



Issue Date: 03 July 2012

JERRI LEIGH JACKSON,
Complainant,

v.

Case No.: 2012-STA-00007

C.R. ENGLAND CORPORATION
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This proceeding arises under the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (formerly 49 U.S.C. app. § 2305); 29 C.F.R. Part 1978, implementing regulations found at 29 C.F.R. Part 24, and the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges found at 29 C.F.R. Part 18.

In essence, I find that even if Complainant is able to prove Whistleblowing, the evidence shows that she was no longer qualified to drive, and therefore Respondent could not employ her as a driver. On May 4, 2011, George Dunn, LCSW, at St. Matthews Pastoral Counseling, determined it was not in Complainant's best interest to return to work due to her medical condition. Complainant does not dispute this fact. I find that, by clear and convincing evidence, Complainant's acknowledged mental condition precludes the capacity to drive. 49 U.S.C. § 42121(b)(2)(B). *See e.g., Sacco v. Hamden Logistics, Inc.*, ARB No. 09-024, ALJ 2008-STA-00043 and ALJ 2008-STA-00044, slip op. at 4 (ARB Dec. 18, 2009); *Bailey v. Koch Foods*, ARB No. 10-001, ALJ 2008-STA-061 (Sept. 30, 2011).

PROCEDURAL HISTORY

On December 19, 2011, I issued a *Notice of Hearing* scheduling this matter for a formal hearing on April 24, 2012, in Louisville, Kentucky. The parties were also directed to file and exchange, on or before February 1, 2012, prehearing submissions including a simple statement of the issues to be decided and witness and exhibit lists. I then issued four notices of ex-parte communications and four prehearing orders. In the notices of ex-parte communications, Complainant was instructed to submit copies of all filings to Respondent's attorney.

On April 3, 2012, Respondent filed a motion for summary decision. In response, Complainant filed a motion to strike the motion for summary decision. On April 9, 2012, I issued a Third Prehearing Order, cancelling the hearing. Additionally, I ordered the following: 1) Complainant must be civil; 2) Respondent will honor Complainant's request for production by May 7, 2012; and 3) The Complainant shall respond to the *Respondent's Motion* (for summary decision) by close of business, June 7, 2012. Having received no response from Respondent regarding Complainant's request for production, I then issued a Fourth Prehearing Order on May 15, 2012. In my Fourth Prehearing Order, I instructed Respondent to show cause why the Motion for Summary Disposition should not be struck, and why a default should not be rendered to Complainant on liability in this case. On May 21, 2012, Respondent filed a response to the

Fourth Prehearing Order. Subsequently, Complainant filed a motion to quash Respondent's explanation to the order to show cause and requesting that summary decision be awarded in her favor.

I repeatedly advised Complainant to seek legal representation. It is clear that Complainant will proceed in this matter pro se, without counsel. Therefore, this matter will need to be decided without counsel representing the pro se Complainant's interest.

REGULATIONS

Hearings before the Office of Administrative Law Judges are conducted pursuant to 29 C.F.R. Part 18, unless otherwise provided. Additionally, the Federal Rules of Civil Procedure apply in any situation not controlled by these rules or rules of special application. *See* 29 C.F.R. § 18.1(a). 29 C.F.R. §§ 18.40 and 18.41 provide the governing regulations for a motion for summary decision. 29 C.F.R. § 18.40(d) (motion for summary decision) sets forth in part:

The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

Summary decision is appropriate when the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See also* 29 C.F.R. § 18.40. No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

POSITIONS OF THE PARTIES

COMPLAINANT

Motion to Appeal

On December 7, 2011, the Court received Complainant's Motion to Appeal and Motion of Opposition to Dismissal, with several attached exhibits. Complainant states that this complaint involves an occupational illness. Complainant argues that her dismissal was illegal and that OSHA did not allow Complainant an opportunity to present rebuttal to Respondent's position statement. Complainant generally alleges procedural issues against OSHA offices in Utah and Denver.

Concerning her truck driving training and education with Respondent, Complainant states that she was housed in "unclean" and "unsanitary" residences while in training school. Complainant states she was "propositioned" by a field instructor and that she reported this incident. Complainant also makes allegations against her trainer, Paul Flores. She alleges Respondent withheld Mr. Flores' history with his students and his illness from Complainant. Complainant also alleges Mr. Flores did not complete daily evaluations, sign them, or have Complainant sign evaluations. Mr. Flores threatened to leave Complainant in the mountains in

Wyoming, but Complainant stayed in the truck. Mr. Flores became very sick, causing Complainant to become ill too. Mr. Flores threatened and harassed Complainant to not report the illness. Complainant, as a student-trainee, was forced to drive in the mountains alone, while Mr. Flores was sick. Complainant was medicated and forced to answer questions and write complaints verbally and in writing. Complainant wrote down several trainer negligence issues and presented them to OSHA and Respondent. Additionally, Complainant informed Carrie Johansen, in Respondent's HR department, of Mr. Flores' injustices.

Complainant states that illness and medication alters behavior, and that illness and medication should not be used to terminate a contracted employee. Complainant was required to take a bus from Salt Lake City to Louisville, traveling three days while medicated. Complainant states she had medical clearances from three doctors. Complainant alleges that Respondent manipulated Don Hastie with Lakeside Medical, who conducted Complainant's mental evaluation in Louisville, so Respondent could terminate her employment. Complainant asserts that disabilities require accommodation, and that safety first means rest, food, and careful driving. Complainant notes that she was in remission, but Respondent undid her remission. Complainant was honest about her medical history, and she alleges Respondent used this information against her. Additionally, Respondent harmed Complainant's "health and safety by mandating [Complainant] to produce while medicated." Furthermore, Complainant never received notification of her termination in writing. She states that she suffered an adverse employment action. Complainant also states Respondent committed a hate crime.

Complainant requests damages of unpaid wages of \$430.00 per week under contract with Respondent, damages for the mishandling of her OSHA complaints, reimbursement for phone calls and mailings, medical expenses, transportation expenses, food expenses, housing expenses, and retraining expenses, among multiple, other damage requests.

Complainant filed several exhibits with her appeal of the OSHA dismissal. The exhibits include a copy of Complainant's employment history, documentation from Complainant's wage claim against Grey and Blue Express, LLC, training and education certificates, medical reports, documentation from Claimant's settlement with employer Sitton Motor Lines, and Complainant's driving records, among other exhibits.

