U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 13 August 2018

CASE NO: 2017-NTS-2

In the Matter of:

J. MICHAEL CLARA

Complainant

v.

UTAH TRANSIT AUTHORITY,

Respondent

APPEARANCES:

AUSTIN B. EGAN, ESQ.

For The Complainant

CHARLES A. STORMONT, ESQ.

For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This case arises under the National Transit Systems Security Act of 2007, 6 U.S.C. § 1142 ("the NTSSA") and the regulations promulgated thereunder at 29 C.F.R. Part 1982. The NTSSA prohibits covered employers from discharging or otherwise discriminating against an employee who has engaged in protected activity pertaining to public transportation safety or security, or the employee is perceived to have engaged in or is about to engage in protected activity. 29 C.F.R. § 1982.100(a). The instant case was brought by J. Michael Clara ("Complainant") against the Utah Transit Authority ("Respondent" or "UTA").

I. PROCEDURAL HISTORY

On December 7, 2015, pursuant to the NTSSA, Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA"), alleging that on November 20, 2015, Respondent terminated his employment in retaliation for reporting public transportation safety concerns to management.[1] (JX-37, p. 8).

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The "Secretary's Findings" were issued on January 3, 2017. OSHA determined Complainant engaged in protected activity and Complainant was subjected to adverse employment action. However, it was determined there was no evidence of Respondent's animus or disparate treatment, that Respondent followed its job abandonment policy when it terminated Complainant, and therefore, there was no evidence that Complainant's protected activity was a contributing factor in Respondent's decision to terminate Complainant's employment. Consequently, OSHA determined the evidence developed during the investigation did not support a finding of a violation pursuant to 6 U.S.C. § 1142. (ALJX-1).

On January 25, 2017, Complainant filed his objections to the Secretary's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ"). (ALJX-2; JX-37, p. 8).

On February 17, 2017, the undersigned issued a Notice of Hearing and Pre-Hearing Order, notifying the parties that the formal hearing would be conducted on September 20, 2017, in Salt Lake City, Utah. (ALJX-3).

A de novo hearing was held in Salt Lake City, Utah from September 20-23, 2017. The parties proffered joint exhibits 1-37, Complainant offered 22 exhibits and Respondent proffered 32 exhibits, which were admitted into evidence, along with six administrative law judge exhibits.[2] (Tr. 7-8, 691). On January

---

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Joint Exhibits: JX-___; Complainant's Exhibits: CX-___; Respondent's Exhibits: RX-___; and Administrative Law Judge Exhibits: ALJX-___.

[2] Complainant's Exhibits consist of Exhibits 3, 6, 7, 8, 10, 11, 13, 18, 21, 23, 25, 34, 42, 56, 58 (pages 5, 7, 10, 16, 17, 22, 25, 29, 33, 37, 43, and 44-46), 59, 61, 63, 64, 66, 68, and 69.
Respondent's Exhibits consist of Exhibits 20, 22, 24, 28, 29, 35, 44 (page 26), 46, 48, 54, 55, 62, 65-67, 69, 71, 72, 76-78, 83, 86, 87, 89, 90, 97-100, and 104. The administrative law judge exhibits consist of the Closing

19, 2018, the parties submitted post-hearing briefs. This decision is based upon a full consideration of the entire record.

II. UNDISPUTED FACTS[3]

At the commencement of the hearing, the parties stipulated, and I find:

1. At all times material, Complainant was an "employee" within the meaning of 6 U.S.C. § 1142.

2. At all times material, Respondent is a "public transportation agency" within the meaning of 6 U.S.C. §§ 1142 and 1131(5).

3. In fall 2015, UTA was in the construction phase of its efforts to improve public bus stops along the 200 South corridor in Salt Lake City, Utah.

4. For bus stops along the 200 South corridor, UTA incurred approximately $302,914.00 in costs to design and install amenities as part of its improvement process from 2014 to 2016.

5. In October 2015, Complainant got into a dispute with Jacob Splan, a UTA Engineering Construction Planner III, (who was one of his peers in another UTA department) because Mr. Splan was not following UTA's bus stop amenity installation policy.

6. Complainant served as a service plan deployment specialist from 2005, until he was terminated in 2015.

7. Complainant's job duties as a service plan deployment specialist included various safety related matters.

Letter from the Secretary, as well as the Secretary's Findings and a copy of Complainant's complaint (ALJX-1); Complainant's objections to the Secretary's Findings (ALJX-2); the February 17, 2017 Notice of Hearing and Pre-Hearing Order (ALJX-3); Complainant's Formal Complaint dated March 23, 2017 (ALJX-4); Respondent's Answers and Defenses to Complainant's Complaint (ALJX-5); and the September 6, 2017 Notice Stating Location of Hearing. (ALJX-6; Tr. 7).

[3] In the instant case, the parties stipulated to 82 facts that require no proof. (JX-37, pp. 8-16). Nevertheless, for purposes of judicial efficiency the undersigned will refer to the majority of the stipulated facts only when necessary in the Decision and Order that follows.

8. On October 26, 2015, Complainant sent an email to Mr. Chesnut, his supervisor, stating "If you have no objection, I am going to take vacation starting tomorrow, for two weeks . . . I will be [sic] by phone and will come in the day that we make the switch at Meadowbrook Trax Station."

9. Mr. Chesnut responded to this email, stating "Ok."

10. The following day, Tuesday, October 27, 2015, Complainant sent an email to several members of his department stating "I am on vacation until November 11. Colton Christensen will be taking my calls. I plan to come in one or two days if needed to take care of unfinished projects that have already started."

11. Complainant also sent an out of office notification on his email that stated "I am out of the office and will not return until November 11, 2015."

12. Complainant performed some of his work duties for UTA from October 27, 2015 to November 1, 2015.[4]

13. Complainant performed no work for UTA from November 2, 2015 to November 20, 2015.

14. On November 16, 2015, Mr. Chesnut and Complainant spoke by telephone.

15. By letter dated November 20, 2015, Mr. Chesnut notified Complainant that his employment had been terminated "effective November 11, 2015."

16. According to Complainant's pay stub for the pay period ending November 7, 2015, Complainant was paid for 80

[4] Although the parties stipulated Complainant performed "some" of his work duties from October 27, 2015 to November 1, 2015, the parties dispute the extent of the work duties performed, with Complainant contending he performed a full week's worth of work. See (JX-37, p. 3 n. 1). Complainant also contends that during this time period he worked 50 to 60 hours, including weekend days. On the other hand, Respondent argues this issue is irrelevant because Complainant failed to obtain permission from his supervisor to extend his vacation beyond November 10, 2015 until November 16, 2015. Alternatively, Respondent contends Complainant failed to complete a time sheet for the week of October 27, 2015 through November 1, 2015, so Respondent is unable to determine how much time Complainant worked. (JX-37, p. 11 n. 2).

hours of vacation time and was not paid for any work he performed.

17. At all times material, UTA had in place Corporate Policy No. 6.5.3 entitled "Separation of Employment."

18. At all times material, UTA had in place Corporate Policy 4.3.5 entitled "Responding to Employees Safety Complaints and Concerns."

19. Complainant was unemployed following the date of his termination by UTA until December 12, 2016.[5]

III. FACTUAL FINDINGS

A. Testimonial Evidence

Complainant

Complainant testified at the formal hearing that he attended high school, and thereafter attended the University of Texas in Austin, Texas, but he did not finish his education before going into law enforcement. (Tr. 35). For approximately four to five years he worked at Robinette Academy, training with law enforcement agencies. He also worked in Austin and Maynard, Texas, and in Travis County as a park ranger, paramedic, and police officer. He worked as a police officer for a total of six to seven years. His training for law enforcement included a peace officer training course. (Tr. 36).

Following his career in law enforcement, Complainant began working for Respondent where he initially worked as a bus driver for two years. (Tr. 36-37). He obtained his commercial driver's license to drive buses, and he drove buses in Salt Lake City County. (Tr. 37). Complainant applied for other positions with the UTA and began working in the Planning Department as a "Planner Tech," testing bus routes for the planners who planned bus routes. He worked as a planner tech for a couple of years. (Tr. 38). He transitioned from working as a Planner Tech to a "Planner 5," and in 2005, he began working as a "Service Plan Deployment Specialist." (Tr. 38-39). Complainant testified November 20, 2015, was his final day of employment with UTA. (Tr. 39; JX-3). Complainant confirmed that JX-3 accurately described his duties as a Service Plan Development Specialist which required him to drive a motorized vehicle 75 percent of

[5] The parties dispute the effective date of Complainant's termination. (JX-37, p. 13 n. 3).

his time on the job, and he worked in Salt Lake, Davis, Tooele and Weaver Counties. (Tr. 40; JX-3, pp. 3-4). Complainant confirmed UTA provided him with a work vehicle, and that he performed his duties inside and outside in varying temperatures. Complainant described his job duties as a "go-between or the conduit between the Operations Department and the Planning Department." Complainant stated he tested new bus routes the Planning Department wanted to implement to ensure the routes worked from an operational perspective. (Tr. 41). Complainant also ensured bus stops were operationally safe, and he assisted with emergency management, helping create policies and operational procedures between buses and trains during emergencies. (Tr. 41-42).

Complainant's immediate supervisor at UTA was Chris Chesnut. (Tr. 42). Complainant confirmed that between 2013 and 2015, UTA's headquarters were located at 200 South and 600 West, Salt Lake City. Complainant did not speak with Mr. Chesnut every working day, nor did he speak with him every work week. (Tr. 43). Complainant testified sometimes he spoke with Mr. Chesnut daily, once per week, and on occasion just once or twice per month. (Tr. 43-44). Complainant confirmed he had a work email address while employed by Respondent. Complainant identified JX-4 as a "Planning Department Organizational Chart" dated January 12, 2016, listing the Chief Planning Officer as Matt Sibul. Complainant testified Matt Sibul was Mr. Chesnut's supervisor. (Tr. 44).

Prior to 2014, Complainant was told how to access UTA's corporate policies which were located on their "intranet," an in-house UTA computer network. (Tr. 44). However, there were times Complainant did not have access to the "intranet" network because the system was down or his credentials had to be updated. UTA had an IT Department, but Complainant often worked at night or on weekends when the IT Department was not available. (Tr. 45).

Complainant confirmed JX-37 contains UTA's policy OPO 1.2, which addresses UTA's standard operating procedure for installation, removal, modification, and relocation of bus stops and amenities, while Complainant was employed with Respondent. (Tr. 45-46). As part of Complainant's duties, he performed bus stop site visits for the purpose of removing, installing, or relocating bus stops, as well as determining the safety aspects of the same. (Tr. 46). Sometimes the site visits would require Complainant to take photographs and complete electronic work orders in UTA's "Bus Stop Management System ("BSM")." (Tr. 46-

47). Complainant explained the BSM had several drop down windows that he used to complete information for a work order, and thereafter, the work order was sent to UTA's Facilities Department. Complainant's supervisors, planners, or UTA's Customer Service Department notified him as to what bus stop sites he needed to inspect. Complainant did not complete work orders when he inspected sites for potential bus stops. (Tr. 47).

Complainant identified CX-3 as a copy of UTA's policy OPO 1.2. Complainant confirmed he had read and was familiar with OPO 1.2 while working for UTA. The OPO 1.2 contained measurements that Complainant was also familiar with, including those relating to Americans with Disabilities Act ("ADA") compliance. (Tr. 48). Complainant explained some of the measurements were related to the bus pad (an area at which the bus would deploy trams so passengers could board and disembark the bus), and bus shelters (a covered area protecting passengers from outside elements).[6] (Tr. 49).

Complainant identified JX-22 as documentation of a merit increase he received in March 2015, that was based upon his 2014 job performance. Following his evaluation, Mr. Chesnut informed Complainant of his merit increase. (Tr. 50). Complainant recalled that his job performance evaluations were performed annually, were in writing, and listed areas of work performance in need of improvement. However, Complainant did not recall Mr. Chesnut indicating that he needed to improve in any area of his job duties during the 2015 evaluation. (Tr. 51). Complainant confirmed he voted in the 2015 election held in Salt Lake City, Utah, and that he was familiar with "Proposition 1" before he cast his ballot.[7] (Tr. 52).

As a Service Plan Development Specialist, Complainant conducted site visits at bus stops in downtown Salt Lake City, Utah. (Tr. 52). Complainant explained that Salt Lake City is arranged according to a grid system. (Tr. 53). He testified that he is familiar with the 200 South corridor section of Salt Lake City which spans approximately 10 city blocks, and that he has driven, parked, and used public transportation along the 200

[6] Complainant's Exhibit 3 was offered and received into evidence without objection. (Tr. 50).

[7] The parties stipulated that "Proposition 1" referred to the Utah House Bill 362 entitled "Transportation Infrastructure Spending" that included a county level ballot option, allowing voters to approve or reject an increase in sales tax to fund public transportation." Proposition 1 did not pass in Salt Lake City County following the November 2015 election. (Tr. 51; JX-37, p. 16, Stipulated Fact No. 76).

South corridor. (Tr. 53-54). In fall 2015, Complainant was assigned to approve UTA bus stops that were under construction as part of Respondent's efforts to improve public bus stops along the 200 South corridor. (Tr. 54). Complainant identified CX-7 as an email dated October 7, 2015, that he sent at 10:44 p.m. to UTA's Facilities Department, asking the department "what was going on in 200 South." (Tr. 54-55). Complainant confirmed his October 7, 2015 email concerned an amenity, that is, a bus shelter that was installed without a work order.[8] (Tr. 55). Complainant explained that he became aware of the issue with the bus shelter after receiving a complaint about the shelter. (Tr. 55-56). He was not aware that this particular bus shelter, as well as other shelters, had been installed. Complainant stated in his October 2015 email that "this seems to be a recurring problem" because a similar situation occurred just one month before where the Facilities Department installed a bus shelter without going through the proper process. Thereafter, Complainant issued work orders to remove various bus shelters because they were not safe in their current locations. (Tr. 56). Complainant recalled that one of the bus shelters near State Street was installed in a location that did not permit people who were walking or in wheelchairs to safely reach the bus shelter at the bus stop in order to board and disembark the bus.[9] (Tr. 56-57).

Complainant confirmed CX-8 was an October 7, 2015 email that he, along with Scott Vederlaus, received from Mr. Splan, who worked in UTA's Capital Development Department, with the subject of the email being "Bus Stop Relocation on 200 South 169 East." Complainant further confirmed he responded to Mr. Splan's email on the same day at 1:49 p.m., stating "Jake, I would not start the relocation process for the bus stop until the city has established [a] no parking zone. Do you have a timetable." (Tr. 58). Complainant explained he sent the email because Mr. Splan had suggested he submit a work order which would have triggered the installation of a new bus stop before the city had created a "no parking zone" for the bus stop area. (Tr. 58-59). Complainant testified the "no parking zone" was important because without it the bus would not be able to park next to the curb due to cars being parked in the area, which would diminish safety for passengers walking in or out of cars

[8] Complainant confirmed that UTA amenities refer to "shelters, benches, trash cans, bike stations, and the kinds of products that go at a bus stop." (Tr. 55; JX-37, p. 14).

[9] Complainant's Exhibit 7 was offered and received into evidence without objection. (Tr. 57).

on the street to board and disembark the bus. Complainant confirmed Mr. Splan responded to his email, and he sent a response email back to Mr. Splan at 7:48 p.m. on October 7, 2015.[10] (Tr. 59).

Complainant testified Mr. Splan was not his supervisor, nor was he ever told he had to follow Mr. Splan's instructions. Complainant explained that the overall issue with the bus stops installed by UTA's Facilities Department, and located at 200 South and 169 East, was the lack of a dedicated area where the bus could stop and allow people to board and disembark the bus. (Tr. 60). Complainant knew UTA did not place proper signage in advance of moving the bus stop because he would have placed it there prior to the Facilities Department installing the bus stop. (Tr. 60-61). Complainant explained that no bus stop amenities should have been installed prior to his issuing a work order. Complainant would only issue a work order after determining the location of a "no parking zone," the bus shelter, and determining whether there was enough room for passengers to board and disembark the bus.[11] (Tr. 61).

Complainant confirmed JX-5, is an email dated October 8, 2015 (at 1:53 a.m.), that he, along with other UTA employees, received from Ginger Westlund, a supervisor in UTA's Passenger Facilities Department. Ms. Westlund stated "Michael, I do not get copies of work orders. I was instructed to get these shelters installed by Jacob and Tom." Complainant testified the email referred to Jacob Splan in UTA's Capital Development Department, and Tom Hare, the manager in UTA's Facilities Department.[12] (Tr. 62). Also contained in JX-5 is an email dated October 8, 2015 (at 2:47 a.m.), that Complainant sent to Mr. Chesnut. Complainant explained that on October 7, 2015, he realized there were a number of installed bus shelters in violation of UTA's OPO 1.2 Policy, and as a result, he sent an email early in the morning because the Facilities Department employees would begin work at 3:00 a.m. to 4:00 a.m., in the morning. It was common practice for Complainant to correspond with the Facilities Department early in the morning. (Tr. 63).

---

[10] It was stipulated by the parties that at the time of the October 7, 2015 email between Complainant, Scott Vederlaus, and Mr. Splan, that Mr. Splan was employed by UTA in its "Capital Development Department and his duties included design and construction oversight for new and modified bus stops." (Tr. 59-60; JX-37, p. 9).

[11] Complainant's Exhibit 8 was offered and received into evidence without objection. (Tr. 61).

[12] Complainant testified Tom Hare is Ginger Westlund's supervisor in UTA's Facilities Department. However, Mr. Hare has since retired from UTA. (Tr. 62; JX-37, p. 9).

In Complainant's email to Mr. Chesnut, he communicated that "Ginger [Westlund] advised me that Jake [Splan] said this [installation of bus shelters] had to get done because of the bond vote." (Tr. 63-64). Complainant explained that "bond vote" referred to "Proposition 1." Complainant testified Ms. Westlund stated that due to the "bond vote" UTA wanted to get bus shelters done to showcase the shelters to the public before they voted. (Tr. 65).

In his email to Mr. Chesnut (JX-5), Complainant provided Ms. Westlund's explanation to Mr. Chesnut, stating her explanation did not make sense, and that the location of one of the shelters (along the 200 South corridor) was placed where a taco stand stood and was in violation of UTA's safety policy. (Tr. 67). Complainant testified he was concerned about the proximity of the taco stand to the bus stop because a couple of years earlier a bus hit the taco stand and injured people. Complainant worked with Salt Lake City and the owner of the taco stand to outline a safe area for the taco stand and allow for safe operation of the buses. Consequently, Complainant stated the new location of the bus shelters would create safety problems again between the bus stop and the taco stand. (Tr. 68). He further stated the bus stop and/or shelter had a six percent slope toward the street which is why he never approved of UTA placing anything in the area because the ADA standard does not allow for a slope to exceed a two percent slope. Finally, Complainant noted in his email that it appeared there were numerous other shelters that were not documented in the BSM, which he determined by seeing no documentation coincided with the installation of such shelters. (Tr. 69). Complainant believed these unapproved shelters along the 200 South corridor were not safe. (Tr. 69-70).

Complainant recalled that Mr. Chesnut responded by phone and email to his concerns regarding the bus shelters. Complainant stated Mr. Chesnut did not know why bus shelters may have been installed without going through proper procedure. Complainant did not understand how the "bond vote" would have compelled UTA to install unsafe bus shelters. Complainant testified that he, along with Mr. Chesnut, assumed the Facilities Department would rectify the situation by responding to Complainant's work orders. (Tr. 70).

Complainant identified CX-11 as an email sent to him by Mr. Splan on October 7, 2015, at 11:26 p.m., asking Complainant to put in a work order for relocation of a bus stop. Complainant replied stating he could start the relocation process once the

city established the no parking zone for the new bus stop location, and he requested that Mr. Splan let him know when the process was started. Complainant could not recall the specific location of the bus stop referred to in Mr. Splan's email, but he believed it could be the "700 East or 800 East" location on the 200 South corridor. (Tr. 71). Complainant further communicated to Mr. Splan that UTA was under a federal mandate to install amenities that were ADA compliant, and that he "would not have installed the amenities until the [bus] stop was ready to be activated." (Tr. 72). Complainant explained the ADA calls for, at the minimum, a 5 foot x 3 foot pad going out from the bus entrance and exit. Complainant testified he would receive calls from the UTA Legal Department to go over the ADA standards and to ensure he was properly applying the standards. (Tr. 73).

Complainant explained that prior to a bus stop being installed he inspects the location and ensures it meets UTA safety guidelines and ADA guidelines. After inspecting the site, Complainant issues work orders for the bus stop and shelter at the same time. (Tr. 74). However, Complainant testified that with the amenities being installed improperly it created a safety hazard because people see the amenities, but the bus stop signs were not located by the amenities causing people to run out into the street to flag down buses. (Tr. 74-75). Complainant averred pedestrians had been injured and killed trying to flag down buses. Complainant confirmed Mr. Splan emailed him October 7, 2015, at 8:08 p.m., stating "[y]ou'd better move the signs then ASAP, all the stops recently completely [sic] meet the guidelines you state below." Complainant responded to Mr. Splan stating "[t]he bus cannot access the stop with vehicles parked in the bus zone. As I already stated, I will activate the new stops once the no parking zones are in place." (Tr. 75).

Mr. Splan continued emailing Complainant on the evening of October 7, 2015, at 8:17 p.m., stating "[t]hese stops already exist without no [sic] parking zones, that has not seemed to bother you up to this point." Complainant responded to Mr. Splan stating, "[n]o amount of badgering on your part will change the criteria for the application of those standards." (Tr. 76). Complainant believed Mr. Splan was badgering him because Mr. Splan was insisting that Complainant activate bus stops, despite Complainant explaining why the bus stops were unsafe. (Tr. 77). Complainant and Mr. Splan continued to send emails, but Mr. Splan concluded in saying "[d]o not worry, I will work with someone else to get improvements completed."

(Tr. 77-78). Complainant found Mr. Splan's statements odd because Mr. Splan had already bypassed Complainant approving the bus stop sites, and UTA's Facilities Department already began installing bus stop shelters. (Tr. 78-79). Complainant included Mr. Joey Alsop in the email correspondence because Mr. Alsop worked in UTA's Planning Department with Complainant, and Complainant thought Mr. Splan may contact Mr. Alsop to complete the bus stop sites.[13] (Tr. 79).

Complainant confirmed JX-6 is an email that he sent to Mr. Chesnut on October 11, 2015, expressing concern about the placement of a "white line" that corresponds with the GPS of a new bus stop because it was not ordered by UTA's Planning Department, and as a result, the new bus stop was not placed in UTA's BSM system. (Tr. 80). According to Complainant, only the Planning Department would determine the placement of the "white line," and therefore if the new bus stop was not properly entered into the BSM system by the Planning Department, passengers could not use their mobile devices to locate bus stops using GPS. (Tr. 80-81). At the time, Complainant was also concerned about other UTA Departments bypassing proper procedure and creating additional safety issues. (Tr. 81).

Complainant identified CX-13 as an email he sent on October 11, 2015, at 10:21 p.m., to "Customer Concerns," along with a carbon copy sent to Mr. Chesnut and Mr. Alsop. (Tr. 81). Complainant's email concerned "a stop closure at 120 East and 200 South" along the 200 South corridor, and he attached a work order to remove a bus shelter at the identified bus stop. (Tr. 81-82). Complainant noted in his email that "[i]f the Facilities [Department] can remove the shelter before the a.m. peak, then we will reactivate the stop, if not, it will remain closed until the situation can be rectified and made safe for the operations of the bus." Complainant testified the bus shelter at 120 East and 200 South is one that should have been relocated, but it was not relocated. Complainant stated UTA's Operations Department notified him that a bus had an accident at the location when it hit a pole and closed the bus stop. (Tr. 82). His October 11, 2015 email referred to relocating the bus stop due to safety issues. (Tr. 82-83). A "supervisor" informed Complainant about what caused the bus accident, and Complainant examined the bus shelter where the accident took place. Complainant determined the bus hit a pole because the new bus shelter caused the bus to stop short of the bus stop in a place the bus would not normally stop. (Tr. 83).

[13] Complainant's Exhibit 11 was offered and received into evidence without objection. (Tr. 79).

On October 12, 2015, Complainant received an email from Colton Christensen, a new planner in UTA's Planning Department. (Tr. 83). Complainant responded to Mr. Christensen's email on the same day explaining that the Google picture of the bus shelter and benches was not an accurate depiction of the current shelter, as Complainant was physically at the bus shelter where the benches and shelter were blocking the wheelchair path. (Tr. 83-84). Complainant informed Mr. Christensen that "[p]rior to a planner submitting a work order, the location is checked for safety, ADA compliance, et cetera, as well as being documented in the BSM." (Tr. 84). Mr. Splan joined the email communication and stated the "shelter was installed exactly where the previous shelter was located. Those trash cans have been installed in the ADA zone for years illegally." (Tr. 85). Nevertheless, Complainant disagreed with Mr. Splan because the new bus shelter was not simply placed in the location of the old bus shelter, which caused the bus driver to stop short to accommodate a wheelchair-bound passenger. (Tr. 85-86). Complainant stated if Mr. Splan's assertion, that the new bus shelter had been installed in the same area and blocked the ADA zone for years, it would have created safety issues and an accident prior to the incident at issue.[14] (Tr. 86).

Complainant confirmed JX-7 is an email he sent to Mr. Chesnut dated October 13, 2015, where Complainant discussed the issue of bus stop at 200 South and State Street, the site where the bus accident occurred. (Tr. 87). In his email, Complainant referred to the operator who hit the "biplane" sign, a zone to deploy a bus handicap ramp, and a 16 foot shelter that Complainant measured and determined was installed in violation of UTA safety standards. (Tr. 87-88). Complainant explained he measured distances between the bus shelter, trash can, and recycle bin when he determined the shelter was not installed properly, and thereafter, he issued a work order to have the bus shelter removed or relocated because it did not allow for bus passengers to safely board and disembark the bus. (Tr. 88). Mr. Chesnut responded to Complainant's email, stating he set up a meeting with Tom Hare, the manager of UTA's Facilities Department, and Grey Turner, Mr. Splan's supervisor in UTA's Capital Development Department. (Tr. 88-89). Mr. Chesnut included a "collusion diagram," and asked Complainant the identity of the supervisor on the scene of the bus accident. Mr. Chesnut also asked for a copy of the "green sheet," which Complainant described as an accident report containing the name

[14] Complainant's Exhibit 13 was offered and received into evidence without objection. (Tr. 86).

of the bus driver and the circumstances surrounding the accident. (Tr. 89). Complainant responded to Mr. Chesnut, stating he did not see the situation as a "collusion problem," and "it did not matter." (Tr. 89-90). Complainant explained he was trying to communicate to Mr. Chesnut that it was not just a "process" issue, but it was a "safety" issue. (Tr. 90-91). Complainant was frustrated because other UTA employees were so intent on installing bus shelters, and in doing so, it was at the expense of passenger safety. (Tr. 91).

Complainant identified JX-8 as an email he sent to Mr. Splan on October 13, 2015, about "Declined 200 South amenities markup." Complainant recalled that he met with Mr. Splan regarding bus stop upgrades. (Tr. 91).

Complainant confirmed CX-18 contains an email from Mr. Chesnut to Complainant, Mr. Splan, Mr. Aslop, and Mr. Christensen regarding the "bus stop state at 1602 South, SLCC Campus." Mr. Chesnut asked for Complainant's reply about the matter. Complainant responded, stating that "no parking zones" were needed. (Tr. 92). Mr. Splan replied to the email on October 15, 2015, "[y]ou received those work orders in August, not two weeks ago, as a matter of real facts." (Tr. 92-93). Complainant responded to Mr. Splan and copied his response to Mr. Toby Alires, who was the manager in the UTA's Civil Rights Compliance Department, and was responsible for conducting investigations of ADA violations. (Tr. 93). Complainant had spoken with Mr. Alires about the safety issues at the bus stops and the improper installation of the bus stops in violation of ADA standards. (Tr. 93-94). According to Complainant, Mr. Alires requested to have documentation of the ADA issues in writing, and as a result, Complainant copied Mr. Alires regarding the email. Complainant was not under the impression that the installation issues along the 200 South corridor were resolved.[15] (Tr. 94).

Complainant identified CX-59 as a text message from his UTA issued phone dated October 15, 2015, between himself and Mr. Chesnut. (Tr. 95). That afternoon, Complainant texted Mr. Chesnut in order to meet with him and talk about the meeting Mr. Chesnut had with Jake Splan, Tom Hare, and Grey Turner. (Tr. 95-96). Complainant picked up Mr. Chesnut in his car, and Mr. Chesnut conveyed to Complainant that the meeting involved a discussion about the bus stop issues on the 200 South corridor, and that the other men wanted Mr. Chesnut to terminate

[15] Complainant's Exhibit 18 was offered and received into evidence without objection. (Tr. 94).

Complainant. Mr. Chesnut further stated to Complainant that they discussed budgets, and moving Complainant's position into "Steve Meyer's department," with Mr. Splan taking over Complainant's responsibilities. Complainant did not recall Mr. Chesnut stating that there was a discussion about Complainant notifying the UTA Civil Rights Department, but Mr. Chesnut did email Complainant stating he should not have done so.[16] (Tr. 96).

Complainant acknowledged that JX-11 is an email from Mr. Chesnut to several recipients, including Complainant, about bus shelters being installed and removed along the 200 South corridor. (Tr. 98). Mr. Chesnut stated that "work orders to install and remove amenities along 200 South should not be completed for the time being and the sites along 200 South will be visited that day." On October 16, 2015, Mr. Chesnut sent another email to Complainant and other recipients about Joey Alsop from the Planning Department and Mr. Splan from the Capital Development Department completing a site visit. Mr. Chesnut further stated Complainant would complete work orders for the bus stops visited by Mr. Alsop and Mr. Splan. (Tr. 99). On the same day, at 3:23 p.m., Complainant replied via email and referred to several work orders he issued, and discussed removing safety hazards like bolts remaining in the pavers on the ground and holes in the area that may cause people to trip and fall. (Tr. 99-100).

Complainant acknowledged JX-12 contains emails from Mr. Sibul dated October 18, 2015, and an email from Ginger Westlund dated October 19, 2015. (Tr. 100). Ms. Westlund had emailed Mr. Sibul that there were work order numbers in the system "stuck" under Complainant's name with no information about the work orders, except to add a bus shelter, trash can, and bench. (Tr. 100-01). Mr. Chesnut responded to Ms. Westlund's email, stating "[t}he holdup on the remaining shelters are the no parking zones." (Tr. 101). Complainant responded to Mr. Chesnut, but limited his response only to Mr. Chesnut and Mr. Alsop because he wanted to rectify the situation. (Tr. 102).

Complainant acknowledged CX-23 contains a photograph showing the bus stop on 200 South and State Street, which shows the new bus stop and shelter with a bus stop sign just to the

[16] Complainant's recollection of the text messages contained in CX-59, was offered to lay a foundation for the meeting between Mr. Chesnut and Complainant. (Tr. 97). Complainant's Exhibit 59 was offered and received into evidence without objection. (Tr. 98).

right of a fire hydrant. (Tr. 102-03). Complainant explained that normally a bus would come up to the bus stop and be even with the bus stop sign. However, due to the improper installation of the shelter the bus could not stop there because passengers could not board or disembark the bus, nor could wheelchair passengers get on and off the bus. (Tr. 103).

Complainant also identified an October 20, 2015 email in CX-23 from Mr. Splan to Mr. Chesnut and Complainant about "200 South at 120 East," stating [t]he trash cans being removed from the ADA loading zone, and can we please verify the stop meets all requirements and reactivate it?" Complainant responded to Mr. Splan in an email, stating "[i]t meets ADA, but Ops still thinks the shelter should be moved six feet to the west. I told them I have a work order that is still pending." (Tr. 103). On the same day, Mr. Chesnut responded by stating "I have not heard of any holdups," but it could be "staffing and time." Complainant testified he did not know how the bus shelter he referred to in his email was installed twice without his creating a work order. Complainant explained that he suggested the west side of the bus shelter be used as a landing pad for passengers to board the bus and disembark because the UTA Facilities Department would not relocate the shelter. Consequently, Complainant requested the city remove the recycle bin and trash can to create the additional space needed due to the shelter remaining in the same location. (Tr. 104). Complainant also stated "we still need the shelter move to the west to close the gap, so that all buses can only load and alight passengers at the front of the zone." (Tr. 105). He explained that it was important to move the shelter because it would allow the buses to stop at the front of the loading zone and the passengers could safely board the bus and disembark.[17] (Tr. 105-06).

Complainant identified CX-25 as an email dated October 21, 2015, that he sent to Mr. Alires, manager of the Civil Rights Compliance, Ruth Hendricks, a Title VI Compliance Officer, and Mr. Chesnut. The email concerned "[a] forward reading 200 South at 120 East" with an attachment of the "OPO 1.2 Bus Stop Amenities." (Tr. 106). Complainant wrote that he was the transit planner who was assigned to work on the bus stops, and that he would generate work orders according to the UTA policy. Complainant stated Mr. Splan had been tasked with making bus stop improvements, but that Complainant reviewed each site to ensure it meets UTA safety and ADA guidelines. In his email,

[17] Complainant's Exhibit 23 was offered and received into evidence without objection. (Tr. 106).

Complainant also acknowledged that he did not activate three bus sites because the city had not yet installed "no parking zones." (Tr. 107). Complainant testified that he sent this email in response to Ms. Westlund's email which stated Complainant was creating a hostile work environment because he was asking Ms. Westlund questions about work orders. Complainant copied Mr. Chesnut when he sent the email because Mr. Chesnut had communicated to Complainant that "these guys in the other department wanted [him] fired." Complainant was concerned that he was "being set up to be fired."[18] (Tr. 108).

Complainant confirmed he took the photographs contained in CX-56, showing the white bus sign that was crooked and facing vehicles traveling eastbound due to the bus hitting the sign. Complainant was sending the photographs as part of an email he was sending to Customer Service, letting them know why he was closing the bus stop. (Tr. 110). The photographs also showed the "white line" that was incorrectly placed on the pavement by someone other than UTA's Planning Department. Complainant took the photographs at either "200 East or 300 East" in Salt Lake City on the north side of street.[19] (Tr. 111). Complainant stated that to this day a "no parking zone" was never established in the area where the bus hit the bus stop sign. (Tr. 112). Complainant took the photographs within 72 hours of each other and sent them to UTA's Customer Service Department on October 11, 2015. (Tr. 113). In the second to last photograph in CX-56, Complainant stated it depicted either 200 East or 300 East in Salt Lake City, where buses would travel westbound. Complainant acknowledged the photograph shows a "no parking" sign, but there were parking meters that allowed people to park to the right of the "no parking" sign. Complainant stated the area where the cars parked impeded the bus from pulling up to the curb for passengers to board and disembark the bus.[20] (Tr. 115). Complainant described the last photograph in CX-56 as the "taco stand bus stop" where the bus shelter was installed, then taken out, and then installed again. Complainant confirmed this bus site was unsafe because of where the bus shelter was placed, which did not allow for safe loading and unloading of passengers. (Tr. 116).

The parties stipulated that "the TRAX is a light rail system that UTA operates within Salt Lake County." (Tr. 116;

---

[18] Complainant's Exhibit 25 was offered and received into evidence. (Tr. 109).

[19] CX-56 contains approximately five pages of photographs. (Tr. 110-11).

[20] Complainant's Exhibit 56 was offered and received into evidence without objection. (Tr. 115-16).

JX-37, p. 14). Further, the parties stipulated "on or about October 2, 2015, a disabled individual was killed after his wheelchair went off the sidewalk at the 4500 South track's crossing. Clara [Complainant] brought this to Chesnut's attention." (Tr. 117; JX-37, p. 16). Complainant testified he never inspected track crossings during his employment with the UTA. Nor did he inspect track crossings outside of his employment with the UTA. Complainant informally looked at the accident that occurred at the track crossings when he worked with Ryan Taylor, a manager over the UTA Accessibility Department. Mr. Taylor asked Complainant to spend one day with him and point out places with the UTA system (including buses and trains) that created obstructions and were unsafe. (Tr. 117). Complainant explained that he examined safety at the bus stops located at the track stations. Complainant testified Mr. Ryan was going to meet with engineers from the cities within the UTA's service area and inform the engineers about what needed to be "fixed." Complainant went with Mr. Ryan to the location where the disabled person was killed by the track crossing and saw there were gaps within the railroad tracks that would cause a wheelchair to become stuck. (Tr. 118).

Following his meeting with Mr. Taylor, Complainant spoke with Mr. Chesnut at the "200 South and 600 West" location, where the frontrunner train travels, and pointed out to Mr. Chesnut there were "gaps" that were too wide based on the ADA standards just as there was at the 4500 South track crossing. (Tr. 119). However, Mr. Chesnut responded by telling Complainant not to bring up the issue with gaps in the tracks because "[e]ither you are in hot water or you have created enough, you know, attention to yourself on these kinds of things, so do not even bring it up." Consequently, Complainant agreed not to say anything. (Tr. 120).

Complainant confirmed that JX-19 contained an October 26, 2015 email he sent to Mr. Chesnut stating he would be "available by phone and will come in the day that we make the switch at Meadowbrook Track Station." (Tr. 120-21). Complainant explained he met with Mr. Chesnut at his office and they discussed Complainant's vacation, but that he would come in to handle the "Meadowbrook switch." Complainant explained that Meadowbrook is a track station that has buses coming in and going out. Complainant was overseeing the rebuilding of "bus bays" and had to inspect the new bus bays to ensure the buses could safely enter and leave the bus bays. (Tr. 121). Complainant was waiting on the building contractor to complete the Meadowbrook project, and he was not sure when it would be

complete, which is why he was going to come back to work during his vacation if necessary. (Tr. 122).

At the time he requested to go on vacation, Complainant was not under the impression that the safety concerns he raised regarding the 200 South corridor had been resolved. Despite the issues not being resolved, Complainant decided to go on vacation because he believed "there was nothing else [he] could do" as he raised safety concerns and could not "force the issue to make things safe." (Tr. 122). Complainant did not begin his vacation on October 27, 2015, rather it began on November 2, 2015, because the "Meadowbrook switch-over" for the bus bays was then complete. (Tr. 124). In addition, there were other issues that arose while Complainant came back to work that he worked on for some UTA planners. (Tr. 125).

Complainant confirmed CX-58 contained a work order that he completed on October 27, 2015, pertaining to the bus stop signs at the Meadowbrook track station. (Tr. 125-26; CX-58, pp. 46-47). Similarly, Complainant confirmed CX-58 contained an October 27, 2015 (10:00 a.m.) email sent to him from Mr. Paul Drake, the manager of the UTA Transit Oriented Development Department, about going over some concerns Mr. Drake had about the work on the Sandy Civic Center construction. Complainant confirmed he worked on the project and that the Sandy Civic Center is in the Salt Lake Valley. (Tr. 126; CX-58, p. 44). Complainant identified other emails contained in CX-58, as an October 27, 2015 email he sent to Colton Christensen, Mr. Alsop, and Mr. Chesnut, as well as two emails dated October 29, 2015, that he sent to Mr. Chesnut and to Ms. Huffman. (Tr. 127; CX-58, pp. 37, 43). Complainant confirmed CX-58 contained additional emails dating from October 27, 2015 through October 30, 2015, that contained work orders and inquiries about work orders with various UTA employees. (Tr. 127-30; CX-58, pp. 5, 7, 10, 17, 22, 25, 29, 33). In general, Complainant stated the emails concerned the Meadowbrook project, and issues in the City of Draper, South Salt Lake City, and in Toole County.[21] (Tr. 130). Complainant estimated that from October 29, 2015 through November 1, 2015, he worked an average of 10 hours per day. (Tr. 132). Complainant planned to work one to two days during his vacation because of the Meadowbrook project, but he worked for longer than expected during his planned vacation. (Tr. 132-33).

[21] Complainant's Exhibit 58, pages 5, 7, 10, 17, 22, 25, 29, 33, 37, 43, 44, and 46 was offered and received into evidence without objection. (Tr. 132).

Complainant identified JX-36 as his calendar that demonstrates his vacation began on November 2, 2015, and ended on November 23, 2015, during which he did not perform any work. On November 16, 2015, Complainant recalled that he spoke with Mr. Chesnut on the telephone. (Tr. 133). Complainant called Mr. Chesnut because he received a call from "Joey" who was looking for Complainant at work. Mr. Chesnut asked Complainant why he was not at work. Complainant reminded Mr. Chesnut that he worked the first week of his planned vacation. Mr. Chesnut recalled Complainant working at that time, and Complainant informed Mr. Chesnut he would be back to work the next Monday. Mr. Chesnut responded by joking with Complainant that he thought Complainant might be "dead" or that the "superintendent of the school district" might have hurt Complainant. Nevertheless, Mr. Chesnut did not tell Complainant that he expected Complainant to return to work on Wednesday, November 18, 2015. (Tr. 134).

On Friday, November 20, 2015, Mr. Chesnut called Complainant and sounded "upset, like he [Mr. Chesnut] was crying." (Tr. 134-35). Mr. Chesnut stated "this is the hardest thing I have ever had to do, and I have to terminate your employment for job abandonment." Complainant asked how he abandoned his job, stating he was coming back on Monday and was still on vacation. Mr. Chesnut told Complainant to "take that up with Matt [Sibul]" who told Mr. Chesnut to terminate Complainant's employment. (Tr. 135). After receiving the phone call, Complainant went to UTA's headquarters (around 4:30 p.m.) to speak with someone in the HR Department about his termination. He spoke with Camille Glenn in the conference room and told her that he worked his first week of vacation and thus, extended his vacation. Ms. Glenn stated Complainant's "manager" was not aware that he worked his first week of vacation, but Complainant informed her that Mr. Chesnut was aware of the situation. (Tr. 136).

Thereafter, Complainant asked Ms. Glenn for a copy of the policy under which he was terminated, as well as an account of how many vacation days he accumulated. Ms. Glenn gave Complainant a post-it note stating he had 30 to 45 days of vacation remaining. Complainant confirmed JX-20 is a letter dated November 20, 2015, stating "[t]his letter is to notify you that your employment is terminated effective November 11, 2015, for job abandonment under UTA Corporate Policy 6.53 Separation of Employment," which was signed by Mr. Chesnut. (Tr. 137).

During his November 20, 2015 conversation with Mr. Chesnut, Complainant did not recall Mr. Chesnut stating Complainant's

termination was effective November 11, 2015. He was also not aware that Mr. Chesnut tried to contact him numerous times, by phone or email, from November 11, 2015 through November 13, 2015. Complainant did not receive any phone calls or emails from Mr. Chesnut during this time period. (Tr. 138). As notified on his termination letter, Complainant appealed the decision to terminate his employment within five days when he sent an email to Matt Sibul (along with sending a copy of the email to Mr. Chesnut) on the evening of November 20, 2015. (Tr. 138-39). Complainant identified JX-20 as an email he sent to Matt Sibul, stating "please accept this email as my letter of appeal." In his email, Complainant apologized for the misunderstanding, stating "my intent was to use vacation days that I have accumulated." (Tr. 139; JX-20). Complainant stated his doctor changed his Attention Deficit Disorder ("ADD") medication which made him "hyper-focused." (Tr. 139-40). Complainant also stated he experienced a loss "of a sense of time" and short-term memory loss due to his medication. However, Complainant averred the ADD medication did not impair his recollection of the November 16, 2015 phone call between him and Mr. Chesnut. (Tr. 140).

Complainant recalled his December 14, 2015 meeting at the UTA's headquarters to discuss his appeal of his termination. Complainant recorded his December 14, 2015 meeting because he was concerned about "unethical behavior and dishonesty that [he] was witnessing," and he wanted to confirm what occurred at the appeal meeting. (Tr. 140). Complainant used a "handheld recording device" during his appeal meeting with Matt Sibul, Camille Glenn, and David Heier. (Tr. 141). Excerpts of the recording of the appeal meeting indicate Complainant communicated to Mr. Sibul that Complainant informed Mr. Chesnut he would come into work for a couple of days during his vacation to take care of some issues, but Complainant worked for longer than expected. (Tr. 142-43; JX-29). Complainant confirmed he worked October 29, 2015, and October 30, 2015, while he was scheduled to be on vacation. Complainant also communicated to Mr. Sibul that he had emails evidencing he was at work because he completed approximately 20 work orders for bus stop movements and other issues. Complainant confirmed that it was his voice on the audio tape. (Tr. 144).

The December 14, 2015 audio recording further reflects when Mr. Sibul asked Complainant whether there was an understanding between Complainant and Mr. Chesnut that Complainant would return a week later than originally planned on the following Monday, November 23, 2015, Complainant confirmed that was the

understanding after they spoke on the telephone on November 16, 2015. Complainant explained to Mr. Sibul that Mr. Chesnut said you are supposed to be back to work, to which Complainant said "well I am coming back on Monday." Mr. Chesnut stated "today is Monday," but Complainant stated "right, I worked the whole first week, so I am taking an extra week." Mr. Chesnut said "okay" and joked around with Complainant on the phone. The next time Complainant heard from Mr. Chesnut was on November 20, 2015. (Tr. 145). Mr. Sibul responded to Complainant, stating Mr. Chesnut recalled their being an agreement that Complainant was going to return to work on Wednesday, November 18, 2015. Complainant responded to Mr. Sibul that he was riding on the bus when Mr. Chesnut called him and that he was not looking at a calendar. (Tr. 146; JX-29).

On November 16, 2015, Complainant did not remember talking to Mr. Chesnut about the "number days (i.e., November 18, 2015 or November 23, 2015)," but instead they discussed "days of the week." Complainant further stated "the 18th is a Friday, there is a possibility I did say the 18th," but Complainant did not recall. Complainant explained he is "handicapped" with the issue of "days" and now looking at the December 2015 calendar, he may have thought the 18th was a Friday. Nevertheless, Complainant specifically talked to Mr. Chesnut about returning the next Monday because Mr. Chesnut stated "today is Monday." (Tr. 147). Complainant recalled Chesnut saying today is Monday because he "thought maybe I got my day wrong today," and Complainant asked himself what is today, but when Mr. Chesnut stated today is Monday, Complainant stated "well, I am coming back next Monday." (Tr. 147-48; JX-29). The audio tape continues with Complainant stating he thought this was a misunderstanding, and he did not understand why Mr. Chesnut did not call him on his personal phone on November 18, 2015, to ask why he was not at work, if in fact, Mr. Chesnut was under the impression Complainant was to return to work. (Tr. 148-49). Complainant stated the next phone call he received was from Mr. Chesnut on November 20, 2015, at 4:00 p.m. or 4:15 p.m., letting him know his employment with Respondent was terminated. Complainant went to UTA headquarters within five minutes of talking with Mr. Chesnut, and he spoke with Ms. Glenn to understand why he was terminated, and why he did not receive any communication that there was a misunderstanding as to when he was to return to work. (Tr. 149). Complainant again confirmed the audio excerpt depicts his comments and voice. (Tr. 150; JX-29).

Complainant identified JX-35 as the December 17, 2015 letter he received from Mr. Sibul, UTA's Chief Planning Officer, stating "Michael, after review of the decision to terminate your employment for job abandonment, under UTA Corporate Policy 6.53 Separation of Employment is upheld." (Tr. 150). Complainant identified JX-23 as his pay stubs. (Tr. 150-51). Complainant did not receive any further wages beyond the pay period ending on November 21, 2015. Complainant confirmed JX-24 was entitled "Total Compensation Statement" which showed his work compensation from August 3, 2014 through August 1, 2015, as being $54,760.46. (Tr. 151). Another column on the Compensation Statement identifies Complainant's benefits as an employee transit pass, with Respondent contributing $2,376.00 as the annual cost for a pass. (Tr. 151-52). Complainant confirmed he received the transit pass while he was employed with Respondent and that he used the pass to ride the bus and trains. (Tr. 152). Complainant also received an annual Christmas gift card for $216.57 from Respondent, retirement contributions in the amount of $1,108.55, and pension funding with Respondent contributing $8,380.35 for the year. Complainant's total UTA Retirement Plan Contributions equaled $9,488.90. Respondent contributed $4,972.00 annually for Complainant's Health and Welfare Plan, which included dental coverage. Complainant's "Government Mandated Benefits" totaled $76,003.21 for the year. (Tr. 153).

Following Complainant's termination, he filed for unemployment benefits with the State of Utah Department of Workforce Services ("DWS"). (Tr. 153-54). However, his application for benefits was not granted. Complainant appealed the denial of benefits, and DWS conducted a telephonic hearing regarding his application. (Tr. 154). Complainant identified CX-50 as the transcript from his February 8, 2016 DWS telephonic hearing. (Tr. 154-55). Complainant, as well as other UTA employees, provided testimony at the DWS hearing. Complainant received benefits from DWS and identified CX-68 as his payment history from DWS. Complainant received approximately $12,000.00 in unemployment benefits from DWS.[22] (Tr. 155).

Complainant identified JX-25 as his "work search history" that he reported to DWS while receiving unemployment benefits. (Tr. 156-57). Complainant first applied for employment on January 5, 2016, when he had to report to DWS. Complainant did not apply for employment while appealing his termination with Respondent because he believed the appeal "would be in his

[22] Complainant's Exhibit 68 was offered and received into evidence without objection. (Tr. 155-56).

favor." (Tr. 157). Through a program with DWS that identified available jobs with a person's work skills and experience, Complainant submitted applications with various companies. (Tr. 157-58). Complainant identified JX-25 as a record of the companies to which he applied and the positions available. (Tr. 158). Complainant also looked on "KSL," a local news website that posted job openings, along with the State of Utah's webpage that listed available jobs. Complainant found employment approximately one year later, in December 2016, at Crossroads Urban Center where he is a community organizer. (Tr. 159). Complainant did not turn down any job offers of employment prior to working at Crossroads Urban Center. Complainant identified CX-69 as his pay stubs from Crossroads Urban Center ("Crossroads") showing he earns $41,000.00 annually. (Tr. 160). Crossroads does contribute to Complainant's health insurance costs, but they do not provide dental insurance benefits. Likewise, Crossroads does not provide 401K or any other deferred compensation contributions, or a public transit pass. (Tr. 161).

Complainant identified CX-64 as the UTA's Pension Benefit Estimate that showed as of December 3, 2015, Complainant's monthly benefits upon retirement would be $1,794.06, and if paid in a lump sum would be $86,618.00. (Tr. 161). Complainant planned on working for Respondent until he retired around age 65, which would be approximately in 2029.[23] (Tr. 162). Complainant confirmed that CX-66 is a withdrawal form showing Complainant withdrew $20,000.00 from his retirement fund and a $5,000.00 withdrawal to pay federal income tax for his retirement fund withdrawal. Complainant withdrew the money to pay for legal fees concerning the present matter.[24] (Tr. 163).

Complainant testified that he experienced stress and depression, and felt powerless after losing his job with Respondent because he believed he lost his job due to dishonesty and unethical behavior by UTA. (Tr. 163-64). Complainant's feelings of stress and depression have been compounded by the financial impact of losing his job (i.e., whether he could afford to stay in his home), going through the DWS process, and the process of the current litigation. When asked whether he was concerned about his future, Complainant stated "absolutely."

---

[23] Complainant's Exhibit 64 was offered and received into evidence without objection. (Tr. 162).

[24] Complainant's Exhibit 66 was offered and received into evidence without objection. (Tr. 163).

He testified it was "unsettling" to lose his job with Respondent. (Tr. 164).

On cross-examination, Complainant confirmed that in 2005, he became a Service Plan Deployment Specialist with UTA. (Tr. 165). In 2013 or 2014, Mr. Chesnut became his supervisor. (Tr. 165-66). Complainant confirmed Mr. Chesnut was a "good boss," he was easy to work with, and treated Complainant fairly during the time he worked at UTA. Mr. Chesnut was Complainant's supervisor at the time of his termination. Complainant confirmed Mr. Alsop was one of his co-workers in UTA's Planning Department. Complainant was not familiar with any "Integrated Service Planning Group" as being part of the Planning Department. (Tr. 166). Complainant examined JX-4, p. 3, which stated Mr. Chesnut was manager of the Integrated Service Planning, but Complainant testified again that this was not a phrase he ever heard while working for Respondent. (Tr. 167). Complainant identified Mr. Alsop as his co-worker in UTA's Planning Department, and that Mr. Alsop treated him fairly and honestly. (Tr. 167-68).

Complainant confirmed JX-7 contained an October 13, 2015 email chain with Mr. Chesnut. In the email chain, Complainant asked Mr. Chesnut "[w]here are we with having a meeting with Tom Hare and Jacob S[plan]?" (Tr. 168). Complainant further stated "I have noted in the past that the truth is not Jake's friend." Complainant confirmed he was referring to Jacob Splan. (Tr. 169). Complainant also confirmed that in JX-5 he referred to the "300 West fiasco and untruths spoken" by Mr. Splan. (Tr. 170).

Complainant is familiar with Grey Turner who is Jacob Splan's supervisor in UTA's Capital Development Department. (Tr. 170-71). Complainant confirmed Tom Hare was the manager in UTA's Facilities Department. Complainant identified JX-7 as an email dated October 13, 2015, that was sent by Mr. Chesnut to Complainant, stating "I see your point, I am bringing the policy to the meeting, as well as the other documentation you are/have provided. My intention is to show that by following the policy then we will achieve quality and safety for UTA customers and operators." (Tr. 171). Complainant stated he did not agree with Mr. Chesnut's response because he "was concerned that [he] was not going to be at the meeting." (Tr. 172).

