr. Snyder, who examined Complainant and asked her to get the report of injury form. TR at 24-25. The next day, March 30, 2012, Complainant went to the M/V *Columbia*, signed her time sheets for the pay period ending that day, and obtained a copy of her report of injury. TR at 25. Complainant returned to Dr. Snyder later on March 30, who signed an "unfit for duty" form for Complainant extending from March 29 to April 4. TR at 25-26; CX 3. She also prescribed antibiotics and Flonase, and asked Complainant to return for a check-up on April 4. TR at 26. On April 4, Dr. Snyder determined that Complainant would be fit for duty on April 6. RX F at 1.

8. On March 30, 2012, Complainant anonymously filed an online complaint with OSHA alleging that she was exposed to asbestos. TR at 29-30, 40; CX A-1. Her complaint was directed first to the OSHA district office for Alaska, and subsequently referred to Alaska Occupational Safety and Health ("AKOSH"). TR at 37; CX 9. AKOSH informed Complainant on June 7, 2012, that it was not able to investigate the complaint as it lacked jurisdiction over the M/V *Columbia*. CX 9.

9. On April 22, 2012, Complainant filed a complaint of retaliation with AKOSH, which was referred to OSHA for investigation on April 25. RX O at 1; CX R. The complaint alleged that she was retaliated against on April 8 for reporting to the U.S. Coast Guard an exposure to asbestos. RX A at 1. She also filed an anonymous online complaint with OSHA on April 22, 2012. CX A-1. On June 1, 2012, OSHA sent Respondent a notice that Complainant

had filed a complaint of retaliation under NTSSA. CX I. On July 12, 2012, Respondent replied to the notice, denying that it had retaliated against Complainant. RX K at 1.

10. On May 8, 2012, Complainant filed a report of potential asbestos exposure with the U.S. Coast Guard, which had jurisdiction over safety issues on the M/V *Columbia*. CX 10. On July 12, 2012, the U.S. Coast Guard sent Respondent a notice of the complaint. CX 12. On October 1, 2012, the U.S. Coast Guard informed Complainant of its determination that there had not been a safety hazard on the M/V *Columbia*. CX 10.

11. On the morning of April 8, 2012, Complainant, who believed that she was on the schedule to work for the period from April 4 to April 13, returned to the M/V *Columbia* fit for duty. TR at 26-27. Complainant believed that she was scheduled to work because she had previously been on the yard schedule while the M/V *Columbia* was on lay-up status. TR at 27. Complainant believed that, according to the IBU CBA, an employee who was injured may return to work once given a fit for duty so long as the employee's schedule had not ended, and that her schedule would therefore continue until April 13, 2012. TR at 55-56. She spoke to Mr. Roldan, who told her that she had been replaced and that the ship was on a new schedule which did not include Complainant. TR at 27. Mr. Roldan was leaving the ship at the time, and was replaced as chief steward by Pam Bushnell. TR at 28. Complainant did not speak with Ms. Bushnell on April 8, and went home. TR at 29.

12. Deborah Porter, a dispatch supervisor for Respondent, established that Complainant would not have been scheduled to work on April 8 because she was on the B crew list. TR at 81. She said that while pay periods are two weeks long and end on Fridays, crew assignments are one week long and change on Sundays and Mondays, so the ends of pay periods do not match the ends of crew assignments. TR at 86. She also said that Complainant would have been paid sick leave for any time period that she was supposed to work but was unfit for duty. TR at 90. When an employee is on sick leave, a time sheet is not filled out for the employee but the employee receives a pay statement. TR at 89, 92.