Dilemma Letter

On January 11, 2012, Complainant filed a letter, dated January 9, 2012, alleging procedural issues against OSHA offices in Indiana, Utah, Kansas City, and Denver. Complainant argues her complaint was unlawfully dismissed. She asserts her complaint is a "valid occupational safety complaint highlighting occupational acquired illness and a medicated state that follows with discriminatory offenses...." Complainant alleges damages against Respondent and OSHA offices in Indiana, Utah, Kansas City, and Denver. Complainant attached documentation concerning her complaint against the Indiana Occupational Safety and Health Administration (IOSHA) and her complaint with the Utah Occupational Safety and Health Division.

Complainant also states that Respondent hired a non-disabled person to replace her and that this is discrimination. Respondent targeted a psychological evaluation while Complainant was medicated and recovering from an occupational illness. Complainant generally alleges Respondent abused, discriminated against, and terminated her because of her disability.

Complainant requests relief and damages including, but not limited to, payment of all educational expenses, \$1 billion per year, for a masters completion at a seminary and for a

degree in occupational therapy. Complainant also included documentation asking for damages from St. Matthews Baptist Church and Counseling Center. Complainant attached copies of various records, including bank statements, her driver application with Respondent, DOT rules and regulations, Complainant's resume, Complainant's status as a homeless person with no residence of her own, copies of medical treatment and lab reports, and records from previous employers.

Motion of Opposition to Dismiss

On January 27, 2012, Complainant filed a motion opposing Respondent's motion to dismiss this complaint. Complainant notes that the law permits a person to bring a claim for discrimination and states her belief that she was unlawfully terminated from her employment by Respondent. Complainant argues that Respondent terminated her because she suffered from a psychological disability as Respondent had her medicated for a viral and bacterial infection. She further argues that Respondent made no accommodations for her disability and that Respondent used this as a pretext for termination. Complainant was "unlawfully evicted from medical protection." Complainant also alleges Respondent and OSHA mishandled case materials and that Respondent made fun of her disabilities and sought to "worsen conditions with unsanitary circumstances." Complainant states Respondent had knowledge of her behavior-emotional, psychological disorders, and Respondent targeted her behavior, attacking her emotionally, psychologically, socially, academically, mentally, physically and financially. Furthermore, Complainant alleges she was subject to abuse and was falsely imprisoned and held capture.

Additionally, Complainant states that upon her release from employment, there was "no proof of factual reasoning." Respondent knew Complainant suffered from three specific disabilities when she was hired. Complainant asserts that she is qualified, credentialed and licensed, and intelligent enough to perform her job and that she wanted evaluations, assessments, and skilled professionals to help her "work out the kinks." Complainant passed all drug and medical tests. However, Complainant alleges Respondent wanted to promote the general public's hatred and fear of a disabled trucker. Complainant was threatened to talk and write while she was in a medicated state. Complainant states she followed her training contract, though she also pointed out irregularities and inconsistencies in procedure as spelled out in the training contract. However, Complainant alleges that she reported the abuse of discrimination, but she was penalized for doing so. Complainant also never received any record of termination from Respondent. It was not until July 9, 2011, that Complainant received a letter from Respondent about her employment. Furthermore, Complainant asserts this letter was sent to OSHA and not to Complainant.

Moreover, Complaint alleges issues with her trainer. For example, she states that her trainer threatened to abandon her in the mountains in Wyoming. Additionally, she asserts her trainer tried to force her to drive hours that students are not supposed to drive, from 1:00 a.m. to 5:00 a.m.

Complainant alleges that Respondent engaged in "unjust illegalities" concerning federal motor carrier rules, regulations, policies and procedures in Indiana and Utah. Complainant also makes allegations that OSHA violated federal rules, regulations, policies and procedures in handling her complaints and harmed Complainant in the process.

Complainant also presents several other issues against Respondent. For example, Complainant alleges Respondent blamed Complainant for truck mechanical problems, from March 30, 2011, to April 8, 2011; Respondent made Complainant drive a defective, not properly

maintained vehicle from March 30, 2011, to April 8, 2011; Respondent concealed the negative training history and illness of her trainer Paul Flores; Respondent did not secure a Utah DOT state examiner for driving and backing proficiency tests as required by law for a mental disability; Respondent “bullied” Don Hastie into restricting/cancelling Complainant’s medical clearance; Respondent engaged in discriminative, abusive and inappropriate words to harm a known, triply disabled person over 40 years of age; Respondent engaged in inappropriate behavior because during Complainant’s training, Complainant’s trainer was in a sleeper berth which resulted in inappropriate attention to a learning, disabled person driving the bulk of the mileage; Complainant’s trainer did not follow the training rules; Respondent hired Complainant before conducting an efficient background check; and several other issues and allegations by Complainant.

Complainant also alleges Respondent did not follow the 1990 Psychiatric Medical Conference Amendments, which violates Federal Motor Carrier rules and regulations for a person with a known disability. Complainant states that no course completed certificate should have been issued and no contract offered to her because: 1) no occupational therapist was secured in Indiana or Utah for evaluation; and 2) no Indiana or Utah state medical examiner was secured for testing and scoring. Additionally, Complainant alleges log violations occurred as a result of John Probasco losing Complainant’s failing exam on a handwritten log test and the fact that she was still placed in a truck with a trainer. Complainant did not receive any computer training, although she is computer illiterate.

Complainant also believes she was terminated because she pointed out illegalities concerning her log sheets in March 2011, which she states were inconsistent, to Chris Kelsey, Senior School Director and John Probasco, class instructor. Both took the logs and said nothing. With her motion, Complainant attached copies of her driving logs. Complainant believes the log violation was used to terminate Complainant. She notes that she had difficulty understanding the computerized logs and their coding and she was not given proper instruction on the modules. Additionally, Complainant states that she failed a paper log book test, but her exam was never returned to her. She questions why Respondent would allow someone who had failed the exam to continue.

Complainant seeks \$1 billion in damages for each alleged violation, including but not limited to, the following: 1) Complainant’s protected class and protected conduct was violated; 2) Complainant’s rights to privacy and confidentiality were violated; 3) Complainant reported the violations and was made to take the fall; and 4) Complainant was injured, diagnosed as sick on the job. Complainant also seeks back wages from March 25, 2011, to present. Complainant’s weekly salary is \$430.00, plus benefits under her contract.

