

U.S. Department of Labor

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Issue Date: 20 July 2009

Case Nos: 2008-STA-00019
2008-STA-00024

In the Matter of

PERETTE L. SHEPPARD,
Complainant,

v.

DEL-JEN, INC.,¹
Respondent.

APPEARANCES:

Cecile M. Scoon, Esquire
For the complainant

Helen A. Palladeno, Esquire
For the respondent

BEFORE: DONALD W. MOSSER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises from a claim under the Surface Transportation Assistance Act (STAA or the Act), 49 U.S.C. § 31101, *et. seq.*,² and the implementing regulations found at 29 C.F.R. Part 1978. Section 405 of the Act provides protection to covered employees who report violations of commercial motor vehicle safety rules or refuse to operate vehicles in violation of those rules from retaliatory acts of discharge, discipline, or discrimination.

¹ The United States Air Force 95th Fighter Squadron was also named a party to this case. However, in an Order dated April 7, 2008, I determined that the Air Force was not an employer of complainant and granted the Air Force's Motion to Dismiss. (Tr. 5; ALJX 9).

² Ms. Sheppard filed her complaint on April 9, 2007. Therefore, the 2007 amendments to the Act are not applicable in this case.

Complainant, Perette L. Sheppard, filed a complaint with the Occupational Safety Health Administration (OSHA) on April 9, 2007, alleging that Del-Jen, Inc. (Del-Jen or employer) transferred her in reprisal for reporting safety concerns, in violation of Section 31105 of the Act. (JX 2). She subsequently added allegations that she was disciplined and terminated by Del-Jen in retaliation for her involvement in the complaint to OSHA.³ (ALJX 1; RX 9). The Secretary of Labor, acting through her duly authorized agents, investigated the complaints and determined that there was no reasonable cause to believe that Del-Jen violated the Act. The Secretary's findings were issued on November 22 and December 7, 2007. (ALJX 1, 3).

On December 12, 2007 and January 4, 2008, complainant mailed her appeals opposing the Secretary's findings. (ALJX 2, 4; JX 6). I conducted a formal hearing in Panama City, Florida on October 29 and 30, 2008, at which time the parties were afforded the opportunity to present documentary and testimonial evidence on all of the issues.⁴ The parties waived the statutory time constraints and the record remained open following the hearing for the filing of post-hearing briefs.

ISSUE

Whether Del-Jen violated the STAA, Section 31105(a)(1)(A), by retaliating against the complainant for making a safety complaint.

FINDINGS OF FACT

Employer, Del-Jen, Inc., is a services contractor that provides support services to the United States government. One of its contracts is with the Air Force at the Tyndall Air Force Base (Tyndall) in Panama City, Florida. (Tr. 7, 15). This contract requires Del-Jen to provide logistic support, transportation, fuel and supply services to the base. (Tr. 7-8; JX 5 at 25).

The complainant, Perette L. Sheppard, was employed in Del-Jen's transportation division as a vehicle operator. (Tr. 25, 305). Complainant was also appointed a Flight Line Trainer. (Tr. 178-79; JX 20). She began working for Del-Jen's predecessor, Trend Western, in 1997 and her employment was renewed when Del-Jen took over the contract. (Tr. 305). As a vehicle operator, complainant's primary responsibility was to drive a shuttle bus that transported pilots between their squadron operations building and their aircraft located on the flight line. (Tr. 305; JX 19). As part of her employment, Ms. Sheppard acknowledged that she received and would adhere to the Del-Jen policies, procedures and safety practices as contained in the Employee Handbook. (JX 5 at 188-89, 238-40; JX 17b, 19).

³ The initial complaint, case number 2008-STA-00024, was made after complainant was transferred from her position as a shuttle driver. (ALJX 3). She then added allegations of retaliation, case number 2008-STA-00019, after she was subsequently disciplined and terminated for violating company policies. (ALJX 1).

⁴ References in this decision to JX refer to the joint exhibits submitted by the parties. References to ALJX, CX and RX pertain to the exhibits of the administrative law judge, complainant, and respondent, respectively. The hearing transcript is cited as Tr. and by page number.

The International Association of Machinists and Aerospace Workers Union is the bargaining unit that represents the Del-Jen employees. (Tr. 106-07; JX 8). Under the collective bargaining agreement, employer may discipline or discharge a covered employee for just cause. Accordingly, employer has implemented a progressive discipline program. Employees who violate company policies are administered a letter of counseling/caution/warning for the first offense, and a written warning for a second violation. Termination will occur upon the third violation provided the violation occurs within one year of the first. (JX 8, 17c).

Del-Jen's division manager is responsible for investigating alleged violations of company policy. (JX 17c). In doing so, the division manager obtains written statements from witnesses, which are believed to be truthful, and determines if discipline is warranted. (JX 5 at 74). He then discusses the proposed discipline with the project manager. If the project manager decides that the discipline is appropriate, he notifies corporate human resources for final approval. (Tr. 107-09, 220). After the discipline is administered, the employee has the opportunity to challenge it under the bargaining agreement through a four step grievance process by presenting exculpatory evidence. (Tr. 109; JX 5 at 62-63, 74; JX 8). The project manager has the authority to remove the disciplinary action, if the employee's evidence proves it was not justified. (Tr. 97-98, 109-10, 469).

