U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 27 September 2016

Case No.: 2015-NTS-00002

In the Matter of

JANATHAN HARTE
Complainant

v.

METROPOLITAN TRANSPORTATION AUTHORITY/ NEW YORK CITY TRANSIT AUTHORITY and MARK RUGGIERO
Respondents

Appearances: CHARLES GOETSCH, Esq.
For the Complainant

ROBERT K. DRINAN, Esq.
JAMES J. GALLAGHER, Esq.
For the Respondent

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER

This proceeding arises out of a complaint filed pursuant to the employee protection provisions of the National Transit Systems Security Act of 2007 (NTSSA or the "Act"), which was enacted on August 3, 2007, as Section 1413 of the Implementing Regulations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, and is found at 6 U.S.C. § 1142. Implementing regulations were published on November 9, 2015. See "Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and Federal Railroad Safety Act," 80 Fed. Reg. 69,138 (Nov. 9, 2015) to be codified at 29 C.F.R. Part 1982.[1]

[1] Unless otherwise noted, all references to regulations are to Title 29, Code of Federal Regulations (C.F.R.). References to the implementing regulations will cite to the applicable provision in Part 1982, rather than to the Federal Register.

Procedural History

On October 12, 2012, the Complainant filed a complaint, under the NTSSA, with the Occupational Safety and Health Administration (OSHA), the U.S. Department of Labor against the Respondents, the New York City Transit Authority (NYCTA) and superintendent Marc Ruggiero. The Complainant alleged that Respondent Ruggiero threatened to remove the Complainant from overtime consideration in retaliation for raising concerns over the operability of a drill press during a safety inspection. See CX 12.[2,3] In addition, the Complainant averred that Respondent Ruggiero enacted a number of unpopular safety regulations at the Linden Shop after the incident and attributed these changes to the Complainant's actions during the safety inspection in an attempt to paint him in a negative light among his co-workers. Id. On November 15, 2012, the parties received correspondence from the Secretary of Labor, acting through the OSHA Regional Administrator, indicating that it planned to investigate the matter. See CX 17, 18. Upon conducting the investigation, the Regional Administrator determined the following: the Complainant's complaint was timely; the Complainant filed an additional complaint reasonably related to his initial complaint, rendering it an amendment to the initial complaint; the parties are subject to the Act; and the Complainant engaged in protected activity under 6 U.S.C. § 1142. See Secretary's Findings, dated March 19, 2015 ("OSHA Findings"). The OSHA Findings also recommended, among other things, that compensatory damages of $2,500 and punitive damages of $50,000 be awarded. Id.

Consequently, on April 6, 2015, the Respondents timely objected to the OSHA determination and requested a hearing before an administrative law judge (ALJ). The case was forwarded to the Office of Administrative Law Judges (OALJ) and subsequently assigned to me. I issued a notice of hearing on April 28, 2015. On January 14, 2016, through counsel, the Respondents filed a Motion for Summary Decision. The Complainant filed a response to the Respondents' Motion for Summary Decision on January 29, 2016. On March 8, 2016, the Assistant Secretary of Labor for Occupational Safety and Health filed an Amicus Curiae Brief Opposing Respondents' Motion for Summary Decision. I issued an Order on March 22, 2016, granting in part and denying in part the Respondents' Motion for Summary Decision. I found that there were issues of material fact regarding whether the Complainant engaged in protected activity pursuant to 6 U.S.C. § 1142(a)(1)(A) and (b)(1)(A). See Order of Mar. 22, 2016, at 10. In addition, I found that the NTSSA's election of remedies provision afforded the Complainant the opportunity to seek relief under the NTSSA. Id. at 11-12. Finally, I determined that based on the facts of record, no rational trier of fact could find that the Complainant's complaint of perceived mistreatment by Respondent Ruggiero or the Complainant's co-workers constituted protected activity under 6 U.S.C. § 1142(a)(3). Id. at 13.

The hearing was held before me in New York, New York on March 29, 2016. During the hearing, the parties had full opportunity to present evidence and argument. The decision that follows is based upon an analysis of the record, the arguments of the parties, and applicable law.

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[2] The following abbreviations are used in his Decision: "CX" refers to Complainant's Exhibits; "RX" refers to Respondent's Exhibits; and "T." refers to the transcript of the March 29, 2016 hearing session.

[3] CX 12 is the Complainant's detailed narrative of his complaint against the Respondents dated August 15, 2012. The Complainant formally filed a complaint against the Respondents with OSHA on October 12, 2012, to which he attached this narrative.

I have considered the entire record, including the parties' briefs, the documentary evidence, and the hearing testimony.

Applicable Law

In pertinent part, the Act provides that a public transportation agency may not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee," if such action is due "in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security…." 6 U.S.C. § 1142(a)(1); see also § 1982.102(a)(1). Moreover, the Act further states that a public transportation agency shall not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for reporting a hazardous safety or security condition." 6 U.S.C. § 1142(b)(1)(A); see also § 1982.102(a)(2).

The Act provides that the burdens of proof set forth at 6 U.S.C. § 1142(c)(2) apply. Under the governing regulation, the complainant bears the burden initial burden, and must show "by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint." § 1982.109(a). The burden then shifts to the respondent, who must demonstrate "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity." § 1982.109(b).

Under the Act, a prevailing employee shall be entitled to all relief necessary to make the employee whole. See 6 U.S.C. § 1142(d)(1). Specific elements of damages provided in the Act include reinstatement with the same seniority status that the employee would have had but for the discrimination; backpay with interest; and compensatory damages, including compensation for special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. See 6 U.S.C. § 1142(d)(2)(A-C). Punitive damages in an amount up to $250,000 may also be awarded. See 6 U.S.C. § 1142(d)(3).

The Parties' Contentions

As set forth in their post-hearing briefs, the parties' positions are as follows:

Complainant

- The NTSSA applies to employee workplace safety. See Complainant's Brief, at 1.
- The Complainant suffered an adverse action. See Complainant's Brief, at 3.
- The Complainant is entitled to compensatory and punitive damages. See Complainant's Brief, at 5.

Respondent

- The Complainant has failed to establish through credible testimony and documentary evidence that he suffered any adverse action. See Respondent's Brief, at 8.
- The Complainant did not engage in protected activity under the NTSSA when he turned on a drill press. See Respondent's Brief, at 11.
- The Complainant has failed to establish that he is entitled to compensatory damages of any kind. See Respondent's Brief, at 20.
- The Complainant has failed to establish that he is entitled to punitive damages because the Complainant's testimony, even if fully credited, fails to establish that the Respondents acted with callous disregard or intentionally violated federal law. See Respondent's Brief, at 23.

Issues

The following issues are presented for adjudication:

- Whether the Complainant engaged in protected activity under 6 U.S.C. § 1142(a)(1)(A) and/or (b)(1)(A).
- Whether Respondent Ruggiero hostilely reacted to the Complainant's act of turning on the drill press.
- Whether the Complainant suffered adverse actions when Respondent Ruggiero allegedly threatened to place him at the rack and/or take away his overtime, and made negative comments about the Complainant's actions to the Complainant's co-workers.
- In the event the Complainant establishes that the Respondent violated the Act, the appropriate remedies.

Stipulated Facts

At the hearing, the parties agreed to stipulate to generally the same facts as presented in their respective amended pre-hearing statements (T. 6). However, the parties indicated that they did not wish to stipulate to the fourth item on the Complainant's list, that the Complainant reported various alleged workplace safety hazards at the Linden Shop to Respondent Ruggiero (T. 7). The remaining facts were stipulated to and they are as follows:

1. Respondent NYCTA is a public transportation agency subject to the NTSSA, 6 U.S.C. § 1142.
2. The Complainant is an employee of Respondent NYCTA.
3. The Linden Shop has two main functions: fabrication of track panels, switches and other track related items in the Shop; and fleet operations, which involve the trucks that distribute material for track jobs.

4. In June 2012, the Complainant filed a complaint with the New York State Department of Labor's Public Employee Safety and Health (PESH) regulatory agency regarding various workplace safety hazards at the Linden Shop.
5. As a result of the Complainant's complaint, on August 9, 2012, two PESH inspectors, Kwo Lam and Iris Rivera, visited the Linden Shop to conduct a health and safety inspection. They arrived at approximately 7 A.M.
6. The inspection began at approximately 9 A.M.
7. The Complainant was present for part of the inspection.
8. Also present during the inspection were Respondent NYCTA's management officials, including Respondent Ruggiero, and TWU Local 100 union officials.
9. The PESH inspection proceeded through various areas in the Shop.
10. At approximately 2 p.m., the Complainant, Respondent Ruggiero, and the PESH inspectors and the other individuals present stopped at a device called a drill press.
11. At the drill press, there was a discussion regarding the operability of the drill press between the Complainant, Respondent Ruggiero, and one of the PESH inspectors, Mr. Lam.
12. The drill press is the location at which the Complainant alleged Respondent Ruggiero made a threatening remark toward him, and that remark forms the basis of the Complainant's claim of retaliation.
13. At some point shortly after the discussion at the drill press, the Complainant left the inspection to work his four hours of pre-scheduled overtime in the fabrication shop.
14. On October 12, 2012, OSHA received Complainant's NTSSA complaint, which was referred by PESH on September 27, 2012.

See Complainant's Amended Pre-hearing Statement, at 2-3. I find the evidence of record supports these stipulations.

Documents Submitted by the Parties

At the hearing, the parties provided me with a binder labeled "Complainant's Exhibits 1-21" containing their joint exhibits (T. 5). The parties agreed to the admissibility of most of the 21 exhibits, but not necessarily to the truth of the contents of those exhibits (T. 6). The exhibits are listed below:

- NTSSA Statute Text. Complainant's Exhibit (CX) 1.
- NYCTA Anti-harassment Policy. CX 2.
- NYCTA Safety Policy. CX 3.
- Complainant's List of Linden Shop Safety Complaints. CX 4. **
- Complainant's June 28, 2012 Safety Complaint to PESH. CX 5. **
- July 13, 2012 PESH Notice of Safety Hazard. CX 6.
- August 9, 2012 Inspection Sign-in Sheet. CX 7. *
- Photo of Drill Press. CX 8. *
- August 10, 2012 Lam/Rivera Inspection Field Notes. CX 9.

- March 19, 2015 OSHA Findings (limited to factual recitation at bottom of page 2 to top of page 3, only for the purpose of establishing notice to NYCTA and NYCTA notice thereto). CX 10.
- August 9, 2012 Memo from Complainant to Blazejewicz. CX 11. **
- August 15, 2012 Complainant's Complaint to New York State Department of Labor. CX 12. **
- August 9, 2012 PESH Inspection Narrative. CX 13. **
- May 29, 2013 PESH Notice that Complainant's Complaint is Sustained. CX 14.
- September 27, 2012 Referral Request. CX 15. *
- September 27, 2012 PESH Referral Letter to OSHA. CX 16. *
- November 15, 2012 OSHA Letter to Complainant. CX 17. *
- November 15, 2012 OSHA Letter to Respondent NYCTA. CX 18. *
- Complainant Bonus Sheet. CX 19.
- Deposition Transcript of New York Department of Labor PESH Inspector Kwo Lam. CX 20.
- Deposition Transcript of New York Department of Labor PESH Inspector Iris Rivera. CX 21.
- Collective Bargaining Agreement. CX 22. (T. 187).
- Listing of Eight Occasions that Complainant Worked on Case. ALJ 1. (T. 187)

* Denotes that the parties agree to admissibility

**Denotes that the parties agree as to admissibility to show that certain events occurred, but not for the truth of its contents

Summary of the Testimonial Evidence From Hearing

Iris Rivera

Iris Rivera, a public employee safety and health inspector with the New York State Department of Labor, described PESH's jurisdiction as covering state and city employees and its purpose as ensuring that the working environment for a state or city agency is safe from physical hazards. Although PESH falls under OSHA guidelines and enforces OSHA's regulations, the Federal OSHA oversees private sector working environment safety, while PESH does the same for the public sector, Ms. Rivera stated. On August 9, 2012, the day of the Linden Shop inspection, Ms. Rivera identified herself, fellow investigator Kwo Lam, Respondent Ruggiero, and the Complainant as attendees at the inspection. Ms. Rivera testified that the inspection was unannounced and that Respondent Ruggiero repeatedly asked her and Mr. Lam to introduce themselves and explain why they were on site. During the walkthrough, Mr. Lam informed Respondent Ruggiero that union members were permitted to join them and that he and Ms. Rivera could look around the work area freely, even if certain areas were not mentioned in the complaint (T. 11-19).