Complainant confirmed RX-12 contains his September 20, 2017 deposition taken in the present matter. (Tr. 172). Complainant acknowledged Mr. Chesnut had a meeting with Mr. Hare, Mr. Splan,

and Mr. Turner, and that Mr. Chesnut discussed the meeting with Complainant. On October 15, 2015, Complainant spoke with Mr. Chesnut about the meeting. (Tr. 174). Complainant examined RX-24, an October 15, 2015 email from Mr. Chesnut to Complainant, following the meeting with Mr. Hare, Mr. Splan, and Mr. Turner, which Complainant stated did not reflect the discussion he had with Mr. Chesnut.[25] (Tr. 175). Mr. Chesnut sent the October 15, 2015 email to Complainant, along with UTA's Planning and Facilities Departments, and he stated "[o]ver the last few days emails have been circulated about stops in improvements along 200 South. Shelters have been installed and then removed for various reasons." Complainant acknowledged that during his deposition he agreed Mr. Chesnut's email was a good summary of the safety concerns Complainant had been bringing to the forefront. (Tr. 176; RX-24). Mr. Chesnut also directed that "[i]n an attempt to relieve the confusion, and based on conversations and reading emails, this is how we are going to proceed. Attached is the SOP that was developed in 2008 and signed by all impacted departments. This SOP is still in effect and, if followed, will ensure that amenities and stops are properly installed and operationally feasible. I will not outline the details in the email, please read the SOP so you will understand the roles and responsibilities of each department." Complainant testified that Mr. Chesnut's directive was in keeping with Complainant's requests to ensure everyone was following standard operating procedure. (Tr. 177).

In JX-12, Complainant responded to an October 19, 2015 email from Mr. Chesnut, stating that he issued three work orders for three new bus stops that were evaluated the day before, on October 18, 2015.[26] (Tr. 178-79; JX-12, p. 5). Complainant further stated "that should bring everything on the 200 South corridor up to date, with the exception of the improved stop locations that are waiting for the creation of the no parking zones by the city, before UTA will activate the location as bus stops." (Tr. 179; JX-12, p. 4). Thereafter, Mr. Matt Sibul, Mr. Chesnut's supervisor, responded to the email chain, stating that he was "glad to hear there has been better collaboration and understanding of the process, as well as the special conditions in this corridor." (Tr. 179-80; JX-12, p. 3). In addition, Ms. Westlund replied to the email and raised issues regarding the work orders. Complainant sent an additional email

[25] Respondent's Exhibit 24 was offered and received into evidence without objection. (Tr. 175-76).

[26] Mr. Chesnut's October 19, 2015 email was sent to many UTA employees including Mr. Joseph Alsop, Mr. Matt Sibul, Ms. Ginger Westlund, and Mr. Grey Turner, as well as other UTA employees. (JX-12).

to Mr. Chesnut, in response to the ongoing email chain, stating "I would like you to note that Michael [Complainant] had enough sense not to respond to this email and provide anymore teachings, he is letting people catch up to what has already been provided." Mr. Chesnut responded to Complainant noting that Complainant's "restraint is noted and appreciated." (Tr. 180). (Tr. 180; JX-12, p. 1).

Complainant confirmed RX-29 contained an October 19, 2015 email that he sent to Mr. Chesnut about the three work orders he issued as discussed in JX-12.[27] (Tr. 181-82). In his email, Complainant stated "I should point out that these stops were not part of the drama from the past two weeks." (Tr. 182). Complainant further confirmed that the "drama" he referred to in his email was in regard to his dispute with Mr. Splan over policy issues. (Tr. 183).

Complainant identified JX-19 as his request for vacation that he sent to Mr. Chesnut, along with Mr. Chesnut's response, approving Complainant's request. (Tr. 183; JX-19). Complainant acknowledged that during his deposition he testified he sent Mr. Chesnut an email regarding his vacation because Mr. Chesnut had "a tendency to forget things." (Tr. 183-84; RX-12, p. 86). Complainant also sent an email to his co-workers letting them know he would be on vacation "until November 11th," but that he planned on returning to work during his vacation for one to two days if needed. (Tr. 184-85; JX-19). Similarly, Complainant's "Out of Office" notification during his vacation informed callers that he was out of the office until November 11, 2015. (Tr. 185; JX-19).

Complainant testified he was aware of UTA's policy requiring him to obtain his supervisor's approval to take a vacation. Complainant acknowledged he could access UTA's policies on its "intranet," as well as receiving emails regarding policy. (Tr. 185). Complainant had to log into a "system" at work to report his work hours for each pay period. (Tr. 186). If Complainant worked his regular schedule during a pay period, he would report a "single no exceptions code" on his time entry function. If Complainant could not access Respondent's electronic time system, he could prepare a "paper" time sheet and send it to his supervisor. During Complainant's first week of vacation from October 27, 2015 through November 1, 2015, he did not complete any time sheet because time sheets were completed bi-weekly. (Tr. 187).

[27] Respondent's Exhibit 29 was offered and received into evidence without objection. (Tr. 182).

Complainant confirmed JX-19 contains an email that he sent on October 27, 2015, at 9:39 a.m., while at work, notifying his co-workers he would be on vacation until November 11, 2015. (Tr. 188; JX-19). Complainant confirmed JX-14 contains an email that he sent on October 29, 2015, at 4:28 p.m., while he was at work. (Tr. 188-89; JX-14). However, Complainant stated he may not have physically been in his office, but rather he may have been out on the street working in his vehicle. (Tr. 189).

Complainant identified CX-58, p. 22, as an email that he sent on Friday, October 30, 2015, at 5:21 p.m. Nevertheless, Complainant did not recall discussing the October 30, 2015 email during his deposition in this matter. (Tr. 190). Complainant deposed that he did not recall sending the October 30, 2015 email. (Tr. 190-91; RX-12, p. 149). Complainant explained that he could not recall whether he sent the October 30, 2015 email because it occurred two years ago. (Tr. 191).

Complainant identified RX-97 as a letter he sent to Mr. Matt Sibul dated January 19, 2016. In part, Complainant wrote "[a]t UTA you have approximately 25 employees that report to you, yet you recently orchestrated the unjust termination of the only ethnic minority in your department." (Tr. 192; RX-97). Complainant further wrote "I find it ironic that you would take time out of your day to attend an event of this nature." Complainant confirmed the event he was referring to was the annual "NAACP Martin Luther King Memorial" luncheon. Complainant sent the letter to Mr. Sibul in regard to a project Complainant was working on relating to patterns of treatment concerning people of color.[28] (Tr. 193; RX-97). Complainant did not state in his letter to Mr. Sibul that he believed he was a victim of race discrimination while working for Respondent. Nevertheless, Complainant deposed "[a]nd I just happened to be a victim of it, so I wanted to ask him [Mr. Sibul] . . . how does he reconcile orchestrating my termination, but still think it is . . . okay with going to [the] NAACP luncheon." (Tr. 194). During the deposition, when asked whether he believed he was a victim due to his race, Complainant replied "yes." (Tr. 194-95; RX-12, p. 37).

Complainant identified RX-98 as a December 31, 2015 letter he sent to Mr. Jerry Benson, the Chief Executive Officer at

[28] Respondent's Exhibit 97 was offered and received into evidence without objection. (Tr. 193).

UTA.[29] (Tr. 195; RX-98). In his letter to Mr. Benson, Complainant stated "Matt Sibul orchestrated his wrongful termination from the UTA, because I would not authorize the installation of non-ADA compliant bus stops along the 200 South corridor in Salt Lake City, during the month of October 2015." Complainant believed his refusal to permit non-ADA compliant bus stops from being installed was one of the reasons for his termination. (Tr. 196; RX-98). Complainant also deposed that other reasons contributing to his termination were his complaints about not complying with federal regulations or the UTA bus stop standards. (Tr. 197-98; RX-12, pp. 42-43).

Complainant confirmed RX-99 is a printout of some of Complainant's Facebook posts in early 2017. (Tr. 198). On April 4, 2017, Complainant wrote on his Facebook page that "[i]n November of 2015, is when Utah Transit Authority management fired me for challenging their hashtag (#) unethical use of federal funding. I guess those hashtag (#) reforms had not yet kicked in." Complainant believed he was terminated, in part, for challenging the unethical use of federal funds.[30] (Tr. 199; RX-99, p. 8).

Complainant identified RX-100 as the March 4, 2016 "Charge of Discrimination" that he filed with the Equal Employment Opportunity Commission ("EEOC"). In his EEOC filing, Complainant stated "I feel I was harassed and discharged in retaliation for opposing violations of the Americans with Disabilities Act of 1990, as amended."[31] (Tr. 200; RX-100). Complainant received a "Right to Sue" letter from the EEOC more than 90 days ago, but he decided not to pursue his EEOC claim. (Tr. 201).

Complainant confirmed RX-7 is his responses to Respondent's first set of interrogatories and request for admissions.[32] (Tr. 201-02). In Respondent's fourth interrogatory, Complainant was asked to explain why he forwarded emails from or to his UTA email account, from or to his personal email account. Complainant replied to the interrogatory and explained that he

---

[29] Respondent's Exhibit 98 was offered and received into evidence without objection. (Tr. 195).

[30] Respondent's Exhibit 99 was offered and received into evidence without objection. (Tr. 199).

[31] Respondent's Exhibit 100 was offered and received into evidence without objection. (Tr. 200).

[32] Respondent's Exhibit 7 was offered and received into evidence without objection. (Tr. 202-03).

worked from home which required him to print emails from his home desktop computer. (Tr. 203). Other times, Complainant would forward work emails to his personal email account so it would mark the email as "unread" and remind him to respond to the email. Complainant admitted that he occasionally confused his personal and work accounts on his smart phone and he would inadvertently exchange emails between the two accounts. (Tr. 204). Complainant confirmed there were approximately 1500 pages of emails that were exchanged between his UTA email and his personal email account. Complainant did not believe he ever sent an email from his personal account to his UTA email account to print documents at work. (Tr. 205). During his deposition, Complainant deposed he did not recall ever sending a personal email to his work email for the sole purpose of printing the material. However, he later deposed there may have been a couple occasions he did print something, but it might have been his time sheet. (Tr. 205-06; RX-12, pp. 241-42).

Complainant identified RX-62 as an email he sent from his UTA work email to his personal email account that he received from Stephanie Johnston, who worked for Respondent, with an attachment identified as "BSN Training Agenda."[33] Complainant acknowledged this is an email he received on his wireless device that he forwarded to his personal email account so he could print the attachment at home. (Tr. 206-07). Complainant confirmed that Respondent's Exhibit 65 is an email he sent from his personal email account to his work email in February 2014, which contained attachments.[34] (Tr. 208-09). Complainant did not believe he sent this personal email to his work email to print the contents of the attachment to the email. Complainant stated he may have sent the personal email to his work email so that he could read it and follow-up on the email. (Tr. 211). Complainant explained that he would receive work, personal, and school emails on his personal devices. His "school account" would forward emails to his personal email account. Consequently, Complainant had difficulty distinguishing between emails because they all had his name on each email. (Tr. 212). Complainant acknowledged RX-66 was another personal email sent to his work email account, but he did not print the email at work because he had no reason to do so.[35] (Tr. 212-13).

---

[33] Respondent's Exhibit 62 was offered and received into evidence without objection. (Tr. 207).

[34] Respondent's Exhibit 65 was offered and received into evidence without objection. (Tr. 210-11).

[35] Respondent's Exhibit 66 was offered and received into evidence without objection. However, the facts alleged in the attachment to the email will not be referred to in the Decision and Order that follows because it is not relevant to the instant case. (Tr. 213).

Complainant could not recall whether RX-67 was an email sent from his personal account to his work email account. (Tr. 214-15). However, during his deposition Complainant confirmed the email was sent from his personal email to his work email. (Tr. 215; RX-12, p. 249). Complainant acknowledged the email contained an attachment that appeared to be a "complaint" that consisted of 54 pages. (Tr. 215-16). Complainant could not recall whether the attachment in the email was related to his School Board work.[36] (Tr. 216). Complainant identified RX-69 as another email that he could not initially distinguish whether it originated from his personal or work email, but the email was addressed to School Board members and was something Complainant received in his capacity as a member of the Salt Lake City School Board.[37] (Tr. 217-18).

Complainant agreed that RX-71 appeared to be another personal email sent to his work email because it stated it was from Michael Clara despite not showing an email address. Complainant confirmed the email was in regard to his work with the Salt Lake City Housing Authority. Nevertheless, Complainant explained that while he was a commissioner at the Housing Authority, Mr. Chesnut requested some information about the Housing Authority with respect to bus issues. Upon a closer examination of the email, Complainant stated the email appeared to relate to the agenda for a particular Housing Authority Meeting. (Tr. 219). He testified that he may have opened the email on his phone and realized it was something he needed to read later, and as a result, he forwarded the email to himself.[38] (Tr. 220).

Likewise, Complainant identified RX-72 as a Salt Lake City School Board email that he forwarded from his personal email account to his work email that contained an attachment and was

---

[36] Respondent's Exhibit 67 was offered and received into evidence without objection. Nonetheless, the facts alleged in the attachment to the email will not be referred to in the Decision and Order that follows because it is not relevant to the instant case. (Tr. 216).

[37] Respondent's Exhibit 69 was offered and received into evidence without objection. Nevertheless, the facts alleged in the attachment to the email will not be referred to in the Decision and Order that follows because it is not relevant to the instant case. (Tr. 218).

[38] Respondent's Exhibit 71 was offered and received into evidence without objection. The email contained in RX-71 is 36 pages long, however, only the first page of the email will be referred to in the Decision and Order that follows because the remainder of the email is not relevant to the instant case. (Tr. 220).

72 pages in length.[39] (Tr. 220-21). Complainant was unsure whether he accessed the attachment to the email from his phone or laptop. (Tr. 222). Complainant acknowledged RX-74 is also another email sent from his personal email account to his work email account with a picture attached and captioned "The Frito Bandito You Must Not Offend." (Tr. 223). The email was sent on Tuesday, March 3, 2015, at 11:57 a.m., but Complainant was not sure whether he was at work at the time the email was transmitted. Complainant acknowledged he sent the email because he was in a dispute with the Salt Lake City School Board president and Complainant was concerned that the president was acting "to criminalize his dissent." (Tr. 224).

Complainant confirmed he attended the University of Texas for three years while studying Anthropology. He also worked as a law enforcement counselor for Robinette Academy which involved "executive protection work." Complainant also worked in law enforcement consulting. (Tr. 225). Complainant also served as the Mayor of Maynard, Texas, and while doing so, he worked on accountability, environmental and human resource issues, as well as community development and law enforcement. (Tr. 225-26). Complainant worked a total of ten years in law enforcement. (Tr. 226).

Complainant reported safety issues as part of his regular duties as a Service Plan Development Specialist while employed by Respondent. (Tr. 226-27). Complainant worked as a Service Plan Development Specialist for ten years. Complainant also served on the Salt Lake City School Board and oversaw accountability and public funding issues, education administration, and the budget for the School Board. (Tr. 227).

Complainant identified JX-25 as his Department of Workforce Services Work History which shows jobs he applied for while receiving unemployment. Complainant also went on the "KSL" website to look for employment after he lost his job with the UTA. (Tr. 228). In January 2016, Complainant completed his first job application following his termination. However, his job search history does not show that he applied to his current job at the Crossroads Urban Center in the summer 2016. (Tr. 229). Complainant's DWS work search history only covers six months, and shows the last job he applied for was in August 13, 2016. (Tr. 229-230). Complainant testified that he continued looking for employment after August 13, 2016. (Tr. 230). Complainant explained that the DWS job search history only

[39] Respondent's Exhibit 72 was offered and received into evidence without objection. (Tr. 221).

includes the jobs he applied for while he was receiving unemployment. (Tr. 231). Complainant acknowledged that in RX-7, his response to Interrogatory 2, Complainant stated he did not receive any offers of employment other than from Crossroads Urban Center, where he currently is employed. (Tr. 231; RX-7). Complainant confirmed he began working for Crossroads Urban Center on or about December 12, 2016. Complainant did not agree that he provided Respondent with an incomplete work search history. (Tr. 232).

Complainant identified JX-22 as a copy of his UTA March 2015 merit increase showing that he earned an annual salary of $54,342.08. (Tr. 232-33). While working for Respondent, Complainant was an "exempt employee" who was not eligible for overtime. At the time of his termination, Complainant earned an annual salary of $54,342.08. (Tr. 233).

Complainant confirmed RX-101 is a wage claim he submitted to the UTA Labor Commission, as well as the Labor Commission's response to his wage claim. (Tr. 233). On his wage claim form, Complainant stated he worked from 8:00 a.m. to 5:00 p.m., even though he worked additional hours, because he was an exempt employee and could only earn wages for 40 hours per week. (Tr. 234-35). Complainant earned $26.12 per hour, and he earned $1,044.80 for 40 hours of work. (Tr. 236).

Complainant confirmed JX-24 sets forth his salary and benefits, including his retirement benefits. Complainant's retirement plan with UTA is referred to as the "457 contribution." (Tr. 236). Respondent annually contributed $1,108.55 and Complainant contributed $2,704.46 to his retirement plan. Similarly, Complainant contributed annually $1,588.44 to his medical coverage plan, which was deducted from his paycheck on a monthly basis. Complainant also receives health insurance from his current employer, Crossroads Urban Center. (Tr. 237). Complainant could not recall if he is seeking annual compensation of $4,536.36 for no longer having health insurance with Respondent. (Tr. 237-38).

Complainant confirmed RX-6 demonstrates that in his initial disclosures he claims his medication costs increased from $26.00 per month to $96.00 per month. As a result, Complainant is seeking $70.00 in monthly compensation from Respondent for increased medication costs. (Tr. 239). However, during his deposition, Complainant deposed he had not yet applied for health insurance with his new employer, Crossroads Urban Center. (Tr. 240; RX-12, p. 207). Complainant also stated he was

compelled to withdraw $20,000.00 from his 401K retirement account and incurred a 20 percent ($4,000.00) tax penalty for early withdrawal of funds. (Tr. 242). Complainant confirmed CX-66 demonstrates he withdrew funds from his 401K retirement account on March 31, 2017. (Tr. 243).

Complainant acknowledged that while on vacation he did not speak to anyone at UTA from November 2, 2015 until November 16, 2015, until Mr. Chesnut contacted Complainant about his whereabouts. (Tr. 243-44). On November 16, 2015, Complainant spoke with Mr. Chesnut and he communicated to Mr. Chesnut that he would return to work the following Monday, November 23, 2015. (Tr. 244).

Complainant identified CX-43 as the November 20, 2015 appeal letter he sent (via email) to Mr. Matt Sibul following his termination from his employment with Respondent. (Tr. 244-45). In his appeal letter, Complainant stated he had a "handicap" in regard to managing calendar days due to his attention deficit disorder. Nevertheless, Complainant never requested accommodation from UTA for any disability. Mr. Chesnut asked Complainant whether he required any accommodations, but Complainant informed Mr. Chesnut that he did not require any accommodation. On an annual basis, Mr. Chesnut asked Complainant whether he required any accommodation for disability. (Tr. 245). Complainant's difficulty with maintaining calendar days is related to his attention deficit disorder. Complainant typically would write things down to manage any difficulties he experienced from his attention deficit disorder. He denied having any difficulty remembering dates in November 2015 because of a change in medication for his attention deficit disorder.[40] (Tr. 246). However, in Complainant's November 20, 2015 email to Mr. Matt Sibul, Complainant stated his medications had changed and he became hyper-focused to the point that he lost track of the passage of time, thus "so, I depend on writing things down and keeping track of things in that fashion." (Tr. 248). Complainant stated he did not write anything down when he spoke with Mr. Chesnut on November 16, 2015, regarding when he would return to work. (Tr. 249).

On November 20, 2015, when Complainant appealed to Mr. Sibul to reconsider his termination, he stated "[f]irst of all,

[40] Respondent's Exhibit 87 was offered and received into evidence without objection. (Tr. 247-48). It is noted that RX-87 is a duplicate copy of the November 20, 2015 email from Complainant to Mr. Matt Sibul contained in CX-43.

it is not my intent to abandon my job and I apologize to you and Chris for giving you that impression." During his deposition, Complainant stated "[a]t the time I thought these guys [Mr. Chesnut and Mr. Sibul] were professional, ethical men and they think that I abandoned my job when I was on vacation, so clearly I did something wrong that to be on vacation these two guys think I abandoned my job while on vacation." (Tr. 249). Complainant explained that at the time he wrote his November 20, 2015 email he had not yet received his letter of termination showing the specific dates Respondent claimed he was to return to work, and the allegation that Mr. Chesnut tried to contact him several times during his vacation. (Tr. 250). Complainant received his termination letter on or about Thursday, November 26, 2015. (Tr. 250-51).

On December 14, 2015, Complainant attended his appeal hearing at the UTA headquarters with Mr. Matt Sibul, Mr. David Heier, and Ms. Camille Glenn in order to discuss the appeal of his November 20, 2015 termination. Complainant recorded the December 14, 2015 appeal hearing, but he did not inform the other attendees that it would be recorded. (Tr. 251). During his appeal hearing, Complainant recalled stating that "November 18, 2015," was mentioned during his November 16, 2015 conversation with Mr. Chesnut. In particular, Complainant further stated it "could be accurate that I sa[id] the 18th to him, I do not recall." (Tr. 252). Complainant also stated at the appeal hearing that he thought he may have been confused about "today," the date of the December 14, 2015 meeting. (Tr. 252-53). Complainant also recalled that he deposed he had difficulty "with calendar days," and that he can be "oblivious to the passage of time." Complainant further deposed his ADD made it difficult for him to know whether something occurred five years or one year ago, or he will believe an incident occurred last week when it in fact occurred two months ago. (Tr. 253-54; RX-12, p. 123). Complainant testified that he compensates his ADD disability by writing things down and having a calendar. (Tr. 255).

Complainant confirmed JX-29 contains his statements from the December 14, 2015 appeal hearing where he stated "[p]art of what happens to me, because of my ADD, I just do not have any concept of time, like the passage of time. Like I do not know what day it is or even I do not have a sense of time passing." (Tr. 255).

On re-direct examination, Complainant believed UTA had terminated his employment because he raised concerns about

unethical funding, his race, and discrimination under the ADA. (Tr. 256-57). Complainant also believed his termination was motivated by his safety complaints concerning bus stops. Complainant did not consider his ADD to be a disability that he should have reported to Mr. Chesnut. (Tr. 257). However, on an annual basis Complainant did speak with Mr. Chesnut about his disorder because of his commercial driver's license to drive buses. Mr. Chesnut knew Complainant took medication and, thus, he would ask Complainant whether he required accommodations. (Tr. 258). Complainant did not believe Respondent terminated his employment because he suffers from ADD. Nor did he believe Mr. Chesnut terminated his employment due to his disorder. (Tr. 258). Complainant was employed by Respondent for 20 years, and during that time he was able to keep track of the passage of time and maintain his employment. (Tr. 258).

Dr. John Janzen

In 1973, Dr. Janzen obtained his Bachelor's Degree in Social Work from Tabor College in Hillsboro, Kansas, and thereafter, in 1974, he obtained his Master's Degree in Rehabilitation Counseling from Oklahoma State University. Dr. Janzen also obtained his Doctorate Degree in Counseling Psychology from the University in San Francisco, and conducted post-graduate study in Counseling Psychology at the University of Southern California. (Tr. 261). Dr. Janzen is also a certified Rehabilitation Counselor, which required experience in rehabilitation and passing an examination for national certification. (Tr. 262). In 1979, Dr. Janzen began a business offering rehabilitation services, developing and implementing rehabilitation plans, including job placement for individuals. Dr. Janzen continues his private rehabilitation business, and in the past year he became an adjunct professor at the College of Idaho teaching rehabilitation classes. (Tr. 263).

Dr. Janzen has worked significantly with employees in the transportation industry such as truck drivers and railroad employees, developing and implementing rehabilitation plans. (Tr. 263). In addition, Dr. Janzen also works with individuals who have been separated from employment (i.e., wrongful termination cases), but are looking to return to the labor market. (Tr. 264). Dr. Janzen explained that his evaluations are the same whether someone is returning to work following an injury or disability, or whether a person is trying to re-enter the workforce following a wrongful termination. (Tr. 265).

Dr. Janzen testified he was hired and being compensated by Respondent for his work in the instant case. His rates vary from $230.00 per hour for evaluating an individual, $375.00 per hour for testifying by deposition or at a trial, and $100.00 per hour for travel. (Tr. 265). Dr. Janzen has been qualified as an expert witness on previous occasions, and he is normally hired by employers. However, over the past 7 or 8 years Dr. Janzen has begun to do more work at the request of plaintiffs.[41] (Tr. 266).

Dr. Janzen's evaluation regarding employability and earning capacity includes reviewing and analyzing an individual's employment history to determine transferable employment skills. Dr. Janzen will consider limitations of an injury or disability, along with educational background. In addition, he examines an individual's overall psychological makeup, including cognitive and emotional issues. Dr. Janzen uses several resources as part of his evaluation, one of which is the *Revised Handbook for Analyzing Jobs* that sets forth educational skill requirements for certain types of jobs. (Tr. 270). Dr. Janzen also utilizes employment websites such as "Indeed.com, Glassdoor.com, and Salary.com" to determine salaries and job requirements. (Tr. 270-71). Dr. Janzen will also utilize local sources such as the Utah Workforce Services to identify jobs. (Tr. 271).

Dr. Janzen employed the aforementioned process when evaluating Complainant. (Tr. 271-72). Dr. Janzen reviewed Complainant's Complaint, his initial and supplemental disclosures, the February 17, 2017 Hearing and Pre-Hearing Order, and information from Respondent which included Complainant's deposition testimony, records from UTA's Labor Commission, and Complainant's compensation statement. (Tr. 272). Based upon his evaluation, Dr. Janzen testified Complainant had skills for an urban city planner, transportation and logistics planner and coordinator, and a transportation specialist. (Tr. 282-83). In particular, Dr. Janzen stated Complainant could work as a regional planner with Interide Transport, a transportation logistics manager with Salt Lake City, a transportation coordinator with Intermountain Donor Services or with CR England Company, all of which are jobs he identified in his job search for Complainant. (Tr. 283; RX-104). The salary range for the occupations Dr. Janzen identified is $43,400.00 per year to $55,030.00 per year. (Tr. 285-86). Dr. Janzen testified Complainant would be at the upper

[41] Dr. Janzen was tendered as an expert witness in the field of employability, job market assessment, and earning capacity, and was accepted as an expert with no objections. (Tr. 266-67).

spectrum of the salary range because of his experience with UTA, specifically his 10 years of experience in the "transportation capacity." (Tr. 286-87). Dr. Janzen stated the jobs he identified offered comparable benefits to that of Complainant's job with Respondent, except the UTA train pass and his pension, and were available in June 2017 and July 2017. (Tr. 287).

Dr. Janzen also identified similar positions that were available at the end of 2015, and the beginning of 2016, by contacting the human resource departments of various companies.[42] (Tr. 287-88). Dr. Janzen acknowledged that he was able to confirm the positions were available and the salary range for each position, but he was unable to confirm the date or month the jobs were available in 2015 and 2016. (Tr. 290). He also confirmed the 2015 and 2016 positions fell between the salary ranges of $43,400.00 to $55,030.00. (Tr. 290-91).

Upon reviewing Complainant's work search history, Dr. Janzen stated Complainant was overqualified for a number of jobs he applied to such as a dairy delivery driver, cashier, clerk, receptionist, and a shuttle driver. (Tr. 291-92). On the other hand, Dr. Janzen testified Complainant applied to positions that exceeded his qualifications such as a locomotive engineer, a workers' compensation coverage waiver specialist, an assistant radio reporter, a research analyst, and a patient coordinator. (Tr. 292). Dr. Janzen stated Complainant applied for one planning job with the State of Utah, which was the only job that related specifically to Complainant's qualifications. (Tr. 292-93). In Dr. Janzen's opinion, Complainant did not exercise reasonable diligence in conducting a job search because he only utilized the Utah Department of Workforce Services. Dr. Janzen stated Complainant could have looked for employment on other job-posting websites, as well as networking with other city planners or urban planners. (Tr. 293). Based upon Dr. Janzen's research, he was of the opinion that Complainant could have obtained alternative employment as a "planner" in one to two months following his termination. (Tr. 293-94). Dr. Janzen testified Complainant did not suffer any diminution in his earning capacity as a result of his termination from his employment with Respondent. (Tr. 294).

On cross-examination, Dr. Janzen confirmed he reviewed Complainant's Complaint, Complainant's initial and supplemental disclosures, the February 17, 2017 Notice of Hearing and Pre-

[42] Respondent's Exhibit 104 was offered and received into evidence without objection. (Tr. 289-90). Respondent's Exhibit 104 consists of Dr. Janzen's vocational evaluation of Complainant's employability and earning capacity.

Hearing Order, a UTA bus pass, and Complainant's deposition. (Tr. 294-95). Dr. Janzen was not sure if he reviewed Complainant's UTA job description, which was not referenced in his report. (Tr. 295-96). Nor did Dr. Janzen recall Complainant's deposition containing any discussion about Complainant's job description. Dr. Janzen acknowledged he stated in his report that Complainant "exclusively" used the Department of Workforce Services website to apply for jobs. However, Dr. Janzen stated it was his understanding that Complainant found job openings on the DWS website and subsequently applied on each company's respective website. (Tr. 297). Upon hearing Complainant's formal hearing testimony, Dr. Janzen first learned Complainant conducted job searches on "KSL.com" and the State of Utah's website. However, Dr. Janzen testified he would have to review the new job searches to determine whether his respective opinion would be altered. Dr. Janzen acknowledged that JX-25 demonstrates Complainant completed 114 job applications between January 5, 2016 and August 13, 2016. (Tr. 298). Dr. Janzen testified there was no reason Complainant could not have applied to jobs prior to January 5, 2016, despite Complainant appealing Respondent's decision to terminate his employment. (Tr. 298-99). In light of Respondent terminating Complainant for job abandonment, Dr. Janzen deferred to UTA's human resources personnel on whether Complainant would receive a favorable job reference from UTA. (Tr. 299).

Dr. Janzen confirmed RX-103 identifies the job position of "regional planner" with Interide Transport, which lists a job responsibility as "assisting with bid process and spot marketing pricing on all customer freight."[43] (RX-104). Dr. Janzen stated Complainant did not have the specific experience for the regional planner position, but he possessed the proper skills. (Tr. 300). The "regional planner" position also required "overseeing the sales and solicitation processes of existing and new shippers." Likewise, Dr. Janzen acknowledged Complainant did not have the specific experience listed, but he possessed the proper abilities and skills. Finally, the position with Interide Transport listed "required qualifications" as "strong negotiation persuasion skills with documented success." Dr. Janzen stated Complainant possessed "persuasion skills" given his position with UTA and his experience with the Salt Lake City School Board. (Tr. 301). Although Complainant did not have

[43] Although the parties reference RX-103 as containing Dr. Janzen's report and identified employment positions, the record evidence shows Dr. Janzen's report is contained in RX-104. See (RX-104). Accordingly, the undersigned will identify Dr. Janzen's report as RX-104 in the discussion that follows.

"documented" success of his negotiation and persuasion skills, Dr. Janzen believed Complainant possessed skills that equated to an ability to negotiate, persuade, and problem solve. (Tr. 301-02). Dr. Janzen explained that the job listing with Interide Transport simply stated "apply now," but did not provide a specific start date for the job opening. (Tr. 302). Nevertheless, on July 10, 2017, when Dr. Janzen found the "regional planner" job listing, the position was available with Interide Transport. (Tr. 302-03). Dr. Janzen acknowledged the position with Interide Transport did not list a starting salary, but stated the salary would be commensurate with experience. (Tr. 303).

Dr. Janzen also identified a job with "Glassdoor" which shows the "transportation logistics planner" position was available as of July 10, 2017. (Tr. 303-04). However, the job posting did not provide information about the position's salary. (Tr. 304). With respect to the "Stericycle" position, Dr. Janzen believed Complainant possessed 10 years of experience in "developing route plans." Dr. Janzen acknowledged Complainant's job description with UTA (JX-3) does not state Complainant had to "develop plans and daily maintenance of routing data" required by the Stericyle position. (Tr. 305; JX-3).

Dr. Janzen identified the position listed on "CareersPeopleClick.com" as a "transportation logistics router" in Salt Lake City, Utah, that required five to seven years of experience or the equivalent of a Bachelor's Degree. Dr. Janzen acknowledged Complainant does not possess a Bachelor's Degree, nor did he have five to seven years of experience as a transportation logistics router. (Tr. 306). Dr. Janzen further acknowledged that Complainant's experience inspecting bus stops is not similar to that of "routing logistics." The "logistics router" position also required "overseeing and participating in the maintenance of DOT requirements." Dr. Janzen confirmed Complainant did not have any training or experience with Department of Transportation ("DOT") requirements. (Tr. 307).

Dr. Janzen also identified a position titled "city jobs" on June 29, 2017, with job duties including "writing zoning ordinances, interpretations and action policies concerning complex development issues currently under review by the DRT and the Business Licensing Section." (Tr. 307-08). Dr. Janzen admitted Complainant did not have specific experience required for the "city jobs," but Dr. Janzen believed Complainant had sufficient qualifications. (Tr. 308). The minimum qualifications for the "city jobs" were "graduation from an

accredited college or university in Urban Planning or a closely related field, and one year paid intern or professional experience in urban planning, long range or current planning, or an equivalent combination of education and paid professional experience." (Tr. 308-09). Dr. Janzen recalled that Complainant studied Urban Planning in college, but he did not obtain a Bachelor's Degree. (Tr. 309).

With respect to the U.S. National Guard position, Dr. Janzen acknowledged it required Complainant to enlist, however, Complainant must be between the ages of 17 and 35, which exceeds his current age. Despite not meeting the age requirement for enrollment in the National Guard, Dr. Janzen believed the position is consistent with Complainant's skills and capabilities. (Tr. 309).

On June 29, 2017, Dr. Janzen also identified the "transportation coordinator" position with Intermountain Donor Services which required transportation of things and people, and logging items for transportation. The position only required a high school diploma. (Tr. 310). Dr. Janzen did not know the salary offered for the "transportation coordinator" position, or whether it would fall in the salary range he identified as Complainant's earning capacity. (Tr. 310-11).

Dr. Janzen also identified a "load planner" position with CR England that did not list the rate of pay. The job responsibilities included "building and matching plan freight with trucks, coordinating with driver managers and drivers to ensure all loads are acknowledged to maximize efficiency and on-timer service." (Tr. 311). Although Complainant had not worked as a "load planner," Dr. Janzen believed Complainant possessed the proper skills for the position. The required qualifications for the "load planner" position included "expertise in time and distance requirements as it pertains to the DOT HOS requirements." In addition, CR England stated that a college degree was preferred. (Tr. 312).

On July 10, 2017, Dr. Janzen identified another position with CR England working as an "after hours logistics coordinator" that required the applicant to "manage asset utilization and drivers to ensure high delivery of customer service and fleet profitability, and assists, coaches, mentors drivers in all training and administrative items." (Tr. 312-13). Dr. Janzen acknowledged Complainant did not have experience driving trucks or managing a fleet, but he did have experience driving buses. (Tr. 313). However, the position

also required "a working level knowledge of transportation P&I, metrics and levers to drive profitability," which Dr. Janzen stated Complainant would have to learn on the job. There was no rate of pay listed for the logistics coordinator position either. (Tr. 314).

On July 10, 2017, Dr. Janzen also identified a position with Packsize, LLC, working as a "Transportation Specialist" that required four years or more of transportation planning experience, and a college degree was preferred. (Tr. 314-15). Dr. Janzen testified Complainant has at least four years in planning and possessed strong verbal skills, could work in a team atmosphere and cross-train with others. However, Dr. Janzen stated Complainant would have to acquire knowledge about maintaining delivery schedules and truck deliveries. (Tr. 315). Dr. Janzen confirmed the job listing did not provide a rate of pay or salary. (Tr. 316).

Dr. Janzen acknowledged that all the positions he identified in June 2017 and July 2017, were subsequent to Complainant securing employment in December 2016. (Tr. 316).

On re-direct examination, Dr. Janzen confirmed he reviewed Complainant's deposition taken in this matter, but that he was not asked to draw any conclusions about whether Complainant's work search was sufficient to qualify him for unemployment benefits. (Tr. 317-18). In Dr. Janzen's search for potential jobs, Dr. Janzen considered Complainant's statement that his work at UTA required him to be a liaison between the Operations Department and the Planning Department. (Tr. 318). Dr. Janzen confirmed Complainant deposed that the "planners" at UTA would create and implement new routes, but sometimes the Operations Department did not like the routes, and as a result, Complainant would work as a liaison between the two departments to facilitate communication. (Tr. 318-19). Dr. Janzen further confirmed Complainant did not have "planning" experience when he began working in UTA's Planning Department, but he was able to learn and apply his problem-solving skills in his planning position. (Tr. 319). Likewise, Dr. Janzen stated Complainant exhibited he could work with others in his positions at the UTA and with the Salt Lake City School Board. (Tr. 319-20). Dr. Janzen opined Complainant's problem-solving skills would transfer into many of the jobs he identified in his report. On this basis, Dr. Janzen testified that many employers are not looking to see whether a person worked in the exact capacity of the available job, but rather does a person possess problem-

solving, analytical, team building and organization skills. (Tr. 320).

Dr. Janzen testified that when he considered whether Complainant put forth a diligent effort to find employment, Dr. Janzen considered that Complainant did not continue to search for employment after he was hired by Crossroads Urban Center. Dr. Janzen opined Complainant should have continued looking for employment more commensurate with his job with the UTA because Complainant earned significantly less at the Crossroads Urban Center. In Dr. Janzen's opinion, Complainant made a diligent effort at the beginning of his job search, but not throughout the entire time since Complainant was terminated from his employment with the UTA. (Tr. 321).

On re-cross examination, Dr. Janzen testified he knew that Complainant had been unemployed for over one year when he was hired by the Crossroads Urban Center in December 2016. Dr. Janzen did not know if Complainant was under financial duress when he took the position with Crossroads Urban Center, but Dr. Janzen stated Complainant should have continued searching for a higher salary job. (Tr. 322).

Cloene Huffman

Ms. Huffman confirmed CX-7 contains an October 7, 2015 email sent to her, as well as another UTA employee, at 10:44 p.m., from Complainant, stating "[w]hat is going on at 200 South in Salt Lake City, it appears that a number of amenities were installed without a work order from a planner via the Bus Stop Management System ("BSM"). This seems to be a recurring problem and I am not sure what we need to do to correct this problem. Can you please tell me what is going on?" (Tr. 324). Prior to receiving this email, Ms. Huffman was aware of amenities being installed on the 200 South corridor without work orders due to her meeting with other UTA employees and Mr. Tom Hare, her manager in UTA's Facilities Department. During the meeting, Mr. Hare communicated that "pads" were ready to be installed on "2nd South," and even though no work orders were received, Mr. Hare wanted the pads installed at the bus shelters because he did not want to wait any longer. (Tr. 325).

Ms. Huffman works in UTA's Facilities Department as a "Passenger Facilities Road Crew Supervisor." (Tr. 325). She works with Ginger Westlund and Rod Wilson, both of whom hold similar positions in the Facilities Department. (Tr. 325-26). Ms. Huffman testified that Mr. Hare instructed her, Ms.

Westlund, and Mr. Wilson to complete the work on the 200 South corridor without work orders, but she did not agree with his decision because work orders were usually completed prior to installation. Ms. Huffman, as well as Mr. Wilson, communicated to Mr. Hare that they did not agree to install pads without prior issuance of work orders. (Tr. 326). Ms. Huffman and Mr. Wilson did not have any action taken against them for not proceeding with the work on the 200 South corridor, and she along with Mr. Wilson are currently employed with UTA. (Tr. 327).

Currently, Ms. Huffman is supervising five road crews, but in 2015, she was supervising seven road crews. Similarly, in 2015, Ms. Westlund supervised eight road crews, and Mr. Wilson supervised 14 road crews. (Tr. 327). Ms. Huffman testified that none of the crews she or Mr. Wilson supervised ever performed work without work orders, but Ms. Westlund permitted crews to work without work orders. Ms. Huffman was aware of Ms. Westlund permitting work to be completed without work orders because Ms. Westlund informed her about the same. Ms. Huffman reported Ms. Westlund's actions to Complainant and Mr. Wilson. (Tr. 328).

Ms. Huffman confirmed JX-11 contains an October 16, 2015 email that she, along with other UTA employees, received from Mr. Chesnut, stating "[w]ork orders either verbal/email/BSM to install or remove amenities or stops along 200 South should not be completed for the time being." (Tr. 330). Ms. Huffman confirmed the aforementioned email was in regard to the issue of work orders not being issued prior to work being completed. (Tr. 330-31). Mr. Chesnut's October 16, 2015 email further stated "[o]ver the last few days emails have been circulated about stops and improvements along 200 South, shelters have been installed and then removed for various reasons." Ms. Huffman confirmed that she did not speak to Mr. Chesnut about these concerns, but she did speak to Complainant. (Tr. 331).

Ms. Huffman confirmed JX-19 is an email that she received from Complainant on October 27, 2015, stating he would return to work from his vacation on November 11, 2015. Ms. Huffman stated Complainant also spoke with her and informed her that he would return from his vacation on November 11, 2015. (Tr. 332).

Ms. Huffman identified RX-44 as an email she sent to Complainant on Wednesday, November 11, 2015, stating "Welcome back." Ms. Huffman sent the email in anticipation of Complainant returning to work, and asked him to complete some

work for her.[44] (Tr. 333; RX-44, p. 26). On November 11, 2015, Ms. Huffman also tried to call Complainant "a few times." (Tr. 334).

Ms. Huffman also identified RX-48 as her work cell phone records from November 11, 2015 through November 19, 2015, that contains Complainant's number on the list. (Tr. 334). Ms. Huffman confirmed Complainant's phone number and stated she has his work phone number programmed into her cell phone. (Tr. 336). On November 16, 2015, at 6:19 a.m., Ms. Huffman called Complainant, but she could not remember the specific reason she called Complainant.[45] (Tr. 336-37). Ms. Huffman testified that she usually called Complainant regarding an issue she had at a bus stop, or she needed a "white-line" at a bus stop. Ms. Huffman typically called Complainant early in the morning and she would leave messages because she begins work at 4:00 a.m. (Tr. 337). During her employment with Respondent, Ms. Huffman never heard anyone state they wanted Complainant terminated. (Tr. 337-38).

On cross-examination, Ms. Huffman testified she manages crews that maintain and care for bus shelters and bus stops. Ms. Huffman explained that "amenities" referred to items such as a bus stop shelter bench and garbage cans. (Tr. 338). If an amenity is going to be installed by the UTA, Ms. Huffman receives a work order from a planner, stating the work that needs to be completed, and thereafter, she assigns the work to a particular crew. (Tr. 338-39). Ms. Huffman stated a work order is necessary to know what is going on around Salt Lake City and to keep record of the work completed. Ms. Huffman is familiar with the UTA Policy OPO 1.2 that pertains to amenities installation, and it is her understanding that a work order is required for any work to be completed. (Tr. 339).

Ms. Huffman confirmed CX-10 is an email from Ms. Westlund sent to her and other UTA employees on October 8, 2015, at 1:53 a.m. Ms. Huffman was not working at the time Ms. Westlund sent this email, as Ms. Huffman worked from 4:00 a.m. to 12:30 p.m. In the October 8, 2015 email, Ms. Westlund stated she was instructed by Jacob Splan and Tom Hare to install bus shelters, but she had not received copies of work orders for the installations. Ms. Huffman testified that she and Ms. Westlund have the same job duties, and Ms. Huffman obtains copies of work

[44] Respondent's Exhibit 44, page 26, was offered and received into evidence without objection. (Tr. 333-34).
[45] Respondent's Exhibit 48 was offered and received into evidence without objection. (Tr. 337).

orders by going into the BSM. (Tr. 340). Ms. Huffman was aware that amenities were being installed along the 200 South corridor without work orders at the time she received this email from Ms. Westlund. (Tr. 340-41). Ms. Huffman did not reach out to Ms. Westlund regarding the work orders because Ms. Westlund knew how to access work orders. (Tr. 341).

Ms. Huffman recalled that Mr. Splan worked in UTA's Capital Development Department, but he is no longer employed with the UTA. Ms. Huffman testified Mr. Splan's job duties included contracting with outside companies to pour cement pads for bus stops after obtaining work orders from a planner to have the bus stops installed. Ms. Huffman testified Mr. Splan was working quickly and had to wait on work orders to be completed. (Tr. 341). Mr. Splan never explained to Ms. Huffman why he was working at such a fast pace.[46] (Tr. 342).

Ms. Huffman confirmed CX-58 contains an October 29, 2015 email from Complainant to Ms. Huffman, asking "can you tell me the status of the attached work order, I am not sure if it is going through the BSM?" (Tr. 342-43). Ms. Huffman responded to Complainant, stating "you will have to talk to Ginger [Westlund], she is in charge of the installation removal of the bus stops on 200 South." Ms. Huffman explained she directed Complainant to speak with Ms. Westlund because she was managing the 2:00 a.m. crews who were building and installing the shelters at that time.[47] (Tr. 343; CX-58, p. 16).

Ms. Huffman testified she voted during the November 2015 election in Salt Lake City, Utah. Ms. Huffman was also familiar with the ballot option "Proposition 1" during the November 2015 election. (Tr. 344). When asked whether she recalled any UTA employee stating the bus stop amenities were being installed along the 200 South corridor without work orders because of Proposition 1, Ms. Huffman stated "no." Ms. Huffman acknowledged Jacob Splan was a "go-getter," but she was not sure why he was working at a fast pace. (Tr. 344-45).

On November 16, 2015, following her phone call to Complainant, Ms. Huffman does not recall whether she called other planners. She testified that she mostly stayed in contact with Complainant, but she would occasionally call Mr. Alsop or

---

[46] Complainant's Exhibit 10 was offered and received into evidence without objection. (Tr. 342).

[47] Complainant's Exhibit 58, page 16, was offered and received into evidence without objection. (Tr. 343-44).

Mr. Christensen. Ms. Huffman usually called Complainant because "he was good at his job," and he was "easy to work with." (Tr. 346). Ms. Huffman recalled Complainant called her about why amenities were being installed without work orders, and she told Complainant "you will have to talk to Ginger [Westlund]" because she had 'no part of that.'" (Tr. 347).

On re-direct examination, Ms. Huffman confirmed CX-58, p. 16, shows her response to Complainant, stating that he should speak with Ms. Westlund because she already refused to work without a work order on the 200 South corridor. (Tr. 347).

Christopher Chesnut

Mr. Chesnut testified he received a Master's Degree in Business Administration from the University of Utah in 2014, and in 2003, he obtained his Bachelor's Degree in Geography from the University of Utah. In 2014, he also obtained a certificate in "Green Belt," which is about process and process improvement. In 1996, Mr. Chesnut began working for Respondent as a bus operator, and did so for one and one-half years. (Tr. 349). Thereafter, he began working in UTA's Planning Department where he held various positions, including technician, analyst, and service planning. (Tr. 349-50). In 2008, while still working for UTA, he became the manager of Long-Range and Strategic Planning, but in 2012, he was promoted to manager of Service Planning for the Salt Lake Business Unit. In 2014, Mr. Chesnut was promoted to UTA's Manager of Service Planning, which services the entire region, and he currently holds this position. (Tr. 350).

In 1996, Mr. Chesnut first met Complainant when they were driving buses for UTA. Mr. Chesnut's current position with Respondent requires him to integrate across all of UTA's modes, buses and trains, a unified, cohesive operation that works for the benefit of customers. Mr. Chesnut confirmed that safety is an important part of his work at UTA. Currently, Mr. Chesnut reports to Laura Hansen, UTA's Planning Director. In 2015, he reported to Matt Sibul, the chief Planning Officer. (Tr. 350). Mr. Chesnut testified Mr. Sibul was no longer employed by Respondent after it was reorganized in November 2016. (Tr. 350-51).

From 2012 through 2015, Mr. Chesnut supervised Complainant's work in UTA's Planning Department. Mr. Chesnut worked with Complainant on various projects on a regular basis, and their conversations were mainly about bus stops as well as

what was happening out in the field. (Tr. 351). Upon examining JX-3, Mr. Chesnut testified the contents accurately describe Complainant's job duties in 2015. (Tr. 351-52). Mr. Chesnut testified that "generally [Complainant] was good at his job." However, Mr. Chesnut stated there were times Complainant's personal interactions were not positive, but other times they were positive. Mr. Chesnut explained that Complainant often had to make decisions out in the field regarding bus stop locations, and at times, people were upset with Complainant when he denied their request to remove bus stops. (Tr. 352). Mr. Chesnut testified people were usually upset with how Complainant treated them, but Mr. Chesnut stated Complainant became aware of the issue and was making good progress in his communications with others. (Tr. 352-53).

Mr. Chesnut testified that UTA's Planning Department worked with many other departments, including UTA's Capital Development Department. Mr. Chesnut explained that the Planning Department's duties were to find the location for bus stops and identify operational feasibility for the stops, while the Capital Development Department's role was to construct and install the bus stops and procure outside contractors to assist with installation. (Tr. 353).

Mr. Chesnut confirmed that a significant part of Complainant's duties in the Planning Department was to report safety concerns, and Complainant did so on a regular basis. From 2012, until November 20, 2015, when Complainant's employment was terminated, Mr. Chesnut supervised Complainant and overall gave Complainant positive work performance reviews. Mr. Chesnut confirmed Complainant also received pay raises. As one of UTA's administrative employees, Complainant's work schedule was from 8:30 a.m. to 5:00 p.m. However, Mr. Chesnut testified Complainant's schedule would vary from time to time, but Complainant would email Mr. Chesnut to let him know of the change in Complainant's schedule. (Tr. 354). Mr. Chesnut's work schedule also varied from time to time because he had to attend meetings in the evening and public hearings. (Tr. 354-55).

Mr. Chesnut confirmed JX-4 is an organization chart demonstrating how UTA's Planning Department is set up, but he testified it is no longer accurate as of 2016. He testified that Matt Sibul is no longer employed by Respondent as a chief Planning Office, Hal Johnson is now a manager of Project Development in UTA's Capital Development Department, Holly Mahone works in a different UTA department, James McNulty is no

longer employed by UTA, Al Mahascal is over UTA's Grants Department, and Cary Dunn and John Close both report to G.J. Labonti. (Tr. 355). Nevertheless, Mr. Chesnut confirmed he is still the manager of UTA's Integrated Services Planning, and all service planners report to Mr. Chesnut about safety issues on a regular basis. Other than Complainant, Mr. Chesnut has not terminated any UTA employee. (Tr. 356).

Mr. Chesnut testified he is familiar with UTA's fall 2015 project regarding bus stops along the 200 South corridor in Salt Lake City. (Tr. 356). He confirmed the planning of the 200 South corridor project began in 2013, which included identifying the corridor and beginning to look at the existing conditions to determine how to make the corridor better in regard to bus stops. (Tr. 356-57). During fall 2015, Mr. Chesnut stated there was no greater sense of urgency placed upon the 200 South corridor than that of any other UTA projects on other corridor's in Weaver, Davis, and Utah counties. He confirmed UTA was working on the State Street corridor bus stops as well. No UTA employee ever communicated to Mr. Chesnut that the 200 South corridor project should be prioritized due to "Proposition 1." (Tr. 357). Mr. Chesnut was familiar with "Proposition 1" and that it was a valid proposition on the ballot in November 2015. Mr. Chesnut confirmed the "bulk" of the 200 South corridor projects were completed prior to the November 2015 vote on "Proposition 1." (Tr. 358).

Mr. Chesnut confirmed that JX-16 shows the "built year" in which the bus stop amenities were built at various locations along the 200 South corridor in Salt Lake City. He further confirmed that if the amenities work was completed in 2015, it was finished prior to weather changes in late fall. (Tr. 358).

Mr. Chesnut was aware that "Proposition 1" failed to pass after the November 2015 election. (Tr. 358-59). He confirmed that he was also aware of the UTA's legislative audit that was completed in 2014, which was "mostly negative." (Tr. 359).

In fall 2015, Mr. Chesnut was aware of the dispute that existed between Complainant and Mr. Splan relating to the 200 South corridor bus stop amenities installations. (Tr. 359-60). Mr. Chesnut first became aware of the dispute when Complainant emailed him about Mr. Splan "circumventing the process for installing amenities along [the] 200 South [corridor]." Mr. Chesnut identified JX-5 as an October 8, 2015 email he received from Complainant alerting him to the issues pertaining to the 200 South corridor installations. Mr. Chesnut also identified

an email in JX-5 from Ms. Westlund to Complainant, stating "Michael, I do not get copies of work orders. I was instructed to get the shelters installed by Jacob [Splan] and Tom [Hare]." (JX-5, pp. 1-3). Mr. Chesnut was concerned when he read Ms. Westlund's response because all amenities are supposed to have work orders generated by the Service Plan Department Specialist or Service Planners. Consequently, Mr. Chesnut set up a meeting with other managers to determine why work orders were not being issued prior to the installation of bus stop amenities. (Tr. 360). Mr. Chesnut confirmed that JX-5 shows Complainant's response to Mr. Chesnut, stating "I am having them put a 'Discontinued' sign on the shelter that was installed where there is no bus stop, and the curb is lined with metered parking." Although Mr. Chesnut did not ask Complainant to place a "Discontinued" sign on the bus shelter, Mr. Chesnut trusted Complainant's judgment because Complainant was out in the field, and Mr. Chesnut supported Complainant's decision if Complainant believed it was necessary to discontinue the bus shelter for safety reasons. (Tr. 361).