The Air Force contract mandates Del-Jen to provide superior customer service and allows the Air Force to rate the company each year and conduct quarterly progress meetings regarding employer's performance. (Tr. 11, 15-16, 18). Employer stresses that customer service is of the utmost importance. John Wyatt, Del-Jen project manager at Tyndall, has an internal quality assurance program in order to provide excellent customer service. Customer Service Feedback/Evaluation Forms are accessible to the Air Force personnel and delivered directly to Mr. Wyatt. When an evaluation with a rating of satisfactory or less is received, the project manager takes immediate action to correct the problem, because continuous negative customer evaluations can negatively impact the annual contract performance review. (Tr. 18-21, 41-42).

Del-Jen regards safety as its number one priority. The project manager devotes the beginning of each weekly staff meeting to a safety topic which is then forwarded to the employees in weekly briefings. (Tr. 21-22; JX 5 at 28-29, 81, 146, 178-79). The Employee Handbook includes provisions regarding health and safety to assure employee compliance with Del-Jen's safety practices. It provides in pertinent part:

The health and safety of employees...are of the utmost concern. It is therefore the policy of Del-Jen to strive constantly for the highest possible level of safety in all activities and operations....Unsafe work conditions in any work area that might result in an accident should be reported immediately to a supervisor. Del-Jen safety policy and practices will be strictly enforced, including possible termination of employees found to be willfully negligent in the safe performance of their jobs.

(JX 17a). With specific regard to the shuttle buses, the employer's safety program requires passengers to remain seated while the shuttle bus is in motion. It is the drivers' responsibility to convey this safety procedure to their passengers. (Tr. 23).

Ms. Sheppard was a shuttle driver for the 43rd Fighter Squadron from January through March of 2007. (Tr. 305). She rotated to a position as shuttle driver for the 95th Fighter Squadron on March 5, 2007. (Tr. 306). During her first few weeks as a driver for the 95th Fighter Squadron, complainant had several issues arise with the pilots. Specifically, some of the pilots were standing while the vehicle was in motion. (Tr. 307-08, 352). Complainant also began picking up the pilots on the side of the squadron operations building, because the area in front of the building had “no parking” signs posted. (Tr. 312, 355).

Complainant reported these problems through her chain of command: the vehicle operations chief, the transportation division manager, and the project manager. Her supervisors instructed her not to move the shuttle bus until the pilots were seated and not to park in “no parking” areas. (Tr. 26, 30, 308-09, 312-13, 352-54). Additionally, the project manager immediately contacted the Air Force and relayed the safety concerns. He asked that the Air Force reconcile the problem with the 95th squadron’s commander. Signs were also installed on each shuttle bus reminding passengers to remain seated for their safety while the bus was in motion, and the drivers were instructed to enforce the company’s safety practices. (Tr. 26, 165-66; JX 2). The supervisors asked the complainant to keep them apprised of the situation with the pilots. (Tr. 353).

On March 22, 2007, complainant was involved in a verbal disagreement with a major of the 95th Fighter Squadron regarding the new pick-up location. Ms. Sheppard told the major, “sir, if you have a complaint you can call my boss at [phone number]...” The major perceived her to be defensive and stated he would file a complaint with her employer. (Tr. 49, 400; JX 1). That same day, the major completed a Customer Service Feedback/Evaluation wherein he rated the transportation as “unsatisfactory.” He indicated that the “driver was rude when asked why [she would not pick-up at the normal location].” (JX 7a).

Complainant notified the vehicle operations chief and the transportation division manager of the confrontation with the major and again expressed her safety concerns. (Tr. 164-65, 312-14; JX 1). In her March 23, 2007 statement, Ms. Sheppard reported that some of the pilots were standing while she was driving the shuttle bus, using profanity, and harassing her for parking in a different location. (JX 1). The transportation division manager forwarded complainant’s letter to the Air Force with a cover letter that called attention to Ms. Sheppard’s concerns regarding safe vehicle operation and the pilots’ unprofessional behavior. (Tr. 167-68, 315; JX 3). The cover letter also reiterated Del-Jen’s commitment to customer service and safety and pointed out the new signs on the shuttle buses. The transportation division manager also asked the Air Force to resolve the matter promptly. (JX 3).

The employer received two additional complaints from two of the commanders of the 95th Fighter Squadron. The first complaint submitted on March 26, rated the complainant’s service as “marginal” and cited specific examples of her poor service in providing transportation to the pilots. The second complaint dated March 28 rated the transportation as “unsatisfactory” alleging the complainant was not available to transport pilots to their planes. (JX 7a).

The project manager and transportation division manager met with the commander of the 95th Fighter Squadron, and the major who filed the initial complaint about Ms. Sheppard. (Tr. 42, 168). At the April 3, 2007 meeting, they discussed the safety concerns raised by the complainant. The commander agreed the passengers should be seated and stated the problem was being addressed in his unit. (Tr. 43, 45-49, 168; JX 10). The commander also stated that many of the flying wing's operations commanders were dissatisfied with the complainant's performance and unprofessional conduct and requested that she be removed from shuttle service. (Tr. 43, 169). He specifically indicated that her general attitude was negative, she was rude, she had to be "run down" when she was needed, and she did not drop the pilots off in the proper place or in a timely manner. (Tr. 44-45; JX 10). The project manager requested that the commander's concerns be put into writing; however, he agreed to reassign complainant from her shuttle driving duties for the 95th Fighter Squadron. (Tr. 50-52, 100, 117-18, 170; JX 10).

On April 11 and 12, 2007, the Air Force commander submitted two formal letters of complaint regarding Ms. Sheppard. In his April 12 letter, he summarized the aforementioned meeting and reiterated the reasons why the 95th Fighter Squadron did not want complainant as its shuttle driver. The commander specifically stated that "any attempt to discuss [complainant's] performance ends up in a confrontation" and that "[complainant's] professional demeanor and lack of enthusiasm simply do not fit into [their] operation. She is hard to talk with and is often rude." He indicated that her level of performance was unsatisfactory and requested that a former driver be reassigned to drive their shuttle. (JX 11, 31).