Upon reaching the drill press at around 2 P.M., Ms. Rivera noted that it lacked a protective guard, which she alluded to in her narrative regarding the inspection at CX 13. She did not know of its inoperability prior to the inspection. Reading from her report, Ms. Rivera

indicated that regulation 29 C.F.R. § 1910.212(a)(3)(ii) is a federal OSHA regulation that PESH has authority to enforce. During the walkthrough, Ms. Rivera recalled, Respondent Ruggiero told the attendees that the drill press was not in operation in response to a question posed by Mr. Lam; but the Complainant indicated otherwise, stating that his members had used it, and he demonstrated its operability. Ms. Rivera recollected that Respondent Ruggiero responded to the Complainant by stating: "Really? You're going to do this to me? I am taking you off the rack," and she described his manner as upset, harsh and not in jest. Ms. Rivera construed Respondent Ruggiero's words as a retaliatory threat to the Complainant based on his tone and because his words came in response to the Complainant's assertion that the drill press was actually operational, contrary to Respondent Ruggiero's statement, even though she was unfamiliar with the term "rack" (T. 20-23, 47-48).

Once she noticed the lack of a cover guard on the drill press, Ms. Rivera's immediate concern went to employee safety and the possibility that an employee could suffer a puncture wound if he or she used the drill press without a safety guard. She believed the drill press should have been locked out or tagged out, and not plugged in given its condition. Asked to recall the Complainant's reaction to Respondent Ruggiero's response, Ms. Rivera remarked that the Complainant appeared embarrassed and she advised the Complainant that if Respondent Ruggiero retaliated against him in the future, he could contact her office. As to her own reaction, Ms. Rivera claimed she was shocked and had never seen such an exchange, especially compared to other incidents that she termed a "gray area." In contrast, Ms. Rivera characterized Respondent Ruggiero's reaction as immediate and "a bit threatening." Mr. Lam then made sure the drill press was unplugged and informed Respondent Ruggiero to post a sign indicating its inoperability. At the conclusion of the inspection, Mr. Lam advised Respondent Ruggiero of the whistleblower protection policy, as reported in the investigation narrative at CX 13, to ensure no retaliatory action would be taken after the inspectors left, according to Ms. Rivera. Ms. Rivera testified that, upon the investigators' departure, Respondent Ruggiero was told he could not change an employee's shift or work location in retaliation and she perceived that he did not take the warning seriously. Finally, Ms. Rivera stated that she and Mr. Lam customarily advised attendees as to the retaliation policy at the closing conference, but given the events that transpired at the drill press, they wanted to particularly ensure that they conveyed this information at this closing conference (T. 23-26, 48, 53, 55, 59).

Upon returning from the inspection and after she and Mr. Lam conveyed to their supervisor, Raynard Caines, what had transpired, Mr. Caines instructed them to create a field note about the drill press incident, according to Ms. Rivera. This field note appears at CX 9 and refers to the statement made from Respondent Ruggiero to the Complainant at the drill press regarding overtime. Complainant's counsel then directed Ms. Rivera's attention to CX 14, a PESH letter from Mr. Caines to the Complainant. Ms. Rivera indicated that this letter confirmed to the Complainant that his complaint was sustained. Finally, Ms. Rivera said that she did not disagree in any significant way with Mr. Lam's statements at his deposition (T. 25-28).

On cross-examination, Ms. Rivera confirmed that, consistent with PESH policy, PESH did not forewarn the Respondents of its inspection, but did notify Steve St. Hill, a union representative, prior to the inspection. Union representatives Paul Navarro and Mr. St. Hill, Safety Officer of the Maintenance and Way Division Gene Jerome, and the Complainant

attended the inspection, she testified. Ms. Rivera stated that, after receiving a call from Respondent Ruggiero, Safety and Health Administrator Jeffrey Johns joined the inspection after it had started and she wrote his name on the attendance sheet at CX 7 to record his participation (T. 30-39).

According to Ms. Rivera, the Complainant remained with the group for the entire walkthrough until the closing conference. Ms. Rivera testified that, later in the walkthrough, Respondent Ruggiero became upset with Mr. Johns regarding the condition of a coffee machine, which was not rated as industrial and featured a makeshift wooden wire, rendering it a potential shock hazard. However, Ms. Rivera stated that the only threatening comment made by Respondent Ruggiero to the Complainant occurred at the drill press. At the closing conference, according to Ms. Rivera, she and Mr. Lam instructed Respondent Ruggiero to address the safety issues raised during the inspection. In May 2013, Ms. Rivera and PESH issued a report as to the drill press incident and gave notification of its findings to Respondent NYCTA at that time. Given the number of complaints listed in the Complainant's complaint, Ms. Rivera considered this inspection a major one (T. 49-53).

The Complainant

The Complainant stated that while working in the fabrication facility at Linden Shop, he noticed an exorbitant number of safety hazards and violations in the shop, including bird feces, electrical hazards, broken outlets, exposed wires that were still running, fire hazards, and strewn cable throughout the facility. In response, the Complainant communicated these safety concerns to Respondent Ruggiero, but the Complainant testified that Respondent Ruggiero would not cooperate with him. The hazards remained uncorrected after a number of monthly safety inspections. In June 2012, the Complainant filed complaints with OSHA and PESH in connection with these unaddressed safety issues. In response, PESH conducted a safety inspection on August 9, 2012, attended by the Complainant, Respondent Ruggiero, Mr. Lam, Ms. Rivera, Mr. Navarro, Mr. St. Hill, and Mr. Johns. (T. 62-68).

On the day of the inspection, Mr. St. Hill advised the Complainant, who was working his 6 A.M. to 2 P.M. shift in the welding section, that the PESH inspectors had arrived and instructed the Complainant to meet them downstairs, taking him away from his assigned work for the day. Once the group had congregated, the Complainant recalled Respondent Ruggiero phoning Mr. Jerome to advise him that the inspectors had arrived and ask him to appear, which he did. Mr. Johns also joined the inspection two or three hours into the tour at Respondent Ruggiero's request, after the drill press stop. Prior to this inspection, the Complainant testified to going on one walkthrough with Mr. Johns, who the Complainant characterized as not taking safety seriously (T. 130-35).

The Complainant testified that Respondent Ruggiero was upset that the Complainant attended the inspection and asked the PESH inspectors if the Complainant needed to be present, to which Mr. Lam responded that he wanted the Complainant present. As the walkthrough commenced, the Complainant asserted, Respondent Ruggiero told passing employees that the inspection was due to the Complainant's complaint and attributed the potential shut down of the facility to the Complainant. When the inspection reached the garage building, Respondent

Ruggiero confronted the Complainant about not wearing his personal protection equipment ("PPE"), jabbing his forefinger at the Complainant, according to the Complainant (T. 62-71, 113).

The inspection made its way to the fabrication shop and approached the drill press around 1 P.M., where a previous incident had occurred that was supposed to render the drill press out of service, the Complainant testified. The Complainant stated that he witnessed co-workers using the drill press just prior to the inspection. During the inspection, the Complainant recalled that the drill press was not plugged in, but hardwired to a circuit breaker, and in the "on" position. The Complainant also recollected that the safety guard was missing. Mr. Lam asked Respondent Ruggiero whether the drill press was operational, to which Respondent Ruggiero replied that it does not work and that employees know not to use the drill press, the Complainant stated. As the Complainant thought otherwise, he informed the PESH investigators that the drill press was indeed operational, which the Complainant demonstrated by turning on the machine. According to the Complainant, Respondent Ruggiero turned off the drill press and became "incredibly upset and [he] just blew up," his race reddening and finger gesturing. The Complainant recollected that Respondent Ruggiero told him: "You are going to do this to me? Really? Really? You are going to do this to me in front of them? I'll take you, and I'll put you on the rack. I'll take you off the overtime list." The PESH inspectors took note of his reaction immediately. The Complainant characterized Respondent Ruggiero's threat as a weapon used against him, but acknowledged that Respondent Ruggiero did not follow through on this threat (T. 71-75, 136, 139-41).

The Complainant described the rack as a demanding type of work compared to other tasks in the shop and testified that he took Respondent Ruggiero's threat very seriously. The Complainant asserted that Respondent Ruggiero, the superintendent of the facility, had the power to assign Complainant to a different job and affect his overtime earnings. In order to contest his loss of overtime, the Complainant would have had to slog through the protracted grievance process. As the inspection progressed, Respondent Ruggiero indicated that he would not compensate the Complainant at his overtime rate after 2 P.M. The Complainant was scheduled to work overtime at the rack starting at 2 P.M., which requires six to eight people in a gang, not the usual four, because production expectations were higher than normal during overtime. Mr. St. Hill assured the Complainant that he and his partner would thoroughly conduct the remainder of the inspection, so the Complainant departed from the inspection. Complainant's counsel then showed the Complainant CX 11, which the Complainant testified he created to keep Jack Blazejewicz, the union chairman, as well as the Department of Labor, apprised of the inspection (T. 75-78, 108-09).

The day after the inspection, the Complainant became aware of a meeting between Respondent Ruggiero and his foremen. Upon the meeting's conclusion, the Complainant observed that the foremen immediately confronted shop employees, advising them that they would lose certain privileges as a result of the Complainant's complaint. As a result, the Complainant noticed an immediate change in his relationships with his co-workers. He perceived, on a daily basis, that his co-workers lost trust in him and associated him with the loss of their work privileges. For example, the Complainant asserted that supervisor John Keiva suggested, in front of the Complainant's co-workers, that the Complainant should be tarred and

feathered for his actions. Complainant's counsel showed Complainant CX 15, the September 27, 2012 Voluntary Information Complaint Referral Request. The Complainant testified that the Department of Labor and the PESH investigators prompted the transmission of this letter and recommended that OSHA investigate the matter. As a result of CX 15, PESH sent a referral letter to OSHA (T. 79-86).

As a result of pursuing his whistleblower complaint, the Complainant estimated that he lost $2,208 in wages, at $276 per day over eight days. The Complainant stated that he spent six workdays on this matter and had to use his personal and vacation days to do so. The other two days, which consisted of the OSHA interview in part, were scheduled on the Complainant's off day. The Complainant testified that his work week consisted of Sundays through Thursdays. The Complainant testified that he endured stress as a result of the events of August 9, 2012, including fears of being taken out of service for speaking out. When asked to elaborate on his complaint at CX 11, the Complainant explained that he was labeled a troublemaker by co-workers as a result of his actions because word travels fast in the shop. The Complainant stated that he brought his complaint because Respondent NYCTA leads by intimidation, does not take safety concerns seriously, and will retaliate against those who bring safety concerns to the forefront such that others will lose trust in that person, as happened to the Complainant. Finally, the Complainant explained that he hoped that this adjudication would help others speak up about their rights without fear of intimidation (T. 88-94, 152-53).

As to the history between the Complainant and Respondent Ruggiero, the Complainant, in his capacity as vice chairman of the union, once conducted a safety meeting with Ronnie Smith, the general superintendent at the time. The Complainant found Mr. Smith to be receptive to his safety concerns. According to the Complainant, he asked Respondent Ruggiero to attend the meeting, then politely requested that Respondent Ruggiero leave early in the meeting to speak with Mr. Smith alone. The Complainant perceived that Respondent Ruggiero was upset at his request. Between 2010 and 2012, the Complainant testified, he did not make efforts to address safety concerns because it was not with in his purview. The Complainant stated that by 2012, after becoming better acquainted with safety protocol, he felt the union steward let safety concerns linger because of his desire not to confront Respondent Ruggiero, who was the general superintendent at that time. The Complainant reiterated his view that Respondent NYCTA has a culture of ignoring safety issues and asserted that he was aware of some safety issues at the Linden Shop between 2010 and 2012. The Complainant testified that he knew something was wrong with the drill press prior to the inspection and first found out about it through Respondent Ruggiero (T. 110-17, 137).

Regarding prior issues at the Linden Shop, the Complainant estimated that he filed about 45 grievances, some relating to overtime, but mainly due to his treatment after the inspection and the lack of training provided to him. Employer's counsel characterized the Complainant's grievances as an objection to long-held overtime policies. The Complainant conceded that no one else filed grievances regarding overtime. However, the Complainant claimed that other co-workers expressed satisfaction that he filed these grievances and that he filed them because he felt these practices were not consistent with the collective bargaining agreement (T. 141-147).

