

CASE NO. 22-7657

IN THE SUPREME COURT OF THE UNITED STATES

ANNECIA M. FORT,

Petitioner,

v.

DEPARTMENT OF LABOR, et al.,

Respondents.

/

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF LANDSTAR TRANSPORTATION LOGISTICS, INC.

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. QUESTIONS PRESENTED BY THE PETITION:

Question 1: Is disclosing public safety concerns to your management (internal reporting) a protected activity? [Under Surface Transportation Assistance Act (STAA) Whistleblower Protection Act 49 U.S.C. § 31105 (a) (1) (A) (i) (ii)]

Question 2: Is a motor carrier that requires or permits a driver with egregious violations of drive-time limits [in 49 CFR part 395] in violation of Federal Motor Carrier Safety Regulations?

Question 3: Is it legal for a motor carrier to tell a driver seeking immediate ELD Hours of Service assistance to call back the next day due to being under-staffed?

Question 4: Is it legal for a motor carrier to log into a driver's ELD account with the driver's ID and Password instead of the carrier's support account information?

Question 5: Can a motor carrier coerce a driver into changing their logs after a fatal accident? [see witness statement] Q

2. CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE
STATEMENT IN COMPLIANCE WITH FRAP RULE 26.1 AND
SUPREME COURT RULE 29.6

COMES NOW the Respondent, Landstar Transportation Logistics, Inc., ("Landstar") by and through its undersigned counsel, and files this Corporate Disclosure Statement in Compliance with Rule 26.1 of the Federal Rules of Appellate Procedure and Supreme Court Rule 29.6 and Certificate of Interested Persons. The Petitioner, Annecia M. Fort, is a current employee of Landstar, a wholly owned subsidiary of Landstar System Holdings, Inc. Landstar System Holdings, Inc. is a wholly owned subsidiary of Landstar System, Inc. Landstar System, Inc. is a publicly traded corporation traded on the NASDAQ market under the symbol "LSTR." Landstar System, Inc. does not have a parent corporation. Currently, no other entity owns 10% or more of Landstar System, Inc.'s common stock.

Those persons that have been involved in this litigation and who have an interest are listed alphabetically by last name as follows:

1. Burrell: Hon. Thomas H. Burrell, Administrative Appeals Judge for the DOL Administrative Review Board
2. Cason: Ms. Mahal Cason, former Manager, Log Compliance Department for Landstar
3. Clark: Richard Clark, Esq., Vice President and Assistant General Counsel for Landstar
4. Dunlop: Janet R. Dunlop, Esq., General Counsel, Administrative Review Board

5. Elizabeth B. Prelogar, Counsel of Record, U.S. Department of Justice
6. Fort: Ms. Annecia Fort, Petitioner
7. Harper: G. Thomas Harper, attorney for Respondent Landstar
8. Hasty: Ms. Nancy Hasty, Vice President, Human Resources for Landstar
9. Haynes: Hon. James A. Haynes, Administrative Appeals Judge for the DOL
Administrative Review Board
10. Henley: Hon. Stephen R. Henley, Chief Administrative Law Judge
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11. Johnson: Hon. Paul C. Johnson, Jr., District Chief Administrative Law Judge
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12. Kneller: Michael Kneller, Esq., Vice President and General Counsel for
Respondent Landstar
13. Leslie: Hon. Heather C. Leslie,
Administrative Appeals Judge for the DOL Administrative Review Board
14. Lopez: Juan C. Lopez, Esq., U.S. Department of Labor, Office of the Solicitor,
Washington, D.C.
15. Schriever: Leigh Anne Schriever, Esq., U.S. Department of Labor, Office of
the Solicitor, Washington, D.C.

16. Slavet: Beth S. Slavet, Mediator, U.S. Department of Labor, Office of Administrative Law Judges, Washington, D.C.

17. Waler: Mr. John T. Waler, Regional Investigator
U.S. Department of Labor

Occupational Safety and Health Administration
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18. The Judges of the U.S. Court of Appeals of the Eleventh Circuit.

Dated this 23th day of June, 2023.

by: s/G. Thos. Harper



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5. SUMMARY OF LANDSTAR'S OPPOSITION TO A WRIT OF CERTIORARI

The arguments made in Petitioner's Writ do not meet any of the "compelling reasons" stated in Supreme Court Rule 10. The petition does not show or support that "...a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.... (or that) (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The two cases cited by Petitioner as conflicting with the Court of Appeals decision in this case are clearly distinguishable from the facts and conclusions reached by the 11th Circuit in this case. The decision in Clean Harbors Environmental Services, Inc. v. Herman ("Clean Harbors"), 146 F.3d 12, 14 IER Cases 14, 1998 O.S.H.D. (CCH) P. 31,582 (1st Cir. 1998) involved a clear violation of

a regulation that was not disputed or an issue in that decision. In Petitioner's case, Ms. Fort failed to prove or show that, in any of the three (3) instances claimed by her, the actions of Landstar violated a motor vehicle safety regulation and therefore Ms. Fort did not engage in any activity that the STAA protects.

Likewise, the decision of the Sixth Circuit in Coggin Truck Line Company, Inc v Administrative Review Board ("Coggin"), 172 F.3d 872, 1999 WL 68694 (6th Cir. 1999) is distinguishable. Coggin involved an internal complaint by the employee/complainant of a safety violation that was not disputed. Fort's claims are distinguishable since she failed to prove or show that in any of the three (3) instances claimed by her, the actions of Landstar violated a motor vehicle safety regulation.¹

None of the other decisions cited by Fort to support certiorari are binding precedent for the Eleventh Circuit or conflicting with the Eleventh Circuit decision here. Petitioner cites Davis v H.R. Hill, (Davis), USDOL/OALJ Reporter, Case No. 86 STA 18 (Secretary of Labor, July 14, 1987) to argue that her internal complaint was sufficient to show protected activity. However, Davis is distinguishable since in the Davis line of cases there was no issue that the employee, Davis, had complained internally about a violation of a vehicle safety regulation. (See also, Davis v H.R. Hill, USDOL/OALJ Reporter, Case No. 86 STA 18 (ALJ, May 20, 1987) and Davis v H.R. Hill, USDOL/OALJ Reporter, Case No. 86 STA 18 (Secretary of Labor, March 19, 1987) (Remand to ALJ)). As to Manske v. UPS Carthage Servs.

¹ Coggin is an unpublished Per Curiam decision. Local Rule 32.1(b) for the 6th Circuit states: "Published panel opinions are binding on later panels."

cited by Petitioner, Landstar believes that Ms. Fort is referring to the Order Denying Summary Judgment by Chief Judge John A. Woodcock, Jr. in Manske v. UPS Carthage Services, Inc. (Manske), Case No. 2:10-cv-00320-JAW (D. Me., May 4, 2012). The Order in Manske is also distinguishable from Fort's complaint since Manske involved numerous complaints of violations of vehicle safety regulations. Similarly, Warren v. Custom Organics, USDOL/OALJ Reporter, ARB Case No. 13-004 (Administrative Review Board, May 23, 2013) (Final Decision and Order) also involved employee complaints of vehicle safety regulations (vehicle overweight, hours of service violations and unsafe vehicle conditions) unlike Ms. Fort's complaints. (See also, Warren v. Custom Organics, USDOL/OALJ Reporter, ARB Case No. 10-092 (Administrative Review Board, February 29, 2012) (Order of Remand).

6. Statement of the Case: Procedural Background

The Petitioner, Ms. Annecia M. Fort (hereafter, "Petitioner" or "Ms. Fort"), is a *current employee* of the Carrier Qualifications Department at Landstar. During 2013-15 Ms. Fort was an employee of Landstar in its Log Compliance Department. Ms. Fort filed a complaint with OSHA on September 15, 2015 claiming that Landstar violated federal law by retaliating against her in violation of the Surface Transportation Assistance Act (STAA), 49 U.S.C. Section 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007. Thus, this case arises from the STAA, 49 U.S.C. § 31105 (2007) as implemented at 29 C.F.R. Part

1978 (2018); *see* 49 U.S.C. § 42121 (2000) (providing standards referenced in the STAA).