Mr. Chesnut identified JX-6 as an October 11, 2015 email sent at 11:00 p.m., from Complainant about a "white line" and "advising Jake [Splan] of the need for a no parking sign." (Tr. 362). Mr. Chesnut explained that a "white line" indicates a UTA employee has been out and visited the site, they have identified where the bus stop should go, have positioned the new location for the bus stop, and have entered all relevant information into the "bus stop manager (i.e., the BSM)." (Tr. 362-63). In the October 11, 2015 email, Complainant also informed Mr. Chesnut that he communicated to Mr. Splan he would move forward with the installation if a "no parking zone" was installed, but Mr. Splan stated "not to worry about it" because Mr. Splan was going to "find someone else to do it." Mr. Splan's statements concerned Mr. Chesnut as proper policy needed to be followed. At the time he received this email, Mr. Chesnut was trying to set up a meeting to discuss the ongoing issues with Mr. Grey Turner and Tom Hare. Mr. Chesnut testified he had a lot of verbal conversations with Complainant about the issues regarding the installation of bus stops without work orders. (Tr. 363).

Mr. Chesnut identified JX-7 as another email chain he had with Complainant dated October 13, 2015, where Complainant asked Mr. Chesnut about the location of the meeting they were having with Tom Hare and Jacob Splan. Mr. Chesnut testified he told Complainant about the meeting he was trying to arrange with Tom Hare and Grey Turner in order to put an action plan together so the various UTA departments could be "on the same page." (Tr.

364). Mr. Turner was Jacob Splan's supervisor in October 2015. Mr. Chesnut informed Complainant about the meeting because he wanted Complainant to know he was working on the issue and it was important to him that policy should be followed. Mr. Chesnut sent another email to Complainant on October 13, 2015, stating he set up the meeting with Tom Hare and Grey Turner, and that Tom Hare invited Jacob Splan to the meeting. (Tr. 365). Due to UTA's email system, Mr. Chesnut was notified that Tom Hare forwarded his email to Jacob Splan to invite him to the meeting. Despite Mr. Splan being invited to the meeting, Mr. Chesnut did not invite Complainant because he intended the meeting to be for supervisors only. Mr. Chesnut wanted a meeting with only managers so that they could make manager level decisions and the direction would be clear to all those employees who reported to the managers. (Tr. 366). Mr. Chesnut confirmed, however, that Mr. Splan was not a manager. Mr. Splan reported to Mr. Turner, who reported to Mr. Meyer in the UTA's Capital Development Department. Mr. Chesnut considered Mr. Splan a peer to Complainant although they worked in different departments. Mr. Chesnut confirmed that in his October 13, 2015 email he stated "my intention in this meeting is to not talk about people, I will focus on process and outcome." (Tr. 367). In his email, Mr. Chesnut also referred to a "collusion problem" and provided a diagram because he saw people "pointing fingers at each other and it was exacerbating the problem," instead of working through the problem and finding a solution. Mr. Chesnut's purpose in setting a meeting with supervisors was to stop the collusion problem and find better outcomes. (Tr. 368). In the October 13, 2015 email chain, Complainant responded to Mr. Chesnut, stating "I am not sure I see this as a collusion problem, or a quality control issue. I see it more of [sic] an issue of following UTA policy." Mr. Chesnut agreed with Complainant, but he also believed that collusion was contributing to relationship degradation between the UTA departments. Mr. Chesnut responded to Complainant's email, stating "I see your point. I am bringing the policy with me to the meeting as well as the other documentation you are/have provided. My intention is to show that by following the policy, then we will achieve quality and safety for UTA customers and operators." (Tr. 369).

Mr. Chesnut testified he held the meeting with Tom Hare, Grey Turner, and Jacob Splan on either October 14, 2015, or October 15, 2015, and they went over the UTA policy for bus stop amenities. (Tr. 369-70). Mr. Chesnut stated the conversation at the meeting was about what was happening at the 200 South corridor bus stops, and they talked about Jacob Splan having the

ability to enter work orders to speed up the process. However, they did not agree about whom should issue work orders, and Mr. Chesnut stated the work orders should be issued by UTA's Planning Department to ensure quality. Mr. Chesnut testified no one at the meeting asked for Complainant to be terminated. (Tr. 370). Nor did Complainant's job status come up in the discussion at the meeting. (Tr. 370-71).

Mr. Chesnut acknowledged JX-7 also contained another email from Complainant dated October 13, 2015. Complainant, in part, stated "[i]n conclusion, it is my understanding that my boss, Chris C[hesnut], has set up a meeting in an effort to resolve the misunderstandings from the bus improvements. I am awaiting the outcome of those conversations." (Tr. 371). Mr. Chesnut believed Complainant's statement was "fair" and that Complainant was attempting to step back from the "collusion problem." (Tr. 371-72).

Mr. Chesnut confirmed JX-9 is another email chain that he was copied on, and is dated October 13, 2015, and October 14, 2015. Mr. Chesnut acknowledged the first email was sent from Complainant to Ms. Westlund on October 13, 2015. (Tr. 372). Thereafter, on October 14, 2015, Ms. Westlund forwarded Complainant's email to her supervisor, Mr. Tom Hare, and Mr. Hare forwarded the email to Mr. Chesnut, stating "FYI, I have had enough of Michael Clara harassing our employees." When Mr. Chesnut received Mr. Hare's email, he did not know what Mr. Hare was referring to. Mr. Sibul also responded to the emails, stating "[t]here is plenty of blame to go around. Let us work together to figure out a better path forward." (Tr. 373). Mr. Chesnut agreed with Mr. Sibul's statement, and that there were people pointing fingers at each other about problems, attitudes, approaches, responses to emails, and what was happening out in the field. At the time, Mr. Chesnut had not spoken personally with Mr. Sibul about the personnel issues. (Tr. 374). Mr. Sibul never gave Mr. Chesnut specific directions regarding the personnel issues, but he directed Mr. Chesnut to try to "keep the relationships going and keep moving." (Tr. 375).

Mr. Chesnut identified JX-10 as an email chain that he was copied on, dated October 15, 2015. (Tr. 375-76). Mr. Splan sent an email to Complainant, without copying anyone else, but Complainant responded to Mr. Splan and copied other UTA employees. Thereafter, Mr. Turner emailed Mr. Chesnut and stated "Chris, before I unleash on Michael, I am going to let you take care of him ASAP. With him copying everyone and their dog on this email, that is not cool. Let me know what happens,

otherwise this will need to be escalated quickly." Contained in the same email, Mr. Turner states "Jake, let us talk before you strangle this guy." (Tr. 376). On October 15, 2015, Mr. Chesnut responded to Mr. Turner's email, stating "I thought we had everything cleared up yesterday" and "it is my understanding he [Complainant] asked for certain things to happen along 200 South [corridor]." (Tr. 377). Mr. Chesnut listed the items not yet completed on the 200 South corridor to remind Mr. Turner about their prior discussion and meeting, and he was trying to "stand up" for Complainant. (Tr. 377-78). Mr. Chesnut was not concerned about the situation "escalating," but he was under the impression that the previous meeting he had with Mr. Turner, Mr. Splan and Mr. Hare had cleared up all problems and provided a path forward. Mr. Chesnut did not interpret Mr. Turner's "strangling" comment as a threat, but he was concerned that this language was used in the email discussion about a UTA employee. (Tr. 378).

Mr. Chesnut confirmed JX-4 shows the general organization of the UTA in November 2015, which begins with the Board of Trustees, then the President and Chief Executive Officer, followed by seven various UTA departments. (Tr. 379). Mr. Matt Sibul was the Chief Planning Officer over the entire Planning Department, where Mr. Chesnut was Manager of Integrated Service Planning. (Tr. 379-80). Mr. Steve Meyer was Chief Development Officer over the entire Development Department. Mr. Turner worked under the supervision of Mr. Meyer in UTA's Development Department. (Tr. 380). Respondent's Capital Development Department is a part of its Development Department, while the Integrated Service Planning Department is a part of UTA's Planning Department. (Tr. 380-81).

Mr. Chesnut identified RX-24 as an October 15, 2015 email he sent at 2:30 p.m., to various UTA employees, including Complainant with an attachment of the UTA's "OPO 1.2 Bus Stop Amenity Installation." (Tr. 381). In the email Mr. Chesnut stated "over the last few days, emails have been circulated about stops and improvements along 200 South [corridor]. Shelters have been installed and then removed for various reasons." Mr. Chesnut was referring to "emails" that were previously discussed and were sent between various UTA employees. (Tr. 382). Mr. Chesnut knew Complainant had various bus stop shelters removed because proper procedure had not been followed, and as a result, safety issues arose. (Tr. 382-83). Mr. Chesnut did not direct Complainant to remove the bus stop shelters, but Complainant used his judgment to determine the shelters should be removed until proper procedures were

followed. Nevertheless, Mr. Chesnut agreed with Complainant that the bus stop shelters should be removed. Mr. Chesnut further stated in his October 15, 2015 email that in an "attempt to relieve the confusion and based on conversations and reading emails, this is how we are going to proceed," and he attached the "Standard Operating Procedure," asking everyone to read the Procedure. (Tr. 383). Mr. Chesnut concluded his email by stating "[i]f followed, it will ensure that amenities and stops are properly installed and operationally feasible." (Tr. 383-84). He requested that "work order, either verbal/email/BSM to install or remove amenities or stops along 200 South should not be completed for the time being." To Mr. Chesnut's knowledge the work at the 200 South corridor bus stops ceased after his email, and he noted in his email that "sites will be visited and changes outlined before more work is done." (Tr. 384). Mr. Chesnut anticipated that the changes at most bus stop sites would be minor to make the sites safe, operational, and compliant because there were only a "few" sites where major disputes occurred over safety and installation. (Tr. 385).

Mr. Chesnut identified JX-11 as an October 16, 2015 email chain that followed his October 15, 2015 email. Mr. Chesnut sent the email to various UTA employees, including Complainant. (Tr. 385). In his October 16, 2015 email, Mr. Chesnut noted that Mr. Alsop and Mr. Splan visited various bus stop sites along the 200 South corridor, and Mr. Chesnut summarized Mr. Alsop and Mr. Splan's findings and asked Complainant to submit work orders. Mr. Chesnut also noted in his email that the "shelter near the taco cart on the westbound stop at the 200 South and State Street will need to be removed." (Tr. 386). Mr. Chesnut further noted that the shelter near the taco cart had been installed without a work order, and that it was "grand-fathered" under the ADA, but by improving the bus stop it must be ADA compliant. Thereafter, Mr. Chesnut asked Complainant to complete a work order to have the "taco cart" bus stop shelter removed. Mr. Chesnut concluded his email by stating "this is an example of why we have quality control during the process." (Tr. 387). Mr. Chesnut explained he sent this email to re-confirm that by following correct procedure shelters will be properly installed and at the right locations, according to all UTA guidelines and policies. (Tr. 387-88). Mr. Chesnut sent his email also to support Complainant's effort to follow UTA policy. Complainant responded to Mr. Chesnut in the email chain and let Mr. Chesnut know that he completed all the requested work orders. (Tr. 388). Complainant stated "that should bring everything on the 200 South corridor up to date, with the exception of the improved stop locations that are awaiting for

the creation of the no parking zones by the city, before UTA will activate the locations as bus stops. (Tr. 388-89). Mr. Chesnut believed Complainant's response indicated that his plan for resolution was working. (Tr. 389).

Mr. Chesnut confirmed JX-12 contains an email from Mr. Matt Sibul, Mr. Chesnut's supervisor, stating "I am glad to hear there has been better collaboration and understanding of the process, as well as the special conditions in this corridor." Other than Mr. Sibul's email, Mr. Chesnut did not have any other discussions with Mr. Sibul about his efforts to resolve problems with the 200 South corridor. (Tr. 389). Ms. Westlund responded to Mr. Sibul's email and raised issues about work orders. In particular, Ms. Westlund stated "we are anxious to get these installed before the snow flies. Can we see what the hold-up is?" Mr. Chesnut responded to Ms. Westlund and asked her to send copies of the work orders to him. Ms. Westlund, as well as Complainant, provided Mr. Chesnut with copies of the work orders. (Tr. 390).

Mr. Chesnut identified RX-29 as an October 19, 2015 email that Complainant sent to him with the copies of three work orders Ms. Westlund addressed in her email. Complainant informed Mr. Chesnut that the work orders were "not part of the drama from the past two weeks." (Tr. 391). Mr. Chesnut stated Complainant's email reassured him that his effort to resolve the ongoing problems was working. (Tr. 392).

Mr. Chesnut confirmed CX-21 is an October 19, 2015 email that he sent to Ms. Westlund and Complainant, along with other UTA employees, letting them know that there was a problem with the BSM program such that when Complainant entered information it was not saved and carried forward to another department. Mr. Chesnut was aware of the problems with the BSM program because an independent company reviewed the system. Mr. Chesnut wanted Ms. Westlund to know that the problems with the work orders were not Complainant's fault.[48] (Tr. 392).

Mr. Chesnut confirmed JX-12 contains an October 19, 2015 email that he received from Complainant stating "I would like you to note that Michael [Complainant] had enough sense not to respond to the email and provide anymore teachings. He [Complainant] is letting people catch up to what has already been provided." Complainant's email reassured Mr. Chesnut that

[48] Complainant's Exhibit 21 was offered and received into evidence without objection. (Tr. 392-93).

Complainant believed Mr. Chesnut's resolution was working. (Tr. 393). Mr. Chesnut replied to Complainant's email stating, "[y]our restraint is duly noted and appreciated." (Tr. 393-94). Mr. Chesnut replied to Complainant in this manner because he was thankful that everyone was moving forward towards following proper procedure. (Tr. 394).

Mr. Chesnut testified that he talked with Complainant about "flange way gaps," which are gaps where the wheels of a train will roll to stay on the rail line. (Tr. 394). Mr. Chesnut stated Complainant brought up an issue with the flange way gaps when they were at 4500 South track station, and that a passenger in a wheelchair became stuck in the "gap," and he could not get out of his wheelchair. Regrettably, the passenger was struck by a train and died. Mr. Chesnut recalled that Complainant talked about the track station accident being an "ADA problem." Complainant did not ask Mr. Chesnut to address any issue at the track station, but Mr. Chesnut did ask Complainant if there was something he needed to do about the problem, to which Complainant replied "no." (Tr. 395). Mr. Chesnut clarified Complainant also discussed the "flange way gaps" at the "front runner track on 200 South," and that is when Mr. Chesnut asked Complainant if there was anything he needed to do. (Tr. 396).

Mr. Chesnut identified RX-78 as UTA's 2015 "Corporate Policy No. 4.3.5 Responding to Employee Safety Complaints and Concerns." This policy was implemented on February 5, 2015, and Mr. Chesnut confirmed the policy applied to UTA's Planning Department.[49] (Tr. 397). Mr. Chesnut testified he is familiar with the portion of the policy's "non-retaliation" provision. Mr. Chesnut has reported safety issues to his supervisors "multiple times over the years," and he served on UTA's "Safety Committee" that convened on a regular basis to allow UTA employees from various departments to report safety issues. (Tr. 398).

Mr. Chesnut confirmed JX-11 contains an October 15, 2015 email that he sent to many UTA employees about proper procedure and policy, and that the 200 South corridor project was temporarily suspended. (Tr. 398-99). No one ever told Mr. Chesnut not to send this email, nor did anyone take action against Mr. Chesnut for sending the email. Mr. Chesnut recalled Mr. Turner's email that discussed "unleashing" on Complainant. Mr. Chesnut did not believe Mr. Turner's statement "supported" UTA's non-retaliation policy. Following Mr. Turner's statement,

[49] Respondent's Exhibit 78 was offered and received into evidence without objection. (Tr. 397-98).

Mr. Chesnut set up a meeting with Mr. Turner and Mr. Hare to discuss how to best move forward on the 200 South corridor. Mr. Chesnut believed his meeting with Mr. Turner, Mr. Hare, and Mr. Splan "addressed that issue." (Tr. 399). Mr. Chesnut confirmed his email in JX-11 was sent, in part, to various UTA employees to address Mr. Turner's email about "unleashing" on Complainant. (Tr. 400).

When Mr. Chesnut worked in lower level UTA planning positions he regularly reported safety issues. Mr. Chesnut has been regularly promoted while working for Respondent, and he obtained, with UTA's assistance, his Bachelor's and Master's Degrees while employed by Respondent. Mr. Chesnut explained that Respondent offers each employee tuition reimbursement and pays one-half of tuition costs. (Tr. 400).

Mr. Chesnut identified JX-19 as an October 26, 2015 email that he received from Complainant about his upcoming two-week vacation, to which Mr. Chesnut replied "okay." Mr. Chesnut never discussed a three-week vacation with Complainant. Based upon Complainant's October 26, 2015 email, Mr. Chesnut expected Complainant to return to work on November 11, 2015. (Tr. 401).

Mr. Chesnut confirmed CX-34 contains an email dated January 8, 2016, that he sent to Ms. Camille Glenn with a subject "Statement Regarding Michael Clara Unemployment Claim." In the email, Mr. Chesnut wrote "I was not aware that he was conducting any work between October 27th [2015] through November 1st [2015]." However, Mr. Chesnut explained that at the time he sent the email to Ms. Glenn he was not aware Complainant had sent several work emails during that time period until sometime later. Mr. Chesnut further explained he receives a lot of emails and he "forgot" Complainant sent emails during this time. (Tr. 402). Mr. Chesnut did not personally see Complainant during the week of October 27, 2015 through November 1, 2015, but he saw "emails and traffic about things that were happening" so he was aware of Complainant working during this time. Mr. Chesnut was responsible for reviewing and approving Complainant's time sheets, but he did not recall seeing a time sheet from Complainant for work completed from October 27, 2015 through November 1, 2015. Mr. Chesnut testified there were times that Complainant was good about submitting his time sheet, but there were also times he was not good, and as a result, Mr. Chesnut had to submit Complainant's time sheet for him. (Tr. 403).

From November 9, 2015 through November 13, 2015, Mr. Chesnut was out of the office conducting peer reviews in three different cities and transit agencies in Denver, Houston, and Minneapolis. (Tr. 403-04). Nevertheless, Mr. Chesnut knew Complainant did not return to work on November 11, 2015, because various UTA employees from the Planning Department were notifying Mr. Chesnut they had not seen Complainant at work. (Tr. 404-05). On November 16, 2015, Mr. Chesnut returned to work after traveling out of town. (Tr. 405). Mr. Chesnut was concerned when Complainant did not return to work from his vacation on November 11, 2015, and on November 16, 2015, Mr. Chesnut called Complainant's work cell phone to find out his whereabouts. (Tr. 405-06). Mr. Chesnut identified RX-46 as his UTA work cell phone records, which shows he called Complainant's work cell phone on November 16, 2015 at 8:00 p.m.[50] (Tr. 406-07; RX-46, p. 4). Mr. Chesnut called Complainant's work cell phone, and not his personal phone, because Mr. Chesnut anticipated that Complainant would be back to work on November 16, 2015. (Tr. 407-08).

Mr. Chesnut confirmed RX-35 contains a November 16, 2015 email that was sent at 12:52 p.m., from Ms. Cheryl Posey to Mr. Chesnut, as well as other UTA employees. (Tr. 408-09). Ms. Posey was asking for an update on a location within UTA's system, and Mr. Chesnut forwarded the email to Complainant and Joey Alsop, asking one of them to respond to the issue raised by Ms. Posey. (Tr. 409-10). However, Mr. Chesnut testified Complainant did not respond to his request, and to his knowledge Complainant did not respond directly to Ms. Posey.[51] (Tr. 410). After forwarding the email to Mr. Alsop and Complainant, Mr. Chesnut asked Mr. Alsop if he had seen or talked to Complainant, but Mr. Alsop stated that he had not seen or spoke with Complainant. (Tr. 410-11).

Mr. Chesnut became more concerned about Complainant's whereabouts and safety because Complainant had shared with Mr. Chesnut that different people and groups might bring personal harm to Complainant due to his position on the Salt Lake City School Board. After waiting "a little while," on November 16, 2015, Mr. Chesnut and Mr. Alsop went to Complainant's home to ensure that Complainant was safe. (Tr. 411). Mr. Chesnut

[50] Respondent's Exhibit 46 was offered and received into evidence without objection. (Tr. 407).

[51] Respondent's Exhibit 35 was offered and received into evidence without objection for the limited purpose of demonstrating Mr. Chesnut's response to Ms. Posey's email. (Tr. 410).

requested that Mr. Alsop go with him to Complainant's house because Mr. Chesnut was not sure what he would find and wanted another witness present. (Tr. 411-12). When they arrived at Complainant's home he was not there. Mr. Chesnut and Mr. Alsop walked around the home and knocked on the door and looked inside windows, but they did not hear or see Complainant. (Tr. 412). Mr. Chesnut spoke with Complainant's neighbor and felt some relief about Complainant's well-being. (Tr. 412-13).

As Mr. Chesnut and Mr. Alsop were about to leave Complainant's home, Complainant called Mr. Chesnut on his work cell phone and they "kind of laughed a little bit about the whole situation." Mr. Chesnut testified that he and Complainant discussed Complainant's whereabouts and why Complainant did not show up to work. In doing so, Mr. Chesnut reminded Complainant that he was supposed to return to work on November 11, 2015. Mr. Chesnut said to Complainant "okay, well what day are you going to come back" and Complainant responded that he would return to work on "Wednesday." Mr. Chesnut simply responded "okay, I will see you on Wednesday." During their November 16, 2015 conversation, Complainant did not remind Mr. Chesnut that he worked during the first week of his vacation. (Tr. 413). Complainant explained to Mr. Chesnut that he had not returned to work yet because he was busy with community work and met with personnel working for Jackie Biskupski, the new Mayor of Salt Lake City. (Tr. 413-14). At this point, Mr. Chesnut had not contacted anyone in UTA's Human Resources Department because Complainant was to return to work on the upcoming Wednesday, November 18, 2015. Mr. Chesnut also had no plans to reprimand Complainant for not coming back to work on November 11, 2015. (Tr. 414). After his phone call with Complainant concluded, Mr. Chesnut shared with Mr. Alsop what transpired and that Complainant stated he would return to work on Wednesday, November 18, 2015. (Tr. 414-15). Mr. Chesnut has no doubt that Complainant stated he would return to work on Wednesday, November 18, 2015. However, Mr. Chesnut confirmed that Complainant did not return to work on November 19, 2015, or November 20, 2015. (Tr. 415).

When Complainant did not return to work on November 20, 2015, Mr. Chesnut examined UTA's attendance policy on the UTA intranet and spoke with Camille Glenn about what action he should take. Mr. Chesnut explained to Ms. Glenn all that had transpired with Complainant, including his well-being visit to Complainant's home and that Complainant stated in his initial email that he would be back to work on November 11, 2015. (Tr. 415). Mr. Chesnut testified that he was frustrated with

Complainant because on two separate occasions Complainant did not come to work and there "were things that needed to get done." After speaking with Ms. Glenn about UTA's job abandonment policy, Mr. Chesnut was concerned that he, as Complainant's supervisor, was violating the policy. (Tr. 416). According to Ms. Glenn's explanation, Mr. Chesnut was in violation of Respondent's abandonment policy by not taking action when Complainant did not show up to work on November 16, 2015, and by waiting until November 20, 2015, to take any action. (Tr. 416-17).

Following his discussion with Ms. Glenn, Mr. Chesnut decided to terminate Complainant's employment with Respondent. Mr. Chesnut did not discuss with Ms. Glenn anything regarding the 200 South corridor, nor did he discuss anything relating to "flange way gaps." Terminating Complainant's employment was "really hard" for Mr. Chesnut because he had known Complainant for 20 years and considered Complainant a "friend." (Tr. 417). Ms. Glenn requested Mr. Chesnut to summarize why he was enforcing UTA's abandonment policy against Complainant and to email the summarization to her. (Tr. 417-18). Mr. Chesnut identified JX-15 as the email he sent to Ms. Glenn following their discussion of UTA's job abandonment policy relating to Complainant. Mr. Chesnut wrote "[a]fter Michael [Complainant] had not returned to work on November 11th, and several people had tried to contact him, Joey Alsop and [sic] when to his house on Monday, November 16th, to make sure he was okay." (Tr. 418). Mr. Chesnut did not try to contact Complainant prior to November 16, 2015. (Tr. 418-19). Mr. Chesnut also wrote in his email to Ms. Glenn that he "reminded him [Complainant] that he said on the email that he would return on November 11th." Mr. Chesnut also stated in his email that he "sent him [Complainant] two emails with tasks that needed to be completed and have not had a response," which were in regard to the email from Ms. Posey. (Tr. 419).

Mr. Chesnut confirmed JX-20 is the termination letter he drafted and sent to Complainant on November 20, 2015. In the termination letter, Mr. Chesnut stated "I tried contacting you [Complainant] numerous times, both by phone and email, from November 11th to November 13th, with no response from you." Mr. Chesnut acknowledged that he did not try to contact Complainant numerous times, rather it was other UTA employees who tried to contact Complainant from November 11, 2015 through November 13, 2015. (Tr. 420). Mr. Chesnut admitted he was nervous about sending the termination letter to Complainant because he does not often terminate people, and terminating Complainant who was

his friend and a co-worker for a long period of time made it more difficult for Mr. Chesnut. Mr. Chesnut also communicated with Mr. Sibul, his supervisor, to inform him about Complainant's termination and why he was terminating Complainant. (Tr. 421). Mr. Sibul did not counsel Mr. Chesnut regarding Complainant's termination, rather Mr. Sibul only said that if Mr. Chesnut believed he was making the right decision then Mr. Sibul would support his decision. (Tr. 421-22). Mr. Chesnut testified that speaking with Mr. Sibul about Complainant's termination contributed to his error (i.e., that Mr. Chesnut tried to contact Complainant numerous times) in Complainant's termination letter because it brought "home" the decision to terminate Complainant. (Tr. 422).

On November 20, 2015, after sending Complainant the termination letter, Mr. Chesnut also called Complainant at 4:00 p.m. to tell Complainant he was terminated for "job abandonment." (Tr. 422-23). Complainant responded by asking Mr. Chesnut if he was "serious," and Mr. Chesnut replied "yes." Complainant asked Mr. Chesnut if there was someone he could speak with at UTA, and Mr. Chesnut referred Complainant to Ms. Glenn. Mr. Chesnut also informed Complainant he could file an appeal, and that Mr. Chesnut believed Complainant should file an appeal. Mr. Chesnut did not cry when he called Complainant to terminate his employment. Mr. Chesnut knew Complainant came to the office after he terminated Complainant, but Mr. Chesnut did not see him. (Tr. 423).

Mr. Chesnut did not authorize Complainant to use his UTA email account for his work on the Salt Lake City School Board. Likewise, Mr. Chesnut did not authorize Complainant to send work emails to his personal email account so Complainant could work at home. (Tr. 423). Mr. Chesnut explained that there was no need for Complainant to forward work emails to his personal email account because Complainant had a UTA mobile phone with a UTA email account, a UTA laptop, and a UTA mobile hotspot for internet connection. If Mr. Chesnut knew Complainant was forwarding work emails to his personal email account he would have sought guidance from UTA's Human Resources Department. (Tr. 424).

Mr. Chesnut identified JX-26 as Respondent's Corporate Policy on Separation of Employment, the policy on which Mr. Chesnut based his decision to terminate Complainant's employment. Mr. Chesnut confirmed JX-26 also includes UTA's job abandonment policy. Other than his November 20, 2015 discussion with Ms. Camille Glenn, Mr. Chesnut did not discuss terminating

Complainant with any other person. While Complainant was employed with UTA, Mr. Chesnut did not tell any other UTA employee that he wanted to terminate Complainant. Mr. Sibul never communicated to Mr. Chesnut that he did not like Complainant, nor did Mr. Sibul tell Mr. Chesnut to terminate Complainant's employment. (Tr. 425). Mr. Chesnut testified Mr. Sibul gave him positive feedback when Complainant worked on a specific bus stop issue because Mr. Sibul appreciated Complainant's effort to install the bus stop or make improvements. Mr. Chesnut confirmed that Mr. Sibul never complained or brought up issues concerning Complainant and his work. Mr. Chesnut testified that none of Complainant's safety reports concerning bus stop locations played a role in Mr. Chesnut's decision to terminate Complainant. (Tr. 426).

On cross-examination, Mr. Chesnut confirmed that in 2015, there were three employees in the "Salt Lake Business Unit" that reported to him, including Complainant, Mr. Christensen, and Mr. Alsop. Mr. Chesnut was Complainant's supervisor for three years from 2012 through 2015. For the most part, Mr. Chesnut considered Complainant to be very thorough and very good at his job while employed by Respondent. Mr. Chesnut also performed Complainant's annual performance reviews. (Tr. 428). On a scale of 1 to 10, Mr. Chesnut rated Complainant's job performance at 5 or 6, but he would rate Complainant's technical performance (for policies and procedures) at 7 or 8. Mr. Chesnut rated Complainant's overall performance at six because of Complainant's issues with his communication skills. Nevertheless, despite Complainant's communication issues, Mr. Chesnut did not issue him any write-ups, warnings, or other formal discipline due to such issues. (Tr. 429). Mr. Chesnut confirmed he provided Complainant with two "merit increases" in 2012 and 2014. (Tr. 429-30). Mr. Chesnut did not recognize RX-54 and RX-55, which are Complainant's July 8, 2012 and March 30, 2014 merit increases, even though he signed them. (Tr. 430). Mr. Chesnut explained that the merit increase documents look different than the ones that he received and signed. (Tr. 430-31).

Mr. Chesnut confirmed JX-37 stipulates that the "UTA's policies define a workday as starting roughly at 8:30 o'clock a.m. and ending at 5:00 o'clock p.m." Mr. Chesnut also confirmed that Complainant, at times, deviated from UTA's workday schedule. Mr. Chesnut did not dispute that Complainant performed most of his work outside of the office and he was not required to obtain Mr. Chesnut's permission to do so. Mr. Chesnut confirmed that the only work Complainant performed at

his office was attending meetings, and connecting with the UTA database and the Bus Stop Manager. (Tr. 431).

Mr. Chesnut recalled attending a deposition for the instant case, and understood he answered questions under oath. (Tr. 431-32). During his deposition, when asked whether there were any job duties Complainant could only perform inside his office, Mr. Chesnut stated Complainant had to come to the office for meetings with other UTA departments. Mr. Chesnut also deposed Complainant had all the technology to perform quite a bit of his job duties outside the office as well. Mr. Chesnut acknowledged he did not mention Complainant had to come into the office for the BSM connection. (Tr. 433).

Mr. Chesnut confirmed that a "bus pad" refers to a cement slab of concrete that serves as a landing area to enable people with wheelchairs and disabilities to access a bus and sidewalk. Mr. Chesnut also confirmed CX-6 contains an email chain that was first sent by Complainant to the Transit Communications Center ("TCC") on October 5, 2015. (Tr. 433). Mr. Chesnut testified he was aware of Complainant's October 5, 2015 email to the TCC, when Complainant notified the TCC there was construction in progress at the 710 East and 200 South bus stop that was unsafe.[52] (Tr. 433-34).

Mr. Chesnut identified JX-5 as another email chain, part of which contains an October 8, 2015 email from Complainant to Mr. Chesnut that states "Ginger advised me that Jake said this has to get done because of the bond vote." (Tr. 435). At the time he received Complainant's October 8, 2015 email, Mr. Chesnut was aware that Mr. Hare and Mr. Splan were instructing UTA employees in the Facilities Department to install shelters along the 200 South corridor without a work order. (Tr. 436). Mr. Chesnut acknowledged that, in a previous email, Ms. Westlund told Complainant she does not receive "copies of work orders," and that she "was instructed to get these shelters installed." Mr. Chesnut was aware bus shelters were being installed without work orders because Complainant, who worked out on the streets, informed him of the same. Mr. Chesnut considered Complainant's reports concerning the work order issues to be credible. Mr. Chesnut also had knowledge of UTA's Policy OPO 1.2 that requires work orders to be issued by a planner prior to the installation of bus stops and amenities. (Tr. 437). Mr. Chesnut confirmed

[52] Complainant's Exhibit 6 was offered and received into evidence without objection. (Tr. 435).

the installation of bus stops and amenities usually involves emails and site visits, followed by the issuance of work orders. (Tr. 437-38). Mr. Chesnut was aware of Ms. Westlund's statement that Jake Splan advised her "this has to get done because of the bond vote." Mr. Chesnut confirmed the bond vote referred to "Proposition 1." (Tr. 438). Mr. Chesnut set up a meeting with other managers to discuss the process of installing bus shelters and/or amenities, but he did not investigate whether Complainant's allegation regarding the bond vote was true. (Tr. 438-39). Mr. Chesnut confirmed that in Complainant's October 8, 2015 email he also mentioned that he never placed a bus shelter at 200 South and State Street because there is a six percent slope toward the street. Mr. Chesnut confirmed that the ADA requires a slope of less than two percent, and that a slope at six percent could present safety issues for wheelchair-bound passengers. (Tr. 439).

Mr. Chesnut confirmed CX-11 contains an email chain between Complainant and Mr. Splan, eventually which Mr. Chesnut also received beginning on October 7, 2015, at 7:00 p.m. (Tr. 439-40). In the email chain, Complainant emailed Mr. Splan stating "Jake, I am not sure why the set of upgrades are causing so much confusion. You are confused as to my role. I am not your clerk. I am not going to input work orders upon your command. And I will take your request for work orders and follow the process." Thereafter, Complainant informed Mr. Splan about the process of entering work orders, which Mr. Chesnut confirmed is consistent with UTA's policy. (Tr. 440). Mr. Chesnut acknowledged that Complainant was not Mr. Splan's clerk, nor was Complainant required to enter work orders on demand. (Tr. 440-41). In Complainant's email he also referred to "no parking zones," which Mr. Chesnut confirmed would be important for any bus stop along the 200 South corridor because metered parking on the street could obstruct a bus from approaching the curb and deploying ramps for passengers. Mr. Chesnut agreed that without a "no parking zone" passengers would have to enter travel lanes to get to a bus which would create safety hazards. (Tr. 441). Mr. Chesnut confirmed Complainant's email also discussed bus stop upgrades, and that Mr. Splan was installing upgrades faster than ever in UTA's history because he was working with a Federal Transit Administration ("FTA") allocation of money that Mr. Splan stated "needed to be spent." (Tr. 442).

Mr. Chesnut acknowledged that on or about October 14, 2015, he conducted a meeting with Mr. Turner and Mr. Hare about Mr. Splan's failure to follow proper procedure for installing bus stop amenities by by-passing Complainant. (Tr. 442). Mr.

Chesnut agreed that Mr. Splan wanted to install bus stop amenities faster than the UTA procedures permitted. (Tr. 443).

Mr. Chesnut confirmed CX-13 contains an October 11, 2015 email chain between Complainant, Mr. Christensen, and Mr. Splan that he also received. In the October 11, 2015 email, Complainant referred to benches and shelters blocking a wheelchair's path to board and exit at the front of the loading zone, which in turn caused the bus to stop short of the stop, causing an accident. (Tr. 443). It was Mr. Chesnut's understanding that the accident Complainant referred to in his email was the accident at 120 East and 200 South where a bus hit a sign attached to a light pole. Mr. Chesnut considered the "blocked wheelchair path" mentioned by Complainant, to be a safety hazard. (Tr. 444).

Mr. Chesnut identified JX-7 as an October 13, 2015 email he received from Complainant, and his response to the same. (Tr. 444). Upon hearing Complainant's description of the 200 South and State Street bus stop, Mr. Chesnut considered it to be unsafe, and as a result, set up a meeting with Mr. Hare and Mr. Turner to resolve installation issues. (Tr. 444-45). Mr. Chesnut responded to Complainant's October 13, 2015 email, stating he wanted a copy of the "green sheet" regarding the bus that hit the light pole. Mr. Chesnut explained a "green sheet" is the document bus drivers complete following a bus accident. (Tr. 445). Complainant also reported to Mr. Chesnut that "Jake [Splan, Tom [Hare], and Ginger [Westlund] were installing amenities in violation of UTA policy," to which Mr. Chesnut replied that he was bringing UTA's policy OPO 1.2 to his meeting with Mr. Hare and Mr. Turner. Mr. Chesnut confirmed that bus shelters were being installed and removed along the 200 South corridor because Complainant asked them to be removed for reasons relating to safety and ADA compliance. Mr. Chesnut was supportive of Complainant's concerns and actions regarding the bus shelters and safety. (Tr. 446).

Mr. Chesnut confirmed CX-61 is an October 15, 2015 email to several UTA employees, as well as Mr. Chesnut, that he received at 9:15 a.m. Mr. Chesnut responded to Complainant's email at 10:05 a.m., stating "Michael [Complainant], everyone did not need to be brought into the conversation." Mr. Chesnut acknowledged that in Complainant's October 15, 2015 email, Complainant also copied the email to UTA's Civil Rights and

Safety Departments regarding what was transpiring with Mr. Splan.[53] (Tr. 447).

Mr. Chesnut acknowledged RX-78 contains Respondent's policy about responding to an employee safety complaint and/or concern, which, in part, states "[e]stablish and conduct a Business Unit Safety Committee meeting at least monthly." (Tr. 448-49). Mr. Chesnut agreed that UTA's safety policy was inclusive of concerns raised by employees and communicated to UTA's Safety Department, and that Complainant's email notifying the Safety Department was in line with what UTA's safety policy contemplated. (Tr. 449). Mr. Chesnut explained that he told Complainant "everyone (i.e., UTA's Safety Department) did not need to be brought into the conversation" because Mr. Chesnut wanted to "keep the group small," he had already met with everyone involved, and he felt that Complainant's email was "continuing the cycle of pointing fingers and bringing in people who were not ready to be brought in yet." (Tr. 449-50). Mr. Chesnut did not deny that safety concerns existed concerning the 200 South corridor bus stops, but Mr. Chesnut did not want more UTA employees involved because he believed the problem was solved during his meeting with Mr. Hare, Mr. Turner, and Mr. Splan. (Tr. 450). Mr. Chesnut's intent in keeping the issues within the "group" was not an attempt to exclude the UTA's Safety and Civil Rights Departments, but rather to implement policy and keep moving forward in the right direction. (Tr. 450-51). Nevertheless, Mr. Chesnut admitted UTA's Safety and Civil Rights Department needed to be involved with the bus stop safety concerns along the 200 South corridor. (Tr. 451).

Mr. Chesnut confirmed that JX-11 contains an October 16, 2015 email that he received from Complainant about work orders, no parking zones, and broken pavers. (Tr. 451-52). Mr. Chesnut considered Complainant's reference to "broken pavers" to be a safety hazard. (Tr. 452).

Mr. Chesnut agreed with Complainant's comments in an October 15, 2015 email to Mr. Splan (JX-10) regarding Mr. Splan's actions that resulted in closure of bus stops along the 200 South corridor due to unsafe conditions. (Tr. 452).

Mr. Chesnut confirmed CX-21 contained an October 19, 2015 email chain between himself and Ms. Westlund, as well as other

[53] Complainant's Exhibit 61 was offered and received into evidence without objection. However, the handwritten notes on the exhibit are not received into evidence. (Tr. 448).

UTA employees. Ms. Westlund discussed issues in the past with Complainant not providing enough information or a "stop number" in regard to work orders. (Tr. 452). Mr. Chesnut responded by letting Ms. Westlund know Complainant was correctly entering work order information into the BSM, but there were software issues with BSM that caused information to be absent. (Tr. 453).

Mr. Chesnut identified CX-23 as an October 20, 2015 email that Complainant sent to him, among other UTA employees. Complainant stated a bus driver had to use the west side of a bus shelter as a landing pad, which Mr. Chesnut acknowledged would be an "awkward angle" to deploy a ramp to get off and on the bus. (Tr. 453). Mr. Chesnut also acknowledged that at this angle the back end of the bus would be in the street, creating a safety hazard. (Tr. 453).

Mr. Chesnut confirmed CX-25 contains an October 21, 2015 email from Complainant to Mr. Toby Alires, in UTA's Civil Rights Department, which was also copied to Mr. Chesnut. Mr. Chesnut confirmed the Civil Rights Department oversees ADA compliance and internal issues related to various types of discrimination. Mr. Chesnut does not recall Mr. Turner informing him that Complainant should not have sent the October 21, 2015 email to Mr. Alires. Mr. Chesnut also does not recall telling Complainant he was hurting Respondent's image by notifying UTA's Civil Rights Department about all the personnel issues surrounding the bus shelter installations on the 200 South corridor. Mr. Chesnut also did not recall telling Complainant that Mr. Sibul wanted his employment terminated. (Tr. 454).

Mr. Chesnut recalled Complainant emailing him on October 26, 2015, stating "[i]f you have no objection, I will be taking vacation for two weeks starting tomorrow" and that he would be available by phone. Mr. Chesnut responded "okay" to Complainant's email. Mr. Chesnut agreed that he approved Complainant's vacation. (Tr. 455; JX-37, p. 10, Stipulated Fact Nos. 15-16). Based upon Complainant's vacation request, Mr. Chesnut was expecting Complainant to return to work on November 11, 2015. Mr. Chesnut was out of town the week that Complainant was to return to work, but Mr. Chesnut returned home on November 13, 2015, and came back to work on November 16, 2015. Mr. Chesnut did not realize Complainant had not returned to work until Mr. Chesnut returned to work on November 16, 2015. Mr. Chesnut confirmed Complainant missed four days of work between November 11, 2015 and November 16, 2015. (Tr. 456). However, Mr. Chesnut elected not to terminate Complainant's employment on

November 16, 2015, because Complainant had been a UTA employee for 20 years, and at the time, Mr. Chesnut did not believe Complainant had abandoned his job. (Tr. 456-57).

Mr. Chesnut confirmed CX-34 is an email dated January 8, 2016, that he sent to Ms. Camille Glenn regarding Complainant's failure to return to work from vacation.[54] (Tr. 457). Mr. Chesnut stated in his January 8, 2016 email that he was not aware of Complainant performing any work between October 27, 2015 and November 1, 2015. Mr. Chesnut agreed his account of Complainant's work during that time span is incorrect because he received emails from Complainant between the aforementioned dates. (Tr. 458). Nevertheless, it was not until Mr. Chesnut had looked at additional data following Complainant's unemployment claim (after January 8, 2016) that Mr. Chesnut realized his statement to Ms. Glenn was incorrect. (Tr. 458-49). Mr. Chesnut confirmed that from October 27, 2015 through November 1, 2015, he received emails from Complainant about the UTA's "Meadowbrook Station," but he did not recall receiving any emails about the 200 South corridor, the Sandy Civic Center, or work orders. (Tr. 459). Mr. Chesnut identified CX-58, p. 45, as an October 27, 2015 email he received from Complainant regarding his completed "work orders."[55] (Tr. 459-60). Upon looking at CX-58, p. 43, Mr. Chesnut confirmed that on October 27, 2015, Complainant did email him about the Sandy Civic Center. Likewise, CX-58, p. 37, demonstrates that on October 29, 2015, Mr. Chesnut emailed Complainant referencing a work order for the 200 South corridor. (Tr. 461). Mr. Chesnut agreed that Complainant had worked from October 27, 2015 through November 1, 2015, when Complainant should have been on vacation. (Tr. 461-62). Mr. Chesnut testified that following his January 8, 2016 email to Ms. Glenn he never followed-up with her to inform her that he was incorrect in stating Complainant did not work from October 27, 2015 through November 1, 2015. (Tr. 462).

Mr. Chesnut testified that he spoke with Complainant by telephone on November 16, 2015, late in the afternoon while Mr. Chesnut was with Mr. Alsop. Mr. Alsop did not hear the conversation between Mr. Chesnut and Complainant because the conversation was not on speaker phone. (Tr. 462). According to

---

[54] Complainant's Exhibit 34 was offered and received into evidence without objection. However, the handwritten notes on the exhibit are not received into evidence. (Tr. 457).

[55] Complainant's Exhibit 58, page 45, was offered and received into evidence without objection. (Tr. 460).

Mr. Chesnut, Complainant stated he was returning to work on Wednesday, November 18, 2015. (Tr. 462-63). Mr. Chesnut recalled that Complainant simply stated he would return to work on "Wednesday," but he did not provide a date. (Tr. 463).

On Friday, November 20, 2015, Mr. Chesnut called Complainant to inform him that his employment with Respondent had been terminated. (Tr. 463). Mr. Chesnut recalled that Complainant responded to his phone call, stating it was unfair to terminate him when he had been employed by Respondent for so long. Mr. Chesnut responded to Complainant by strongly suggesting that Complainant appeal his termination. Mr. Chesnut explained that he suggested Complainant appeal his termination because Respondent has an appeal process that allowed Complainant to "tell his side of the story." According to Respondent's policy, Mr. Chesnut would not hear or consider Complainant's appeal. (Tr. 464).

Mr. Chesnut identified JX-20 as Complainant's November 20, 2015 termination letter that he wrote and sent to Complainant, stating that he "tried calling Complainant numerous times." (Tr. 464-65). However, Mr. Chesnut admitted the aforementioned statement was an "error or oversight" because he had not personally called Complainant numerous times. Mr. Chesnut did not attempt to correct his misstatement with Ms. Glenn or with Mr. Sibul, despite Complainant filing his appeal of his termination with Mr. Sibul. Mr. Chesnut testified the purpose of Complainant's appeal was to reconsider Complainant's termination, but not to wordsmith Mr. Chesnut's termination letter. (Tr. 465). Nonetheless, Mr. Chesnut agreed that an appeal decision should be based on all the correct facts. Ultimately, Mr. Chesnut did not correct his misstatement because his "previous email" stated that various people, and not Mr. Chesnut, tried to contact Complainant. Mr. Chesnut did not want Complainant's appeal to be denied. (Tr. 466).

Mr. Chesnut testified that "technically" Complainant abandoned his job on November 11, 2015, even though Mr. Chesnut approved Complainant's vacation through the same day. (Tr. 466-67). According to Respondent's job abandonment policy, an employee must miss three consecutive days, and as such, Mr. Chesnut agreed Complainant's termination was not effective on November 11, 2015. (Tr. 467). Mr. Chesnut admitted he did not terminate Complainant's employment on November 18, 2015, the day Mr. Chesnut claims Complainant was to return to work. (Tr. 467-68). Mr. Chesnut did not communicate to Complainant that he

expected him to return to work prior to Wednesday, November 18, 2015. (Tr. 468).

Mr. Chesnut confirmed CX-50 contains his testimony during Complainant's telephonic unemployment hearing before a Workforce Service Administrative Law Judge. (Tr. 468). Mr. Chesnut's testimony shows that he again claims he did not receive any emails from Complainant from October 27, 2015 through November 1, 2015. In particular, Mr. Chesnut testified at the telephonic unemployment hearing that he received an October 27, 2015 email from Complainant, but he did not receive anything from Complainant after that day. Mr. Chesnut did not agree that he perpetrated a misstatement under oath at Complainant's unemployment hearing. (Tr. 470).

On re-direct examination, Mr. Chesnut confirmed he did not realize that he had made a mistake about receiving Complainant's emails from October 27, 2015 through November 1, 2015, until sometime after January 2016. (Tr. 470-71). Mr. Chesnut stated whether he, or other people tried to contact Complainant numerous times, would not have affected his decision to terminate Complainant's employment. Mr. Chesnut also confirmed that the issue of Complainant working his first week of vacation was never discussed, nor did it play a role in Mr. Chesnut's decision to terminate Complainant. Mr. Chesnut testified Complainant did not mention that he worked the first week of his vacation when he called Complainant on November 20, 2015, to terminate Complainant. (Tr. 471). It was Mr. Chesnut's expectation that Complainant would work his first week of vacation because when Complainant emailed Mr. Chesnut requesting his two-week vacation, Complainant also stated he would also be performing some work. (Tr. 472).

Mr. Chesnut confirmed CX-11 contains an October 7, 2015 email between Complainant and Mr. Splan in which Complainant informs Mr. Splan that he is not Mr. Splan's clerk. (Tr. 472). Mr. Chesnut acknowledged Mr. Splan did not possess supervisory authority over Complainant, but rather he, along with Mr. Matt Sibul, oversaw Complainant's work. (Tr. 472-73). When Mr. Chesnut decided to terminate Complainant's employment on the basis of job abandonment he did not consult with Mr. Splan. (Tr. 473).

Mr. Chesnut spoke with Mr. Toby Alires concerning the email (CX-25) that Complainant sent to Mr. Alires about Ms. Westlund's complaint that Complainant created a "hostile work environment," and in doing so, Mr. Alires stated he conducted an investigation

and determined no hostile work environment existed. Mr. Alires informed Mr. Chesnut that he dismissed Ms. Westlund's complaint. (Tr. 473). During Mr. Alires investigation, Mr. Chesnut defended Complainant's actions by explaining to Mr. Alires that Complainant was trying to follow UTA's process for installing and removing bus stops. (Tr. 473-74).

On November 16, 2015, when Mr. Chesnut spoke with Complainant to find out his whereabouts, Mr. Chesnut did not consider Complainant to have abandoned his job and he was relieved to hear Complainant was okay. According to Mr. Chesnut, UTA's job abandonment policy requires termination be effective on the first day an employee is absent without permission. (Tr. 474). Mr. Chesnut approved Complainant's absence from work beginning on November 16, 2015 until November 18, 2015, which was contingent on Complainant returning to work on November 18, 2015. (Tr. 474-75). Mr. Chesnut confirmed Complainant did not return to work on November 18, 2015. (Tr. 475).

Mr. Chesnut testified he did not consider Complainant to have abandoned his job when he did not return to work on November 11, 2015 through November 16, 2015. (Tr. 475-76). Mr. Chesnut first sought counsel from Ms. Glenn on November 20, 2015. However, Mr. Chesnut failed to communicate to Ms. Glenn that Complainant did not abandoned his job from November 11, 2015 through November 18, 2015, the date Complainant was to return to work. Mr. Chesnut sought Ms. Glenn's counsel to determine the appropriate steps to take in light of Complainant's failure to return to work on November 18, 2015. According to Mr. Chesnut, UTA's Human Resources Department informed him that Complainant's three-day abandonment period began to run on November 18, 2015. When asked why Complainant's effective termination date was noted as November 11, 2015, Mr. Chesnut stated "that is a really good question." (Tr. 476). Mr. Chesnut confirmed that on November 20, 2015, he first spoke with Ms. Glenn about Complainant's job abandonment, then he wrote and sent Complainant his termination letter, and thereafter, he called Complainant to inform him that he was terminated. Mr. Chesnut testified that on November 20, 2015, Complainant came to work and spoke with someone in UTA's Human Resources Department about his termination. (Tr. 477).

Mr. Chesnut testified that November 20, 2015, was the first time he began to consider whether Complainant abandoned his employment. Mr. Chesnut researched Respondent's Separation of Employment and Attendance Policy, which raised concerns for Mr.

Chesnut that not only had Complainant not returned to work on November 11, 2015, but he did not return to work again on November 18, 2015. Prior to terminating Complainant for job abandonment, Mr. Chesnut had never applied the policy to any other employee. (Tr. 478).

On re-cross examination, Mr. Chesnut reviewed JX-26, Respondent's job abandonment policy, and he confirmed that nowhere in the policy does it state "the termination and abandonment decision is retroactive to the first day when they [employee] did not show up for work." (Tr. 479).

On re-direct examination, Mr. Chesnut testified that JX-26 correctly states Respondent's job abandonment policy and how it has been applied in the past. (Tr. 479).

Matthew Sibul

Mr. Sibul testified that he currently serves as UTA's Director of Government Relations. (Tr. 480-81). However, from 2010 to October 2016, Mr. Sibul served as UTA's Chief Planning Officer. In 2007, Mr. Sibul first began working for Respondent as a project manager "on the airport track line." Prior to working for Respondent, Mr. Sibul worked in transportation consulting for thirteen years. Mr. Sibul received education in the field of engineering. (Tr. 481).

In 2015, Mr. Chesnut reported to Mr. Sibul as the Chief Planning Officer. (Tr. 481). Mr. Sibul explained that Mr. Chesnut's job, as the Manager of Service Planning, required planning 110 bus routes in the UTA's service areas, connecting markets and destinations together, and revising and optimizing the bus system on a periodic basis. (Tr. 481-82). In 2015, Complainant did not report to Mr. Sibul, but instead he reported to Mr. Chesnut. However, Mr. Sibul had periodic interactions with Complainant. Mr. Sibul would call Complainant when he was utilizing the UTA system, riding buses, in order to tell Complainant about an issue or ask him a question about a bus stop. Mr. Sibul testified Complainant managed UTA's bus stops program and worked to coordinate the activities relating to 6,000 or more bus stops. Consequently, Mr. Sibul would call Complainant with issues because of his knowledge and quick response to Mr. Sibul's questions and concerns. (Tr. 482).

Mr. Sibul identified JX-4 as a 2015 organization chart showing UTA's departmental organization. (Tr. 482-83). The chart shows Mr. Sibul as the Chief Planning Officer with Mr.

Chesnut serving as one of the managers under Mr. Sibul's management. Mr. Sibul confirmed that Jacob Splan worked in UTA's Capital Development Department where Steve Meyer was the Chief Development Officer and Grey Turner, who answered to Mr. Meyer, was Mr. Splan's supervisor. (Tr. 483). Mr. Sibul confirmed that JX-4 also showed the organization of UTA's Planning Department in 2016, which does not show Complainant in the Service Planning Department. (Tr. 483-84). Mr. Sibul explained that the Service Planning Department developed and planned over 100 bus routes, revised and added bus routes, and managed over 6,000 bus stops associated with all the routes. Mr. Sibul testified that in 2015, Respondent had over 2,400 employees with roughly the same amount of employees today. (Tr. 484).