Complainant attached copies of various medical records, including a list of salaries for professional drivers, letters concerning a complaint filed against the Indiana Occupational Safety and Health Administration (IOSHA), which was dismissed for lack of jurisdiction, and letters concerning issues from Complainant’s previous employment relationships with Sitton Motor Lines, Falcon Transport Company, and Western Express Trucking.

Statement of Issues

On February 3, 2012, Complainant filed for a Motion for Response-Issues Presented, dated January 28, 2012. In her motion, Complainant presented several issues in this case. Complainant notes that mental illness is a “protected handicap under the law” and discrimination is an unlawful act. The law permits someone to bring a claim if that person is a victim of such

conduct [discrimination]. Complainant further notes and states that two wrongful dismissals have occurred (IIC and STAA) without proof of judicial reasoning. Complainant also alleges that “[a] law was broken” and that “improper motives abound” with Respondent, OSHA, and judicial orders. Additionally, Complainant states that, to date, she has not received any case materials from Respondent.

Complainant seeks \$1 billion in damages for each issue presented, payment for all legal fees and expenses, and reimbursement for all of Complainant’s out-of-pocket expenses related to this complaint. Complainant enclosed copies of UPS mail receipts to evidence that she served copies of her motion on Respondent and OSHA.

Response to Second Prehearing Order

On April 4, 2012, Complainant submitted a response to my Second Prehearing Order, dated March 30, 2012, stating, among several other things, that she did not receive a copy of Respondent’s witness or exhibit lists or the name and address of Respondent’s attorney. Complainant also provided a list of other documents that she requests copies of, including, but not limited to, her test results, school test scores and evaluations, orientation packet, contract signed by Complainant, training evaluation sheets and notes from training coordinators, among other documents. Complainant also provided a list of damages including, but not limited to, wages and benefits to date, front and back pay, reinstatement, relocation, reassignment, retraining, and medical, housing, and transportation recovery, among other requested damages.

Additionally, in response to my previous orders on ex-parte communications, Complainant enclosed copies of mail receipts to evidence that she mailed copies of her filings by UPS ground signature delivery and date or by certified mail.

Complainant also asserts that Respondent has targeted Complainant for mechanical failures, glitches and shop stops for repair. Furthermore, Respondent has blamed Complainant’s control of the vehicle in diverse weather conditions, road conditions, weigh stations and toll booths. However, Complainant asserts she is not to be held for mechanical repairs or failures, as she drove the vehicle the bulk of the mileage with her sick trainer in the sleeper berth. Complainant asserts that no trucking school should award a disabled person a certificate of course completion without a mental evaluation by an occupational therapist, or without a driving state examiner’s evaluation on driving skills. No trucking company can allow a contract without these federal medical and academic criteria being met. Complainant argues this activity by Respondent is illegal.

Complainant also alleges “Indiana” has opened an OSHA STAA dismissal to silence Complainant’s complaint. Additionally, Complainant states that she never received a termination letter from Respondent and that George Dunn [with St. Matthews Pastoral Counseling Center] cannot fire Complainant with his letter, nor can Respondent.

Motion to Strike

On May 11, 2012, Complainant filed a Motion to Strike.¹ Complainant moves to strike Respondent’s motions for summary decision and dismissal. Complainant also filed a counter motion for summary decision in Complainant’s favor. Complainant states that Respondent did not produce the requested documents on or before May 7, 2012. Complainant provided a copy of a U.S. Postal Service Delivery Notice. The notice, dated May 7, states that an attempted delivery was made and the package may be picked up at the Post Office beginning May 8, at

¹ Complainant’s motion is dated “7/9/2011.” Presumably this date is in error and it should have read “5/9/2012.”

8:00 a.m. The package was delivered by certified mail. Complainant notes that Respondent did not produce any discovery documents from December 2011 to May 7, 2012.²

Complainant states she is qualified to drive a commercial vehicle and was employed to do so under a one-year contract with Respondent. She asserts that all contracts were signed and approved on March 13, 2011, and comply with [FMCSR] and the Surface Transportation Assistance Act. Complainant argues that Respondent seeks to hide an occupational illness, and that Complainant was medicated and “threatened into contract foreclosure illegally.” Complainant asserts that both her physical and mental disabilities were cleared in all aspects. Complainant further argues she was terminated illegally because of “intentional disability discriminations” and that a psychiatric or psychological evaluation cannot be used as a disqualifier, citing to the Americans with Disabilities Act (ADA).

Complainant also states that Respondent does not have a policy that refusing to attend counseling is grounds for dismissal. She notes that Don Hastie, with Lakeside Medical, signed a work release on April 15, 2011, and argues that this release was used as a “substitute for disciplinary action as contract foreclosure was threatened.” Complainant further argues that a mental, psychological evaluation cannot be applied to a physical disqualifier by law, and that this activity is illegal. Complainant attached copies of various medical records, including records from Don Hastie, and copies of current and past driver certification cards, medical examiner’s certificates, and medical examination reports for commercial driver fitness determination. Complainant notes that she was cleared twice by Respondent’s doctors to work and has an existing two-year medical clearance from a doctor in Weatherford, Texas.

Complainant concludes that she should be reinstated, retrained, relocated and reassigned to continue her contract and also reimbursed for damages, including medical expenses.

Prehearing Submissions

On May 14, 2012, Complainant filed her prehearing submissions, dated May 9, 2012, which included copies of several exhibits, including medical records, employment records, records from current and past federal and state OSHA complaints, and various other exhibits. Complainant again alleges procedural issues against and unlawful activity performed by OSHA, as well as this Court. Complainant again notes that she appeared for the formal hearing, originally scheduled on March 24, 2012. Complainant provided copies of the court schedule, showing this matter on the docket for April 24-April 26, 2012.