On December 23, 2016 after an investigation by OSHA, the Secretary of Labor for OSHA issued its determination finding that Landstar had not violated the STAA in its actions toward Ms. Fort. A copy of the decision by OSHA is found under Tab “B” of Landstar’s Supplemental Appendix of the Record². Ms. Fort then initiated an appeal to the Department of Labor (“DOL”) on January 25, 2017. Ms. Fort’s appeal of the findings of OSHA was assigned to an Administrative Law Judge (ALJ) of the Department of Labor for a hearing and determination of the merits of her complaint. On January 6, 2018, Landstar filed a Motion for Summary Decision which Ms. Fort opposed. Landstar’s Motion for Summary Decision was supported by affidavits, a deposition transcript and exhibits that were a part of the record before the ALJ (TAB’s “C”, “D”, “E”, “F” and “G”, Suppl. Appendix). After considering Landstar’s Motion for Summary Decision and Ms. Fort’s Objections (TABS “J” and “K”, Suppl. Appendix), the DOL Administrative Law Judge granted Landstar’s motion under 29 C.F.R. § 18.72 (2016) and cancelled the scheduled hearing. (*See* Order Granting Summary Decision (Feb. 2, 2018) (TAB “L”, Suppl. Appendix) (attached).

Ms. Fort appealed the ALJ’s decision to the DOL’s Administrative Review Board (“ARB”) on February 8, 2018. The DOL ARB agreed with the ALJ and affirmed the ALJ in an Order entered on March 6, 2020 (the “March 6 Decision”). The March

² References to portions of the record before OSHA, the ALJ and the ARB are designated as Landstar’s Supplemental Appendix (Suppl. Appendix), preceded by the appropriate TAB and page number found under that TAB in Landstar’s Suppl. Appendix filed with the Eleventh Circuit.

6 Decision of the ARB affirming the ALJ's granting of Summary Decision is TAB "O" of Landstar's Supplemental Appendix.

On March 20, 2020, Ms. Fort filed two (2) separate petitions for review (TABS "P" and "Q", Suppl. Appendix) (the "March 20 Petitions for Reconsideration") asking the ARB to reconsider its March 6, 2020 decision. Landstar opposed Fort's March 20 Petition for Reconsideration (TAB "R") and on October 1, 2020 the ARB *denied* Fort's March 20 Petitions for Reconsideration. The Order Denying Reconsideration is Docket/Tab 2 to Ms. Fort's Supplemental Appendix.³

Ms. Fort appealed the decision of the ARB to the Court of Appeals for the Eleventh Circuit. On January 11, 2023 the Eleventh Circuit issued its *unpublished* opinion (Case No. 20-13998) DENYING Fort's petition for review.⁴ Ms. Fort asked the eleventh Circuit for a rehearing which was DENIED. The mandate of the Court of Appeals was issued on March 20, 2023. Fort's Petition for Writ of Certiorari was filed in this Court on May 23, 2023.

³ Landstar objects to certain pages in Ms. Fort's Supplemental Appendix filed with the Eleventh Circuit as not a part of the record in this case before OSHA, the ALJ or the ARB. These pages are argument written by Ms. Fort and should be stricken from her Supplemental Appendix. These pages are found at Tab No. 4, pages 1 and 2; Tab 6, p.1 and Tab 8, p.1.

⁴ Local Rule 36-2 of the 11th Circuit states, in part, Unpublished Opinions. An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority. In addition, Internal Operating Procedure Number 6 of the 11th Circuit Court states, in part, as follows: 6. Unpublished Opinions. A majority of the panel determine whether an opinion should be published. Opinions that the panel believes to have no precedential value are not published. Although unpublished opinions may be cited as persuasive authority, they are not considered binding precedent. The court will not give the unpublished opinion of another circuit more weight than the decision is to be given in that circuit under its own rules.

STATEMENT OF FACTS

7. The Story Running Before Ms. Fort's Complaint: This is not your normal case of retaliation under STAA. Indeed, Ms. Fort's job was to report violations of DOT regulations by drivers and she did this on a daily basis for over ten (10) years with no claims of retaliation against her because of her reporting of violations. Her job was to monitor Landstar drivers to make sure they were in compliance with FMCS Regulations and train drivers on compliance (TAB "G", Suppl. Appendix, at Tr. 24, L.25; Tr. 23, L. 2). ("As a Log Compliance Representative, I was responsible for monitoring independent contracted drivers (under Landstar's authority), making sure they were complying with Federal Motor Carrier Safety Regulations (FMCSR) (49 C.F.R. Subchapter B, Part 350 *et seq.* and Part 395.22) (citation added) related to both paper logs (logbooks) and electronic logs." See, Fort's Opposition to Motion for Summary Judgment dated January 12, 2018 (TAB "J", Suppl. Appendix, at pages 1-2). During her work in the Log Compliance Department a number of drivers were disqualified to drive for Landstar as a result of Ms. Fort's recommendations⁵ (TAB "G", Suppl. Appendix at Tr. 34, L.3-24).

From November 2004 until September 2015, Ms. Fort worked in the Log Compliance Department at Landstar Transportation Logistics, Inc., ("Landstar").

⁵ All tractor-trailers operating under the federal motor carrier operating authority of a Landstar motor carrier are owned and operated by independent contractors, referred to by Landstar as BCOs (Business Capacity Owners). Landstar can determine whether a truck operator is qualified to operate a tractor-trailer operating under the federal operating authority of a Landstar motor carrier. As these truck operators are not Landstar employees, Landstar can only disqualify them from hauling freight for a Landstar motor carrier under that motor carrier's operating authority.

This department provides safety and compliance services to the various Landstar motor carriers (TAB "G", Tr.17, L.4).⁶ Ms. Fort's job position was a Log Compliance Representative (TAB "G", Tr. 24, L.25). As a Log Compliance Representative, Ms. Fort was one of approximately 25 Log Compliance Representatives responsible for monitoring that all independent contractor drivers for Landstar were in compliance with Federal Motor Carrier Safety Regulations ("FMCS Regulations" or "FMCSR") records of duty status (logs) and for training as drivers transitioned from "paper" to "electronic" driving logs (TAB "G", Tr. 23, L.2 and Tr. 25, L.4). As a Log Compliance Representative, Ms. Fort reported to a Supervisor, who in turn reported to a Manager, who in turn reported to a Director, who in turn reported to a Vice President.

In the fall of 2014 Ms. Fort applied for supervisory and manager positions in the Logs Department and she was not selected for these positions (TAB "G", Tr. 44, L.3; Tr. 45, L.8; Tr. 47, L.20-Tr. 48, L.7). After Ms. Fort was turned down for promotion, incidents of disrespectful conduct toward her Supervisors, Manager and Director began to occur. For example, on December 29, 2014, Ms. Fort was asked by her Manager, Jamie Lepke, to send a brief "Tip of the week" to other Log Compliance Representatives. Ms. Fort's response to this request was attached to Ms. Lepke's

⁶ References to the transcript of the deposition of Ms. Annecia Fort taken on December 18, 2017 are referred to as "TAB "G", Suppl. Appendix filed with the Eleventh Circuit, followed by the appropriate page ("Tr.") and line number. Exhibits identified during the deposition of Ms. Fort are referred to as "TAB "H", followed by the appropriate number of the exhibit. References to affidavits that are part of the record are referred to by the affiant's last name, followed by the appropriate TAB and page number. The complete transcript of Ms. Fort's deposition was filed by her in response to Respondent's Motion for Summary Judgment and as TAB "G" to Landstar's Supplemental Appendix. Relevant exhibits identified during the deposition of Ms. Fort have also been filed with this brief as TAB "H", Suppl. Appendix.

affidavit (TAB "E", Attachment "A", p. 2). Ms. Fort declined this request by her manager.