13. Complainant next attempted to return to work on April 15, 2012, and expected to work as the Head Waiter based on a conversation with Ms. Bushnell. TR at 30. Two copies of the crew assignment list for April 15, 2012, appear in the record, one listing Complainant as both Cashier and Head Waiter, and the other listing Complainant as Cashier with no crew member assigned to the Head Waiter position. RX G at 3, 4. There is no explanation provided for the two versions of the list. Head waiters were paid \$22.61 per hour at the time, and Cashiers were paid \$22.52 per hour. RX C at 21. When Complainant arrived at 7:00 a.m., Ms. Wilson told her that another employee who had more seniority would be Head Waiter. TR at 31. Complainant thought that she had more seniority, but was not sure. TR at 32. Ms. Wilson asked Complainant to go down to the purser to get her "station bill," but there was a long line at the purser's office so Complainant went back to find Ms. Wilson, who was in her office with the new Chief Steward, Ludy Uddipa. TR at 33; CX H. Complainant asked what job she would be given and neither Ms. Wilson nor Ms. Uddipa immediately answered her. TR at 34. Complainant then told Ms. Uddipa that she was sick and needed to leave the ship. RX W at 3.

14. Ms. Wilson said in an affidavit that she was in the process of switching assignments so that Complainant would be Head Waiter when the purser told her that

Complainant had left the ship because she was sick. RX U at 2. Even if the other employee had greater seniority, Complainant would have been assigned a different steward position had she not left the ship. TR at 83. Ms. Wilson also told Dispatcher Craig Blisson by e-mail on April 16 that Complainant told her at 7:45 am the previous day that she was sick and needed to leave the ship. RX V at 1. Complainant said she felt scared, bad, and embarrassed when she did not receive a job assignment, and that it made her sick. TR at 59.

15. On April 17, 2012, Complainant filed a Notice of Pay Problem asserting that she had been assigned to the *M/V Columbia* on April 8 as Head Waiter, that another employee with less seniority and no Head Waiter bid was given the position instead, and that Complainant was entitled to lost wages for the difference in pay rates between the positions. CX G. The CBA provides that, if an employee is denied a dispatch at a higher classification despite having seniority, he or she is due the difference between the wages paid and the wages which would have been paid at the higher classification, or the wages lost if the employee is denied dispatch altogether. RX C at 23.

16. Debbie Porter responded to the Notice of Pay Problem on April 19, 2012, writing that the April 8 *Columbia A* crew list had another person listed as Head Waiter, and that Complainant was assigned to the *Columbia B* crew list at the time. CX G. She also said that Complainant had never held a Head Waiter bid, but that she was dispatched in the Head Waiter position for April 15, 2012, and that Complainant reported to the ship supervisors at 7:45 a.m. on April 15 that she was sick and left the ship before it sailed. *Id.* Therefore, Complainant was not entitled to pay for a difference in wages. *Id.*

17. Complainant was able to work as of the next scheduled crew change on April 29, 2012, after she submitted another form certifying that she was fit for duty. TR at 34, 45. On May 3, 2012, Peace Primary Healthcare stamped a form indicating that Complainant was not fit for duty from April 29 to May 4, 2012. RX J at 1.

18. Complainant filed a grievance with her union for lost work due to her sickness and the days she did not work and for the failure to issue her a respirator. TR at 39; CX B; CX G. Respondent denied the grievances on June 1, 2012. CX I.

19. Complainant said that the time sheet she signed on March 29 was later revised by Mr. Roldan to charge her sick leave on March 28, and that even though she complained about the change, the problem was never corrected. TR at 35; CX E. On April 2, 2012, Mr. Roldan e-mailed a time sheet for Complainant to the Alaska Marine Highway System time sheet department. CX E. The time sheet listed Complainant as unfit for duty on March 28, 2012, and was not signed by Complainant. *Id.* On June 21, 2012, Complainant sent an e-mail to Mr. Roldan asking him to fix her time sheet so that she would not be charged sick leave and be paid regular pay, and told him that if he did not respond ASAP she would contact her union board. CX F. Mr. Roldan replied that he did not have a copy of Complainant's time sheet and was not sure what the problem was. *Id.* Complainant replied "[a]re you going to fix it or you want me to fix your error. Yes or no !" [*sic*]. Mr. Roldan replied "[h]eyyyy slow down. Are you threatening me? You do whatever you want to do. You know what you don't tell me what to do" [*sic*]. *Id.*

### III. ANALYSIS

As set forth below, the following conclusions of law are based upon analysis of the entire record; arguments of the parties; and applicable regulations, statutes, and case law. 29 C.F.R. § 18.57. In deciding this matter, the administrative law judge is entitled to weigh the evidence, to draw inferences from it, and to assess the credibility of witnesses. *See Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 477 (1947); 29 C.F.R. § 18.29.