Complainant also reasserts her arguments that Respondent engaged in illegal activity, broke her contract, discriminated against her, illegally terminated her, and sought to hide her occupational illness. Complainant alleges safety problems, for example, Complainant was forced to drive in heavy thunderstorms, not to slow down or stop as visibility warranted; Complainant was forced to drive over steep mountain grades without a trainer assisting her under contract mandates; Complainant’s trainer had a negative training history, which jeopardized Complainant’s safety and stability and Complainant reported Mr. Flores’ discriminatory actions; Mr. Flores threatened to abandon Complainant; Mr. Flores tried to coerce Complainant into driving between the hours of midnight and 5:00 a.m.; Mr. Flores did not complete daily evaluations on Complainant; the training truck was unsanitary because of Mr. Flores’ urination; Mr. Flores criticized Complainant for diving below the speed limit; Mr. Flores did not allow Complainant to make requested bathroom stops; Complainant failed a written log test but was

² Complainant also notes that she appeared for the formal hearing, originally scheduled on March 24, 2012. Complainant provided copies of the court schedule, showing this matter on the docket for April 24-April 26, 2012.

never retested, among other accusations. Complainant also alleges she was falsely accused of stealing by Respondent. Additionally, Complainant states Respondent had knowledge of her prior claim against a previous employer, Sitton Motor Lines. Complainant also generally alleges Respondent broke its own policies, providing a copy of Respondent's Driver Employee Policy Manual. Complainant was never issued any verbal or written warning about her breaking any company policies.

Additionally, Complainant submits that Complainant: 1) is disabled under the ADA; 2) is able to perform the essential functions of the job; 3) suffered an adverse employment action; 4) showed Respondent proof of her disability in 2 states, Indiana and Utah; 5) is sure a nondisabled person replaced her; 6) belongs to a protected class and protected conduct; 7) was a qualified candidate for Respondent, who was seeking applicants, students and contracted trainees and employees; 8) despite her qualifications and achievements with Respondent, Complainant was rejected; 9) after Complainant was rejected, Respondent continued to seek applicants, students, contracted trainees/employees of Complainant's qualifications. Complainant states she has submitted ample evidence to substantiate her claim. Furthermore, Complainant states that a genuine issue exists in this matter. Complainant motions for summary judgment to be awarded in her favor.

Complainant asserts damages for out-of-pocket expenses, medical recovery, housing recovery, front and back pay, reinstatement, retraining, education expenses, and other damages for alleged illegal activity. Complainant also requests that the Court modify, reverse, remand for hearing, or set aside the Secretary's findings by OSHA, Region 8.

Motion to "Squash"

On May 25, 2012, Complainant filed a Motion to Squash and a Motion for Summary Judgment, dated May 23, 2012. Complainant also filed additional prehearing submissions. In her motion, Complainant states that, although she received partial discovery from Respondent, she has not received several discovery documents requested from Respondent. Additionally, Complainant has not received any response from Respondent to the Order to Show Cause. Complainant's motion includes several additional requests for damages. Complainant also submitted Exhibits A-L to evidence intentional discrimination by Respondent, including driving logs that evidence Complainant's trainer, Mr. Flores, lied about his mileage and driving, Complainant's employment records, and Complainant's medical records, among other documents.

RESPONDENT

Statement of Issues:

On February 2, 2012, Respondent submitted its Simple Statement of the Issues and Relief Sought. Respondent states the main issue in this claim is whether Complainant was terminated or subject to adverse employment action because she engaged in protected activity under the Surface Transportation Assistance Act. Respondent argues that Complainant was terminated because she failed to qualify to drive under § 391.41(b)(9) of the Federal Motor Carrier Safety Regulations³ and that Complainant was not terminated for any reasons related to any complaints Complainant made about her truck or trainer.

Respondent included a copy of Complainant's termination evaluation which noted that

³Pursuant to section 391.41(b)(9), "[a] person is physically qualified to drive a commercial vehicle if that person—has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his/her ability to drive a commercial motor vehicle safely."

Complainant was terminated on May 11, 2011, and listing the reason for termination as “VOLUNTARY–OTHR EMP NON-DRIVING–PERSONAL HEALTH” and the following explanation of termination: “DAC 933 PERSONAL HEALTH XP.” A supervisor’s evaluation also marked “NO” to the following questions: “Was the Employee:” “Stable,” “Dependable” and “Hardworking.” Additionally, the supervisor’s evaluation marked “NO” for Rehire, but also marked no to the following questions: “Evidence of any Problems?” and “Any Warnings?” The safety evaluation marked “NO” to Evidence of Drug Abuse, and “YES” to “Safe Driving Habits?” and “Rehire.” Respondent also included a copy of a letter from George Dunn, LCSW, at St. Matthews Pastoral Counseling Center, dated May 4, 2011, stating that he had seen Complainant for an evaluation and it is not in Complainant’s best interest to return to work due to her past and current stressors.

Summary Decision

On April 3, 2012, Respondent filed a Motion for Summary Disposition. In the motion, Respondent presents the following facts in this matter. Complainant was employed by Respondent from March 25, 2011, to May 4, 2011. During that period, Complainant was on a truck in training with two different trainers, for approximately two weeks during that time period, spending one week with each trainer. Complainant was sent for a mental evaluation and was removed from work by her treating clinician.

After several driving incidents while on the truck with her second trainer, Mr. Flores, Complainant decided to remove herself from the truck. Mr. Flores and Complainant returned to Respondent’s Salt Lake City facility on April 7, 2011. Complainant claimed she had become ill and was seen by Don Hastie, FNP, at the Lakeside Clinic. Mr. Hastie gave Complainant a 72 hour work release, which was subsequently extended until April 15, 2011. During the work release, Complainant made several visits to Respondent’s Human Resources Department. On her first visit, on April 8, 2011, Complainant spoke with Carrie Johansen, Assistant Director of HR. Complainant’s “unrelated and disjointed stories” gave Ms. Johansen cause for concern, so she referred Complainant to the Clinic to review her mental fitness to drive a truck. On April 11, 2011, Complainant returned to HR and provided 200-plus pages of handwritten notes, which she asked Ms. Johansen to read. The notes included a narrative of Complainant’s training experience, but midway through the narrative, Complainant wrote about her belief that the police were following her because of a 2003 conversation with an individual in Congress. Complainant expressed her belief that the police were working together and also with her trainer to follow her from state to state.