On January 9, 2015, Fort attended a team meeting of Log employees. This was the first team meeting with Kim Sellers as Supervisor over the team (TAB "G", Tr. 228, L. 18). Ms. Fort admitted that she understood how Kim Sellers took her actions in this meeting as disrespectful toward Ms. Sellers (TAB "G", Tr. 230, L. 2; Tr. 234, L.17).

After three (3) separate incidents involving Ms. Fort, she was issued a written Employee Warning Notice on January 30, 2015. This notice referenced three incidents of willful misconduct by Ms. Fort. A copy of this Employee Warning Notice is Exhibit No. 33 to the affidavit of Ms. Nancy Hasty filed in support of Landstar's Motion for Summary Decision (TAB "D", Exh. No. 33).

Despite the warning notice, incidents with Ms. Fort continued. On March 3, 2015 Ms. Fort's entire team in Log Compliance was asked what they felt their strengths and weaknesses were. Attachment "C" (Exh. No. 25) to Ms. Lepke's affidavit contains Ms. Fort's response. She responded to her supervisor:

"Strength-my counsel and effectiveness with drivers"

"Weakness-dealing with a deceitful management team (Mahal, Jamie and Kim to be exact)" (TAB "E", Attachment "C", Suppl. Appendix).

In May of 2015, Ms. Fort applied for a job in another department that was available at Landstar but was not selected for the position. (TAB "H", Exh. No. 8; TAB "G", Tr. 50, L.19)

Disrespectful conduct by Ms. Fort continued. For example, on August 20, 2015, a team member sent out an e-mail listing a nice comment about each employee. Ms. Fort left her work station and walked over to the employee and announced that she (the employee) would be the perfect replacement for the Supervisor! (TAB "H", Exh. No. 41; TAB "G", Tr. 311, L.1-4) This statement was made so other employees heard the comment.

Supervisors in the Log Department attempted to reach out to Ms. Fort to try to repair the relationship (TAB "G", Tr. 236, L.16; Tr. 141, L.6). However, when Ms. Fort's conduct continued, her Supervisor, Manager and Director held a meeting on August 26, 2015 to discuss her negative influence on the department. Ms. Fort was viewed as constantly trying to discredit her management and trying to make the department's management look bad to the employees in the department (TAB "D", Hasty Aff., p.3).

While the Log Compliance department's management was in Human Resources (HR) discussing Ms. Fort's situation with HR, Ms. Fort brought to Human Resources a one-page complaint claiming that she had been retaliated against as a result of her actions in regard to three (3) drivers. (TAB "D", Hasty Aff., Exh. No. 23) These incidents were asserted by Ms. Fort to support her claims that she was a victim of retaliation for reporting issues under Landstar's conflict of interest policy. After receipt of her complaint an investigation was begun on August 28, 2015 and continued into September. During the investigation Ms. Fort continued to work in her position in the Log Department. Ms. Fort was interviewed at length and

approximately eight (8) other employees and supervisors were also interviewed. Records of the three drivers in issue were collected and studied.

8. Ms. Fort's Complaint (with Landstar's Corrections to Petitioner's Statement of facts):

The complaint filed by Ms. Fort referred to issues involving three (3) Landstar truck operators: Michael Pease, Jose Martinez and Andrea Hurddrobneck.

A. Driver Michael Pease: Truck owner-operator Michael Pease was having log compliance issues in connection with the operation of a recently installed electronic logging device ("ELD") in his truck.⁷ Due to these issues, Ms. Fort recommended that Mr. Pease be disqualified as an operator for Landstar (TAB "G", Tr. 81, L.23). This recommendation was taken into consideration but ultimately overridden by Mahal Cason, the Director with responsibility for the Log Compliance department, after an independent Landstar agent, Jim Stelts, asked Ms. Cason to give Mr. Pease another chance since he was an older, long-time driver and just did not understand electronic logs (TAB "F", Cason Aff., p.2). There was no issue with respect to the actual driving time of Mr. Pease under the hours-of-service regulations; rather, his issues stemmed entirely from his lack of understanding regarding how to operate the ELD, a new technological device recently installed in his truck. Ms. Fort admits that Ms. Cason had authority to refer Pease for

⁷ Although today electronic logs are the norm and required by all truck operators, electronic logs were a new innovation in 2015 and were not required by federal law to be used until 2017.

additional training on the use of the device (TAB "G", Tr.76, L. 11). The investigation determined that the day after Ms. Fort made her recommendation, Mr. Pease had two separate minor accidents and he was then disqualified to drive for Landstar (TAB "G", Tr.72, L.6).

Although Ms. Fort did nothing wrong in recommending Pease's disqualification, Ms. Fort has agreed that Landstar did not violate any FMCSR Regulations by referring Mr. Pease for additional training regarding use of an ELD (TAB "G", Tr. 115, L.11).

B. Driver Jose Martinez's Telephone Request for ELD Training: On January 20, 2015, Ms. Fort was attending a training presentation with approximately half of the Log Compliance Department (TAB "G", Tr.127, L.4). During the time she was at the presentation, a driver she had been trying to reach, Jose Martinez, called in to the Log Compliance Department asking for help with his ELD (TAB "G", Tr.128, L.24). His call was answered by another Log Compliance Representative. Mr. Martinez was told that the department was short-staffed and that he should continue using his paper logs and call back the following morning for training (TAB "G", Tr. 131, L.6). The employee who took the call entered notes of her discussion with Mr. Martinez in the Landstar "counsel notes" system (TAB "G" Tr. 129, L.3).

When Ms. Fort returned from the presentation, she read the counsel notes of the response to Mr. Martinez and felt it was not consistent with department practice (TAB "G", Tr.128, L.18; Tr.129, L.3). After reading the notes, Fort spoke with the employee who took the call from Martinez and learned that her Supervisor, Kim

Sellers, had told the employee to have the driver call back the next day (TAB "G", Tr. 131, L.6). Ms. Fort then went and spoke with Ms. Sellers who confirmed that she had approved asking the driver to call back (TAB "G", Tr. 131, L.19). Ms. Fort then reported Ms. Seller's decision to Mahal Cason.

Upon learning of the incident with Martinez, Ms. Cason told Ms. Fort that she would take care of the matter (TAB "G", Tr. 132, L.17). Ms. Cason counseled Ms. Sellers that the number of staff available to handle calls should have been better managed so that the department was not so short-staffed (TAB "F", Cason Aff., p.3). As to the handling of driver Martinez, Ms. Fort alleges noncompliance with a departmental practice but she has not, and cannot point to any violation of applicable law or FMCS Regulations as to Martinez (TAB "G", Tr. 182, L. 11).

C. Driver Andrea Hurddrobneck: During August 2015, Landstar employed a consultant to engage in a "mock DOT audit" to evaluate how Landstar would perform during a real DOT audit (TAB "G", Tr.162, L.19). One of the random files asked for by the auditor was driver Andrea Hurddrobneck. When her file was pulled for the auditor and reviewed, Ms. Hurddrobneck's log showed that she had been in her sleeper berth in her truck for the past three weeks! (TAB "G", Tr.164, L.4) A telephone call to Ms. Hurddrobneck discovered that her truck was in the shop and that she had failed to log-off her ELD when she left the truck. Again, there is no allegation here that the truck driver at issue had an actual hours of service issue with respect to her on-duty driving time. Rather, the issue related to a driver still becoming accustomed to operating with an ELD and who had forgotten to log

off the device after bringing her truck in for maintenance. The driver confirmed that the information provided by the ELD was incorrect as she had not spent the preceding three weeks in her sleeper berth and that it was appropriate and necessary to correct her logs for this period (TAB "E", Lepke Aff., p.3, L. 10-20). Ms. Hurdrobneck further confirmed that she was not able to go to the truck at that time and, accordingly, Landstar used its "demo" ELD device in the Landstar office to log her off-duty (TAB "E", Lepke Aff., p.3). After investigation, Landstar confirmed that using the demo ELD to change the driver's status was not a violation of DOT regulations (TAB "E", Lepke Aff., p. 3).