The Air Force was unhappy with the complainant and was putting pressure on Del-Jen to resolve their problems with her. The project manager and transportation division manager therefore decided to transfer the complainant out of the 95th Fighter Squadron shuttle service. They deemed a transfer to be in the best interest of all the parties involved, so as to alleviate the complaints from the squadron and the harassment to which the complainant was exposed. (Tr. 51-52, 117-18, 174-76).

The supervisors informed Ms. Sheppard that she was being temporarily transferred from her position as a shuttle driver for the 95th Fighter Squadron out of concern for her safety. (Tr. 176, 257, 316; JX 2). The transportation division manager suggested that the complainant drive the shuttle for the 43rd or 2nd Fighter Squadrons. However, Ms. Sheppard was concerned that such a transfer would cause animosity between her and the other shuttle bus drivers. (Tr. 248-49, 253, 317-18, 361; JX 2). She also indicated that the problems with the pilots would not cease. (Tr. 253, 317, 320; JX 2). The project manager therefore offered Ms. Sheppard any position in vehicle operations, other than the manager position. (Tr. 319-20, 363; JX 2). Complainant was temporarily assigned to the yard, performing taxi duties as well as cleaning and checking vehicles, until the project manager reached a final decision. (Tr. 320-21; JX 2).

Ms. Sheppard requested a meeting with the project manager on April 3, 2007 to inquire about his decision regarding the transfer. (Tr. 322). The meeting took place the following day with the complainant, the project manager, and union officials. (Tr. 323). They discussed her concerns regarding the pilots and her reassignment to the vehicle operations taxi service. (Tr. 50, 100, 323; JX 2, 7b). The project manager explained to the complainant that the 95th Fighter Squadron did not want her as their driver. He reiterated that her transfer was for her safety, to

protect her from future complaints by the pilots, and that it was in her best interest to be reassigned. (Tr. 257, 323, 397; JX 2, 7b). He stressed that she acted properly in bringing her safety concerns to his attention and indicated that the Air Force had taken action to resolve the safety issues. The project manager also assured complainant that she would not suffer a loss of pay or change in her scheduled shift through the transfer to the taxi service until the next assignment bidding cycle in September 2007. (Tr. 51, 54, 101, 207, 323-24; JX 7b). Complainant later clarified with the project manager that she could bid on a shuttle driving position during the next bidding cycle, and he reduced this agreement to writing. (Tr. 116-17, 247, 357-59; JX 7d). Although the complainant preferred to remain a shuttle driver, she admits that she was satisfied with the temporary reassignment. (Tr. 55, 363).

Ms. Sheppard filed a complaint with OSHA on April 9, 2007. (Tr. 337-38; JX 2). She detailed in this complaint the events of March of 2007, including instances where some of the pilots were standing while the shuttle bus was in motion. She also included a synopsis of the meetings with her supervisors and the services that other shuttle bus drivers provided to the pilots. Complainant alleged that she was unjustly transferred, only after bringing her safety concerns to her supervisors' attention, based on "unfounded and invalidated comments" in the evaluation forms submitted by the 95th Fighter Squadron. The complainant also acknowledged that her supervisors conveyed several times that she had done nothing wrong and she was right in bringing her safety concerns to their attention. (JX 2). OSHA then notified Del-Jen of the complaint and conducted an investigation into the allegations. (Tr. 95-96, 212; ALJX 1, 3).

Ms. Sheppard's first alleged violation of company policy involved copying of personnel documents. Complainant requested to see the evaluations submitted by the 95th squadron commanders at the April 4, 2007 meeting. (Tr. 325). The project manager provided her with copies of the evaluations that were available, but stated that the complainant would have to get a copy of her personnel record from the corporate human resources department. (Tr. 325-26). This policy is also contained in the Employee Handbook. (JX 17a).

In an e-mail dated May 31, 2007 to the transportation division manager, the complainant requested "to review and get a copy of everything in my personnel records." (Tr. 181, 330; JX 13). The e-mail was forwarded to the administrative assistant for the project manager who also serves as the human resources (HR) representative for Del-Jen at Tyndall. (Tr. 138). He replied "let [complainant] know she can come over and look at them," which was forwarded back to Ms. Sheppard. (Tr. 331; JX 13). The HR representative, however, did not forward the e-mail to the corporate human resources department, because he did not know the specific documents Ms. Sheppard wanted to copy. (Tr. 139, 143).

The complainant went to the project manager's office the next morning requesting to review her personnel records, which the HR representative granted. (Tr. 142, 156-57, 337). He clarified to Ms. Sheppard that if she needed anything out of the file, she would have to contact corporate human resources. (Tr. 142-43, 151-52, 331, 337; JX 14a). Shortly thereafter, the HR representative informed another employee that the complainant was reviewing her personnel records and that he was leaving for lunch. (Tr. 148-49, 157, 264-65, 332; JX 14a). Upon completing her review, the complainant approached that employee and asked where she could make copies. He assumed, because of her question, she had permission from corporate office to

make copies of her record and directed her to the photocopier. After approximately twenty minutes of copying, Ms. Sheppard returned her personnel file and departed with her copies. (Tr. 265-66, 332; JX 14c).

When the project manager learned that the complainant made copies of her personnel file without corporate approval, he sent his administrative assistant to retrieve the copies. (Tr. 149, 157, 334; JX 14b, 14c; JX 23a at 16). The administrative assistant reported that the complainant expressed her belief that they were her records and she should be entitled to them. (JX 14b). Ms. Sheppard then contacted the vice president of human resources and requested a copy of her personnel record. (Tr. 334-35; JX 13, 23b).