In its Motion for Summary Disposition, Respondent states that section 391.41 of the Federal Motor Carrier Safety Regulations (“FMCSR”) provides the Department of Transportation’s qualifications for truck drivers. Specifically, subsection 391.41(b)(9) states: “[a] person is physically qualified to drive a commercial vehicle if that person— has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his/her ability to drive a commercial motor vehicle safely.” Complainant’s behavior caused Ms. Johansen concern, so she alerted Don Hastie at Lakeside Medical. Mr. Hastie then met with Complainant and also expressed his concern that Complainant may have an episode while driving because of her belief that she was being trailed, which could pose a safety risk to the public. Mr. Hastie recommended Complainant seek a mental evaluation before returning to work. Complainant left Respondent’s facility in Salt Lake City and returned to Kentucky for a mental evaluation. On May 4, 2011, George Dunn, LCSW, at St. Matthews Pastoral Counseling, determined it was not in Complainant’s best interest to return to work due to her past and current

stressors.

Based on these facts, Respondent argues Complainant cannot satisfy the prima facie case of retaliation. The Surface Transportation Assistance Act requires Complainant to show that she engaged in a protected activity. Specifically, Complainant must have “filed a complaint or begun a proceeding related to a commercial motor vehicle safety regulation.” 49 U.S.C. § 31105. Respondent asserts Complainant never filed a complaint or began a proceeding related to a commercial motor vehicle safety regulation. Respondent notes that Complainant complained to its HR department that her trainer had been ill, causing her to become ill as well. However, Respondent does not find this incident to be a violation of a commercial motor vehicle safety or security regulation.

Regardless, even if Complainant had engaged in protected activity, Complainant was not retaliated against because of any alleged protected activity. Respondent asserts Complainant was terminated because she was determined no longer qualified to drive by her clinician. Because Complainant was no longer qualified to drive, Respondent could not employ her as a driver, and thus, she was terminated.

Response to Motion to Strike

On May 21, 2012, Respondent submitted its response to the Fourth Prehearing Order, which asked Respondent to show cause why its Motion for Summary Disposition should not be struck. Respondent states it attempted to comply with my Third Prehearing Order by mailing the requested documents by certified mail to Complainant and the Court on May 4, 2012. The package to Complainant arrived at her address on May 7, 2012, as evidenced in Complainant’s Motion to Strike. However, Complainant was not at home to sign for the package, so she was notified that she could pick up the package from the post office. The package sent to the Court was returned to Respondent on May 14, 2012. Respondent then resent the package on May 15, 2012.⁴ Respondent provided a copy of the package’s tracking history, which demonstrated the package was not accepted and returned to sender on May 9, 2012.

Respondent asserts that it made a good faith effort to comply with the Court’s order to respond to Complainant’s request for production by the May 7, 2012, deadline. Respondent notes that although the package sent to the Court was returned, Complainant’s package was delivered on the appointed date. Therefore, Respondent requests that its motion for summary disposition not be struck and that default not be rendered to Complainant, and instead, requests that this matter be dismissed in Respondent’s favor.

DISCUSSION

APPLICABLE LAW

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

(a) Prohibitions:

- (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because:

⁴ I note that the package of documents was received by the Court on May 22, 2012. The enclosed documents include Complainant’s driving records, background search, employment history, medical records, education history, training documents, driver application with Respondent, tax documents, Complainant’s wage claim against Grey & Blue Express, Complainant’s previous DOT complaints against employers, Complainant’s termination evaluation, Complainant’s handwritten notes, Respondent’s driving logs and communications, and documents from Complainant’s complaint with the Indiana Civil Rights Commission, among other documents.

(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 vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

(B) the employee refuses to operate a vehicle because:

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

49 U.S.C. § 31105(a).

Under the Statute:

2) "employee" means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who - (A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and (B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

3) "employer" - (A) means a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce; but (B) does not include the Government, a State, or a political subdivision of a State.

49 U.S.C. § 31101(2) and (3).

Additionally, complaints filed under STAA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, ("AIR 21"). 49 U.S.C. § 42121. *See* 49 U.S.C. § 31105(b)(1). Accordingly, to prevail, Complainant must demonstrate that:

(1) her employer is subject to the Act, and she is a covered employee under the Act;

(2) she engaged in a protected activity, as statutorily defined;

(3) her employer knew that she engaged in the protected activity;

(4) she suffered an unfavorable personnel action; and

(5) the protected activity was a contributing factor in the unfavorable personnel action.

See 49 U.S.C. § 42121(b)(2)(B); *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" as used in AIR 21, and thus STAA, means to "prove by a preponderance of the evidence." *See Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 9 (ARB Jan. 30, 2004). Thus, Complainant bears the burden of proving her case by a preponderance of the evidence. If Complainant establishes that Respondent violated the STAA, 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. *See* § 42121(b)(2)(B); *Sacco v. Hamden Logistics, Inc.*, ARB No. 09-024, ALJ 2008-STA-00043 and ALJ 2008-STA-00044, slip op. at 4 (ARB Dec. 18, 2009).

MOTION TO STRIKE

Complainant moves to strike Respondent's motions for summary decision and dismissal. Complainant states that Respondent did not produce the requested discovery documents on or before May 7, 2012. Complainant provided a copy of a U.S. Postal Service Delivery Notice. The notice, dated May 7, states that an attempted delivery was made and the package may be picked up at the Post Office beginning May 8, at 8:00 a.m. The package was delivered by certified mail. Complainant notes that Respondent did not produce any discovery documents from December 2011 to May 7, 2012. Complainant also filed a Motion to Squash and a Motion for Summary Judgment. In her motion, Complainant states that, although she received partial discovery from Respondent, she has not received several discovery documents requested from Respondent.

On May 21, 2012, Respondent submitted its response to the Fourth Prehearing Order. Respondent states it attempted to comply with my Third Prehearing Order by mailing the requested documents by certified mail to Complainant and the Court on May 4, 2012. The package to Complainant arrived at her address on May 7, 2012, as evidenced in Complainant's Motion to Strike. However, Complainant was not at home to sign for the package, so she was notified that she could pick up the package from the post office. Respondent asserts that it made a good faith effort to comply with the Court's order to respond to Complainant's request for production by the May 7, 2012, deadline. Respondent notes that although the package sent to the Court was returned, Complainant's package was delivered on the appointed date. Therefore, Respondent requests that its motion for summary disposition not be struck and that default not be rendered to Complainant, and instead, requests that this matter be dismissed in Respondent's favor.