9. Landstar's Investigation Completed

After the investigation of Fort's complaint was completed, a meeting was held with Ms. Fort to report to her the results of the investigation. (TAB "G", Tr. 177, L.24) The Landstar investigation concluded that Landstar had not violated any FMCS Regulations in the actions taken as to the three drivers stated in Ms. Fort's complaint. However, all of her supervisors believed that her continued presence in the Logs Department was disruptive to the department.

On September 14, 2015, Ms. Fort was placed on **paid leave** to allow her to interview for other available positions within Landstar. This decision was made by Nancy Hasty, V.P., Human Resources, due to Ms. Fort's length of service with the company, her job knowledge and her good working relations with drivers (TAB "D", Hasty Aff., p.4). **Ms. Fort was not given a deadline in which she had to find a new position within the company (TAB "G", Tr. 186, L. 20) and she continued**

to receive her full pay and benefits while she was looking for a new position (TAB "G", Tr. 188, L.3; Tr. 190, L. 6-9). During late September and early October, Ms. Fort was interviewed for several positions at Landstar (TAB "G", Tr. 187, L.5). She applied for and was selected for the position of Carrier Qualifications Service Specialist in the Carrier Qualifications Department (TAB "G", Tr. 189, L.14). Ms. Fort began working in this position on October 7, 2015 at her same rate of pay as her position in the Log Compliance Department (TAB "G", Tr. 189, L.22; Tr. 190, L.1-10). Since beginning her new position, Ms. Fort has received regular reviews and pay increases. She continues to work in that position today and has lost no pay or benefits as a result of her job change. ("I was back on track once I got in that department." TAB "G", Tr. 195, L.8)

10. Landstar's Argument that the Petition Should be Denied:

The opinion of the Court of Appeals accepted and followed the decision of the Administrative Review Board of the Department of Labor ("ARB") in Dick v. Tango Transportation ("Dick"), ARB No. 14-054, ALJ No. 2013-STA-60 (Dept. of Labor Admin. Review Board, Aug. 30, 2016). The Dick opinion is cited by Petitioner to argue that she met the standard to establish protected activity set by the ARB in that case. Petitioner argues that under Dick, she did not have to show that she complained about a specific safety regulation, just a complaint "related to" safety regulations. However, this is the standard adopted and accepted by the Court of Appeals. (See, Eleventh Circuit Opinion, pages 7-8)

According to Petitioner, she met the “reasonable person” standard adopted by the ARB in Dick because a notice of proposed rulemaking had been published and a reasonable person would have known that using another person’s or company’s ID and password was a violation of a safety regulation. However, the Eleventh Circuit disagreed and found that these two factors were not sufficient to establish an objectively reasonable belief related to violations of safety regulations. Instead, the court of appeals found that none of the incidents with the three drivers related to vehicle safety violations.

Ms. Fort cannot establish that any of the three (3) instances complained of involved, or even claimed to involve, violations of law or FMCS Regulations by Landstar. All issues raised by Ms. Fort at most constituted possible violations of prevailing practices and procedures in the Log Compliance department. These issues related to internal disagreements between Ms. Fort and the management staff in the Log Compliance department, but in no way represented violations of federal law. Ms. Fort did not like the way each situation was handled, but she cannot show that a law or regulation was violated. In Ms. Fort’s responses to the ALJ, the ARB, the Eleventh Circuit, and in her Petition to this Court, Ms. Fort has not identified any law or regulation violated by Landstar with respect to the 3 complaints Fort made: drivers Michael Pease, Jose Martinez and Andrea Hurdrobneck.

Driver Michael Pease: As to driver Michael Pease, Ms. Fort stated under oath in her deposition that Landstar did not violate any FMCS Regulations by referring Mr. Pease for additional training on the use of an ELD (TAB “G”, Tr. 110,

L.11). The decision to give Mr. Pease another chance was the decision that Fort disagreed with and this decision did not involve a violation of law or FMCS regulation.

As correctly noted by the ALJ, there is nothing in the FMCS Regulations that required Landstar to disqualify Pease as a driver. **The failure of Landstar to disqualify Pease is the decision that Ms. Fort complains about, not the existence of issues with his use of his ELD device to accurately maintain his logs.** Landstar was not required under law or FMCS Regulations to terminate Mr. Pease. Ms. Fort argues that Pease's log violations and two minor accidents required that Landstar disqualify him from driving. There is no law or FMCS Regulation that requires such action.⁸ Even the fact that a driver has two (2) accidents in the same day, does not prove a violation of any FMCS Regulation! In short, there was and is no evidence in the record that Pease was actually violating FMCS Regulations. In addition, there is no evidence in the record that public safety was at risk as to driver Pease, or as to either of the other two drivers referred to in Ms. Fort's complaint.

The "ELD alerts" from driver Pease were not safety or hours of service violations. Instead, they were "alerts" to be investigated for possible violations. Electronic log requirements were not in effect when these instances occurred and a

⁸ Ms. Fort argues facts that are not known and are not in the record before the ALJ. Fort argues that the listing of violations by Pease in his Big Pic review (TAB "J", Suppl. Appendix, Attachment H) proves that he was in violation of FMCS regulations. This is simply incorrect. As stated herein, the list denotes *possible violations* that must be investigated to determine if any were *actual violations*. There can be many different reasons why a circumstance that led to an ELD sending a message of a violation is found, after investigation, to have involved no *actual violation* of FMCS Regulations.

reasonable Log Compliance Representative with Fort's work experience would not have believed that these instances were violations of safety regulations.

Fort did not complain that she was retaliated against because she recommended that Pease be terminated because he was in violation of safety regulations. (After all, Pease's right to drive for Landstar was terminated.) Instead, Fort's complaint was that Cason made the decision to give Pease another chance for "a friend," and this decision was a "conflict of interest" in violation of Landstar policies (See, TAB "D", Affidavit of Nancy Hasty, Exh. No. 23). Further, under oath in her deposition Fort testified that the retaliation against her was because she attempted to go over the head of her Director and address her concerns directly to the department Vice President (TAB "G", Tr. 92, L.13; Tr. 184, L.10-25; Tr. 297, L.1-4; Tr. 296, L. 25).

Driver Jose Martinez: As to Ms. Fort's complaint that driver Jose Martinez was asked to call back the next day for training, this action was not in compliance with the Log Department's usual practice. However, as the Administrative Law Judge concluded, and the ARB affirmed, Ms. Fort did not and cannot point to any violation of applicable law or FMCS Regulations as to asking driver Martinez to call back the next day for training, as opposed to receiving additional training at that point in time (TAB "G", Tr. 182, L. 11). Although Ms. Fort alleges in her brief that Martinez was in violation of HOS, this is not supported by the evidence before the ALJ or ARB. Fort had received HOS (Hours of Service) alerts. Alerts are just that. They are alerts of a possible violation. There are many reasons why an alert would

register, and an alert must be investigated before a determination can be made that a driver is in violation of driving hours. Fort has come forward with no evidence that Martinez was actually in violation of a safety regulation and the decision by Landstar to instruct Martinez to call back the next day for counseling was not a violation of any FMCS Regulation. Moreover, a reasonable person with Fort's background, knowledge and experience would not have believed that the decision to have the driver call back the next day violated any safety regulation.⁹

Driver Angela Hurddrobneck: According to Ms. Fort, Angela Hurddrobneck's duty status was an obvious error and her truck was in the shop.¹⁰ (TAB "G", Tr. 163, L. 25-164, L.16) Ms. Fort was told at the time that a telephone call had been placed to Ms. Hurddrobneck and Landstar discovered that her truck was in the shop and that she had failed to log-off her ELD when she left the truck. (TAB "G", Tr. 176, L.1-2; See TAB "M", Brief of Fort to ARB, page 5, L. 1, "The driver was contacted and advised us that her truck was in the shop.") There was no allegation by Fort that Ms. Hurddrobneck had an hours-of-service issue with respect to her on-duty driving time. There is no evidence in the record that Hurddrobneck was in violation of any FMCS Regulation or that public safety was at risk. Rather, the issue related to a driver who had forgotten to log-off the device after bringing her truck in for maintenance. According to Ms. Fort, Landstar called

⁹ The counsel notes in Landstar's electronic record system are for Landstar's use and changing these counsel notes are also not a violation of FMCS Regulations.