When the transportation division manager learned of the incident, he requested statements from the two employees involved. Based on the written statements provided by the two employees and the acknowledgement by complainant that she was aware of the policy prior to making the copies, the transportation division manager determined that a disciplinary action was appropriate. (Tr. 183-84, 237; JX 16a, 14a, 14c). Ms. Sheppard was issued a documented verbal warning, the lowest level of discipline, on June 8, 2007 for violating corporate policy. (Tr. 184, 333; JX 16a). Complainant subsequently filed a grievance regarding the verbal warning. After researching the issue, the union withdrew the grievance. (RX 1; JX 16a).

One week later, complainant allegedly violated company policy for a second time. During the week of June 11, 2007, Ms. Sheppard contacted the Del-Jen computer operations department regarding a problem with a USB port on a government computer. She informed the computer operator that she was attempting to open a document from a thumb drive and thought the USB port was not working. (Tr. 340, 372, 403, 410-11; JX 24d). When asked if the document was work related, the complainant replied that it was. (Tr. 403-04; JX 5 at 113, 117-18, 121, 218). The operator explained the computer problems Ms. Sheppard was having to a client support administrator and the computer operations lead. (Tr. 284-85, 403, 414; JX 24b, 24d). The operations lead called the Air Force communications department to confirm the policy regarding peripheral devices. (Tr. 286, 415; JX 5 at 139). The lead then assigned the support administrator to assist Ms. Sheppard, because the document was represented as "government official." (Tr. 285, 287, 415; JX 24a).

When the support administrator arrived, he questioned Ms. Sheppard regarding whether the thumb drive was government property or her own personal property. The complainant replied that it was her personal property and she created the document on her home laptop. He informed her that using her personal thumb drive would be a security violation, because only official government peripheral devices were approved for use under Air Force and Del-Jen policies. (Tr. 66-68, 186, 224-26, 279-81; JX 17a, 26c). He stated that she should take her thumb drive to a non-government computer. However, Ms. Sheppard indicated that the project manager needed the document immediately. (Tr. 339, 415-16; JX 24b).

Relying on her representation that the document was for the project manager, the support administrator opened the document onto a government computer with a compatible USB port. He first had to convert the document into a recognized format for the employer's software. He then noticed that the document was a letter of complaint which he deemed to be of a personal

nature. Because the use of government computers for personal business is against the Del-Jen policies, the support administrator indicated that he could not assist her any further. (Tr. 97, 408; JX 17a). Ms. Sheppard reiterated that the document needed to be on the project manager's desk that afternoon, so the support administrator printed the document. He then ceased assisting the complainant and suggested that she use a non-government computer to finish her task. He also reported the matter to the computer lead. (Tr. 416-18, 287-88; JX 24a, 24b).

On two subsequent occasions, the complainant was observed using government computers for personal business and spending more time on the computers as compared to the other drivers. These incidents were reported by the vehicle operations dispatcher to the vehicle operations chief and the transportation division manager. (Tr. 242, 255, 425; JX 24c; RX 4).

The transportation division manager again investigated the matter by obtaining statements from the witnesses, confirming the facts in the e-mail sent by the dispatcher, and researching Ms. Sheppard's computer training history. (Tr. 227-28; JX 24a, 24b, 24c). The complainant was issued a written warning and three day suspension on July 2, 2007 for violating company policy. (Tr. 341; JX 16b). The written warning explains that Ms. Sheppard used the government computers for personal business and installed a personal computer device onto a government computer, two policies covered in her most recent training. (JX 26a, 26b, 26c, 26d). It also provides that she misrepresented to the computer operations personnel that the document was government official and needed immediately by the project manager. (Tr. 186-87, 189-92, 227-28, 240-42, 410-11; JX 16b).

On July 6, 2007, the union filed a grievance on Ms. Sheppard's behalf regarding the written warning and suspension. The grievance alleges that "none of the data provided indicates that [the complainant] did anything wrong...nor can the contents of the alleged personal documents be confirmed." (Tr. 243, 341; JX 16b). The grievance was denied because neither the complainant nor the union submitted the letter to confirm that the document on the thumb drive was work related. (Tr. 187, 243-44, 250-51; JX 16b). At the hearing before me, the complainant did produce a copy of a document which was purported to be a copy of that letter. (JX 7c, JX 30). Mr. Wyatt reviewed this document and acknowledged that the disciplinary action would have been reversed had Ms. Sheppard produced a copy of this e-mail during the grievance process. (Tr. 62, 64; JX 5 at 107, 109-10).

The third discipline was imposed by Del-Jen, after an employee lodged a safety violation complaint against Ms. Sheppard. (JX 16c). On June 27, 2007, two Del-Jen employees were waxing a pick-up truck; one on each side of the vehicle. The complainant, who was also asked to help, began buffing the truck. When she moved to the driver's side, the door was open. She slammed the driver's side door shut in close in proximity to her co-worker's head. (Tr. 343, 383, 434-36, 440, 456; JX 25a, 25b; RX 8).

The employee became upset and confronted the complainant asking for an apology. Rather than apologize, Ms. Sheppard became defensive, stating "I knew where your head was" and that she just was not thinking. (Tr. 343, 436, 442, 456-57, 464; JX 25a, 25b; RX 8). She also commented that "some people are just too sensitive," which further angered him. The employee then approached the complainant and asked how she would feel if he slammed the door near her

head. Because Ms. Sheppard believed his response to be threatening, she sought assistance from the vehicle operations chief. (Tr. 343-44, 436, 438-39, 442-46, 457; JX 25a, 25b).