Mr. Sibul identified JX-3 as Complainant's 2015 job description when he was employed by Respondent. (Tr. 484). According to Mr. Sibul, Complainant was always responsive, professional, and organized when he interacted with Complainant. Mr. Sibul also interacted with Complainant at meetings and with other "outside groups," and found Complainant to be professional, courteous, and Mr. Sibul thought Complainant represented UTA well. (Tr. 485). However, Mr. Meyer and Mr. Alsop would tell Mr. Sibul how "abrasive and difficult" Complainant could be when working with him. (Tr. 485-86).

Mr. Sibul was familiar with the fall 2015 bus stop improvement project along the 200 South corridor in Salt Lake City. Mr. Sibul testified UTA wanted to make improvements along the 200 South corridor for several years, thus in 2013, UTA began to create a plan to improve the bus stops, and in 2014, new designs were created and a budget was implemented. Mr. Sibul testified Respondent began to make actual improvements to the bus stops in late 2014, into early 2015, before the weather became too cold and rainy to pour concrete. (Tr. 486).

Mr. Sibul testified he is familiar with "Proposition 1." (Tr. 486). When asked whether there was any heightened urgency on the 200 South corridor project because of the upcoming vote on "Proposition 1," Mr. Sibul stated UTA wanted to demonstrate excellence and finish the 200 South corridor project, but UTA was focused on the 200 South corridor long before "Proposition 1" was proposed. Mr. Sibul explained that the 200 South corridor project was of the upmost importance because it is one of the most highly utilized corridors in UTA's system. (Tr. 487).

Mr. Sibul estimated Respondent's total budget in 2015, was approximately $320 million to $330 million. (Tr. 487). Mr. Sibul identified RX-38 as UTA's 2015 budget in the amount of $347 million. Mr. Sibul confirmed Respondent spent $302,914.00 in costs to design and install bus stop amenities along the 200 South corridor. (Tr. 488).

Mr. Sibul was aware of the dispute between Complainant and Mr. Splan relating to the 200 South corridor. (Tr. 488). Mr. Sibul confirmed that Mr. Splan did not have supervisory authority over Complainant or any other UTA employee. Mr. Sibul was aware of the dispute between Complainant and Mr. Splan due to various emails he received, and discussions with Mr. Splan as well as other UTA employees. However, Mr. Sibul did not personally become involved in resolving the dispute, but instead spoke with Mr. Chesnut on several occasions about how to best move forward. (Tr. 489). Mr. Sibul confirmed JX-9 contained an October 14, 2015 email that he sent to Mr. Tom Hare, Mr. Chris Chesnut, and Mr. Steve Meyer in response to emails sent between Complainant and Ms. Westlund. (Tr. 490). Mr. Sibul wrote that it was his "understanding that there is a meeting this morning to discuss how to resolve the issues with how we are developing and installing the shelters on 200 South. There is plenty of blame to go around, let us work together to figure out a better path forward." (Tr. 490-91). The "issues" Mr. Sibul referred to in his email was in regard to installing bus stop shelters on the 200 South corridor and removing the shelters because they were not installed according to ADA requirements. Mr. Sibul also spoke with Mr. Chesnut about how UTA employees were communicating with each other, who was responsible for approving bus shelters prior to installation, and who must sign-off on proposed installations. (Tr. 491). Mr. Sibul stated in his email that "there was plenty of blame to go around" because shelters were installed that did not meet ADA requirements, and there was a breakdown in communication between Complainant, Ms. Westlund, Mr. Hare, and other UTA employees. (Tr. 491-92). Mr. Sibul was aware of Mr. Chesnut holding a meeting regarding the installation of bus stop shelters along the 200 South corridor because Mr. Chesnut told him about the meeting. (Tr. 492).

Mr. Sibul confirmed RX-28 contains an October 15, 2015 email chain from Mr. Chesnut to other UTA employees, including Mr. Sibul.[56] (Tr. 492). Mr. Sibul's response to the October 15, 2015 email stated "I am glad to hear there has been better collaboration and understanding of the process, as well as

[56] Respondent's Exhibit 28 was offered and received into evidence without objection. (Tr. 492-93).

special conditions in this corridor." Mr. Sibul's reference to "the process" meant the process of approving the location and installation of bus stops, who was to perform the work orders, and timely processing of the work orders. (Tr. 493). Mr. Sibul also referred to the "special conditions in this corridor" because the 200 South corridor is a very visible corridor with several bus routes that carry many passengers along the corridor. (Tr. 493-94). Mr. Sibul was aware that Mr. Chesnut stopped all work along the 200 South corridor due to the issues involving improper installation of bus shelters. Mr. Sibul did not reprimand Mr. Chesnut for his order to stop work along the 200 South corridor. (Tr. 494).

Mr. Sibul was aware that Complainant requested permission from Mr. Chesnut to take a vacation from work in October 2015, because Mr. Chesnut informed him about Complainant's request. (Tr. 494-95). Mr. Sibul confirmed JX-20 is Complainant's November 20, 2015 termination letter that was written by Mr. Chesnut. Mr. Chesnut sent Mr. Sibul a copy of the letter, but Mr. Sibul did not draft the letter, nor did he see the letter before it was sent to Complainant. Mr. Chesnut did not seek Mr. Sibul's approval before he sent Complainant's termination letter, but Mr. Chesnut did not need Mr. Sibul's approval. Mr. Sibul explained that he gave Mr. Chesnut the authority to hire and terminate employees, and although Mr. Sibul discussed "the situation" many times with Mr. Chesnut, he did not direct him to draft the termination letter or to terminate Complainant's employment. (Tr. 495).

On November 16, 2015, Mr. Sibul first spoke with Mr. Chesnut about Complainant's absence from work. (Tr. 495-96). Mr. Sibul testified Mr. Chesnut was concerned about Complainant's whereabouts, and as a result, Mr. Chesnut and Mr. Alsop went to Complainant's home to ensure he was okay. (Tr. 496). Mr. Sibul spoke again with Mr. Chesnut later in the day (on November 16, 2015) and Mr. Chesnut informed Mr. Sibul that he spoke with Complainant's neighbor who confirmed Complainant had been home and was okay. (Tr. 496-97). Complainant called Mr. Chesnut when he was driving back to the office. Mr. Chesnut told Mr. Sibul that he understood Complainant had worked the first week of his scheduled vacation and Complainant thought Mr. Chesnut knew he needed to extend his vacation by one week to November 18, 2015. Mr. Chesnut stated he was not aware of the circumstances, but he granted Complainant an extension for his vacation and he expected Complainant to return to work on November 18, 2015. Several weeks later, during Complainant's December 14, 2015 appeal hearing, Mr. Sibul also spoke with

Complainant about the work he completed during his first week of vacation. (Tr. 497).

On November 18, 2015, Mr. Sibul also spoke with Mr. Chesnut again about Complainant failing to return to work, and he spoke with Mr. Chesnut again on November 19, 2015, when Complainant still had not returned to work. (Tr. 497). Mr. Sibul remained in close contact with Mr. Chesnut through November 20, 2015, as well as UTA's HR Department to discuss the job abandonment policy. Initially, Mr. Chesnut met with the HR Department, but later Mr. Sibul met with Mr. Chesnut and Ms. Camille Glenn, who works in UTA's HR Department. Mr. Sibul confirmed JX-26 contains Respondent's Corporate Policy on Separation of Employment. (Tr. 498). Mr. Sibul testified he did not instruct Mr. Chesnut to terminate Complainant's employment in November 2015, nor did Mr. Sibul communicate to any UTA employee that Complainant should be terminated. (Tr. 498-99). Likewise, Mr. Sibul did not ever communicate that he did not like Complainant. (Tr. 499).

Mr. Sibul identified RX-87 as the November 20, 2015 email that he received from Complainant entitled "Termination Appeal." Mr. Sibul considered the email as an appeal of Complainant's termination and an attempt to explain that Complainant did not abandon his job. Mr. Sibul considered Complainant's November 20, 2015 email to be part of Complainant's appeal process. Under Respondent's job abandonment policy, it was Mr. Sibul's job to consider Complainant's appeal. (Tr. 499).

Mr. Sibul confirmed JX-28 contains a November 21, 2015 email between Mr. Sibul and Mr. Jerry Benson, UTA's interim President and CEO. Mr. Benson referred to Mr. Chris Sloan and Mr. James Evans. Mr. Sibul explained that Mr. Chris Sloan was on UTA's Board of Trustees as the vice chairman, and Mr. Evans was the chair of the Republican Party of Utah. Mr. Sibul wrote in response to Mr. Benson's email "[t]hanks for the note. This is messy, but we are following all protocols. When someone does not show up for work for 10 days -- and by the way, I have no idea what he is talking about regarding that assignment – there should be something we do about it." (Tr. 500). Mr. Sibul explained that when he stated "this is messy" he was referring to Complainant's involvement with political organizations, including the Salt Lake City School Board, and Mr. Sibul expected Complainant to reach out to the media and claim he was wrongfully terminated. Mr. Sibul referred to Complainant missing "10 days" of work because initially Complainant was to return to work on November 11, 2015, and by November 20, 2015,

Complainant had still not returned to work. At the time of Mr. Sibul's November 21, 2015 email, he had received Complainant's November 20, 2015 appeal email. (Tr. 501). According to Mr. Sibul, Complainant was terminated for job abandonment after being absent 10 days from work. (Tr. 501-02).

Mr. Sibul identified RX-89 as a November 21, 2015 email from Mr. Benson to Mr. Sibul, to which Mr. Sibul responded "BTW I will get together with HR and legal right away tomorrow." Mr. Benson then responded to Mr. Sibul stating, "I think Christopher [Chesnut] covered all the bases, but you had better be sure. I am sure we would all like to hear Michael's [Complainant's] explanation." Mr. Sibul agreed with Mr. Benson that he wanted to hear Complainant's explanation as to why he was not at work. (Tr. 502). Mr. Sibul did not consider any other input from Mr. Benson in Complainant's appeal process.[57] (Tr. 502-03).

Mr. Sibul confirmed RX-90 is an email he received from Grantley Martelly dated November 29, 2015, that was also sent to Mr. Benson. Mr. Sibul testified Mr. Martelly is a former UTA employee who worked in the Salt Lake Business Unit and managed a portion of bus operations in one of UTA's garages. (Tr. 503). The email indicates Mr. Martelly spoke with Greg Hughes, who is also a former chair of the UTA board. According to Mr. Sibul, Mr. Hughes was elected to become the speaker of the House of Representatives at the Utah State Legislature. Mr. Sibul responded to Mr. Martelly's email stating "I am glad you conveyed what you did to Michael [Complainant], that is exactly what is supposed to happen in an appeal. Our plan is to pull all the pieces of this together and move forward quickly." Mr. Sibul confirmed that the email reflected his plan.[58] (Tr. 504). Mr. Sibul testified he pulled all the pieces together to reach a determination regarding Complainant's appeal of his termination. However, in doing this, Mr. Sibul did not consider input from Mr. Martelly or Mr. Benson. (Tr. 505).

On December 14, 2015, Mr. Sibul arranged an appeal meeting with Complainant, as well as Ms. Camille Glenn and Mr. David Heier from UTA's HR Department. Mr. Sibul identified JX-34 as his notes that he took during the December 14, 2015 meeting. Mr. Sibul confirmed JX-33 contains Mr. Heier's notes from the meeting. (Tr. 505). Mr. Heier's notes reflect that during the

---

[57] Respondent's Exhibit 89 was offered and received into evidence without objection. (Tr. 503).

[58] Respondent's Exhibit 90 was offered and received into evidence without objection. (Tr. 504).

meeting Complainant discussed that he worked during the first week of his vacation from October 27, 2015 through November 1, 2015. Mr. Sibul investigated Complainant's claim, and confirmed Complainant did work the first week of his vacation. (Tr. 506). Mr. Heier's notes also stated that Complainant recalled that during the November 16, 2015 phone call with Mr. Chesnut he "remembered telling him [Mr. Chesnut] I will be back on Monday, because I did not take the first week of vacation. There is a possibility I did say the 18th, that could be accurate, I do not recall. Like I said, I am a little bit handicapped regarding calendar days." (Tr. 506-07). Mr. Sibul recalled Complainant making the aforementioned statement during the December 14, 2015 meeting. Mr. Sibul found Complainant's statements helpful in determining whether Mr. Chesnut was correct in terminating Complainant because Mr. Chesnut and Mr. Alsop stated they had discussed with Complainant that he would return to work on November 18, 2015. Mr. Heier's notes show Complainant stated "[b]ecause Matt, you have already made up your mind. Chris [Chesnut] told me that you wanted to fire me and he said he was doing everything he could to vouch for me." (Tr. 507). Mr. Sibul recalled Complainant's comments as noted by Mr. Heier, and he was "shocked and offended by it" because it was absolutely not true that he wanted Complainant terminated, nor was it true that he already made up his mind to terminate Complainant.[59] Mr. Sibul recalled that Complainant worked in Respondent's Planning Department for approximately five years. (Tr. 508).

Mr. Sibul's December 14, 2015 meeting notes contained in JX-34, demonstrate Mr. Sibul noted "ADD passage of time is problematic." Mr. Sibul recalled that Complainant mentioned he suffered from ADD and did not always understand the passage of time. Subsequent to the meeting, Mr. Sibul asked Ms. Glenn to look in Complainant's employee file to confirm whether he suffered from ADD and that Complainant requested special accommodations, but there was no mention of ADD. (Tr. 509). Mr. Sibul's notes also reflect that he wrote "27th, 28th, 29th, 30th, 31st, November 1st, November 2nd." (Tr. 509-10). The "29th" is circled with a note that says "CJ" and an arrow, "CJ and Joey were on the bus with him, discussed extra week." Mr. Sibul explained that Complainant met with CJ Stewart and Joey Alsop on October 29, 2015, and Complainant discussed extending his vacation an extra week. Complainant's statement to Mr. Stewart and Mr. Alsop struck Mr. Sibul as "a little odd." Mr. Sibul also noted that "Chesnut discussion. Clara [Complainant] says that one week later he would return, i.e. the following

[59] JX-29 contains the recoding of Complainant's appeal meeting with Mr. Sibul, Mr. Heier, and Ms. Glenn on December 14, 2015. (Tr. 508).

Monday, the 23rd." Mr. Sibul noted "he [Complainant] backtracked a bit on the days thing, because of his handicap." (Tr. 510).

Mr. Sibul testified there were things he wanted to investigate as part of the appeal process that he had not thought of prior to his meeting with Complainant. (Tr. 511). Mr. Sibul noted "[d]id Mr. Chesnut object to this," and he asked Mr. Chesnut what kind of work relationship he had with Complainant and whether Mr. Chesnut was okay with Complainant giving him one day notice that he was taking two weeks of vacation. (Tr. 511-12). According to Mr. Sibul, Mr. Chesnut was okay with Complainant's notification. Mr. Sibul also noted "[a]re we giving mixed signals," which referred to Mr. Sibul's concern that Mr. Chesnut gave mixed signals to Complainant when he was not firm with Complainant about his returning to work. Mr. Sibul noted that Complainant did not inform Mr. Chesnut that he was going to take an extra week for vacation, which led to Mr. Chesnut's going to Complainant's residence for a well-being check. Mr. Chesnut gave Complainant the benefit of the doubt and agreed that Complainant would return to work on November 18, 2015. (Tr. 512). Mr. Sibul also noted "were expectations clearly established?" Mr. Sibul spoke with Mr. Chesnut and Mr. Alsop about their joint conversation with Complainant about the date he was to return to work. (Tr. 512-13).

Other than asking Ms. Glenn whether Complainant's file listed any special accommodations for ADD, Mr. Sibul did not review Complainant's employment file because he "did not think it was relevant to the situation and the topic at hand," that is, job abandonment. When asked why he did not issue Complainant an intermediate reprimand, rather than terminating Complainant, Mr. Sibul stated that in his conversations with Ms. Glenn she informed him that the job abandonment policy was "very severe" and it was of the utmost importance for employees to come to work unless there are extenuating circumstances. (Tr. 513).

Mr. Sibul identified JX-35 as his December 17, 2015 letter that he sent to Complainant stating that he was upholding Complainant's termination. During his review of Complainant's termination, at no time did Mr. Sibul consider Complainant's dispute with Mr. Splan regarding the 200 South corridor. (Tr. 514).

On cross-examination, Mr. Sibul agreed with the stipulated fact set forth in JX-37, stating "[a]ccording to Mr. Sibul, Clara [Complainant] performed his duties very effectively and he

was an integral part of UTA's team." (Tr. 514; JX-37, p. 14, Stipulated Fact No. 59). Mr. Sibul testified he agreed with the aforementioned statement. Mr. Sibul confirmed he is familiar with "Proposition 1," and he confirmed that if "Proposition 1" had passed it would have resulted in additional funds for UTA to improve safety and efficiency of public transportation. At the time "Proposition 1" was considered, Mr. Sibul was in a management level position with the UTA. (Tr. 515). He confirmed Respondent tried to educate the public about the results of "Proposition 1," but without advocating for its passage. Mr. Sibul confirmed that UTA's improvements along the 200 South corridor were, at the least, conducted for the purpose of "Proposition 1." (Tr. 516).

Mr. Sibul confirmed JX-9 contained an email he sent on October 14, 2015, that mentioned "resolving issues," which Mr. Sibul explained referred to installation and removal of bus shelters. (Tr. 516). His email also related to Complainant identifying various ADA issues at bus stops along the 200 South corridor. (Tr. 516-17). Mr. Sibul admitted Complainant raised issues and concerns that led to increased costs associated with removing and reinstating bus shelters. Mr. Sibul was "frustrated" that UTA had to remove amenities that were just installed, but Mr. Sibul believed "there was plenty of blame to go around" because the problems reflected poorly on UTA. Mr. Sibul agreed that the bus stop amenities being installed and removed along the 200 South corridor, in the month proceeding the election, affected the public's perception of UTA. (Tr. 517).

Mr. Sibul agreed it was important to conduct a review of an appeal in a fair and objective manner, to consider all material facts surrounding the termination decision, and whether the facts are true. Mr. Sibul confirmed he considered all the allegations made in JX-20 which contains Complainant's termination letter as written by Mr. Chesnut. However, upon conducting his review, Mr. Sibul believed Complainant did work the first week of his vacation, thus his termination date should not have been November 11, 2015, but instead November 18, 2015. (Tr. 518). Nevertheless, Mr. Sibul's letter notifying Complainant that his termination was confirmed upon appeal did not state Complainant's termination date was November 18, 2015, which Mr. Sibul stated was an "oversight." To Mr. Sibul's knowledge, Mr. Chesnut did not attempt to contact Complainant when he did not come to work until November 16, 2015. Mr. Sibul had no knowledge of Mr. Chesnut contacting Complainant between November 11, 2015 and November 13, 2015, and during his

discussions with Mr. Chesnut they "focused more" on Mr. Chesnut's November 16, 2015 discussion with Complainant. (Tr. 519).

Prior to Mr. Sibul reaching his final decision on appeal, Mr. Chesnut did communicate to him that Complainant worked during the week of October 27, 2015 through November 1, 2015. (Tr. 519-20). When asked whether it would surprise him that Mr. Chesnut testified at the DWS appeal hearing, and as late as January 8, 2016, that Mr. Chesnut was not aware of Complainant working beyond October 27, 2015, Mr. Sibul stated "that would seem peculiar to me." Mr. Sibul testified it was his understanding that on November 16, 2015, Mr. Chesnut was aware Complainant worked the first week of his vacation when he spoke with Complainant and agreed Complainant would return to work on November 18, 2015, rather than November 11, 2015. (Tr. 520). Mr. Sibul confirmed CX-34 contains Mr. Chesnut's January 8, 2016 email to Ms. Camille Glenn, in which Mr. Chesnut stated "I was not aware that he [Complainant] was conducting any work between [sic] October 27th through November 1st." Mr. Sibul also confirmed JX-28 contains a November 21, 2015 email he sent to Mr. Benson, UTA's President and CEO, at 9:55 p.m., in which Mr. Sibul claimed Complainant "did not show up for work for 10 days." (Tr. 521). Mr. Sibul stated that at the time he sent his email to Mr. Benson he had previously spoken with Mr. Chesnut, Mr. Alsop, and Ms. Glenn on multiple occasions. (Tr. 521-22). However, Mr. Sibul confirmed that he did not receive Complainant's appeal (email) of his termination until November 20, 2015, at 6:42 p.m. (Tr. 522). Mr. Sibul admitted that when he emailed Mr. Benson on November 21, 2015, prior to Complainant's appeal meeting, he already determined Complainant had not come to work on Wednesday, November 18, 2015, according to Mr. Chesnut and Mr. Alsop's statements because he credited their statements over that of Complainant. (Tr. 522-23). Mr. Sibul also weighed Complainant's statements from the December 14, 2015 appeal meeting against that of Mr. Chesnut and Mr. Alsop to determine when Complainant was to return to work. Mr. Sibul was under the impression that Mr. Alsop was part of the November 16, 2015 phone conversation between Mr. Chesnut and Complainant. (Tr. 523). Nevertheless, Mr. Sibul did not know whether the November 16, 2015 phone conversation between Mr. Chesnut and Complainant was on speaker phone or not. Mr. Sibul only knew that Mr. Alsop was in the car when Mr. Chesnut spoke with Complainant about when Complainant would return to work from his vacation. (Tr. 523-24). Mr. Sibul testified Mr. Chesnut, as well as Mr. Alsop, heard the date when Complainant intended to return to work. (Tr. 524).

Mr. Sibul was aware that on November 20, 2015, Complainant arrived at Respondent's headquarters "around the close of business" to protest his termination. Mr. Sibul acknowledged Mr. Chesnut's phone records show that on November 20, 2015, at 4:13 p.m., Mr. Chesnut called Complainant to let him know his employment was terminated. (Tr. 524). Mr. Sibul further acknowledged Complainant told Mr. Sibul during his appeal meeting that he went to Respondent's headquarters "within minutes" of receiving Mr. Chesnut's phone call. Mr. Sibul confirmed that he spoke with Mr. Chesnut, Mr. Alsop, and Ms. Glenn on numerous occasions regarding Complainant's termination for job abandonment. Mr. Sibul recalled testifying that the documents contained in Complainant's personnel file were "not relevant to the topic at hand." (Tr. 525). However, Mr. Sibul did consider how many years Complainant was employed by Respondent and his performance during those years when he determined whether Complainant should be terminated. Mr. Sibul testified Complainant performed his job duties well, he was professional, and dedicated, and as such, Mr. Sibul did not lightly take his decision to uphold Complainant's termination. As a result of Complainant's appeal, Mr. Sibul determined Complainant had not been absent 10 days from work, rather he missed three days of work from November 18, 2015 through November 20, 2015. (Tr. 526).

On re-direct examination, Mr. Sibul testified he was upset with many people that the bus stop amenities along the 200 South corridor including Complainant, Mr. Splan, Ms. Westlund, Mr. Hare, Mr. Meyer, and himself. (Tr. 527). When asked whether he confused Mr. Chesnut's recollection that Complainant did not work the first week of his vacation with Complainant's recollection that he did work the first week of his vacation, Mr. Sibul answered "I suppose." (Tr. 527-28).

On examination, Mr. Sibul confirmed he had never conducted an appeal of an employee's termination before that of Complainant's appeal. Mr. Sibul also confirmed he was aware that "other" UTA employees were terminated for job abandonment. (Tr. 528). However, Mr. Sibul was not aware of the circumstances of the other employees who were terminated for job abandonment. (Tr. 528-29). Ms. Glenn produced a list to Mr. Sibul of all the UTA employees who had been terminated for job abandonment, which showed Mr. Sibul the policy had been used "extensively" and was "very critical" for UTA as an organization. Mr. Sibul did not know if any other terminated employee possessed 20 years of employment with Respondent. Mr.

Sibul stated Complainant's 20-year employment history was a factor he considered before confirming Complainant's termination. (Tr. 529). Mr. Sibul explained that Mr. Chesnut also considered Complainant's 20-year employment history which is why Mr. Chesnut gave Complainant a "second chance" to return to work on November 18, 2015, rather than November 11, 2015. (Tr. 529-30). Mr. Sibul considered Complainant's 20-year employment history because Complainant was a dedicated employee who cared deeply about his job. (Tr. 530).

Joseph Alsop

Mr. Alsop testified he goes by "Joey" at work. Currently, Mr. Alsop is employed by Respondent as a Senior Service Planner. In 2008, Mr. Alsop began working for Respondent as an intern, and one year later he was hired as a Service Planner. In 2015, Mr. Alsop's supervisor was Mr. Chesnut and he is still Mr. Alsop's supervisor. As a Service Planner, Mr. Alsop regularly reports to others about safety concerns. Mr. Alsop explained that when complaints about safety issues arise he was tasked with going to the identified location and inspecting the safety issues. (Tr. 532). He also communicates with UTA's Safety Department and may meet them at a particular location to look at safety concerns. Mr. Alsop testified that typical safety concerns are bus stop locations being too close to an intersection, or traffic movements for bus operators are too difficult. Mr. Alsop has never been reprimanded for reporting a safety concern to Respondent. (Tr. 533).

In 2015, Mr. Alsop regularly worked with Complainant. (Tr. 533). Mr. Alsop confirmed JX-19 contains Complainant's October 26, 2015 email to Mr. Chesnut, on which he was copied, stating Complainant would return to work from his vacation on November 11, 2015. (Tr. 533-34). Mr. Alsop testified he performed work with Complainant the week of October 27, 2015 through November 1, 2015, addressing bus movements at the Meadowbrook Track Station, as well looking into "detours" at the Sandy Civic Station and the South Jordan Station. (Tr. 534). During this time, Complainant never communicated to Mr. Alsop that he would extend his vacation. (Tr. 534-35). Mr. Alsop was out of town from November 9, 2015 through November 13, 2015, with Mr. Chesnut for a peer-review in Denver, Colorado, Houston, Texas, and Minneapolis, Minnesota. Mr. Alsop testified that Matt Sibul, Jim Wadley, Brad Armstrong, and Kenzi Kunckle also went on the multi-destination trip. (Tr. 535). After the trip, Mr. Alsop returned to work on Monday, November 16, 2015. (Tr. 535-36). When Mr. Alsop returned to work he spoke with other UTA

employees and determined that Complainant did not return to work on November 11, 2015. (Tr. 536).

Mr. Alsop confirmed RX-35 is an email chain dated November 16, 2015, from Ms. Sheryl Posey that was copied to Mr. Alsop. (Tr. 536-37). Mr. Chesnut responded to Ms. Posey's email asking Mr. Alsop or Complainant to respond to the issue identified by Ms. Posey. Following Mr. Chesnut's request, Mr. Alsop tried calling Complainant's work phone, but it went straight to voicemail. Thereafter, Mr. Alsop called Complainant's personal phone because he could not reach him on his work phone. (Tr. 537). Mr. Alsop called Complainant on his work and personal phones around 1:13 p.m., when he received Mr. Chesnut's email request. (Tr. 539-40). However, Mr. Alsop never heard back from Complainant and he became concerned about Complainant's well-being. (Tr. 540). Mr. Alsop attempted to call Complainant later in the day at 4:21 p.m., but he did not speak with Complainant or get a response from Complainant. (Tr. 541).

Mr. Alsop became more concerned about Complainant and informed Mr. Chesnut that he was going to drive to Complainant's home for a welfare check. (Tr. 541-42). Mr. Chesnut offered to go with Mr. Alsop, and Mr. Alsop did not turn Mr. Chesnut's offer down because he had no reason to say "no." When Mr. Alsop and Mr. Chesnut arrived at Complainant's home he was not present. Mr. Alsop knocked on the door and Complainant's dogs came to the door, but Complainant did not answer the door. Mr. Alsop called Complainant's personal phone, but he did not hear it ringing, so he went to the back of Complainant's house to see if there was anything suspicious looking. (Tr. 542). Mr. Alsop also overheard Mr. Chesnut's conversation with Complainant's neighbor who said Complainant had been "in and out" of his home. When Mr. Alsop was driving Mr. Chesnut back to his car at the Murray Central Station, Complainant called Mr. Chesnut. The phone call between Mr. Chesnut and Complainant was not on speaker phone. (Tr. 543). Based on hearing the context of Mr. Chesnut's conversation, Mr. Alsop assumed he was talking to Complainant and that Complainant would return to work on "Wednesday." (Tr. 544). In particular, Mr. Alsop overheard Mr. Chesnut say "I will plan on seeing you at work on Wednesday." (Tr. 544-45). Mr. Alsop spoke with Mr. Chesnut following his conversation with Complainant, and as a result, Mr. Alsop expected Complainant to return to work on Wednesday, November 18, 2015. (Tr. 545).

On cross-examination, Mr. Alsop confirmed that he could not hear what Complainant stated on the phone during the November

16, 2015 conversation between Complainant and Mr. Chesnut. Mr. Alsop testified that he never spoke with Mr. Sibul about the phone conversation, nor did he tell Mr. Sibul that he could hear Complainant's comments during the phone call. (Tr. 546).

Grey Turner

Mr. Turner testified he currently works for Respondent as a Senior Program Manager of UTA's Engineering and Project Development in UTA's Capital Development Department. Mr. Turner oversees the project managers who manage the engineering program that involves bus lines and commuter rail construction and design. Mr. Turner confirmed the Capital Development Department is separate from the Planning Department. Mr. Turner's employment with Respondent began on December 31, 2013. (Tr. 556).

In 2015, Mr. Turner reported to Mr. Steve Meyer. Mr. Turner testified that Mr. Tom Hare did not report to him, but did report to Mr. Meyer. Mr. Hare oversaw the Facilities Department. (Tr. 556). In 2015, Mr. Turner also oversaw Mr. Splan, who was an Engineering Construction Planner, but he is no longer employed with Respondent. Mr. Turner explained that Mr. Splan found other employment with Stadler Rail, a locomotive constructor, with offices in Salt Lake City, Utah. According to Mr. Turner, Mr. Splan worked on minor design and construction bus stop projects with designers. (Tr. 557).

In fall 2015, Mr. Turner testified UTA was upgrading bus stops along the 200 South corridor because it was one of the busiest corridors and UTA had designated money to improve/ upgrade bus stop facilities along the 200 South corridor. (Tr. 557). Mr. Turner estimated that the upgrade project along the 200 South corridor began in fall 2014, or in spring 2015. Mr. Turner stated he was not sure if he would characterize the improvements along the 200 South corridor as "rushed," but UTA always tries to complete projects as quickly as possible before the weather changes. Mr. Turner explained that the asphalt and concrete projects must be wrapped up before the middle to the end of October when the outside temperature becomes cooler. Mr. Turner testified UTA is in the same predicament every year in regard to weather and construction projects. (Tr. 558).

Mr. Turner stated safety is always a top priority for Respondent, and in Mr. Turner's experience, compared to his past employers, Respondent is the most concerned about safety. (Tr. 558-59). Prior to working for Respondent, Mr. Turner worked as

a consultant for 20 years, and he also worked for approximately five years in private engineering firms that provided services to agencies such as the DOT and UTA. (Tr. 559).

In October 2015, Mr. Turner was aware there were problems between Mr. Splan and Complainant regarding bus stops getting approved and built. Mr. Turner learned of the problems between Mr. Splan and Complainant because Mr. Splan would speak to Mr. Turner about issues that were arising. Mr. Turner testified that most of the problems involved communication and he encouraged Mr. Splan to speak with other employees about the building schedule. (Tr. 559). After problems persisted between the Capital Development Department and the Planning Department, Mr. Turner approached Mr. Chesnut about meeting to discuss how to best implement the approval and installation of the bus stop improvements. On October 14, 2015, Mr. Turner met with Mr. Chesnut in Mr. Turner's office to discuss the problems between the two departments. (Tr. 560). Mr. Turner testified that Mr. Tom Hare and Mr. Splan also attended the meeting. Mr. Turner confirmed that JX-10 contained an October 15, 2015 email exchange between Complainant and Mr. Splan. (Tr. 561). Mr. Splan emailed Complainant stating "you received those work orders in August, not two weeks ago, as a matter of real facts," to which Complainant responded and copied several other UTA employees including Mr. Turner. (Tr. 561-62). Mr. Turner was surprised to see the email exchange between Mr. Splan and Complainant because he believed the October 14, 2015 meeting resulted in a "plan of attack" for operating and scheduling procedures, better communication, and how they were going to finish the installation for the remaining bus stops. (Tr. 562). Mr. Turner was surprised by Mr. Splan's email statement because he talked to Mr. Splan about communication, but he was also surprised by Complainant's response to Mr. Splan. (Tr. 562-63).

Mr. Turner explained that he was "a little upset" over the October 15, 2015 email exchange between Mr. Splan and Complainant. Mr. Turner wanted Mr. Chesnut to speak with Complainant because he supervised Complainant, and Mr. Turner was going to speak with Mr. Splan. Mr. Turner believed the problems between Mr. Splan and Complainant "were resolved, but obviously they were not." Mr. Turner spoke with Mr. Splan about communicating through emails, and Mr. Turner suggested Mr. Splan speak directly to fellow employees when issues arose. Mr. Turner also spoke with Mr. Splan about the "tone" of his email and informed Mr. Splan that he did not want to see that in the future, but he did not reprimand Mr. Splan in writing. (Tr. 563). Mr. Turner acknowledged that his response to the email

between Mr. Splan and Complainant stated "[b]efore I unleash on Michael [Complainant], I am going to let you take care of him ASAP." Mr. Turner did not believe it was his responsibility to speak with Complainant because he did not oversee his work. Mr. Turner was troubled by the email exchange between Mr. Splan and Complainant because all the other UTA employees copied on the email should not be bothered by bickering between two employees. When Mr. Turner suggested things may need to be escalated quickly he meant that he and Mr. Chesnut should handle the situation, but he did not intend to inform his or Mr. Chesnut's supervisors. (Tr. 564). Mr. Turner believed everyone involved could act professionally and solve problems and concerns without involving large groups of UTA employees. (Tr. 564-65).

Mr. Turner acknowledged he also responded to the October 15, 2015 email exchange between Mr. Splan and Complainant, stating "Jake, let us talk before you strangle this guy." Mr. Turner admitted his response was "not the best choice of words," and he never intended to cause physical harm to anyone involved. Mr. Turner explained that he was upset and he wanted Mr. Splan to know that he was standing up for him within the Capital Development Department. However, Mr. Turner also wanted to speak with Mr. Splan about his statement which was not appropriate. Mr. Turner believed standing up for Mr. Splan would result in better resolution of the problem, but if an employee is wrong he will also correct the employee. (Tr. 565).

Mr. Turner identified RX-24 as an October 15, 2015 email that he, along with many other UTA employees, received from Mr. Chesnut with the UTA's "OPO 1.2 Bus Stop Amenities Installation" attached to the email. (Tr. 565-66). Mr. Turner confirmed Mr. Chesnut's October 15, 2015 email accurately described what was discussed during their October 14, 2015 meeting. (Tr. 566). Mr. Chesnut sent Mr. Turner his summary prior to emailing it to other UTA employees to ensure it was correct. (Tr. 566-67). Mr. Turner agreed with Mr. Chesnut that the email set forth the appropriate way to proceed concerning "installation practice, the bus stop SOPs, [and] the operating procedure." Mr. Turner also received Complainant and Mr. Sibul's responses to Mr. Chesnut's October 15, 2015 email setting forth proper procedure. (Tr. 567). On the basis of their responses, Mr. Turner believed the procedure set forth was working based on the language and tone used in the responses which were "professional." (Tr. 568).

On cross-examination, Mr. Turner confirmed he was Mr. Splan's direct supervisor, and that on October 14, 2015, he met

with Mr. Hare and Mr. Chesnut. (Tr. 568). Mr. Turner further confirmed that at the October 14, 2015 meeting they discussed "OPO 1.2" regarding installation of bus stop amenities. Mr. Turner confirmed he had knowledge of disputes between Mr. Splan and Complainant, but he found out just one week before his October 14, 2015 meeting with Mr. Chesnut and Mr. Hare that Complainant was upset with Mr. Splan about bus stop amenities being installed without work orders. (Tr. 569). Mr. Turner was not immediately aware that Mr. Splan was directing bus stop amenities to be installed without work orders. He assumed Mr. Splan was following proper procedure and that work orders were submitted prior to installation of the amenities. Until it was brought to his attention, Mr. Turner was not aware that Mr. Splan directed UTA's Facilities Department to install amenities without work orders. He learned of Mr. Splan's actions approximately one week prior to his October 14, 2015 meeting with Mr. Chesnut and Mr. Hare, which is why he requested a meeting with Mr. Chesnut. (Tr. 570). According to Mr. Turner, Mr. Splan told him that he had submitted work orders to Complainant, but the work orders remained on Complainant's desk. (Tr. 571).

Mr. Turner explained his comments in his October 15, 2015 email to Mr. Chesnut that "I am going to let you [Mr. Chesnut] take care of him [Complainant], asap," did not indicate his desire to have Complainant terminated. Rather, Mr. Turner was asking Mr. Chesnut to speak with Complainant and he was going to speak with Mr. Splan about stopping "the bickering back and forth on emails." Mr. Turner agreed that he would encourage a UTA employee to report safety complaints and he would not characterize such a report as "bickering." (Tr. 571). Mr. Turner confirmed he was upset by the October 15, 2015 email exchange between Mr. Splan and Complainant because the email was copied to several other UTA employees. (Tr. 571-72). Mr. Turner did not see that Mr. Tim Rhodes, in "Safety Admin Transit Systems," was copied on the October 15, 2015 email, but he saw there were numerous people who received the email and it "upset" Mr. Turner. Mr. Turner had hoped that the October 14, 2015 meeting with Mr. Chesnut and Mr. Hare resolved any issues, and emails like the October 15, 2015 email would not be sent to UTA employees. (Tr. 572).

When asked whether he instructed Mr. Splan to work quickly in fall 2015, Mr. Turner testified that "we were trying to keep his schedule to where we could pour all these concrete pads before winter." (Tr. 572). Mr. Turner explained that he was trying to keep on schedule because UTA's Facilities Department

had downtime between September 2015 and October 2015, to install shelters since they were between "summer cleanings and their winter maintenance." (Tr. 572-73). Mr. Turner is familiar with "Proposition 1," and he confirmed that it was never discussed with Mr. Splan as a motivating factor to move quickly, nor did Mr. Turner consider "Proposition 1" to be a motivating factor. (Tr. 573).

William Steven Meyer

Mr. Meyer testified he works for Respondent as the Director of Capital Projects. (Tr. 574). Mr. Meyer explained he oversees the Capital Development Group that takes projects after the projects have gone to UTA's Planning Department, and passed through environmental analysis and design and construction. In 2002, Mr. Meyer began working for Respondent as a Staff Civil Engineer. In October 2002, he was promoted to Manager of Engineering and Construction for Commuter Rail, and he managed two frontrunner projects from Ogden to Salt Lake City and Provo to Salt Lake City. Thereafter, in 2010, Mr. Meyer became the Chief Capital Development Officer, and as such, he oversaw the Facilities, Maintenance and Capital Development. In 2014, Mr. Meyer became the Chief Development Officer that included "Transit Oriented Development." Mr. Meyer stated UTA's reorganization refocused on just capital development. (Tr. 575). Mr. Meyer explained that after the legislative audits he began overseeing Transit Oriented Development because it was determined there was a conflict of interest between the Transit Oriented Development and the Legal Department, thus separation of the two were recommended. (Tr. 575-76). Because Mr. Meyer oversaw the UTA's Capital Development which included Property Management and Real Estate, UTA moved the Transit Oriented Group within the Capital Development Department as it shared commonalities. (Tr. 576).

Mr. Meyer confirmed JX-4 accurately reflects UTA's company organization in 2015. Mr. Meyer identified his position in JX-4 as Capital Chief Development Officer, along with a breakdown of the UTA's Planning Department. (Tr. 576). Mr. Meyer identified Mr. Grey Turner as a Senior Program Manager over the Engineering Project Development Department who oversees project managers and engineers, as well as vehicle procurement for buses. Mr. Meyer testified Mr. Splan worked as an "Engineering Construction Planner 2," and he would oversee "primarily passenger enhancement type projects." Mr. Meyer confirmed no other UTA employees reported to Mr. Splan. (Tr. 577). Mr. Meyer testified that in 2015, Mr. Tom Hare was the Facilities

Maintenance Manager and he was responsible for overseeing maintenance of UTA facilities, buildings, shops, bus stations, bus stops, train stations, canopies and platforms, and passenger enhancements. Mr. Meyer stated the Facilities Department also installed new bus stops, and in doing so, interacted with Mr. Splan who would identify and complete bus stops. Mr. Meyer confirmed that Ms. Westlund, Ms. Huffman, and Mr. Wilson all worked for Respondent as Passenger Facilities Supervisors. (Tr. 578). Mr. Meyer testified Passenger Facilities Supervisors are responsible for light rail and commuter rail platforms, bus stops, cleaning, light replacement, damage repair, snow removal, and installation of bus stop amenities. Mr. Meyer explained that the installation of bus stop amenities is usually performed during the spring and fall. (Tr. 579).

In fall 2015, Mr. Meyer confirmed UTA was working to upgrade the bus stops along the 200 South corridor in Salt Lake City, Utah. Mr. Meyer was not sure if upgrades were being implemented in other areas, but he stated there was a specific intense effort that was managed by Mr. Splan to have passenger enhancements installed along the 200 South corridor. Mr. Meyer estimated that construction along the 200 South corridor began in 2015. Mr. Meyer stated there was not too much design involved in the upgrade improvements along 200 South corridor because he was trying to minimize bringing in engineers and detailed designs due to increased costs. He explained that instead of employing additional engineers, Mr. Splan would work with engineers to take pictures and measurements of bus stop sites and enter the information in a "sketch-up" program to create a design with slopes and measurements. Thereafter, the "sketch-up" design would be given to a contractor to obtain pricing for installation. However, UTA hires a consultant if more detailed engineering plans are required. (Tr. 581). Mr. Meyer recalled that design work for the upgrades along the 200 South corridor began in December 2013. (Tr. 582).

Mr. Meyer never instructed an UTA employee to circumvent Respondent's policy for bus stop amenities installations along the 200 South corridor. In Mr. Meyer's experience, safety is an important issue for Respondent. Mr. Meyer testified safety is "our primary importance" because UTA transports the public every day, the operators interact with the public, and UTA's vehicles are among the public. (Tr. 582). Mr. Meyer stated "if we do not have a credible system, people are not going to use UTA." (Tr. 583).

Mr. Meyer was aware of the October 2015 dispute between Mr. Splan and Complainant because of emails he received and discussions that passed between the Capital Development Department and the Service Planning Department. Mr. Meyer confirmed CX-16 contains an October 13, 2015 email chain from Complainant to Mr. Splan that was forwarded to Mr. Meyer from Mr. Tom Hare, who stated "FYI, for your reading pleasure." Mr. Meyer interpreted Mr. Hare's email as Mr. Hare using his discretion in keeping Mr. Meyer informed about issues arising between various UTA departments. (Tr. 583). Mr. Meyer acknowledged Mr. Hare also forwarded to him Complainant's October 15, 2015 email to Mr. Splan regarding the 200 South corridor. Upon seeing the email, Mr. Meyer was concerned about the "friction" between UTA departments. (Tr. 584).

Mr. Meyer confirmed RX-20 contained several email exchanges between him and Mr. Splan on October 14, 2015. (Tr. 584). In one of the email exchanges, Mr. Meyer wrote to Mr. Splan "I need to understand your issues with Michael Clara [Complainant] and how they are getting resolved." Mr. Meyer testified he was concerned and wanted to make sure his department followed proper procedure and policy, and were taking care of issues. Mr. Meyer stated it does not bode well for UTA to build something that later must be torn out or relocated. Mr. Meyer testified that "Mr. Splan, from time to time, he [sic] was more focused on quantity than quality." (Tr. 585). Thereafter, Mr. Meyer received a "purchasing requisition 1" which is a request from Mr. Splan for additional work or purchase of equipment or material, which Mr. Meyer stated is a normal request, but he was concerned about approving the requisition due to the problems arising between the Service Planning and Capital Development Departments. (Tr. 585-86). Mr. Meyer explained he would be asked to approve a requisition from Mr. Splan when additional equipment or materials were needed, or to contract out for work. Mr. Meyer testified his approval was required when the value of the materials ranged from $50,000.00 to $100,000.00. (Tr. 586). Mr. Splan responded to Mr. Meyer's email stating "I am sorry this issue has gotten up to your level. I should have babysit it [sic] better and worked it out somehow." (Tr. 596-87). Mr. Meyer then replied to Mr. Splan stating "We share your pain. I spoke with Chris [Chesnut], seems like the meeting went well and you have a path forward." Mr. Meyer's email referred to the meeting Mr. Chesnut held to talk about the proper process to be followed and issues arising at 2nd South and State Street. Mr. Meyer believed Mr. Splan had not followed proper procedure and Mr. Chesnut was attempting to have everyone understand their roles and responsibilities while following procedure. (Tr.

587). Mr. Meyer stated "we share your pain" because he recognized it can be frustrating when people cannot work issues out and engage other people in the disagreement. (Tr. 587-88). Mr. Meyer admitted Complainant could be "a little contentious at times," but he expected people in the Capital Development Department to work well with other departments.[60] (Tr. 588).

Mr. Meyer identified JX-9 as an October 14, 2015 email chain that he was copied on between Complainant and Ms. Westlund that was also forwarded to Mr. Hare and Mr. Chesnut. (Tr. 588-89). Mr. Hare's response in the email chain stated "I have had enough of Michael Clara harassing our employees." Upon seeing Mr. Hare's response, Mr. Meyer believed there was a lack of communication between people, and there was the potential for conflict because the Facilities Department was under pressure to complete projects and preparing for winter (snow removal). (Tr. 589). Mr. Sibul responded to the October 14, 2015 email stating "my understanding is that there was a meeting this morning to discuss how to resolve the issues with how we are developing and installing the shelters on 200 South. There is plenty of blame to go around. Let us work together to figure out a better path forward." At the time Mr. Meyer received the October 14, 2015 email he did not know there were physical problems with some of the construction and approvals, and requirements Mr. Splan had to meet. Mr. Meyer stated for example, a "no parking" zone was needed at the bus stop so cars would not park at the stop. Likewise, Mr. Meyer stated there were grading issues with the sloping being too steep to meet accessibility requirements. Mr. Meyer believed there were issues, but he was not aware of any issue between Complainant and Ms. Westlund regarding the Bus Stop Manager. (Tr. 590).

Mr. Meyer confirmed RX-22 contains an October 14, 2015 email from Mr. Splan stating "[t]he meeting did go well. I will continue to build enhancements in coordination with planners and send in work order request to Planning, as we have been. They will issue the work order to install flags and amenities in a timely fashion and show up to the field visits where we mark the sites." (Tr. 591). Mr. Splan's response gave Mr. Meyer some comfort that issues were resolved, but he also spoke with Mr. Chesnut about the meeting as well.[61] (Tr. 592).

---

[60] Respondent's Exhibit 20 was offered and received into evidence without objection. (Tr. 588).

[61] Respondent's Exhibit 22 was offered and received into evidence without objection. (Tr. 592-93).

Mr. Meyer confirmed he received an October 15, 2015 email from Mr. Chesnut (RX-28) which set forth standard operating procedures for UTA employees in different departments. (Tr. 593-94). Mr. Meyer verbally reprimanded Mr. Splan for not following proper procedures at a track station location at University Stadium. Mr. Meyer explained Mr. Splan was to expand the capacity at the stop, but he constructed the stop incorrectly because he did not follow proper procedure. Mr. Meyer stated Mr. Splan's mistake cost over $10,000.00. Mr. Meyer was concerned about Mr. Splan's "propensity towards quantity at the expense of quality." Mr. Meyer coached Mr. Splan over this issue. (Tr. 594).

Camille Glenn

Ms. Glenn testified she works for Respondent as a Senior Human Resource Generalist and she supports a variety of groups within UTA for their human resource needs including employee relations, staffing, recruiting, job design, and compensation. Ms. Glenn is also familiar with benefits offered by Respondent. (Tr. 596).

Ms. Glenn recalled speaking with Complainant on November 20, 2015, which was her first interaction with Complainant. Prior to Complainant's termination, Ms. Glenn never consulted with Mr. Sibul regarding Complainant's employment status. (Tr. 596). Ms. Glenn did not recall meeting with Mr. Sibul the week of November 16, 2015 through November 20, 2015. (Tr. 596-97). However, Ms. Glenn did meet with Mr. Sibul on a number of occasions following Complainant's termination on November 20, 2015. Ms. Glenn recalled that Mr. Chesnut attempted to speak with Ms. Glenn on the morning of November 20, 2015, about Complainant's absence from work, but she was not available to speak with him until that afternoon. Ms. Glenn recalled that she spoke with Mr. Chesnut about Complainant's vacation request, his failure to return to work on November 11, 2015, Mr. Chesnut went to Complainant's home on November 16, 2015, and Complainant agreed to return to work on November 18, 2015, but he did not return. (Tr. 597).

Ms. Glenn confirmed she requested that Mr. Chesnut document his conversation with Ms. Glenn and his understanding of the background and facts concerning Complainant's absence from work. (Tr. 597). Ms. Glenn confirmed RX-15 is Mr. Chesnut's response to Ms. Glenn's request. (Tr. 597-98). Based upon her conversation with Mr. Chesnut and his summarization of the facts

leading up to Complainant's absence from work, Ms. Glenn recommended Mr. Chesnut follow the Respondent's job abandonment policy, which results in termination. When asked whether she told Mr. Chesnut he was in violation of Respondent's job abandonment policy if he did not terminate Complainant's employment, Ms. Glenn stated "not in so many words." She explained that she often advises on policies and past practice to let someone know the policy needs to be followed for consistency within the organization. At the time she advised Mr. Chesnut, Ms. Glenn had no knowledge of Complainant's work on the 200 South corridor project, nor did she know of Complainant's discussion with Mr. Chesnut about "flange way gaps." Ms. Glenn did not learn of Complainant's involvement in the 200 South corridor project until after he was terminated and upon Complainant filing "several claims."[62] Following her discussion with Mr. Chesnut, Ms. Glenn became aware that Mr. Chesnut terminated Complainant's employment. (Tr. 599).

Ms. Glenn identified JX-20 as Complainant's November 20, 2015 termination letter, which she reviewed before it was sent to Complainant. On November 20, 2015, Complainant met with Ms. Glenn at approximately 4:30 p.m. to discuss the decision to terminate his employment with Respondent. Complainant communicated to Ms. Glenn that he received a phone call from Mr. Chesnut stating he was terminated and he called Ms. Glenn to better understand why he was terminated and what options he might have for reconsideration. (Tr. 599). Ms. Glenn recalls that she spoke with Complainant about his vacation accrual and balance, and the impact upon his benefits. Ms. Glenn also spoke with Complainant about his opportunity to appeal his termination and how to submit a written appeal within five days by email or by letter. Ms. Glenn confirmed RX-87 is Complainant's "Termination Appeal" letter that he emailed to Mr. Sibul and copied to Ms. Glenn. (Tr. 600). She further confirmed Complainant's termination appeal did not mention his work along the 200 South corridor, nor did Ms. Glenn know about Complainant's work along the 200 South corridor. (Tr. 600-01). Complainant's termination appeal letter also did not mention "flange way gaps." Based upon Complainant's termination appeal letter, Ms. Glenn agreed to set up a meeting with Complainant to discuss his termination. (Tr. 601).

Ms. Glenn identified JX-30 as a December 9, 2015 email that she sent to David Heier, Respondent's Employment and Client Services Manager, inviting him to attend a meeting with Mr.

[62] Ms. Glenn did not describe the nature of the claims filed by Complainant. (Tr. 598).

Chesnut. Ms. Glenn also met with Matt Sibul, and Lisa Bowman, Respondent's corporate counsel. (Tr. 601). Ms. Glenn explained that she invited Mr. Heier to Complainant's termination appeal meeting because Mr. Heier is her supervisor, and because she had never conducted an appeal for job abandonment. Ms. Glenn requested Mr. Sibul also come to the appeal meeting because he would be making the final decision concerning Complainant's termination appeal. (Tr. 602). Mr. Heier asked Ms. Glenn if there was any additional information he should be briefed on prior to the appeal meeting, to which Ms. Glenn replied "[n]ot really. The plan was to keep it simple and focus on the job abandonment from the 18th. Also, give him [Complainant] a chance to add anything else." (Tr. 602-03). Ms. Glenn explained that the "plan" for the appeal meeting was to focus on the facts, dates, timing of Complainant's vacation request, Complainant's phone conversation with Mr. Chesnut on November 16, 2015, and Complainant's failure to return to work on November 18, 2015. However, during the appeal meeting, Complainant discussed other information that Ms. Glenn was not sure whether it was relevant to Complainant's termination. (Tr. 603).

Ms. Glenn confirmed JX-26 contains Respondent's Separation of Employment Policy, which sets forth Respondent's job abandonment policy. (Tr. 603-04). Part 2(b) of Respondent's job abandonment policy states "If the separation is appealed, management shall not be required to prove the employee's intent to abandon the position." Ms. Glenn testified the requirements of Part 2(b) underscore why Complainant's appeal meeting was kept simple. (Tr. 604).