¹⁰ In Fort's Response to the Motion for Summary Judgment before the ALJ she stated, "Her logs showed she was in sleeper for multiple days. However, her truck was in the shop and she would not be able to correct this for a few days." (TAB "J", Suppl. Appendix, page 4, bottom paragraph: Fort's Motion Opposing Respondent's Summary Judgment with Supporting Memorandum, dated January 12, 2018)

the driver and found out about the truck being in the shop and that Hurddrobneck could not go to the truck to change her status.

In her Petition to this Court, Ms. Fort claims that Landstar coerced an employee by asking that employee to log into the office “demo” Electronic Log Device and change Ms. Hurddrobneck’s status (TAB “M”, Suppl. Appendix, Fort’s brief, p.6). Fort alludes on page 5 of her Petition that this conduct violated 49 CFR Section 395.22: Motor carrier responsibilities-In general. However, Ms. Fort does not explain how or which provision in Section 395.22 was violated. Again, Fort fails to identify of explain how Landstar’s actions violated safety regulations.

11. LANDSTAR'S ANSWERS TO THE QUESTION(S) PRESENTED BY THE PETITION:

Question 1: Is disclosing public safety concerns to your management (internal reporting) a protected activity? [Under Surface Transportation Assistance Act (STAA) Whistleblower Protection Act 49 U.S.C. § 31105 (a) (1) (A) (i) (ii)]

Answer: No, unless the public safety concerns are violations of the statutes and regulations involved, or related to safety regulations, this conduct is not “protected activity” under STAA. As found by the Court of Appeals and the lower agency decisions, none of the three (3) incidents involved in Petitioner’s complaint established that a reasonable person in Petitioner’s position would have believed that Landstar’s actions violated a vehicle safety regulation and therefore were not “protected activities.”

Question 2: Is a motor carrier that requires or permits a driver with egregious violations of drive-time limits [in 49 CFR part 395] in violation of Federal Motor Carrier Safety Regulations?

Answer: The Petitioner failed to establish drive-time violations for any of the three instances covered by Petitioner’s complaint. Instead, the evidence established electronic logging device “alerts.” There was no issue with respect to the actual driving time of Mr. Pease under the hours-of-service regulations; rather, his issues stemmed entirely from his lack of understanding regarding how to operate the ELD, a new technological device recently installed in his truck. Ms. Fort admitted that

Ms. Cason had authority to refer Pease for additional training on the use of the device (TAB "G", Tr.76, L. 11).

Question 3: Is it legal for a motor carrier to tell a driver seeking immediate ELD Hours of Service assistance to call back the next day due to being under-staffed?

Answer: Yes. As to the handling of driver Martinez, Ms. Fort alleges noncompliance with a departmental practice but she has not, and cannot, point to any violation of applicable law or FMCS Regulations as to Martinez (TAB "G", Tr. 182, L. 11). Fort presented no evidence that driver Martinez was actually in violation of a safety regulation and the decision by Landstar to instruct Martinez to call back the next day for counseling was not a violation of any FMCS Regulation.

Question 4: Is it legal for a motor carrier to log into a driver's ELD account with the driver's ID and Password instead of the carrier's support account information?

Answer: At the time of the incident with driver Hurddrobneck, the answer was "Yes". The issue with driver Hurddrobneck related to a driver still becoming accustomed to operating with an ELD and who had forgotten to log off the device after bringing her truck in for maintenance. The driver confirmed that the information provided by the ELD was incorrect as she had not spent the preceding three weeks in her sleeper berth and that it was appropriate and necessary to correct her logs for this period. Ms. Hurddrobneck further confirmed that she was not able to go to the truck at that time and, accordingly, Landstar used its "demo"

ELD device in the Landstar office to log her off-duty (TAB "E", Lepke Aff., p.3). After investigation, Landstar confirmed that using the demo ELD to change the driver's status was not a violation of DOT regulations (TAB "E", Lepke Aff., p. 3). Ms. Fort has not, and cannot show that Landstar's changing of the duty status to show the correct status for Hurddrobneck was in violation of any law or FMCSR regulation at the time of this incident. The Court of Appeals was correct that Ms. Fort's raising concerns about the change to Hurddrobneck's log did not constitute "protected activity." As affirmed by the Eleventh Circuit, the ARB's interpretation that Fort's complaints concerned electronic logging problems, and not violations of STAA or safety related matters, was correct.

Question 5: Can a motor carrier coerce a driver into changing their logs after a fatal accident? [see witness statement] Q

Answer: These allegations were not part of Petitioner's complaint filed with Landstar, OSHA or her claims before the agency or the Court of Appeals.

12. Conclusion:

As the Eleventh Circuit ruled correctly, Fort failed to establish protected activity to make a *prima facie* case of retaliation. Fort has failed to support her arguments with anything beyond conclusory statements in her Petition. Although pointed out by the ALJ, the ARB and the Court of Appeals, Ms. Fort has failed to point to a specific FMCS Regulation violated by Landstar as to the three drivers in question.

The arguments made in Petitioner's Writ do not meet any of the "compelling reasons" stated in Supreme Court Rule 10. The petition does not show or support that "...a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.... (or that) (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Opinion of the Eleventh Circuit should be upheld and the Petition for Writ of Certiorari DENIED.

Respectfully submitted, on or before the 23rd day of June, 2023.

by: s/G. Thos. Harper 

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**13. TABLE OF CONTENTS TO SUPPLEMENTAL APPENDIX
OF LANDSTAR**

TAB "L" : Order dated 02/02/2018 by ALJ Granting Summary Decision.....(Attached)

Respectfully submitted, on or before the 23rd day of June, 2023.

by: s/G. Thos. Harper

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Attorney for the Respondent

14. CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the above and foregoing Brief of Landstar in Opposition to Petition for Writ of Certiorari has been served via regular U.S. mail and by electronic mail on or before June 23, 2023 to the following email addresses:

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Dated, this 23rd day of June, 2023, by:

s/G. Thos. Harper

G. Thomas Harper

TAB "L"

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Issue Date: 02 February 2018

CASE NO.: 2017-STA-00028

In the Matter of:

ANNECIA FORT,
Complainant,

v.

LANDSTAR TRANSPORTATION LOGISTICS, INC.,
Respondent.

ORDER GRANTING SUMMARY DECISION

Annecia Fort (hereinafter "Complainant" or "Fort") alleges that Landstar Transportation Logistics, Inc. (hereinafter "Employer" or "Landstar") retaliated against her in violation of the whistleblower protections in the Surface Transportation Assistance Act (STAA).

Procedural History

On September 15, 2015, Fort filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging retaliation in violation of the STAA. On December 23, 2016, after an OSHA investigation, the Secretary of Labor determined that Landstar had not violated the STAA. On January 25, 2017, Complainant appealed the Secretary's determination and requested a hearing before the Office of Administrative Law Judges. By cover letter dated January 6, 2018, Employer filed a Motion for Summary Decision. By cover letter dated January 12, 2018, Complainant filed an Opposition to Employer's Motion. This matter is currently scheduled for hearing on February 13, 2018 in Jacksonville, Florida.

Statement of Facts

Fort was employed as a Log Compliance Representative in Landstar's Log Compliance Department from November 2004 until October 2015. Aff. of Nancy Hasty at ¶ 2. As a Log Compliance Representative, Fort was responsible for helping Landstar's drivers achieve compliance with federal motor carrier safety regulations. *Id.* Fort's retaliation complaint is based on three separate incidents, spanning from November 2014 to August 2015.