The employee involved in the incident submitted a formal complaint on the following day to the vehicle operations chief and transportation division manager. He alleged that Ms. Sheppard's actions placed his personal safety in jeopardy and that she had a poor attitude when he confronted her. (Tr. 437, 439-40; JX 25a). The transportation division manager investigated the incident by requesting a written statement from another employee whom witnessed the event. (Tr. 458; JX 25b). He then concluded that Ms. Sheppard's actions placed an employee's safety at risk and reflected negatively on her civility and ability to work with other employees.⁵ The transportation division manager also concluded that her conduct raised substandard performance issues and reflected a disregard for safety. (JX 16c, JX 5 at 44-46). He recommended termination of the complainant because she had two prior disciplinary actions. The termination was approved by both the project manager and the vice president of human resources. (Tr. 219; JX 5 at 46, 16c).

Perette Sheppard was terminated by Del-Jen on July 10, 2007. She was terminated because the recent incident allegedly involving the safety of a fellow employee was her third violation of company policy.

The complainant was working forty hours per week and earning \$13.54 per hour plus retirement benefits at the time of her termination. (JX 28). Although she has actively been seeking work, she has not secured employment as of the date of the hearing. (Tr. 346-47, 386).

CONCLUSIONS OF LAW

The STAA prohibits covered employers from retaliating against employees who engage in certain protected activity relating to commercial motor vehicle safety. The employee protection provisions of the Act prohibit discharging, disciplining or discriminating against an employee regarding pay, terms or privileges of employment, because

(A) the employee or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate the vehicle because

⁵ The Employee Handbook indicates under "General Company Policies: Rules of Conduct" that the inability to cooperate and work amicably with fellow employees is an infraction that may result in disciplinary actions, including termination. (JX 17a). Furthermore, the HSE Disciplinary Procedure provides several examples of "serious" safety violations. The first example specifies that "gross or willful disregard of established (or commonly recognized) safe work actions and/or behavior that can reasonably be expected to result in, or did result in 'immediately dangerous to life or health' situations" are considered a serious safety violation. (JX 17c).

(i) the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a)(1). These activities, which are referred to as protected activities, are the only activities for which redress is available under the Act prior to its 2007 amendments. Different wrongful activities by an employer may be redressed under different statutes, but those statutes are not at issue in this proceeding.

To prevail on a claim of unlawful discrimination under the STAA whistleblower protection provisions, Ms. Sheppard must establish that she was subjected to an adverse employment action because she engaged in protected activity. To do this, the complainant must initially make a *prima facie* case of discrimination by evidence showing that (1) she engaged in protected activity; (2) that the employer was aware of her activity; (3) that she was subjected to adverse action;⁶ and (4) the existence of a causal link, *e.g.*, that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Clean Harbors Env'tl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).

Del-Jen may rebut the *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The employer must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse action. The explanation provided must be legally sufficient to justify a judgment for the employer. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Once the employer produces evidence sufficient to rebut the "presumed" retaliation raised by the *prima facie* case, the inference simply "drops out of the picture," and the "trier of fact proceeds to decide the ultimate question."⁷ *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510-11 (1993).

Ms. Sheppard then has the opportunity to prove, by a preponderance of the evidence, that the employer's reason for the adverse action was mere pretext for discrimination. *Burdine*, 450 U.S. at 253. Specifically, complainant must establish that the proffered reason for the adverse action is false and that her protected activity was the true reason for the adverse employment action. *St. Mary's Honor Center*, 509 U.S. at 507. Although the burden of production shifts, the ultimate burden of persuasion remains with the complainant to show that the employer

⁶ The Administrative Review Board has held that the *Burlington Northern* "materially adverse" standard is applied to an STAA whistleblower case. The "materially adverse" standard tests whether the employer's action could dissuade a "reasonable person in the plaintiff's position" from engaging in protected activity. See *Melton v. Yellow Trans., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008) (citing *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)).

⁷ In cases where the employer asserts a non-discriminatory reason for discharge, the *prima facie* step can be bypassed and I can proceed directly to an inquiry into whether the employer's reason is pretextual. See *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op at n.12 (ARB Sept. 30, 2003) (citing *Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op at n.7 (ARB May 30, 2003)).

intentionally discriminated against her. *Id.* If the proof establishes that the adverse action was undertaken for both discriminatory and nondiscriminatory reasons, *i.e.* “mixed motives,” the employer must show by a preponderance of the evidence that it would have taken the same adverse action absent the complainant’s protected activity. *See Price Waterhouse v. Hopkins*, 409 U.S. 228, 245 (1989).

Initially, I emphasize that my jurisdiction is limited by law in this case to deciding whether the complainant was discriminated against because of protected activity under the STAA. It is important that the parties understand that it is not my place to decide whether Del-Jen should have terminated Perette Sheppard. My inquiry must focus solely on whether Ms. Sheppard’s protected activity was the reason for the adverse employment action taken against her.

Regarding her initial burden, Ms. Sheppard provided sufficient evidence to establish a *prima facie* case of discrimination. The evidence establishes that the complainant engaged in protected activity. It is well recognized that the phrase, “filed a complaint or begun a proceeding,” under Section 31105(a)(1)(A) of the Act includes an employee’s internal complaint to her supervisors of her reasonable belief regarding a violation of a federal motor vehicle safety regulation, standard or order. These internal complaints are considered protected activity where they are reasonable and asserted in good faith. *See Moon*, 836 F.2d at 227-29; *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 1999-STA-37 (ARB Dec. 31, 2002); *Clean Harbors Environ. Serv’s., Inc.*, 146 F.3d at 21. Ms. Sheppard’s internal complaints to her supervisors regarding safe operation of the shuttle buses and her written statement reporting that some of the pilots were standing while the vehicle was in motion qualify as protected activity. Her belief was reasonable in light of Del-Jen’s safety practice which requires passengers to remain seated while vehicles are in motion.