Respondent Ruggiero

Respondent Ruggiero testified that he served as Superintendent at the Linden Shop from 2007 to November 2012 and knew that reporting a safety hazard constituted protected activity to which management could not retaliate. During the first half of 2012, Respondent Ruggiero was the lone superintendent on site and the Complainant sent him emails regarding various safety issues. Respondent Ruggiero testified that on his arrival to work on August 9, 2012, he was taken by surprise when he learned that PESH would be conducting an inspection that day. According to him, the PESH inspectors informed Respondent Ruggiero that the Complainant initiated the safety complaint that brought them to the Linden Shop that morning. Respondent Ruggiero believed that having the Complainant attend the walkthrough would discriminate against the Respondents and asked the PESH investigators to exclude the Complainant from the walkthrough, which they did not do (T. 155-162).

When the walkthrough reached the drill press, Respondent Ruggiero acknowledged that the drill press did not have a safety guard, did not have a lock-out or tag-out notice, and was plugged into the outlet. Upon Mr. Lam asking Respondent Ruggiero whether the drill press was operational, Respondent Ruggiero answered that it was not, based on the information he had at that time. This prompted the Complainant to tell the PESH inspectors that the drill press did work and he turned on the drill press, according to Respondent Ruggiero. Respondent Ruggiero could not remember what he told the Complainant in response, but maintained that whatever he said was inadvertent. Respondent Ruggiero testified that he was upset that he received misinformation from his subordinates regarding the operability of the drill press. Upon Complainant's counsel showing Respondent Ruggiero CX 13, the investigation narrative, he recalled that the PESH investigators informed him about the retaliation policy at the inspection's closing conference. CX 9 reflects comments from PESH investigators that Respondent Ruggiero made threats against the Complainant during the inspection, which Respondent Ruggiero denied and suggested that the PESH investigators misunderstood the situation. Respondent Ruggiero also confirmed that he conducted a meeting with his foremen the day after the inspection (T. 163-66).

For the six to eight months he served as the lone superintendent, Respondent Ruggiero testified, he performed the work of three superintendents, engaging in administrative work that kept him from overseeing the field. Among his responsibilities included workplace safety and he worked with safety manager Mr. Johns, who Respondent Ruggiero regarded as very diligent and smart. Respondent Ruggiero lauded Mr. Johns' safety record and expressed his satisfaction with Mr. Johns' performance. Respondent Ruggiero disagreed with the Complainant's characterization that Mr. Johns did not take safety seriously, stating that he could not recall any safety incidents under Mr. Johns' watch and that he changed eyewash stations, and put up exit and pipe signs, both of which had been long overdue. As part of Mr. Johns' position, he would participate in safety walkthroughs, fill out paperwork, discuss his findings with Respondent Ruggiero, and they would prioritize which issues needed fixing. Respondent Ruggiero was satisfied with Mr. Johns' performance as to these tasks. As a manager, Respondent Ruggiero characterized his style as in keeping with the rules of the company, treating everybody the same, and putting safety above all else. Respondent Ruggiero denied threating employees who made

safety complaints and arbitrarily reassigning employees to less desirable jobs as part of his management style (T. 167-71).

During his morning briefing on the day of the PESH inspection, Respondent Ruggiero indicated that his subordinates told him that the drill press was broken and that they could not use it. Respondent Ruggiero testified that he learned that the gears on the inside were stripped, which indicated why when the Complainant turned on the drill press the motor would turn on, but Respondent Ruggiero explained that if one put any pressure on the drill bit, it would stop. Because it could not perform its intended function, the drill press was broken, Respondent Ruggiero stated. As the PESH inspectors arrived, they walked onto the property unescorted and Respondent Ruggiero was not informed about their presence until after their arrival, which caught him off guard. The employees at the Linden Shop knew about their presence not long after the PESH inspectors had arrived, according to Respondent Ruggiero. The PESH inspectors' arrival aggravated Respondent Ruggiero because he perceived that they had taken over his authority and prevented the Complainant from doing his work, as he was not on union release time. Respondent Ruggiero also noticed that nobody had their PPE on in preparation for the walkthrough and instructed them to don their gear, including the Complainant, and everyone complied (T. 171-75).

As the inspection arrived at the drill press, Mr. Lam commented about its lack of a safety guard. Then, Respondent Ruggiero explained, the inspection became heated because the Complainant turned on the drill press, Respondent Ruggiero shut off the breaker, and everyone stepped back from the drill press. However, Respondent Ruggiero could not recall saying anything to the Complainant and testified that he would have no reason to threaten him, but that he was frustrated that no one had informed him about the condition of the drill press so he could fix it. After the group departed the drill press, Respondent Ruggiero told the Complainant that his shift ends at 2 P.M. and offered that he could continue on the walkthrough and not earn at the overtime rate or he could return to the rack and work overtime as scheduled. The Complainant opted for the latter. Respondent Ruggiero denied that he made threatening or hostile remarks to the Complainant during or after the walkthrough and also denied taking actions that day or in the days after the walkthrough that would cause the Complainant to lose overtime. Respondent Ruggiero did not intend to punish or prejudice the Complainant and stated that he would feel terrible if the Complainant felt that way. In general, Respondent Ruggiero testified, he wanted his employees to come to him with safety concerns so they can be corrected such that no one injures himself or herself, and he lauded his own impeccable record as to employee safety. Respondent Ruggiero also denied the Complainant's accusation that a culture of punitive action against employees who make safety complaints existed in the Linden Shop and contended that safety had improved since he started in 1982 (T. 174-78).

On redirect examination, Respondent Ruggiero characterized the Complainant's turning on the drill press as showing that the gears did not work correctly, but not evidence of a safety concern. The safety concern focused on the lack of a guard; Respondent Ruggiero said he was upset at his subordinates who did not alert him that the guard was missing, not at the Complainant. Respondent Ruggiero confirmed that the drill press did not have a lock-out or tag-out that morning but he did not learn about the gear problems until after the incident at the drill

press. Once again, although Respondent Ruggiero could remember that the incident became heated, he could not remember what he said to the Complainant (T. 179-80).

At the conclusion of Respondent Ruggiero's testimony, he indicated that Maintenance Supervisors Level 2 were responsible for scheduling overtime and they did so on a rotating, seniority basis. However, an employee could opt not to be on the overtime list if he or she desired. Employees would know a day or two in advance if they were eligible for overtime based on the rotation. During August 2012, the shop assigned a large number of overtime hours because it had to construct the interlocking switches within a specific timeframe for installation during periods when the trains were out of service. Respondent Ruggiero testified that he had the power to remove employees from the overtime list, but he never took that action so as not to cause an uproar with the union. However, he had no power over employees' picks for their regular jobs. As to the period of time in which Respondent Ruggiero served as the lone superintendent, he described the situation as overwhelming because he had to do the work of three people and indicated that he did not receive overtime during this period. At that time, Respondent Ruggiero stated that he worked 50 or 60 hours per week and as such, certain issues would fall between the cracks. Respondent Ruggiero asserted that he did not know the Complainant made his complaint until the PESH inspectors arrived at the shop and the PESH inspectors volunteered that it was the Complainant who specifically filed the complaint (T. 181-85).

Summary of Deposition Testimony

The Complainant (EX A)

The Complainant, a specialist chauffeur, track worker, truck driver, welder/burner, has worked for Respondent NYCTA at its Linden Shop for 18 years (EX A at 8-13). The Complainant started working at the rack in the Linden Shop in 2004, where he built panels. According to the Complainant, the rack is composed of two rails set up on ties for three rail lengths and he would have to lay out the ties, rails, plates, pads and build a track with a gang of four or five people. The Complainant also worked as a welding inspector at the Linden Shop and served in that capacity until Respondent NYCTA eliminated his job in 2012. Next, the Complainant picked into a dual-rate chauffeur in fleet operations, a motor pool for a division of support services for capital construction in any department that needed equipment moved. The Complainant operated the equipment under the supervision of the Maintenance Supervisors, level 1 (MS-1). Id. at 15-21.

Throughout his time at the Linden Shop, the Complainant testified that he had several safety concerns, especially starting in January 2012 after receiving walkthrough safety training from the union and Respondent NYCTA. Specifically, the Complainant noticed fire hazards and exposed electrical wires. The Complainant contacted the superintendent at the time, Respondent Ruggiero, to address these safety issues, which included unclean and broken eyewash stations, exposed electrical wires, strewn cables, fire hazards, a building with a crack in it that needed to be condemned, and a failure to follow lock-out/take-out[4] procedures. Because of Respondent

[4] The transcript of the Complainant's deposition refers to this procedure as a "lock-out/take-out" (EX A at 24). In all other references to this procedure throughout the record, it is known as a "lock-out/tag-out."

Ruggiero's non-responsiveness, the Complainant and a joint labor-management safety committee pushed for regular inspections, which were supposed to be done monthly but had not occurred regularly. The Complainant testified that management was not cooperative, despite its contacting Respondent Ruggiero via email to address these problems. Thereafter, the Complainant told Mr. Blazejewicz that the union and management need to reinstitute the walkthrough and advised him of the existing problems. Mr. Blazejewicz directed the Complainant and Respondent Ruggiero to arrange the walkthrough. Starting in March 2012, the Complainant and Mr. Johns, a safety officer appointed by Respondent Ruggiero, performed walkthroughs for three months, whereupon Mr. Johns filled out forms that served as a guide to conduct repairs for issues discovered during the walkthrough. These forms would then be disseminated to Mr. Johns' superiors, including Respondent Ruggiero. Id. at 21-35.

When these safety issues remained unaddressed, the Complainant, with the assistance of union safety liaison Mr. St. Hill, completed a PESH safety complaint that detailed various safety hazards in June 2012. On August 9, 2012, PESH inspectors appeared at the Linden Shop for a walkthrough in response to the Complainant's complaint. The Complainant testified to not having foreknowledge of the walkthrough that specific day, but in July 2012, Mr. St. Hill advised him that PESH would come to visit the facility at some point in response to the complaint. Employer's counsel then marked the Complainant's letter to Mr. Blazejewicz and copied to others as EX A, detailing the events that transpired the day of the inspection, as the Complainant perceived that Respondent Ruggiero retaliated against him during the walkthrough.[5] EX A also included a list of about 30 safety issues at the Linden Shop. The Complainant copied a number of recipients when he dispatched this list, including John Samuelson, the union president at the time; Earl Phillips, the recording secretary for the union; Mr. Jerome, Respondent Ruggiero, and the New York State Department of Labor to emphasize the importance of this issue. Id. at 29-60.

The Complainant learned of the walkthrough at 7 A.M. that morning when Mr. St. Hill called him and indicated that PESH investigators were on their way to the facility and instructed the Complainant to join them in the main building. Upon reaching the main building, the Complainant greeted the inspectors, who sought out Respondent Ruggiero so they could begin the opening conference, in which the Complainant did not participate. After concluding the opening conference, the Complainant rejoined the group in the yard and observed that Respondent Ruggiero was unhappy about the union's presence there. The Complainant testified that he perceived Respondent's unhappiness based on his demeanor, loud voice, and a call he made to Mr. Jerome requesting that he join the walkthrough. Mr. Jerome did not join the inspection until the group reached the fleet building. When Respondent Ruggiero asked who was leading the walkthrough and whether the Complainant had to be there, the inspector responded that no one person leads the walk and that the union must be present, including the Complainant, because he has knowledge of the complaints. Id. at 43-53.

As the inspection made its way to different areas of the Linden Shop and the inspectors took note of various hazards, Respondent Ruggiero exuded his upset based on his gestures, mannerisms, and comments, the Complainant testified. Respondent Ruggiero made comments indicating that the Linden Shop would be closed due to the Complainant's complaint and the

[5] This letter, marked as CX 11 in the record, was introduced as EX A during the Complainant's deposition.

Complainant perceived that Respondent Ruggiero was becoming increasingly aggravated as the walkthrough continued, the Complainant stated. In general, according to the Complainant, employees at the Linden Shop described Respondent Ruggiero as hotheaded and harsh in the way he dealt with people. In addition, the Complainant described Respondent Ruggiero as difficult to convince, citing an anecdote in which Respondent Ruggiero refused employees' request to salt ice over walking areas in front of the building, which had been standard protocol. Id. at 66-72.

Returning to the events of August 9, 2012, the group proceeded to the fabrication shop. The Complainant directed the group's attention to the drill press, which the Complainant noted as having malfunctioned, and he mentioned a problem with the safety guard. The main purpose of the drill press, according to the Complainant, is to make a hole used to fasten a steel plate, which holds the rail in place. The inspectors asked whether the drill press worked, and Respondent Ruggiero responded that the drill press did not work, employees did not use it, and they had been instructed not to use it. The Complainant testified that he had knowledge that the drill press had been used that morning or the night before and he pressed the button to activate the machine. When he turned on the drill press, the Complainant recalled, Respondent Ruggiero reacted in an agitated manner, his face turning red and pointing and screaming "You're going to do that to me? You are going to see what happens to you, I'm going to take you off the overtime list. I'm going to put you on the rack." The Complainant described Respondent Ruggiero's manner as serious and believed this threat to be credible because Respondent Ruggiero had the authority to alter the Complainant's overtime schedule. Id. at 83-85.