Ms. Glenn identified JX-32 as her notes from Complainant's December 14, 2015 termination appeal meeting. (Tr. 604). Ms. Glenn explained that Complainant's appeal meeting did not occur until December 14, 2015, because following Complainant's appeal she had several meetings with Mr. Sibul and Mr. Chesnut, as well as the Thanksgiving Holiday break. (Tr. 604-05). Ms. Glenn also investigated some of Complainant's claims and statements set forth in his termination appeal letter. (Tr. 605). Ms. Glenn's appeal meeting notes state "ADD no passage of time" because Complainant explained that he suffered from ADD which affected his perception of the passage of time, and the Complainant had just changed ADD medications. (Tr. 605). Ms. Glenn also noted "looking at December calendar" because Complainant stated he had been looking at the December calendar, but Ms. Glenn was not sure if Complainant had been looking at the December calendar when he spoke with Mr. Chesnut about extending his vacation and his return to work. Complainant also

mentioned during the appeal meeting that he intended to take a "three week vacation." Finally, Ms. Glenn's notes state "no communication with Chris [Chesnut] to extend vacation." (Tr. 606).

Ms. Glenn listened to the voice recording contained in JX-29 from Complainant's termination appeal meeting in which Complainant was asked "[s]o after you realized you had been working, you know, a couple of days into your vacation, and you could extend it, did you have any communication with Chris [Chesnut] at that time, what your intention was?" Complainant answered "no." (Tr. 607-08). Ms. Glenn confirmed that Complainant answered "no" to the aforementioned question. (Tr. 608).

Ms. Glenn's appeal meeting notes (JX-32) also state "normal short notice behavior." Ms. Glenn was not sure what she meant at the time, but it likely meant that Complainant had a lack of accountability, lack of taking responsibility for his actions, and made excuses for not making any contact with Mr. Chesnut. (Tr. 608). Ms. Glenn also noted "made an assumption extension" because Complainant did not speak with Mr. Chesnut about an extension, nor did he receive approval for his extension. Ms. Glenn noted there was a "misunderstanding" because Complainant stated he misunderstood when he should have returned to work. Ms. Glenn further noted "two weeks before vacation" and "not ADA compliant." (Tr. 609). During the appeal meeting, Ms. Glenn confirmed that Complainant discussed the 200 South corridor project, but Ms. Glenn did not consider Complainant's statements regarding the same because it was irrelevant to Complainant being terminated for job abandonment. (Tr. 609-10). Ms. Glenn's notes also include "issues" that she considered after the appeal meeting concluded. One "issue" noted by Ms. Glenn was "conflicts in Michael's [Complainant's] story" because Complainant provided conflicting dates and he could not remember when he was supposed to return to work from his vacation. Ms. Glenn also believed Complainant's appeal letter conflicted with his appeal meeting statements. (Tr. 610). Another "issue" noted by Ms. Glenn was "perception of termination" because Ms. Glenn perceived that Complainant was under the impression he was terminated for "other reasons" due to his last statements in the appeal meeting.[63] (Tr. 610-11).

[63] Ms. Glenn did not expound on Complainant's statements in regard to his belief that he was terminated for "other reasons" than job abandonment. (Tr. 611).

Ms. Glenn identified JX-23, p. 24, as Complainant's final direct deposit statement for his last paycheck from Respondent. (Tr. 611). Ms. Glenn explained that if Complainant's effective termination date changed from November 11, 2015, to November 18, 2015, the only thing that would have changed is Complainant's "vacation time" would have been rolled into his "vacation payout number." (Tr. 611-12). However, the final amount Complainant was paid would not have changed irrespective of his termination date being November 11, 2015, or November 18, 2015. (Tr. 612).

Ms. Glenn testified that during Complainant's appeal process she investigated whether other UTA employees tried to contact Complainant after November 11, 2015, to determine if Complainant had worked his first week of vacation. (Tr. 612). It was Ms. Glenn's understanding that Complainant was to return to work on November 11, 2015. (Tr. 612-13).

Ms. Glenn confirmed that JX-22 shows Complainant received a wage increase in the spring of 2015, with a salary of $54,342.08. Ms. Glenn testified Complainant was not an "exempt employee" and he was not eligible for overtime. (Tr. 618). Ms. Glenn testified that in 2016, and 2017, Respondent's employees also received three percent merit raises. (Tr. 618-19). Ms. Glenn confirmed JX-24 set forth Complainant's "Total Compensation Statement" while employed with Respondent. (Tr. 619). Ms. Glenn explained that Complainant's total pay as set forth in JX-24 was $54,760.00, which included any payment for performance incentive bonus, as well as vacation time taken. (Tr. 619-20). Ms. Glenn testified Respondent's 2016 and 2017 performance incentive bonuses were similar to that of the 2015 performance incentive bonuses. She confirmed Respondent offered total compensation, total pay, and paid time off, which were benefits Complainant would have been eligible for in 2015. (Tr. 620). Ms. Glenn explained that Respondent contributed $2,376.00 to Complainant's transit pass, but Complainant was not paid money to purchase the pass. (Tr. 620-21). She confirmed Respondent's annual contribution to Complainant's retirement plan (i.e., 457 contribution) was $1,108.55, and Complainant annually contributed $2,704.46. (Tr. 621). Ms. Glenn also confirmed Respondent annually contributed $8,380.35 to Complainant's "pension fund." Ms. Glenn explained that Complainant's pension was a percentage of Complainant's total wages and current pension funding levels. Respondent also contributed to Complainant's "health and welfare plans" and medical, dental, and vision insurance plans. (Tr. 622). However, none of Respondent's contributions to insurance would have been paid directly to Complainant, but rather to the

insurers. (Tr. 622-23). Ms. Glenn explained that for any employee to receive payment through insurance provided by Respondent, the employee must submit a claim. (Tr. 623). According to Ms. Glenn, Respondent paid "Government Mandated Benefits" on behalf of Complainant in the amount of $1,189.27, but the benefits were not paid directly to Complainant. (Tr. 623-24). Ms. Glenn explained that "Your Total Compensation" in the amount of $76,003.21 was a combination of various numbers in Complainant's Total Compensation Statement. (Tr. 624).

Ms. Glenn identified JX-27 as Respondent's vacation policy for administrative employees, which was applicable in 2015. (Tr. 624). Ms. Glenn explained that Part 3(d) of Respondent's vacation policy entitled "Scheduling" required an employee to have accrued vacation time, a request for vacation and approval by a manager. (Tr. 624-25). Ms. Glenn testified a manager's approval for vacation does not have to be in writing, but can be verbal. If an employee did not receive approval for vacation, Ms. Glenn stated the employee would receive an "absent without leave." (Tr. 625).

Ms. Glenn confirmed Respondent's Separation of Employment Policy (JX-26) was applicable in 2015, and contains a job abandonment policy that interacts with the vacation policy. (Tr. 625). Ms. Glenn explained that the two policies interact when an employee is absent from their position without prior approval for three days or more, which would be considered job abandonment. Ms. Glenn testified that if an employee does not come to work and does not call for three days, the employee is considered to have abandoned his job because an employee is expected to notify his manager prior to a scheduled shift. Ms. Glenn confirmed that the termination process for job abandonment begins on the third day of absence and the notification of termination is also sent out on the third day. According to Ms. Glenn, even if an employee came to work at the end of the third day of absence, the employee would not be exempt from Respondent's job abandonment policy. (Tr. 626). Ms. Glenn was not aware of an employee coming into work on the third day of missing work. Even though Complainant came into work on November 20, 2015, Ms. Glenn testified it did not except him from Respondent's job abandonment policy because he was already terminated and notification was already sent to Complainant. (Tr. 627).

Ms. Glenn identified a chart of employees (JX-1) who have been terminated from January 1999 through May 9, 2017, pursuant to Respondent's job abandonment policy. (Tr. 627-28). Since

1999, Ms. Glenn confirmed that there were more than 100 employees terminated for job abandonment. Ms. Glenn also confirmed that one of the listed employees "B,H Operator" worked for Respondent for 30.06 years prior to being terminated for job abandonment. Likewise, another operator with 13.69 years was terminated for job abandonment. Ms. Glenn identified Complainant on Respondent's termination list as well. (Tr. 628). Ms. Glenn explained Respondent has two classifications of employees, the administrative employee staff and the bargaining unit employee staff, both of which are subject to Respondent's job abandonment policy. Ms. Glenn testified that seniority and prior disciplinary history does not play a role in application of Respondent's job abandonment policy. The only exceptions to Respondent's job abandonment policy occur when Respondent becomes aware of an employee being absent due to incapacity, hospitalization, or an inability to make contact. (Tr. 629). Ms. Glenn confirmed JX-2 demonstrates Respondent terminated four administrative employees for job abandonment since 2014, including two employees for 3 days of absence and Complainant for "eight" days of absence. (Tr. 629-30). Ms. Glenn admitted another employee who had raised health issues was permitted additional time before the employee was terminated for being absent without leave. (Tr. 630-31). Similarly, a family contacted Respondent when an employee went missing, and Respondent gave additional time before terminating employment because Respondent was not sure if the employee was capable of making contact. (Tr. 630).

Ms. Glenn testified Complainant was expected to return to work on November 11, 2015, and by November 16, 2015, he was absent from work for four days. (Tr. 631). If Complainant's absence was brought to Ms. Glenn's attention on November 16, 2015, she would have recommended Complainant be terminated for job abandonment. (Tr. 631-32). Ms. Glenn admitted UTA is not a perfect organization and has approximately 2,500 employees, so if a supervisor does not consult with Human Resources it can result in policy not being implemented properly. (Tr. 632).

Ms. Glenn testified that Respondent's policies are usually distributed to employees via UTA's intranet, as well as email after a new policy has been created or there are updates to existing policies. According to Ms. Glenn, employees access UTA's intranet with their login credentials. (Tr. 632). Ms. Glenn confirmed that in 2015, employee login credentials did not change. Ms. Glenn also confirmed UTA's IT Department is available after 5:00 p.m. because many employees work shift work and may require help at all times during each day. (Tr. 633).

Ms. Glenn identified RX-83 as a December 18, 2009 email sent to all UTA employees regarding "corporate policies," one of which was Respondent's "Separation of Employment" policy. Ms. Glenn testified Complainant would have received the December 18, 2009 email which also contained a "job abandonment" provision.[64] (Tr. 637).

Ms. Glenn also identified RX-85 as another email sent to UTA employees regarding Respondent's 2011 version of the "Acceptable Use of Technology Resources Policy." (Tr. 638-39). Similarly, Ms. Glenn identified RX-86 as another email sent to UTA employees regarding Respondent's 2015 version of the "Acceptable Use of Technology Resources Policy," which was issued on October 30, 2015.[65] (Tr. 640). Lastly, Ms. Glenn identified RX-76 and RX-77 as Respondent's "Acceptable Use of Technology Resources Policy," that were in effect prior to October 2015, and after October 2015.[66] (Tr. 641). Ms. Glenn confirmed RX-76 contains a "Definition" section, Part 3(d), which would characterize an email as a "technology resource." (Tr. 641-42). In the same section, Part 4(d)3 requires that users (employees) shall not release UTA technology resources other than what is required for completion of job responsibilities. Ms. Glenn testified she was present during Complainant's testimony about sending emails between his personal and work email accounts, and she confirmed Complainant had no reason to be sending work-related emails to his personal email account. Ms. Glenn explained Complainant had access to a work laptop and a wireless hotspot to allow Complainant to access his work email. Ms. Glenn confirmed RX-76 and RX-77 contain a similar provision to that of Part 4(d)3. (Tr. 642). Ms. Glenn agreed that Complainant sending work emails to his personal email account violated both versions of Part 4(d)3 found in RX-76 and RX-77. (Tr. 642-43).

Ms. Glenn agreed that under Part 4(m) of RX-76 and Part 4(n) of RX-77, Complainant sending a work email to his personal email account could raise "data protection concerns," but it depends on the contents of the email and how it is stored on a

---

[64] Respondent's Exhibit 83 was offered and received into evidence without objection. (Tr. 637-38).

[65] Respondent's Exhibit 86 was offered and received into evidence without objection. (Tr. 640).

[66] Respondent's Exhibits 76 and 77 were offered and received into evidence without objection. (Tr. 641).

personal server. Ms. Glenn confirmed Respondent protects its data, including emails, with fire walls and encryption. (Tr. 643). Ms. Glenn testified that UTA employees have to change their computer passwords every six or twelve weeks. (Tr. 643-44).

Ms. Glenn confirmed that Part 4(l) of RX-76 and Part 4(m) of RX-77 discuss the prohibition of use of a UTA account or any technology resources for personal and commercial activities. Ms. Glenn agreed the aforementioned provisions would prohibit the use of UTA resources for outside political activities. Ms. Glenn also agreed the provisions would prohibit Complainant from using UTA resources for his Salt Lake City School Board work. Ms. Glenn testified that using any UTA resource for personal activities would be a violation of Respondent's policies as it could be a conflict of interest with the employee's current position. (Tr. 644). Ms. Glenn acknowledged in Part 4(k) there is an "Incident Use Exception," but she stated it would not apply to any of the aforementioned activities because there is no reason why the information should be forwarded to a personal email account. (Tr. 644-45).

Ms. Glenn is aware that Complainant sent emails between his work and personal email accounts that exceeded 1,500 pages of emails. (Tr. 645). In March 2016, Respondent first learned Complainant sent emails between his work and personal email accounts when UTA responded to a "GRAMA request" for access to government records. If Ms. Glenn learned of Complainant's emailing between his work and personal email accounts while he was still employed by Respondent, Ms. Glenn would have initiated an investigation and recommended corrective action up to and including termination. (Tr. 464). Based on the number of Complainant's emails sent between his personal and work email accounts, Ms. Glenn would have terminated Complainant. (Tr. 646-47).

On cross-examination, Ms. Glenn acknowledged that to access the UTA intranet an employee would have to use their username and a password. However, Ms. Glenn further acknowledged that in 2015, she had no knowledge of how the usernames and passwords were distributed to UTA employees. To Ms. Glenn's knowledge, in 2015, UTA employees did not sign any type of acknowledgement that they had been granted access to UTA's intranet. (Tr. 647). Ms. Glenn agreed that violations of Respondent's "technology policy" found in RX-76 does not result in "automatic termination," but rather an employee could be warned, written up, suspended, or have network access suspended. (Tr. 647-48).

Ms. Glenn also agreed that circumstances affecting the severity of punishment for violating Respondent's technology policy could be based on who the information was received from or sent to, the type of information accessed, and how the information was used. (Tr. 648).

Ms. Glenn testified that if a UTA employee sent an email to his girlfriend, saying "I will be late for dinner tonight," this would be an improper use of Respondent's email system under its policies, but it would likely not result in termination of employment. In RX-76, Part (k), it addresses "incidental use" which Ms. Glenn agreed would include emailing a girlfriend and/or family member. Ms. Glenn testified that if a UTA employee experienced trouble with their personal email account, and as a result, used their work email account it would be an incidental use that must be approved by a manager. (Tr. 649).

Ms. Glenn is not aware of any harm coming to Respondent due to Complainant sending emails to his personal email account. (Tr. 649). Ms. Glenn is not aware that Complainant's email activities caused Respondent a loss of revenue, nor did Complainant share trade secrets, disclose Respondent's confidential business secrets to third parties, or confidential information regarding safety protocols. (Tr. 649-50). Ms. Glenn recalled that she testified Complainant had no reason to forward emails to himself in order to print the emails. Ms. Glenn acknowledged Complainant did not have a printer in his vehicle and that he frequently worked outside the office. However, Ms. Glenn testified Complainant had access to printers in his office, as well as "other locations." (Tr. 650).

On December 14, 2015, during Complainant's appeal meeting, Ms. Glenn did not recall Complainant discussing his November 16, 2015 discussion with Mr. Chesnut in which (according to Complainant) Mr. Chesnut stated "we expect you back to work Monday" and Complainant replied "I am coming back on Monday" and thereafter, Mr. Chesnut responded "today is Monday." (Tr. 651). Ms. Glenn listened to the audio recording of the December 14, 2015 appeal meeting designated as JX-29 which stated:

> So, just to clarify, though, you are saying that there was an understanding, that you and Christopher [Chesnut] had, that you would return to work a week later, so not on Wednesday the 18th, but the following Monday, whatever date that is. Well that would have been on – he and I had that conversation on the 16th, when he called me. Right. And he [Mr. Chesnut] said 'you were supposed to

> be back to work' – and I don't remember if he said that day or the date, and then I said 'Well, I am coming back on Monday.' And he said 'today is Monday' and I said 'right, but I worked the whole first week, so I am taking an extra week.' And he said 'okay.'"

(Tr. 652; JX-29). Upon hearing the recording, Ms. Glenn testified the recording did not refresh her memory as to whether Complainant requested extending his vacation. (Tr. 653).

Ms. Glenn identified CX-42 as a November 20, 2015 email that she sent to Mr. David Heier, Respondent's Employment and Client Services Manager, as well as Ms. Nancy Malecker, a Senior Human Resources Officer. Ms. Glenn testified she sent the email to Mr. Heier, her direct supervisor, to update him about the events that transpired. (Tr. 653). In her November 20, 2015 email, Ms. Glenn stated Mr. Chesnut tried to contact Complainant between November 11, 2015 and November 13, 2015. At the time Ms. Glenn sent the email she believed Mr. Chesnut's statement was true. However, Ms. Glenn admitted she now knows that Mr. Chesnut did not attempt to contact Complainant between November 11, 2015 and November 13, 2015. Prior to the appeal meeting with Complainant, Ms. Glenn discussed the incorrect statement with Mr. Heier concerning Mr. Chesnut's attempted communication with Complainant. (Tr. 654). In particular, Ms. Glenn informed Mr. Heier that she was under the impression Mr. Chesnut attempted to contact Complainant the week of November 11, 2015, but she later learned this statement was not true. Ms. Glenn testified she did not review any documents pertaining to Complainant's work from October 27, 2015 through November 1, 2015, because she did not know of any documents that she could review. (Tr. 655). Ms. Glenn confirmed that on November 20, 2015, Complainant told her that he worked the first week of his vacation, but she did not review any documents to verify his claim because no documents were submitted to her. (Tr. 655-656). Ms. Glenn admitted that, following his termination, Complainant did not have access to his email and he could not supply her with work product or emails.[67] (Tr. 565).

Ms. Glenn acknowledged that on November 20, 2015, when she met with Complainant about his termination, Complainant requested a copy of Respondent's Separation of Employment policy. Ms. Glenn testified "I may have said I would send them

[67] Complainant's Exhibit 42 was offered and received into evidence without objection. (Tr. 656).

to him [Complainant] and I did not." (Tr. 656-57). Ms. Glenn admitted Respondent's Section 3(c) Job Abandonment, subsection (1) discusses "Notification to Supervisor" which does not state notification to a supervisor must be made in writing. (Tr. 657). However, Ms. Glenn stated the notification does contain a formal requirement that notification must be made prior to an employee's shift, but it is contained in one of Respondent's "other" policies. (Tr. 657-58). Ms. Glenn testified the requirement that an employee notify a supervisor prior to missing three consecutive days of work is located in Respondent's "Administrative Work Week" policy. Nevertheless, Ms. Glenn admitted that to her knowledge Complainant was not furnished the Administrative Work Week policy in connection with the instant case. Ms. Glenn testified it was not permissible under Respondent's job abandonment policy for an employee to notify a supervisor of absence from work at the end of the third working day or the expiration of the third working day. (Tr. 658).

Ms. Glenn further acknowledged she was deposed concerning the instant case, and during her deposition she testified that an employee must provide notification to his supervisor **prior to the expiration** of the third working day. (Tr. 659). However, at the formal hearing Ms. Glenn testified an employee must give notice of absence to his supervisor **prior to or at the beginning** of a shift. Ms. Glenn confirmed that an employee will be considered to have abandoned his job even if the employee provides notification of absence to a supervisor prior to the end of the third working day or before the expiration of the third working day. (Tr. 660). Nonetheless, Ms. Glenn acknowledged she deposed that an employee would not be considered to have abandoned his job if he notified his employer on the third working day. Ms. Glenn again testified that, in contrast to her deposition testimony, an employee could not notify a supervisor on the third working day to avoid job abandonment allegations. (Tr. 661).

Ms. Glenn confirmed Respondent's abandonment policy refers to an employee's "right to appeal," and an "executive" decides whether to affirm or reverse an employee's appeal. According to Ms. Glenn, the "executive" may consider several factors as to why an employee did not come to work including, the reason the employee did not come to work, whether the absence was within the employee's control, and whether the employee had knowledge that he was supposed to be at work. (Tr. 661). Ms. Glenn confirmed that on November 20, 2015, Complainant met with her prior to the expiration of the working day. (Tr. 662-63).

Ms. Glenn confirmed JX-1 contains a list of Respondent's employees who were terminated for abandoning their jobs, but Ms. Glenn was not sure whether the list contained four "administrative" employees. (Tr. 664). Ms. Glenn confirmed that at the time of his termination Complainant was not a bus driver, and Complainant had a different supervisor than that of a bus driver and different job responsibilities. Ms. Glenn testified the list of Respondent's employees who were terminated for job abandonment does contain more than four administrative employees. (Tr. 665). Ms. Glenn testified Complainant was absent from work for eight days beginning on November 11, 2015 through November 20, 2015. (Tr. 666). Ms. Glenn confirmed that besides Complainant, no other "planners" were terminated for job abandonment. (Tr. 666-67). Ms. Glenn also confirmed that besides one bus operator, there were no other employees on the termination list that exceeded Complainant's years of employment with Respondent. (Tr. 667).

Ms. Glenn confirmed she was not the decision maker concerning Complainant's termination appeal, rather Mr. Sibul was the decision maker. However, Ms. Glenn was involved in Complainant's appeal process and Mr. Sibul considered her input regarding the same. Ms. Glenn acknowledged that in her December 14, 2015 email to Mr. Heier (JX-30), he asked Ms. Glenn if there was any information he should be briefed on regarding Complainant's termination. (Tr. 668). Ms. Glenn responded to Mr. Heier stating "not really, the plan was to keep it simple and focus on the job abandonment from the 18th. Also, give him a chance to add anything else." Ms. Glenn acknowledged her email statement that, Complainant abandoned his job on November 18, 2015, contradicted earlier statements that Complainant was absent from work for **eight days** beginning on November 11, 2015 through November 20, 2015. Ms. Glenn testified she was interested in conducting an objective appeal and in considering all relevant facts. Ms. Glenn stated Complainant did not make any factual allegations during his December 14, 2015 appeal meeting. (Tr. 669). Ms. Glenn explained that during the appeal meeting Complainant only presented information about his medical condition and medications. Other than focusing on Complainant's job abandonment, Ms. Glenn did not tell Mr. Heier there were facts to consider because it was Complainant's opportunity to bring information forward at his appeal meeting. (Tr. 670).

In her December 9, 2015 email to Mr. Heier, Ms. Glenn stated Complainant was scheduled to be on vacation through November 11, 2015. Ms. Glenn met with Complainant prior to

sending her December 9, 2015 email to Mr. Heier. Ms. Glenn intended to inform Mr. Sibul and Mr. Heier as to what Complainant stated when he met with Ms. Glenn on November 20, 2015, to inquire about his termination. (Tr. 670).

Ms. Glenn confirmed CX-63 contains a letter dated November 30, 2015, that was sent to Complainant from Jenny Hansen, Respondent's pension specialist. Ms. Hansen's letter referred to Complainant's options under his "457 Deferred Compensation Plan." (Tr. 671). Ms. Glenn also confirmed Ms. Hansen's letter to Complainant is one that is typically sent to UTA employees who have 457 plans and who are no longer employed with Respondent.[68] Ms. Glenn testified the 457 Plan is a retirement savings plan offered to Respondent's employees that allows employees to make tax-free contributions, along with UTA matching employees' contributions. (Tr. 672). Ms. Glenn confirmed Complainant had a 457 Plan while employed with Respondent. (Tr. 673).

Ms. Glenn confirmed CX-64 contained details concerning Complainant's UTA pension benefits. She testified Complainant was "vested" in the pension plan prior to his termination. Ms. Glenn explained that a UTA employee's pension benefits are based upon years of service, age, and the employees highest five year earnings at the time of retirement. Ms. Glenn confirmed that if Complainant continued working for Respondent beyond November 2015, his UTA pension benefits would have continued accruing and increasing in value. (Tr. 673).

Ms. Glenn acknowledged that Complainant's Total Compensation Statement (JX-24) reflects his total compensation from August 3, 2014 to August 1, 2015, while employed with Respondent. (Tr. 673-74). Ms. Glenn confirmed the Total Compensation Statement is inclusive of Complainant's base pay and other employee benefits, including paid sick leave and vacation benefits. Complainant would accrue 2.78 hours of paid sick leave per pay period. Respondent paid Complainant on a bi-weekly basis. (Tr. 674). Ms. Glenn confirmed JX-27 demonstrated Complainant received 20 days of paid vacation per year. Ms. Glenn testified Complainant also received a gift certificate valued at $216.00 during the holidays, which was customarily given to all UTA employees. (Tr. 675). In 2016, Respondent also gave gift certificates to employees. (Tr. 676).

[68] Complainant's Exhibit 63 was offered and received into evidence without objection. (Tr. 672).

Ms. Glenn identified RX-54 as Respondent's "Administrative Merit Increase" that was effective July 8, 2012. Ms. Glenn confirmed Complainant received a merit increase on July 8, 2012, for his job performance in 2011.[69] (Tr. 676). Ms. Glenn confirmed RX-55 shows Complainant's merit increase dated March 2014, based upon Complainant's job performance in 2013.[70] (Tr. 677).

On re-direct examination, Ms. Glenn identified CX-42 as a November 20, 2015 email that she sent to Mr. David Heier following her meeting with Complainant on the same day. (Tr. 678). In her email, Ms. Glenn wrote to Mr. Heier "I told Michael [Complainant] that his employment was in fact terminated due to job abandonment. He claimed he told Chris [Chesnut] he was taking a 20-day vacation and that he has taken calls from UTA and has worked a couple of days. I told him that was contrary to what his manager stated." (Tr. 678-79). Ms. Glenn further stated in her email that "Chris Chesnut tried to contact him [Complainant] between the 11th through the 13th with no luck." However, in Mr. Chesnut's November 20, 2015 email to Ms. Glenn (JX-15), Mr. Chesnut wrote "after Michael [Complainant] had not returned to work on November 11th, and several people tried to contact him, Joey Alsop and [sic] went to his house on Monday, November 16th to make sure he was okay." (Tr. 679). Ms. Glenn confirmed that Mr. Chesnut did not state in his November 20, 2015 email that he attempted to contact Complainant from November 11, 2015 through November 13, 2015, rather Mr. Chesnut stated "several people" tried to contact Complainant. Ms. Glenn did not have an explanation why her email provided a different account concerning Mr. Chesnut contacting Complainant from November 11, 2015 through November 13, 2015. Ms. Glenn stated she "might have misunderstood" Mr. Chesnut. (Tr. 680).

Ms. Glenn confirmed that if an UTA employee was terminated for job abandonment and then came to work, they would not be excepted from the job abandonment policy according to Respondent's application of the policy. (Tr. 681).

Ms. Glenn testified that during the December 14, 2015 appeal meeting Complainant appeared confused about the day he was supposed to return to work from his vacation. (Tr. 682). Ms. Glenn listened to the recording of Complainant's December

[69] Respondent's Exhibit 54 was offered and received into evidence without objection. (Tr. 676-77).

[70] Respondent's Exhibit 55 was offered and received into evidence without objection. (Tr. 677).

14, 2015 appeal meeting, which stated Mr. Chesnut expected Complainant to return to work on Wednesday, November 18, 2015, but Complainant stated Mr. Chesnut agreed he could return to work on Monday, November 23, 2015. However, when Complainant was speaking to Mr. Chesnut about returning to work he was riding on a bus and was not looking at a calendar. (Tr. 683). Complainant could not recall if November 18, 2015, came up in the discussion with Mr. Chesnut, but Complainant stated there was a possibility he did say the "18th." Complainant admitted he was "a little handicapped with the issue of dates," so if he is talking about dates he needs to look at a calendar. (Tr. 684). Nevertheless, Complainant stated that when he spoke with Mr. Chesnut he specifically remembered talking about "Monday" because Mr. Chesnut stated today is Monday, to which Complainant replied "well, I am coming back the next Monday." (Tr. 684-85). Ms. Glenn confirmed that it was this portion of the December 14, 2015 appeal meeting that Complainant appeared confused about the day he was to return to work. (Tr. 685).

On re-cross examination, Ms. Glenn testified that prior to Complainant's termination she was not aware Complainant had raised concerns about shelters being installed without work orders. (Tr. 686-87). Ms. Glenn did not recall seeing the October 21, 2015 email correspondence between Ms. Westlund and Complainant concerning a bus shelter that was installed and later removed by Complainant. Ms. Glenn did not recall receiving the October 21, 2015 email from Mr. Hare, but if she had received the email Ms. Glenn stated she would have forwarded the email to UTA's Civil Rights Department. However, she does not recall if she forwarded the October 21, 2015 email to UTA's Civil Rights Department. (Tr. 687).

On re-direct examination, Ms. Glenn confirmed the October 21, 2015 email did not contain the word "safety." However, Ms. Glenn confirmed the email demonstrates Ms. Westlund stated "I feel he [Complainant] is trying to create a hostile work environment here." Ms. Glenn agreed that Ms. Westlund was referring to Complainant. (Tr. 688).

On re-cross examination, Ms. Glenn confirmed the October 21, 2015 email also refers to a "16-foot shelter." (Tr. 689). According to Ms. Glenn, she did not recognize any safety concerns regarding a 16-foot shelter. (Tr. 688-89).

IV. ISSUES

1. Did Complainant engage in protected activity pursuant to 6 U.S.C. § 1142(a)(1) and 29 C.F.R. § 1982.102(a)(1)?[71]

2. Did Complainant suffer any unfavorable adverse action?

3. Was Complainant's alleged protected activity a contributing factor in the alleged unfavorable adverse personnel action?

4. If Complainant meets his burden of entitlement to relief, did Respondent establish, by clear and convincing evidence, that it would have taken the same adverse action absent the alleged protected activity?

5. If entitlement to relief is established, should Complainant be reinstated or awarded future wages?

6. Is Complainant entitled to compensatory damages, back pay for lost wages, future wages, damages for lost deferred compensation damages, and prejudgment interest on back wages?

7. Did Complainant act to mitigate his alleged damages?

8. Whether Complainant's failure to request attorney's fees in his objection to the Secretary's Findings bars his recovery of attorney's fees in the instant case?

V. CONTENTIONS OF THE PARTIES

In brief, Complainant contends he engaged in protected activity pursuant to the NTSSA when he reported hazardous safety conditions in public transportation. Specifically, he asserts that throughout October 2015, he engaged in protected activity when he alerted other UTA employees, including his supervisor Mr. Chesnut, about improper installation of bus stop amenities along the 200 South corridor that violated ADA standards and created other safety hazards for all UTA bus passengers. Similarly, Complainant engaged in protected activity when he alerted other UTA Departments and employees that he was ordering the removal of previously installed bus shelters because the shelters were installed without work orders and were not in accordance with the safety standards set forth in UTA Policy OPO

[71] The parties stipulated that UTA does not dispute Complainant engaged in "some" protected activity. See (JX-37, p. 3 n.1).

1.2. In addition, Complainant reported to Mr. Chesnut about "gaps" between tracks at the UTA's TRAX line where wheelchair-bound passengers could become stuck.

Further, Complainant argues that UTA was aware of Complainant's protected activity as Mr. Chesnut received multiple emails in October 2015, from Complainant informing him about safety hazards along the 200 South corridor including improper installation of bus stop amenities, failure to comply with ADA standards, and that a wheelchair-bound passenger was killed after going off the sidewalk at the 4500 South TRAX crossing. Likewise, Complainant avers Mr. Sibul had knowledge that Complainant reported ADA issues concerning slope levels at bus stops and proximity of the bus stops to bus shelters, which also created safety hazards.[72]

Complainant avers he suffered an adverse employment action when his employment was terminated on November 20, 2015, for "job abandonment." Furthermore, Complainant contends his protected activity was a contributing factor in Respondent's decision to terminate his employment as evidenced by temporal proximity, pretext, inconsistent application of Respondent's job abandonment policy, and irregularities in Respondent's appeal process. Therefore, Complainant asserts he has established a **prima facie** case pursuant to 29 C.F.R. § 1982.104(e)(2), and that Respondent has failed to produce clear and convincing evidence that his termination would have occurred in the absence of his protected activity.

Additionally, Complainant asserts his emails are not "after acquired evidence" upon which Respondent would have terminated his employment on an earlier date because Respondent has failed to demonstrate Complainant's "personal emails" transmitted to his work email account were of such severity that his employment would have been terminated. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 356 (1995).

Complainant further asserts that his EEOC charge does not bar his present NTSSA claim for several reasons. First, Complainant explains, for the election of remedies to apply, three elements must be present: (1) the existence of two or more remedies; (2) an inconsistency between the remedies; and (3) the choice, with knowledge of the facts, of one of several remedies. Complainant alleges the first and third elements do not apply to

[72] In brief, Complainant avers the parties stipulated that Complainant not only engaged in protected activity, but that Respondent had knowledge of his protected activity. See JX-37, Stipulated Facts Nos. 72-75.

Complainant. The first does not apply, because Complainant is not disabled and thus has no "remedies" under the ADA to pursue. The third element does not apply, because Complainant did not choose to pursue any remedies under the ADA. Most significantly, Complainant notes that his NTSAA claim was filed long before his EEOC charge. Thus, Complainant elected to pursue his remedies under NTSSA long before submitting his charge to the EEOC. Second, Complainant asserts that an "act" may be the same for two law suits, but the "act" may be unlawful for fundamentally different reasons. Complainant asserts that a claim for discrimination and retaliation under the ADA is a separate and distinct cause of action from a claim for retaliation under the NTSSA, because both claims have different elements and different burdens of proof. Third, Complainant alleges, "simply because there may be an 'overlap' between [Complainant's] safety complaints and issues related to ADA compliance does not mean that [Complainant's] NTSSA claim is barred." According to Complainant, 6 U.S.C. § 1142(b) does not contain a "nullification or prohibition of safety complaints that have 'overlap' with ADA requirements."

With regards to Respondent's allegations that Complainant's claim is barred by the theory of "claim splitting," Complainant argues Respondent failed to include "claim splitting" as an affirmative defense, and Respondent has thus waived such a defense. Nevertheless, Complainant denies his claim is barred by "claim splitting" for the simple reason that he has not filed two cases in the same court, asserting the same claims for relief. Moreover, Complainant contends that defending against an EEOC charge of ADA discrimination is a far cry from defending against an actual lawsuit alleging ADA discrimination. Therefore, Complainant asserts that his EEOC charge comes nowhere close to implicating the prohibition against claim splitting.[73]

---

[73] One of the "issues of law" designated by the parties to be determined by the undersigned is whether Complainant's request and filing a charge with the Equal Employment Opportunity Commission ("EEOC") alleging harassment and retaliation for opposing violations of the ADA (but not pursuing this claim in court) bars his claim due to the election of remedies provision in the NTSSA, as well as the statute of limitations on his ADA claim having passed. (JX-37, p. 2). In Respondent's April 27, 2017 Answer and Defenses to Complainant's Complaint, Respondent avers that on or about February 19, 2016, Complainant filed a charge of discrimination with the EEOC alleging he was harassed and discharged in retaliation for opposing violations of the ADA. (ALJX-5; RX-100). Consequently, Respondent asserts that to the extent Complainant relies on his reporting of alleged ADA concerns as the basis for his retaliation claim in the instant case, such claims are barred by his election of remedies in seeking relief through the EEOC. See 42 U.S.C. § 1142(e)("An employee may not seek protection under both this section and

Complainant also contends he is entitled to $96,488.55 in back wages, $105,009.63 in future wages, $11,085.50 for lost deferred compensation, and $83,803.50 for lost pension benefits. Complainant also seeks an award of consequential losses in the amount of $5,000.00 due to a tax penalty he incurred for a 401k withdrawal, as well as compensatory damages for emotional distress, pre-judgment interest, and attorney's fees.

Finally, Complainant argues he satisfied his obligation to mitigate his damages when he submitted 114 applications for employment from January 5, 2016 through August 13, 2016. Furthermore, Complainant contends Dr. Janzen's conclusions that Complainant could have secured comparable employment within one to two months following his termination and that Complainant failed to exercise reasonable diligence in finding new employment are without merit.

Conversely, in brief, Respondent concedes Complainant engaged in "some" protected activity, and that Complainant suffered an unfavorable personnel action when he was terminated on November 20, 2015. However, Respondent argues Complainant has failed to demonstrate through direct and/or circumstantial evidence that his protected activity was a contributing factor in Respondent's decision to terminate employment. Respondent asserts that much of Complainant's circumstantial evidence suggesting his protected activity contributed to his termination

---

another provision of law for the same allegedly unlawful act of the public transportation agency."); see also Lee v. Norfolk Southern Railway Co., 802 F.3d 626 (4th Cir. 2015). Nevertheless, in brief, Respondent does not address the issue any further. See Respondent's Brief, pp. 1-72. As discussed in the September 13, 2017 Order Denying Respondent's Motion for Summary Decision, the undersigned found Respondent's argument that Complainant's EEOC charge barred his present complaint to be unpersuasive, and as a result, denied Respondent's Motion with respect to the EEOC charge. See Order Denying Respondent's Motion For Summary Decision, p. 8. Accordingly, the undersigned will not address this issue in the discussion that follows.

Likewise, the parties also identified the issue of "claim splitting" and whether Complainant's claim for retaliation under the NTSSA is barred by the doctrine of claim splitting. (JX-37, p. 2). However, as noted by Complainant, Respondent failed to include "claim splitting" as an affirmative defense in its Answer, thus effectively waiving its defense. (ALJX-5); Complainant's Brief, pp. 29-30. Furthermore, in the September 13, 2017 Order Denying Respondent's Motion for Summary Decision, the undersigned considered the issue of claim splitting and found Respondent's arguments unconvincing, and thus denied Respondent's Motion with respect to this issue. Accordingly, the undersigned will not address the issue of claim splitting in the discussion that follows.

is inadmissible hearsay, and of the evidence that is admissible, it demonstrates Complainant is not credible. Further, Respondent contends Complainant's protected activity, although close in time, was completely unrelated to his termination because the UTA encouraged safety reporting by its employees and Complainant conceded that he regularly reported such issues for the past decade. Respondent avers "numerous" employees, namely Ms. Huffman, Mr. Meyer, Mr. Chesnut, and Mr. Wilson engaged in safety reporting efforts regarding the 200 South corridor project, but they suffered no adverse consequences. Thus, Respondent argues Complainant's allegations of disparate treatment due to his protected activity are simply untrue.

Moreover, Respondent asserts that Mr. Chesnut, Complainant's supervisor, was consistently supportive of Complainant's reporting of safety issues and never exhibited any animus toward Complainant. As such, Respondent contends Complainant has failed to prove intentional retaliation prompted by his engaging in protected activity. See Jones v. BNSF Railway Co., No. 14-2616, 2016 U.S. Dist. LEXIS 4887, *19-20 (D. Kan. Jan. 14, 2016). Respondent further contends Complainant's termination was solely due to his failure to return to work following his vacation, not once, but twice, and as a result, Complainant cannot utilize whistleblower protections to shield himself from the consequences of his own misconduct or failures. Trimmer v. U.S. Dep't of Labor, 174 F.3d 1098, 1104 (10th Cir. 1999). Given the foregoing, Respondent argues it is clear that Complainant's protected activity played no role in his termination and that Respondent would have taken the same action whether he engaged in protected activity or not. See Wallace v. SMC Pneumatics, 103 F.3d 1394 (7th Cir. 1997)(noting that a court should not act as a super-personnel department and second guess an employer's decision where "even an invidious factor but not one outlawed by the statute" is at issue).

Respondent also asserts that Complainant's claim for damages is unsupported and unjustified. More specifically, Respondent contends that in light of Dr. Janzen's employment and earning capacity evaluation, Complainant failed to mitigate his damages as he did not diligently search for new employment. Likewise, Respondent argues Complainant has failed to support any claim for back pay besides his salary and pension because Complainant offered no evidence of any out-of-pocket expenses incurred as a result of his loss of various benefits (i.e. health care benefits) provided by Respondent. In the same way, Respondent asserts Complainant has failed to establish entitlement to front pay because he offered no evidence of other

work opportunities available, whether he could become re-employed with reasonable efforts, or how he proposes to discount a front pay award to net present value, and thus his request for front pay is speculative and impermissible. See Cummings v. Std. Register Co., 265 F.3d 56, 66 (1st Cir. 2001).

In the alternative, Respondent argues that after-acquired evidence demonstrates Complainant misused public resources for personal and political gain when he sent over 1,500 pages of emails between his work and personal email, and as such, he would have been terminated from his employment upon Respondent's discovery of this issue in March 2016. In the event this Court finds damages are appropriate in the present matter, Respondent contends Complainant is not entitled to attorney's fees due to his failure to request the same in his objection to the Secretary's Findings. See 29 C.F.R. § 1982.106(a).

VI. DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tenn. Valley Auth., Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his/her evidence worthy of belief." Indiana Metal Prods. v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so **natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe** . . . Credible testimony is that which meets the test of plausibility.

Id. at 52(emphasis added).

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Constr. Co. v. NLRB, 514 F.2d 8, 16 and n.5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

In the present matter, Complainant's burden of persuasion rests principally upon his testimony. I found the majority of Complainant's testimony to be overwhelmingly credible, most of which relate to his job duties, protected activity, the events leading up to his termination, and the events following his termination. In particular, I found Complainant's testimony regarding the improper installation of the bus stop shelters along the 200 South corridor to be very credible. I found Complainant exhibited a thorough understanding of UTA's safety policies and ADA standards for proper installation of bus stops, bus shelters and amenities. In the same way, I found Complainant honestly portrayed the disputes arising between himself and other UTA employees (i.e., Mr. Splan, Ms. Westlund, Mr. Turner and Mr. Hare), which resulted from his desire to properly follow UTA policy for the installation of bus stop shelters.

I also credit Complainant's testimony that he engaged in protected activity when he spoke with Mr. Chesnut at the "200 South and 600 West" location, where the frontrunner train travels, and pointed out to Mr. Chesnut that there were "gaps" that were too wide based on the ADA standards just as there was at the 4500 South track crossing. However, Mr. Chesnut responded by telling Complainant not to bring up the issue with gaps in the tracks because "[e]ither you are in hot water or you have created enough, you know, attention to yourself on these kinds of things, so do not even bring it up."[74]

[74] The parties stipulated that "the TRAX is a light rail system that UTA operates within Salt Lake County." (Tr. 116; JX-37, p. 14). Further, the parties stipulated "on or about October 2, 2015, a disabled individual was killed after his wheelchair went off the sidewalk at 4500 South track's

Similarly, I found Complainant credible when he testified that he sent an October 21, 2015 email to Mr. Alires, manager of the Civil Rights Compliance, in response to Ms. Westlund's email which stated Complainant was creating a hostile work environment because he was asking Ms. Westlund questions about work orders. Complainant copied Mr. Chesnut when he sent the email because Mr. Chesnut had communicated to Complainant that "these guys (i.e., Mr. Splan, Mr. Turner, and Mr. Hare) in the other department wanted [him] fired." Complainant was concerned that he was "being set up to be fired."

On the other hand, I found Complainant's testimony at times to be contradictory and inconsistent concerning the length of his vacation. Specifically, there are inconsistencies and contradictions in his testimony when correlated internally with statements he made in his October 26, 2015 email to Mr. Chesnut requesting a vacation, as well as his December 14, 2015 appeal hearing. On October 26, 2015, Complainant emailed Mr. Chesnut, his supervisor, stating in part, "if you have no objection, I am going to take [a] vacation starting tomorrow, for **two weeks**." Complainant further stated "I will be available be [sic] by phone and will come in the day that we make the switch at Meadowbrook Trax Station." Similarly, Complainant sent another email on October 27, 2015, at 9:29 a.m., to other UTA employees, including Mr. Chesnut, stating "I am on vacation until November 11. Colton Christensen will be taking my calls. I plan to come in one or two days if needed to take care of unfinished projects that have already started." (JX-19, pp. 1-4). Conversely, during his December 14, 2015 appeal hearing, Complainant averred it was always his intention to take **three weeks** of vacation, and that he determined he was looking at December 2015, rather than November 2015 (looking at his electronic calendar which he normally does not use), when he requested his vacation from October 27, 2015 through November 11, 2015, which explains the discrepancy in his vacation time.[75] Complainant also stated he spoke with Mr. Chesnut about taking a three week vacation.

Similarly, there are discrepancies in Complainant's testimony with respect to his November 16, 2015 conversation with Mr. Chesnut as to whether Complainant was to return to work on Wednesday, November 18, 2015, or on Monday, November 23, 2015. Complainant averred that when he spoke with Mr. Chesnut

---

crossing. Clara [Complainant] brought this to Chesnut's attention." (Tr. 117; JX-37, p. 16).

[75] Complainant's December 14, 2015 appeal hearing was recorded by Complainant and is designated as JX-29.

on November 16, 2015, Mr. Chesnut reminded him that he was to return to work on November 11, 2015, but Complainant reminded Mr. Chesnut that he had worked the first week of his vacation. Thereafter, Mr. Chesnut asked Complainant when he was going to return to work, and Complainant replied "on Monday" and Mr. Chesnut stated "today is Monday." However, Complainant explained he meant the following Monday (November 23, 2015). Nevertheless, during his December 14, 2015 appeal hearing, Complainant recalled that it "could be accurate that I sa[id] the 18th to him, I do not recall." Complainant further stated that during the November 16, 2015 phone call with Mr. Chesnut he "remembered telling him [Mr. Chesnut] I will be back on Monday, because I did not take the first week of vacation. There is a possibility I did say the 18th, that could be accurate, I do not recall. Like I said, I am a little bit handicapped regarding calendar days." Nonetheless, Complainant stated during the appeal meeting, that he did not discuss dates with Mr. Chesnut, rather they discussed the day (i.e., Monday or Wednesday) Complainant would return to work. In his November 20, 2015 termination appeal letter, Complainant blamed his failure to return to work on his Attention Deficit Disorder ("ADD"), stating his ADD required that he write things down to "keep track of things" and that his new medication caused him not to sleep well, to become hyper-focused, suffer memory loss, and to lose track of time. Complainant explained that it was his "intent to use vacation days that [he] accumulated."

Given the foregoing, while Complainant stated he intended to take a **three week** vacation, and that he noted incorrect dates because he was looking at the December 2015 calendar, Complainant clearly noted in his October 26, 2015 email to Mr. Chesnut that he intended to take "**two weeks**" of vacation, rather than **three weeks** of vacation. Consequently, I am unpersuaded that Complainant always intended to take a three week vacation, or if he did, I find Complainant did not clearly communicate his intention.

Notwithstanding the foregoing, I do find Complainant consistently and credibly testified that he worked during the first week of his vacation from October 27, 2015 through November 1, 2015, which is also supported by documentary evidence such as work emails and work orders, and I credit his testimony that he did not start his vacation until November 2, 2015.[76] I also find Complainant sincere and honest in his

[76] The parties also stipulated that Complainant worked from October 27, 2015 through November 1, 2015. (JX-37, p. 11, Stipulated Fact No. 25; see infra, note 77.

testimony that on November 16, 2015, he recalled telling Mr. Chesnut he would return "Monday" (November 23, 2015), but that "Wednesday" (November 18, 2015), could have been discussed and Complainant could not recall because he did not have a calendar in front of him that day when he was riding the bus and speaking with Mr. Chesnut about returning to work. Accordingly, I credit Complainant's testimony that he did in fact communicate to Mr. Chesnut that he was going to return to work on "Monday" (November 23, 2015), and that he misunderstood Mr. Chesnut in his expectation that Complainant was to return to work on Wednesday, November 18, 2015. I also credit Complainant's testimony that he suffers from ADD, which made it more difficult to maintain dates and passage of time, especially without a calendar. Moreover, I found Complainant credible and sincere when he stated at his December 14, 2015 appeal meeting that if Mr. Chesnut truly believed Complainant was to arrive at work on Wednesday, November 18, 2015, Complainant did not understand why Mr. Chesnut would not have simply called him and asked Complainant his whereabouts. Finally, I find Complainant to be very credible that he had no intentions to abandon his job while he was on vacation.

I also credit Complainant's testimony over that of Mr. Chesnut with respect to their conversation on November 20, 2015, when Mr. Chesnut called Complainant to terminate his employment. As will be discussed below, I found Mr. Chesnut incredible, and in doing so, I credit Complainant's testimony that when Mr. Chesnut called Complainant to terminate Complainant's employment, Mr. Chesnut "sounded upset, like he was crying" and communicated to Complainant that this was "the hardest thing I have had to do." I find Complainant's testimony credible when he replied to Mr. Chesnut "how did I abandon my job? I was coming back on Monday and I am on vacation" to which Mr. Chesnut replied "well you will have to take this up with Matt [Sibul], because he is the one who told me to do this."

While I found Dr. Janzen to be credible, I was not overly impressed with his testimony, and overall I found his testimony unpersuasive. Although Dr. Janzen researched several potential jobs that he determined to be compatible with Complainant's skill set, Dr. Janzen admitted he did not review Complainant's job description while Complainant was employed with Respondent as a "Service Plan Deployment Specialist" for ten years. Indeed, Dr. Janzen admitted the positions he identified such as the regional planner, transportation logistics router, "city jobs," the U.S. National Guard position, and logistics planner did not comport with Complainant's training and experience

(i.e., required college degree and/or required enlistment in National Guard). Similarly, I was not persuaded by Dr. Janzen's testimony that Complainant did not exercise reasonable diligence in conducting his job search, despite Complainant completing 114 job applications between January 5, 2016 and August 13, 2016, as his conclusion was made under an incorrect pretense that Complainant "exclusively" used the Department of Workforce Services website to apply for jobs. Finally, I was not impressed by Dr. Janzen because he failed to take into account the difficulty Complainant may encounter when searching for alternative employment when he was terminated for "job abandonment" after almost 20 years of employment with UTA.

I found Cloene Huffman to be a very credible witness. Ms. Huffman was very believable when she testified that Mr. Hare requested that she, along with Ms. Westlund and Mr. Wilson, complete work for the 200 South corridor without issuance of work orders. I also credit her testimony that she and Mr. Wilson refused to permit crews to work without work orders, but Ms. Westlund proceeded to permit crews to work without work orders. Likewise, I found Ms. Huffman's testimony credible that she did not recall any UTA employee stating bus stop amenities were being installed along the 200 South corridor without work orders due to "Proposition 1." Finally, I credit Ms. Huffman's testimony that she "mostly" called Complainant in UTA's Planning Department because "he was good at his job."

In contrast, I was not impressed with the testimony of Mr. Chesnut, and overall I found him to be incredible. Initially, I found Mr. Chesnut credible when he testified that he supported Complainant's safety concerns regarding the bus stop shelters, and Complainant's desire to operate pursuant to UTA's policy OPO 1.2, which addresses UTA's standard operating procedure for installation, removal, modification, and relocation of bus stops and amenities. In addition, Mr. Chesnut appeared sincere in his concern to rectify the safety and policy issues between the UTA's Planning Department and Facilities Department.

Nevertheless, Mr. Chesnut's testimony relating to Complainant's vacation, the events leading up to Complainant's termination, and following Complainant's termination detracts considerably from his credibility. It is undisputed that on October 26, 2015, Complainant notified Mr. Chesnut that he would like to take a **two week** vacation from October 27, 2015 through November 11, 2015. On this basis, I credit Mr. Chesnut's testimony that Complainant was to return to work on November 11, 2015, after two weeks of vacation.

With respect to the November 16, 2015 conversation with Complainant, Mr. Chesnut testified that he reminded Complainant he was to return to work on November 11, 2015, and he asked Complainant when he planned to return to work. According to Mr. Chesnut, Complainant stated he would return to work on "Wednesday," and Mr. Chesnut replied "Okay. I will see you on Wednesday." On the other hand, Complainant testified Mr. Chesnut asked Complainant when he was going to return to work, and Complainant replied "on Monday" and Mr. Chesnut stated "today is Monday." However, Complainant explained he meant the following Monday (November 23, 2015). Mr. Alsop, who I find to be a credible and unbiased witness, testified that he heard Mr. Chesnut state to Complainant during the November 16, 2015 conversation, "I will plan on seeing you at work on Wednesday." However, Mr. Alsop also confirmed the phone conversation between Mr. Chesnut and Complainant was not on speaker phone, nor did he hear any of Complainant's November 16, 2015 conversation with Mr. Chesnut. In light of the foregoing, I do not discredit Mr. Chesnut's testimony that he expected Complainant to return Wednesday because Mr. Alsop's credible testimony comports with his testimony. However, I find it is also very probable and plausible that Complainant did indeed mention to Mr. Chesnut that he would return on "Monday," (November 23, 2015), and that there was a misunderstanding between Complainant and Mr. Chesnut about the day of Complainant's return to work, as Mr. Alsop did not hear Complainant's conversation with Mr. Chesnut.