Under the NTSSA, a public transportation agency, or a contractor or subcontractor of the agency, may not retaliate against a public employee “in whole or in part” because of the employee’s cooperation in the investigation of a violation under the NTSSA, or the employee’s report of hazardous safety and security conditions in public transportation. 6 U.S.C. §§ 1142(a), (b); 29 C.F.R. §§ 1982.102(a)(1), (2). The prohibition against retaliation extends to discharge, demotion, suspension, reprimand, intimidation, threats, restraints, coercion, blacklisting, or discipline, if the report of hazardous safety and security conditions contributed in any way to that action. 6 U.S.C. §§ 1142(a), (b); 29 C.F.R. §§ 1982.102(a)(1),(2).

The implementing regulations for the NTSSA whistleblower protections are found in the same regulations as the Federal Rail Safety Act of 1982 (“FRSA”), 49 U.S.C. § 20109. However, the FRSA specifically incorporates the procedures for handling whistleblower matters under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”), while the NTSSA does not. 49 U.S.C. § 20109(d)(2). There is very limited case law dealing with NTSSA whistleblower matters, but the whistleblower protections afforded by the NTSSA, and the elements necessary to prove a case of retaliation under the NTSSA, are similar to those found in the FRSA, AIR 21, and other statutes, such as the Surface Transportation Assistance Act (“STAA”), 49 U.S.C. § 31105, and the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (“SOX”). Therefore, I look to decisions issued by the ARB in similar whistleblower statutes for guidance in examining the issues presented here.

In order to prevail in an NTSSA whistleblower retaliation action, Complainant must demonstrate by a preponderance of the evidence that the “protected activity was a contributing factor in the adverse action alleged in the complaint.” 29 C.F.R. § 1982.109(a). This is the same burden as imposed under FRSA and AIR 21. *Id.* The ARB has recently clarified that the “two-part burden-shifting test” imposed by AIR 21 requires that a complainant first show by a preponderance of evidence that: (1) the complainant engaged in protected activity as defined by the statute; (2) that the complainant suffered an unfavorable personnel action, often referred to as an adverse action; and (3) that the protected activity was a contributing factor in the unfavorable personnel action. *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 10-11 (ARB Mar. 20, 2015) (Reissued With Full Dissent Apr. 21, 2015).

If a complainant meets the burden at the first stage, the employer may avoid liability if it shows by clear and convincing evidence that it “would have taken the same adverse action in the absence of any protected behavior.” 29 C.F.R. § 1982.109(b); *Powers*, ARB No. 10-034, ALJ No. 2010-FRS-030, slip op. at 11. At this stage, any legitimate, non-retaliatory reasons for taking an adverse action may be weighed by the ALJ. *Powers*, ARB No. 10-034, ALJ No. 2010-FRS-030, slip op. at 11.

As a preliminary matter, the parties do not dispute that the NTSSA applies here. *See* Respondent's Pre-Hr'g Statement at 1. Respondent is a public transportation agency, and so falls within the coverage of NTSSA. 6 U.S.C. §§ 1131(5), 1142(a). There is also no dispute that Complainant was an employee of Respondent within the meaning of 6 U.S.C. § 1142(a) during the relevant period. Consequently, I find that NTSSA applies to this dispute.

Complainant alleges that she engaged in protected activity by submitting complaints to the U.S. Coast Guard and OSHA regarding asbestos on the M/V *Columbia*. TR at 104; RX A at 1. She alleges that Respondent retaliated against her by not paying her the correct wages for March 28, 2012, and by denying her dispatches on April 8 and April 15, and that her complaint to OSHA was a contributing factor in that retaliation. TR at 104-05.

Respondent concedes that Complainant engaged in the protected activity of filing a complaint, but argues that there is no evidence that it was aware of the complaint prior to the events which Complainant alleges constituted adverse actions. TR at 106-07. It also argues that Complainant did not suffer any adverse action since she was not scheduled to work on April 8, 2012, and left the M/V *Columbia* on April 15 because she was sick, not because she was refused a dispatch. TR at 107, 110.