The Complainant interpreted Respondent Ruggiero's words as a credible threat because he knew the rack to be a dirty area that requires aggressive labor and most people try to avoid it. As such, the Complainant believed Respondent Ruggiero was using the prospect of assigning this job against him. Up to this point, the Complainant perceived that Respondent Ruggiero was growing more and more agitated with each item the inspectors noted and would tell passersby that the inspectors would shut down the shop because of the Complainant's complaint. Once Respondent Ruggiero made these comments, the other attendees appeared flabbergasted, according to the Complainant. The Complainant testified that he felt humiliated and degraded in front of the inspectors and reiterated that he construed Respondent Ruggiero's words as a credible threat, as he was known to exercise his will over people in the shop, which the inspectors took note of and instructed him not to do. At 2 P.M., Respondent Ruggiero adamantly stated that he would not pay the Complainant overtime for his participation in the walkthrough, as his shift ended at 2 P.M. The Complainant conferred with Mr. St. Hill, and because Mr. St. Hill was familiar with safety issues that lay ahead, the Complainant did not see a need to continue and departed the inspection at 2 P.M. to begin his overtime shift. In the days following the walkthrough, the Complainant worked his overtime shift according to the rotation schedule and continued to do so throughout August 2012. Id. at 85-97.

The Complainant testified that he did not write the letter to Mr. Blazejewicz immediately after the drill press incident, but after other events transpired over the next few days (CX 11).[6] In addition, the Complainant filed a retaliation complaint with PESH regarding the inspection

[6] This letter, marked as CX 11, was introduced at the Complainant's deposition as Exhibit A and is dated August 9, 2012, the day of the PESH inspection.

and later consented to PESH forwarding his complaint to OSHA. Mr. Lam, one of the PESH inspectors present at the inspection, believed the matter would be more appropriately handled by OSHA due to the PESH inspectors' presence at the walkthrough (CX 15). OSHA began an investigation into the inspection incident and an OSHA investigator, Aisha Ferrel-Jennings, interviewed the Complainant regarding the alleged retaliation at the walkthrough. Another OSHA investigator, Michael Burros, communicated with the Complainant regarding subsequent retaliation and instructed the Complainant to continue documenting any other retaliatory treatment. Id. at 97-99.

The day after the walkthrough, the Complainant averred that Respondent Ruggiero held a meeting with his supervisors. At the conclusion of the meeting, the supervisors began discarding certain items, including a microwave and toaster oven, and informed employees that they could not enjoy certain privileges they used to have thanks to the Complainant's complaint to OSHA. According to the Complainant, the PESH inspectors noted that the toaster oven and microwave were not grounded properly with a three-prong plug, and the Complainant believed the discarding of the microwave and toaster stemmed from the PESH investigation. The Complainant perceived that the foremen's comments that accompanied these actions constituted retaliation. Specifically, the Complainant recalled that another level one manager, John Kiever, started pointing to various items that he maintained had to go due to the Complainant's complaint. The Complainant described the negative reaction from co-workers when supervisors intimated that Complainant's complaint caused the loss of certain privileges. For example, when the Complainant would come in contact with co-workers such as Pat Dalton and Jeffrey Phillips, they would jokingly ask what appliances or privileges they would lose next, the Complainant recalled. Mr. Kiever suggested that the Complainant be tarred and feathered for his actions. The Complainant described a work atmosphere in which his co-workers held him in negative regard due to the complaints he made. Id. at 112-120.

Marc Ruggiero (EX B)

Marc Ruggiero ("Respondent Ruggiero") served as a superintendent of the Linden Shop from 2007 to 2012 and became the general superintendent over the entire Linden Shop complex from 2011 to 2012. Respondent Ruggiero testified that he did not receive training in preparation for the superintendent position, but as an MS-1, he was trained on subjects such as safety, sexual harassment, and right to know regulations. Upon seeing CX 1, the text of NTSSA Section 1412, Respondent Ruggiero claimed that he had never seen the document and did not take training related to the statute. However, he stated that he was familiar with the term "protected activity" based on disseminated policy instructions, and acknowledged that an employer could not retaliate against an employee who reported a safety concern. Respondent Ruggiero also claimed familiarity with CXs 2 and 3, the NYCTA anti-discrimination policy and safety policy, respectively, and confirmed their application to the Linden Shop. Id. at 6-19.

In the first half of 2012, as general superintendent, Respondent Ruggiero developed, implemented, and regularly scheduled inspections of the workplace environment by having Mr. Johns and a union representative walk through the shop to document any hazards. Mr. Johns would then place work orders for items in need of repair, he stated. Respondent Ruggiero testified that he directed Mr. Johns to keep an ongoing list of deficiencies in the shop on a

monthly basis and each item would be addressed by priority. Respondent Ruggiero also asserted that he and Mr. Johns convened regularly regarding the operation of this process and that he did the best he could under the circumstances, as he was performing the jobs of three people. Id. at 19-24.

During his time as superintendent, Respondent Ruggiero stated that he received multiple safety complaints from the Complainant via e-mail. Upon learning of these complaints, Respondent Ruggiero testified, he would delegate the issue to Mr. Johns. Complainant's counsel showed Respondent Ruggiero CX 4, a list of safety issues created by the Complainant, and he claimed that he did not receive the list, but had seen it before. Most other complaints, according to Respondent Ruggiero, came to the foreman via word of mouth. Upon the foreman relaying the issue to Respondent Ruggiero, he directed the foreman to fix the problem, as Respondent Ruggiero described himself as a "hands-off superintendent." Respondent Ruggiero did not recall whether these issues listed at CX 4 came to his attention before August 9, 2012 because of his preoccupation with adjusting employees' schedules, the demands of the fabrication shop, and because he was the lone superintendent. Id. at 24-27.

Respondent Ruggiero stated that he had no foreknowledge of the PESH inspection of the Linden Shop and first became aware of the inspection when the inspectors arrived early in the day of the inspection. Respondent Ruggiero said he was taken by surprise by the visit because the security guard did not inform him of their arrival, and ordinarily Respondent Ruggiero had to escort them on to the property, as he had done previously. Up until August 9, 2012, Respondent Ruggiero stated, he had participated in one such inspection about two years prior with then-general superintendent, Mr. Smith. Respondent Ruggiero maintained that he did not question the union representatives' participation in the inspection, but did object to the Complainant's participation because the Complainant was not on union release time and he believed the Complainant's presence at the inspection would create a bias against him. Mr. Jerome and later, Mr. Johns, accompanied Respondent Ruggiero during the inspection. As the group set out, Respondent Ruggiero did not alert the employees or managers on the floor as to the inspection because it was self-evident and word would spread throughout such a loose-lipped environment; nor did he comment to others about the status of the Linden Shop as a result of the inspection, he testified. Id. at 29-39.

The group stopped at the drill press in the fabrication area. Respondent Ruggiero confirmed that the drill press did not have a guard or lock-out and explained that the drill press would only have a lock-out if it was working. Respondent Ruggiero recalled that Mr. Lam asked him if the drill was operational, to which Respondent Ruggiero responded that it was not, based on a report he received that morning that the drill press needed special plates. Respondent Ruggiero added that the lack of a guard was an issue, but he told the inspectors that the drill machine was not operational because the gear was stripped such that when one would turn on the drill press, it would run, just as a car would run, but not move, if its transmission did not work. He then explained to the PESH inspectors that the track equipment maintainer would lock-out/tag-out the drill press when they were able to and that it was not the responsibility of track workers to lock-out/tag-out the machine. Respondent Ruggiero stated that the machine was plugged in at the time and the Complainant indicated that the machine works and turned it on. In response, Respondent Ruggiero said the machine turns on, but does not work, to which

Respondent Ruggiero did not recall the Complainant reacting one way or another. Respondent Ruggiero indicated that he felt frustrated that the Complainant turned on the machine, but did not speak to the Complainant. Id. at 40-43.

Upon leaving the drill press area around 1:45 P.M., Respondent Ruggiero instructed the Complainant, in a calm voice, that he could either continue on with the inspection but not receive overtime since his shift ended at 2 P.M., or could work his overtime shift at the rack, to which the Complainant chose the latter. Complainant's counsel showed Respondent Ruggiero CX 9, a signed field note from the PESH inspectors indicating that they observed threatening conduct made by management to the Complainant during the inspection, but Respondent Ruggiero refuted that account. Id. at 43-44.

The next day, August 10, 2012, Respondent Ruggiero held a meeting with his foreman in which he informed them that the inspection did not go well, expressed his disappointment, and reprimanded them. Respondent Ruggiero deemed their performance unacceptable because he believed safety to be his first priority and he was upset that they did not alert him as to the safety hazards uncovered at the inspection. Respondent Ruggiero added that the electrical appliances needed to be removed. After the meeting, Respondent Ruggiero recalled, he did not discuss the inspection further and never knew the outcome of the inspection until after he retired. Respondent Ruggiero averred that at no time did he read the Complainant's complaint with PESH or OSHA as to the events of August 9, 2012, nor did he even know about it. Id. at 46-49.

On cross-examination, Respondent Ruggiero reiterated that he did not learn about the Complainant's complaint until early 2013, after his retirement in November 2012. Employer's counsel showed Respondent Ruggiero CX 8, a picture of the drill press that was inspected, and Respondent Ruggiero indicated that, due to the wiring of the circuit breaker that creates the electrical power, it cannot be unplugged. In order to stop the power, one would have to throw the knife switch on the circuit breaking board, Respondent Ruggiero explained. Finally, Respondent Ruggiero indicated that on the day of the inspection, the employees in the shop did not use the drill press. Id. at 50-53.

Alexander Umana (EX C)

Alexander Umana, an employee of Respondent NYCTA, worked in fleet operations at the Linden Shop (EX C at 6-7). His department's work consisted of operating vehicles for purposes of delivering various materials, but it did not repair or maintain the vehicles. Id. at 8. During his time at the Linden Shop in 2011, Respondent Ruggiero served as the lone superintendent, but upon moving to the fleet department, Mr. Umana had little contact with Respondent Ruggiero. Id. at 19-20. Mr. Umana became aware of the August 9, 2012 PESH inspection through word of mouth, but did not interact with the inspectors on that day nor did he discuss the consequences of the inspection with others afterwards. Id. at 21-22. Mr. Umana could not recall whether he learned that the Complainant filed a complaint based on the events that transpired at the inspection in the months following the inspection, but he testified that he knew the Complainant to file grievances or complaints often. Id. at 23-25. After August 2012, the Complainant came under Mr. Umana's supervision as a fleet supervisor, and Mr. Umana

recalled that he overheard that the Complainant filed grievances related to internal matters at the fleet, such as overtime. Id. at 8-27.

Kwo Lam (EX E)

Mr. Lam works for the New York State Department of Labor as a discrimination investigator and investigates instances where, for example, an employee was retaliated against for filing a safety complaint (EX E at 4-5). When Mr. Lam conducts inspections where he discovers a violation, he will issue a citation and confer with the employer as to try to fix the issue on the spot or otherwise provide an abatement period for it to do so. On August 9, 2012, PESH investigators Mr. Lam and Ms. Rivera arrived at the Linden Shop to conduct an inspection with a list of health and safety violations gleaned from a sanitized version of the Complainant's complaint. This version did not include the identity of the Complainant. Employer's counsel also entered a one page document entitled "Inspection Fields Notes" as EX B[7] into evidence, to which Mr. Lam testified that he signed the document on October 9, 2012. Finally, Mr. Lam stated that he signed the New York State Department of Labor Voluntary Discrimination Complaint Referral Request on September 27, 2012, marked as EX C,[8] which is a referral from PESH to OSHA, the federal agency exercising jurisdiction over such matters via the NTSSA. Id. at 5-15.

Based on the complaints listed, Mr. Lam characterized the August 9, 2012 inspection as a major one prior to his arrival at the Linden Shop. Upon arrival, Mr. Lam and Ms. Rivera conducted an opening conference in which they gathered the union and management representatives together to address the complaints, explained why the inspectors were present, and explained the scope of the inspection. Mr. Lam recalled a number of people who attended the opening conference, including the Complainant, Respondent Ruggiero, Messrs. St. Hill and Navarro of TWU Local 100, and Mr. Jerome. As the inspection began, Mr. Lam recollected, Respondent Ruggiero asked him if the union had to be present, as it appeared that he did not want the union there, to which Mr. Lam indicated that its presence was required. Id. at 17-39.