She further engaged in protected activity when she filed her complaint with OSHA alleging that she was retaliated against for making an internal safety complaint. The evidence establishes that Ms. Sheppard directed her safety concerns to her supervisors. They were also notified by OSHA regarding her formal complaint. Therefore, the first two prongs of the *prima facie* case are satisfied.

The employer does not dispute that the discipline and termination of the complainant’s employment was an adverse employment action. Furthermore, a preliminary inference of a causal nexus between the protected activity and the adverse action arises due to the relatively short time span between Ms. Sheppard’s safety complaint and her termination. These establish the third and fourth prongs of the *prima facie* case.

Del-Jen, however, maintains that it had legitimate, nondiscriminatory reasons for taking the employment actions. As will be further discussed, the employer has produced evidence of alleged violations of company policy on the part of Ms. Sheppard, and it maintains this misconduct warranted disciplinary action. Because the employer utilizes a progressive discipline policy, the third disciplinary action against the complainant resulted in termination. This evidence satisfies the employer’s burden of production at this stage of the burden shifting framework. Del-Jen has provided an independent nondiscriminatory basis for the complainant’s

discharge from Del-Jen's employ which rebuts Ms. Sheppard's *prima facie* case. Therefore, this case will turn on whether the alleged misconduct is "pretext" for the adverse action, or whether the misconduct combined with the protected activity to create a "dual motive" for the termination. The relevant inquiry is whether Ms. Sheppard prevails by a preponderance of the evidence on the ultimate question of whether her protected activity was the reason for the adverse employment actions.

The complainant may demonstrate that the employer's allegations of misconduct by Ms. Sheppard are a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. *Zinn v. Univ. of Missouri*, Case No. 93-ERA-34 at 4 (Sec'y Jan. 18, 1996); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 133, 139 (6th Cir. 1994). She must present some evidence, beyond employer's mere knowledge of the protected activity, which raises an inference that the protected activity was the likely reason for the adverse action. *Clay v. Castle Coal and Oil Co., Inc.*, Case No. 90-STA-37 (Sec'y Nov. 12, 1991). I reiterate that the complainant retains the ultimate burden of proving that the adverse action was in retaliation for her protected activity.

Ms. Sheppard's initial allegation of retaliation contained in her OSHA complaint regarded her transfer from her position as a shuttle bus driver for the 95th Fighter Squadron. She alleges that her transfer was predicated on "unfounded and invalidated complaints," and happened only after she raised her safety concerns with Del-Jen supervisors. Although the time span between Ms. Sheppard's protected activity and her transfer was only a few weeks, I find that the basis for her transfer was independent from her safety complaints.

The weight of the evidence supports a conclusion that Del-Jen transferred the complainant based upon formal, written complaints from the 95th Fighter Squadron commanders. These complaints focused on Ms. Sheppard's attitude, professional behavior and unsatisfactory performance. The commanders alleged that she was rude, confrontational and unprofessional in her interactions with the pilots. The project manager and the transportation division manager investigated the allegations during a meeting with the squadron commanders. At that meeting, the commander raised concerns regarding Ms. Sheppard's unprofessional conduct and specifically requested that she be removed from the 95th squadron's shuttle service. The commander subsequently filed two formal complaints against Ms. Sheppard, again stating that her demeanor and attitude did not fit well with his unit. Because customer service is of the utmost importance to Del-Jen, I agree that the supervisors were left with no alternative but to appease the Air Force commander and transfer the complainant off of the 95th squadron's shuttle service. Ms. Sheppard acknowledged this pressure from the Air Force in her OSHA complaint.

The supervisors also explained to Ms. Sheppard during the April 2007 meetings that reassignment was in her best interest to protect her from future harassment and complaints. She was told that she would not suffer loss of pay or change in shifts. She also was assured that she could bid on a shuttle driver position at the next bid cycle. This indicates that the employer viewed her transfer as temporary, to allow time to pass and memories to fade.

The record also reflects that Ms. Sheppard was initially offered the opportunity to drive a shuttle bus for a different squadron. However, she declined to do so. Complainant expressed

concern to her supervisors that such a transfer would cause animosity with the other drivers. She was also concerned that the harassment from the pilots would not cease. Her concern supports Del-Jen's legitimate reason to transfer her from her shuttle driver position to the taxi service in vehicle operations.

Ms. Sheppard further argues that her transfer was motivated by retaliation because she was unable to review all of the complaints the employer had received regarding her driving service. She suggests that the supervisors told her that they relied on these complaints to cover their true motivation of retaliation. However, the credible evidence in the record does not support this allegation.

Complainant acknowledged that she received copies of the three customer survey evaluations filed by the 95th squadron commanders. She subsequently requested copies of the formal complaint letters from the commanders and was expressly told by the project manager that she needed to contact corporate human resources as the letters were contained in her personnel file. When she was again informed of the policy, she called the vice president of human resources and requested a copy of her personnel file. The record does not contain any evidence regarding whether or not she received the copies she requested; however, Ms. Sheppard also has not submitted any evidence that her request was denied by Del-Jen or that the letters simply do not exist.