#### Protected Activity

The NTSSA protects employees who report hazardous safety conditions. 6 U.S.C. § 1142(b)(1). Complainant reported a potentially hazardous safety condition, specifically what she believed to be an asbestos release, to OSHA on March 30, 2012. F.F. ¶ 8. While a subsequent investigation by the U.S. Coast Guard ultimately concluded that no unsafe condition existed on the M/V *Columbia*, F.F. ¶ 10, the NTSSA does not require that a hazardous condition actually existed, only that the complainant had a reasonable belief that she was reporting an unsafe condition. *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1000-01 (9th Cir. 2009) (explaining the elements of a retaliation claim under the Sarbanes Oxley Act); *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14, slip op. at 18 (ARB Nov. 13, 2002) (stating that protected activity under federal whistleblower statutes requires that the whistleblower reasonably believe that compliance with safety standards is in question). Complainant credibly established that she was concerned about working in a room where there had been recent asbestos work, and where she had seen asbestos workers in protective gear. F.F. ¶ 4. The potential presence of asbestos in a work area is a safety hazard. Additionally, Respondent does not dispute that Complainant engaged in protected activity by filing safety complaints with AKOSH, OSHA, and the U.S. Coast Guard. Therefore, I find that Complainant engaged in protected activity.

#### Adverse Action

In addition to showing that she engaged in protected activity, Complainant must show that she was the subject of an adverse action from Respondent. Complainant contends that her time sheet for March 28 was changed, and that she was refused work dispatches on April 8 and 15, 2012.

To qualify as an adverse action, the challenged action must be “more than trivial, either as a single event or in combination with other deliberate employer actions.” *Williams v. American Airlines Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-4, slip op. at 15 (ARB Dec. 29, 2010).<sup>3</sup> There need not be “tangible job consequences,” and “minor acts of retaliation can be sufficiently substantial when view together to be actionable.” *Menendez v. Halliburton, Inc.*, ARB Nos. 02-002, 003, ALJ No. 2007-SOX-005, slip op. at 20-21 (ARB Sept. 13, 2011). Certain employment actions, such as termination of employment, demotion, or suspension, are per se adverse. *Williams*, ARB No. 09-018, ALJ No. 2007-AIR-4, slip op. at 15 n. 75. In other situations, the complainant “must show that a reasonable employee would have found the challenged action materially adverse, [meaning] it well might have dissuaded a reasonable worker from” engaging in protected activity. *Id.*, slip op. at 13 (quoting *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).<sup>4</sup> The definition of adverse action under SOX, FRSA, and AIR 21 is more expansive than under Title VII, as the language of the former statutes explicitly proscribes non-tangible activity. *Fricka v. Nat’l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (ARB Nov. 24, 2015).

Complainant was not scheduled to work on April 8, 2012. The evidence clearly established that, on April 8, the A Crew came on duty and took over the operations of the M/V *Columbia*. F.F. ¶ 2. Complainant was assigned to the B crew, which was not scheduled to work on April 8. F.F. ¶¶ 2, 12. If she was not scheduled to work, Complainant cannot have suffered an adverse action by being denied a dispatch on that date.

Complainant contends that the CBA requires that an employee who takes sick leave during their work assignment be permitted to return and complete that assignment once they are pronounced fit for duty so long as the employee is still scheduled, and that she was therefore scheduled to work on April 8, 2012. TR at 55-56. Despite the fact that a crew change was scheduled for April 8, and that the B Crew, to which Complainant was assigned, was not scheduled to operate the M/V *Columbia* until April 15, Complainant argues that her work schedule extended to April 13 because she received a time sheet for the pay period ending on