While in the fabrication shop, the group approached the drill press, the juncture that Mr. Lam identifies as the starting point of the alleged retaliation. Mr. Lam recalled asking whether the drill press worked, to which Respondent Ruggiero responded that it did not. Mr. Lam replied by asking why the drill press was plugged in and had no safety guard or lock-out/tag-out notice, at which time the Complainant indicated that the drill press was working and proceeded to turn it on. According to Mr. Lam, Respondent Ruggiero became upset and alluded to the Complainant losing his overtime and made a reference to the rack. Mr. Lam described Respondent Ruggiero's manner as intense, recognized that others had overheard this exchange, and testified that he heard Respondent Ruggiero's words fairly clearly. Id. at 33-36.

The inspection continued to other locations in the shop and Mr. Lam indicated that he did not have further interaction with Respondent Ruggiero, except as to the observation of unsafe conditions. When Mr. Lam addressed subsequent safety hazards, he characterized Respondent Ruggiero as responsive to some of the issues, but became upset regarding other issues. For

[7] These field notes, marked as CX 9 in the record, were introduced at Mr. Lam's deposition as Exhibit B.
[8] This request, marked as CX 15 in the record, was introduced at Mr. Lam's deposition as Exhibit C.

example, Mr. Lam recalled that Respondent Ruggiero became upset with safety issues in the locker room and specifically spoke in a harsh tone to Mr. Johns. Mr. Lam did not recall any additional threatening remarks made by Respondent Ruggiero to the Complainant that day aside from the drill press incident. Id. at 41-50.

Employer's counsel directed Mr. Lam toward the referral that he signed on September 27, 2012, and Mr. Lam stated that the Complainant withdrew his retaliation complaint to allow for its referral to OSHA. Mr. Lam explained that PESH offers complainants the option to file under PESH or OSHA when their respective jurisdictions overlap and that he has generated such referrals through his office in the past. He characterized this instance as "one of the few that actually federal OSHA will take over." Mr. Lam discussed this option with the Complainant by phone, but did not recall advising the Complainant as to which path to pursue. Mr. Lam also noted federal OSHA's broader reach under the NTSSA. Id. at 51-55.

Returning to the on-site inspection at the Linden Shop, Mr. Lam observed that a toaster oven in the break room was non-compliant, as it was either not properly grounded or the cord penetrated a wooden wall. Mr. Lam believed that the latter concern was abated, but noted that the presence of the toaster, coffeemaker, and microwave represented violations because the label on these appliances read "for household use only." However, Mr. Lam could not recollect whether Ms. Rivera issued a citation as to these violations. Mr. Lam believed that the Complainant remained with the group for the duration of the inspection and through the closing conference. Id. at 55-57.

On cross-examination, Mr. Lam described Respondent Ruggiero's voice as agitated and louder than his normal tone and his demeanor as unhappy upon the Complainant activating the drill press. Onlookers seemed shocked at Respondent Ruggiero's reaction because of the rareness of such an exchange between a manager and employee, according to Mr. Lam. At the closing conference, Mr. Lam recalled informing Respondent Ruggiero that, as a discrimination investigator, it was not wise for Respondent Ruggiero to conduct himself the way he did at the drill press. Respondent Ruggiero responded by indicating that his comments at the drill press were in jest, and Mr. Lam intuited that after Respondent Ruggiero learned that Mr. Lam was a discrimination investigator, it was only then that he characterized the incident as a joke. Finally, Mr. Lam testified that between the inspection on August 9, 2012 and the referral of Complainant's complaint on September 26, 2012, the Complainant and Mr. St. Hill spoke to Mr. Lam and Mr. Lam advised that PESH could refer the case to OSHA. Id. at 58- 61.

Iris Rivera (EX F)

Ms. Rivera indicated that her job as a public employee safety and health inspector with the New York State Department of Labor includes responding to employee complaints and conducting investigations regarding those complaints (EX F at 3-5). Ms. Rivera testified that PESH gave Respondent NYCTA forewarning of the inspection, which is standard practice. Ms. Rivera recalled that Respondent Ruggiero appeared annoyed at her and Mr. Lam's presence during the opening conference. The inspectors provided Respondent Ruggiero with a sanitized copy of the Complainant's complaint, which Ms. Rivera described as having several items and a wide variety of types of complaints. Id. at 8-22.

During the inspection, the group evaluated the second floor, which included a coffee pot that constituted an electrical hazard because the wire ran through a makeshift wooden structure and was plugged in, which Ms. Rivera stated she noticed immediately. Ms. Rivera recounted that Respondent Ruggiero abated this hazard by directing Mr. Johns to remove the coffee pot from the break room in what Ms. Rivera described as a demeaning tone, indicating that Respondent Ruggiero was upset with Mr. Johns. Id. at 15-17.

Ms. Rivera did not recall noticing when the Complainant left the inspection and was under the impression that he remained at the inspection through its entirety. When asked whether she received any correspondence from the Complainant between the date of inspection, August 9, 2012, and his subsequent complaint related to the inspection dated September 26, 2012, Ms. Rivera responded that she did not. She noted that any complaints would have filtered to Mr. Lam and indicated that Mr. Lam received a complaint from the Complainant within that period of time. Id. at 23- 25.

Later, the group stopped at the drill press. Rivera recalled that the Complainant, who was there in both his capacities as a union representative and the complainant, Respondent Ruggiero, Mr. St. Hill, Mr. Navarro, Mr. Lam, and she were all present at this juncture of the inspection. Ms. Rivera recounted that Mr. Lam observed that the drill press did not have a protective guard and asked Respondent Ruggiero if the machine was in operation, to which Respondent Ruggiero responded it was not. At that point, the Complainant stated the drill press was in operation, as his crew used it all the time and he proceeded to turn it on, causing the drill bit to spin around. Next, Respondent Ruggiero said, "Oh, you're going to do this to me? You're going to see what's going to happen to you. You're going to be taken off the overtime rack and you'll see what's going to happen," according to Ms. Rivera, who indicated that these were Respondent Ruggiero's exact words and interpreted them as a threat due to Respondent Ruggiero's loud, harsh, and intimidating tone.

Ms. Rivera interpreted the Complainant's actions as protected activity because he drew attention to an alleged safety hazard for purposes of protecting employees and demonstrated that his employer was not forthright about the condition of the hazard when, but for the Complainant's actions, the inspectors would otherwise have thought that there was no hazard based on Respondent Ruggiero's representation. Further, Ms. Rivera was shocked because she characterized a normal discrimination complaint as "a gray area," and to her, what Respondent Ruggiero did was clear due to his aggressive tone. Mr. Lam admonished Respondent Ruggiero that he could not speak to an employee that way, Ms. Rivera noted, and she also observed a look of shock and embarrassment on the Complainant's face before explaining to the Complainant his whistleblower rights. Ms. Rivera told the Complainant if Respondent Ruggiero retaliated against him in some form, including changing his schedule, he had 30 days to file a complaint. Ms. Rivera could not recall whether others at the inspection overheard her explanation to the Complainant. For the rest of the walkthrough, Respondent Ruggiero did not interact with the Complainant, according to Ms. Rivera. Id. at 18-33.

Ms. Rivera confirmed that CX 5 was the Complainant's June 28, 2012 complaint sent to the PESH office, and identified CX 6 as the sanitized version of the complaint without the Complainant's name. The sanitized version indicated that the date of the notice of alleged safety

hazards was July 13, 2012 and was directed to Respondent Ruggiero, who would receive it at the opening conference on the day of the inspection. Next, Ms. Rivera confirmed that CX 12[9] was a May 29, 2013 letter from the Department of Labor, Division of Health and Safety to the Complainant which indicated that the Department addressed eight items from CX 5 that the Complainant brought to attention and sustained them. Id. at 31-33.

Discussion

During the hearing, I had the opportunity to observe the Complainant, as well as several other witnesses. I find that the Complainant was credible in his testimony and conclude that he testified in accordance with his memory of the PESH inspection that occurred on August 9, 2012. Furthermore, I found the other witnesses called at the hearing to be largely credible and sincere in their testimony. Their recollections about the events of August 9, 2012 were mostly consistent with each other and the exhibits contained in the record. I note that evidence was offered regarding the Complainant's exercise of his right to engage in protected activity during the PESH inspection, as well as the Complainant's perceived treatment of him by his superiors and co-workers after having filed his safety complaint.

The Complainant's Burden

The Act adopts the procedures and burdens of proof for claims brought under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR-21"), 49 U.S.C. § 42121 (2011). See 49 U.S.C. § 20109(d)(2). Thus, the NTSSA requires a complainant to prove, by a preponderance of the evidence, that: (1) he engaged in protected activity or conduct; (2) he suffered an adverse action; and (3) the protected activity was a contributing factor in the adverse action alleged in the complaint. See 29 C.F.R. § 1982.109(a). If the complainant succeeds, the burden then shifts to the respondent, who must demonstrate "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity." § 1982.109(b).

Protected Activity

By its terms, the NTSSA prohibits public transit agencies from discriminating against an employee if such discrimination is due, in whole or in part, to the employee's good faith act "to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security." 6 U.S.C. § 1142(a)(1)(A). Moreover, "a public transportation agency… or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for reporting a hazardous safety or security condition." 6 U.S.C. § 1142(b)(1)(A).

The Respondents argue that the Complainant's conduct at the August 9, 2012 PESH inspection does not constitute protected activity under the NTSSA because the statute provides

[9]Complainant's Counsel referred to the May 29, 2013 letter from the New York State Department of Labor to the Complainant as Plaintiff's Exhibit 12, but that letter is marked as CX 14 in the record.

limited jurisdiction regarding safety and security concerns that relate to the nation's public transportation system. See Respondent's Brief, at 12. Instead, the Respondents assert that New York state labor law would more properly have jurisdiction over the kind of protected activity the Complainant alleges. Id. As such, the Respondents contend, an employee may not bring just any retaliation complaint under the NTSSA whistleblower provision, but only retaliation complaints that relate to the statute's goal of promoting public safety and preventing terrorist attacks. Id. at 13. Notably, the Respondents emphasize that the NTSSA whistleblower provision was modeled after the protections available to railroad workers under the Federal Railroad Safety Act (FRSA) , 49 U.S.C. § 20109 as amended, citing the 2007 "Implementing Recommendations of the 9/11 Commission Act." Id. at 15-16. Specifically, the Respondents point to an excerpt contained in § 1521 of the Implementing Regulations that updated the FRSA whistleblower provision: "to protect railroad employees from adverse employment impacts due to whistleblower activities related to *rail security*." (emphasis in original). Id. at 16. The Respondents seem to argue that this updated provision limits the scope of protected activity to security matters affecting the public by emphasizing the words "rail security."

However, the Respondents' reliance on this seemingly restrictive language does not provide a complete picture. While the Respondents accurately cite the language above, if one reads § 1521 in its entirety, one also finds the following language:

> The Conference substitute adopts a modified version of the Senate language. It modifies the railroad carrier employee whistleblower provisions and expands the protected acts of employees, including refusals to authorize the use of safety-related equipment, track or structures that are in a hazardous condition.

Section 1521 continues:

> The Conference notes that railroad carrier employees must be protected when reporting a safety or security threat or refusing to work when confronted by a hazardous safety or security condition to enhance the oversight measures that improve transparency and accountability of the railroad carriers.

(Emphasis added)

H.R. Rep. No. 110-259, at 348 (2007)

By inserting these provisions into the NTSSA, Congress evidenced a goal to enlarge the scope of the FRSA whistleblower provision beyond matters promoting public safety and preventing terrorist attacks. The language in the first paragraph cited above plainly indicates an aim to prohibit railroad carriers from taking retaliatory action in response to an employee's refusal to authorize the use of safety-related equipment. The reference to safety-related equipment cannot reasonably be read to apply only to hazards that expose the public to danger based on the language relating to "use" of safety-related equipment. Riders on railroad or public transit systems do not utilize safety-related equipment on their commute, but employees use safety-related equipment on a regular basis in the ordinary course of their employment. It may be argued that Congress did not modify the FRSA whistleblower protection to include the

reporting of safety equipment in hazardous condition, only the refusal to authorize its use. However, the use of the word "including" suggests that Congress did not intend to limit such protected activity to a refusal to authorize, but instead used "refusal to authorize" as just one example of many types of unenumerated protected activities that it anticipated the statute would address.

Moreover, the second cited paragraph makes particular reference to the importance of protecting employees who report a safety threat. Again, the language indicates that Congress did not evidence an intention to exclude employee-only safety hazards from this broad umbrella of safety threats. The clause "or refusing to work when confronted by a hazardous safety or security condition" also indicates that Congress meant to include reports of hazards specific to employees, not just the public at large.