The credible evidence as a whole proves that Del-Jen was motivated by legitimate business reasons when it reassigned Ms. Sheppard from her position as a shuttle driver. Specifically, Del-Jen did so to uphold its customer service obligations under the Air Force contract. Accordingly, I find that the complainant has not met her burden of proving that the employer's proffered reason for the transfer is pretext for discrimination or retaliation.

I must next consider Ms. Sheppard's disciplinary actions and termination, which she asserts were in retaliation for her OSHA complaint. Complainant argues that the evidence supports a determination that she did not violate the employer's policies; therefore, the three disciplinary actions were unwarranted. She also argues that it is evident that employer targeted her for discipline because she was not given an opportunity to present her side of the story prior to being disciplined. As will be further addressed, I find that the weight of the evidence does not support Ms. Sheppard's assertions that the adverse actions were retaliation for her protected activity.

The verbal warning, the first of the disciplinary actions, was a result of Ms. Sheppard photocopying personnel documents without proper authorization, which Del-Jen maintains is a violation of company policy. Employer explains that Del-Jen requires an employee to seek authorization from the corporate human resources department prior to copying documents from the employee's personnel file. The complainant, however, testified that she was informed by the HR representative that the policy requiring corporate approval was new. Her statement is inconsistent with the weight of the evidence. The procedure to seek corporate approval is expressly stated in the Employee Handbook, and the complainant acknowledged receiving, understanding and adhering to these policies in 2004. Therefore, I initially find she had constructive notice of these policies whether or not she was aware of this specific provision.

Secondly, the evidence establishes that Ms. Sheppard had actual knowledge of the policy regarding the copying of documents from her personnel file. When the complainant asked the project manager for the complaint letters at the April 4, 2007 meeting, she was informed that she needed to contact the corporate office because the letters were contained in her personnel file. The HR representative also stated in his e-mail response that she was able to “come over and look at them.” It did not indicate that she was able to make copies of the documents. Furthermore, complainant revealed that she was aware of this policy in her statements to the HR representative just prior to making the copies when she acknowledged that she needed approval from the corporate office. Ms. Sheppard specifically stated in the e-mail that she sent to the vice president of human resources that she asked the HR representative “who said I was not able to have a copy” to which the representative answered “corporate.” Therefore, I find that the evidentiary record convincingly demonstrates that complainant was aware of the procedure regarding copying personnel documents prior to making her copies.

When the transportation division manager learned of this incident, he commenced an investigation to determine if complainant violated company policy. Relying on the credible statements of the two witnesses, the supervisor determined discipline was warranted and issued complainant a verbal warning. I note that this was the lowest level of discipline and is consistent with the employer’s procedures for progressive discipline.

I recognize that this disciplinary action was issued without first allowing the complainant the opportunity to explain her side of the events. However, the transportation division manager convincingly indicated his procedure was to investigate the matter, issue the discipline and then allow the four step grievance process to take its course. Pursuant to the bargaining agreement, the complainant had the opportunity to present exculpatory evidence to convince her employer that her discipline was unwarranted, but the union chose to withdraw the complainant’s grievance of this disciplinary action. More important to this proceeding, I find the complainant has not satisfied her burden of demonstrating that the employer’s reasons for the discipline were false or pretext for discrimination.

Regarding her second disciplinary action, the complainant has not convinced me that the employer’s proffered reason for the written warning is not worthy of credence. This disciplinary action arose from an alleged violation of the policy regarding the use of peripheral devices and government computers. The evidentiary record clearly supports Del-Jen’s position regarding the uses of such devices and government computers by its employees. It also proves that the complainant knew of this policy through recent training. Moreover, the credible evidence demonstrates that Del-Jen believed the complainant abused this policy in attempting to print a document on a government computer through the use of a personally owned thumb drive. There is no evidence that this disciplinary action was administered for any reason other than that it was believed by Ms. Sheppard’s superiors that she had abused the company policy regarding the use of computers.

The complainant argues that she followed procedure because she sought permission from the computer operator to install the thumb drive prior to attaching it to the computer. Her statements are not supported by credible evidence. The computer operator explained that the complainant stated in initially contacting him that she thought the USB port was not working

because it was not responding to her thumb drive. His recollection of the event, both in his 2007 written statement and at the hearing, is consistent with the statements from the other two employees who were involved in this incident. This establishes that she installed her thumb drive prior to getting the proper approval. Moreover, Ms. Sheppard secured approval to install the thumb drive after representing that the document was official government business requested by the project manager.

Ms. Sheppard never proved to Del-Jen that the document on the thumb drive was work related. She also has not denied that she misrepresented the nature of the document to the company personnel. The evidence establishes that Ms. Sheppard stated several times to the computer employees that the project manager requested the document and that it was official government work. The project manager credibly testified that he made no such request of the complainant and Ms. Sheppard has not produced any evidence to the contrary.

The question of whether the document in question was business or personal is not important to this case. The employer made several requests for the document during the grievance process, but the discipline was upheld because the actual letter was never produced. I am convinced that had she produced the letter from her thumb drive to the supervisors, the disciplinary action would have been reversed and Ms. Sheppard would not be in the position she is in now. Notwithstanding, her assertions alone do not prove by a preponderance of the evidence that the employer's reasons for the discipline are pretext for discrimination. Del-Jen believed at the time the disciplinary action was taken that it was based on a violation of company policy and nothing more.

I also note with respect to this disciplinary action that the evidence proves Ms. Sheppard was not singled out for her personal use of the government computers. Evidence that demonstrates a complainant was treated differently from other similarly situated employees may serve as evidence of discrimination. *Calmat Co. v. USDOL*, No. 02-73199 (9th Cir. April 19, 2004). However, the evidence in this case indicates that Del-Jen also has disciplined other employees for similar infractions, one of which resulted in a three day suspension. This further supports Del-Jen's position that it had a legitimate reason for its adverse action against Ms. Sheppard.