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<sup>3</sup> The Board concluded that language in AIR 21 which “prohibits ‘discrimination’ against an employee with respect to the employee’s ‘compensation, terms, conditions, or privileges of employment’” and implementing regulations which prohibited “efforts ‘to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee’” mandated a “strong protection” of whistleblowers. *Williams*, ARB No. 09-018, ALJ No. 2007-AIR-4, slip op. at 10, 15 (quoting 49 U.S.C.A. § 42121(a) and 29 C.F.R. § 1979.102(b)). NTSSA provides that “a public transportation agency . . . shall not discharge, demote, suspend, reprimand, or in any way discriminate against an employee,” 6 U.S.C. § 1142(a), while the implementing regulations mandate that “[a] public transportation agency . . . shall not discharge, demote, suspend, reprimand, or in any other way retaliate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining” a whistleblower. 29 C.F.R. § 1982.102(a). The Board has approved the application to the AIR 21 standard in FRSA cases. *Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-018, slip op. at 2 (ARB Dec. 21, 2012). The regulations implementing the FRSA use language identical to those implementing the NTSSA. Compare 29 C.F.R. § 1982.102(a) with 29 C.F.R. § 1982.102(b).

<sup>4</sup> In a per curiam decision, the Fifth Circuit Court of Appeals reviewed the Board’s decision in *Menendez*, ARB Nos. 02-002, 003, ALJ No. 2007-SOX-005, and held that the Board properly applied the *Burlington* standard of “material adversity.” *Halliburton, Inc. v. ARB*, 771 F.3d 254, 260-62 (5th Cir. 2014). The Fifth Circuit noted that some language in *Menendez* which suggested a broader standard was “troubling,” but concluded that the Board’s language was mere dicta. *Id.* at 260 n. 5.

that date. TR at 56. Contrary to Complainant's arguments, however, the document to which she refers as a time sheet does not establish that she was scheduled to work during any period. The document is a State of Alaska Payroll Advice form, which lists Complainant's earnings and deductions for both the year to date and for the pay period ending April 13, 2012. See RX S at 9. Unlike the State of Alaska Marine Timesheet submitted as evidence by Complainant, the Payroll Advice form does not list specific hours worked or scheduled. Compare CX E with RX S at 9. Ms. Porter credibly established that, when an employee is on sick leave, a timesheet is not generated but the employee is paid and a pay statement is created, which is consistent with the existence of the Payroll Advice form for the period ending April 13. F.F. ¶ 12. As this was the sole basis on which Complainant argued that she was scheduled to work on April 8, and because the M/V *Columbia*'s crew list and the testimony of Ms. Porter both show that Complainant was not scheduled to work on the M/V *Columbia* on April 8, I find that Complainant did not suffer any adverse action when she was denied dispatch on April 8, 2012, because she was not scheduled to work on that day.

On April 15, 2012, Complainant was scheduled to work on the M/V *Columbia* as part of the B Crew. F.F. ¶¶ 2, 13. Complainant testified that she left the ship because she was denied an assignment as Head Waiter, TR at 56-57, but, when shown a letter she sent to Respondent regarding a pay problem, also testified that she left because she was sick. TR at 59. Complainant takes the position that she was denied a dispatch as Head Waiter, and that she was humiliated by having to discuss her assignment with Ms. Wilson and Ms. Uddipa. F.F. ¶ 13. There was some confusion as to what position Complainant would be working on April 15, *Id.*, but Ms. Wilson was in the process of switching Complainant to the Head Waiter position when she learned that Complainant had left the ship. F.F. ¶ 14. Complainant said that she did not wait to find out what job she would be assigned, or if she would be denied a position entirely, but instead left the ship. F.F. ¶ 13. She also did not wait to receive her station bill because the line was too long. *Id.* Complainant suggests, though it is not entirely clear, that she felt sick, and therefore left the ship, because she was offended at having to wait for her station bill. F.F. ¶ 14. Being annoyed or even feeling discomfort due to confusion about a work assignment does not rise to the level of a material consequence required for an adverse action. Moreover, apart from Complainant's equivocal testimony, no evidence in the record supports the conclusion that Complainant left the M/V *Columbia* because she was upset at her treatment rather than because she was ill. I find that Complainant left the M/V *Columbia* on April 15 because she felt sick and for no other reason.