However, contradictions and inconsistencies arise in Mr. Chesnut's testimony when he stated prior to and following Complainant's termination that he had no knowledge of Complainant working during the first week of his scheduled vacation from October 27, 2015 through November 1, 2015. Mr. Chesnut testified that during his November 16, 2015 conversation with Complainant there was no mention by Complainant that he worked the first week of his vacation, rather Complainant simply stated he was busy with community work, and that he would return to work on Wednesday, November 18, 2015. Nevertheless, as discussed below, Mr. Sibul credibly testified that Mr. Chesnut informed Mr. Sibul that on November 16, 2015, during his discussion with Complainant, that Complainant reminded Mr. Chesnut he worked the first week of his vacation, which according to Mr. Sibul, is why Mr. Chesnut agreed to extend Complainant's vacation to Wednesday, November 18, 2015. Furthermore, in contrast to Mr. Chesnut's testimony, Mr. Sibul stated that after Complainant's December 14, 2015 appeal hearing he confirmed with Mr. Chesnut again that Complainant worked

during the first week of his scheduled vacation. Perhaps most troubling, Mr. Chesnut testified that he always expected Complainant to work during his vacation because Complainant stated he would be coming into the office for various projects during his vacation. In contrast, Complainant credibly testified that when he first spoke with Ms. Glenn on November 20, 2015, she informed Complainant that Mr. Chesnut averred he was not aware that Complainant worked the first week of vacation. Indeed, Mr. Chesnut continued to assert in a **January 8, 2016** email to Ms. Camille Glenn that he "was not aware that he [Complainant] was conducting any work between October 27th [2015] through November 1st [2015]." (CX-34). Again, during Complainant's February 2016 DWS unemployment hearing, Mr. Chesnut testified under oath that he did not receive any work emails from Complainant during the last week of October. However, the record evidence demonstrates Mr. Chesnut received several emails from Complainant from October 27, 2015 through November 1, 2015, when Complainant was working during the first week of his scheduled vacation.[77]

In the same way, there are discrepancies between Mr. Chesnut's testimony and other witnesses that are troubling. For example, Mr. Chesnut testified that Mr. Sibul did not counsel him regarding Complainant's termination, but he supported Mr. Chesnut's decision. On the other hand, Complainant stated that during his November 20, 2015 discussion with Mr. Chesnut, he advised Complainant to "take that up with Matt [Sibul]" who told Mr. Chesnut to terminate Complainant's employment. (Tr. 135). Mr. Chesnut testified he did not really speak to Mr. Sibul (or anyone for that matter) about Complainant's termination, other than letting him know that he was going to terminate Complainant, but Mr. Sibul testified they he spoke with Mr. Chesnut on November 18, 2015, November 19, 2015, and November 20, 2015, as well as meeting together with Mr. Chesnut and Ms. Glenn to discuss Complainant's absence. Similarly, on Saturday, November 21, 2015, Mr. Benson, UTA's interim President and CEO, emailed Mr. Sibul stating "[Mr. Chesnut] briefed me Friday on the Clara termination. I figured we would hear about it."

[77] On October 27, 2015, Mr. Chesnut was party to an email sent by Complainant regarding the Sandy Civic Center, as well as another email from Complainant documenting two work orders he completed for the "Meadowbrook" project. (CX-58, pp. 43, 45). On October 29, 2015, Mr. Chesnut sent Complainant an email discussing a work order for a bus shelter located at 200 South State Street. (CX-58, p. 37). Also on October 29, 2015, Mr. Chesnut was a party to five emails sent by Complainant regarding the bus stop located at 200 South 810 East, and work being completed at the Meadowbrook project. (CX-58, pp. 7, 10, 17, 29). Mr. Chesnut was a party to another email sent by Complainant on November 1, 2015, discussing the 200 South 810 East bus stop. (CX-58, p. 5).

Also troubling, Mr. Chesnut testified that when he called Complainant to terminate Complainant he advised Complainant he could appeal his termination and that he strongly believed Complainant "should" appeal his termination. Mr. Chesnut's statement that Complainant should appeal his decision to terminate Complainant calls into question whether it was Mr. Chesnut's decision to terminate Complainant, and if not, whether Mr. Chesnut agreed Complainant should have been terminated.

I also detract credibility from Mr. Chesnut because he erroneously stated in Complainant's November 20, 2015 termination letter that he attempted to call and email Complainant several times between November 11, 2015 and November 13, 2015, when he indeed did not. Mr. Chesnut also made another erroneous statement in Complainant's termination letter, stating Complainant's termination was effective "November 11, 2015 for job abandonment," when, according to Mr. Chesnut, he permitted Complainant to be absent from work until Wednesday, November 18, 2015. Likewise, I was not persuaded by his statement that he was nervous about terminating Complainant which led to his erroneous statement. Mr. Chesnut also testified that other than Camille Glenn, he did not discuss terminating Complainant's employment with any other person, which is not true as documented by Mr. Sibul's testimony that he met with Mr. Chesnut to discuss Complainant's absence on November 18, 2015, November 19, 2015, and November 20, 2015.

Lastly, I am troubled by Mr. Chesnut's testimony that he did not consider Complainant to have abandoned his job from November 11, 2015 through November 16, 2015, after missing four working days. However, just four days later on November 20, 2015, Mr. Chesnut determined Complainant, who worked for Respondent for almost 20 years, had abandoned his job after missing less than three consecutive days of work. What is also troubling is that Mr. Chesnut called and visited Complainant's home on November 16, 2015, when he did not show up for work on November 11, 2015, out of "concern" for Complainant's safety, but just a few days later on November 20, 2015, with no phone call to determine whether there was a misunderstanding or if Complainant was okay, Mr. Chesnut simply concluded Complainant "abandoned" his job.

Overall, I found Mr. Sibul to be an incredible witness as well. Initially, I found Mr. Sibul to be credible and sincere when he testified Complainant was always responsive, professional, organized, and courteous. Mr. Sibul also credibly testified that in 2013, Respondent began to create plans for the

improvements along the 200 South corridor, and although Respondent wanted to demonstrate excellence and finish the 200 South corridor prior to the vote on "Proposition 1," Mr. Sibul stated the UTA was focused on the 200 South corridor project long before "Proposition 1" was proposed. However, I also found Mr. Sibul's testimony that the UTA's improvements along the 200 South corridor were, at the least, conducted for the purpose of "Proposition 1," was also honest and sincere. I also credit Mr. Sibul's testimony that he spoke with Mr. Chesnut on several occasions on how to best move forward concerning the dispute between Complainant and Mr. Splan, and that there was "plenty of blame to go around" because there was a breakdown in communication between several UTA employees. I also found Mr. Sibul's admission that Complainant's actions and concerns led to increased costs associated with UTA's removal and reinstatement of bus shelters to be credible.

I further credit Mr. Sibul's testimony that Mr. Chesnut reported to Mr. Sibul that he spoke with Complainant on November 16, 2015, upon which Complainant reported to Mr. Chesnut that he worked his first week of vacation and believed Mr. Chesnut knew he needed to extend his vacation by one week to November 18, 2015. Mr. Sibul further credibly testified that prior to reaching his final decision on appeal, he again confirmed with Mr. Chesnut that Complainant worked during the week of October 27, 2015 through November 1, 2015. I also found Mr. Sibul credibly testified that on November 16, 2015, (and the 18th, 19th, 20th) Mr. Sibul first spoke with Mr. Chesnut about Complainant being absent from work, and that Mr. Sibul spoke with Mr. Chesnut many times about the absences.

Nevertheless, I discount credibility from Mr. Sibul based upon his November 21, 2015 statement to Mr. Benson that "[t]his is messy, but we are following all protocols. When someone does not show up for work for **10 days**," that is, from November 11, 2015 through November 20, 2015, when Mr. Sibul testified that he knew Complainant worked the first week of his vacation and that Mr. Chesnut had permitted Complainant to be absent from work at least until November 18, 2015. I was also unpersuaded by Mr. Sibul's explanation that when he stated "this is messy" he was referring to Complainant's involvement with political organizations, including the Salt Lake City School Board, and Mr. Sibul expected Complainant to reach out to the media and claim he was wrongfully terminated.

In addition, I was very troubled by Mr. Sibul's statement at Complainant's **December 14, 2015** appeal meeting, when

Complainant expressed confusion as to why he should have return to work on November 11, 2015, when he worked from October 27, 2015 through November 1, 2015, to which Mr. Sibul responded "Christopher [Chesnut] did not even know that." However, Mr. Sibul testified that Mr. Chesnut informed him after his **November 16, 2015** phone conversation with Complainant that Complainant worked the first week of his scheduled vacation. I was also perturbed by Mr. Sibul's testimony that it was an "oversight" when he did not correct Complainant's termination date from November 11, 2015 to November 18, 2015, despite his knowing Complainant had not been absent from work for ten days. Also troubling, is Mr. Sibul's testimony that he spoke with Mr. Alsop and Mr. Chesnut numerous times about their joint conversation with Complainant on November 16, 2015, and that both Mr. Alsop and Mr. Chesnut stated Complainant said he would return to work on Wednesday, November 18, 2015. However, as discussed below, Mr. Alsop credibly testified that Mr. Sibul never spoke with him about the November 16, 2015 conversation between Mr. Chesnut and Complainant, nor did Mr. Alsop ever communicate to Mr. Sibul that he heard the conversation between Mr. Chesnut and Complainant. Lastly, Mr. Sibul's decision to affirm Complainant's termination on appeal for "job abandonment" is also distressing, given Mr. Sibul's testimony that he considered Complainant worked for Respondent for 20 years, and that Complainant was a dedicated employee "who cared very deeply about his job."

I found Mr. Alsop to be a very credible, unbiased witness. In particular, I found his testimony to be honest and sincere when he testified it was his expectation that Complainant would return to work on November 11, 2015, on the basis of Complainant's October 26, 2015 email, stating the same. I also credit Mr. Alsop's testimony that he worked with Complainant the week of October 27, 2015 through November 1, 2015, on various projects, but that Complainant never communicated to him that he was going to extend his vacation. In addition, Mr. Alsop credibly testified that when he returned to work on November 16, 2015, he was concerned that Complainant had not returned to work, and that he tried calling him on two occasions before driving to Complainant's home for a well-being check.[78] I also

[78] It is also noteworthy that Mr. Alsop's testimony contradicts Mr. Chesnut's testimony, in that Mr. Alsop testified he became concerned about Complainant when he did not return to work, and Mr. Alsop informed Mr. Chesnut that he was going to drive to Complainant's home for a well-being check upon which Mr. Chesnut offered to go with Mr. Alsop to Complainant's home. (Tr. 541-42). Conversely, Mr. Chesnut testified he became concerned and requested that Mr. Alsop go with him to Complainant's house for a well-being check. (Tr. 411).

found Mr. Alsop to be very credible and sincere when he testified that on November 16, 2015, he was in the car with Mr. Chesnut when Mr. Chesnut spoke with Complainant about why he did not return to work on November 11, 2015, and that although Mr. Alsop did not hear what Complainant stated during the conversation, he recalled Mr. Chesnut stating "I will plan on seeing you at work on Wednesday," which indicated to Mr. Alsop that Complainant was returning to work on Wednesday, November 18, 2015. Finally, I credit Mr. Alsop's testimony that Mr. Sibul never spoke with him about the November 16, 2015 phone conversation between Mr. Chesnut and Complainant, and that Mr. Alsop never told Mr. Sibul that he could hear Complainant's comments during the conversation.

On the other hand, I was not entirely impressed or persuaded by Mr. Turner's testimony that he did not know Mr. Splan, whom he supervised in UTA's Capital Development Department, directed the UTA's Facilities Department to install bus stop amenities without work orders. As discussed above, I found Ms. Huffman credibly testified that Mr. Tom Hare, the UTA's Facilities Department manager, requested that she along with other employees in the UTA Facilities Department install bus stop amenities without work orders.[79] In light of the foregoing circumstances, I find it highly unlikely that Mr. Splan, who was not a supervisor, requested that Mr. Hare, who was a supervisor, order UTA's Facilities Department employees to install bus stop amenities without Mr. Turner's knowledge. In addition, while I do credit Mr. Turner's testimony that he did not want to physically harm Complainant, I am not persuaded Mr. Turner simply wanted Mr. Chesnut to speak with Complainant, and not to their supervisors, Mr. Sibul and Mr. Meyer, when he stated "[b]efore I unleash on Michael, I am going to let you take care of him, asap. With him copying everyone and their dog on this email—that is not cool. Let me know what happens, otherwise this will need to be escalated quickly. Jake let us talk before you strangle this guy." Due to Mr. Turner's aforementioned statement, I am also not persuaded that he was going to speak with Mr. Splan about stopping "the bickering back and forth on emails." (JX-10). However, I do credit Mr. Turner's testimony that UTA always completed projects, especially those involving asphalt and concrete, prior to the winter months, and that he did not consider "Proposition 1" to be a motivating factor regarding the installation of bus stop shelters along the 200 South corridor.

[79] Mr. Turner testified that Mr. Tom Hare oversaw the Facilities Department. (Tr. 556; JX-37, p. 9, Stipulated Fact No. 7).

In general, I found Mr. Meyer to be a very credible witness. Specifically, I found his testimony to be honest and sincere when he stated safety is a primary concern for UTA because if UTA did "not have a credible system, people are not going to use UTA." I also found Mr. Meyer to be sincerely concerned about resolving the dispute between Mr. Splan and Complainant, and that Mr. Meyer was honest when he admitted Mr. Splan was more focused on "quantity than quality" and Complainant could be "a little contentious at times." Additionally, I credit Mr. Meyer's testimony that he believed Mr. Splan had not followed proper procedure concerning the bus stop shelter installations along the 200 South corridor.

I found portions of Ms. Glenn's testimony to be credible, while other portions of her testimony were not credible or persuasive. Ms. Glenn credibly testified that she did not recall meeting with Mr. Sibul from November 16, 2015 through November 20, 2015, but she met with him on a number of occasions after Complainant's termination. Similarly, I credit her testimony that she initially was told by Mr. Chesnut that Complainant was to return to work on November 11, 2015, that on November 16, 2015, Mr. Chesnut went to Complainant's home to ensure if he was safe, and that Complainant agreed to return to work on November 18, 2015. I also found Ms. Glenn credibly testified that at the time she advised Mr. Chesnut about Respondent's job abandonment policy she did not have any knowledge about Complainant's work on the 200 South corridor, nor did she know about Complainant's discussion with Mr. Chesnut about "flange way gaps."

However, I found Ms. Glenn's conflicting testimony regarding Respondent's job abandonment policy to be unpersuasive and incredible. Ms. Glenn, deposed that an employee would not be considered to have abandoned his job if notification was provided **before the expiration** of the third workday. On the other hand, at the formal hearing in this matter, Ms. Glenn testified "notification" concerning Respondent's job abandonment policy had to be provided **before the beginning of an employee's shift.**[80]

---

[80] Notably, Respondent's job abandonment policy does not address if or when an absent employee may notify Respondent that they have not abandoned his or her employment. In other words, Respondent's job abandonment policy does not state Complainant had to notify Respondent **at the beginning** or the **expiration** of the third consecutive work day in order to avoid termination due to job abandonment. See (JX-26, p. 2). Ms. Glenn testified the requirement that an employee notify a supervisor **prior to** missing three consecutive days of work is located in Respondent's "Administrative Work Week" policy. Nevertheless, Ms. Glenn admitted that to her knowledge Complainant was not furnished the

I was also unpersuaded by Ms. Glenn's testimony that during the December 14, 2015 appeal hearing Complainant failed to make any factual allegations. To the contrary, during the appeal hearing, Complainant alleged he worked the entire first week of his vacation, that he sent Mr. Chesnut emails while he worked during the first week of his vacation, that he told Mr. Chesnut he would return to work on Monday, November 23, 2015, that he told co-workers he was going to extend his vacation for one week, and that he believed he was possibly terminated for disputing with co-workers about the improper installation of UTA bus stop shelters. Also troubling, is that Ms. Glenn communicated to Mr. Heier that the appeal hearing would focus on Complainant abandoning his job on **November 18, 2015**, but she acknowledged earlier statements that Complainant abandoned his job as of November 11, 2015.

Also perplexing, is Ms. Glenn's testimony that she did not recall Complainant stating during his appeal meeting that on November 16, 2015, he told Mr. Chesnut that he would be returning to work on "Monday" (November 23, 2015), nor did she recall this event after listening to Complainant's recording of the December 14, 2015 appeal meeting. However, Ms. Glenn testified that on November 20, 2015, when Complainant was terminated, he informed her that he worked the first week of his vacation, but she did not review any documents to verify his claim because she was not given any documents, nor did she speak to any UTA employee to attempt to verify Complainant's factual allegations. On the whole, I find Ms. Glenn's testimony that she was interested in conducting an "objective" appeal and in considering all relevant facts, to be incredible and unpersuasive.

B. Evidentiary Hearsay Issues

In the present matter, the parties contest two statements allegedly made by Ms. Westlund, Mr. Splan, and Mr. Hare, all of whom did not testify at the formal hearing. In addition, Mr. Splan and Mr. Hare allegedly made the statements during their employment, but are no longer employed by the UTA. The statements are as follows:

> On October 8, 2015, Complainant sent an email to Mr. Chesnut notifying him that, according to Ms. Westlund, Mr.

"Administrative Work Week" policy in connection with the instant case. (Tr. 658). Significantly, Respondent's Administrative Work Week policy is not part of the record evidence.

> Splan stated UTA's Facilities Department was installing bus stop amenities along the 200 South corridor without work orders "because of the bond vote."[81]
>
> On October 15, 2015, Complainant met with Mr. Chesnut at 1:00 p.m., and during this meeting Mr. Chesnut allegedly stated that Mr. Splan, Mr. Hare, and Mr. Turner wanted Complainant's employment terminated because Complainant was "hurting UTA's image and jeopardizing the upcoming bond vote." In addition, they allegedly stated after Complainant would be terminated his job responsibilities could be "transferred to the facilities department, or Mr. Splan could assume some of [Complainant's] job responsibilities."

(Tr. 95-96; JX-5; CX-59).

Pursuant to 29 C.F.R. § 18.801(d)(2), Complainant asserts Ms. Westlund, Mr. Splan and Mr. Hare's statements are admissions of a party opponent that are not hearsay. More specifically, Complainant asserts that the statements allegedly made by Mr. Splan and Mr. Hare are admissions of a party opponent because they were "statements by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship." 29 C.F.R. § 18.801(d)(2)(iv); Fed. R. Evid. 801(d)(2); Fischer v. Forestwood Co., Inc., 525 F.3d 972 (10th Cir. 2008); Abuan v. Level 3 Comm'cs, Inc., 353 F.3d 1158, 1171-72 (10th Cir. 2003)(finding that a vice president's statements concerning his company's unethical treatment of a direct subordinate is an admission within the scope of the executive's employment). Moreover, contrary to Respondent's argument, Complainant contends that the cases relied upon by Respondent do not stand for the blanket rule that an agent's admissions are only permissible if the agent was "involved in the termination decision" or "hiring decision." On this basis, Complainant argues that such language would contradict the plain language of Federal Rule of Evidence 801(d)(2)(D), which requires only that a statement of a party-opponent be made during the existence of the agency relationship, and within the scope of that agency. See Fisher, supra at 984-85; see also Rainbow Travel Serv. V. Hilton Hotels Corp., 896 F.2d 1233, 1242 (10th Cir. 1990)(finding that a shuttle driver's statements were admissions of a party opponent

[81] In regard to the October 8, 2015 email, Ms. Ginger Westlund did not testify at the formal hearing in this matter to confirm whether Mr. Splan did in fact tell her the bus stop amenities along the 200 South Corridor were being installed without work orders "because of the bond vote." (JX-5).

because they were "related to the scope of his employment with the hotel.").

With respect to both statements, Complainant avers Respondent has not contested that the at-issue statements were made during the time period of Ms. Westlund, Mr. Splan, and Mr. Hare's employment with Respondent. Therefore, Complainant asserts the at-issue statements were about matters within the scope of agency and during the existence of the employment relationship. 29 C.F.R. § 18.801(d)(2)(iv).

Conversely, Respondent argues Mr. Splan and Mr. Hare's statements do not qualify as admissions of a party opponent because the Tenth Circuit Court of Appeals, under whose jurisdiction this case arises, has held "an employee's statements are not attributable to h[is] employer as a party-opponent admission in an **employment dispute** unless the employee was 'involved in the decision-making process affecting the employment action' at issue." Johnson v. Weld Cnty., 594 F.3d 1202, 1208-09 (10th Cir. 2010), (quoting Jaramillo v. Colo. Judicial Dep't, 427 F.3d 1303, 1314 (10th Cir. 2005))(emphasis added); see also Ellis v. J.R.'s Country Stores, Inc., 779 F.3d 1184, 1202 (10th Cir. 2015). Thus, Respondent asserts that where a party is not involved in the decision-making process affecting the employment action, his statements would be "outside the scope of his employment and not admissible as statements of a party opponent." Jaramillo, supra at 1314. Respondent also avers that many of the at-issue statements involve hearsay within hearsay, which can only be admitted "if each part of the combined statements conforms with an exception to the hearsay rule." 29 C.F.R. § 18.805.

Given the foregoing, Respondent avers that either Mr. Chesnut or Mr. Sibul made the decision to terminate Complainant's employment,[82] and as such, according to Tenth Circuit jurisprudence, the purported statements from Ms. Westlund, Mr. Splan and Mr. Hare when offered to support Complainant's claims of retaliation are outside the scope of their employment and are therefore inadmissible hearsay because

[82] Respondent avers that the parties have identified as a disputed fact "whether the decision to terminate Complainant was made by Mr. Chesnut or Mr. Sibul." (JX-37, p. 21). As a result, Respondent contends that there is no question Ms. Westlund, Mr. Splan, and Mr. Hare did not play any role in the decision to terminate Complainant's employment.

they were not the decision-makers involved with Complainant's termination.[83]

As discussed by the parties, a statement is not hearsay when made by a party opponent and is a "statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]" 29 C.F.R. § 18.801(d)(2)(iv). Furthermore, where statements contain hearsay within hearsay, as is the case here, each part of the combined statements must conform with an exception to the hearsay rule. 29 C.F.R. § 18.805. Nevertheless, pursuant to Tenth Circuit precedent, when an "**employment dispute**" is at issue an employee's statements are not attributable to his employer as a party-opponent admission unless the employee was involved in the decision-making process affecting the employment action at issue. Johnson, supra at 1209 (citing Jaramillo, supra at 1314). Complainant is correct in stating that, in general, the statements are not considered hearsay if they are made by the opposing party's agent or employee during the course of the relationship. However, contrary to Complainant's assertion, the Tenth Circuit further requires in the case of an "**employment dispute**" that the employee making the statement must be "involved in the decision-making process affecting the employment action at issue." Ellis, supra at 1202; Johnson, supra at 1208-09; Jaramillo, supra at 1314.

Conversely, in Rainbow Travel the court did not consider an employment dispute (i.e., a hiring or firing issue), but instead considered whether there was a breach of contract after a hotel was overbooked and could not provide rooms to guests who reserved rooms through Rainbow Travel Service Incorporated. Rainbow Travel, supra at 1242. In doing so, the court found the bus driver's statements about the hotel's reservation practices were admissible statements by an employee concerning a matter within the scope of agency. Id. On the other hand, in Fischer the court considered an employment dispute, finding the admission of the party-opponent was admissible because the statement came from the president of the company at the time the

[83] Respondent also notes that the at-issue statements offered by Complainant were allegedly made by employees in entirely different departments than that of UTA's Planning Department, where Complainant worked, and by employees who had no supervisory authority over Complainant. See (JX-4, pp. 1, 3). Indeed, Respondent avers Ms. Westlund, Mr. Splan, and Mr. Hare worked in UTA's Capital Development Department, and none of whom had supervisory authority over Complainant. (Tr. 60, 575).

statement was made and he was authorized to make statements concerning "hiring and firing." Fischer, supra at 984.

Accordingly, I find and conclude that Ms. Westlund's alleged statement to Complainant regarding Mr. Splan's alleged statement about the bus shelter amenities being installed without work orders because of the upcoming "bond vote" is impermissible hearsay as Ms. Westlund and Mr. Splan's statements do not qualify as admissions by party-opponents. Here, unlike Rainbow Travel, an **employment dispute** exists, namely whether Complainant was terminated for engaging in protected activity pursuant to 6 U.S.C. § 1142. On this basis, neither Ms. Westlund nor Mr. Splan played any role in the decision to terminate Complainant's employment, rather the parties acknowledge either Mr. Chesnut or Mr. Sibul (or both) was the decision-maker for Complainant's termination. See (JX-37, p. 21). In addition, Ms. Westlund and Mr. Splan did not work in UTA's Planning Department where Complainant worked, and neither of them worked in supervisory roles that would have any impact upon Complainant's employment. See (JX-4, pp. 1, 3; Tr. 575-79)(Mr. Meyer testified Complainant worked in UTA's Planning Department which was not part of UTA's Capital Development Department where Ms. Westlund, Mr. Splan, and Mr. Hare worked). Consequently, pursuant to Tenth Circuit precedent, because Ms. Westlund and Mr. Splan were not involved in the decision-making process affecting the employment action at issue, their statements are not attributable to Respondent as a party-opponent admission.

With respect to the October 15, 2015 comments allegedly made by Mr. Splan, Mr. Hare, and Mr. Turner to Mr. Chesnut, stating Complainant was hurting UTA's image, that they wanted him terminated, I find and conclude the purported statements by Mr. Splan and Mr. Hare are impermissible hearsay given the foregoing discussion. Like Ms. Westlund and Mr. Splan, Mr. Hare was not a decision-maker in Complainant's termination, nor did he possess a supervisory role over Complainant in the Planning Department. See Ellis, supra at 1202; Johnson, supra at 1208-09; Jaramillo, supra at 1314. Therefore, I find Mr. Splan and Mr. Hare's alleged statements are not attributable to Respondent as a party-opponent admission. However, Mr. Chesnut and Mr. Turner testified at the formal hearing in the instant case, therefore I do not find any alleged statement by either Mr. Chesnut or Mr. Turner to be hearsay as each witness was cross-examined at the formal hearing in this matter and testified

under oath about their purported statements.[84] See Fed. R. Evid. 801(d)(1). Consequently, I find the alleged statements made by Mr. Turner and Mr. Chesnut are admissible statements.

C. NTSSA Statute

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); Graves v. MV Transp., Inc., ARB No. 14-045, ALJ No. 2013-NTS-002, slip op. at 2 (ARB July 23, 2015).

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). Notwithstanding the foregoing, 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"). Accordingly, I will look to decisions issued by the ARB in similar whistleblower statutes for guidance in examining the issues presented here.

---

[84] Mr. Chesnut testified he held the meeting with Tom Hare, Grey Turner, and Jacob Splan on either October 14, 2015, or October 15, 2015, and that no one at the meeting asked for Complainant to be terminated. (Tr. 370). Nor did Complainant's job status come up in the discussion at the meeting. (Tr. 370-71). Similarly, Mr. Turner testified he met with Mr. Chesnut in Mr. Turner's office to discuss the problems between UTA's Planning and Capital Development Departments. (Tr. 560). Mr. Turner believed the October 14, 2015 meeting resulted in a "plan of attack" for operating and scheduling procedures, better communication, and how they were going to finish the installation for the remaining bus stops. (Tr. 562).

D. Retaliation Under the NTSSA

In order to prevail in an NTSSA whistleblower retaliation action, Complainant must demonstrate by a preponderance of the evidence: **(1)** he engaged in a protected activity or was perceived to have engaged or to be about to engage in protected activity; **(2)** the respondent knew, suspected, or perceived that Complainant engaged in the protected activity or was about to engage in protected activity; **(3)** he suffered an adverse action; and **(4)** the circumstances were sufficient to raise the inference that the protected activity (or perception thereof) was a contributing factor in the adverse action. 29 C.F.R. § 1982.104(e)(2); Duncan v. Wash. Metro. Area Transit Auth., 174 F. Supp. 3d 123, 127 (D.D.C. 2016); Luder v. Cont'l Airlines, Inc., ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012); Clemmons v. Ameristar Airways Inc., et al., ARB No. 05-048, ALJ No. 2004-AIR-11, slip op. at 3 (ARB June 29, 2007).

The term "demonstrate" means to "prove by a preponderance of the evidence." Palmer v. Canadian Nat'l Ry., ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 17 (ARB Sept. 30, 2016)(en banc); see Peck v. Safe Air Int'l, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004); Brune v. Horizon Air Indus., Inc., ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)(defining preponderance of the evidence as superior evidentiary weight). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence, however the evidence need not be "overwhelming" to satisfy the requirements set forth in 29 C.F.R. § 1982.104(e)(2). Indeed, circumstantial evidence is sufficient to meet this burden. Araujo v. New Jersey Transit Rail Operations, Inc., No. 12-2148, 708 F.3d 152, 2013 WL 600208 (3rd Cir. Feb. 19, 2013). Moreover, when the fact-finder considers whether the complainant has proven a fact by a preponderance of the evidence "necessarily means to consider all the relevant, admissible evidence and . . . determine whether the party with the burden has proven that the fact is more likely than not." Palmer, supra, slip op. at 17-18.

If Complainant meets his burden, Respondent may avoid liability only if it can prove by **clear and convincing evidence** that it would have taken the same unfavorable personnel action **in the absence of Complainant's protected behavior**. 29 C.F.R. § 1982.104(e)(4); Menefee v. Tandem Transp. Corp., ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010) (citing Brune, ARB No. 04-037, slip op. at 13). The ARB noted the

"clear and convincing" standard is rigorous and denotes a conclusive demonstration that "**the thing to be proved is highly probable or reasonably certain**." Speegle v. Stone & Webster Constr., Inc., ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB April 25, 2014)(emphasis added).

1. Protected Activity

By its terms, the NTSSA prohibits public transit agencies from discriminating against an employee if such discrimination is due, in whole or in part, to the employee's good faith act done, or perceived by the employer to have been done or about to be done:

> **(1)** to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—
>
> > **(A)** a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452);
> >
> > **(B)** any Member of Congress, any Committee of Congress, or the Government Accountability Office; or
> >
> > **(C)** a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;
>
> **(2)** to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to public transportation safety or security;

6 U.S.C. §§ 1142(a)(1)-(2); Graves, supra, slip op. at 2.[85]

[85] Additionally, 6 U.S.C. § 1142(b)(1)(A) prohibits a public transportation agency from taking adverse action (including discrimination or discharge) against an employee who reports a "hazardous safety condition." However, this provision applies only to "security personnel, including transit police,

Here, the parties stipulated that Complainant engaged in "some" protected activity, with no further explanation or description pursuant to 6 U.S.C. § 1142. See (JX-37, p. 3 n. 1). These stipulations include:

a. In the time period of October-November 2015, Mr. Chesnut was aware Complainant had communicated that there were safety hazards along the 200 South corridor.

b. Mr. Sibul confirmed the ADA "issues" Complainant raised were inclusive of passenger safety concerns "relative to the ADA," including slope levels at bus stops and proximity of the stop to shelters.

c. In October 2015, Mr. Sibul was aware (through emails) that Complainant was communicating with UTA employees by email that bus stops along the 200 South corridor were unsafe. In the same time period, Mr. Sibul was aware through emails that Complainant had submitted work orders to remove bus stop shelters along the 200 South corridor.

d. On or about October 2, 2015, a disabled individual was killed after his wheelchair went off the sidewalk at the 4500 South TRAX crossing. Complainant brought this incident to Mr. Chesnut's attention.[86]

(JX-37, pp. 15-16, Stipulated Fact Nos. 72-75).

---

employed or utilized by a public transportation agency to protect riders, equipment, assets or facilities." 6 U.S.C. § 1142(b)(3). Here, Complainant was employed by Respondent as a "service plan deployment specialist," and not as security personnel. (JX-37, p. 9, Stipulated Fact No. 5). Accordingly, based on the record before me, I find and conclude 6 U.S.C. § 1142(b)(1)(A) does not apply in the present matter. I also find and conclude that the provisions of 6 U.S.C. § 1142(a)(3)-(5), which describe other types of protected activity, such as cooperating with an investigation of the National Transportation Safety Board, are not implicated under the facts in the instant case, and therefore the undersigned will not address the aforementioned provisions in the discussion that follows.

[86] Respondent stipulated to this fact, but avers it made the stipulation subject to its claim that the issues raised by Complainant regarding flangeway gaps were not actionable safety issues because Respondent contends the flangeway gaps at issue were ADA compliant and safe, and because Respondent contends Complainant indicated no action was required. (JX-37, p. 16).

e. Complainant's Alleged October 7, 2015 & October 8, 2015 Protected Activity[87]

Complainant also asserts he engaged in protected activity on October 7, 2015, when he asked Ms. Westlund and Ms. Huffman, employees in UTA's Facilities Department, about bus shelter amenities being installed without work orders, and that Complainant had to issue three work orders to remove those amenities because their placement made the bus stops unsafe.[88] Complainant testified the bus stop amenities failed to provide transit passengers with a path to "safely get to the bus stop and where the shelter was at, and be able to board and de-board the bus." (CX-7; Tr. 57-58). On October 8, 2015, Complainant forwarded his email exchange with Ms. Westlund and Ms. Huffman to Mr. Chesnut. (JX-5). In his email to Mr. Chesnut, Complainant expressed concerns about a bus shelter being installed at 200 South and State Street where a taco stand had conducted business. (JX-5, p. 1). Complainant testified that in 2013, a bus collided with the taco stand and injured several people. (Tr. 69). Complainant also informed Mr. Chesnut that the bus stop at 200 South and State Street had a 6% slope toward the street which exceeded the ADA requirement for a 2% slope, thus creating a safety hazard for individuals in wheelchairs and parents pushing baby strollers.[89] (JX-5, p. 1; Tr. 70).

Also, on October 7, 2015, Complainant received an email from Mr. Splan requesting that Complainant issue a work order to relocate a "no parking" sign in anticipation of moving a bus

---

[87] The following alleged protected activities set forth in sections "e" through "j" are not stipulated to by the parties, rather Complainant alleges he engaged in such protected activities.

[88] Complainant avers that UTA's standard operating procedure for installation, removal, modification, and relocation of bus stops and amenities is set forth in Policy OPO 1.2. (JX-37, p. 15, Stipulated Fact No. 66; CX-3). Under OPO 1.2, "bus stops and amenities may only be installed after approval from Business Unit planners or Service Plan Deployment specialists, and that generally requires emails, a site visit and work orders." (JX-37, p. 15, Stipulated Fact No. 67). Further, UTA Policy OPO 1.2, section (3) refers to ADA compliance, and lists requirements for bus pads pertaining to length (96"), width (60"), slop (1:50), and surface area for a wheelchair (30" x 48"). (CX-3, p. 3). In addition, OPO 1.2, section (3)(D) refers to an "ADA compliant path to the ADA shelter." Complainant testified the requirements for the "path" include a flat surface with a width of three feet for passengers with disabilities, enabling them to safely navigate to and from the bus stop. (Tr. 50-51).

[89] Mr. Chesnut testified that at the time he received Complainant's October 8, 2015 email, he was aware that Mr. Splan and/or Mr. Hare were instructing UTA employees to install shelters along the 200 South Corridor without work orders, and that installation of a bus stop with a 6% slope would create safety issues. (Tr. 436-37, 439).

stop located at 200 South and 169 East. However, Complainant responded to Mr. Splan by letting him know he was not going to start the relocation process until the "City" established a "no parking zone." (CX-8). Complainant testified the "no parking zone" was important because without it the bus would not be able to park next to the curb due to cars being parked in the area, which would diminish safety for passengers walking in and out of cars on the street to board and disembark the bus. (Tr. 59-60). In his email exchange with Mr. Splan, Complainant reminded Mr. Splan that when they first discussed bus stop upgrades they discussed UTA being under "federal mandate to only install amenities at bus stops that are ADA compliant, the bus can access the stop and there is an ADA path from the stop to the sidewalk and the sidewalk goes to the intersection with a curb cut." Complainant also reminded Mr. Splan that if he activated a new bus stop which did not meet ADA criteria it would jeopardize Respondent's federal funding. (CX-11, p. 4). Complainant testified the "ADA path" required a "pad" that was five feet by three feet. Complainant continued to exchange emails with Mr. Splan, and in doing so, he informed Mr. Splan "[t]he bus cannot access the stop with vehicles parked in the bus zone. As I already stated, I will activate the new stops once the NO PARKING ZONES are in place." (CX-11, p. 3). Complainant testified that despite his email exchange with Mr. Splan, he bypassed Complainant and had UTA's Facilities Department install bus stop shelters. (Tr. 78-79).

f. Complainant's Alleged October 11, 2015 Protected Activity

Complainant further contends he engaged in protected activity on Sunday, October 11, 2015. In particular, Complainant notified Mr. Chesnut that Mr. Splan bypassed Complainant and had a white line painted (to indicate bus stop amenities installation) at 200 South and 200 East. Complainant informed Mr. Chesnut that he did not paint the line and he would only "activate" the stop once the "City" created a "no parking zone." Complainant also attached UTA's current policy on amenities and installation in his email to Mr. Chesnut. (JX-6).

Also on October 11, 2015, at 10:21 p.m., Complainant emailed UTA's "Customer Concerns" Department, letting them know that the bus stop shelter at 120 East and 200 South needed to be removed until the stop is "made safe for operation of the bus." (CX-13, p. 4). Complainant testified that he submitted a work order for removal of the bus stop shelter because a bus hit a pole at the stop earlier in the day. (Tr. 82-83). In Complainant's opinion, the bus hit the pole because of the

installation of a bus stop shelter, which caused the bus to stop short of the actual bus stop. (Tr. 83). In an October 12, 2015 email to Colton Christensen (with carbon-copy to Mr. Chesnut), Complainant explained that benches and a bus shelter at the location of the accident blocked the wheelchair path to the boarding zone, which forced the bus driver to stop short, and in turn caused the bus accident. Complainant also informed Mr. Christensen that usually, prior to the Planning Department issuing a work order, "the location is checked for safety, ADA compliance etc… as well as being documented in the BSM." Complainant stated a number of bus shelters had been installed the previous week without a work order from a planner, which caused multiple problems. (CX-13, p. 2; CX-56). Mr. Chesnut testified he knew about the bus accident at 120 East and 200 South, that the bus hit a sign, and that he understood what "accident" Complainant referred to in his October 12, 2015 email to Mr. Christensen. (Tr. 443-44).

g. Complainant's Alleged October 13, 2015 Protected Activity

Complainant also argues he engaged in protected activity on October 13, 2015, by sending an email to Mr. Chesnut stating the following: 1) a bus driver hit the bike lane sign that was on the black light pole in the middle of the boarding zone; 2) UTA operations closed the bus stop because the shelter at the bus stop caused the driver to angle the bus into the middle of the zone before deploying the boarding ramp; 3) Complainant examined the bus stop area and found the front of the zone was "cluttered with amenities" that needed to be moved, and among the amenities was a 16' bus shelter installed without a work order; 4) Complainant issued a work order to have the bus shelter removed and relocated; and 5) the bus stop remained closed until it could be determined to be "safe for buses."[90] (JX-7, pp. 2-3).

Later in the day on October 13, 2015, Complainant sent a follow-up email to Mr. Chesnut reporting that Jake Splan, Tom Hare, and Ginger Westlund (in UTA's Facilities Department) were installing amenities in violation of UTA policy that ensured compliance with safety and ADA standards. (JX-7, p. 1).

[90] At the formal hearing in this matter, Mr. Chesnut confirmed that after reading Complainant's October 13, 2015 email regarding the 200 South and State Street bus stop, Mr. Chesnut considered it to be unsafe, and as a result, set up a meeting with Mr. Hare and Mr. Turner to resolve installation issues. (Tr. 444-45). Mr. Chesnut also responded to Complainant's October 13, 2015 email, stating he wanted a copy of the "green sheet" regarding the bus that hit the light pole. Mr. Chesnut explained a "green sheet" is the document bus drivers complete following a bus accident. (Tr. 445).

h. Complainant's Alleged October 15, 2015 & October 16, 2015 Protected Activity

In addition, Complainant avers he engaged in protected activity on October 15, 2015, when he sent an email to many recipients including Mr. Splan, Mr. Chesnut, Mr. Turner, Mr. Hare, and Mr. Alires in UTA's Civil Rights Department. Complainant testified that he sent the email to Mr. Alires because he had spoken with him at an earlier time about UTA's violations regarding their installation policy. (Tr. 93-94). In his October 15, 2015 email, Complainant informed Mr. Splan that it was his job to determine whether a bus stop meets UTA policy and safety standards, to focus on the quality of the bus stops, and that Mr. Splan's "misrepresentations, badgering, work arounds etc…" did not intimidate Complainant into disregarding "UTA policy and federal ADA standards." Complainant further stated that over the past two weeks Mr. Splan's actions had caused bus stop closures along the 200 South corridor due to unsafe conditions for buses. He explained that bus operators and passengers were confused because a bus stop shelter and bench was installed where no UTA bus stop even existed, which Complainant stated could have been avoided if Mr. Splan had followed UTA policy. (CX-18, pp. 1-2).

Complainant asserts he again engaged in protected activity on October 16, 2015, when he emailed Mr. Chesnut (and several other recipients) that each time UTA's Facilities Department installed and later removed a bus shelter they left "broken pavers" on the ground which created a "trip hazard" for pedestrians.[91] (JX-11, p. 1; Tr. 100).

i. Complainant's Alleged October 20, 2015 & October 21, 2015 Protected Activity

On October 20, 2015, Complainant avers he engaged in protected activity when he emailed Mr. Chesnut that a bus shelter at 200 South and 120 East had been installed twice without a work order. Complainant stated that "per the attached work order" the bus shelter at the bus stop still needed to be moved to "close the gap" and enable the bus to alight passengers at the front of the zone. (CX-23, p. 1). Mr. Chesnut testified that with the bus having to take an awkward angle to deploy the ramp, it would cause the back end of the bus to stick out into the street, creating a safety hazard. (Tr. 453-454).

[91] Mr. Chesnut testified that he considered Complainant's reference to "broken pavers" to be a safety hazard. (Tr. 452).

Thereafter, on October 21, 2015, Complainant contends he engaged in protected activity when he sent an email to Mr. Alires (with a carbon-copy sent to Mr. Chesnut), referencing three bus stops along the 200 South corridor. Complainant informed Mr. Alires that he would not "activate" the bus stops due to safety concerns. Complainant explained to Mr. Alires that Mr. Splan bypassed him in order to have the shelters installed without proper work orders in violation of UTA Policy OPO 1.2. Complainant again referenced the bus accident that occurred at the "taco stand." (CX-25; Tr. 107).

j. Complainant's Alleged Protected Activity—UTA'S TRAX Line

Lastly, Complainant argues that on or about October 8, 2015, he engaged in protected activity when he reported to Mr. Chesnut his concern about gaps between the tracks, and concluded the gaps were large enough for a wheelchair to become stuck. Complainant reached this conclusion after meeting with UTA's Manager of Accessibility, Ryan Taylor. (Tr. 117-119).

In contrast, Respondent contends that Complainant did not engage in protected activity when he reported concerns about the flangeway gaps. Respondent avers that Mr. Chesnut did not tell Complainant not to report any safety issue concerning the "gaps," but instead Mr. Chesnut asked Complainant if any action was required to which Complainant replied "no." (Tr. 395). Additionally, Respondent avers the flangeway gaps at grade crossings are, by law, under the jurisdiction of the Utah Department of Transportation, and not UTA. See Utah Code § 54-4-15. Further, Respondent notes that the TRAX crossings were inspected by UTA, and found to be in complete compliance with the ADA. (JX-18, pp. 1-2). Therefore, Respondent contends Complainant did not engage in protected activity when he reported safety issues with the flangeway gaps.

Given the foregoing, I find that Complainant engaged in a substantial amount of protected activity throughout October 2015, when he acted to provide information which he reasonably believed constituted a violation of federal law and/or regulation relating to public transportation safety and reported it to persons with supervisory authority over him such as Mr. Chesnut and Mr. Sibul, and refused to violate or assist in the violation of any Federal law, rule, or regulation relating to public transportation safety or security. 6 U.S.C. §§ 1142(a)(1)(C), (2); Graves, supra, slip op. at 2.

In general, I find that Complainant not only informed other UTA employees, but also his direct supervisor Mr. Chesnut about violations concerning Respondent's Policy OPO 1.2, which addressed compliance with ADA standards for all bus stops and bus stop amenities. (CX-3, pp. 1-5). More specifically, I find Complainant engaged in protected activity when on October 7, 2015, and on October 8, 2015, when he informed Ms. Westlund, Ms. Huff, and Mr. Chesnut about the improper installation of bus stop amenities which created safety hazards because the placement of the amenities was improper, and as such did not comply with ADA standards. I also find that on October 8, 2015, Complainant again engaged in protected activity when he spoke with Mr. Chesnut at the "200 South and 600 West" location, where the frontrunner train travels, and pointed out to Mr. Chesnut that there were "gaps" that were too wide based on the ADA standards just as there was at the 4500 South track crossing. In contrast to Respondent's assertion, I find that at the time Complainant reported the issue of the flangeway gaps to Mr. Chesnut, Complainant held a reasonable belief of a violation given that he knew of the October 2, 2015 accident where a disabled individual was killed after his wheelchair went off the sidewalk at 4500 South track's crossing. Further, the record is devoid of any evidence showing Complainant had knowledge at the time he reported "gap" issues to Mr. Chesnut that the TRAX crossings were inspected by UTA and determined to be in compliance with ADA.

Likewise, I find Complainant engaged in protected activity on October 11, 2015, when he informed UTA's "Customer Concerns" Department that he was removing the bus shelter at 120 East and 200 South, where a bus accident occurred, until the bus stop could be made safe for bus operation. In addition, I also find that on October 12, 2015, when Complainant emailed Mr. Christensen and Mr. Chesnut about the 120 East and 200 South bus shelter, that the amenities blocked the wheelchair path at the bus stop, and that a number of bus shelters had been installed without work orders, which meant the locations were not inspected for safety and ADA compliance. In the same way, I find Complainant also engaged in protected activity on October 13, 2015, when he emailed Mr. Chesnut about the bus accident at 120 East and 200 South, that he examined the accident site, issued a work order to remove the improperly placed bus stop amenities, and closed the bus stop until it was made "safe for buses." Finally, on the same day, I find Complainant again engaged in protected activity when he emailed Mr. Chesnut letting him know that Ms. Westlund, Mr. Splan, and Mr. Hare were installing bus stop amenities in violation of UTA policy that

ensured compliance with safety, and in violation of ADA standards.

Similarly, I find Complainant engaged in protected activity on October 15, 2015, and on October 16, 2015, when he communicated to various UTA employees, including Mr. Chesnut, about the improper installation of bus stop shelters which created unsafe conditions, and that when the Facilities Department installed and later removed a bus shelter, broken pavers were left on the ground, creating a safety/trip hazard. I also find Complainant engaged in protected activity on October 20, 2015 and on October 21, 2015, when he again emailed Mr. Chesnut and Mr. Alires about bus stops safety, including bus stop shelters were still not properly located, that he would **not "activate"** bus stops due to safety concerns, and Mr. Splan had bypassed Complainant and installed bus shelters in violation of UTA Policy OPO 1.2, which set forth specific safety standards including ADA compliance guidelines. See (CX-3, p. 3).

2. Respondent's Knowledge of the Protected Activity

Although the respondent's knowledge of the protected activity is not conclusive evidence that the complainant's protected activity was the catalyst for respondent's adverse personnel action, it is certainly a causal factor that must be considered. See Hamilton v. CSX Transp., Inc., ARB No. 12-022, ALJ No. 2010-FRS-25, slip op. at 3 (ARB Apr. 30, 2013). Generally, it is not enough for the complainant to show that the respondent, as an entity, was aware of his protected activity. Rather, the complainant must establish that the "decision-makers" who subjected him to the alleged adverse actions were aware of his protected activity. See Gary v. Chautauqua Airlines, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); Peck v. Safe Air Int'l, Inc., ARB Case No. 02-028 (ARB, Jan. 30, 2004); see Johnson v. BNSF Ry. Co., ALJ. No. 2013-FRS-00059, slip op. at 11, n. 8 (ALJ July 11, 2014)(noting that the final decision-maker's 'knowledge' and 'animus' are only factors to consider in the causation analyses).

Where the complainant's supervisor had knowledge of his protected activity and had substantial input into the decision to fire the complainant, even though the vice president who actually fired the complainant did not know about the protected activity, such knowledge could be imputed to the respondent. Kester v. Carolina Power & Light Co., ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003).

Here, the parties have stipulated that Mr. Chesnut was Complainant's direct supervisor, and Mr. Sibul was Mr. Chesnut's direct supervisor. (JX-37, p. 9, Stipulated Fact No. 10). The parties acknowledge that either Mr. Chesnut or Mr. Sibul (or both) was the decision-maker for Complainant's termination. See (JX-37, p. 21). Nevertheless, without reaching a determination as to whether it was either Mr. Sibul or Mr. Chesnut (or both) who was the ultimate decision-maker in terminating Complainant, I find both Mr. Chesnut and Mr. Sibul had knowledge of Complainant's protected activity.

As discussed above, the parties stipulated that during the time period of October-November 2015, Mr. Chesnut was aware that Complainant had communicated there were safety hazards along the 200 South corridor. (JX-37, p. 15, Stipulated Fact No. 72). Further, Mr. Chesnut testified he knew Complainant had various bus stop shelters removed because proper procedure had not been followed, and as a result, safety issues arose. (Tr. 382-83). Likewise, the parties stipulated that in October 2015, Mr. Sibul was aware (through emails) that Complainant was communicating with UTA employees by email that bus stops along the 200 South corridor were unsafe. In the same time period, Mr. Sibul was aware through emails that Complainant had submitted work orders to remove bus stop shelters along the 200 South corridor due to unsafe conditions. The parties further stipulated Mr. Sibul confirmed that the ADA "issues" raised by Complainant were inclusive of passenger safety concerns relative to the ADA, including slope levels at bus stops and proximity to bus shelters. (JX-37, p. 15, Stipulated Fact Nos. 73-74). Accordingly, I find and conclude Mr. Chesnut and Mr. Sibul had knowledge of Complainant's protected activity, and thus Respondent had knowledge of Complainant's protected activity.

3. Alleged Unfavorable Personnel Action

The presumptive starting point for an adverse action is the statute and regulation which should be read broadly, and where it defines the prohibited action, that should be sufficient to define adverse action. Williams v. Am. Airlines, Inc., ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 10 (ARB Dec. 29, 2010). An adverse action under the NTSSA is expansive, and includes any conduct which involves discharge, demotion, suspension, reprimand, intimidation, threats, restraint, coercion, blacklisting or discipline of an employee for engaging in protected acts. 29 C.F.R. § 1982.102(a). It is the same expansive list of conduct prohibited under the FRSA. 29 C.F.R. § 1982.102(b).

In addition, the ARB has clarified the definition of "adverse action" to be an unfavorable employment action that is more than trivial, either as a single event or in combination with other alleged deliberate employer actions. Williams, supra slip op. at 15. An adverse action can also include an employment action that "would dissuade a reasonable employee from engaging in protected activity." Menendez v. Halliburton, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-2005 (ARB Sept. 13, 2011), slip op. at 20 (in SOX matters, use of the broad adverse action definition to include activity that would dissuade a reasonable employee from engaging in protected activity is "consistent with the expansive construction required by whistleblower statutes."); Burlington N. & Sante Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006). "Where termination, discipline, and/or threatened discipline are involved, there is no need to consider the alternative question whether the employment action will dissuade other employees." Vernace v. Port Auth. Trans-Hudson Corp, ARB No. 12-003, ALJ 2010-FRS-00018, (ARB Dec. 21, 2012), slip op. at 2, n.4 (approving use of the Williams and Menendez standards in FRSA matters). Given the similarities in the statutes, I find that the definition of adverse action adopted in Williams and applied in FRSA cases, is equally applicable to NTSSA matters.

In the instant case, the parties do not dispute that Complainant suffered adverse action when he was terminated from his employment with UTA on November 20, 2015, for abandoning his employment. (JX-37, p. 11, Stipulated Facts Nos. 28-29). Therefore, I find Complainant has demonstrated by a preponderance of the record evidence that he was subjected to adverse action when he was terminated by Respondent on November 20, 2015.

4. Contributing Factor

The NTSSA requires that the protected activity be a contributing factor to the alleged unfavorable personnel actions against Complainant. A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 262-63 (5th Cir. 2014) (quoting Allen v. Admin. Rev. Bd., 514 F.3d 468 (5th Cir. 2008)); accord Ameristar Airways, Inc. v. Admin. Rev. Bd., 650 F.3d 563, 567 (5th Cir. 2011); Palmer, supra, slip op. at 53; Coates v. Grand Trunk W. R.R. Co., ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 3 (ARB July 17, 2015). Essentially, the

question is not whether the respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor which, alone or in connection with other factors, tends to affect in **any** way the decision to take an adverse action. Nevertheless, if the respondent claims the protected activity played **no role** whatsoever in the adverse action, the evidence of the respondent's non-retaliatory reasons for termination **must be considered alongside** the complainant's evidence in making such a determination. Palmer, supra, slip op. at 29, 55. On the other hand, the fact-finder need not compare the respondent's non-retaliatory reasons with the complainant's protected activity to determine which is more important in the adverse action. Id. at 55.

In the event the fact-finder determines that the respondent has a true non-retaliatory reason for terminating the complainant, this still does not preclude protected activity as a contributing factor in the termination of employment. Palmer, supra, slip op. at 54, n.224 (citing Bobreski v. J. Givoo Consultants, Inc. [Brobeski II], ARB No. 13-001, ALJ No. 2008-ERA-003 (ARB Aug. 29, 2014)). On this basis, the argument that respondent had a "legitimate business reason" to take the adverse action "is **by itself insufficient** to defeat an employee's [the complainant's] claim under the contributing-factor analysis . . . since unlawful retaliatory reasons [can] co-exist with lawful reasons."[92] Palmer, supra slip op. at 58 (quoting Brobeski II, supra, slip op. at 17 (internal quotations omitted)(emphasis added); contra Henderson v. Wheeling Lake Erie Ry., ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 11 (ARB Oct. 26, 2012)(citing Zinn v. Am. Commercial Lines Inc., ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 11 (ARB Mar. 28, 2012))(holding that the "legitimate business reason" burden of proof analysis does not apply to FRSA whistleblower cases).