At issue, the Complainant's complaint concerns an incident during a PESH safety inspection at the Linden Shop on August 9, 2012. During the inspection, the PESH investigators observed that the drill press did not have a mandated safety guard attached to it and asked Respondent Ruggiero if the drill press was operable (EX A at 83-84; EX B at 40-41; EX E at 34; EX F at 19). Further, the Complainant testified that he observed co-workers using the drill press, without the safety guard, just prior to the inspection (T. 71-72). This testimony is consistent with that of Respondent Ruggiero, who acknowledged that the drill press did not have a lock-out/tag-out notice such that employees would know not to use it (EX B at 53, T. 163). Because the Complainant drew attention to an operable machine without a safety guard meant to protect the safety of employees during a PESH investigation, I find that the Complainant's actions constitute protected activity. The investigation narrative written by Ms. Rivera reinforces that the absence of a machine guard represented a hazard to Linden Shop employees. In it, she observed that at the "Indoor Linden Shop, between Bay 2 and Bay 3, a drill press [was] observed operational and without a machine guard, exposing employees to possible puncture wounds at the point of operation." CX 13 at 9. Ms. Rivera even cited 29 C.F.R. § 1910.2129(a)(3)(iii) which states:

> The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefore, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

Id.

At the hearing, Ms. Rivera asserted that she believed the Complainant's conduct to be protected activity "because here the employer [is] telling us it's not operational, and then we have [Complainant] actually saying it is operational and actually showing us it's operational. That's creating a danger, which means actually the employer was not telling us the truth" (T. 22-23). She added that the issue that concerned her most about the drill press was "employee safety, of puncture wounds if they were to use it, and if it did not have the machine guard…some very serious hazards can happen" (T. 55). Even though the drill press, located within the Linden Shop yard, does not face the public and therefore does not present a direct threat to the public, the danger to employees in the Linden Shop yard is self-evident. Respondent Ruggiero contended

that the drill press could turn on but could not operate (EX B at 41-42). Although one could argue that this suggests the drill press may not have posed a danger to the employees, Ms. Rivera characterized her observation of the resultant spinning of the drill press, after the Complainant activated the machine, as an "actual alleged hazard." (EX F at 27-28). Moreover, Respondent Ruggiero acknowledged that the track equipment maintainers ("TEMs") had not yet placed the lock-out/tag-out notice on the machine, but explained to the investigators that "they just haven't gotten to it," indicating that the employees should have been put on notice of the hazard. As discussed above, legislative history indicates that Congress did not intend to limit the reach of the FRSA whistleblower provision, the statute upon which the NTSSA is modeled, to danger to the public only. Instead, NTSSA protected activity extends to reporting hazards that present a threat to employee safety. As such, the Complainant's conduct at the drill press during an investigation conducted by New York State Department of Labor's PESH, a state regulatory agency, constitutes protected activity under subsections (a)(1)(A) and (b)(1)(A) of the NTSSA.

In addition, case law suggests that administrative law judges (ALJs) in the past have treated similar workplace safety concerns as protected activity under the NTSSA. In Serrano v. Metro Transit Auth. and NYCTA, ALJ No. 2008-NTS-00001, slip op. 4, 10-11 (ALJ Oct. 17, 2008), the complainant reported that other workers failed to use the required mats intended to protect them from the electric third rail that powers the subway system. Despite the fact that these safety issues did not concern safety to the public or the prevention of a terrorist attack, the ALJ deemed the complainant's report as protected activity under subsection (b)(1)(A) of the NTSSA. Id. at 11. Similarly, in Winters v. S.F. Bay Area Rapid Transit. Dist., ALJ No. 2010-NTS-00001, slip op. 6, 17 (ALJ July 16, 2012), the ALJ determined that the complainant's complaint about the insufficiency of cleaning products and the need for proper protective equipment used to clean vomit from a train car constituted protected activity under the same subsection. Finally, in Graves v. MV Transp., Inc., ALJ No. 2011-NTS-00004, slip op. 7, 14 (ALJ Apr. 18, 2012), the parties stipulated that the complainant's memorandum objecting to the practice of backing his bus between two other buses in the yard without a spotter was protected activity. The protected activity at issue in these cases mirror that of the Complainant because, like the reporting of a defective drill press, they invoked workplace safety concerns and did not pose a danger to the public, yet were deemed protected activities under subsection (b)(1)(A) of the NTSSA.

The Respondents also argue that matters of workplace safety, such as the issue in this case, belong exclusively within the purview of New York state law and its enforcement mechanism, PESH. See Respondents' Brief, at 16. PESH was created to address workplace safety concerns and because the Complainant's complaint does not relate to matters of public transportation or national security, his complainant is not covered under the NTSSA, they contend. Id. at 17-18. However, 6 U.S.C. §1142(e) provides an election of remedies provision which states: "An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the public transportation agency." As discussed above, the NTSSA, modeled after the FRSA, extends protected activity to workplace safety. Moreover, the election of remedies provision reinforces the notion that the Complainant may pursue a remedy through either the NTSSA, or a statute that affords similar protections such as Section 11(c) of the Occupational Safety and Health Act or its state equivalent, but not both. See Secretary of Labor's Amicus Brief, at 9. New York Lab. Law § 27-a, which created PESH,

affords workplace safety protections similar to that of the NTSSA and is one such state equivalent:

> The commissioner shall by rule adopt all safety and health standards promulgated under the United States Occupational Safety and Health Act of 1970 (Public Law, 91-596) which are in effect on the effective date of this section, in order to provide reasonable and adequate protection to the lives, safety and health of public employees and shall promulgate and repeal such rules and regulations as may be necessary to conform to the standards established pursuant to such act…

NY CLS Labor § 27-a(4)

Because New York Lab. Law § 27-a and 6 U.S.C. §1142 both serve to ensure workplace safety, the Complainant may choose which statute to pursue his claim under the latter's election of remedies provision. Furthermore, the FRSA provides a nearly identical provision to 6 U.S.C. §1142(e): "An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." § 20109(f). The Fourth Circuit held, in Lee v. Norfolk S. Ry. Co., 802 F.3d 626, 634 n.6 (4th Circ. 2015), that "Congress intended the Election of Remedies provision to address only the potential overlap between the OSH Act, various state versions of the OSH Act, and the FRSA." Based on the language of NY CLS Labor § 27-a(4), I find that PESH is a state version of the OSH Act as contemplated by Section 20109(f) of the FRSA. By extension, because the NTSSA whistleblower provision was modeled after the FRSA whistleblower provision, it stands to reason that the Complainant has an identical choice to pursue his complaint either under PESH, an OSH state equivalent, or the NTSSA.

The testimony of PESH Inspector Kwo Lam buttresses this interpretation. At his deposition, Mr. Lam indicated that when the Complainant filed his complaint, he had the option to file with PESH or with OSHA (EX E at 15). Most notably, Mr. Lam stated that when individuals opt for the latter route, his office will "refer it over to federal OSHA, and they will cover it under the National Transportation Surface Security Act." Id. Mr. Lam proceeded to testify that the Complainant's complaint was "one of the few that actually federal OSHA will take over." Id. at 53. Based on legislative history, prior case law, and Mr. Lam's testimony, I find that the Complainant's demonstration of activating the drill press during a PESH investigation constitutes protected activity under subsections (a)(1)(A) and (b)(1)(A) of the NTSSA and is not a matter covered exclusively under the New York State PESH law.

Moreover, I find the complaint that the Complainant filed with PESH on June 28, 2012, in which he brought a number of safety issues to PESH's attention to be protected activity under 6 U.S.C. § 1142(b)(1)(A). Under this subsection, an employee may report a hazardous safety or security condition without fear of the public transportation agency discharging, demoting, suspending, reprimanding, or in any other way discriminate against the employee. Here, the Complainant filed a complaint with PESH, a state agency that enforces safety and health standards, concerning safety issues such as pile ups of debris that could potentially cause fires, utility poles with missing covers, exposed wires, tripping hazards, and other problems that

spanned eight pages (CX 5). Because the Complainant reported such hazards to PESH, I find that his June 28, 2012 complaint constituted protected activity under subsection (b)(1)(A).

Adverse Action- Threat of Overtime Removal and Rack Assignment

The NTSSA provides a broad definition of adverse action, stating that an employer cannot "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee," if that employee engages in protected activity. 6 U.S.C. § 1142(a).

At the inspection's stop at the drill press during the walkthrough, Respondent Ruggiero informed Mr. Lam that the drill press was not operational, at which point the Complainant asserted to the contrary and turned on the drill press to show its operability. Based on several reports of the incident, Respondent Ruggiero angrily reacted and, by some testimony, threatened to remove the Complainant from the overtime list and place him on the rack. (EX A at 84; EX E at 35; EX F at 19-20; T. at 22, 75). The Respondents contend that Ms. Rivera and Mr. Lam did not clearly hear the words Respondent Ruggiero uttered at the drill press and they described the atmosphere in which they heard these words as busy and noisy. See Respondent's Brief, at 8. Based on this description, the Respondents argue that Ms. Rivera did not understand Respondent Ruggiero's statement to the Complainant about overtime or the rack, adding that Mr. Lam's recollection of the events at the drill press was equally as unclear and that he had no knowledge of what the term "rack" meant. Id. at 9.

The Respondents' depiction of Mr. Lam's testimony conflicts with what Mr. Lam stated at his deposition. When asked what Respondent Ruggiero said to the Complainant when the Complainant pressed the button to operate the machine, Mr. Lam stated:

> Something referring to overtime. Okay. He's not going to be getting overtime. Something about taking off the rack. Now, I don't know what the "off the rack" means. That's transit jargon, I'm assuming. So – but, once you say that you're not going to be getting overtime and started, all of a sudden acting much more intense with [Complainant], then I said, okay, you know, there's a problem here.

EX E at 35.

While it is true that Mr. Lam was unfamiliar with the term "rack," Mr. Lam could clearly piece together that Respondent Ruggiero had threatened to remove the Complainant from the overtime list, based on Respondent Ruggiero's demeanor and his overt reference to overtime. Mr. Lam did not need to understand the term "rack" to recognize that the Complainant's protected activity of drawing attention to the defective drill press triggered an immediate reaction, described by Mr. Lam as intense and accompanied by a threat to make the Complainant ineligible for overtime. Moreover, Mr. Lam's testimony directly contradicts the Respondents' characterization that the atmosphere at the time of the inspection was busy and noisy such that Mr. Lam could not clearly understand Respondent Ruggiero. Rather, Mr. Lam continued, "There was a lot of people that was hearing a lot of the conversation that was going on" and Mr. Lam also indicated that it appeared Respondent Ruggiero was denying the Complainant overtime, which Mr. Lam stated he heard clearly and from a short distance. Id. at 36. Mr. Lam's

perception that Respondent Ruggiero engaged in questionable conduct is further evidenced by his deposition testimony, in which he recalled speaking to Respondent Ruggiero at the closing conference: "[T]owards the end, that's when I mentioned to [Respondent] Ruggiero, you know, I was the last person that you wanted to do that in front of, because I happen to be the discriminatory investigator for the PESH office in New York City." Id. at 59.

Ms. Rivera's recollection of what transpired at the drill press tracks Mr. Lam's testimony and reinforces her belief that Respondent Ruggiero's words can be construed as an adverse action. She testified at deposition that Mr. Lam asked Respondent Ruggiero whether the drill press worked. Respondent Ruggiero responded that it did not, and the Complainant stated, "Yes, it is. It is in operation, my members use it all the time," and proceeded to turn on the machine (EX F at 19). The words Ms. Rivera spoke to the Complainant upon observing Respondent Ruggiero's reaction to the Complainant starting the drill press demonstrates her belief that such conduct set the foundation for a potentially actionable whistleblower claim:

> So, at this point, Mr. Lam explained to [Respondent Ruggiero] that he shouldn't be speaking in that way... I saw that [Complainant] looked embarrassed and I saw what happened, I immediately explained his whistleblower rights to him. And I explained to him, you know, if [Respondent] Ruggiero retaliates you in any way, if he changes your schedule – I gave him some examples – you have 30 days to file.

Id. at 20.

At the hearing, Ms. Rivera expounded on her recollection from that moment of the inspection. She quoted Respondent Ruggiero as telling the Complainant, "'Really? You're going to do this to me?' He was like, 'I am taking you off the rack.' I don't know what that term means. That's what I heard." (T. 22) Like Mr. Lam, Ms. Rivera was not familiar with this transit terminology, but that did not prevent Ms. Rivera from understanding the nature of what she had observed: "I personally was shocked. I have never seen something like that happen in front of me. Usually as an inspector and an investigator, we kind of – it's kind of a gray area. This one was like right there. It was immediate. The tone was harsh. I felt like I was witnessing something" (T. 24).