Accordingly, the complainant has not established that the employer's reason for her written warning, namely that she used government computers for personal use, is false. She produced no evidence to Del-Jen to prove her use of the thumb drive was work-related. She also has not established that she had permission to install the thumb drive onto government computers prior to doing so. Because the Employee Handbook is clear on the policy regarding government computers and the complainant completed training just a few months prior to the incident, employer's motives for the discipline appear to be legitimate and nondiscriminatory.

Ms. Sheppard asserts that her third disciplinary action, which resulted in her termination, was also motivated by discriminatory animus. She argues that the adverse action was issued without a legitimate reason because she did not violate the employer's policies. I am not persuaded by her arguments and find that Del-Jen believed her conduct was a violation of employer's policy when it administered this third disciplinary action.

Del-Jen's written warning to Ms. Sheppard resulted from an investigation into an employee's formal complaint alleging she placed his personal safety at risk. The employee alleged that complainant slammed a door of a truck in close proximity to his head. The complainant contends that she did not slam the truck door, but rather, "pushed the door closed with her knee." She testified that prior to closing the vehicle door she ascertained that the employee was out of harm's way. The credible evidence, however, simply does not support her story.

Two witnesses provided written statements and testified that they heard a loud noise when the vehicle door closed, like it was slammed shut. The employee whose head was nearly hit also testified that he felt the wind as the door went past him. These statements support a conclusion that Ms. Sheppard slammed the vehicle door. The complainant also refused to apologize when confronted. Rather, she became defensive and further escalated the confrontation by making inappropriate remarks. The employee responsible for filing the complaint felt that his personal safety was jeopardized and was infuriated by her response. Regardless of Ms. Sheppard's intentions, I find it was reasonable for her supervisor to conclude that her actions reflected a poor attitude and disregard for the safety of others.

Once the transportation division manager was apprised of the complaint filed by the employee, he investigated the allegations contained therein. The written warning cited complainant's inability to work amicably with others, which was demonstrated by her confrontational and defensive remarks to the employee. It also indicates that she violated the company's safety practices. The Employee Handbook provides that serious safety violations would result in harsh disciplinary actions, including termination. Accordingly, the evidence demonstrates that the written warning was grounded on the employer's policies.

Ms. Sheppard's assertion that she was terminated because of her protected activity is not persuasive. The employer followed the procedure outlined in the bargaining agreement and its own Employee Handbook. With each prior incident, the supervisor investigated the matter before issuing Ms. Sheppard a disciplinary action. *Compare Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995) (noting an employer's failure to follow its own policies may serve as evidence of discrimination). Because the written warning was the third disciplinary action in the progressive discipline process, it resulted in termination. This was the natural progression of Del-Jen's disciplinary policy which is clearly set out in the Employee Handbook. There is no evidence that the termination was retaliation for Ms. Sheppard's protected activity.

Lastly, I am not convinced that Ms. Sheppard suffered retaliation because she reported safety concerns. The weight of the evidence establishes that safety is the utmost priority to the employer. The Employee Handbook specifically provides as such, indicating that a failure to report a safety violation would be cause for discipline. It is clear that Del-Jen expects its employees to bring safety concerns to its attention. Ms. Sheppard's supervisors welcomed her safety concerns and found them to be legitimate, which is evident in their behavior subsequent to her calling attention to the safety issues. The project manager immediately contacted the Air Force to rectify the situation and the transportation division manager posted signs on each bus reminding passengers to remain seated while the bus was in motion. Del-Jen placed a significant

emphasis on its safety practices which further supports a conclusion that the proffered nondiscriminatory reasons for the disciplinary actions are legitimate.

In sum, except for the attenuated temporal proximity of the protected activity to complainant's disciplinary actions and termination, Ms. Sheppard has not produced convincing evidence of any causal connection between her safety complaints and her discharge. Del-Jen has adduced plausible and credible proof that the reason for complainant's discharge was her three separate occasions of conduct which Del-Jen believed violated company policy. The actions consisted of photocopying her personnel record without first seeking approval from the corporate office, violating the government computer policy by installing a peripheral device onto a government computer for personal use, and disregarding safety practices which placed a co-worker's personal safety in jeopardy. Moreover, employer has produced evidence that the complainant's transfer from her duties as a shuttle bus driver was not a disciplinary action, but rather, Del-Jen's attempt to rectify a problem between its customer, the Air Force, and Ms. Sheppard, and was in the best interest of all the parties involved. Complainant has not proven that any of the employer's proffered reasons for the adverse actions were false or pretext for discrimination.

Ms. Sheppard has not met her burden demonstrating by a preponderance of the evidence that her transfer, discipline and termination were in retaliation for, or otherwise caused by, any protected activity under the STAA. Employer has clearly established that it had independent and sufficient reasons for complainant's discipline and termination consisting of the plausible and substantiated complaints of serious misconduct and company policy violations. There is no indication of pretext nor is there any convincing evidence that the complainant's protected activity played any role whatsoever in Del-Jen's decision to terminate her.

RECOMMENDED ORDER

For the above stated reasons, IT IS HEREBY RECOMMENDED that the complaints of Perette L. Sheppard under the Surface Transportation Assistance Act be dismissed.

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DONALD W. MOSSER
Administrative Law Judge

NOTICE: This Recommended Decision and Order, along with the administrative file, will be forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Suite S-5220, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002). Within thirty days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule.

See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.