The Board observed in Rudolph v. National Railroad Passenger Corporation (AMTRAK), ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 16 (Mar. 29, 2013), that "proof of causation or 'contributing factor' is not a demanding standard." To establish that the protected activity was a "contributing

[92] The ARB noted in Palmer, that the administrate law judge specifically stated "the argument that [Illinois Central] had a 'legitimate business reason' to take the adverse action is inapplicable to FRSA whistleblower cases." The Board explained it would be "**clear error**" for the fact-finder to conclude that Illinois Central's "legitimate business reason" is **irrelevant** to the contributing-factor analysis. Id., slip op. at 58.

factor" to the adverse action at issue, the complainant need not prove that his or her protected activity was the **only or the most significant reason** for the unfavorable personnel action. Indeed, the contributing factor need not be "significant, motivating, substantial or predominant," rather it need only play "**some**" role. Araujo, supra at 158; Palmer, supra, slip op. at 53, n.218. The complainant need only establish by a preponderance of the evidence that the protected activity, "**alone or in combination with other factors**," tends to affect in **any way** the employer's decision or the adverse actions taken. Klopfenstein v. PCC Flow Techs., ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006); Barker v. Ameristar Airways, Inc., ARB No. 05-058, ALJ No. 2004-AIR-012, slip op. at 6 (Dec. 31, 2007). Furthermore, the complainant **is not required to demonstrate the respondent's retaliatory motivation or animus** to prove the protected activity contributed to respondent's adverse personnel action. See Halliburton, supra at 263 (quoting Marano v. Dep't of Justice, 2 F.3d 1137, 1141 (Fed. Cir. 1993)).

The contributing factor element of a complaint may be established by **direct evidence** or indirectly by **circumstantial evidence**. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. Brucker v. BNSF Ry. Co., ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 10-11 (ARB July 29, 2016)(noting that intent and credibility are crucial issues in employment discrimination cases); see, e.g., DeFrancesco v. Union Railroad Co., ARB No. 13-057, ALJ No. 2009-FRS-9, slip op. at 6-7 (ARB Sept. 30, 2015); Speegle, supra, slip op. at 10; Palmer, supra, slip op. at 55, n.227. Whether considering direct or circumstantial evidence, an administrative law judge **must make a factual determination** and **must be persuaded that it is more likely than not** that the complainant's protected activity played some role in the adverse action. Palmer, supra, slip op. at 55-56.

a. Temporal Proximity

"Temporal proximity between the employee's engagement in a protected activity and the unfavorable personnel action can be circumstantial evidence that the protected activity was a

contributing factor to the adverse employment action. See Kewley v. Dep't of Health and Human Servs., 153 F.3d 1357, 1362 (Fed. Cir. 1998) (noting that, under the Whistleblower Protection Act, 'the circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, **prima facie**, that the disclosure was a contributing factor to the personnel action')(internal quotation omitted)." Direct evidence of an employer's motive is not required. See Araujo, supra, at 161. Thus, "normally" the complainant's burden will be satisfied if the complainant can demonstrate that the adverse personnel action took place shortly after the protected activity. 29 C.F.R. § 1979.104(b)(2); Barker, supra, slip op. at 7.

Determining, what, if any, logical inference can be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science, but requires a "fact intensive" analysis. Brucker, supra, slip op. at 11 (quoting Franchini v. Argonne Nat'l Lab., ARB No. 11-006, ALJ 2009-ERA-014, slip op. at 8-9 (ARB Sept. 26, 2012). Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. Robinson v. Nw. Airlines, Inc., ARB No. 04-041, ALJ No. 2003-AIR-22, slip op. at 9 (ARB Nov. 30, 2005). However, where an employer has established one or more legitimate reasons for the adverse actions, the **temporal inference alone may be insufficient** to meet the employee's burden to show that the protected activity was a contributing factor. Barber v. Planet Airways, Inc., ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

The Tenth Circuit Court of Appeals, under whose jurisdiction this case arises, has not established "a precise temporal line" in determining whether the requisite proximity is present to establish the causation element. However, the Tenth Circuit noted that if the adverse action occurred in a brief period "up to one and a half months" after the protected activity, temporal proximity alone will be sufficient to establish the requisite causal connection. Conroy v. Vilsack, 707 F.3d 1163, 1181 (10th Cir. 2013); see Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999)("We have held that a one and one-half month period between protected activity and adverse action may, by itself, establish causation. By contrast, we have held that a three-month period, standing alone, is insufficient to establish causation."); see also Evans v. Wash. Pub. Power Supply Sys., ARB No. 96-065, ALJ No. 1995-

ERA-052, slip op. at 4 (ARB July 30, 1996)(finding that a lapse of approximately one year was too remote to justify an inference that protected activity caused the adverse action); Clark v. Pace Airlines, Inc., ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006)(dismissing claims related to complaints more than one year prior to the adverse action).

Here, Complainant engaged in protected activity as early as October 7, 2015, when he emailed Mr. Chesnut, informing him that the bus shelter located at 200 South and State Street was not compliant with ADA standards, and as late as October 21, 2015, when Complainant emailed Mr. Alires that he would not "activate" bus stops along the 200 South corridor due to "safety" concerns since Mr. Splan bypassed Complainant in order to install the bus shelters without a work order as required by UTA's Policy OPO 1.2. Thereafter, Respondent terminated Complainant on November 20, 2015, after Complainant had been on vacation. Based on the foregoing, I find that the temporal proximity between Complainant's October 21, 2015 protected activity and his November 20, 2015 termination is sufficient circumstantial evidence to demonstrate that Complainant's protected activities contributed to his November 20, 2015 adverse personnel action (i.e., termination), and therefore create an inference of retaliation. See Conroy, supra at 1181; see also Anderson, supra at 1179.

b. Antagonism or Hostility Toward Complainant's Protected Activity

Complainant also argues that Respondent acted with latent and overt hostility towards him when he obstructed UTA's efforts to rapidly install bus stop amenities along one of the busiest transportation corridors in Salt Lake City, Utah, due to their not being in compliance with UTA's safety Policy OPO 1.2 and ADA requirements, which in turn increased UTA's operational costs. On this basis, Complainant avers that in fall 2015, Respondent was in the construction phase of its efforts to improve public bus stops along the 200 South corridor in Salt Lake City, Utah. (JX-37, p. 9, Stipulated Fact No. 6). Further, the improvements along the 200 South corridor were important to Respondent because 200 South has one of the highest volume of passengers in UTA's entire system. The improvements to the 200 South corridor bus stops included new bus "pads," shelters, benches, trash cans, and bike stations, and UTA incurred approximately $302,914.00 in costs to design and install bus stop amenities along the 200 South corridor from 2014 to 2016. (JX-16; JX-37, p. 14, Stipulated Fact Nos. 55, 57-58). Complainant further

avers he was assigned to "approve" the bus stop improvements along the 200 South corridor, which included safety related matters. (Tr. 55; JX-37, p. 13, Stipulated Fact No. 46).

Complainant asserts his protected activity was preventing UTA from quickly installing bus stop amenities, and installing the amenities in violation of its own safety policy OPO 1.2. Moreover, Complainant contends his protected activity was causing UTA to also install and uninstall bus stop amenities, wasting valuable time, money, and resources. However, Complainant argues he was not causing the "waste," but rather UTA's Facilities Department was causing the "waste" by disregarding Respondent's safety protocols and ADA requirements, hoping no one would notice. Nevertheless, Complainant avers he noticed the unsafe installations, he blew the whistle, and as a result, he was terminated from his employment with Respondent on November 20, 2015.

According to Mr. Turner, the Senior Program Manager of Engineering and Project Development, the 200 South corridor is one of UTA's busiest corridors and UTA had "money to spend" to upgrade facilities along the corridor in fall 2015. (Tr. 557-58). Mr. Turner also testified that in September and October, Respondent worked as quickly as possible before the weather changed because concrete becomes "drastically more expensive to pour and to finish" in cold weather. (Tr. 558). Mr. Turner confirmed that in October 2015, Mr. Splan was moving quickly in order to install bus stop amenities, and that Mr. Splan was "directing [the] Facilities [Department] to install amenities without work orders." (Tr. 570). In addition, Mr. Chesnut acknowledged Mr. Splan was working quickly because there was a Federal Transit Administration ("FTA") allocation of money that had to be utilized. (Tr. 442). Mr. Chesnut further acknowledged Mr. Splan wanted to install amenities faster than UTA's procedures permitted. (Tr. 443). Likewise, Mr. Meyer testified it did not bode well for UTA to build something that later it must tear out or relocated. Mr. Meyer also testified that "Mr. Splan, from time to time, he [sic] was more focused on quantity than quality." (Tr. 585).

Like Mr. Turner, Mr. Sibul testified UTA was interested in moving quickly to install bus stop amenities along the 200 South corridor because UTA "wanted to get things wrapped up before bad weather set in. It is difficult to pour concrete when the weather gets cold and rainy and so forth." (Tr. 486). Mr. Sibul testified he was aware that Complainant raised issues and concerns which led to increased costs associated with removing

and reinstating bus shelters. Mr. Sibul was "frustrated" that UTA had to remove amenities that were newly installed, but he believed "there was plenty of blame to go around" because the problems reflected poorly on UTA. Mr. Sibul agreed that the bus stop amenities being installed and removed along the 200 South corridor, in the month preceding the election, affected the public's perception of UTA. (Tr. 517). Mr. Sibul testified he was "upset with a lot of people" about the installation and removal of bus stop amenities, including Complainant, Mr. Splan, Ms. Westlund, Mr. Hare, Mr. Meyer, himself, and UTA as a whole. (Tr. 527). Nevertheless, Complainant asserts that unlike all the other UTA employees, he engaged in multiple acts of protected activity which resulted in removal of bus stop shelters and increased cost for Respondent, and shortly thereafter his employment was terminated.

Complainant avers Respondent made it no secret UTA was frustrated with his safety complaints and his obstruction of its efforts to install amenities quickly along one of its busiest route. Complainant notes that after he copied UTA's Civil Rights and Safety Departments on his email dated October 15, 2015, wherein Complainant reminded Mr. Splan of the correct installation procedures for bus stop amenities in accordance with Respondent's safety policies and ADA guidelines, Mr. Turner reacted with hostility when he sent this email to Mr. Chesnut, stating the following:

> "Before I unleash on Michael [Complainant], I am going to let you [Mr. Chesnut] take care of him, asap. With him copying everyone and their dog on this email—that is not cool . . . Let me know what happens, otherwise this will need to be escalated quickly." Jake [Splan] let's talk before you strangle this guy [Complainant]."

(JX-10, p. 1). At the formal hearing, Mr. Turner confirmed that he asked Mr. Chesnut to speak to Complainant because Complainant did not work for him, but that he thought Complainant's October 15, 2015 email was a "big issue not just about some of the points that he [Complainant] brought up, but [Mr. Turner's] main concern was the amount of people that got brought into it." (Tr. 569).

Complainant argues that Mr. Turner's aforementioned statements and reaction to his October 15, 2015 email demonstrates he was upset with Complainant for bringing the dispute with Mr. Splan to the attention of UTA's Safety and Civil Rights Departments. Thus, Complainant asserts the logical

conclusion is that Mr. Turner was upset with Complainant for slowing down UTA installations of bus stop amenities due to Complainant's insistence to follow safety policies and ADA guidelines.

Similarly, Complainant contends that, less than one hour after he sent the October 15, 2015 email to other UTA employees and UTA's Safety and Civil Rights Departments, Mr. Chesnut sent Complainant an email stating "[e]veryone did not need to be brought into this conversation." (CX-61). However, Complainant avers Respondent's Policy 4.3.5 ("Responding to Employee Safety Complaints") states UTA's business unit managers should "establish and conduct a Business Unit Safety Committee meeting at least monthly." See (RX-78). Complainant further avers Mr. Chesnut acknowledged that Complainant's October 15, 2015 email is consistent with Respondent's Policy 4.3.5. (Tr. 449). Moreover, when Complainant met with Mr. Chesnut on or about October 15, 2015, and discussed the unsafe conditions presented by the TRAX "gaps" that were too large for safe operation of wheelchair passengers, Mr. Chesnut suggested Complainant not "bring that up" because Complainant was already in "hot water" and "you have created enough, you know, attention to yourself on these kind of things." (Tr. 120).

Given the foregoing, the undersigned agrees with Complainant that there was antagonism and hostility directed towards him for preventing rapid installation of bus stop amenities, as well as removal of improperly constructed amenities. Irrespective of whether Respondent wanted to rapidly install bus stop amenities because of impending winter weather, FTA allocation of money, or the high-volume of passengers that used the 200 South corridor bus system, Complainant faced hostility from Mr. Splan, Mr. Hare, and Ms. Westlund when he removed previously installed bus stop amenities or would not issue work orders for the same. Likewise, the undersigned finds Mr. Chesnut and Mr. Sibul expressed frustration with Complainant as well.

There are several emails between Mr. Splan and Complainant, in which Complainant reminds Mr. Splan of Respondent's policies and that he would "jeopardize our [UTA's] federal funding if I [Complainant] activate a new stop that does not meet this [ADA] criteria." Complainant also reminded Mr. Splan that he would not issue work orders for the installation of bus stop shelters until Salt Lake City issued a "no parking zone" so that a bus could pull along the curb for passengers to safely board the bus. See (CX-8; CX-11, pp. 1-7; JX-8; JX-10). On October 7,

2015, Mr. Splan replied to Complainant's refusal to violate UTA's policies, stating "do not worry I will work with someone else to get improvements completed . . . You cannot pick and choose what rules and when you want to enforce [rules] just to prove your view." (CX-11, p. 7). Indeed, on October 14, 2015, Mr. Splan apologized to Mr. Meyer for the "issues" between him and Complainant escalating to Mr. Meyer's "level" and that he "should have babysit [sic] it better and worked it out somehow." Mr. Meyer replied "we share your pain. I spoke with Chris [Chesnut]. Seems like the meeting went well and you have a path forward." (RX-20, p. 1).

I also note that on October 14, 2015, Mr. Hare emailed Mr. Chesnut stating "I have had enough of Michael Clara harassing our employees."[93] (JX-9). Mr. Hare was responding to Ms. Westlund's October 14, 2015 email stating she believed Complainant had lied, she did not feel comfortable communicating with him, and she did not like the way he was conducting himself. (JX-9). Ms. Westlund's email was in response to Complainant's email which addressed whether Mr. Hare was still prohibiting processing of Complainant's work orders that he submitted in the BSM. Complainant further stated he assumed his work orders were not being processed because the bus shelter at 200 South and State Street had not been removed and the bus stop was closed. Complainant informed Ms. Westlund the bus stop had been closed for three days and UTA's Customer Service continued to receive calls from upset passengers. Complainant also asked Ms. Westlund when the bus shelter at 200 South and 400 East was installed because the land owner stated no one spoke to him about the installation, and Complainant could not locate any paperwork in the BSM to show work orders were completed for installation. Complainant asked Ms. Westlund to "let [him] know when and who told you to install it [the bus shelter]." (JX-9, p. 2). In light of the foregoing, I find Mr. Hare and Ms. Westlund's responses are hostile and antagonistic given Complainant was simply attempting to have work orders processed for the proper and safe installation of bus stop shelters, and asking why bus stop shelters were installed in violation of Respondent's Policy OPO 1.2.

[93] Mr. Hare also copied Mr. Sibul when he sent his October 14, 2015 email to Mr. Chesnut, stating he had enough of Complainant "harassing our employees." Mr. Sibul replied to Mr. Hare's email, stating, "[m]y understanding is that there is a meeting this morning to discuss how to resolve the issues with how we are developing and installing the shelters on 200 South. There is plenty of blame to go around; let's work together to figure out a better bath forward." (JX-9).

Additionally, Ms. Westlund accused Complainant of creating a "hostile work environment" after he asked Ms. Westlund about the location of missing work orders for the installation of bus stop shelters. Thereafter, on October 21, 2015, Complainant emailed Mr. Toby Alires, UTA's Manager of Civil Rights Compliance, along with Mr. Chesnut and Ms. Hendricks, UTA's Title VI Compliance Officer about Ms. Westlund's accusation. Specifically, Complainant stated Ms. Westlund's allegation that he created a hostile work environment was serious and should be looked into, but that it "was not and is not his intent to create a hostile work environment," rather he was asking Ms. Westlund about work orders. Complainant explained his dispute with Mr. Splan and Ms. Westlund, noting he refused to approve the installation of three bus stop sites because Salt Lake City had not installed "no parking" zones, and in doing so, Mr. Splan became upset with Complainant. Complainant further explained that Mr. Splan bypassed Complainant when he directed UTA's Facilities Department to install bus shelters that were not ADA compliant. Complainant averred Ms. Westlund stated he "threatened" her by stating UTA could lose its federal funding, and thus he was going to have bus shelters moved and/or removed due to the bus shelters not being ADA compliant. Complainant addressed Ms. Westlund's complaint that Complainant did not "fulfill assignments" and sent "blank work orders," stating the information he entered into BSM appears to be present, but he was not sure what Ms. Westlund viewed when she used BSM. In conclusion, Complainant informed Mr. Alires that he found "it a bit odd that I am now accused of creating a hostile work environment because I was enforcing UTA policy and federal ADA standards." (CX-25, pp. 1-2; Tr. 106-08).

Based on the foregoing, I find the record clearly demonstrates there was antagonism and hostility towards Complainant's protected activity that further demonstrates Complainant's protected activity was a contributing factor to his November 20, 2015 termination from his employment with Respondent.

c. Proposition 1 & Complainant's Protected Activity

Complainant argues that UTA was rapidly installing bus stop amenities along the 200 South corridor to develop support for Proposition 1, but Complainant's protected activity obstructed those efforts. Complainant avers that Utah House Bill 362, titled "Transportation Infrastructure Spending" passed during the 2015 Utah legislative session and included a county-level ballot option which allowed voters to approve or reject an

increased sales tax to fund public transportation ("Proposition 1"). However, following the November 2015 election, Proposition 1 did not pass in Salt Lake City, Utah. (JX-37, p. 16, Stipulated Fact Nos. 76-77).

Complainant avers Mr. Sibul testified that Respondent's disregard for safety protocols along the 200 South corridor was unconnected to Proposition 1, stating:

> I think Proposition 1 was one aspect that we, of course, wanted to demonstrate excellence at UTA and finish a project up that was well-utilized. But primarily . . . we had focused on it [the 200 South corridor] well before there was anything such as Proposition 1. . . The 200 South corridor was really important to UTA and we needed to improve those bus stops because it was one of the most highly utilized corridors in our system.

(Tr. 487).

However, Mr. Sibul acknowledged that if voters had passed Proposition 1 it would have resulted in additional funding for Respondent, which would have improved the efficiency of public transportation across Salt Lake County. (Tr. 515). Nonetheless, Mr. Sibul admitted that UTA's improvements along the 200 South corridor were at least partially engaged for the purpose of Proposition 1. (Tr. 516). In an October 14, 2015 email, Mr. Sibul addressed disputes over the bus stop amenities being installed and removed due to improper installation along the 200 South corridor, stating "there is plenty of blame to go around." (JX-9, p. 1). Mr. Sibul agreed that the bus stop amenities being installed and removed along the 200 South corridor, in the month preceding the November 2015 election, affected the public's perception of UTA. (Tr. 517).

On October 8, 2015, Complainant emailed Mr. Chesnut to notify him that UTA's Facilities Department, at the direction of Mr. Hare, was violating Respondent's policies by installing bus stop amenities without work orders. Complainant argues the evidence demonstrates that Respondent was quickly installing bus stop shelters, benches, and other amenities to obtain favor with Salt Lake County voters in the month preceding the Proposition 1 vote. Complainant further argues that his protected activity obstructed Respondent's efforts, the voters failed to pass Proposition 1, and Complainant's employment was terminated three weeks later. Consequently, Complainant contends his protected

activity was a contributing factor to UTA's decision to terminate his employment.

On the other hand, Respondent asserts Proposition 1 was not a motivating factor for quickly installing bus stop amenities along the 200 South corridor. Respondent avers that Mr. Chesnut, Mr. Sibul, Mr. Turner, and Ms. Huffman all testified that the bus stop shelters were not installed with heightened urgency due to Proposition 1. (Tr. 346, 357, 486-87, 572). Further, Respondent avers Complainant testified he was familiar with Proposition 1 due to reading about it and being an informed voter, but Complainant did not testify it was due to any discussion at work. (Tr. 52). Respondent also asserts Complainant has offered no evidence demonstrating that any voter was influenced by UTA's improvements along the 200 South corridor. In addition, Respondent argues the work along the 200 South corridor is minor compared to Respondent's overall 2015 budget ($347,000,000.00) such that it could not play a meaningful role in the Proposition 1 vote. Lastly, Respondent contends Complainant's protected activity could not have influenced the outcome of Proposition 1 because the majority of the work performed along the 200 South corridor was completed before the November 2015 election, with improvements beginning in 2014. (Tr. 581; JX-37, p. 14, Stipulated Fact No. 58).

Notwithstanding Mr. Sibul's testimony that the 200 South corridor improvements were at least partially engaged for the purpose of Proposition 1, the undersigned finds Proposition 1 does not appear to be Respondent's primary cause for rapidly installing bus stop amenities. Indeed, Mr. Sibul testified UTA wanted to make improvements along the 200 South corridor for several years, thus in **2013**, UTA began to create a plan to improve the bus stops, and in **2014**, new designs were created and a budget was implemented, which is long before voting for Proposition 1 occurred in **2015**. In addition, Ms. Huffman, Mr. Chesnut and Mr. Hare testified Proposition 1 was not a motivating factor for rapidly installing bus stop amenities along the 200 South corridor, but rather the impending winter weather and the high utilization of the 200 South corridor bus stops brought heightened urgency to complete the improvements along the corridor. Furthermore, the record is devoid of any evidence demonstrating the installation and removal of bus stop shelters along the 200 South corridor affected the voters passing Proposition 1. Therefore, the undersigned finds Complainant's protected activity with respect to Proposition 1 is not a contributing factor to UTA's decision to terminate his employment.

d. Indications of Pretext

A complainant is not required to prove pretext as the only means of establishing the causation element of a whistleblower claim. As the Board has stated, to prevail on a complaint, the complainant need not necessarily prove that the respondent's "proffered non-discriminatory reasons [for the adverse action] are pretext." Coates, supra, slip op. at 4; Klopfenstein v. PCC Flow Techs. Holdings, Inc., ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 19 (ARB May 31, 2006). However, by doing so, it provides the complainant with "circumstantial evidence of the mindset of the employer," which may be sufficient to establish by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse employment decision. Bechtel v. Competitive Technologies, Inc., ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011).

Further, the complainant may demonstrate that the respondent's non-discriminatory reasons are pretextual in nature when evidence is presented which indicates the respondent did not in **good faith** believe the complainant violated its policies, but relied on the alleged violations in **bad faith** pretext to terminate employment. See Redweik v. Shell Exploration & Prod. Co., ARB No. 05-052, ALJ No. 2004-SWD-002, slip op. at 9 (ARB Dec. 21, 2007). Pretext may be established by demonstrating "the defendant's [respondent's] proffered non-discriminatory explanations for its actions are so **incoherent**, **weak**, **inconsistent**, **or contradictory** that a rational factfinder could not conclude [they are] worthy of belief." Conroy, supra at 1172. Consequently, a complainant may show pretext by revealing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the respondent's proffered legitimate reasons for its actions. Garrett v. Hewlett Packard, 305 F.3d 1210, 1217 (10th Cir. 2002)(quoting Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997); Reynolds v. School District No. 1 Denver, 69 F.3d 1523, 1535 (10th Cir. 1995)(pretext may be shown by demonstrating the reason for the employment decision was not the true reason, but instead was a "disingenuous or sham reason.").

Consequently, in the present matter, Complainant may demonstrate by a preponderance of the evidence that "job abandonment" was not Respondent's true reason for terminating his employment, thereby invoking an inference that Complainant's reports of protected activity was pretext for retaliation.

Complainant avers that he worked for Respondent for approximately 20 years without even a blemish on his performance record, and was never issued any write-ups, warnings, or any other formal or informal discipline by Mr. Chesnut.[94] Complainant notes that he performed most of his work outside of UTA's office, and he was not required to obtain Mr. Chesnut's permission to work outside the office. (JX-37, p. 16, Stipulated Fact Nos. 78-80). According to Complainant's job description, his duties involved driving a vehicle 75% of the time, and Complainant drove throughout UTA's system in Salt Lake County, Davis County, Tooele County, and Weber County. (JX-3, p. 3; Tr. 41). Additionally, Complainant notes UTA provided him with equipment that enabled him to perform his job outside of the office, he commonly worked beyond 5:00 p.m., and there were times he would go an entire week without speaking with Mr. Chesnut. (JX-37, p. 17, Stipulated Fact No. 83; Tr. 41, 44, 56).

Further, Complainant avers Mr. Chesnut approved his vacation on October 26, 2015, and that Complainant emailed several employees in the Planning Department letting them know he would be on vacation from October 27, 2015 through November 11, 2015, but that he planned on coming into the office for one to two days to work on unfinished projects.[95] (JX-19; JX-37, p. 10, Stipulated Fact Nos. 15-17). Notwithstanding his initial vacation request, Complainant avers that he worked the first week of his vacation on projects concerning the Sandy Civic Center, the Meadowbrook project, and the bus shelter at 200 South State Street and the bus stop at 200 South and 810 East. Moreover, Complainant asserts Mr. Chesnut was fully aware that he worked during the first week of his vacation as evidenced by emails and work orders sent to various UTA employees, as well as Mr. Chesnut from October 27, 2015 through November 1, 2015.

---

[94] Complainant notes that in 1996, he began working for Respondent as a bus driver. (JX-37, p. 9, Stipulated Fact No. 5). Complainant worked in his current position as a Service Planner for ten years, and Mr. Chesnut supervised Complainant's work from 2012 to 2015, during which Mr. Chesnut provided Complainant with merit increases in 2012, and 2014. (Tr. 354, 428-30).

[95] On October 26, 2015, Complainant sent an email to Mr. Chesnut, stating "if you have no objection, I am going to take vacation starting tomorrow, for two weeks . . . I will be available be [sic] by phone and will come in [sic] the day that we make the switch at Meadowbrook Trax Station." Mr. Chesnut replied to Complainant's email, stating "ok." (JX-37, p. 10, Stipulated Fact Nos. 15-16).

(CX-58, pp. 5, 7, 10, 17, 29, 37, 43, and 45).[96] Indeed, Complainant notes that Mr. Chesnut testified he "expected" Complainant would be working during the first week of his vacation. (Tr. 472). Complainant also argues that he and Mr. Chesnut did in fact agree that he would return to work on "Monday" (November 23, 2015), and Mr. Chesnut did not state he expected Complainant back on November 18, 2015 (Wednesday). (Tr. 135).

Complainant asserts that Respondent terminating him for job abandonment is pretextual in nature because he did not "abandon" his job. Complainant avers that to constitute "abandonment" Respondent's policy requires that an employee be absent for "three consecutive days," and be "capable of providing notification" to his or her supervisor, but the employee does not do so. (JX-26, p. 2). Moreover, notification of an absence can be made verbally. (Tr. 657). Respondent's policies define a workday as starting at "roughly" 8:30 a.m., and ending at 5:00 p.m. (JX-37, Stipulated Fact No. 63). Complainant notes that Ms. Glenn, deposed that an employee would not be considered to have abandoned his job if notification was provided **before the expiration** of the third workday. On the other hand, at the formal hearing in this matter, Ms. Glenn contradicted her prior testimony when she testified "notification" concerning Respondent's job abandonment policy had to be provided **before the beginning of an employee's shift**. Nonetheless, Ms. Glenn recognized there was no such requirement contained in Respondent's job abandonment policy.[97] (JX-26, p. 2).

On this basis, Complainant asserts he was at UTA headquarters on November 20, 2015, **prior to the expiration** of the third workday, and therefore he did not abandon his job. In particular, Complainant avers Mr. Chesnut called him on Friday, November 20, 2015, at 4:15 p.m., to let him know he was

---

[96] See supra, note 77. Additionally, Complainant argues that UTA pointed out Complainant did not submit a time sheet for his work from October 27, 2015 through November 1, 2015, but Mr. Chesnut confirmed that it was not unusual for Complainant to work without submitting a time sheet, and that Mr. Chesnut would occasionally complete Complainant's time sheets on his behalf. (Tr. 403).

[97] Ms. Glenn testified "notification" does contain a formal requirement that it must be made **prior to an employee's shift**, but it is contained in one of Respondent's "other" policies. (Tr. 657-58). Ms. Glenn testified the requirement that an employee notify a supervisor prior to missing three consecutive days of work is located in Respondent's "Administrative Work Week" policy. Nevertheless, Ms. Glenn admitted that to her knowledge Complainant was not furnished the "Administrative Work Week" policy in connection with the instant case. (Tr. 658). Significantly, Respondent's "Administrative Work Week" policy is not part of the record evidence.

terminated. Thereafter, by 4:20 p.m. or 4:30 p.m., Complainant avers he arrived at UTA's headquarters to discuss with Ms. Glenn why he was terminated. According to Ms. Glenn, she met with Complainant on November 20, 2015, "towards the end of the day" to discuss his termination, but Ms. Glenn testified that by the time Complainant arrived he was already terminated (i.e., the termination notification was already sent to Complainant). Consequently, Complainant argues Respondent decided to terminate Complainant prior to the expiration of the third consecutive working day, and thus he did not abandon his job.

Complainant further argues that Respondent's "job abandonment" policy does not require "automatic" termination. Specifically, Complainant avers Mr. Chesnut testified that Complainant failed to come to work on November 11, 2015 through November 16, 2015, which consisted of four consecutive working days.[98] Nevertheless, Mr. Chesnut did not consider Complainant's absence during this period as job abandonment, and according to Mr. Chesnut, he elected not to terminate Complainant on November 16, 2015, because Complainant worked for Respondent for 20 years. Further, Complainant asserts Mr. Chesnut approved his absence from work from November 16, 2015 to November 18, 2015. Therefore, Complainant contends the aforementioned inconsistencies reveal termination from employment with Respondent is not "automatic" for abandonment, and Respondent's job abandonment policy is selectively enforced.

Complainant also argues that his termination for job abandonment is pretextual in nature as evidenced by the inconsistencies and irregularities in Complainant's appeal of his termination. Complainant avers that Mr. Sibul, Mr. Chesnut's direct supervisor, oversaw Complainant's appeal process, and that Complainant's appeal was the first termination appeal conducted by Mr. Sibul. (Tr. 499, 528). Complainant avers that he along with Mr. Sibul, Ms. Glenn, and Mr. Heier attended Complainant's December 14, 2015 appeal meeting. (JX-37, p. 14 Stipulated Fact No. 62).

Complainant asserts Mr. Sibul appeared to have made up his mind regarding Complainant's appeal prior to engaging in any substantive review of the underlying facts. For example, on **November 21, 2015,** just one day after receiving Complainant's November 20, 2015 appeal letter, Mr. Sibul sent an email to Mr. Benson, UTA's interim president, stating "when someone [Complainant] does not show up for work for 10 days . . . there

[98] Complainant did not work over the weekend on Saturday, November 14, 2015, and Sunday, November 15, 2015.

should be something we do about it." (JX-28). Mr. Sibul admitted later that Complainant was absent for just three days, rather than ten. (Tr. 527). Complainant notes that Mr. Sibul testified he spoke "extensively" with Ms. Glenn, Mr. Chesnut, and Mr. Alsop on November 18, 2015 through November 20, 2015. However, Mr. Alsop credibly testified he never spoke with Mr. Sibul about the November 16, 2015 phone conversation between Complainant and Mr. Chesnut, nor did he tell Mr. Sibul that he could hear the entirety of their conversation.

Complainant avers that during the December 14, 2015 appeal meeting, he accurately recalled that he informed Mr. Chesnut he would return to work on "Monday," and after Mr. Chesnut stated "today is Monday," Complainant replied "well, I am coming back next Monday." (Tr. 146). Complainant characterized his November 16, 2015 phone call with Mr. Chesnut as a "misunderstanding," and he expressed bewilderment as to why Mr. Chesnut would not simply have called him to determine if there was in fact a misunderstanding, rather than summarily terminating Complainant. By letter dated December 17, 2015, Mr. Sibul notified Complainant that he upheld Respondent's decision to terminate Complainant's employment due to job abandonment. (JX-35). Mr. Sibul confirmed that in denying Complainant's appeal, he credited Mr. Chesnut's recollection of events over that of Complainant, and Mr. Sibul noted that Mr. Alsop confirmed what Mr. Chesnut stated. However, Complainant asserts Mr. Sibul's testimony is incredible because Mr. Alsop testified he was not a party to the phone call, the call was not on speaker phone, and he could not hear Complainant during the phone call. Further, Mr. Alsop testified he did not speak to Mr. Sibul about the November 16, 2015 phone call between Mr. Chesnut and Complainant. Complainant notes that Mr. Sibul also listed his termination date to be effective on November 11, 2018, when he knew the proper date should have been November 18, 2015. Nevertheless, Mr. Sibul simply stated this error was an "oversight."

Complainant argues Mr. Sibul's credibility further erodes concerning Complainant's appeal because during the December 14, 2015 appeal meeting Mr. Sibul stated that Mr. Chesnut had no knowledge that Complainant worked the first week of his vacation from October 27, 2015 through November 1, 2015. However, at the formal hearing in this matter, Mr. Sibul testified that on November 16, 2015, Mr. Chesnut informed him that Complainant worked the first week of his vacation, which according to Mr. Chesnut, is why he permitted Complainant to continue his vacation for an extended period. Thus, Complainant asserts

either Mr. Sibul was lying at the appeal meeting or at the formal hearing, either of which calls into question his credibility. Finally, when Mr. Sibul was notified that as late as January 8, 2016, Mr. Chesnut was still claiming he was not aware Complainant worked during the first week of his vacation, Mr. Sibul testified "that would seem peculiar to me." (Tr. 520).

Based on the foregoing, I find Complainant has shown by the preponderance of the evidence that Respondent's reason for terminating Complainant, that is, job abandonment, is pretextual in nature as Respondent's proffered reason is incoherent, weak and inconsistent, such that I cannot conclude it is worthy of belief. See Conroy, supra at 1172. Initially, I note that I credit the testimony of Complainant over that of Mr. Chesnut and Mr. Sibul, both of whom I found to be incredible overall. Notwithstanding Mr. Chesnut's testimony that Complainant was to return to work on Wednesday (November 18, 2015), I found Complainant credible that he was to return Monday (November 23, 2015), and that more likely than not there was a misunderstanding between Mr. Chesnut and Complainant as to when he was to return to work. I further note that although Mr. Alsop heard Mr. Chesnut say I will see you on "Wednesday," he did not hear Complainant's conversation with Mr. Chesnut on November 16, 2015, and thus Mr. Alsop could not confirm whether it was Complainant's understanding he was to return to work on Wednesday, November 16, 2015. Significantly, the record is devoid of any evidence Complainant had a history of absenteeism, or that he habitually failed to return to work following vacations or holidays.

Irrespective of whether Complainant was to return to work on Wednesday, November 18, 2015, or Monday, November 23, 2015, the inconsistent application of Respondent's job abandonment policy is most troubling in the instant case. Respondent's job abandonment policy demonstrates that an employee may be terminated if the employee misses three consecutive days of work, and the employee fails to notify Respondent of an absence when able to do so. Nonetheless, on November 16, 2015, when Mr. Chesnut realized Complainant did not come back to work, he did not terminate Complainant for job abandonment, but instead Mr. Chesnut and Mr. Alsop drove to Complainant's home out of "concern" for Complainant's safety. However, just four days later on November 20, 2015, Mr. Chesnut terminated Complainant for job abandonment. Furthermore, it is perplexing as to why Mr. Chesnut would not have simply called Complainant to determine whether he was in fact working given that Complainant

performed at least 75% of his duties outside the office, he had equipment that enabled him to work outside the office, and that according to Complainant, there were times when one week would pass before he spoke with Mr. Chesnut about anything work-related.

Also troubling, is Ms. Glenn's vacillating testimony concerning the proper application of Respondent's job abandonment policy. As discussed above, I found Ms. Glenn's testimony largely incredible and unpersuasive including her conflicting testimony about Respondent's job abandonment policy, and whether the policy required notice **before the expiration** of the third working day or **before the beginning** of an employee's shift. Notably, Respondent's job abandonment policy sets forth no such requirement. Moreover, the "Administrative Work Week" policy relied upon by Ms. Glenn to support her contention that an employee must provide notification of absence prior to a shift is not in the record evidence, and according to Ms. Glenn it was not provided to Complainant. Notwithstanding the foregoing, Mr. Chesnut called Complainant on November 20, 2015, at 4:15 p.m., to let him know he was terminated. However, this was prior to the end of the expiration of the third working day (i.e., 5:00 p.m.) from which Complainant was absent. Further, on November 20, 2015, no later than 4:30 p.m., Complainant was at UTA's headquarters to determine why he was terminated for job abandonment, which clearly shows he had no intention to abandon his job.

Lastly, the inconsistencies in Mr. Sibul's testimony concerning his handling of Complainant's termination appeal is also troubling. During the appeal meeting, Mr. Sibul stated Mr. Chesnut was not aware that Complainant had worked the first week of his vacation from October 26, 2015 through November 1, 2015, which completely contradicts Mr. Sibul's testimony that on November 16, 2015, Mr. Chesnut informed Mr. Sibul that Complainant did work during this time. In addition, Mr. Sibul confirmed that in denying Complainant's appeal, he credited Mr. Chesnut's recollection of events over that of Complainant, and Mr. Sibul noted that Mr. Alsop confirmed what Mr. Chesnut stated. Nevertheless, Mr. Alsop credibly testified he did not speak to Mr. Sibul about any of the events that transpired on November 16, 2015. On November 21, 2015, Mr. Sibul also knowingly misrepresented to Mr. Benson, UTA's interim president and CEO, that Complainant missed ten days of work when he was terminated for job abandonment, when in fact Complainant was allegedly absent for three days.

Given the foregoing discussion, I find Complainant has established Respondent's proffered reason for terminating Complainant, that is, job abandonment, is incoherent and inconsistent, and thus not worthy of belief. Conroy, supra at 1172. Furthermore, the circumstantial evidence indicates Respondent did not in good faith believe Complainant violated its policies, but instead relied on the alleged violation in bad faith as evidenced by the inconsistent and incredible testimony of Mr. Chesnut and Mr. Sibul. See Redweik, supra, slip op. at 9. Accordingly, I find and conclude Respondent's proffered reasons for Complainant's termination are pretext for unlawful retaliation.

e. Lack of Comparator Employees

The United States Tenth Circuit Court of Appeals, under whose jurisdiction this case arises, states that to "establish disparate treatment a plaintiff must demonstrate that he is similarly situated to an employee in "**all relevant respects**." Aramburu v. Boeing Co., 112 F.3d 1398, 1404 (10th Cir. 1997). The Court explained that to be a proper comparator the employee must have a **similar job, is subject to similar performance standards, and report to the similar chain of command**. McGowan v. City of Eufala, 472 F.3d 736, 745 (10th Cir. 2006). Additionally, to demonstrate employees are similarly situated a court should compare the relevant employment circumstances including, work history and company policies applicable to the plaintiff and comparator employee. Finally, of those employees who are similarly situated, they "must have been disciplined for conduct of 'comparable seriousness' for their disparate treatment to be relevant." Kendrick v. Penske Transp. Servs., 220 F.3d 1220, 1230 (10th Cir. 2000).

Complainant argues that Respondent attempted to show that it consistently applied its abandonment policy when it identified dozens of employees it terminated for "job abandonment" since 1999. (JX-1, pp. 9-12). Complainant agrees with Respondent that the information regarding such employees is "irrelevant" because the identified employees are not comparable to Complainant. See (JX-1, p. 9). Complainant avers, that other than himself, none of the comparator employees who were terminated for job abandonment were "Service Plan Deploy Specialists," nor did they report to Mr. Chesnut. Complainant further avers that the majority of the comparator employees also possessed far less than 19.84 years of employment with Respondent. Although Respondent cited "B.H." who was a bus operator who had 30.06 years of employment with Respondent,

Complainant argues "B.H." was an hourly employee, while Complainant was an exempt administrative employee. Therefore, Complainant asserts that he and "B.H." had different job duties and responsibilities, and they reported to different supervisors. Finally, Complainant avers that presently only four UTA "administrative" employees (including Complainant) had been terminated for job abandonment. (JX-2, pp. 2-3). Consequently, Complainant asserts Respondent did not provide any comparable employees, with comparable years of service to demonstrate Complainant's termination was part of a consistent application of Respondent's job abandonment policy, which indicates Respondent's termination of Complainant's employment and the handling of his appeal is riddled with inconsistencies and irregularities indicative of pretext.

Respondent provided a list of 106 employees who were terminated for "job abandonment." However, 87 of the comparator employees were employed for less than one year of employment, and the majority of the 87 employees were either a "Bus Operator Trainee" or an "Extra Board Operator." The remainder of the comparator employees consisted of 14 employees who were employed for less than five years, but more than one year, and 5 employees who were employed for more than five years. As noted by Complainant, there was only one employee, "B.H." (a bus operator) who was employed longer than Complainant before being terminated for job abandonment. In sum, there were only four administrative employees, including Complainant, who were terminated for job abandonment. Of the four administrative employees, Complainant was employed the longest for 19.84 years, while the other employees were employed for 0.29, 2.06, and 2.76 years.[99]

Notwithstanding the foregoing, the undersigned finds the absence of proper comparators is indicative of pretext in the instant case. Here, Respondent presented 106 employees that were terminated for job abandonment, the majority of which were not employed by Respondent for more than one year. In addition, Complainant was the only "Service Plan Deployment Specialist" to be terminated, and of the four administrative employees, Complainant's employment exceeded the others by more than 17

[99] Notably, in listing the four "administrative" employees who were terminated for job abandonment, Respondent states Complainant was absent from work for "8" days when he was terminated for job abandonment. (JX-2, p. 2). **Arguably**, if Complainant was absent for eight days, Respondent considered Complainant to have abandoned his job on **November 11, 2015**, despite Mr. Chesnut's testimony that he permitted Complainant to be absent from work until **November 18, 2015**. (Tr. 415).

years, and no other terminated employees answered to Mr. Chesnut or Mr. Sibul. Significantly, the list of 106 employees fails to state whether or not any of the employees engaged in protected activity similar to that of Complainant. Therefore, the undersigned finds that the absence of comparator employees in the present matter indicates Respondent's termination of Complainant's employment and handling of his appeal is pretextual in nature, in that it appears to be inconsistent with Respondent's job abandonment records. See Conroy, supra at 1172.

f. The Legitimacy of the Reasons for Employer's Actions

The Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether the complainant has demonstrated by a preponderance of the evidence that protected activity contributed to the alleged adverse action. Palmer, supra, slip op. at 29, 55; Brune, supra at 14 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. See Florek v. E. Air Cent., Inc., ARB No. 07-113, ALJ No. 2006-AIR-9, slip op. at 7-8 (ARB May 21, 2009) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000)). The complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. Douglas v. Skywest Airlines, Inc., ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-00014, slip op. at 11 (ARB Sept. 30, 2009). Furthermore, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employe[r] taking the alleged prohibited personnel action in order to establish that his [or her] disclosure was a contributing factor to the personnel actions." Marano v. Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993).

Here, Respondent avers it terminated Complainant's employment on November 20, 2015, because he "abandoned" his job pursuant to its "Separation of Employment" policy. See (JX-26). As discussed above, I found Complainant had shown by the preponderance of the evidence that Respondent's reason for terminating Complainant, that is, job abandonment, is pretextual in nature as Respondent's proffered reason is incoherent, weak and inconsistent, such that I cannot conclude it is worthy of belief. See Conroy, supra at 1172. In support of my finding, I

found Respondent inconsistently applied its job abandonment policy when it did not terminate Complainant for job abandonment on November 16, 2015, upon Mr. Chesnut's realization that Complainant did not come back to work on November 11, 2015. However, just four days later on November 20, 2015, Mr. Chesnut terminated Complainant for job abandonment. Furthermore, I am perplexed as to why Mr. Chesnut would not have simply called Complainant to determine whether he was in fact working given that Complainant performed at least 75% of his duties outside the office, he had equipment that enabled him to work outside the office, and that according to Complainant, there were times when one week would pass before he spoke with Mr. Chesnut about anything work-related. I also found Ms. Glenn's vacillating testimony concerning the proper application of Respondent's job abandonment policy to be unpersuasive regarding whether the policy required notice **before the expiration** of the third working day or **before the beginning** of an employee's shift. Notably, Respondent's job abandonment policy set forth no such requirement. Moreover, the "Administrative Work Week" policy relied upon by Ms. Glenn to support her contention that an employee must provide notification of absence prior to a shift is not in the record evidence, and according to Ms. Glenn it was not provided to Complainant. Mr. Chesnut called Complainant on November 20, 2015, at 4:15 p.m., to let him know he was terminated. However, this was prior to the end of the expiration of the third working day (i.e., 5:00 p.m.) from which Complainant was absent. Further, on November 20, 2015, no later than 4:30 p.m., Complainant was at UTA's headquarters to determine why he was terminated for job abandonment, which clearly shows he had no intention to abandon his job. In addition, Respondent continued to incorrectly state Complainant abandoned his job on November 11, 2015, when according to Mr. Chesnut, Complainant received verbal approval from him to be absent from work arguably at least until November 18, 2015.

In sum, irrespective of any retaliatory motive, I find Respondent's proffered reason for terminating Complainant, job abandonment, to be unworthy of credence. See Florek, supra slip op. at 7-8 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000)).

Looking at the totality of the evidence, I find Complainant has demonstrated by the preponderance of the evidence that his protected activity played **some** role in Respondent's decision to terminate Complainant on November 20, 2015, and thus he has demonstrated discriminatory animus contributed in some way to Respondent's adverse action. See Jones v. BNSF Railway Co., No.

14-2616, 2016 U.S. Dist. LEXIS 4887, *20-21 (D. Kan. Jan. 14, 2016). Specifically, the circumstantial evidence, including the temporal proximity between Complainant's October 2015 protected activity and November 20, 2015 termination, evidence of antagonism and hostility toward Complainant's protected activity from UTA employees and supervisors, indications of pretext such as Respondent's inconsistent application of its job abandonment policy, and the absence of proper comparators despite Respondent proffering 106 employees who had been terminated for "job abandonment" supports a finding and conclusion that Complainant's protected activity was a contributing factor in his termination by Respondent. I also find that the preponderance of the evidence shows that both Mr. Chesnut and Mr. Sibul were decision-makers regarding Complainant's termination, and had knowledge of Complainant's protected activity.[100]

Accordingly, I find and conclude Complainant has demonstrated by the preponderance of the evidence that he engaged in protected activity in October 2015, that Respondent knew Complainant engaged in protected activity, Complainant suffered adverse employment action when he was terminated on November 20, 2015, and the circumstances are sufficient to raise an inference that Complainant's protected activity was a contributing factor in Complainant's termination. 29 C.F.R. § 1982.104(e)(2); Duncan, supra at 127; Luder, supra, slip op. at 6-7; Clemmons, supra, slip op. at 3.

E. Same Action Defense

As denoted by Palmer, Respondent must establish that it would have **taken the same action** absent the Complainant's protected activity. Palmer, supra, slip op. at 22. A respondent's burden to prove this step by **clear and convincing** evidence is a purposely high burden, as opposed to complainant's relatively low burden to demonstrate that the protected activity was a contributing factor in the adverse personnel action. Id. Clear and convincing evidence that an employer would have disciplined the employee in the absence of protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the

[100] The undersigned finds and concludes that Mr. Chesnut and Mr. Sibul were decision-makers with respect to Complainant's termination because, at the very least, Mr. Chesnut made the initial decision to terminate Complainant's employment on November 20, 2015, and thereafter, on December 17, 2015, Mr. Sibul affirmed the decision to terminate Complainant's termination. (JX-37; JX-35)

employer of liability. Id. (stating that step-two asks whether the non-retaliatory reasons, **by themselves**, would have been enough that the respondent would have taken the same adverse action absent the protected activity); see DeFrancesco, supra, slip op. at 8; Fricka v. Nat'l R.R. Passenger Corp. (AMTRAK), ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 5 (ARB Nov. 24, 2015).

The "clear and convincing evidence" standard is the intermediate burden of proof, in between "a preponderance of the evidence" and "proof beyond a reasonable doubt." Araujo, supra, at 159. To meet the burden, Respondent must show that "the truth of its factual contentions is **highly probable**." Colorado v. New Mexico, 467 U.S. 310, 316 (1984)(emphasis added); see Speegle, supra, slip op. at 11. Additionally, Respondent must present evidence of "unambiguous explanations" for the adverse actions in question. Brucker, supra, slip op. at 14.

Respondent argues it is clear that Complainant's protected activity played **no role** in his termination and that Respondent would have taken the same action whether he engaged in protected activity or not. In support of its contention, Respondent asserts that Mr. Chesnut, Complainant's supervisor, was consistently supportive of Complainant's reporting of safety issues and never exhibited any animus toward Complainant. As such, Respondent contends Complainant has failed to prove intentional retaliation prompted by his engaging in protected activity. See Jones, supra at *19-20. Respondent further contends Complainant's termination was solely due to his failure to return to work following his vacation, not once, but twice, and as a result, Complainant cannot utilize whistleblower protections to shield himself from the consequences of his own misconduct or failures. Trimmer v. U.S. Dep't of Labor, 174 F.3d 1098, 1104 (10th Cir. 1999).

Respondent further argues that other UTA employees refused to conduct work along the 200 South corridor or regularly reported safety issues, but were not disciplined or terminated for such conduct. For example, Mr. Chesnut explained he regularly "brought up safety concerns and issues [to his supervisors]" and he participated in UTA's Safety Committees, which allow employees to report safety issues. (Tr. 398). Furthermore, Respondent avers Complainant testified that he regularly reported safety issues for approximately 10 years as a Service Plan Deployment Specialist. Likewise, Respondent argues that Ms. Huffman and Mr. Wilson, in UTA's Facilities Department,

refused to order their crews to work on the 200 South corridor without work orders.

In light of the foregoing, I find Respondent has not provided clear and convincing evidence that Respondent would have **taken the same action** absent the Complainant's protected activity. Palmer, supra, slip op. at 22. While Mr. Chesnut may have demonstrated a desire to reconcile the dispute between Mr. Splan (and others), and Complainant regarding improper installation of the bus shelters along the 200 South corridor, it does not overcome the overwhelming circumstantial evidence demonstrating Complainant's protected activity contributed to his November 20, 2015 termination. In addition, I found Mr. Chesnut and Mr. Sibul, both of whom were decision-makers in this case, to be incredible. Moreover, while other employees may have reported safety issues or refused to perform work along the 200 South corridor, there is no evidence that the employees were requesting bus shelters to be uninstalled immediately after installation, and thus increasing costs for Respondent. Nor were the other employees in present conflicts with fellow employees over the installation or removal of bus stops and/or bus shelters. Further, pursuant to Ms. Glenn's incredible and unpersuasive testimony regarding Respondent's job abandonment policy, I find Respondent has not provided clear and convincing evidence that Complainant in fact "abandoned" his job after approximately 20 years of unblemished service to Respondent. Finally, the lack of comparator employees who were terminated for job abandonment, and the inconsistencies in Respondent's handling of Complainant's appeal of his termination do not support a finding that Respondent would have taken the same action absent Complainant's protected activity. Accordingly, I find and conclude Respondent has failed to demonstrate it is **highly probable** Complainant abandoned his employment. Colorado, supra at 316.

F. After Acquired Evidence

Alternatively, Respondent asserts that any award of damages made by the undersigned should not extend beyond March 2016, under the after acquired evidence doctrine. Specifically, Respondent avers that in March 2016, it discovered Complainant misused his UTA resources for "political gain" when Complainant admitted he had more than 1,500 pages of emails that were sent between his work email and personal email, or vice versa. (Tr. 204, 645). On this basis, Respondent asserts Complainant's explanation that he would send work emails to his personal email account so he could print documents at home and work, or

sometimes he would become confused when using his smartphone and accidently forward emails between his personal and work email accounts, are incredible. For example, Respondent avers Complainant received emails that were School Board-related and were not forwarded from his personal email account, but rather were directly sent to Complainant's work email account. See (RX-67). Respondent avers Complainant admitted that he received a School Board-related email in his work email account because he was "in a dispute with the School Board president," but not due to any confusion about such emails when using his smartphone. (Tr. 224). Further, Respondent notes Complainant repeatedly claimed he did not print personal or School Board emails at work, but he eventually admitted "there would have been a couple of occasions where that happened." (Tr. 205, 211-213). Respondent argues Complainant also had no reason to send emails between his personal and work email accounts because he was provided with all technological resources to conduct his work for Respondent. (JX-37, p. 17, Stipulated Fact No. 83).

According to Ms. Glenn, UTA's Acceptable Use of Technology Resources Policy would have been violated in numerous ways by Complainant's use of his work email account. See (Tr. 638-647). Respondent asserts Complainant had no reason to use his personal email account for work, and his use of the same created serious data protection concerns. Respondent argues Complainant's use of UTA resources for "personal and political reasons" was prohibited and constituted a serious violation of the policy. (Tr. 664-45).