Her recollection and advice to the Complainant upon witnessing Respondent Ruggiero's suggests that Ms. Rivera believed there to be no doubt that the Respondent Ruggiero took an adverse action against the Complainant. These observations and perceptions are memorialized in Ms. Rivera's inspection field notes, dated August 10, 2012, in which she states "During the inspection, we witnessed the threats made by management towards [Complainant]." CX 9. Like Mr. Lam, her unfamiliarity with transit jargon did not stop her from realizing that Respondent Ruggiero was unhappy with the Complainant and made a threat to take away the Complainant's overtime eligibility.

The Complainant's recollection of what transpired at the drill press is strikingly similar to Mr. Lam's and Ms. Rivera's accounts. At his deposition on October 29, 2015, the Complainant testified that he turned on the drill press to demonstrate the power was on and described Respondent Ruggiero's reaction:

> [Respondent] Ruggiero was very agitated at that and, I mean, he got hot. You could see it in his face. He was mad and it was red. He started screaming…He just blew up. He was like, "You're going to do that to me?" He was pointing. He said, "You are going to see what happens to you, I'm going to take you off the overtime list, I'm going to put you on a rack." He said, I'm the boss," and I was just floored…

EX A at 84.

The Complainant further testified that he interpreted Respondent Ruggiero's reaction as a credible threat because he has the power to alter the Complainant's overtime and work assignments. Id. at 84-85. Further, the Complainant explained that his understanding of the rack is that not many people want that job and described the work as hard, aggressive, and dirty. Id. at 86-87. Because such work is so undesirable, the Complainant perceived that Respondent Ruggiero had used this job assignment against him. Id. at 87. At the hearing on March 29, 2016, exactly five months after his deposition, the Complainant provided a nearly identical description of Respondent Ruggiero's reaction at the drill press:

> My observation of [Respondent] Ruggiero was that he was incredibly upset and he blew up. And he basically said – he said, "You are going to do this to me? And he was using these hand gestures. His face was red. He was irate. He was like, "I'll take you, and I'll put you on the rack. I'll take you off the overtime list." He was pointing his finger, using hand gestures. He was very serious. He was adamant about what he was saying.

T. 75

In addition, the Complainant similarly testified that Respondent Ruggiero had the ability to affect his overtime earnings (T. 76). Respondent Ruggiero verified this statement, testifying that he had the power to remove an employee from the overtime list, but never did so to avoid the union grievance process (T. 183). Because the Complainant provided such strikingly similar accounts of an event that occurred three years prior to his deposition, and these accounts corroborate the testimonies of Mr. Lam and Ms. Rivera, I find the Complainant's testimony credible.

In contrast, Respondent Ruggiero did not have as sharp a recollection as the other individuals who provided testimony. At his deposition, Respondent Ruggiero testified that when the Complainant started the drill press, he told Mr. Lam that the machine turns on, but does not work (EX B at 42). Respondent Ruggiero described himself at the time as frustrated, but testified that he did not say anything to the Complainant or the PESH inspectors. Id. at 42-43. About five months later at the hearing, Respondent Ruggiero testified that he could not recall what he said to the Complainant after he turned on the drill press (T. 164). Due to the comparatively vague and inconsistent accounts provided by Respondent Ruggiero, I give more credit to the Complainant's testimony regarding the events at the drill press as compared to Respondent Ruggiero's. Moreover, as described above, both Ms. Rivera and Mr. Lam gave similarly detailed accounts at their depositions and the hearing. As PESH investigators, Ms. Rivera and Mr. Lam are trained in investigating workplace disputes and are familiar with situations in which supervisors take adverse actions against employees. Due to their background

training and because they personally observed Respondent Ruggiero's remark, construed it as an adverse action at the time it occurred, and testified to that effect years later, I find Ms. Rivera and Mr. Lam's testimony persuasive.

Irrespective of what Respondent Ruggiero told the Complainant at the drill press, the Respondents contend that Respondent Ruggiero not only did not prohibit the Complainant from working overtime on the day of the inspection, but he also gave the Complainant the option to do so. See Respondents' Brief, at 9. Further, the Respondents characterize the Complainant's claim that Respondent Ruggiero used his alleged statement that he would put the Complainant on the rack as a weapon as implausible, given that the Complainant picked into the job based on seniority. Id. In fact, one could argue that Ms. Rivera's advice to the Complainant demonstrates that Respondent Ruggiero had not yet taken an adverse action against the Complainant because she advised him to file if Respondent Ruggiero changed his schedule or retaliated against him in any way. However, Respondent Ruggiero himself testified that, as superintendent, he had the power to remove employees from the overtime list (T. 183). Because Respondent Ruggiero could alter employees' overtime schedules, it was reasonable for the Complainant to interpret this threat as a credible adverse action.

Moreover, a threat need not result in a discharge or other tangible loss of benefits to constitute an adverse action. This principle was established in Williams v. American Airlines, Inc., ARB No. 09-018, ALJ No. 2007-AIR-4, slip op. at 11, n. 51 (Dec. 29, 2010), where the ARB found that the broad reading of SOX's prohibited adverse actions, including instances of threats and harassment, applied with equal force to the AIR21 Act. In Aymond v. Amtrak, 2014-FRS-00020-21, slip op. at 49 (ALJ Sep. 11, 2015), an administrative law judge reiterated that a threat related to protected activity can, standing alone, constitute an adverse action under the FRSA. In that case, the complainant could only muster second-hand rumors, double hearsay, and speculation to prove that a manager retaliated against the complainant for reporting an injury by blaming the complainant for other employees' loss of overtime work. Id. at 51-52.[10]

More importantly, however, Aymond stands for the proposition that a threat standing alone, without a tangible loss of benefits, can constitute an adverse action under the FRSA. Both 49 U.S.C. § 20109(a) of the FRSA and 6 U.S.C. § 1142(a) of the NTSSA consist of nearly identical wording as far as employers' prohibited actions. The FRSA lists enumerated adverse actions followed by the clause, "or in any other way discriminate against an employee," which indicates that the provision prohibits other adverse actions taken by an employer, such as the threat of lost overtime. Likewise, since the NTSSA was modeled after the FRSA, it follows that a standalone threat constitutes an adverse action under the NTSSA as well. Therefore, that Respondent Ruggiero did not follow through on his threat to take the Complainant off of the overtime list on the day of the inspection does not alter the fact that Respondent Ruggiero made a threat as to the terms of the Complainant's employment. Despite the Complainant's picking into the job based on seniority, the Complainant testified that Respondent Ruggiero, as a manager, retained the authority to affect the Complainant's overtime earnings (T. 76). Respondent Ruggiero confirmed that he had the power to remove employees from the overtime

[10] In Aymond, because the complainant could not proffer any direct proof of the manager's alleged retaliatory statements, the administrative law judge found that the complainant did not meet the preponderance of the evidence standard needed to prove that an adverse action had occurred. Id. at 52.

list, although he testified that he never did so as not to upset the union (T. 183). Furthermore, that Respondent Ruggiero gave the Complainant a choice as to continuing on with the inspection and taking his overtime shift, as Respondents' counsel aver, reinforces the notion that Respondent Ruggiero had the authority to change the Complainants' overtime hours such that the Complainant reasonably perceived Respondent Ruggiero's words as a threat.

As discussed above, a standalone threat, without a tangible loss of benefits, is sufficient to constitute an adverse action. Based on the near uniformity of testimony of the Complainant, Mr. Lam, and Ms. Rivera, I find these accounts of Respondent Ruggiero's conduct in response to the Complainant's protected activity credible. Thus, I find that the Complainant suffered an adverse action when Respondent Ruggiero reacted to the Complainant's act of plugging in the drill press by threatening to remove the Complainant's name from the overtime list.

Adverse Action- Attribution to Removal of Appliances

Not only did Respondent Ruggiero threaten to take away the Complainant's overtime, but the Complainant also asserted events that transpired after the drill press incident strained his relations with other employees. The day after the inspection, the Complainant averred, Respondent Ruggiero held a meeting with the shop supervisors (T. 79). Respondent Ruggiero testified that at that meeting, he instructed his supervisors to remove the electrical appliances based on the inspection and expressed his disappointment in their performance as reflected by and the problems uncovered by the inspection (EX B at 45-46). Upon the conclusion of the meeting, the supervisors told the employees that they could no longer have the coffee pot or microwave, or enjoy other privileges in the break room (T. 79-80). According to the Complainant, some supervisors told their subordinates that they planned to take away their comfort breaks and pinned the removal of the appliances on the Complainant's actions in filing the complaints (T. 80). The Complainant testified that when a co-worker walked to his car to make a phone call one supervisor told the co-worker, "'[n]o, you can't do that. You got to go back inside the building thanks to your boy,'" referring to the Complainant. Id. When a supervisor informed another co-worker about the new microwave policy, "they threw out one guy's toaster oven or something and they were like, yeah, you can thank [Complainant] for that" (T. 81). As a result, the Complainant stated that he perceived that his co-workers lost trust in him and began to associate the Complainant with other potential loss of privileges (T. 81-82). The Complainant recalled co-workers saying, "Here comes [Complainant]. What are we going to lose next?" and "What are they going to take from us next? What did you do now?" while in his presence (T. 82). The Complainant testified that he experienced such interactions on a daily basis and had still incurred this treatment at the time of the hearing; one supervisor suggested that he be tarred and feathered, according to the Complainant (T. 82).

The ARB has recognized a hostile work environment as a basis for asserting unlawful whistleblower claims. See Williams v. National R.R. Passenger Corp, ARB No. 12-068, ALJ No. 2012-FRS-016, slip op. at 6 (ARB Dec. 19, 2013). To determine the presence of a hostile work environment, a court must evaluate a number of factors such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). Neither

discourtesy, rudeness, nor the ordinary tribulations of the workplace, such as occasional teasing or joking about protected activity should be confused with harassment. See Belt v. United States Enrichment Corp., ARB No. 02-117, ALJ No. 2001-ERA-019, slip op. at 8 (ARB Feb. 26, 2004) (citing Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998)). Finally, the abusive conduct must occur because of the protected activity and must be sufficiently severe or pervasive such that it alters the conditions of employment, from the perspective of a reasonable person. See Williams, ARB No. 12-068, ALJ No. 2012-FRS-016, slip op. at 6.

Although the Complainant testified that he endured offensive remarks from co-workers related to his perceived role in their loss of workplace privileges, this sort of teasing or joking does not constitute a hostile work environment. In looking at the relevant factors that indicate a hostile work environment, the lighthearted nature of these comments cannot reasonably be interpreted as severe. Although the Complainant testified that he heard these comments daily, he did not indicate that his co-workers' razzing interfered with his work performance or represented a physical threat or serious humiliation. Instead, the sarcastic questions posed by his co-workers as to what other privileges will be taken away next because of the Complainant's actions at most amounts to the sort of occasional teasing or joking about the Complainant's protected activity that Belt instructs not to construe as harassment. Thus, taking all factors into account, the Complainant's co-workers' remarks do not represent a hostile work environment or adverse action.

However, the ARB has recognized specific circumstances and contexts in which certain workplace conduct can transform otherwise trivial workplace rancor into an adverse action. Particularly, the ARB has held that the key question in determining when an unfavorable employment action becomes more than trivial is to consider "whether a reasonable employee in the same circumstances would be dissuaded from filing a Title VII claim if subjected to the same employment action in question." Williams, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 30 (Dec. 29, 2010), In that case, the ARB focused on the relationship between supervisor and subordinate, when it definitively wrote that "an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity." Id. at 33.

Here, the supervisors' scapegoating of the Complainant regarding the loss of these privileges took on a more-than trivial nature by virtue of their clout over the Complainant and their control of the work environment. The supervisors' attribution to the Complainant's actions singled him out in front of his co-workers and caused the Complainant's co-workers to negatively associate the Complainant with these lost privileges. Specifically, supervisors told the Complainant's co-workers that they could not take comfort breaks and no longer use the microwave in the break room thanks to the Complainant (T. 81-82). As a result, the Complainant perceived that his co-workers lost trust in him. The comments from the Complainant's co-workers are distinguishable from those made by his superiors because the latter could reasonably dissuade the Complainant's co-workers from exercising their whistleblower rights due to the supervisors' authority over the employees to alter the terms of their employment. Based on the principle established in Williams and the power imbalance that comes with the supervisor-subordinate relationship, I find that the Respondent NYCTA's

supervisors' attribution of the removal of kitchen appliances and comfort breaks to the Complainant's protected activity constituted an adverse action as well.