Hearings before the Office of Administrative Law Judges are conducted pursuant to 29 C.F.R. Part 18, unless otherwise provided. 29 C.F.R. § 1978.106(a) (hearings will be conducted in accordance with 29 C.F.R. Part 18). Additionally, the Federal Rules of Civil Procedure apply in any situation not controlled by these rules or rules of special application. *See* 29 C.F.R. § 18.1(a). Under circumstances in which a party fails to comply with a discovery order for the production of documents, Section 18.6(d) provides, in part, as follows:

...the administrative law judge...may take such action in regard thereto as is just, including but not limited to the following: ... (v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

29 C.F.R. § 18.6(d).

Complainant states that Respondent did not produce the requested documents on or before the May 7, 2012, deadline and moves to strike Respondent's motions for summary decision and dismissal. I note that procedural rulings are judged under the abuse of discretion standard. *Cox v. Lockheed Martin Energy Sys., Inc.*, ARB No. 99-040, ALJ No. 1997-ERA-017, slip op. at 4 (ARB Mar. 30, 2001). *See generally Khandelwal v. Southern Cal. Edison*, ARB No. 98-159, ALJ No. 1997-ERA-006 (ARB Nov. 30, 2000); *Malpass v. General Elec. Co.*, Nos. 1985-ERA-038, 039, slip op. at 5-6 (Sec'y Mar. 1, 1994) (discussing ALJ's authority to conduct trial hearings under the Administrative Procedure Act).

Upon review, I deny Complainant's motion. I find Respondent made a good faith effort to comply with the Court's order. I note that the requested documents were delivered to Complainant's address on May 7, 2012, although Complainant was not present at the time of

delivery and was required to pick up the documents at the Post Office the following day. I have the discretion to issue sanctions, however, I do not find the requested sanctions to be appropriate or warranted in this situation. Accordingly, Complainant's motion to strike Respondent's motions for summary decision and dismissal is hereby denied.

MOTION FOR SUMMARY DECISION

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. 49 U.S.C. § 31105(a)(1). To prevail on a STAA claim, Complainant must prove, by a preponderance of the evidence that 1) Complainant engaged in protected activity; 2) Respondent took adverse action against Complainant for engaging in protected activity; and 3) the protected activity was a contributing factor in the unfavorable personnel action. *Bailey v. Koch Foods*, ARB No. 10-001, ALJ 2008-STA-061 (Sept. 30, 2011); *Ferguson v. New Prime*, ARB No. 10-075, ALJ 2009-STA-047 (August 31, 2011); *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052 (ARB Jan. 31, 2011); *Riess v. NuCor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010). See also *Clarke v. Navajo Express*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011).

Once Complainant has established that her protected activity was a contributing factor, Respondent must prove, by clear and convincing evidence, that it would have taken the same action absent Complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B). See e.g., *Sacco v. Hamden Logistics, Inc.*, ARB No. 09-024, ALJ 2008-STA-00043 and ALJ 2008-STA-00044, slip op. at 4 (ARB Dec. 18, 2009); *Bailey v. Koch Foods*, ARB No. 10-001, ALJ 2008-STA-061 (Sept. 30, 2011).

Respondent moves for summary decision. Respondent asserts Complainant never filed a complaint or began a proceeding related to a commercial motor vehicle safety regulation. Respondent notes that Complainant complained to its HR department that her trainer had been ill, causing her to become ill as well. However, Respondent does not find this incident to be a violation of a commercial motor vehicle safety or security regulation. Regardless, even if Complainant had engaged in protected activity, Complainant was not retaliated against because of any alleged protected activity. Respondent asserts Complainant was terminated because she was determined no longer qualified to drive by her clinician. Because Complainant was no longer qualified to drive, Respondent could not employ her as a driver, and thus, she was terminated.

Because Respondent, C.R. England Corporation, does not refute that it is subject to the Act and that Complainant is a covered employee under the Act, and finding no evidence to the contrary, I will proceed to determine whether Complainant has satisfied the remaining burdens of proof.

Protected Activity

Under 49 U.S.C. § 31105(a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992); see also *Lajoie v. Environmental Management*

Systems, Inc., 1990-STA-00031 (Sec’y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. *Nix v. Nehi-R.C. Bottling Co.*, 1984-STA-00001, slip op. at 8-9 (Sec’y July 4, 1984). An employee’s threats to notify officials of agencies such as the Department of Transportation or the Federal Motor Carrier Safety Administration may also be protected under the STAA. *William v. Carretta Trucking, Inc.*, 1994-STA-00007 (Sec’y Feb. 15, 1995).

Such complaints may be oral rather than written. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed. See *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (holding that the complainant’s oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

To be engaged in protected activity under the Act, Complainant must have filed a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order. Only complaints qualified as such will meet Complainant’s proof of burden. Complainant makes numerous, repeated allegations against Respondent. However, I will only examine those complaints that qualify as protected activity, as statutorily defined.

Complainant generally alleges that Respondent engaged in “unjust illegalities” concerning federal motor carrier rules, regulations, policies and procedures in Indiana and Utah. Complainant makes several allegations about her trainer, Mr. Flores, and Respondent’s truck driving school and educational program. Concerning her trainer, Complainant states that Mr. Flores tried to force her to drive hours that students are not supposed to drive, between the hours of midnight to 5:00 a.m. Complainant alleges Mr. Flores did not complete daily evaluations, sign them, or have Complainant sign evaluations. Complainant, as a student-trainee, was forced to drive in the mountains alone, while Mr. Flores was sick. Complainant was forced to drive in heavy thunderstorms, not to slow down or stop as visibility warranted and Complainant was forced to drive over steep mountain grades without a trainer assisting her under contract mandates. Complainant was not provided the appropriate attention as a student-driver because her trainer was in a sleeper berth and she drove the bulk of the mileage, and Complainant’s trainer did not follow the training rules. Additionally, Respondent made Complainant drive a defective, not properly maintained vehicle from March 30, 2011, to April 8, 2011. Complainant states that she wrote down several trainer negligence issues and presented them to OSHA and Respondent. Complainant also informed Carrie Johansen, in Respondent’s HR department, of Mr. Flores’ injustices. Complainant states she followed her training contract, though she also pointed out irregularities and inconsistencies in procedure as spelled out in the training contract. However, Complainant alleges that she reported the abuse of discrimination, but she was penalized for doing so.