Respondent asserts the after-acquired evidence regarding Complainant's use of UTA's technology resources must limit any award of damages. Respondent relies upon McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360-62 (1995), which states the following:

> [T]he after-acquired evidence of the employee's wrongdoing bears on the specific remedy to be ordered . . . The employee's wrongdoing must be taken into account . . . lest the employer's legitimate concerns be ignored . . . [N]either reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.

Id. at 360-62. Moreover, Respondent contends that if the undersigned determine any back pay is to be awarded, back pay

"should be limited to the period from the date of the unlawful discharge to the date the new information was discovered." Clemmons v. Ameristar Airways, Inc., ARB No. 12-105, ALJ No. 2004-AIR-011, 2013 DOL Ad. Rev. Bd. LEXIS 101, *7 (ARB Nov. 25, 2013)(quoting McKennon, supra at 362). Therefore, Respondent asserts no award of damages should be made to Complainant beyond the discovery of his misuse of UTA resources for personal and political gain in March 2016.

Conversely, while Complainant does not disagree that after-acquired evidence may allow an employer to proffer post-termination evidence that an employee engaged in misconduct which would have resulted in termination, Complainant asserts it still does not shield the employer from liability, but may be relevant to the issue of damages. Housley v. Spirit Aerosystems, Inc., 628 F. App'x 571, 575 (10th Cir. 2015); McKennon, supra at 356-61. Further in McKennon, the Court stated "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." McKennon, supra at 360. Thus, Complainant asserts that after-acquired evidence may be used as an attempt to show an employer had a legitimate, alternative reason for terminating an employee, but it may not be used to show that the actual motive was legitimate in the first place. Techan v. Metro-North Commuter R.R. Co., 80 F.3d 50, 55 (2d Cir. 1996). Complainant notes that in applying McKennon, district courts have created a two-part test with respect to after-acquired evidence. First, the employer must establish "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge. Perkins v. Silver Mountain Sports Club & Spa, LLC, 557 F.3d 1141, 1145 (10th Cir. 2009). Second, if the employer meets its burden, the after-acquired evidence may then be considered to limit the damages remedy available to the wrongfully terminated employee. Id.

Complainant asserts that Respondent has fallen short of demonstrating Complainant's personal emails were of such severity that Complainant would have been terminated for sending the emails. Furthermore, Complainant contends Respondent's Technology policy allows for "incidental" use of technology resources which is "subject to approval from a user's department manager." (RX-76, p. 3, Subsection K). Complainant avers Ms. Glenn testified that depending on the circumstances, violations of UTA's technology policy could result in an employee being warned, written up, suspended (and have his network access suspended), and terminated. (Tr. 648; RX-76, p. 4, Subsection

T). According to Ms. Glenn, the circumstances affecting the severity of punishment for violating Respondent's technology policy include the nature of the information sent and/or received, to whom the information was sent and/or received, the type of information accessed, and how the information was utilized. (Tr. 648).

Complainant does not deny that he sent several emails between his UTA email account and his personal account in order to print emails on his home desktop computer when he worked from home, and in order to mark his emails as "unread" to remind him to respond to the email. (Tr. 203-04). Complainant further concedes that his emails included his GRAMA request to the Salt Lake City School District (RX-65), his complaint to the U.S. Department of Education (RX-66), a proposed class-action complaint against the Salt Lake City Police Department (RX-67), the decision of a Salt Lake City School District hearing officer (RX-69), a Salt Lake Housing Authority Board Meeting (RX-71), and salary information for employees of the Salt Lake City School District (which is a matter of public record) (RX-72). Nonetheless, Complainant argues that none of the emails he sent between his UTA email account and his personal email account involved UTA's confidential information or UTA's trade secrets. In addition, Complainant contends Ms. Glenn acknowledged his personal emails did not cause any harm to UTA in any way, nor did Complainant disclose any trade secrets or confidential information, and he did not affect UTA's revenue. (TR. 649-50). Ms. Glenn testified Complainant had no reason to forward his emails to himself in order to print them at his residence given the UTA technology provided to him, but she also confirmed Complainant did not have a printer in his vehicle. (Tr. 650).

In light of the foregoing, the undersigned finds that Respondent's after-acquired evidence fails to demonstrate that Complainant's use of his UTA email account for personal use was of such a severity that it would have warranted Complainant's termination. See Perkins, supra at 1145. In addition, while some of Complainant's personal emails may have contained information relating to the Salt Lake City School Board and Police Department, I do not find Complainant was using UTA's technology resources for "political reasons." Respondent's Technology Resources Policy permits "incidental" use, and although Complainant did not appear to obtain permission for such use, the undersigned does not find his incidental use would warrant termination in this case. As noted by Complainant, the use of his UTA email account and personal email account did not contain UTA's confidential information or trade secrets, it did

not cause any harm to` UTA, none of UTA's information was accessed, nor did Complainant impact UTA's revenue as acknowledged by Ms. Glenn. Furthermore, while Respondent did provide Complainant with technology to support his mobile work, they did not provide him with a printer that operated in his vehicle, thus it was not unreasonable that Complainant forwarded emails to his personal email account in order to print them at home in an effort to complete his work. Accordingly, I do not find the after-acquired evidence of Complainant's misuse of Respondent's technology warrants eliminating any award of damages beyond March 2016.

G. Damages & Mitigation of Damages

Pursuant to 6 U.S.C. § 1142, a NTSSA complainant may be entitled to relief when he has suffered damages as a result of unlawful termination. Section 1142 states relief **shall** include:

(A) Reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) Any backpay, with interest, and

(C) Compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

6 U.S.C. § 1142(d)(2).[101] In an NTSAA whistleblower case, Complainant bears the burden of proving damages. Hobby v. Georgia Power Co., ARB Nos. 98-166, 98-169, ALJ No. 90-ERA-030, 2001 DOL Ad. Rev. Bd. LEXIS 10 *38-39 (ARB Feb. 9, 2001).

The employee protection provision of the NTSSA provides that a wrongfully terminated employee may seek damages that **shall** include reinstatement with the "same seniority status that the employee would have had, but for the discrimination." 6 U.S.C. § 1142(d)(2)(A). Thus, reinstatement for a prevailing complainant is not discretionary irrespective of the complainant's preference regarding reinstatement, rather it is the presumptive remedy in a whistleblower case to make the complainant whole. Ford Motor Co. v. EEOC, 458 U.S. 219, (1982); see Hobby, supra, slip op. at 7; see also Dale v. Step 1

[101] Punitive damages are also recoverable under the NTSSA and may not exceed $250,000.00. 6 U.S.C. § 1142(d)(3). However, Complainant does not seek punitive damages in the instant case.

Stairworks, Inc., ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4 (ARB Mar. 31, 2005). The purpose for reinstatement is to restore the complainant to a position equivalent to that which he "would have occupied but for the illegal action of the employer." Hobby, supra at *6; see Dale, supra, slip op. at 4. The Administrative Review Board ("ARB") has held that an employer is obligated to make a bona fide offer of reinstatement and any waiver of reinstatement by the complainant will be invalid when made prior to an employer's **bona fide** reinstatement offer. Cook v. Guardian Lubricants, Inc., ARB No. 97-055, ALJ No. 95-STA-043, slip op. at 3 (ARB May 30, 1997); see Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 150 (2d Cir. 1968)(remarks by a complainant indicating a disinterest in reinstatement are "of little value" when made before an employer has made an offer of reinstatement).

The complainant or employer may demonstrate "the impossibility of a productive and amicable working relationship or where reinstatement is otherwise not possible or impractical," but reinstatement should not be denied "merely because friction may continue between the complainant and his employer (or its employees)," nor should reinstatement be denied due to any inconvenience on behalf of the employer. Dale, supra, slip op. at 5. Factors such as the source of alleged hostility or friction, its severity, and whether it would be impossible for the complainant and employer to reestablish a productive working relationship should be considered when determining if reinstatement is possible. Hobby, supra, slip op. at 9. However, reinstatement may not be possible when the employer no longer employs workers in the job classification held by the complainant, the employer has no positions for which the complainant is qualified, or where accepting a position with the employer would be economically impractical for the complainant. Dale, supra, slip op. at 5; Hobby, supra, slip op. at 8-13; Kalkunte v. DVI Fin. Servs., Inc., 2004-SOX-056 (July 18, 2005)(it may be appropriate to award front pay in lieu of reinstatement where the employer has closed or restructured its business such that it cannot offer the complainant a comparable position).

With respect to back pay, the employer's liability begins when the complainant is wrongfully discharged, and ends when the complainant is reinstated or declines the employer's bona fide, unconditional offer of reinstatement. Michaud v. BSP Transp., Inc., ARB No. 97-113, ALJ No. 1995-STA-029, slip op. at 5-6 (Oct. 9, 1997)(reasonable refusal of an offer of reinstatement ends employer's back pay liability, but it may subject the

employer to front pay liability); Palmer v. Triple R. Trucking, ARB No. 06-072, ALJ No. 2003-STA-028, slip op. at 4 (Aug. 30, 2006). Back pay may include interest, overtime, shift differentials, as well as fringe benefits such as vacation pay, sick pay, pension benefits and other items the complainant would have received but for Respondent's illegal conduct, but the complainant may not be compensated "for more than he lost as a result of the employer's illegal discrimination." Hobby, supra, slip op. at 34; Creekmore v. ABB Power Sys. Energy Servs., Inc., 93-ERA-24 (Dep. Sec'y Feb. 14, 1996)(health, pension and other related benefits are terms, conditions and privileges of employment to which a successful complainant is entitled from the date of a discriminatory layoff until reinstatement or declination); Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974).

However, other benefits such as lost health insurance benefits may only be recovered for actual and direct expenses resulting from the loss of a health care plan, as well as out of pocket expenses for medical care. Jackson v. Butler Co., ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-026, 2004 DOL Ad. Rev. Bd. LEXIS 196, *16-17 (ARB Aug. 31, 2004)(noting whistleblower back pay awards are calculated to ensure the complainant is "restored to the economic position he would have occupied but for [respondent's] discriminatory act" and the "make whole" remedy is limited to "reimbursement for costs incurred as a result of the loss of benefits."); Van Der Meer v. W. Ky. Univ., ARB No. 97-078, ALJ No. 95-ERA-038, 1998 DOL Ad. Rev. Bd. LEXIS 65, *19 (ARB Apr. 20, 1998)(noting "compensatory damages are designed to make an aggrieved party whole, but does not cover uncompensated medical costs when not supported by evidence).

Notwithstanding the foregoing, pursuant to the NTSSA, the complainant is required to mitigate his damages by engaging in reasonably diligent efforts to find alternative employment. See Hobby, supra at *49-53. Respondent bears the burden of demonstrating that the complainant did not properly mitigate, and in doing so, the "reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the complainant and the job market." Id. at *52 (internal quotation omitted).

Turning to the issue of mitigation of damages, Respondent asserts Complainant failed to mitigate his damages. Specifically, Respondent notes Complainant had three years of education (in anthropology) at the University of Texas, he worked in law enforcement for approximately ten years, and

served as the mayor of Manor, Texas, where he worked on accountability, community development, environmental issues, and human resource issues. (Tr. 35, 225-26). Complainant also worked as a bus driver for UTA and eventually became a Service Plan Deployment Specialist for UTA, as well as serving on the Salt Lake City School Board. Dr. Janzen, Respondent's proffered rehabilitation specialist, found Complainant had the requisite "skills for positions of urban and city planner, transportation and logistics planner and coordinator, and also a transportation specialist, jobs that related to his history in transportation." (Tr. 282-83). According to Dr. Janzen, there were many positions available in the market that Complainant was qualified for at the time of his termination from UTA. Further, Dr. Janzen concluded Complainant could have earned an annual salary of $43,000.00 to $55,030.00 in such jobs, which would offer similar benefits to that of UTA. (Tr. 285, 287; RX-104).

Nevertheless, Respondent contends Complainant's job search was wholly deficient because he focused on jobs well above and below his skill set such as a diary delivery driver and an assistant radio reporter. On this basis, Respondent avers Complainant only applied for a single job in the planning field. (Tr. 239; JX-25). Respondent avers Complainant suggested his job search was sufficient because some of the available jobs were not a perfect fit for him. However, according to Dr. Janzen, employers are not interested in a "perfect fit," rather employers examine an applicant's transferable skills such as negotiation experience, problem-solving experience, relationship building, and analytical skills. (Tr. 319). In sum, Respondent asserts Complainant possessed significant transferable skills, but his job search was woefully deficient, and certainly not reasonably diligent. Respondent argues Complainant could have easily obtained a job at the same salary and benefits level he had with UTA within one to two months. Consequently, Respondent contends any award of damages should be based on Dr. Janzen's assessment and conclusions, as well as taking into account Complainant received $12,896.00 in unemployment benefits in 2016, which is more than sufficient to offset one to two months of his annual salary of $54,342.08. (JX-37, p. 13, Stipulated Fact No. 52; JX-22).

On the other hand, Complainant asserts he satisfied his obligation to mitigate his damages when he submitted 114 job applications from January 5, 2016 through August 13, 2016. (JX-25). Complainant acknowledged he did not begin searching for employment until January 2016, because he believed his appeal to UTA would be successful and his termination would be overturned.

(Tr. 157). Complainant avers he searched for employment using the Department of Workforce Services ("DWS") search algorithm, the KSL job search website, and looked for job openings with the State of Utah. (Tr. 159).

Furthermore, Complainant argues Dr. Janzen relied on insufficient facts, unreliable methods and data when he concluded Complainant should have found comparable employment in one to two months, and did not exercise reasonable diligence in seeking new employment. Complainant contends Dr. Janzen's "methods" in forming his expert opinion were flawed from inception because Dr. Janzen failed to review Complainant's job duties or responsibilities set forth by UTA, which describe the Service Plan Deployment Specialist position Complainant held for ten years. See (JX-3; Tr. 295-96).

Similarly, Complainant asserts Dr. Janzen incorrectly concluded Complainant exclusively relied upon the DWS website to submit job applications, but Complainant avers he did not submit any job applications through the DWS portal, and instead applied through each individual employer. Complainant argues that JX-25 shows he submitted 114 job applications within approximately an eight month period, which alone demonstrates he diligently searched for employment and properly mitigated his damages. Further, Complainant notes that Dr. Janzen testified there was no reason Complainant could not have applied to jobs prior to January 5, 2016, despite Complainant appealing Respondent's decision to terminate his employment. (Tr. 298-99). However, Complainant argues it would have been totally illogical and unreasonable for Complainant to start a new job while his appeal is pending, only to inform his new employer he was resigning after a short period of time. Complainant also notes that Dr. Janzen failed to consider the impact on Complainant's job search in light of his termination from UTA for "job abandonment," thus leaving him without a favorable job reference.

Lastly, Complainant notes Dr. Janzen's report identifies "comparable employment positions" on only two dates, that being, June 29, 2017, and July 10, 2017. (RX-104). Nonetheless, Complainant asserts the obvious flaw with Dr. Janzen's "method" is that Complainant obtained new employment on December 12, 2016, and was not searching for employment in June 2017 or July 2017. (JX-37, p. 13, Stipulated Fact. No. 54). Moreover, Complainant contends Dr. Janzen identified positions Complainant was not qualified for (i.e., never performed work required, did not possess college degree, or required being in the National Guard), and positions that did not offer a comparable rate of

compensation. See (RX-4). Therefore, Complainant asserts Dr. Janzen's conclusions were based on insufficient facts, unreliable methods and data, and as a result, Complainant argues the undersigned should disregard Dr. Janzen's conclusions and award Complainant the full amount of damages requested in the present matter.

As discussed above, I found Dr. Janzen's testimony sincere, but unpersuasive. Dr. Janzen researched several potential jobs that he determined to be "compatible" with Complainant's skill set, but Dr. Janzen admitted he did not review Complainant's job description while Complainant was employed with Respondent as a "Service Plan Deployment Specialist" for ten years. Indeed, Dr. Janzen admitted the positions he identified such as the regional planner, transportation logistics router, "city jobs," the U.S. National Guard position, and logistics planner did not comport with Complainant's training and experience. Furthermore, on at least two identified positions, the potential employers either preferred or required a college degree, which Complainant does not possess. See (RX-104). I was also not persuaded by Dr. Janzen's testimony that Complainant did not exercise reasonable diligence in conducting his job search, despite Complainant completing 114 job applications between January 5, 2016 and August 13, 2016, as his conclusion was made under an incorrect pretense that Complainant "exclusively" used the Department of Workforce Services website to apply for jobs. Lastly, although Complainant did not begin to apply for alternative employment until January 2016, I find it was not unreasonable given that he appealed his termination with UTA, and did not have his appeal meeting with UTA until December 14, 2015.

Accordingly, I find and conclude Complainant exercised reasonable diligence in seeking alternative employment, and acted to mitigate his damages. Thus, I find and conclude any award of damages to Complainant will not be reduced for failure to mitigate his damages.

With respect to damages, Complainant avers he remained unemployed from November 20, 2015, until December 12, 2016, when he began his employment with Crossroads Urban Center in Salt Lake City, Utah, with an annual salary of $41,000.00. (JX-37, p. 13, Stipulated Fact. No. 54). While unemployed, Complainant received unemployment benefits from Utah's DWS totaling $12,896.00. (JX-37, p. 13, Stipulated Fact. No. 52). Complainant notes that he, along with Respondent, stipulated he was eligible for and elected to receive the following UTA employment benefits: a transit pass, medical insurance, dental

insurance, 457 retirement contributions (401K), pension funding, employee assistance counseling program, and basic life insurance. (JX-37, p. 13, Stipulated Fact No. 51).

Complainant avers he earned annual compensation in the amount of $76,003.21 pursuant to his "Total Compensation Statement." (JX-24). In particular, Complainant's annual compensation included payments by Respondent of the following amounts:

1) Gross wages and paid time off: $54,760.46
2) Annual transit pass: $2,376.00
3) Gift certificate: $216.57
4) 457 retirement contributions: $1,108.55
5) Pension funding: $8,380.35
6) Health insurance & welfare benefit contributions: $4,972.01
7) Social Security and Medicare (PICA) Taxes Paid: $4,189.27

(JX-24).

Complainant identifies the time periods he should receive compensation as: 1) October 26, 2015 through October 30, 2015 (JX-23, p. 23, showing Complainant did not receive compensation for work performed, but instead was paid entirely with vacation funds); 2) from November 20, 2015 through December 12, 2016, the time period Complainant was unemployed; and 3) Complainant's differential wages from December 12, 2016 through September 20, 2017, the date of formal hearing in this matter.

Thus, in light of the foregoing, Complainant seeks **$96,488.55** in **back wages** (applying an offset for his unemployment benefits totaling $12,896.00). Complainant further seeks **three years of future wages** at a rate of **$35,003.21 for each year**, totaling **$105.009.63.**[102] Complainant contends future wages is appropriate in the instant case because a productive and amicable working relationship is no longer possible with Mr. Chesnut, who continues to serve as UTA's Senior Manager of Integrated Service Planning, and who, according to Complainant, made severe false allegations against Complainant. See Dale, supra, slip op. at 5.

[102] Complainant avers that with his present employment at the Crossroads Urban Center he receives $41,000.00 in annual compensation, as opposed to the $76,003.21 he received in annual compensation from Respondent. Thus, Complainant avers his differential pay between his former employment with Respondent and his current employment with Crossroads is $35,003.21. Complainant's Brief, p. 31.

In addition, Complainant requests an award of damages for **lost deferred compensation benefits totaling $11,085.50**, and **lost pension benefits totaling $83,803.50.**[103] In support of his request, Complainant avers that he is 53 years old at the time of the formal hearing in the present matter, but that he plans on working until age 65 (retiring in 2029). (Tr. 162). Consequently, Complainant asserts he would have continued receiving deferred 457 compensation contributions from Respondent totaling $11,085.50, and his pension benefits would have continued accruing for a total amount of $83,803.50.[104]

Similarly, Complainant seeks **$5,000.00 for consequential losses** suffered when he incurred a tax penalty for making a withdrawal from his 401K retirement plan to pay for legal fees in the instant case. Complainant also requests an award of **compensatory damages for no less than $10,000.00** commensurate with the distress he experienced following his termination of employment with Respondent. Complainant avers he worked for Respondent over 19 years, and felt depressed, powerless, demeaned, and grieved when he was unemployed for more than one year. Moreover, Complainant had financial concerns regarding his home and whether he should move in light of his being unemployed. (Tr. 164).

Complainant further requests an award of pre-judgment interest on his back wages and consequential losses. Complainant avers pre-judgment interest compensates a party for the "depreciating value of the amount owed over time, and as a corollary, deters parties from intentionally withholding an amount that is liquidated and owing." Trail Mountain Coal Co.

---

[103] As noted above, Complainant seeks three years of future wages pursuant to his differential pay of $35,003.21. However, Complainant's differential pay is based, in part, on his "annual compensation package" with Respondent (totaling $76,003.21), which includes Respondent's annual compensation for Complainant's 457 retirement contributions ($1,108.55 annually) and his pension funding ($8,380.35). On the other hand, Complainant also seeks damages for lost deferred compensation and lost pension benefits for twelve years. Nonetheless, the undersigned notes that awarding damages on the basis of Complainant's requests would result in duplicative recovery of 457 retirement contributions and pension benefits for a period of three years due to overlapping awards for 457 retirement contributions and pension benefits. Accordingly, the undersigned finds that Complainant is not entitled to front pay that includes 457 retirement contributions and pension benefits, along with twelve years of retirement contributions and pension benefits because it would result in a windfall for Complainant.

[104] Complainant avers that UTA provided him with pension benefits, which vested prior to his November 20, 2015 termination. (CX-64; Tr. 673). Furthermore, Complainant states the pension benefits are based on total years of service and the highest five years of earnings. (Tr. 673).

v. Utah Div. of State Lands & Forestry, 921 P.2d 1365, 1370 (Utah 1996). Furthermore, pre-judgment interest may be recovered where "the damage is complete, the amount of loss is fixed as of a particular time, and the loss is measurable by facts and figures." Saleh v. Farmers Ins. Exch., 2006 UT 20 at ¶28, 133 P.3d 428. Complainant notes that the interest begins to run from the date the damages are complete to the date of the final judgment. Kraatz v. Heritage Imports, 2003 UT App 201, ¶64, 71 P.3d 188. Consequently, Complainant seeks pre-judgment interest on his back wages and consequential losses at the applicable statutory rate. Complainant avers that Utah's "default" pre-judgment interest rate is equal to the statutory post-judgment interest rate, which in 2018, is 3.76 percent. See USA Power, LLC v. Pacificorp, 2016 UT 20, ¶109, 372 P.3d 629; see also Utah Code Ann. § 15-1-4. On this basis, Complainant states that upon prevailing in the instant case he will file an appropriate post-judgment motion for pre-judgment interest.

Initially, Respondent avers that it hereby withdraws its request for a ruling that future wages are not appropriate in this matter since Complainant could be reinstated. Although Respondent continues to assert future wages are still not appropriate in the instant case, Respondent avers that a productive and amicable working relationship with Complainant is impossible due to Respondent's belief that Complainant is not credible. Thus, to the extent Complainant does not seek an offer of reinstatement, Respondent does not oppose Complainant's request in this regard.

However, Respondent contends Complainant improperly relies upon his Total Compensation Statement to justify back pay based upon the assessed value of $76,003.21 regarding his compensation package, instead of his **annual salary of $54,760.46.** (JX-22; JX-24). Respondent argues Complainant has offered no evidence of any out-of-pocket expenses incurred as a result of his loss of various benefits provided by UTA. Rather, Respondent asserts Complainant did not provide any out-of-pocket medical expenses he had incurred since his termination, but Complainant seeks on an annual basis $4,536.36 for his loss of health insurance coverage and $334.56 for his loss of dental insurance. Respondent further asserts similar failures of proof exist for Complainant's UTA annual transit pass, totaling $2,376.00. As such, Respondent contends that awarding compensation for the aforementioned benefits would constitute a windfall for Complainant particularly because Complainant has failed to offer an offset for personal contributions that would have been

required of him to obtain the benefits. See (JX-24). Respondent argues Complainant's windfall is further exacerbated when considering Complainant has health insurance in his new employment. (Tr. 237). Respondent contends Complainant also improperly calculated damages for his "457 retirement contributions (401K)" and social security taxes, both of which Complainant paid in part, but he failed to offer a discount for his contribution in his damages calculations. Respondent also contends Complainant is not entitled to damages for emotional distress because he suffered no reputational harm or humiliation. Thus, at most, Respondent argues Complainant's damages should be based on his annual salary of $54,342.08, together with a pension benefit of $8,380.35.

Likewise, Respondent asserts Complainant seeks future wages for a three year period and the value of pension contributions for a period of ten years. However, Respondent notes the only support for his demands is Complainant's testimony that he planned to work for UTA until the age of 65. Respondent further notes Complainant failed to offer any evidence of work opportunities available, whether he could become re-employed with reasonable efforts, or how he proposes to discount a front pay award to net present value. See Whittington v. Nordam Group, Inc., 429 F.3d 986, 1000-01 (10th Cir. 2005). Respondent contends that Complainant's lack of evidence regarding his front pay calls for speculation, which is not permissible. See Cummings, supra at 66 (noting that for a front pay award to not be too speculative, the factfinder "must have sufficient evidence to conclude that [plaintiff] would be unable to find employment comparable to [employer's] until his estimated retirement date, and that the date specified was a plausible one."). On this basis, Respondent avers Complainant has failed to explain why he seeks one category of front pay for three years, while he seeks ten years for another (i.e., pension benefits), which demonstrates Complainant seeks speculative damages.

1. Reinstatement

As discussed above, the employee protection provision of the NTSSA provides that a wrongfully terminated employee shall be entitled to all relief necessary to make the employee whole. 6 U.S.C. § 1142(d)(1). Such relief **shall** include reinstatement with the "same seniority status that the employee would have had, but for the discrimination." 6 U.S.C. § 1142(d)(2)(A).

Here, Complainant averred a productive and amicable working relationship with Respondent is no longer possible with Mr. Chesnut, who continues to serve as UTA's Senior Manager of Integrated Service Planning, because Mr. Chesnut made several false allegations about Complainant in the present matter. Complainant further avers that reinstating his employment "would place him right under [Mr.] Chesnut's direct supervision, presenting a scenario ripe for frequent and imminent conflict," and therefore, a productive and amicable working relationship between Complainant and Mr. Chesnut is no longer possible or practical. Similarly, Respondent also avers a productive and agreeable working relationship with Complainant is impossible because Respondent believes Complainant is incredible. Consequently, Respondent does not oppose Complainant's request to forego reinstatement of his employment with UTA.

Notwithstanding Complainant's implicit waiver of reinstatement, the record is unclear as to whether reinstatement is a viable remedy. Although Complainant argues that an ongoing work relationship with Mr. Chesnut is ripe for conflict, reinstatement should not be denied merely because friction may continue to exist between Complainant and Mr. Chesnut, or any other UTA employees. See Hobby, supra, slip op. at 10-11. Respondent must first make a **bona fide** offer of reinstatement. Once Respondent makes an unconditional offer of reinstatement, and Complainant clearly and unequivocally declines such an offer, only then may other remedies, such as front pay, be appropriate. See Cook, supra slip op. at 3; Heinrich Motors, Inc., supra at 150; Dale, supra, slip op. at 5. Furthermore, the undersigned is unpersuaded by Respondent's argument that Complainant's credibility prevents a viable work relationship. The undersigned found Complainant's testimony to be on the whole, credible. Moreover, the record is devoid of any UTA employee, including Mr. Chesnut and Mr. Sibul, stating Complainant was not a dependable or trustworthy employee. Indeed, Mr. Chesnut testified Complainant was very thorough and very good at his job, and Mr. Sibul testified Complainant was always responsive, professional and organized, and Complainant was a dedicated employee who cared deeply about his job. Lastly, Respondent has not alleged that reinstatement is impossible because Complainant's former position is no longer available, that he is not qualified for available positions within UTA, or that UTA has restructured or no longer operating such that employment for Complainant is not possible.[105] See Hobby, supra, slip op. at 8-13.

[105] Respondent's organization chart dated January 12, 2016 (JX-4), demonstrates Complainant's former position in UTA's Planning Department was "vacant." In

Accordingly, the undersigned finds that because Complainant has been wrongfully terminated, reinstatement is the presumptive remedy. Therefore, the undersigned finds and concludes that Respondent must present a **bona fide** offer of reinstatement to Complainant, and only after Complainant clearly and unequivocally declines the **bona fide** offer of reinstatement, may front pay be appropriate.

2. Front Pay

Alternatively, if reinstatement is not appropriate due to a demonstrative "impossibility of a productive and amicable working relationship . . . or where reinstatement is not possible" front pay is a suitable alternative remedy. Hobby, supra, slip op. at 16-17; Michaud, supra slip op. at 6 (although front pay is not an enumerated form of relief, it is an appropriate remedy where reinstatement is impossible or impractical). "Front pay is the functional equivalent of reinstatement because it is a substitute remedy that affords the complainant the same benefit . . . as he or she would have received with reinstatement." Bryant v. Mendenhall Acquisition Corp., ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 9 (ARB June 30, 2005). In other words, front pay is intended to compensate the complainant for wages and benefits he would have received from the employer in the future, if not for the discrimination. See Dalal v. Alliant Techsystems, Inc., No. 94-1483, 1995 LEXIS 35559, at *7 (10th Cir. Dec. 18, 1995). Therefore, where reinstatement is not an appropriate remedy, whether due to adverse conditions with the employer, hostility of management or due to the new employment obtained by the complainant, "front pay is available as an alternative to compensate the plaintiff from the conclusion of trial through the point at which the plaintiff can either return to the employer or **obtain comparable employment elsewhere**." McNeill v. Crane Nuclear, Inc., 2001-ERA-003, slip op. at 42 (ALJ Oct. 4, 2001).

The Tenth Circuit Court of Appeals set forth numerous factors that are relevant in determining the proper amount of front pay, including: **1)** work life expectancy; **2)** salary and benefits at the time of termination; **3)** any potential increase in salary through regular promotions and cost of living adjustment; **4)** the reasonable availability of other work

---

addition, the record is devoid of any argument from Respondent that reinstatement is impossible because Complainant's position is no longer available.

opportunities; **5)** the period within which the plaintiff may become re-employed with reasonable efforts; and **6)** methods to discount any award to net present value. Whittington, supra at 1000-01; Davoll v. Webb, 194 F.3d 1116, 1144 (10th Cir. 1999); Bryant, supra, slip op. at 9-10 (when seeking front pay the complainant must provide information such as the amount of the proposed award, the length of time the complainant expects to work, and the applicable discount rate). In considering all the aforementioned factors in formulating a front-pay award, the court may consider all evidence presented at trial concerning the individualized circumstances of both the employee and employer, but a windfall must not be granted to the plaintiff. Whittington, supra at 1001 (quoting Mason v. Okla. Turnpike Auth., 115 F.3d 1442, 1458 (10th Cir. 1997). Finally, front pay awards, while often speculative, may not be unduly so, and the longer a proposed front pay period, the more speculative the damages become. Bryant, supra, slip op. at 10.

In the instant case, Complainant seeks three years of front pay in lieu of reinstatement, totaling $105,009.63.[106] However, Complainant offers no other explanation as to why he seeks three years of front pay, given that he has not received a **bona fide** offer of reinstatement from Respondent nor has he declined an offer of reinstatement. See Complainant's Brief, p. 31. In addition, Complainant testified, at the time of the formal hearing, he was 53 years old and he planned to work for UTA until age 65, but he did not provide any information regarding any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities besides his current position with Crossroads Urban Center, or the methods to discount any award to net present value. Assuming **arguendo**, Respondent makes a **bona fide** offer of reinstatement and Complainant clearly declines such an offer, the undersigned finds that one year of front pay is appropriate in light of the limited information provided by Complainant, as any award beyond one year is subject to too much speculation. See Whittington, supra at 1000-01; Bryant, supra slip op. at 9-10. Further, although Complainant has obtained employment with Crossroads Urban Center, arguably he is earning less compensation than while employed by Respondent. Consequently, the undersigned finds one year of front pay would

[106] Complainant claims that as of August 2015, his total annual compensation with Respondent was $76,003.21, but that he currently makes $41,000.00 with his current employer, Crossroads Urban Center. (JX-24; JX-37, p. 13, Stipulated Fact No. 54). Consequently, Complainant seeks three years of front pay according to his differential pay at a rate of $35,003.21 per year ($76,003.21 - $41,000.00 = $35,003.21 x 3 years = $105,009.63).

allow Complainant sufficient time to obtain comparable employment elsewhere. See McNeill, supra, slip op. at 42.

Complainant based his front pay on his total annual compensation with UTA in the amount of $76,003.21, which includes: 1) gross wages and paid time off ($54,760.46); 2) an annual transit pass ($2,376.00); 3) a gift certificate ($216.57); 4) 457 retirement (401K) contributions ($1,108.55); 5) pension funding ($8,380.35); 6) health insurance & welfare benefit contributions ($4,972.01); and 7) Social Security and Medicare Taxes Paid ($4,189.27). See (JX-24). Nevertheless, as will be discussed below, Complainant is also seeking 12 years of pension benefits, as well as 457 retirement contributions. Moreover, Complainant testified Crossroads, his new employer, contributes to his health insurance coverage, but they do not provide dental insurance benefits. (Tr. 161).

Respondent contributed $4,972.01 to Complainant's health care coverage, which included $4,536.36 for medical care coverage, $334.56 for dental coverage, $35.88 for the "employee assistance program" coverage, and $65.21 for basic employee life insurance. See (JX-24). However, Complainant did not provide any specific information regarding Crossroads' contribution to his health care coverage costs. Thus, while Complainant may be entitled to the difference in what Respondent paid for his health care coverage and what Crossroads is currently paying, the record evidence is devoid of such information. See Jackson, supra at *17, 20. Conversely, Complainant testified he does not receive dental health insurance from Crossroads, thus I find Complainant is entitled to an award of $334.56 for dental insurance. Finally, Complainant did not offer any testimony or documentary evidence as to whether Crossroads contributes to life insurance costs and "employee assistance program" coverage. Therefore, the undersigned finds Complainant is not entitled to an award of the same. In the same way, I find Complainant is not entitled to a front pay award for his 457 retirement contributions and his pension benefits because he is also seeking 12 years of contributions and benefits, which results in a duplicative award of damages.[107] Accordingly, Complainant's front pay will be based on his differential wages earned with Respondent and Crossroads Urban Center, annual UTA transit pass, annual gift certificate, Complainant's dental coverage costs, and Social Security and Medicare taxes.

[107] See supra, note 103.

Thus, for the purpose of calculating front pay, I find Complainant received compensation from Respondent totaling $61,876.86 ($54,760.46 (wages); $2,376.00 (transit pass); $216.57 (gift certificate); $334.56 (dental health coverage); $4,189.27 (Social Security and Medicare taxes) = $61,876.86). Furthermore, I find Complainant's gross wages at Crossroads total $44,416.58.[108] Consequently, I find and conclude that if Complainant declines Respondent's **bona fide** offer of reinstatement he would be entitled to one year of front pay totaling $17,460.28 ($61,876.86 - $44,416.58 = $17,460.28).

3. Back Pay

As discussed above, the employer's liability for back pay begins when the complainant is wrongfully discharged, and ends when the complainant is reinstated or declines the employer's **bona fide**, unconditional offer of reinstatement. Michaud, supra, slip op. at 5-6; Palmer v. Triple R. Trucking, supra, slip op. at 4. Back pay should not just reflect lost earnings, but may include interest, overtime, shift differentials, as well as fringe benefits such as vacation pay, sick pay, pension benefits and other items the complainant would have received if he was not wrongfully terminated. Hobby, supra, slip op. at 34. However, other benefits such as lost health insurance benefits may only be recovered for **actual and direct expenses** resulting from the loss of a health care plan, as well as out of pocket expenses for medical care. Jackson, supra at *17, 20 (noting whistleblower back pay awards are calculated to ensure the complainant is "restored to the economic position he would have occupied but for [respondent's] discriminatory act," and that the "make whole" remedy is limited to "reimbursement for costs incurred as a result of the loss of benefits.").

In the present matter, Complainant identifies the time periods he should receive back pay compensation as: 1) **October 26, 2015 through October 30, 2015** (JX-23, p. 23, showing Complainant did not receive compensation for work performed, but instead was paid entirely with vacation funds); 2) **from November 20, 2015 through December 12, 2016**, the time period Complainant was unemployed; and 3) Complainant seeks his differential wage from **December 12, 2016 through September 20, 2017**, the date he

[108] Complainant testified that his gross earnings with Crossroads Urban Centered totaled $41,000.00. However, upon reviewing Complainant's earning records, it demonstrates Complainant received gross wages from Crossroads every two weeks totaling $1,708.33. (CX-69, pp. 1-2). Accordingly, the undersigned finds and concludes Complainant's gross annual earnings with Crossroads are $44,416.58 ($1,708.33 x 26 pay periods = $44,416.58).

began working for his new employer Crossroads Urban Center to the date of formal hearing in the instant case, September 20, 2017, respectively. Based on the foregoing time periods, Complainant seeks **$96,488.55** in back wages (applying an offset for his unemployment benefits totaling $12,896.00).[109]

As noted above, Complainant's total annual compensation while working for Respondent included: 1) gross wages and paid time off ($54,760.46); 2) an annual transit pass ($2,376.00); 3) a gift certificate ($216.57); 4) 457 retirement (401K) contributions ($1,108.55); 5) pension funding ($8,380.35); 6) health insurance & welfare benefit contributions ($4,972.01); and 7) Social Security and Medicare Taxes Paid ($4,189.27). In order to make Complainant whole, the undersigned finds that in addition to his annual wages, Complainant is also entitled to other fringe benefits in his award of back pay. Specifically, the undersigned finds that Complainant is entitled to the costs for his annual gross wages, annual transit pass, annual gift certificate, and Social Security and Medicare taxes.[110] Hobby, supra, slip op. at 34. I also find that Complainant is entitled to recover the entirety of his health insurance and welfare benefits costs in the amount of $4,972.01 only for the period of **November 20, 2015 until December 12, 2016**, while Complainant was unemployed. On the other hand, I find Claimant is not entitled to recover the entirety of his health insurance and welfare benefits costs after he became employed by Crossroads because he did not provide any evidence of **actual and direct expenses** resulting from the loss of a health care plan, as well as out of pocket expenses for medical care. Jackson, supra at *17, 20. As discussed above, Complainant did not provide any information about the health care coverage he receives from Crossroads, except his testimony that he receives such coverage from Crossroads, but he does not receive dental health care coverage. (Tr. 161). Accordingly, with respect to health care coverage costs, the undersigned finds Complainant is entitled to recover the entirety of his health insurance and welfare benefits ($4,972.01) during the period of his unemployment from November 20, 2015 until December 12, 2016, and from December 12, 2016 through September 20, 2017, Complainant is only entitled to costs for lost dental health care coverage totaling $334.56.

---

[109] Complainant did not provide a specific account of his calculation of $96,488.55 in back wages, and whether this sum includes benefits other than his annual gross wages. See Complainant's Brief, pp. 30-31.

[110] The undersigned also finds Complainant is entitled to an award for his lost 457 retirement contributions and pension benefits. However, the undersigned will address Complainant's award for lost retirement and pension benefits in the "Special Damages" section that follows.

Complainant averred he is entitled to back pay for two time periods including:[111]

a. November 20, 2015 until December 12, 2016. (276 Weekdays)

b. December 12, 2016 through September 20, 2017.[112] (202 Weekdays)

Given the foregoing, the undersigned finds Complainant's annual back pay for the period of November 20, 2015 until December 12, 2016, calculates to $66,514.31 (gross wages and benefits, including all health insurance and welfare benefits while employed by Respondent), and his wage per day based on his annual back pay calculates to $255.82 ($66,514.31 ÷ 260 Weekdays = $255.82). Consequently, I find Complainant's back pay for the period of November 20, 2015 until December 12, 2016 is $70,606.32 (276 Weekdays x $255.82 = $70,606.32).

With respect to Complainant's annual back pay for the period of December 12, 2016 through September 20, 2017, the undersigned calculated Complainant's back pay with Respondent to be $61,876.86 (gross wages and benefits, including only dental health care benefits while employed by Respondent). However, for the time period of December 12, 2016 through September 20, 2017, Complainant is seeking the differential pay of $35,003.21. Nonetheless, as discussed above, the undersigned finds that for purposes of calculating back pay, Complainant's proper gross wages with UTA is $61,876.86, and as a result, Complainant's annual differential pay is $17,460.28 ($61,876.86 - $44,416.58[113] = $17,460.28). Consequently, the undersigned finds Complainant's wage per day on the basis of his annual differential pay is $67.15 ($17,460.28 ÷ 260 Weekdays = $67.15/per weekday). Thus, applying Complainant's differential pay for the period of December 12, 2016 through September 20, 2017 is $13,564.30 (202

---

[111] Complainant also seeks back pay for the period of October 26, 2015 through October 30, 2015, on the basis that he did not receive pay for work performed, but instead he was paid entirely with vacation funds. See (JX-23, p. 23). However, Complainant testified he did not complete any time sheet for the first week of his vacation. (Tr. 187). Accordingly, because no time sheet was completed for the time period of October 26, 2015 through October 30, 2015, the undersigned will not award additional back pay for this period of time.

[112] Complainant is only seeking his differential wages for the time period of December 12, 2016 through September 20, 2017, based on the difference between his UTA annual compensation of $76,003.21, and his annual wages at Crossroads Urban Center of $41,000.00, in the amount of $35,003.21. See Complainant's Brief, p. 31.

[113] See supra, note 108.

Weekdays x $67.15 = $13,564.30). Therefore, Complainant is entitled to back pay totaling $84,170.62 ($70,606.32 + $13,564.30 = $84,170.62). However, Complainant also earned unemployment benefits during this time period totaling $12,896.00, which he concedes is an offset to his earnings. Accordingly, the undersigned finds and concludes that Complainant is entitled to $71,274.62 in back pay ($84,170.62 - $12,896.00 = $71,274.62). The undersigned further finds that because Respondent has not offered Complainant a **bona fide** offer of reinstatement, Complainant is entitled to a wage of $67.15 per weekday until Complainant is reinstated or declines Respondent's **bona fide**, unconditional offer of reinstatement. Michaud, supra, slip op. at 5-6; Palmer v. Triple R. Trucking, supra slip op. at 4.

4. **Special Damages**

Pursuant to 6 U.S.C. §§ 1142(d)(1), (2)(C), the complainant who is wrongfully terminated may not only obtain compensatory damages, but may also obtain special damages sustained as a result of the respondent's discrimination, and thus shall be entitled to all relief necessary to make complainant "whole." See Jackson, supra at *19-20 (affirming an award of 401K contributions to complainant because he was not eligible to participate in his new employer's 401K until a later date); see Blum v. Witco Chemical Corp., 829 F.2d 367, 376 (3d Cir. 1987)(the Court held it was not unreasonably speculative to award future pension benefits to plaintiffs wrongfully terminated who were all within eight years of normal retirement age (65 years old) when they were terminated); see also Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 923 (6th Cir. 1984)(award of front pay to 41-year old until normal retirement age might be unwarranted while failure to make such an award to a 63-year old might be abuse of discretion).

In the instant case, Complainant avers he was 53 years old at the time of the formal hearing in this matter, and he planned to work for UTA until age 65, in 2029. (Tr. 162). Thus, Complainant avers that if he remained employed by UTA he would have received twelve years of deferred 457 retirement compensation contributions (401K) in the amount of $11,085.50, and pension benefits in the amount of $83,803.50.[114] Complainant

[114] Complainant avers that he would have worked another **12 years** for UTA, however, he seeks an additional **ten years** of 457 retirement compensation contributions ($1,108.55 x 10 years = $11,085.50) and **ten years** of pension funding ($8,380.35 x 10 years = $83,803.50). Complainant did not offer any other accounting regarding his 401K or pension benefits, and to what extent

also seeks an award of $5,000.00 of consequential losses based on the tax penalty he incurred for making a withdrawal on March 31, 2017, from his 401K retirement plan to assist in paying for his legal fees in the present matter. See (CX-66).

Complainant testified his new employer, Crossroads Urban Center, does not provide 401K or any other deferred compensation contributions such as pension benefits. (Tr. 161). Complainant also testified he received annual 401K retirement contributions from UTA in the amount of $1,108.55. (Tr. 153). With respect to Complainant's pension benefits, Ms. Glenn testified Respondent annually contributed $8,380.35 to Complainant's "pension fund." Ms. Glenn explained that Complainant's pension was a percentage of Complainant's total wages and current pension funding levels. (Tr. 622). Further, Ms. Glenn explained that a UTA employee's pension benefits are based upon years of service, age, and the employee's highest five year earnings at the time of retirement. Ms. Glenn confirmed that if Complainant continued working for Respondent beyond November 2015, his UTA pension benefits would have continued accruing and increasing in value. (Tr. 673).

Based on the foregoing, if Complainant declines Respondent's **bona fide** offer of reinstatement, the undersigned finds that Complainant would be entitled to an award for his 457 retirement compensation contributions (401K) in the amount of $1,108.55, for each year from the date of his termination until the age of sixty-five. Similarly, the undersigned finds Complainant would be entitled to an award for his pension benefits in the amount of $8,380.35, for each year from the date of his termination until the age of sixty-five. See 6 U.S.C. §§ 1142(d)(1), (2)(C); see also Blum, supra at 376. On the other hand, irrespective of his acceptance or rejection of Respondent's offer of reinstatement, I find and conclude Complainant is entitled to an award of $5,000.00 for the tax penalty he incurred for making a withdrawal on March 31, 2017, from his 401K retirement plan to assist in paying for his legal fees in the present matter. See 6 U.S.C. § 1142(d)(1).

5. Compensatory Damages

Complainant contends he is entitled to compensatory damages due to emotional distress for no less than $10,000.00 because of

---

any potential increases in his salary with UTA, but for his wrongful termination, may have affected increases in 401K contributions and/or pension funding.

the stress he experienced after losing his employment with UTA after almost 20 years of service.

As stated above, the NTSSA provides for compensatory damages as a result of the discrimination action. See 6 U.S.C. § 1142(d)(2). Compensatory damages include damages for emotional distress. Baratti v. Metro-North R.R. Commuter R.R. Co., 939 F. Supp. 2d 143, 152 (D. Conn. 2013). The complainant must prove compensatory damages by a preponderance of the evidence. Ferguson v. New Prime, Inc., ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011); Gutierrez v. Univ. of Cal., ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 9 (ARB Nov. 13, 2002); see Harte v. Metro. Transp. Auth. N.Y. Transit Auth. & Ruggiero, ALJ No. 2015-NTS-00002, slip op. at 34-35 (Sept. 27, 2016). "Awards generally require that a plaintiff demonstrate both (1) **objective manifestation of distress**, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) **a causal connection between the violation and the distress**." Martin v. Dep't of the Army, ARB No. 96-131, ALJ No. 1993-SWD-001, slip op. at 17 (ARB July 30, 1999); Creekmore, supra, slip op. at 24-25 (compensatory damages were awarded based upon complainant's testimony concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts). The complainant's credible testimony alone is sufficient to establish emotional distress. Martin, supra, slip op. at 17; see Jackson, supra at *22-23 (the Board approved compensatory damages ($40,000.00) for emotional distress based upon the complainant's testimony, despite his testimony not being supported by medical evidence or testimony from a professional counselor); see also Simon v. Sancken Trucking Co., ARB Nos. 06-039, 06-088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007). An award is "warranted only when a sufficient **causal connection** exists between the statutory violation and the alleged injury." Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 938 (5th Cir. 1996).

Here, Complainant states that when he lost his employment with UTA after almost 20 years of service he felt depressed, powerless, demeaned, and he went through stages of mourning. (Tr. 164). Following his termination, Complainant sought work for more than one year, which Complainant stated took its toll on him and he was unsettled about his future. Complainant testified his stress and depression were compounded by the financial impact of losing his job (i.e., whether he could afford to stay in his home), going through the State of Utah Department of Workforce Services unemployment process, and the

process of the current litigation. When asked whether he was concerned about his future, Complainant stated "absolutely." (Tr. 164). Complainant stated the following:

> I had to start making decisions financially about my home and about, you know, do I need to move. And then, you know, going through the DWS process, going through the OSHA process, so it's just, you know, it was a constant burden, you know, to have to go through.

(Tr. 164).

Respondent argues that Complainant is not entitled to compensatory damages for emotional distress because the record shows he suffered no harm or humiliation, rather he touted his whistleblower complaint on social media after his termination. See (RX-99; Tr. 199).

Given the foregoing, I find that Complainant is entitled to compensatory damages for emotional distress. Complainant credibly testified he was depressed, demeaned, and he felt powerless after being terminated from his employment with UTA, which the undersigned finds is sufficient to demonstrate emotional distress. See Martin, supra, slip op. at 17; Creekmore, supra, slip op. at 24-25. Accordingly, I find and conclude Complainant has carried his burden so far as the causal connection between Respondent's violation and his resultant emotional distress because he provided sufficient testimonial evidence linking his emotional distress to the Respondent's adverse actions. Therefore, I find and conclude that Complainant has demonstrated, by a preponderance of the evidence, a causal connection between Respondent's violation and his distress. As such, I find and conclude that Complainant is entitled to compensatory damages due to emotional distress in the amount of $10,000.00. See Jackson, supra at *22-23.

H. Interest on Back Pay

I find and conclude Complainant is entitled to pre-judgment interest on back pay wages recovered in litigation in accordance with 29 C.F.R. § 20.58(a), at the rate specified by the Internal Revenue Code, 26 U.S.C. § 6621. Respondent is not to be relieved of interest on a back pay award because of the time elapsed during adjudication of Complainant's complaint. Kalkunte v. DVI Financial Servs., Inc. & AP Servs., LLC, ALJ No. 2004-SOX-056, slip op. at 58 (ALJ July 18, 2005); see Jackson, supra at *23 (pre-judgment interest on the award of damages must

be calculated in accordance with the IRS penalty rate pursuant to 26 U.S.C. § 6621); see also Hobby, supra, slip op. at 40 (implementing 26 U.S.C. § 6621 to an award for pre-judgment interest on back pay).[115]

I. Attorney's Fees & Litigation Costs

Having prevailed on his claim, Complainant is entitled to reasonable attorney's fees. See 6 U.S.C. § 1142(d)(2)(C). Complainant asserts Respondent incorrectly contends that he may not recover attorney's fees because his Objection to the Secretary's Findings omitted a request for the same. See (ALJX-2). Complainant argues that a simple omission of fees in an objection is not a jurisdictional or procedural bar to recovery of attorney's fees as an objection to the Secretary's findings is not a pleading. Rather, under the plain language of 29 C.F.R. § 1982.106, the sole purpose of the objection is to seek judicial review of the Secretary's findings. Therefore, Complainant contends that UTA has not been prejudiced by Complainant's omission of a reference to attorney's fees in his Objection. Complainant avers he clearly requested attorney's fees in his Complaint, and Respondent received fair notice that Complainant seeks recovery of his attorney's fees. See (ALJX-4).

For the reasons set forth by Complainant, the undersigned finds and concludes that Complainant's failure to request attorney's fees in his Objection to the Secretary's Findings does not prohibit his recovery of the same. Accordingly, I find Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 6 U.S.C. § 1142(d)(2)(C); 29 C.F.R. § 1982.109(d)(1); Gordon v. Brindi Trailer Sales & Serv., Inc., ALJ No. 2016-STA-00019 (June 13, 2017); Harte, supra, slip op. at 37. Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted thirty (30) days from the date of this Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

[115] Pursuant to 26 U.S.C. § 6621, a determination of the rate for pre-judgment interest on an award of damages is set forth in tables located at https://www.irs.gov/pub/irs-drop/rr-17-06.pdf.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I find and conclude Respondent unlawfully discriminated against Mr. Clara because of his protected activity and, accordingly, Mr. Clara's complaint is hereby **GRANTED.**

IT IS HEREBY ORDERED that:

1. Respondent shall immediately proffer to Complainant a **bona fide** and unconditional offer of reinstatement to his former position with full seniority and benefits.

2. Respondent shall make Complainant whole and pay Complainant back pay in the amount of $71,274.62 for the time periods of November 20, 2015 through December 12, 2016, and from December 12, 2016 through September 20, 2017. In addition, Respondent shall pay Complainant back pay at the rate of $67.15 per weekday from September 21, 2017, to present and continuing, until Complainant is reinstated to his former position with full seniority benefits, or until Complainant provides an unequivocal rejection of Respondent's offer to reinstate his employment. Pre-judgment interest on back pay must also be paid by Respondent from the date such wages were lost until the date of payment in accordance with 26 U.S.C. § 6621.

3. Respondent shall pay Complainant one year of front pay in the amount of $17,460.28, if, and only if, Complainant declines Respondent's **bona fide** offer of reinstatement.

4. Respondent shall pay to Complainant compensatory damages in the amount of $10,000.00.

5. If and only if Complainant declines Respondent's unequivocal offer of reinstatement, Respondent shall pay Complainant 457 retirement compensation contributions (401K) in the amount of $1,108.55 for each year from the date of his termination until the age of sixty-five, and $8,380.35 in pension benefits for each year from the date of his termination until the age of sixty-five.

6. Respondent shall pay Complainant special damages in the amount of $5,000.00.

7. Respondent shall pay Complainant's litigation costs and reasonable attorney's fees. Counsel for Complainant shall file a fully supported and verified application for fees, costs and expenses within thirty (30) days from the date of the instant Decision and Order. Respondent shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

ORDERED this 13th day of August, 2018, at Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge

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

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, the Associate Solicitor, 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).

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).