Finally, I find that the actual removal of the microwave and toaster oven do not constitute adverse actions. After the inspection, Respondent Ruggiero held a meeting with his supervisors and foremen and told them that, as a result of the safety inspection, the electrical appliances had to be removed immediately (EX B at 45). The PESH inspectors' narrative corroborates these safety hazards, as the report took note of an ungrounded toaster oven, which was exposed to contact with an electrical current (CX 14). Because Respondent Ruggiero and his foremen complied with PESH's findings by abating these safety hazards, and did not do so with the intention of discriminating against the Complainant as a whistleblower, the removal of the appliances cannot be considered an adverse action.

Contributing Factor

I have found that the Complainant engaged in protected activity and suffered adverse actions. However, the Complainant also has the burden of proving that the protected activity was a contributing factor in the adverse actions. See 6 U.S.C. § 1142(c)(2); see also C.F.R. § 1982.104(e)(2)(iv). A contributing factor is a factor "'which, alone or in connection with other factors, tends to affect in any way' the decision to take an adverse action." Henderson v. Wheeling & Lake Erie Railway, ARB No. 11-013, ALJ No. 2010-FRS-12, slip op. at 11 (ARB Oct. 26, 2012). The contributing factor element of a complaint can be proven by direct evidence or indirect, circumstantial evidence. See DeFrancesco v. Union R.R. Co., ARB No. 10-114, ALJ No. 2009-FRS-9, slip op. at 6-7 (ARB Feb. 29, 2012). While temporal proximity between the protected activity and adverse action alone may at times be sufficient to satisfy the contributing factor element, ARB precedent has declined to find a contributing factor based on temporal proximity alone, where relevant and objective evidence disproves that element of a complainant's case. See Meadows v. BNSF Railway Co., ALJ No. 2014-FRS-00045, slip op. 51 (ALJ Jun. 30, 2016).

As has been testified to by the Complainant, Mr. Lam, and Ms. Rivera, the Complainant's act of turning on the drill press to demonstrate its operability triggered an immediate reaction from Respondent Ruggiero. The Complainant testified that after he activated the drill press, Respondent Ruggiero became agitated and upset, his face became red, and he told the Complainant that he would take him off of the overtime list and put him on the rack (EX A at 84, T. 75). Mr. Lam stated that Respondent Ruggiero became upset and told the Complainant that he would not be working overtime (EX E at 35). Ms. Rivera likewise testified that after the Complainant pushed the button to operate the drill press, Respondent Ruggiero looked at the Complainant and told him that he would send the Complainant to the rack and take away his overtime, comments that Ms. Rivera perceived to be a threat such that she advised the Complainant of his whistleblower rights immediately after Respondent Ruggiero's outburst (EX F at 19-21). She also characterized the normal whistleblower case as a gray area in nature, but contrasted that description to Respondent Ruggiero's reaction, which she described as "immediate" (T. 24). These accounts indicate that Respondent Ruggiero's threat to remove the Complainant from the overtime list and send him to the rack occurred within seconds of the Complainant activating the drill press. I find that Respondent Ruggiero's rapid response

demonstrates the exceptionally close proximity between the Complainant's protected activity and the ensuing adverse action. With no relevant or objective evidence indicating otherwise, I find that the Complainant's protected activity of turning on the drill press was a contributing factor of Respondent Ruggiero's threat to take away the Complainant's overtime and assign him to the rack.

Likewise, the supervisors' attribution to the Complainant for the removal of kitchen appliances and discontinuation of employee comfort break immediately followed Respondent Ruggiero's meeting with the supervisors, which stemmed from the previous day's inspection (T. 80-81). The Complainant stated that these new policies resulted in a negative change in attitude toward the Complainant, as the Complainant perceived that his co-workers lost trust in him (T. 81). Based on the close temporal proximity between the date of the inspection, which was prompted by the Complainant's PESH complaint, and the singling out of the Complainant by his supervisors the very next day, it is clear that the Complainant's protected activity played a contributing role in the supervisors' communications to the Complainant's co-workers that blamed him for their lost privileges. And I so find.

The Respondents do not contest the contributing factor element of the Complainant's case. Instead, they argue only that the Complainant did not suffer any adverse action and did not engage in protected activity. See Respondent's Brief at 11, 16. Based on the above, then, I find that the evidence establishes that Respondent Ruggiero and his supervisors' actions not only immediately followed the Complainant's protected activity, but in fact were triggered by the Complainant's protected activity.

Conclusion

As set forth above, I have found that the Complainant has established all of the elements of proof, as is required for him to establish that a violation under the Act occurred. See 29 C.F.R. § 1982.104(e)(2)(i-iv). Under § 1982.109(b), the burden shifts to the Respondent, who must demonstrate "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity." However, the Respondents have not proffered any evidence that they would have removed the Complainant from the overtime list, assigned him to the rack, or associate his actions with the PESH inspection or loss of workplace privileges in the absence of his protected activity. Accordingly, I find that the Respondent has not met the regulatory standard, and I therefore find that the Complainant has established, by a preponderance of the evidence, that the Respondents violated whistleblower protection provisions of the NTSSA.

Damages

Having found that the Respondents committed adverse actions directed at the Complainant for engaging in protected activity, I will now consider the appropriate damages for which the Complainant is entitled. Under the Act, a prevailing employee shall be entitled to all relief necessary to make the employee whole. See 6 U.S.C. § 1142(d)(1). Specific elements of damages provided in the Act include reinstatement with the same seniority status that the employee would have had but for the discrimination; backpay with interest; and compensatory damages, including compensation for special damages sustained as a result of the discrimination,

including litigation costs, expert witness fees, and reasonable attorney fees. See 6 U.S.C. § 1142(d)(2)(A-C). Punitive damages in an amount up to $250,000 may also be awarded. See 6 U.S.C. § 1142(d)(3).

Compensatory Damages- Economic Loss

Like other whistleblower statutes, the NTSSA's remedial purpose is to make a prevailing complainant whole. I find that the Complainant is entitled to damages for wages lost as a result of the adverse employment action taken by the Respondents. The Complainant averred that he lost wages of $276 per day for the eight days he spent prosecuting this retaliation claim for a total of $2,208 (T. 88). In particular, the Complainant indicated that he had to expend a combination of vacation and personal days for six of those days and met with an OSHA investigator on two other days in which he did not otherwise work (T. 152-53). The Complainant lost six days of work time and should be recompensed that value. Because the Complainant spent a combined six vacation and personal days to pursue his claim, I find that he is entitled to $1,656, or six days' worth of wages at his $276 per day rate.

Compensatory Damages- Emotional Distress

Emotional distress is not presumed; it must be proven. Moder v. Village of Jackson, Wis., ARB Nos. 01-095, 02-039, ALJ No. 00-WPC-005, slip op. at 10 (ARB June 30, 2003). "Awards generally require that a plaintiff demonstrate both (1) objective manifestation of distress, *e.g.,* sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress." *Martin v. Dep't of the Army,* ARB No. 96-131, ALJ No. 1993-SWD-001, slip op. at 17 (ARB July 30, 1999). To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Gutierrez v. Univ. of Cal.,* ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 9 (ARB Nov. 13, 2002).

The Complainant contended that after Respondent Ruggiero's meeting with his foremen, the foremen advised their employees of the discontinuation of various conveniences and laid blame on the Complainant for it. See Complainant's Brief, at 6. At the hearing, the Complainant testified that due to the supervisors' removal of the kitchen appliances and the subsequent negative treatment he incurred from his co-workers, he felt ostracized and believed that his co-workers lost trust in him (T. 81-82). As a result, the Complainant indicated that he feared what management may do next and claimed to have endured stress on a daily basis, which led to weight gain and increased blood pressure (T. 89). See also Complainant's Brief, at 6. While the Complainant has pointed to an objective manifestation of his distress, namely weight gain, heightened blood pressure, and generalized anxiety, he offered only vague statements and no supporting evidence, such as medical records, or quantifiable proof that relate to these manifestations. I find that the Complainant has not carried his burden so far as the causal connection between the Respondent's violation and his resultant distress because he has not provided sufficient evidence linking his physical manifestations to the Respondents' adverse actions. Therefore, I find that the Complainant has not demonstrated, by a preponderance of the

evidence, a causal connection between the Respondents' violation and his distress. As such, I find the Complainant is not entitled to damages stemming from emotional distress.

Punitive Damages

The inquiry as to whether the Respondents' violation warrants punitive damages focuses on the Respondents' state of mind, and does not necessarily require that their conduct be egregious. See Carter v. BNSF Railway Co., ARB Nos. 14-089, 15-016, 15-022. ALJ No. 2013-FRSA-082, slip op. at 31 (ARB June 21, 2016). In particular, the fact-finder must determine whether the Respondents acted with reckless or callous disregard for the Complainant's rights or intentionally violated the law. Id. at 31-32. The size of the punitive award "is fundamentally a fact-based determination" Youngerman v. United Parcel Serv., ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 10 (ARB Feb. 27, 2013). In analyzing the amount of damages awarded, the focus is on the employer's conduct and "whether it is of the sort that calls for deterrence and punishment." Id. at 10.

The record does not indicate any reckless or callous disregard or intentional violation of the Complainant's whistleblower rights. As has been testified to consistently, the Complainant's act of turning on the drill press triggered an immediate reaction by Respondent Ruggiero in which he confrontationally threatened to take away the Complainant's overtime and put him on the rack (EX A at 84; EX E at 35; T. 75). That Respondent Ruggiero reacted so instantaneously supports the contention that this was not an intentional act, but instead an instinctual response without foresight. Furthermore, the immediate reaction demonstrated by Respondent Ruggiero is not the sort of conduct that could be easily be deterred because it did not involve any kind of forethought.

Likewise, the supervisors' removal of the kitchen appliances in the break room at Respondent Ruggiero's direction represented an attempt to comply with the PESH investigators' findings, not an adverse action. Instead, it was only the supervisors' comments to employees about the removal that constituted an adverse action. Even so, these comments were not a concerted effort by all of the supervisors to compromise the Complainant's whistleblower rights, but rather an expression of frustration by a few concerning the change in the workplace environment.

In Raye v. Pan Am Railways, Inc., ARB No. 14-074, ALJ No. 2013-FRS-084, slip op. at 8 (ARB Sep. 8, 2016), the ARB found that an employer's charge of baseless and serious accusations against a complainant constituted a willful act of retaliation such that punitive damages were appropriate. Some of these accusations included charging the complainant with terminable offenses such as dishonesty, insubordination, and hostility and intimidating and discouraging the complainant and other employees from engaging in protected activity. Id. at 6. These actions caused a chilling effect that dissuaded employees from asserting their whistleblower rights and caused the complainant to second guess his decision to file a complaint and made him reluctant to bring further complaints, the ARB held. Id. In contrast, neither Respondent Ruggiero nor Respondent NYCTA engaged in such actions that would have had a similarly chilling effect on the Complainant or other employees. No evidence in the record suggests that the Complainant hesitated to bring additional complaints even after he began to feel

ostracized by his colleagues as a result of the supervisors' conduct. In fact, the Complainant brought a grievance in 2013, a year after the PESH inspection, regarding his objection to an overtime procedure (T. 144). Moreover, the Complainant's co-workers treatment did not stop the Complainant from pursuing this current claim. Thus, although the Complainant asserted that some supervisors insinuated that the Complainant's protected activity caused the loss of certain privileges, which led to strained relations between the Complainant and his co-workers, I find that such actions did not rise to the level of a willful act of retaliation such that he is entitled to punitive damages.

Attorney's Fees

Having prevailed on his claim, the Complainant is entitled to reasonable attorney's fees. See 6 U.S.C. § 1142(d)(2)(C). Complainant's counsel filed a fee petition with this office on July 15, 2016, seeking $67,546.50 for services rendered, based on an hourly rate of $525, and $3,102.03 for expenses. No opposition or objection to the Attorney Fee Affidavit has been filed by Respondent's counsel. A respondent seeking an award of attorney fees under the NTSSA, must file any objections within 30 days of receipt of the findings pursuant to § 1982.105. See § 1982.106(a). Accordingly, the Respondent has 30 days from the date of receipt of this decision to file an objection to the Complainant's Attorney Fee Affidavit.

Order

The Respondents shall pay to the Complainant the sum of $1,656 in compensatory damages. Within 30 days of receipt of this decision, the Respondent shall file any objection to the Complainant's Attorney Fee Affidavit.

SO ORDERED.

Digitally signed by Adele Odegard
DN: CN=Adele Odegard, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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