Complainant also alleges Respondent did not follow the 1990 Psychiatric Medical Conference Amendments, which violates Federal Motor Carrier rules and regulations for a person with a known disability. Complainant states that no course completed certificate should have been issued and no contract offered to her because: 1) no occupational therapist was secured in Indiana or Utah for evaluation; and 2) no Indiana or Utah state medical examiner was secured for testing and scoring. Respondent did not secure a Utah DOT state examiner for driving and backing proficiency tests as required by law for a mental disability. Complainant asserts that no trucking school should award a disabled person a certificate of course completion

without a mental evaluation by an occupational therapist, or without a driving state examiner's evaluation on driving skills. No trucking company can allow a contract without these federal medical and academic criteria being met. Complainant argues this activity by Respondent is illegal.

Complainant also believes she was terminated because she pointed out illegalities concerning her log sheets in March 2011, which she states were inconsistent, to Chris Kelsey, Senior School Director and John Probasco, class instructor. Both took the logs and said nothing. Complainant alleges additional log violations because John Probasco lost Complainant's failing handwritten log exam and Complainant was still placed in a truck with a trainer.

Furthermore, Complainant alleges "Indiana" has opened an OSHA STAA dismissal to silence Complainant's complaint. The record also includes documentation concerning Complainant's complaint against the Indiana Occupational Safety and Health Administration (IOSHA) and her complaint with the Utah Occupational Safety and Health Division. Additionally, Complainant states Respondent had knowledge of her prior claim against a previous employer, Sitton Motor Lines. Complainant also generally alleges Respondent broke its own policies, providing a copy of Respondent's Driver Employee Policy Manual.

Because this case is before me on Respondent's motion for summary decision, I must draw all reasonable inferences in a manner most favorable to Complainant. *See* 29 C.F.R. § 18.40; Fed. R. Civ. P. 56(c). Respondent must prove there is no genuine issue as to any material fact and that it is entitled to summary decision. Upon review and in viewing the facts in a light most favorable to Complainant, I find there is a genuine issue of material fact as to whether Complainant engaged in protected activity. Respondent did not meet its burden to show an absence of evidence to support Complainant engaged in protected activity. As previously stated, under 49 U.S.C. § 31105(a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. I find that Complainant's made several complaints related to a commercial motor vehicle safety regulation, and therefore, I find a genuine issue of material fact. I note that Complainant need not mention a specific commercial motor vehicle safety standard to be protected under the STAA.

Knowledge of Protected Activity

Complainant, in several of her filings, states that she reported her complaints and violations to Respondent. For example, Complainant states she followed her training contract, although she also pointed out irregularities and inconsistencies in procedure as spelled out in the training contract. However, Complainant alleges that she reported the abuse of discrimination, but she was penalized for doing so. Complainant also reported Mr. Flores' actions. Complainant states that she wrote down several trainer negligence issues and presented them to OSHA and Respondent. Complainant also informed Carrie Johansen, in Respondent's HR department, of Mr. Flores' injustices. Complainant also believes she was terminated because she pointed out illegalities concerning her log sheets in March 2011, which she states were inconsistent, to Chris Kelsey, Senior School Director and John Probasco, class instructor. Additionally, Complainant states Respondent had knowledge of her prior claim against a previous employer, Sitton Motor Lines.

Drawing all reasonable inferences in a manner most favorable to Complainant, I find Respondent had knowledge of Complainant's protected activity. Complainant's complaints were communicated to Respondent, including employee Carrie Johansen, in the HR department.

Unfavorable Personnel Action

Complainant alleges that she suffered unfavorable personnel action as a result of her protected activity. The employee protection provisions of the STAA provide that "[a] person may not discharge an employee" for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). A complainant need not establish termination or discharge, but only an adverse employment action. *See, e.g., Galvin v. Munson Transp., Inc.*, 91-STA-41 (Sec'y Aug. 31, 1992) (finding adverse action despite respondent's characterization of incident, in which complainant was not allowed to complete assignment and then was denied rehire several months later, as a voluntary quit).

Complainant was terminated from her employment with Respondent, as evidenced by Complainant's termination evaluation, which noted that Complainant was terminated on May 11, 2011. I also note that Complainant makes several allegations of abuse and discrimination. Accordingly, I accept that Complainant suffered unfavorable personnel action within the meaning of the Act.

Contributing Factor

Complainant's burden is to prove by a preponderance of the evidence that her protected activity was a contributing factor in Respondent's decision to take unfavorable personnel action. 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." *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). *See Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 11 (ARB Nov 30, 2006). Complainant can succeed by "providing either direct or indirect proof of contribution." *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

A causal connection between the protected activity and the unfavorable personnel action may be circumstantially established by showing that Respondent was aware of the protected activity and that unfavorable personnel action followed closely thereafter. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Thus, close proximity in time can be considered evidence of causation. *White v. The Osage Tribal Council*, ARB No. 99-120, slip op. at 4 (Aug. 8, 1997). While temporal proximity may be used to establish the causal inference, it is not necessarily dispositive. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6 (Apr. 28, 2006). When other, contradictory evidence is present, inferring a causal relationship solely from temporal proximity may be illogical. *Id.* Such contradictory evidence could include evidence of intervening events or of legitimate, nondiscriminatory reasons for the unfavorable personnel action. *Id.*

Complainant states her belief that she was unlawfully terminated from her employment by Respondent. Complainant generally alleges Respondent abused, discriminated against, and terminated her because of her disability. Complainant argues that Respondent terminated her because she suffered from a psychological disability as Respondent had her medicated for a viral and bacterial infection. Complainant states that illness and medication alters behavior, and that illness and medication should not be used to terminate a contracted employee. Complainant further argues she was terminated illegally because of "intentional disability discriminations"

and that a psychiatric or psychological evaluation cannot be used as a disqualifier, citing to the Americans with Disabilities Act (ADA). Complainant alleges that Respondent manipulated Don Hastie with Lakeside Medical, who conducted Complainant's mental evaluation in Louisville, so Respondent could terminate her employment.