Even if Complainant had been assigned to the wrong position on the M/V *Columbia*, the circumstances and evidence do not indicate that this would have constituted an adverse action. Suspending an employee's pay may amount to an adverse action, even if the employee eventually receives back-pay, because fear of the hardship and mental distress resulting from going without pay for an indefinite period could deter a reasonable employee from reporting a hazardous condition. *Burlington Northern*, 548 U.S. at 72-73. Here, however, Complainant would have suffered only a minimal pay differential for a limited period. Even if Complainant had worked and been paid as a Cashier rather than Head Waiter, the injury would have been limited to the two weeks of Crew B's duty on the M/V *Columbia*, the reduction in pay would have been minor (a difference of \$0.09 per hour), and Complainant could have filed a Notice of Pay Problem through the IBU's grievance processes. F.F. ¶ 2, 13, 15. When the harm

threatened is potentially being paid at a slightly lower pay rate for a short, definite period of time, and there is a grievance process in place to make the employee whole, the potential deterrent effect is minimal. The situation here is therefore substantially different than the situation in *Burlington*. Even if Complainant had not left the M/V *Columbia* on April 15, there is no evidence that she would have suffered an adverse action. Therefore, I find that Complainant has failed to show that she was subject to any adverse action on April 15.<sup>5</sup>

### Contributing Factor

A “contributing factor is ‘any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.’” *Powers*, ARB No. 10-034, ALJ No. 2010-FRS-030, slip op. at 11 (citations omitted). Showing that the protected activity was a “contributing factor” is a lesser burden than showing that the activity was a “motivating factor.” *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 04-CAA-5, slip op. at 4-5 n. 6 (ARB Nov. 29, 2006) (citing *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 5-7 (ARB Sept. 30, 2003); and *Van der Meer v. Western Ky. Univ.*, ARB No. 97-078, ALJ No. 1995-ERA-38, slip op. at 3 (ARB Apr. 20, 1998)). A complainant need not “prove that [his or her] protected activity was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action,” but merely that the protected activity “tends to affect in any way the outcome of the [personnel] decision.” *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013). An employer’s showing of legitimate, non-retaliatory reasons for taking an adverse action against a complainant may not be weighed at this first stage. *Powers*, ARB No. 10-034, ALJ No. 2010-FRS-030, slip op. at 14. However, the employer’s evidence rebutting the complainant’s evidence of causation may be considered. *See Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051, slip op. at 22 (ARB Oct. 9, 2014).

Once the complainant has shown by a preponderance of the evidence that protected activity was a contributing factor in the adverse action, the employer can avoid liability if it shows by clear and convincing evidence that it “would have taken the same unfavorable personnel action in the absence of [the protected acts].” *Powers*, ARB No. 10-034, ALJ No. 2010-FRS-030, slip op. at 27 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv)) (brackets in original). The clear and convincing standard is a higher burden than a preponderance of the evidence, and the employer must conclusively demonstrate “that the thing to be proved is highly probable or reasonably certain.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, slip op. at 8 (ARB Feb. 29, 2012). The decision-maker’s knowledge of the protected activity and animus toward the complainant are factors at this stage, though those factors need not be determinative. *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25, slip op. at 3 n. 7 (ARB Apr. 30, 2013).

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<sup>5</sup> Complainant contends that her March 28, 2012, timesheet was altered to charge her sick leave even though she worked that day. She did not list this as an adverse action in her initial complaint and was informed that it would not be an issue addressed at the hearing. *See* Section I, *supra*. However, evidence was presented relating to the issue, and Complainant mentioned the timesheet issue in her closing argument. TR at 105. During its closing argument, Respondent correctly noted the issue was not properly before me. TR at 112-13. Even if the contentions related to Complainant’s timesheet had been included in this hearing, and assuming for sake of argument that it would have amounted to an adverse action, I would have found that Complainant has not shown that her protected activity was a contributing factor in any adverse action related to her March 28 timesheet.

Even if Complainant had shown that she was subject to an adverse action, she has not met her burden of proving causation. Complainant alleges that she was denied a dispatch because she filed a complaint with OSHA. As is not unusual in whistleblower cases, Complainant offers no direct evidence of retaliation and her argument is based on circumstantial evidence, which may constitute a preponderance of the evidence at this stage. *Fordham*, ARB No. 12-061, ALJ No. 2010-SOX-051, slip op. at 20. Therefore, I must determine whether the circumstantial evidence offered by Complainant is sufficient to meet her burden.