On November 21, 2014, Fort recommended that driver Michael Pease be disqualified from driving for Landstar because he accumulated 76 violations. Aff. of Mahal Cason at ¶ 2; CX-H.¹ Landstar agent Jim Stelts requested Director of Compliance Cason to review the

¹ CX refers to Complainant's Exhibits.

recommendation to disqualify Pease and consider additional training as an alternative. Aff. of M. Cason at ¶ 3. Stelts explained to Cason that the reason for the numerous violations was because Pease was an older driver and did not understand the ELD system. *Id.* Persuaded by Stelts, on November 24, 2014, Cason decided to send Pease to face-to-face training at a Landstar Orientation Center instead of disqualifying him. *Id.* at ¶ 2-3. Fort believed that Cason's decision was improper as a conflict of interest. TR 95:2-8. On November 25, 2014, upon learning that Pease was involved in two accidents on November 22, 2014, Fort escalated her concerns to Vice President for Safety and Compliance Michael Cobb. Aff. of M. Cason. at ¶ 2; CX-B. Landstar disqualified Michael Pease shortly after due to the accidents. Aff. of M. Cason at ¶ 2; TR 92:14-15.

On January 20, 2015, Fort attempted to contact driver Jose Martinez to provide log compliance counseling. *Id.* at ¶ 4. While Fort was in a meeting, Martinez called back and talked to another log compliance representative, Pauline Lassette-Norman. *Id.* Because the office was short-staffed and was dealing with an influx of calls, Supervisor Kimberly Sellers instructed the representative to tell Martinez to call back the next day. *Id.*; JS 18. When Fort discovered what had happened, Fort escalated her concerns to Mahal Cason. TR 132:10-17. A subsequent internal investigation concluded that advising a driver to call back at a later date was inappropriate and inconsistent with company and department practice. Aff. of M. Cason at 5; 9/14/15 TR 49-50.²

On August 11, 2015, Landstar underwent a mock Department of Transportation audit. Aff. of Jamie Lepke at ¶ 7. During the audit, auditors randomly selected the file for driver Angela Hurddrobneck. *Id.* The file indicated that Hurddrobneck had been in her sleeper berth for the past three weeks. *Id.* According to Landstar, a log compliance employee contacted Hurddrobneck, who confirmed that she had forgotten to change her driver status before putting her truck in the shop and verbally consented to Landstar remotely changing her status. *Id.* According to Fort, Landstar changed Hurddrobneck's status without notifying her. TR 180:11-15; 183:1-5. Although the parties dispute whether Hurddrobneck gave permission to Landstar to change the driver status, that dispute is not material to this decision, and I will assume for present purposes that Hurddrobneck did not give such permission.

On August 26, 2015, Fort brought to Human Resources a one-page complaint alleging that Landstar retaliated against her on account of reporting the incidents from November 2014, January 2015, and August 2015. JS 24. On September 14, 2015, Landstar suspended Fort with full pay and benefits while she applied for positions in other departments. JS 26-27. During her suspension, Fort was selected for the Carrier Qualifications Service Specialist position in the Carrier Qualification Department, where she has remained since October 7, 2015. JS 29; Aff. of N. Hasty at ¶ 12.

Standard for Summary Decision

Pursuant to 29 C.F.R. § 18.72, Employer filed a Motion for Summary Decision with this Court and Complainant filed an Objection to Employer's Motion. Employer will succeed on its

² Fort transcribed a recording of a September 14, 2015 meeting with Landstar Human Resources Vice President Nancy Hasting and legal team, Richard Clark and Tom Harper.

motion if Employer shows (1) that there is no genuine dispute as to any material fact and (2) Employer is entitled to decision as a matter of law. 29 C.F.R. § 18.72(a). In assessing whether there is a genuine dispute as to any material fact, the Court must resolve any ambiguities and factual inferences in favor of the non-moving party. *Cobb v. FedEx Corp. Serv.*, ARB No. 16-030, ALJ No. 2010-AIR-024, slip op. at 4 (Sept. 29, 2017) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Analysis

To prevail on her STAA retaliation complaint, Complainant must show by a preponderance of the evidence that: (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) the protected activity was a contributing factor to the adverse employment action. *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ No. 2008-STA-020, slip op. at 4-5 (May 13, 2014). If Complainant meets her burden of proof, the burden shifts to Employer to prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [the protected activity]." 49 U.S.C. § 42121(b); 49 U.S.C. § 31105(b)(1) (incorporating the AIR21 legal burdens of proof). The Employer will escape liability if it meets its burden.

Complainant must first prove that she engaged in protected activity. The STAA whistleblower provision provides, in relevant part:

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

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

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

49 U.S.C. § 31105(a). The implementing regulations further provide:

It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee or a person acting pursuant to the employee's request has:

- (1) Filed orally or in writing a complaint with an employer, government agency, or others or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order; or
- (2) Testified or will testify at any proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order.

29 C.F.R. § 1978.102(b). Complainant need not prove an actual violation. Rather, to qualify for protection under the Complaint Clause of the STAA, Complainant must have a reasonable belief that Employer engaged in a violation of a motor vehicle safety regulation. *See Guay v. Burford's Tree Surgeon's, Inc.*, ARB No. 06-031, ALJ No. 2005 STA-045, slip op. at 4 (June 30, 2008); *Dutkiewicz v. Clean Harbors Envtl. Serv., Inc.*, ARB No. 97-090, ALJ No. 95-STA-34, slip op. at 3 (Aug. 8, 1997), *aff'd sub nom. Clean Harbors Envtl. Serv., Inc. v. Herman*, 146 F.3d 12 (1st Cir. 1998). Whether a belief is reasonable is "based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *See Allen v. Administrative Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008) (defining the objective standard in the context of a Sarbanes-Oxley whistleblower complaint). To be a reasonable belief, the belief must be both objectively and subjectively reasonable. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. p. 10, n. 3 (ARB Feb. 29, 2012). In this case, Complainant argues that she engaged in three different instances of protected activity.

The first instance of alleged protected activity involved driver Michael Pease. In November 2014, Fort had recommended to her superiors the disqualification of Pease because he had accumulated 76 violations. Director of Compliance Mahal Cason decided not to disqualify Pease, believing his violations were a reflection of the fact that Pease was an older driver and did not understand the ELD system. Instead of disqualification, Cason decided to send Pease to a face-to-face training on how to use the ELD. On the day after Fort recommended his disqualification, Pease was involved in two accidents in the same day. After Fort learned of the accidents, Fort escalated her concern to Vice President Michael Cobb, and Landstar disqualified Pease shortly after.

Fort argues that Cason had an improper motivation for retaining Pease. Fort alleges that Cason retained Pease at the behest of a friend in a different department. Fort argues that this was a conflict of interest and the reason for the retaliation. Assuming that Fort's allegations are true for the purpose of ruling on this Motion, a reasonable person would not believe that this would constitute a violation of a motor vehicle regulation. Fort has not identified any regulation that she believes Cason violated, and I have not been able to find one. Therefore, the undisputed evidence shows that Fort did not engage in protected activity when she recommended Pease's disqualification or escalated her concern to Cobb.

The second instance of alleged protected activity involved driver Jose Martinez. On January 20, 2015, Fort attempted to contact Martinez to provide log compliance counseling. Martinez returned Fort's phone call, but Fort was in a meeting. Due to short-staffing, Supervisor Kimberly Sellers instructed Pauline Lassette-Norman to tell Martinez to call back the next day. When Fort discovered what had happened, Fort escalated her concerns to Director Mahal Cason. Fort alleges that as a result of this report, Landstar retaliated against her. A subsequent investigation concluded that asking a driver to call back at a later time was inappropriate and inconsistent with company and department practice.

Assuming Fort's allegations are true for the purpose of ruling on this Motion, a reasonable person would not believe that instructing a driver to call back the next day for log compliance counseling would constitute a violation of motor vehicle regulation. Fort has not

identified any regulation that she believes Sellers, Lassette-Norman, or Cason violated, and I have not been able to find one. A violation of internal policies and procedures may or may not implicate motor vehicle safety; in this case, because there is no evidence in the record of any safety concern – only a violation of company policy – it does not. *See, e.g., Abbasi v. Constellation Energy Group, Inc.*, ARB No. 06-136, ALJ No. 2006-ERA-007, -011, slip op. at pp. 11-12 (ARB June 30, 2008). The undisputed facts show that Fort did not engage in protected activity when she escalated her concerns to Cason.