Complainant argues that Respondent made no accommodations for her disability and that Respondent used this as a pretext for termination. Complainant states that, when she was hired, Respondent had knowledge of her psychological disorders, and that Respondent targeted her behavior, attacking her emotionally, psychologically, socially, academically, mentally, physically and financially. Additionally, Complainant states that upon her release from employment, there was "no proof of factual reasoning."

Complainant states she followed her training contract, although she also pointed out irregularities and inconsistencies in procedure as spelled out in the training contract. However, Complainant alleges that she reported the abuse of discrimination, but she was penalized for doing so. Complainant also believes she was terminated because she pointed out illegalities concerning her log sheets in March 2011, which she states were inconsistent, to Chris Kelsey, Senior School Director and John Probasco, class instructor. Both took the logs and said nothing.

I have already determined that Respondent had knowledge of Complainant's protected activity. However, Complainant has the burden of proof to demonstrate, by a preponderance of the evidence, that her protected activity was a contributing factor in Respondent's decision to take unfavorable personnel action. Thus, Complainant must prove that her several complaints relating to a commercial motor vehicle safety regulation were a contributing factor in Respondent's decision to terminate her employment. Complainant, on several occasions, argues she was illegally terminated because of her disability, and not because of any complaints relating to a commercial motor vehicle safety regulation. However, Complainant also stated her belief that she was terminated because she pointed out illegalities concerning her log sheets in March 2011, which she states were inconsistent, to Chris Kelsey, Senior School Director and John Probasco, class instructor.

Respondent argues Complainant was not retaliated against because of any alleged protected activity. Respondent asserts Complainant was terminated because she was determined no longer qualified to drive by her clinician. Because Complainant was no longer qualified to drive, Respondent could not employ her as a driver, and thus, she was terminated.

While the preponderance of the evidence does not lead me to find Complainant has met her burden, this case is before me on Respondent's motion for summary judgment. Therefore, Respondent must prove there is no genuine issue as to any material fact and that it is entitled to summary decision. Drawing all reasonable inferences in a manner most favorable to Complainant, I find there is a genuine issue of material fact as to whether Complainant's protected activity was a contributing factor in Respondent's decision to take unfavorable personnel action. For example, I note that Complainant alleges she was terminated because of her complaints about log violations. Respondent did not meet its burden to show an absence of evidence to support Complainant's argument. I also note a close proximity in time between Complainant's allegations and her termination from employment.

Shifting Burden of Proof

Respondent can overcome the above determinations only if it demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545, 53550; 49 U.S.C. § 42121(b)(2)(B)(ii). *See also*

Ferguson v. New Prime, ARB No. 10-075, ALJ 2009-STA-047 (August 31, 2011) (citing *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 5, citing 49 U.S.C.A. § 42121(b)(2)(B)(iv) (Thomson/West 2007) and 29 C.F.R. § 1979.109(a) (2010)). “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Ferguson v. New Prime* ARB No. 10-075, ALJ 2009-STA-047 (August 31, 2011) (citing *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 5, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citing Black’s Law Dictionary at 577)).

I note that evidence of pretext will prevent Respondent from meeting its clear and convincing burden of proof. *See, e.g., Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009) (where substantial evidence supported ALJ’s finding that respondents’ reasons for firing the complainant were pretext, respondents did not prove by clear and convincing evidence that they would have fired the complainant absent his protected activity); *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009) (where employer’s shifting explanations for its adverse action and its disparate treatment of the complainant evidenced pretext, respondent could not prove that it would have terminated the complainant even if complainant had not engaged in protected activity). Respondent’s burden is to show that it “would have” terminated Complainant for the conduct of which she was accused, not that it “might have” or “could have.” *See, Id.*

Respondent argues that even if Complainant had engaged in protected activity, Complainant was not retaliated against because of any such alleged protected activity. Respondent asserts Complainant was terminated because she was determined no longer qualified to drive by her clinician. Respondent cites to section 391.41 of the Federal Motor Carrier Safety Regulations (“FMCSR”) which provides: “[a] person is physically qualified to drive a commercial vehicle if that person—has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his/her ability to drive a commercial motor vehicle safely.” Complainant’s behavior caused Ms. Johansen, with Respondent’s HR department, concern, so she alerted Don Hastie at Lakeside Medical. Mr. Hastie then met with Complainant and he also expressed his concern that Complainant may have an episode while driving because of her belief that she was being trailed, which could pose a safety risk to the public. Mr. Hastie recommended Complainant seek a mental evaluation before returning to work. Complainant left Respondent’s facility in Salt Lake City and returned to Kentucky for a mental evaluation. On May 4, 2011, George Dunn, LCSW, at St. Matthews Pastoral Counseling, determined it was not in Complainant’s best interest to return to work due to her past and current stressors. Because Complainant was no longer qualified to drive, Respondent could not employ her as a driver, and thus, she was terminated.

After a review of all the evidence, I find Respondent has demonstrated, by clear and convincing evidence, that it would have taken the unfavorable personnel action against Complainant in the absence of Complainant’s protected conduct. Respondent cites to section 391.41 of the Federal Motor Carrier Safety Regulations (“FMCSR”) which requires that a person have “no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his/her ability to drive a commercial motor vehicle safely.” Mr. Dunn determined it was not in Complainant’s best interest to return to work due to her past and current stressors. Therefore, Complainant was no longer qualified to drive under section 391.41 and Respondent could not employ her as a driver. Therefore, I find direct evidence that Complainant was terminated

because she was ineligible to be employed as a truck driver.

Complainant has not presented any evidence or argument that after May 4, 2011 she had the capacity to drive. Drawing all reasonable inferences in a manner most favorable to Complainant, I find there is no genuine issue of material fact as to whether Respondent would have taken the same adverse action in the absence of the protected conduct. Therefore, I find Respondent has established, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the Complainant's protected activity. Accordingly, I find Respondent has shown that it is entitled to summary decision.

CONCLUSION

I find that Respondent has established, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the Complainant's protected activity. Accordingly, I grant Respondent's motion for summary decision and deny Complainant's counter-motion for summary decision.

ORDER

Based on the foregoing, **IT IS ORDERED** that the STAA complaint in the above-captioned matter is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that all other outstanding motions filed by the parties are hereby **DENIED** and **DISMISSED**.

A

Daniel F. Solomon
Administrative Law Judge

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(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. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law

Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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

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

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(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. §§ 1978.110(a) and (b).