Complainant argued that Respondent was aware that she had engaged in protected activity “from the beginning,” by which I understand her to mean from the time she lodged her complaint with OSHA on March 30, 2012, and that her timesheet for March 28, 2012, was altered because she requested a respirator. TR at 42, 104; RX A at 1. Complainant engaged in protected activity when she filed a complaint with OSHA on March 30, which was forwarded to AKOSH, and when she filed a complaint with the U.S. Coast Guard at some time prior to July 12, 2012. F.F. ¶¶ 8-9. The time sheet which Complainant alleges was altered by Mr. Roldan was sent to payroll processing on April 2, 2012. F.F. ¶¶ 7, 19. The dates on which Complainant alleged she suffered adverse actions were April 8 and 15, 2012. F.F. ¶¶ 11, 13; Section I, *supra*. There is no evidence that Complainant disclosed to Respondent that she had filed complaints with AKOSH, OSHA, or the U.S. Coast Guard. There is also no evidence that demonstrates when Respondent was notified of the complaints filed with OSHA or AKOSH, but the U.S. Coast Guard sent Respondent a letter notifying it of an investigation on July 12, 2012. F.F. ¶ 10. No evidence established that Complainant’s reports to OSHA, AKOSH, or the U.S. Coast Guard of unsafe working conditions were ever discussed with her by Respondent.

Other than Complainant’s unsupported assertion that Respondent was aware that she had engaged in protected activity, the only argument that her protected activity was a contributing factor in any adverse action which can reasonably be extrapolated from Complainant’s evidence is the temporal proximity of the alleged adverse actions to her first complaint to OSHA on March 30, 2012. *See* F.F. ¶¶ 8, 11, 13 19. The complaint filed on March 30 was anonymous, however, and there is no evidence, direct, circumstantial, or by inference, that the complaint was forwarded to Respondent before Mr. Roldan submitted Complainant’s time sheet on April 2, or before Complainant attempted to work on April 8 and 15. F.F. ¶ 8, 13. Complainant filed her next complaint with OSHA on April 22, 2012, which only referenced a contact at an unspecified date and time between Complainant and the U.S. Coast Guard. F.F. ¶ 9. There is similarly no evidence that Respondent knew of any contact between Complainant and the U.S. Coast Guard.

For Complainant’s reports to OSHA or AKOSH to have been contributing factors in any adverse action, her anonymous March 30 complaint would have to have been communicated to Respondent and attributed to her within a matter of days. I find this highly unlikely and further find there is no evidence that it occurred. Similarly, the complaint to the U.S. Coast Guard, which does not appear in the record and for which no date was provided, would need to have been rapidly communicated to Respondent and to the actual crew on the ship in order to be a contributing factor in any of the alleged adverse actions. I decline to draw an inference that Respondent had any knowledge of Complainant’s anonymous protected activity within days of their occurrence. There is simply no evidence that this occurred. Thus, had I found an adverse action, I would have further found that Complainant did not establish that Respondent was aware

of any of her protected activities at the time of the alleged adverse actions. I find that Complainant has not shown causation by a preponderance of the evidence.

#### IV. CONCLUSION

I find that Complainant has failed to prove a case of retaliation under the NTSSA. Complainant engaged in protected activity, but did not suffer any adverse action on April 8 or 15. On April 8, Complainant was not scheduled to work, and on April 15 she left the M/V *Columbia* because she was sick and was not denied any dispatch. Furthermore, even if Complainant had been subject to adverse actions on April 8 or 15, or if Respondent improperly altered Complainant's time sheet to charge her sick leave on March 28, Complainant has not demonstrated by a preponderance of the evidence that any protected action was a contributing factor in any of the decisions made by Respondent on April 2, April 8, and April 15.

For the foregoing reasons, Complainant's request for relief under the NTSSA is denied.

SO ORDERED.

RICHARD M. CLARK  
Administrative Law Judge

*San Francisco, California*

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).