The third instance of alleged protected activity involved driver Angela Hurddrobneck. In August 2015, Landstar underwent a mock Department of Transportation audit. During the course of the audit, auditors reviewed the logs of Hurddrobneck. The log showed that Hurddrobneck had been in her sleeper berth for three weeks. According to Employer, a log compliance department employee called Hurddrobneck. Hurddrobneck confirmed that she had simply forgotten to change her duty status before leaving her truck at the shop and verbally consented to Landstar changing her duty status remotely. According to Fort, Landstar improperly logged into Hurddrobneck's ELD and changed her status without the driver's consent.

Fort argues that Employer's actions constituted a violation of 49 C.F.R. § 395.15. That regulation reads in its entirety:

(a) Authority to use.

- (1) A motor carrier that installs and requires a driver to use an automatic on-board recording device in accordance with this section before December 18, 2017 may continue to use the compliant automatic on-board recording device no later than December 16, 2019. Otherwise, the authority to use automatic on-board recording devices under this section ends on December 18, 2017.
- (2) In accordance with paragraph (a)(1) of this section, a motor carrier may require a driver to use an automatic on-board recording device to record the driver's hours of service.
- (3) Every driver required by a motor carrier to use an automatic on-board recording device shall use such device to record the driver's hours of service.

(b) Information requirements.

- (1) Automatic on-board recording devices shall produce, upon demand, a driver's hours of service chart, electronic display, or printout showing the time and sequence of duty status changes including the drivers' starting time at the beginning of each day.
- (2) The device shall provide a means whereby authorized Federal, State, or local officials can immediately check the status of a driver's hours of service. This information may be used in conjunction with handwritten or printed records of duty status, for the previous 7 days.
- (3) Support systems used in conjunction with on-board recorders at a driver's home terminal or the motor carrier's principal place of business must be capable of providing authorized Federal, State or local officials with summaries of an

individual driver's hours of service records, including the information specified in § 395.8(d) of this part. The support systems must also provide information concerning on-board system sensor failures and identification of edited data. Such support systems should meet the information interchange requirements of the American National Standard Code for Information Interchange (ANSII) (EIARS-232/CCITT V.24 port (National Bureau of Standards "Code for Information Interchange," FIPS PUB 1-1)).

(4) The driver shall have in his/her possession records of duty status for the previous 7 consecutive days available for inspection while on duty. These records shall consist of information stored in and retrievable from the automatic on-board recording device, handwritten records, computer generated records, or any combination thereof.

(5) All hard copies of the driver's record of duty status must be signed by the driver. The driver's signature certifies that the information contained thereon is true and correct.

(c) The duty status and additional information shall be recorded as follows:

- (1) "Off duty" or "OFF", or by an identifiable code or character;
- (2) "Sleeper berth" or "SB" or by an identifiable code or character (only if the sleeper berth is used);
- (3) "Driving" or "D", or by an identifiable code or character; and
- (4) "On-duty not driving" or "ON", or by an identifiable code or character.
- (5) Date;
- (6) Total miles driving today;
- (7) Truck or tractor and trailer number;
- (8) Name of carrier;
- (9) Main office address;
- (10) 24-hour period starting time (e.g., midnight, 9:00 a.m., noon, 3:00 p.m.)
- (11) Name of co-driver;
- (12) Total hours; and
- (13) Shipping document number(s), or name of shipper and commodity.

(d) Location of duty status change.

(1) For each change of duty status (e.g., the place and time of reporting for work, starting to drive, on-duty not driving and where released from work), the name of the city, town, or village, with State abbreviation, shall be recorded.

(2) Motor carriers are permitted to use location codes in lieu of the requirements of paragraph (d)(1) of this section. A list of such codes showing all possible location identifiers shall be carried in the cab of the commercial motor vehicle and available at the motor carrier's principal place of business. Such lists shall be made available to an enforcement official on request.

(e) Entries made by driver only. If a driver is required to make written entries relating to the driver's duty status, such entries must be legible and in the driver's own handwriting.

(f) Reconstruction of records of duty status. Drivers are required to note any failure of automatic on-board recording devices, and to reconstruct the driver's record of duty status for the current day, and the past 7 days, less any days for which the drivers have records, and to continue to prepare a handwritten record of all subsequent duty status until the device is again operational.

(g) On-board information. Each commercial motor vehicle must have on-board the commercial motor vehicle an information packet containing the following items:

- (1) An instruction sheet describing in detail how data may be stored and retrieved from an automatic on-board recording system; and
- (2) A supply of blank driver's records of duty status graph-grids sufficient to record the driver's duty status and other related information for the duration of the current trip.

(h) Submission of driver's record of duty status.

- (1) The driver shall submit, electronically or by mail, to the employing motor carrier, each record of the driver's duty status within 13 days following the completion of each record;
- (2) The driver shall review and verify that all entries are accurate prior to submission to the employing motor carrier; and
- (3) The submission of the record of duty status certifies that all entries made by the driver are true and correct.

(i) Performance of recorders. Motor carriers that use automatic on-board recording devices for recording their drivers' records of duty status in lieu of the handwritten record shall ensure that:

- (1) A certificate is obtained from the manufacturer certifying that the design of the automatic on-board recorder has been sufficiently tested to meet the requirements of this section and under the conditions it will be used;
- (2) The automatic on-board recording device permits duty status to be updated only when the commercial motor vehicle is at rest, except when registering the time a commercial motor vehicle crosses a State boundary;
- (3) The automatic on-board recording device and associated support systems are, to the maximum extent practicable, tamperproof and do not permit altering of the information collected concerning the driver's hours of service;
- (4) The automatic on-board recording device warns the driver visually and/or audibly that the device has ceased to function. Devices installed and operational as of October 31, 1988, and authorized to be used in lieu of the handwritten record of duty status by the FMCSA are exempted from this requirement.
- (5) Automatic on-board recording devices with electronic displays shall have the capability of displaying the following:

- (i) Driver's total hours of driving today;
- (ii) The total hours on duty today;
- (iii) Total miles driving today;
- (iv) Total hours on duty for the 7 consecutive day period, including today;
- (v) Total hours on duty for the prior 8 consecutive day period, including the present day; and
- (vi) The sequential changes in duty status and the times the changes occurred for each driver using the device.

- (6) The on-board recorder is capable of recording separately each driver's duty status when there is a multiple-driver operation;
- (7) The on-board recording device/system identifies sensor failures and edited data when reproduced in printed form. Devices installed and operational as of October 31, 1988, and authorized to be used in lieu of the handwritten record of duty status by the FMCSA are exempted from this requirement.
- (8) The on-board recording device is maintained and recalibrated in accordance with the manufacturer's specifications;
- (9) The motor carrier's drivers are adequately trained regarding the proper operation of the device; and
- (10) The motor carrier must maintain a second copy (back-up copy) of the electronic hours-of-service files, by month, in a different physical location than where the original data is stored.

(j) Rescission of authority.

- (1) The FMCSA may, after notice and opportunity to reply, order any motor carrier or driver to comply with the requirements of § 395.8 of this part.
- (2) The FMCSA may issue such an order if the FMCSA has determined that—
 - (i) The motor carrier has been issued a conditional or unsatisfactory safety rating by the FMCSA;
 - (ii) The motor carrier has required or permitted a driver to establish, or the driver has established, a pattern of exceeding the hours of service limitations of this part;
 - (iii) The motor carrier has required or permitted a driver to fail, or the driver has failed, to accurately and completely record the driver's hours of service as required in this section; or
 - (iv) The motor carrier or driver has tampered with or otherwise abused the automatic on-board recording device on any commercial motor vehicle.

49 C.F.R. § 395.15. My review of the regulation reveals no rule that would forbid Employer from changing the duty of status information of a driver. There are two other regulatory sections that may be applicable to the case at hand: 49 C.F.R. § 395.8(e) and 49 C.F.R. § 395.30(d).

Section 395.8(e) reads:

- (e)(1) No driver or motor carrier may make a false report in connection with a duty status.
- (2) No driver or motor carrier may disable, deactivate, disengage, jam, or otherwise block or degrade a signal transmission or reception, or reengineer, reprogram, or otherwise tamper with an automatic on-board recording device or ELD so that the device does not accurately record and retain required data.
- (3) No driver or motor carrier may permit or require another person to disable, deactivate, disengage, jam, or otherwise block or degrade a signal transmission or reception, or reengineer, reprogram, or otherwise tamper with an automatic on-board recording device or ELD so that the device does not accurately record and retain required data.

49 C.F.R. § 395.8(e). The purpose of this regulation is to prohibit the falsification of driver logs. The undisputed facts show that Hurdrobneck's driver log indicated she had been in her sleeper berth for three weeks. Assuming that Fort's allegations are true for purposes of ruling on this Motion, I find that no reasonable person could believe that Landstar falsified the log. It would be unreasonable for Fort to believe that Hurdrobneck had been in her sleeper berth for that duration. Correcting an obvious mistake is not falsification.

Section 395.30 reads:

- (a) Accurate record keeping. A driver and the motor carrier must ensure that the driver's ELD records are accurate.
- (b) Review of records and certification by driver.

- (1) A driver must review the driver's ELD records, edit and correct inaccurate records, enter any missing information, and certify the accuracy of the information.
- (2) Using the certification function of the ELD, the driver must certify the driver's records by affirmatively selecting "Agree" immediately following a statement that reads, "I hereby certify that my data entries and my record of duty status for this 24-hour period are true and correct." The driver must certify the record immediately after the final required entry has been made or corrected for the 24-hour period.
- (3) The driver must submit the driver's certified ELD records to the motor carrier in accordance with § 395.8(a)(2).
- (4) If any edits are necessary after the driver submits the records to the motor carrier, the driver must recertify the record after the edits are made.

(c) Edits, entries, and annotations.

- (1) Subject to the edit limitations of an ELD, a driver may edit, enter missing information, and annotate ELD recorded events. When edits, additions, or

annotations are necessary, a driver must use the ELD and respond to the ELD's prompts.

(2) The driver or support personnel must annotate each change or addition to a record.

(3) In the case of team drivers, if there were a mistake resulting in the wrong driver being assigned driving-time hours by the ELD, and if the team drivers were both indicated in each other's records for that period as co-drivers, driving time may be edited and reassigned between the team drivers following the procedure supported by the ELD.

(d) Motor carrier-proposed edits.

(1) On review of a driver's submitted records, the motor carrier may request edits to a driver's records of duty status to ensure accuracy. **A driver must confirm or reject any proposed change**, implement the appropriate edits on the driver's record of duty status, and recertify and resubmit the records in order for any motor carrier-proposed changes to take effect.

(2) A motor carrier may not request edits to the driver's electronic records before the records have been submitted by the driver.

(3) **Edits requested by any system or by any person other than the driver must require the driver's electronic confirmation or rejection.**

(e) Coercion prohibited. A motor carrier may not coerce a driver to make a false certification of the driver's data entries or record of duty status.

(f) Motor carrier data retention requirements. A motor carrier must not alter or erase, or permit or require alteration or erasure of, the original information collected concerning the driver's hours of service, the source data streams used to provide that information, or information contained in any ELD that uses the original information and HOS source data.

49 C.F.R. § 395.30. It appears that if Fort's allegations are true, altering a driver log without the driver's consent may constitute a violation of 49 C.F.R. § 395.30(d).³ However, at the time of the alleged incident, section 395.30 was not in effect. It was not until December 16, 2015 that the Department of Transportation and Federal Motor Carrier Safety Administration published a Final Rule that amended Chapter 395 to include section 395.30. 80 Fed. Reg. 78,385 (Dec. 16, 2015). And, that Final Rule did not go into effect until February 16, 2016. 80 Fed. Reg. 78,292 (December 16, 2015). The undisputed facts show that Fort had been a Log Compliance Representative at Landstar from November 2004 until October 2015. Her job required expertise in the regulatory requirements of logging hours of duty. A reasonable person with more than a decade of experience in log compliance would not have an objectively reasonable belief in August of 2015 that Land Star needed to obtain a driver's consent before correcting an obviously

³ Such alteration may not violate § 395.30, as the regulation is ambiguous as to timing – does the driver have to consent to an edit before it is made, or certify it after it is made? See § 395.30(a), (b)(4), (c)(2), and (d). However, as discussed above, I need not decide that issue: the regulation was not in effect at the time that Hurdrobneck's log was changed.

incorrect log. Thus, Fort's raising concerns about the change to Hurddrobneck's log does not constitute protected activity.⁴

Conclusion

The undisputed evidence shows that Complainant did not engage in protected activity when she raised concerns about driver Pease, when she raised concerns about Sellers' instruction to driver Martinez to call back the next day for compliance counseling, or when she raised concerns about changing the log of driver Hurddrobneck.

ORDER

Based on the foregoing, IT IS ORDERED:

1. Respondent's Motion for Summary Decision is GRANTED;
2. The complaint of Complainant Annecia Fort is DENIED; and
3. The hearing scheduled to begin on February 13, 2018 at 9:00 a.m. in Jacksonville, Florida is CANCELED.

SO ORDERED.



Digitally signed by Paul Johnson Jr.
DN: CN=Paul Johnson Jr.
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DOL Office of Administrative Law
Judges, L=Newport News, S=VA, C=US
Location: Newport News VA

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ, Jr./ksw
Newport News, Virginia

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

⁴ In her opposition papers, Fort makes reference to having reported a supervisor's "conflict of interest and placing the company at risk" in November of 2014 and/or November of 2015. I find that this is a reference to the incident involving driver Pease, see Transcript of Complainant's deposition of December 18, 2017 at 78:20-24.

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. § 1978.110(a).* Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See 29 C.F.R. § 1978.110(a).*

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See 29 C.F.R. § 1978.110(a).*

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. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).

SERVICE SHEET

Case Name: FORT ANNECIA v. LANDSTAR SYSTEMS, INC.

Case Number: 2017STA00028

Document Title: ORDER GRANTING SUMMARY DECISION

I hereby certify that a copy of the above-referenced document was sent to the following this 2nd day of February, 2018:



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CASE NO. 22-7657

IN THE SUPREME COURT OF THE UNITED STATES

ANNECIA M. FORT,

Petitioner,

v.

DEPARTMENT OF LABOR, et al.,

Respondents.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response Brief of Landstar complies with the page limitations of Supreme Court rules 33 and 34, in that it contains fewer than 40 pages, including all sections of the Brief, from the cover to the Certificate of Service. In addition, the Response brief of Landstar consists of 7,883 words, including all sections of the brief from cover page through the Certificate of Service, according to the word software used to type this document. This document complies with the typeface requirements of the Supreme Court since this document has been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Century Schoolbook type. A copy of Petitioner's Motion for Leave to Proceed In Forma Pauperis is attached to this brief pursuant to Supreme Court Rule 15.3.

Dated, this 23rd day of June, 2023, by:

G. Thomas Harper
s/G. Thos. Harper
G. Thomas Harper

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Annecia M Fort, pro se — PETITIONER
(Your Name)

VS.
The United States Court of Appeals
for The Eleventh Circuit et al — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

The United States Court of Appeals for The Eleventh Circuit

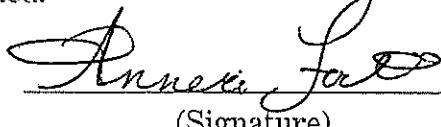
Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

The appointment was made under the following provision of law: _____
_____, or

a copy of the order of appointment is appended.


(Signature)